

Matter of Cahlstadt v Kelly

2011 NY Slip Op 31345(U)

May 19, 2011

Supreme Court, New York County

Docket Number: 113169/10

Judge: Jane S. Solomon

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

PRESENT: JOSE S. SOLOMON

PART 55

Justice

Index Number : 113169/2010
CHALSTADT, EDWARD
 vs.
KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE 4/8/11
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4-5

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 *petition* is decided
 in accordance with the enclosed memorandum
 decision, order and judgment.

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: 5/19/11

JOSE S. SOLOMON
 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 55

-----X
In the Matter of the
application of Edward Cahlstadt,

Petitioner,

DECISION, ORDER and
JUDGMENT

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

Index Number 113169/10

-against-

Raymond W. Kelly, as the
Police Commissioner of the
City of New York, and as
Chairman of the Board of the
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,

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141B).**

Respondents.

-----X
Jane S. Solomon, J.:

Petitioner seeks an order to set aside a determination
(the Determination) of the Board of Trustees of the Police
Pension Fund, Article II (the Board) that denied his application
for an accidental disability pension (ADR) and awarded him an
ordinary disability (ODR).

Parties' Allegations and Procedural History

Petitioner contends that he was a police officer
appointed in 1982 and that he sustained a line of duty (LOD)
injury to his left knee on May 23, 2006 (petition, ¶¶ 3, 5). He
further states that the LOD injury occurred when he was struck by

an unmarked police department vehicle, but that he was not able at that time to get the name of the driver, and that, on reporting for work the next day, he was driven to St. Vincent's Hospital emergency room (*id.*, ¶¶ 5-6, 8). He also asserts that he completed the appropriate paperwork including an aided report and LOD Injury Report, but that these documents were subsequently misfiled and, consequently, were not filed with his application for ADR (*id.*, ¶¶ 9-10).

Petitioner filed his application for an ADR on January 26, 2007 based upon the injuries he suffered from his accident (*id.*, ¶ 12). On January 8, 2010, the Medical Board of the Police Pension Fund (the Medical Board) recommended approval of petitioner's ADR, but noted the absence of the documents (*id.*, ¶ 13). Petitioner then filled out a new LOD Injury Report and aided report (*id.*, ¶ 14).

The Board held meetings on February 25, 2010, March 10, 2010, April 14, 2010 and May 14, 2010, but tabled consideration of petitioner's application, due to the absence or incompleteness of the records (Answer, ¶¶ 24-26).

Petitioner alleges that he learned the driver of the car that struck him was Police Officer Thomas Kelly, that Kelly never prepared an MV 104 report (petition, ¶ 17) and that Kelly is now employed by the Suffolk County Police Department (*id.*, ¶

18).

On March 5, 2007, petitioner commenced an action (the Lawsuit) against the City of New York and Kelly, in Supreme Court, New York County, index number 103055/2007, alleging negligence arising out of the accident.

Petitioner has annexed an excerpt of Kelly's EBT in the Lawsuit in which Kelly states that he was working for the New York City police department on May 23, 2006, when he was involved in an accident (*id.*, ¶ 19).

On June 9, 2010, the Board reviewed petitioner's application and, by a tie vote of 6 to 6, denied the application for an ADR and instead granted him an ODR (*id.*, ¶¶ 20-21, Answer, Exhibit 15). Petitioner contends that the denial of his application for an ADR was arbitrary and capricious and should, therefore, be set aside.

Respondents contend that there was a lack of contemporaneous documents regarding petitioner's accident (Answer, ¶ 30, Exhibit 15) and that petitioner delayed in reporting the accident for 27 hours (*id.*). Moreover, respondents have located the original LOD documents (*id.*, Exhibit 18) which indicate that petitioner signed out at 1803 hours on May 23, 2006 at the end of his tour and that, after he left, he was struck by Kelly's automobile at 1805 hours. Respondents further submit

petitioner's deposition in the Lawsuit in which he states that the accident occurred at 6:05 p.m., that he had "just signed out" and was off-duty (petitioner EBT, at 13).

Respondents assert that the Determination was not arbitrary and capricious, since petitioner has not shown that his disability was caused by an accident that occurred while he was working and that, consequently, the petition should be dismissed.

Procedure to Determine Disability Benefits

The award of ADR benefits is a two-step procedure in which the first step involves fact finding by the Medical Board, which considers the evidence submitted by an applicant and conducts its own medical examination (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). The Medical Board determines whether the applicant is "physically or mentally incapacitated for the performance of city-service" (Administrative Code of the City of New York [Code] § 13-168 [a]). If it finds the applicant to be disabled, it makes a recommendation to the Board as to whether the disability was "a natural and proximate result of an accidental injury received in such city-service" (*id.*).

The Board is bound by the Medical Board's finding of disability, but makes own determination as to causation (*Borenstein*, 88 NY2d at 760). The Medical Board's finding must

be upheld unless it is arbitrary and capricious, meaning that there must be "some credible evidence" to support its determination (*id.* at 761).

Similarly, the second step involves the Board's determination which must be upheld, unless it is arbitrary and capricious (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y.*, Art. II, 60 NY2d 347, 351 [1983]). However, where the decision to deny an ADR is reached as a result of 6 to 6 tie vote, "the standard of judicial review is ... different ... [since] [t]here has been no factual determination ... [and therefore the petitioner must show that he] is entitled to [ADR] ... as a matter of law" (*id.* at 352; *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept.*, Art. 1-B Pension Fund, 90 NY2d 139, 144-145 [1997]).

Analysis

The Code requires that the accident must have occurred "while [the applicant is] actually engaged" in work (*Matter of Alessio v New York City Employees' Retirement Sys.*, 67 NY2d 978, 979 [1986], rather than before work (*id.*; *Matter of Luisi v Safir*, 262 AD2d 47 [1st Dept 1999]) or after work (*Matter of Torres v New York City Employees' Retirement Sys.*, 160 AD2d 578 [1st Dept 1990]).

In this case, there is evidence in petitioner's

deposition testimony in the Lawsuit and the original LOD documents that petitioner had signed out and was off-duty at the time of the accident.

Since there is evidence that the accident happened after petitioner was no longer actually engaged in work and was no longer on duty (*Alessio*, 67 NY2d at 979; *Torres*, 160 AD2d at 579), petitioner cannot demonstrate that he is entitled to ADR as a matter of law (*Meyer*, 90 NY2d at 145). Accordingly, the petition must be dismissed.


Judgment

It is, therefore,

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

Dated: May 19, 2011

ENTER:



J.S.C.

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