

Matter of Prochilo v Gourdine
2011 NY Slip Op 30940(U)
March 24, 2011
Supreme Court, New York County
Docket Number: 401005/2010
Judge: Emily Jane Goodman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Index Number : 401005/2010
PROCHILLO, ROY
vs.
GOURDINE, SIMON P.
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

rejection
~~Motion~~ is decided in accordance
with accompanying memorandum
decision in motion sequence #001

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: 3/24/11

EMILY JANE GOODMAN /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 I.A.S. PART 17

-----X
In the Matter of a proceeding brought under Article 78 of
the CPLR

ROY PROCHILO,

Index No. 401005/10

Petitioner,

-against-

SIMON P. GOURDINE, as Commission of THE CITY
OF NEW YORK CIVIL SERVICE COMMISSION and
JOHN J. DOHERTY, as Commissioner of THE CITY
NEW YORK DEPARTMENT OF SANITATION,

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).

Respondents.

-----X
EMILY JANE GOODMAN, J.S.C.:

This Article 78 proceeding was transferred to this Court from Kings County at the request of Respondent City of New York, notwithstanding that Petitioner resides in Kings County and notwithstanding the extraordinary volume of special proceedings in this county.

Petitioner, Roy Prochilo (Prochilo) alleges that he was wrongfully removed from an eligible list for employment as a sanitation worker when Respondents disqualified him medically. Respondents, having withdrawn a statute of limitations defense, move to dismiss for failure to state a claim.

Prochilo disclosed that his left shoulder was dislocated when he was twelve years old, and, as described by his orthopedist, Dr. William Lackey, he had surgery for a "minor" left torn posterior labrum in 2006, which was a non-invasive "arthroscopic office

procedure with no residual” effects. In 2007, there was an injury to his left shoulder, which respondent’s Medical Director Remy Obas M.D. stated “the extent of that injury is unknown” but which Dr. Lackey found to be a “mild impingement.”

Dr. Obas, who never examined Prochilo, declared him ineligible due to the past shoulder injuries. His conclusion was based on the referenced medical history and because Percocet was prescribed in April 2008 (refillable three times and no longer prescribed as of August, 2008), which led Dr. Obas to conclude that Prochilo’s shoulder was an unstable joint. Dr. Obas gave no weight to Dr. William Lackey’s report stating that, “he is able to work full duty with no restrictions.” Dr. Obas gave no weight to Dr. Lackey’s determination by MRI that there were no tears or any other tissue, tendon, muscle or ligament damage but only “mild impingement.” Nor did Dr. Obas give any weight to the department’s own medical and fitness exams, which Prochilo had passed.

While competing medical reports do not defeat the agency’s medical director’s determination (see Rivers v Department of Sanitation, 49 AD3d 436 [1st Dept 2008]), here, Dr. Obas never examined Prochilo. He referred to a reinjury which he stated “the extent of that injury is unknown” yet he presumed it was extensive merely because of one prescription for Percocet. Dr. Obas’ statement in his report that “Pain, swelling and limitation of motion which limits flexion, extension, adduction and abduction causes limitation of muscular performance or need for compensation at the expense of other body parts...creating further potential for accident or injury” is not irrational. However,

there was no basis to conclude that these facts applied to Prochilo, where Dr. Obas did not perform any range of motion tests, nor even examine the shoulder for signs of swelling. While the Court cannot substitute its judgment for that of the agency's, Dr. Obas, who never examined Prochilo, ignored evidence from a doctor who treated Prochilo, and, made conclusions based on his admitted lack of knowledge of the "extent of the injury." Therefore, the decision should be annulled as lacking in substantial evidence (see e.g., Morrissey v New York State and Local Police and Firemen Retirement System, 239 AD2d 635 [3d Dept 1997] [medical opinion concluding that petitioner was not permanently disabled, which is normally entitled to deference in the resolution of differences of medical opinions, was undermined by an "incomplete examination of petitioner's treatment, hospital records and other crucial reports"]).

It is hereby

ADJUDGED that the Petition is granted to the extent that the February 18, 2009 decision affirming Respondent DSNY's medical disqualification of Petitioner for the job title Sanitation Worker are vacated; and it is further

ORDERED that the issue of Petitioner's medical qualification is remanded for further review; and it is further

ORDERED that the cross motion is denied.

This constitutes the Decision, Order and Judgment of the Court.

Dated: March 24, 2011

ENTER:



J.S.C.
EMILY JANE GOODMAN

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).