

Matter of Pellicane v Kelly

2012 NY Slip Op 30649(U)

March 13, 2012

Supreme Court, New York County

Docket Number: 111176/11

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

3/13/12
(B)

PRESENT: _____

PART _____

Justice

Index Number : 111176/2011
PELLICANE, ANTHONY
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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

~~is denied~~ **is decided** in accordance with the annexed 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).

RECEIVED

MAR 15 2012

REGISTRATION REPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 3/13/12

PK, J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X

In the Matter of the Application of

ANTHONY PELLICANE,

Petitioner,

Index No. 111176/11

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/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 and
THE BOARD OF TRUSTEES of the Police Pension
Fund, Article II,

Respondents.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Anthony Pellicane brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to vacate and annul a determination made by respondents denying petitioner accidental disability retirement ("ADR"); to direct and order respondents to retire petitioner with ADR pursuant to General Municipal Law ("GML") § 207-k, also know as the "Heart Bill," retroactive to the date of his ordinary disability retirement

("ODR"), plus interest thereon; or in the alternative, directing and ordering the respondents by way of remand to review petitioner's application for ADR under the Heart Bill. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner was appointed as a uniformed officer of the New York Police Department ("NYPD") on August 30, 1993. Prior to his appointment with the NYPD, petitioner passed all physical and mental examinations administered by the NYPD that demonstrated petitioner to be both physically and mentally fit to perform full duties as a police officer.

Petitioner alleges that on or about October 3, 2001, he began to suffer from an irregular heart beat, chest pain and shortness of breath. He alleges that he experienced these symptoms while assisting in the removal of two police officers from an overturned NYPD Emergency Services Unit truck. Petitioner was treated and released from the Emergency Room at Bellevue Hospital. On October 5, 2001, petitioner underwent an electrocardiogram which indicated that he had sinus bradycardia, which was within normal limits. An M-mode Doppler echocardiogram was also performed which showed a slight enlargement of the left atrium. Petitioner's blood pressure was 110/70 and the rest of his examination produced normal results. Although a Line of Duty ("LOD") Injury Report was submitted to the NYPD Medical Division for approval, the Commanding Officer of the Medical Division denied the LOD designation on May 24, 2002.

On July 24, 2006, after complaining of palpitations, petitioner was instructed to wear a 24-hour Holter Monitor. The doctor's report states that petitioner had a total of 658 ventricular premature beats and that the hour with the largest number of ventricular premature beats was at 7:00. Ventricular couplets were detected 71 times and the V-tach was detected 20 times during

the Holter tape recording and one of these episodes was a non-sustained run of V-tach.

Additionally, supraventricular ectopics, the most being 184, in a given hour was a total of 1003.

On August 4, 2006, petitioner underwent an echocardiogram which demonstrated that the left atrium was mildly dilated. On August 8, 2006, petitioner underwent an exercise stress test. He exercised for 9 minutes completing the third level of the Bruce protocol. He stopped because of headache and fatigue but he had no cardiac symptoms. His heart rate rose to 154 BP and his blood pressure at rest was 120/85 and rose to 200/90. He performed 10 METs of work which was felt to be less than age appropriate by the administrator. There were no significant ST changes noted during exercise or the recovery period. The left ventricle ejection fraction was 61%. The study did not show any significant abnormalities.

On August 25, 2006, petitioner underwent a cardiac MRI. The report indicated mild aortic root dilation with a maximal diameter of 3.8 cm. The left ventricle size was normal with normal systolic function and wall motion. One minimal midseptal midmyocardial area of hyper enhancement was seen consistent with fibrosis or possibly an old myocarditis. The right ventricle was normal in size and function. The aortic tricuspid and mitral valves appeared normal. The pericardium and portions seen of the central pulmonary arteries appeared normal.

On September 12, 2006, petitioner underwent a cardiac electrophysiology study. The report indicated that petitioner was a 36 year-old man with palpitations and presyncope and non-sustained ventricular tachycardia. The examination found that petitioner had dual AV nodal modification undergone radiofrequency ablation of the slow pathway with AV nodal modification. There was no inducible ventricular tachycardia and it was felt that the risk of such an event was low. For this reason, a heart monitoring device was not suggested.

In an NYPD Consultant's Report dated March 2, 2007, Israel Berkowitz, M.D., an NYPD Cardiologist, noted petitioner's history of arrhythmia associated with lightheadedness and previously noted results on diagnostic examinations. On physical examination, petitioner's blood pressure was 170/100. Dr. Berkowitz noted that petitioner should be on restricted duty and recommended blood pressure control. Additionally, in a report dated March 8, 2007, Daniel Appelbaum, M.D., board-certified in Internal Medicine, noted that petitioner's blood pressure was 170/110.

On December 13, 2007, the Police Commissioner submitted an application for ODR on petitioner's behalf based on the recommendation of the NYPD District Surgeon and the fact that petitioner was placed on restricted duty by Dr. Berkowitz in November 2007 due to problems with his heart. Petitioner disagreed with this application as he wanted to submit an application for ADR instead.

In a report dated March 26, 2008, Steven Evans, M.D., board-certified in Internal Medicine, reviewed petitioner's medical history and findings in detail. The physical examination revealed his blood pressure to be 140/95 in both arms and his pulse was 70 and regular. Otherwise, his examination resulted in normal findings. An ECG revealed sinus rhythm, at 67 BPM with non-specific ST changes noted. There was an isolated Q-wave in Lead III. Dr. Evans' impression was non-sustained ventricular tachycardia in the setting of a structurally normal heart and a negative electrophysiologic test. Dr. Evans felt that petitioner was being appropriately treated with beta-blockers and that he would not repeat the electrophysiologic testing. He noted that it would be worthwhile to follow up on petitioner's hypertension and recommended a repeat echocardiogram, stress test and Holter monitor to follow up on his arrhythmia, atrial size and

ventricular function. Dr. Evans also noted that petitioner's blood pressure was not satisfactorily controlled and that an additional agent should be added.

