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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE Justice PART 5

Index Number : 110782/2010
ALMODOVAR, ERICK
VS.
KELLY RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78
CALEND 7

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/14/11

BARBARA JAFFE J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of ERICK ALMODOVAR,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

-against-

RAYMOND KELLY, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, and THE BOARD OF TRUSTEES of the Police Pension Fund, Article II, NEW YORK CITY POLICE DEPARTMENT, and THE CITY OF NEW YORK,

Respondents.

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Index No. 110782/10

Motion Date: 1/25/11
Motion Seq. No.: 001

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
Jeffrey Sklar, Esq.
Melucci, Celauro & Sklar, LLP
26 Broadway, Ste. 2100
New York, NY 10004
212-244-6222

For respondents:
Ilyse Sisolak, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-788-0752

By notice of petition and verified petition dated August 11, 2010, petitioner brings this Article 78 proceeding seeking an order reviewing and annulling respondents' denial of his application for an accident disability pension and upgrading his pension to an accidental disability pension or directing respondents to reconsider his application. Respondents oppose the petition.

I. BACKGROUND

Petitioner began his employment with the NYPD on August 30, 1993. (Verified Petition, dated Aug. 12, 2010 [Pet.]). On January 24, 1996, while on duty and during an attempt to arrest a suspect, petitioner slipped on a step and felt pain in his lower back. (*Id.*, Exh. A). Following a hospital visit the same day, petitioner was diagnosed with a lower back sprain, and he received chiropractic treatment three times a week from January 1996 to January 1997, and then once or twice a month until 2002. (*Id.*, Exhs. B, C). Petitioner returned to full patrol duty one month after his accident. (*Id.*).

In 2002, petitioner was transferred to a position at the Police Academy, and did not receive chiropractic treatment again until September 2006. On September 26, 2006, petitioner underwent an MRI of the lumbar spine which revealed three disc herniations and a disc bulge. (*Id.*, Exh. D). He continued with physical therapy through January 2007. (*Id.*, Exh. E).

At the end of 2006, petitioner consulted with an orthopedist who recommended a lumbar epidural injection, which petitioner underwent on December 8, 2006. (*Id.*, Exhs. E, F). On January 25, 2007, petitioner underwent spinal surgery, and thereafter continued with physical therapy. (*Id.*, Exhs. E, G).

On August 30, 2008, the NYPD referred petitioner to its Chief Supervising Surgeon for an evaluation of his back injury. (Answer, dated Oct. 20, 2010 [Ans.], Exh. 2). By letter dated September 9, 2008, a doctor at the NYPD's Medical Division - Bronx Clinic concluded that based on petitioner's medical history and the results of an NYPD orthopedic evaluation on May 30, 2008, petitioner's prognosis for full duty was poor. (Pet., Exh. H).

Consequently, petitioner applied for an accidental disability pension from the Police

Pension Fund, contending that his disability was related to and caused by his 1996 line of duty injury. (*Id.*).

On March 4, 2009, petitioner was examined by respondent Medical Board, which recommended by a two-to-one vote that petitioner receive an ordinary disability pension (ODR) rather than an accidental disability pension (ADR), finding as follows:

> Dr. Bottner and Dr. Schieber [two of the Board's examining physicians] feel that there is no documentation or continuous documentation from 1996 until the surgery of 2007 to link the line of duty to the subsequent need for surgery . . . Dr. DePalma [the third Board examining physician] feels that there is an ongoing continuous treatment pattern from 1996 to 2002 with a chiropractor and an officer attempting to perform full duty. There was a lessening of physical activity with his transfer to the Police Academy from 2002 to 2004 and he did not seek any treatment. In 2004, the officer had a worsening which eventually led to his surgery in 2007. It should be noted that this young man had severe degenerative disease in the lower lumbar spine, which one would see in a burned out disc. The postoperative films showing the disc spaces and vertebrate above do not demonstrate any evidence of degeneration. Dr. DePalma, in a minority, feels that there is a link between the incident of 1996 and the degenerative condition which led to the surgery in 2007 . . .

