

Matter of Quintero v Kelly

2012 NY Slip Op 30333(U)

February 8, 2012

Supreme Court, New York County

Docket Number: 107174/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 107174/2011
QUINTERO, JANICE
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1, 2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3, 4</u>
Replying Affidavits _____	No(s). <u>5</u>

Upon the foregoing papers, it is ordered that this motion is

**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).

FILED

FEB 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/8/12



_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

* 2] .
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
In the Matter of the Application of
JANICE QUINTERO,

Index No.
107174/11

Petitioner,

DECISION
and ORDER

-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,
THE BOARD OF TRUSTEES of the Police Pension Fund,
Article II, NEW YORK CITY POLICE DEPARTMENT
and THE CITY OF NEW YORK,

Mot. Seq.
001

Respondents.

-----X
HON. EILEEN A. RAKOWER:

Janice Quintero ("Petitioner") brings this Article 78 petition to annul the decision of Respondent Board of Trustees of the Police Pension Fund ("Board of Trustees") to deny Petitioner either accidental disability retirement ("ADR") or ordinary disability retirement ("ODR").

Petitioner was appointed as a police officer with the New York Police Department ("NYPD") on September 29, 2000. By memorandum dated August 28, 2009, the NYPD recommended to the Supervising Chief Surgeon that Petitioner be surveyed "in order to ascertain whether the member is incapacitated for the performance of duty and ought to be retired." The memorandum indicates that Petitioner has been on restricted duty since September 4, 2008 with complaints of back pain. On November 5, 2009, the Commissioner ordered that Petitioner be examined by the Medical Board for the purpose of ascertaining whether Petitioner was unfit for continued police duty.

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* 3] .

Petitioner reported that her back pain was the result of a line-of-duty (“LOD”) accident which occurred on April 11, 2008. In an LOD injury report of that date, Petitioner reported:

WHILE ON ROUTINE PATROL WE WERE OBSERVING POSSIBLE PROSTITUTION ACTIVITY ON 8TH AVENUE AND 47 STREET [sic]. OUR RMP WAS STOPPED IN THE LEFT LANE WHEN ANOTHER VEHICLE UNEXPECTEDLY STRUCK US FROM BEHIND....

In a memorandum dated April 14, 2008, Petitioner reported that she was feeling neck and back pain, and was feeling stiff and sore as a result of the accident.

The Medical Board first examined Petitioner on November 18, 2009. The Medical Board noted her prior examinations by doctors for the injury she sustained in April 2008. The Medical Board also interviewed Petitioner and conducted its own physical examination. It noted that Petitioner “complain[ed] of back pain with right lower extremity pain. The pain goes down the buttock to the posterior and lateral thigh to the knee and occasionally it goes to the foot. Cough and sneeze causes the pain to go the remainder of the way.” Upon physical examination, the Medical Board observed that “[t]he officer has right-sided signs of a minimal nature, i.e. small right-sided disc, some right-sided weakness of eversion and right-sided limited straight leg raising. The components of right legged pain are at the present time minimal.” However, the Medical Board deferred its final recommendation in light of the fact that Petitioner was scheduled for further evaluation, further MRIs, and possibly surgery.

The Medical Board re-examined Petitioner on May 26, 2010. Petitioner provided the Medical Board with an April 26, 2010 report from Dr. Ji Han. Upon being interviewed, Petitioner reported that her condition was the same as her prior examination by the Medical Board. She complained of “sharp pain and/or numbness and tingling in the low back and down her right leg to above the knee in a posterior path.” Petitioner also reported having the feeling of sharp pain every other day, and sometimes on a daily basis, and that pain and numbness were made worse by sitting for extended periods of time. Upon physical examination, the Medical Board noted that there were no objective indications of any condition which would render Petitioner unfit for duty, notwithstanding her subjective

* 4] .
complaints of pain. Accordingly, the Medical Board recommended denial of both ADR and ODR.

On September 8, 2010, the Board of Trustees remanded the matter to the Medical Board for consideration of new evidence.

The Medical Board interviewed and examined Petitioner once again on October 13, 2010. The new medical evidence provided by Petitioner consisted of a consultation referral from Dr. Arnold Goldman, an NYPD orthopedic surgeon. Goldman had reported "[a] positive straight leg raise on the right which was worse than on the left. There was an antalgic gait. Lower extremity motor strength was 4/5 on the left and 5/5 on the right... The prognosis was fair. Restricted duty was recommended." In her interview with the Medical Board, Petitioner stated that she was disabled as a result of suffering from severe pain. She reported that she "continues to have headaches with neck pain and numbness especially down her right arm. She has numbness and tingling in her right leg. The pain radiates from her mid back to her buttock and down to the posterior aspect of the thigh, calf and into the foot and toes. She also complains of back spasms."

The Medical Board noted that upon physical examination, Petitioner

was crying and made grimacing movements throughout most of the examination on any movement or attempt of resistance. She was asked to only go within her limits of tolerance. She ambulated favoring the left lower extremity which was unusual given the fact that she seemed to have symptoms related more to the right. She denied the ability to heel or toe walk, but was able to stand on her toes and bear weight with the examiner assisting her only for balance. Her range of motion was diffusely decreased throughout the cervical and lumbar spine in all planes. There was a positive axial load with a complaint of back pain with very minimal stimulus. The pain was out of proportion. There was no evidence of spasm and no asymmetry of the spine. She was able to perform a squat three quarters of the way. Seated straight leg raise was negative at 90° on the left and positive at 90° on the right only for the complaint of mid back pain

but without radiculopathy. Upper extremity motor testing was graded 5/5 in all motor groups. Motor testing on the right was 5/5 except for give way on dorsiflexion on the right. Deep tendon reflexes were 2+ and symmetrical in the biceps, triceps, brachioradialis, knee jerks and Achilles. There were no spontaneous fasciculations. There was no clonus. The officer was able to sit with her legs extended and her back flexed on the table without evidence of back spasm and was able to hold this position. She had a complaint of back pain when flexing the hips with the knee flexed. Hip rotation was negative for hip pain but positive for right-sided back pain.

