

Matter of Modlin v Kelly
2011 NY Slip Op 30925(U)
April 12, 2011
Supreme Court, New York County
Docket Number: 110023/2010
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROL E. HUFF**
Justice

PART 32

Index Number : 110023/2010

MODLIN, JOSEPH

vs.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

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: APR 12 2011

[Signature]
CAROL E. HUFF ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of the Application of : Index No. 110023/10
JOSEPH MODLIN,

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, :

Respondents, :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination of respondent Board of Trustees of the Police Pension Fund, dated April 14, 2010, which denied him an accident disability retirement (“ADR”) allowance pursuant to General Municipal Law § 207-k (the “Heart Bill”), and an order directing respondents to retire him with the ADR allowance retroactively. In the April 14 decision, the Board of Trustees granted petitioner an Ordinary Disability Retirement (“ODR”).

Petitioner became a uniformed New York Police Department officer on March 1, 2000, and served continuously until, on May 31, 2007, he filed an application for an ADR alleging that he suffered from a heart condition. Prior to his appointment, he had passed all physical and mental examinations administered by the NYPD.

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The Heart Bill provides:

[A]ny condition of impairment of health caused by diseases of the heart, or by a stroke, resulting in total or partial disability or death to a paid member of the uniformed force of paid police department . . . who successfully passed a physical examination on entry into the service of such respective department, which examination failed to reveal any evidence of such condition, shall be presumptive evidence that it was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence.

General Municipal Law § 207-k.

[T]he theory behind the bill . . . is not only that heart conditions are an occupational hazard for police officers and firemen, but also that this is a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as a result of the continuous stress and strain of the job.

Uniformed Firefighters Assn. v Beekman, 52 NY2d 463, 471 (1981).

On March 20, 2007, petitioner underwent an echocardiogram and was diagnosed with hypertrophic cardiomyopathy, a condition in which the heart muscle has thickened, making it more difficult for the heart to pump blood. On May 31, 2007, petitioner filed an application for an ADR because of his heart condition. On September 28, 2007, the Medical Board of the Police Pension Fund unanimously recommended that the ADR application be denied, but that petitioner should be retired on an ordinary disability allowance (ODR). The Medical Board found that while petitioner did suffer from hypertension, that fact did not play a role in his developing hypertrophic cardiomyopathy, which, the Medical Board found, is a genetic disorder.

On remands from the Board of Trustees, the Medical Board again reviewed the ADR application on August 15, 2008, and on June 5, 2009, and each time confirmed its earlier opinion that petitioner was not entitled to an ADR. Subsequently the Board of Trustees voted to grant petitioner an ODR.

In essence, petitioner's experts and the Medical Board disagree as to whether petitioner's heart disease was a result of job-related conditions, or was hereditary. The Medical Board, however, only summarily dismisses the opinions of petitioner's experts that the cardiomyopathy was caused by hypertension, and offers no substantiation of its conclusion that the disease "is a genetic disorder."

Petitioner submits reports from physicians supporting his contention that his cardiac disorder was a result of his service on the police force. In a letter dated February 26, 2008 (Petition, Ex. J), Dr. James I. Klepper wrote:

[Petitioner] had questions about the cause of his underlying cardiomyopathy. He was wondering what is the nature of it, was it inherited, etc. . . . I have told him, however, that this is not the typical form that is usually inherited and this does not have the other typical features of that type of cardiomyopathy. I told him that I did not have any echocardiograms that were performed some time ago to see at what point this did change related to his underlying hypertension, but that with high blood pressure it usually takes years to develop. I have also told him that any stressful job such as being a police officer can contribute to the hypertension which will then would [sic] theoretically lead to the development of his type of cardiomyopathy.

Another physician who saw petitioner, Andrew Patane, M.D., wrote on March 24, 2008 (Petition, Ex. K):

[M]y patient has been found to have hypertrophic cardiomyopathy with some characteristically atypical features noted of this particular cardiomyopathy. . . . In respect to this the cardiology consultant has noted that this may in fact be cardiomyopathy secondary to the effects of hypertension. In light of the suspicion that perhaps [petitioner's] cardiomyopathy is secondary to the underlying etiology of his hypertension, it would reason that the stressful lifestyle of he has endured over the years as a police officer may in fact be the underlying etiology of this cardiomyopathy.

In a letter dated March 5, 2010 (Petition, Ex. S), Dr. Klepper further wrote:

I have been taking care of [petitioner] for several years regarding his known cardiomyopathy and hypertension. (The hypertension predated his coming to me by 5 years.) These entities are still on-going and being treated. I still feel that

these conditions are job-related due to job-stress and not hereditary.

In its final, June 5, 2009, report (Petition, Ex. R), the Medical Board found:

Based on review of the data in the previous minutes, the new evidence, the current complaints and the physical examination, it is the opinion of the Article II Medical Board to reaffirm the previous decision and recommends approval of the Police Commissioner's application for [ODR] and disapproval of the officer's own application for [ADR] under the Heart Bill. It is to be noted that a review of the echocardiograms that were done in the past indicate that the findings are consistent with a diagnosis of Hypertrophic Cardiomyopathy. This is a genetic disorder with a distinct pathologic abnormality of cardiac musculature. It was also found on the basis of a review that the officer has hypertension and his doctor's recent letter suggests that the dizziness may be related to his hypertension. As already stated, it is the opinion of the Article II Medical Board that the basic problem with respect to the officer's cardiac disease is that of Hypertrophic Cardiomyopathy, which is a genetic disorder.

In its earlier determinations, after summarizing the case history, the Medical Board found in relevant part: "The final diagnosis is Hypertrophic Cardiomyopathy. This condition is not known to be caused by stress." September 28, 2007, report (Petition, Ex. I). "His blood pressure was unlikely to have caused his left ventricular hypertrophy responsible for the gradient across the LVOT [left ventricular outflow track]." August 15, 2008, report (Petition, Ex. P).

The expert opinion of the Medical Board is competent evidence sufficient to rebut the presumption of the Heart Bill, and it is for the Board of Trustees to determine whether that opinion or the one offered by the petitioner's expert is to be credited. Simmons v Herkommer, 62 NY2d 711, 712 (1984). However, a *conclusory* finding by the Medical Board that lacks a factual basis "does not constitute competent evidence sufficient to defeat the presumption [of the Heart Bill]." Liston v City of New York, 161 AD2d 490, 491 (1st Dept 1990). See Lunt v Kelly, 227 AD2d 200 (1st Dept 1996) (affirming grant of petition to annul determination denying ADR, where Medical Board conclusorily determined that petitioner's atrial fibrillation was not

connected to his hypertension).

Here the Medical Board did nothing more than baldly state that petitioner's condition was not caused by high blood pressure and was genetic in origin. It failed to substantiate its reasons for making that determination, and failed to address the contentions of petitioner's experts in any detail. Accordingly, it is

ADJUDGED that the petition is granted to the extent that the Board of Trustees' April 14, 2010, is annulled, and the matter is remanded to the Medical Board for further review in light of this decision; and it is further

ADJUDGED that the petition is otherwise denied.

Dated:

APR 12 2011


CAROL E. HUFF
J.S.C.

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