(*Id.*, Exh. I).

On June 1, 2009, respondent Board of Trustees remanded petitioner's application to the Medical Board in light of new evidence consisting of an April 17, 2009 letter from the surgeon who performed petitioner's 2007 surgery, in which he opined that there was a link between petitioner's 1996 injury and the need for surgery. (*Id.*, Exh. J). After considering the letter, the Medical Board reaffirmed its prior decision by the same two-to-one vote. (*Id.*).

On November 9, 2008, the Board of Trustees remanded petitioner's application to the Medical Board for it to consider an October 22, 2009 medical report from a neurosurgeon who stated his belief that petitioner's disability was the result of his 1996 accident. (*Id.*, Exh. K).

On January 6, 2010, the Medical Board reaffirmed its prior decision, stating that:

> On interview today, [petitioner] spoke of multiple chiropractic visits, however no records were submitted nor are they available. He also spoke of injections but again no records are available. On December 8, 2006, a transforaminal injection was performed, however [petitioner] was speaking of injections performed in the 1990's and early 2000's. There is no documentation of this. He states that he was also referred to a spine specialist by his chiropractor, again however there is no documentation regarding this.

(*Id.*, Exh. L).

On March 10, 2010, the Board of Trustees agreed to review petitioner's application after his representative submitted an updated letter from petitioner's surgeon in which the surgeon agreed with Dr. DePalma's opinion that petitioner's disability was caused by the 1996 accident. (*Id.*, Exh. M).

On April 14, 2010, the Board of Trustees voted by a six-to-six tie to affirm the Medical Board's determination "given the totality of the record" and based on the Medical Board's consistent opinion that there was no "continuous documentation to link the line of duty to a subsequent need for surgery." (*Id.*, Exh. N).

II. CONTENTIONS

Petitioner argues that respondents' denial of his ADR application was arbitrary, capricious, and an abuse of discretion as his evidence establishes that his 1996 accident caused or contributed to his disability, and that respondents' determination was thus irrational and unsupported by substantial credible evidence. He maintains that respondents failed to refute his evidence demonstrating a causal connection and that their reliance on the absence of continuous documentation of treatment between his injury and surgery was irrational. Petitioner asserts that he provided documentation of his treatment from 1996 to 2002, and that his chiropractic records up to 2002 are unavailable for reasons beyond his control. He observes that the Medical Board

erred in stating that there was no proof that he consulted with a spine specialist, and concedes that he received no medical treatment for his back between 2002 and 2006. Petitioner also questions whether the Medical Board reviewed all of the submitted evidence. (Petitioner's Memorandum of Law, dated Aug. 12, 2010).

Respondents contend that their determination that petitioner's 1996 accident did not cause his disability is supported by credible evidence, namely, that when petitioner was injured in 1996, he was diagnosed at that time with only a lower back sprain and was treated conservatively for it, that after the accident, petitioner remained on full duty for large periods of time until late 2006, and that petitioner received no treatment between 2002 and 2006. They argue that where a long period of time passes between an incident and the onset of disability, during which time the applicant works at full duty, has no subsequent complaints, and receives no treatment, causation is not established. Respondents also assert that there is evidence that petitioner's disability was caused by degeneration, and that the fact that some medical professionals found that petitioner's disability was caused by his 1996 accident is irrelevant as the Medical Board and the Board of Trustees have the final authority to resolve conflicting medical testimony. Respondents maintain that petitioner's failure to submit proof of continuous treatment, in and of itself, constitutes sufficient credible evidence to support their decision. (Respondents' Memorandum of Law, dated Oct. 20, 2010).

In reply, petitioner argues that as the Medical Board's determination does not depend on whether he missed any time from work or whether there was evidence of degeneration, those issues should not be considered, and that the Medical Board erred in finding that there was no documentation showing a link between his accident and his injury. (Reply Affirmation, dated

Nov. 9, 2010).

