

Matter of Grant v Kelly
2011 NY Slip Op 31421(U)
May 25, 2011
Sup Ct, NY County
Docket Number: 111787/10
Judge: Barbara Jaffe
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SCANNED ON 5/31/2011

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

PRESENT: JAFFE
Justice

PART 5

Index Number : 111787/2010
GRANT, CAMILLA
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

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

this motion to/for Article 78

PAPERS NUMBERED

1, 2
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

**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: 5/25/11

[Signature]
BARBARA JAFFE 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 5

-----X
In the Matter of the Application of CAMILLA GRANT,

Index No. 111787/10

Petitioner,

Motion Date: 3/22/11

Motion Seq. No.: 001

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

DECISION & JUDGMENT

-against-

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

RAYMOND KELLY, as the Police Commissioner of ~~111B~~ 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.

-----X
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By notice of petition and verified petition dated August 31, 2010, petitioner brings this Article 78 proceeding seeking an order reviewing and annulling respondents' denial of her application for an accidental disability retirement pension and ordering respondents to award her an accidental disability retirement pension or, in the alternative, directing respondents to reconsider her application in a fair and lawful manner. Respondents oppose the petition.

I. BACKGROUND

Petitioner commenced her employment with the New York City Police Department (NYPD) on April 30, 1991, and remained continuously employed until her retirement. (Verified Petition, dated Aug. 31, 2010 [Pet.]).

On November 25, 2006, petitioner was injured when the suspect she was attempting to arrest caused her to be thrown violently to the ground, injuring her back and neck. (*Id.*, Exhs. A, B). Immediately following the accident, petitioner went to the hospital and was diagnosed with a sprained or strained back. (*Id.*). A line of duty accident report was prepared the day of the accident. (*Id.*).

Petitioner thereafter experienced back pain and sought medical treatment. (*Id.*). On December 13, 2006, an x-ray of petitioner's lower spine and a magnetic resonance image (MRI) of her lumbar spine revealed that she had mild levoscoliosis, mild L3-4 and L4-5 spondylosis, and a small L3-4 left foraminal disc herniation. (*Id.*, Exh. C).

In March 2007, petitioner was placed on restricted (light) duty by the NYPD. (Pet.). In a September 12, 2007 report, petitioner's doctor, spinal surgeon William Main, stated that petitioner had been experiencing back pain for approximately the past ten months, and that he believed that she had a herniated disc in her lumbar spine and recommended surgical treatment. (*Id.*, Exh. D).

By letter dated June 18, 2008, the NYPD requested that its Supervising Chief Surgeon examine petitioner to determine whether she was incapacitated for the performance of duty and ought to be retired. The letter also reflects that petitioner had been on restricted duty since March 2007 and that her diagnosis was line of duty neck/back injuries with an MRI of her spine

showing a herniation. (*Id.*, Exh. E).

On July 28, 2008, another MRI of petitioner's lumbar spine revealed that she had degenerative change and a disc bulge, and an MRI of her cervical spine revealed degenerative changes and reversal of the normal lordosis. (*Id.*, Exh. F).

By letter dated September 10, 2008, an NYPD District Surgeon wrote to the Supervising Chief Surgeon that petitioner's MRI showed a herniation, that she continued to have neck/back pain which was not responsive to physical therapy or epidural injections, and that she was being treated by an orthopedist and neurologist. (*Id.*, Exh. G).

On June 3, 2009, petitioner was examined by respondents' Medical Board, which reviewed various medical reports for petitioner from 2006 to 2009, interviewed petitioner, and examined her. It concluded that the evidence failed to substantiate that petitioner was disabled from performing the full duties of a police officer, and unanimously recommended disapproval of either an accidental disability retirement (ADR) or ordinary disability retirement (ODR). (*Id.*, Exh. I).

On August 5, 2009, petitioner's physician diagnosed petitioner with cervical radiculitis and lumbar radiculitis with a history of disc herniation, and opined that she was partially disabled with a poor prognosis. (*Id.*, Exh. H).

On August 24, 2009, petitioner's application was remanded to the Medical Board by respondents' Board of Trustees for it to consider new evidence, consisting of new medical reports including one from Dr. Main, in which he stated that surgical treatment was likely required and opined that irrespective of any future treatment or surgery, petitioner would be unable to perform her duties as a police officer and was totally and permanently disabled. The

Medical Board interviewed and examined petitioner, analyzed the new medical reports, and concluded that although it could not “attribute the cervical or lumbar degenerative changes to the line of duty injury of 2006 based on the time sequence,” petitioner was disabled from performing police duties by virtue of cervical and lumbar osteoarthritis and excessive weight. It thus rescinded its prior decision to the extent of approving the application for ordinary disability retirement, with the final diagnosis being cervical and lumbar osteoarthritis with radiculitis. (*Id.*, Exh. J).

By letter dated January 12, 2010, Dr. Main asked the Medical Board to reconsider its decision, observing that while the Board was correct in concluding that petitioner’s degenerative back condition pre-dated her line of duty injury in 2006, the condition did not explain why petitioner had no symptoms prior to the injury. Dr. Main opined that the most likely explanation for the onset of petitioner’s symptoms was a superimposed injury that, in combination with the pre-existing condition, resulted in petitioner’s back and neck pain, and concluded that her condition was made substantially worse by her injury. (*Id.*, Exh. K).

On January 22, 2010, the Board of Trustees remanded the application to the Medical Board to consider new evidence, including Dr. Main’s January 12, 2010 letter. By decision dated March 2, 2010, the Medical Board reviewed Dr. Main’s letter and did not re-examine petitioner as she had already been found disabled. The Board observed that in all of the examinations performed on petitioner, there was a paucity of objective findings, and thus reaffirmed its prior decision. (*Id.*, Exh. L).