In response to the foregoing, the Medical Board concluded that "the documentary and clinical evidence do not substantiate that the officer is disabled from performing the full duties of a New York City Police Officer." According, the Medical Board recommended disapproval of ADR and ODR.

On December 8, 2010, the Board of Trustees once again remanded Petitioner's case to the Medical Board for consideration of new evidence.

Petitioner was examined yet again by the Medical Board on February 23, 2011. The new evidence submitted consisted of reports from October and November of 2010 from Dr. Alfred Faust, an orthopedic surgeon. The Medical Board noted that it reviewed Petitioner's cervical and lumbar MRIs from 2008, as it had previously, and concluded that the degenerative changes and osteophytic disease were consistent with Petitioner's age. Upon physical examination, the Medical Board observed that Petitioner was walking with "an exaggerated right-sided limp" and was using a cane. While Petitioner "declined to heel and toe walk or do a deep knee bend,"

She had a good range of motion to the neck with extension of 20-25 degrees. She forward flexed to 1cm of the chin on chest and had good rotational movement. In the lumbar area, she forward flexed to 60 degrees, extended to 20 degrees and rotated to 45 degrees bilaterally. There was tenderness to the left sacroiliac and sciatic notch. She made a good buttock contraction and

had no atrophy. Following the range of motion to the back, no evidence of muscle spasm was present. The deep tendon reflexes were 2-3+ in the upper and lowers and symmetrical. No clonus was present nor were pathological reflexes present. There was no evidence of fasciculations. Manual motor testing in the upper extremities was 5/5. There was no evidence of atrophy at measurements of the arms and forearms. In the lower extremities, the motor strength of the left lower extremity was 5/5. In the right lower extremity, there was global weakness starting with the hip flexors, extensors, quadriceps, dorsiflexors, plantar flexors, invertors and evertors, which were reduced to almost 3/5. When asked to dorsiflex her feet, the discrepancy between the left and right was enormous. She fully dorsiflexed the left and barely dorsiflexed the right 10 degrees. There was no movement in the extensor hallucis longus. Straight leg raising on the left was to 90 degrees with no complaints and on the right to 45 degrees with complaint of back pain. Measurements of the calves at maximum circumference revealed no evidence of atrophy.

Based upon its review of Petitioner's medical records and its own examination of Petitioner, the Medical Board concluded that "the evidence of global weakness in all the muscle groups of the right lower extremity is not sustained by the findings on the diagnostic tests that were reviewed. The Medical Board also finds that there was a lack of objective orthopedic and neurological findings."

On April 13, 2011, the Board of Trustees denied Petitioner's application for either ADR or ODR. This petition ensued.

Review of an application for ADR under NYC Admin. Code §13-252 involves a two-tier process wherein a Medical Board consisting of three physicians first ascertains whether the applicant is disabled from performance of his or her duties. If the Medical Board finds that the applicant is in fact disabled, the Medical Board must then determine whether the disability is the result of an accidental injury received in the line of duty (*id.*; see also *Borenstein v. New York City Empls.*

Ret. Sys., 88 N.Y.2d 756, 760 [1996]). The burden of demonstrating both a disability and causation rests upon the applicant (*Lewis v. Kelly*, 2009 NY Slip Op 50477U, *6 [Sup. Ct. New York Cty. 2009]) (citing *Evans v. City of New York*, 145 A.D.2d 351 [1st Dept. 1988]; *Archul v. Bd. of Trustees of the New York City Fire Dept., Art. 1-b Pension Fund*, 93 A.D.2d 716 [2nd Dept. 2007]).

Where, as here, a petitioner commences an Article 78 proceeding challenging the Medical Board's determination as to whether the applicant has a disability, the finding will only be overturned by a reviewing court if found to be lacking a rational basis, or arbitrary and capricious (*Borenstein* at 760).

The Medical Board's determination is conclusive so long as it is supported by substantial evidence which, in the context of disability cases, has been construed to require some credible evidence. Credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered... and [which is] evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion.”

(*Lewis* at *7) (citing *Borenstein* at 760; *Meyer v. Bd. of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 146-47 [1997]).

Moreover, where conflicting evidence is presented, the Medical Board alone has the authority to resolve any such conflict (*id.* at 761; *see also Creegan v. Bd. of Trustees of New York City Police Pension Fund Article II*, 7 A.D.3d 335 [1st Dept. 2004]). Once the Medical Board certifies that the applicant is not disabled, the Board of Trustees is bound by that determination, and neither the Board of Trustees nor a reviewing court may weigh the medical evidence or substitute its judgment for that of the Medical Board (*Lewis* at *7) (citing *Borenstein* at 761).

Applying the foregoing principles to the petition herein, the court finds that the Medical Board's determination is supported by credible medical evidence. In addition to noting the absence of objective medical evidence in Petitioner's records to support her subjective complaints, the Medical Board made repeated examinations of Petitioner in which diagnostic tests yielded no indications of a disability which prevented her from performing her duties. Accordingly, the court lacks the authority to disturb the Medical Board's determination.

Wherefore, it is hereby

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

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 8, 2012



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT

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