III. ANALYSIS

A. Applicable law

The only questions that may be raised in a proceeding to challenge action or inaction by a state or local government agency are, in pertinent part, whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . (CPLR 7801, 7803[3]). The determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 701; *Matter of Mankarios v New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

If the court determines that the administrative determination has a rational basis, the court's inquiry is complete; it may not substitute its judgment for that of the administrative agency. (*Paramount Communications, Inc. v Gibraltar Cas. Co.*, 90 NY2d 507 [1997], *rearg denied* 90 NY2d 1008). Moreover, where a determination has a rational basis, "an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference." (*Matter of Arif v New York City Taxi and Limousine Commn.*, 3 AD3d 345 [1st Dept 2004], *lv granted* 2 NY3d 705, *appeal withdrawn* 3 NY3d 669).

Pursuant to Administrative Code § 13-252, a police officer may retire with an ADR upon application to the commissioner stating that the applicant:

> is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired.

And, upon a medical examination and investigation showing that the applicant is physically or mentally incapacitated

> as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

The determination of an ADR application requires consideration of two factors. First, the Medical Board decides whether the applicant is disabled and should be retired (*Matter of Meyer v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145 [1997]). It must then decide whether the disability resulted from a service-related accident, and certify its

recommendation on this issue to the Board of Trustees. (*Id.* at 144-145). The Board of Trustees must then determine whether the disability was caused by a service-related accident. (*Id.*).

B. Is the Medical Board's determination arbitrary and capricious or irrational?

The Medical Board's determination will be sustained unless it lacks a rational basis or is arbitrary or capricious, and it must be based on "some credible evidence." (*Matter of Borenstein v New York City Empls.' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]). The Medical Board has the authority to resolve any conflicting medical evidence or opinions, and in reviewing the Medical Board's decision, the court may not examine the medical evidence and substitute its own judgment for that of the Medical Board. (*Id.*).

Here, absent any dispute that petitioner was not continuously treated between 1996 and 2007, the Medical Board's finding that there was insufficient evidence of a link between his 1996 accident and 2007 surgery is rational. (*See Matter of Meehan v Kelly*, 50 AD3d 523 [1st Dept 2008], *lv denied* 11 NY3d 712 [Medical Board's finding supported by credible evidence of four-year gap between petitioner's injury and onset of disability]; *Matter of Schmidt v McGuire*, 119 AD2d 532 [1st Dept 1986], *lv denied* 68 NY2d 605 [Medical Board may properly consider length of time between initial injury and onset of back pain; three years elapsed between injury and disability during which petitioner did not complain of back pain]).

While the Medical Board did not specifically state that its finding was based in part on petitioner's ability to work full duty between 1996 and 2006, that fact is included in its initial determination and it was entitled to consider it. (*See Matter of Mooney v Bratton*, 234 AD2d 27 [1st Dept 1996] [finding that there was evidence to support determination of no causal connection as petitioner remained on full duty for more than 10 years after accident, did not seek any