On April 14, 2010, at a meeting of the Board of Trustees, petitioner’s union representative requested that the Board upgrade petitioner’s retirement to an ADR, arguing that

petitioner's 2006 line of duty injury constituted an aggravation of a pre-existing injury or precipitation of a latent condition and observing that petitioner was able to fully perform her duties prior to the accident despite her pre-existing back condition. The Board stated that it would take 30 days to review the request. (*Id.*, Exh. M).

On May 12, 2010, the Board of Trustees, by a six to six tie vote, denied petitioner's application for an ADR and approved an ODR, relying on the Medical Board's November 2009 determination that it could not connect causally petitioner's disability to her 2006 accident. (*Id.*, Exh. N).

II. CONTENTIONS

Petitioner asserts that respondents' denial of her ADR application was arbitrary and capricious as it was contrary to the facts and medical evidence presented to it which demonstrated that petitioner's disability was causally connected to her 2006 accident either by actually causing her disability or by exacerbating a previously asymptomatic, pre-existing condition to the point of disability. Petitioner observes that she had no symptoms and worked full-duty prior to the accident and that her symptoms began immediately after the accident and progressively worsened, and maintains that the Medical Board's decision was neither based on substantial credible evidence nor rational. She also contends that the Medical Board failed to address the issue of whether the accident exacerbated a pre-existing condition, and that the Board of Trustees likewise failed to do so and merely adopted the Medical Board's conclusory and insufficient decision. (Memo. of Law, dated Nov. 1, 2010).

Respondents deny that their determination was arbitrary and capricious as the evidence supports their determination that petitioner's disability was caused by her pre-existing back

degenerative condition and excessive weight, and that her condition worsened progressively over time, observing that the Medical Board did not find petitioner to be disabled until three years after her accident. (Memo. of Law, dated Jan. 10, 2011).

III. ANALYSIS

A. Applicable law

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . 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 Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, 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]).

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]), and if so whether the applicant is disabled. 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. Was respondents' determination arbitrary and capricious?

A 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.*). The Court of Appeals has held that an accident that aggravates a pre-existing injury or precipitates the development of a latent condition constitutes a cause of a resulting disability. (*Matter of Tobin v Steisel*, 64 NY2d 254 [1985]).

Here, there is evidence in the record indicating that petitioner had a pre-existing back

condition that was asymptomatic and did not affect her work performance as she remained on full-duty from the time she began her employment in 1991 to the date of her accident in 2006, and that immediately after the 2006 accident, she began experiencing symptoms and pain, which progressive worsened over the last five years, thus raising the possibility that the accident exacerbated or precipitated her pre-existing condition to the point that petitioner became disabled. (*See Matter of King v DiNapoli*, 75 AD3d 793 [3d Dept 2010] [determination was not supported by substantial evidence in light of fact that although petitioner had degenerative back condition, he was not being treated for back pain before accident and back pain began immediately after accident and never abated]; *Matter of Sanchez v New York State and Local Police and Fire Retirement Sys.*, 208 AD2d 1027 [3d Dept 1994] [annulling determination and finding that there was no evidence supporting conclusion that disability was caused by degenerative back condition unrelated to accident as petitioner had no symptoms prior to accident and was continuously disabled after accident]).

Moreover, this view of the medical findings was articulated in Dr. Main's January 2010 letter and petitioner's application was remanded to the Medical Board specifically for it to consider the letter and Dr. Main's opinion therein. However, there is no indication that the Medical Board ever considered or determined whether petitioner's 2006 accident exacerbated or precipitated her pre-existing back condition, and it did not address Dr. Main's letter or opinion other than stating conclusorily that there were no objective findings set forth in petitioner's medical records.

Thus, it cannot be said that the Medical Board's determination was based on the substantial credible evidence before it. Consequently, it was thus arbitrary and capricious. Nor

did the Board of Trustees consider this issue inasmuch as it relied solely on the Medical Board's determination which was rendered before its receipt and review of Dr. Main's January 2010 letter. This is not a matter of whether respondents' properly resolved conflicting medical opinions. Rather, there was a failure to consider whether petitioner's disability was exacerbated by her accident. (*Compare Matter of Meyer v McGuire*, 64 NY2d 1152 [1985] [application remanded to respondent in light of failure to address whether petitioner's injury precipitated or aggravated pre-existing back condition], *Matter of Brown v Bd. of Trustees of Police Pension Fund of Police Dept. of City of New York*, 111 AD2d 75 [1st Dept 1985] [as respondents did not consider whether line-of-duty injury aggravated "apparently dormant and asymptomatic preexisting condition to the extent that it became disabling," application remanded], *with Matter of Mazzei v Hevesi*, 45 AD3d 1103 [3d Dept 2007] [finding substantial evidence supported conclusion that accident did not cause disability; medical expert considered whether pre-existing condition was aggravated by accident but discounted possibility based on medical records]; *Delahunty v Bd. of Trustees of New York City Fire Dept.*, 173 AD2d 212 [1st Dept 1991], *lv denied* 78 NY2d 982 [record indicated that both Medical Board and Board of Trustees considered petitioner's aggravation argument and rejected it based on review of submitted medical evidence]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is granted to the extent that respondents' May 12, 2010 determination denying petitioner an accidental disability retirement is vacated and annulled; and it is further

ORDERED, that the matter is remanded to respondents for further consideration and proceedings consistent with this decision.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 25, 2011
New York, New York

UNFILED JUDGMENT

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