medical treatment for two three-year periods during that time, and there was general lack of objective evidence establishing link]; *Matter of Bevers v New York City Empls.' Retirement Sys.*, 179 AD2d 489 [1st Dept 1992], *lv denied* 79 NY2d 758 [Medical Board could consider three-year period between accident and disability, during which petitioner worked full duty, in finding no causal connection]; *Matter of Duggan v Ward*, 160 AD2d 532 [1st Dept 1990] [minimal amount of time petitioner was absent from work due to injuries and substantial lapse of time between injuries and onset of ultimate disability constituted substantial evidence of lack of causal connection]; *Belton v Herkommer*, 84 AD2d 713 [1st Dept 1981] [finding that disability was unrelated to accident as two and half years elapsed between accident and surgery and plaintiff was able to work during that period]; *Matter of Scotto v Bd. of Trustees of Police Pension Fund of City of N.Y., Art. II*, 76 AD2d 774 [1st Dept 1980], *affd* 54 NY2d 918 [1981] [finding of no casual connection between accident and disability upheld where five years had elapsed between accident and onset of back pain without recurrence of back condition; Board entitled to give weight to fact that petitioner was able to work full duty and did not seek medical attention during that time]; *Matter of Mackey v Ward*, 166 AD2d 379 [1st Dept 1990] [Medical Board entitled to consider that for eight-year period between accident and claimed disability, petitioner able to perform full duty without seeking medical attention]; *see also Matter of Visconti v Kelly*, 49 AD3d 273 [1st Dept 2008] [upholding determination that petitioner's 1999 injury rather than 1994 injury was cause of disability in light of gap in treatment between two injuries, conservative treatment for 1994 injury, and petitioner's return to full duty after 1994 injury]; *Matter of Dalton v Kelly*, 16 AD3d 200 [1st Dept 2005], *lv denied* 10 NY3d 705 [2008] [Medical Board's determination that prior injury did not cause disability was supported by some credible evidence,

including fact that petitioner returned to full duty for two years after injury]).

And even if the documents identified as missing or unavailable by the Medical Board in its determination on the second remand of petitioner's application were available, they confirm that petitioner received no treatment between 2002 and 2006.

The Medical Board was also authorized to disregard the opinions of petitioner's medical practitioners. (*See Matter of Finkelstein v Kelly*, 41 AD3d 122 [1st Dept 2007] [Board properly considered conflicting medical evidence]; *Matter of Dittrich v Bd. of Trustees, Police Pension Fund, Art. II*, 37 AD3d 342 [1st Dept 2007] [conflicts in medical evidence were for Medical Board to resolve]; *Matter of Clarke v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 46 AD3d 559 [2d Dept 2007] [although independent consultant's findings differed from that of other physicians who had examined petitioner, Medical Board had authority to resolve conflict]; *Matter of Vastola v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 37 AD3d 478 [2d Dept 2007] [although medical conclusions in report differed from petitioner's physicians' opinions, they constituted some credible evidence on which Medical Board based its determination, and thus court properly denied petition]).

Petitioner's contention that the Medical Board failed to consider all of the relevant medical evidence is meritless as each determination of the Board reflects what evidence it considered, including the new evidence that led to the two remands, and petitioner does not state what evidence it alleges was ignored or overlooked.

Thus, petitioner has failed to establish that the Medical Board's determination is arbitrary or capricious or irrational.

C. Is the Board of Trustees's determination arbitrary and capricious or irrational?

The Board of Trustees is bound by the Medical Board's determination as to whether an ADR applicant is disabled but must make its own determination as to whether the disability was caused by a service-related accident. (*Matter of Canfora v Bd. of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347 [1983]). If the Board of Trustees' determination to deny an ADR application is reached by a six-to-six tie vote, the determination may be set aside only if "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident" (*id.*; *Santangelo v Kelly*, 916 NYS2d 71 [1st Dept 2011] [same]), which the petitioner bears the burden of establishing (*Matter of Nicolosi v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 198 AD2d 282 [2d Dept 1993], *lv denied* 83 NY2d 752 [1994]).

Here, the evidence that petitioner's disability was caused by his 1996 accident is based on the opinions of his medical practitioners, which were considered and apparently rejected by the Medical Board, and absent any dispute that petitioner received no treatment between 2002 and 2006, petitioner has not met his burden of establishing, as a matter of law, that his disability was the natural and proximate result of the accident. (*See Matter of Quill v Ward*, 138 AD2d 305 [1st Dept 1988] [it could not be determined as matter of law that petitioner entitled to ADR in light of medical findings and petitioner's return to full-duty status after each injury; Medical Board considered doctors' reports expressing opinion that causal connection existed]; *Matter of Scotto*, 76 AD2d at 776 [even though other physicians opined that accident was casually related to disability, Board of Trustees was entitled to rely on Medical Board's opinion]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 14, 2011
New York, New York

MAR 14 2011

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).