On May 9, 2008, petitioner underwent a second echocardiogram. The report concluded that he had a mildly dilated hypertrophic left ventricle with normal global systolic function, mildly dilated left atrium, redundant mitral valve with trace to mild mitral insufficiency and trace tricuspid insufficiency. The aortic root was 39 mm. The left atrium was 48 mm. The measurement of the posterior wall in diastole was 12 mm. The left ventricular wall was 13 mm. The ejection fraction was 60%. Petitioner also had a mild degree of mitral insufficiency.

On July 10, 2008, petitioner filed an application for ADR. On July 21, 2008, petitioner was transported from his precinct to the Emergency Room at St. Vincent's Medical Center as he was complaining of left sided chest pains that he had been having for a couple of days. His blood pressure was 153/100 and his pulse oximetry was 98%. He was thereafter released. On September 9, 2008, petitioner had another episode of chest pains and was against seen at St. Vincent's Medical Center. In a report dated September 22, 2008, Dr. Appelbaum stated that petitioner was hypertensive and that he was placed on antihypertensive medication.

On September 26, 2008, the Medical Board Police Pension Fund Article II ("Medical Board") considered petitioner's ADR application and the prior application for ODR. The Medical Board approved the application for ODR and denied petitioner's ADR application noting that his heart condition did not meet the criteria for Heart Bill benefits.

On September 24, 2009, petitioner was again examined by Dr. Evans. Dr. Evans stated that petitioner had a recent echocardiogram which revealed concentric hypertrophy with left ventricular thickness of 1.7 cm. This was allegedly due to hypertension. Dr. Evans noted that

“[t]here is no question that his markedly thickened LV of 1.7 cm is caused by his hypertension. This alone qualifies him for retirement under the heart bill criteria. The fact that he has ventricular tachycardia in the setting of hypertensive heart disease is a second, clear criteria.”

Effective April 8, 2009, petitioner retired from the NYPD after fifteen years of service under ODR. On October 9, 2009, the Medical Board again considered petitioner’s ADR application and again denied the application.

On May 7, 2010, the Medical Board reviewed petitioner’s case yet again. The Medical Board rescinded its prior decision and recommended approval of petitioner’s ADR application under the provisions of the Heart Bill due to petitioner’s hypertension and presence of significant LVH with a measurement of 1.7 cm. The final diagnosis was Hypertensive Cardiovascular Disease and Significant Left Ventricular Hypertrophy.

On July 14, 2010, the Board of Trustees remanded petitioner’s case for further consideration by the Medical Board, stating:

We would like the Medical Board to actually review the films or tapes of the echocardiogram. They make reference to a letter from a doctor indicating that the thickening is a 1.7 centimeters, but we note that in the space of approximately one year it went from 1.1 to 1.7. We would like them to look at the actual films or the tapes of those tests and to render a new opinion for us.

On August 30, 2010, petitioner had another echocardiogram performed by Steven M. Kobren, M.D., board-certified in Internal Medicine, which indicated thickened LV of 1.52 cm. On February 16, 2011, Dr. Kobren noted that “...the copy of the echocardiogram that [petitioner] received is the only copy that is available.”

On October 8, 2010, the Medical Board deferred making a final decision in order to

review the October 4, 2006 echocardiogram which stated petitioner's left ventricular thickness was 1.7 cm, as requested by the Board of Trustees. On January 26, 2011, Dr. Evans examined petitioner again. In his report, Dr. Evans stated

[t]his patient has LVH secondary to hypertension and is on antihypertensive medication, and continued palpitations. His yearly echocardiogram in August 2010 revealed a LV thickness of 1.52 cm. This is consistent with his echocardiogram in May 2008 which revealed mild LVH. It has clearly progressed since that time...

On March 11, 2011, petitioner appeared before the Medical Board. The Medical Board stated that the amount of medication taken by petitioner indicated his blood pressure was not severe and that in the absence of verifiable consistent echocardiographic evidence of left ventricular hypertrophy, its previous decision granting petitioner's application for ADR was rescinded. Instead, the Medical Board recommended approval of ODR, as it did not think petitioner's disability was caused by a stress-related disease of the heart based on the medical evidence. The Medical Board diagnosed petitioner as having "Congenital Anomaly of Atrioventricular Conduction System and Hypertension Without Definite Evidence of Left Ventricular Hypertrophy caused by It."

On June 8, 2011, the Board of Trustees adopted the recommendation of the Medical Board and denied petitioner's application for ADR. As a result of the Board of Trustees' decision, petitioner's status remained retired under ODR. Petitioner then filed the instant Article 78 petition challenging the Board of Trustees' decision.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the

‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)(“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that respondents’ determination denying petitioner’s application for ADR was made on a rational basis. Admin. Code § 13-252, which governs retirement for accident disability for members of the NYPD, provides as follows:

Retirement for accident disability.

Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member 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. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service 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.

When a police officer applies for ADR based on disability from conditions of the heart, the Heart Bill comes into effect. The Heart Bill states:

Disabilities of policemen and firemen in certain cities.

a. Notwithstanding the provisions of any general, special or local law or administrative code to the contrary, but except for the purposes of sections two hundred seven-a and two hundred seven-c of this article, the workers' compensation law and the labor law, any 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 a paid police department or fire department, where such paid policemen or firemen are drawn from competitive civil service lists, 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.

Pursuant to the "Heart Bill," petitioner is afforded "a presumption, albeit rebuttable, that any disabling health condition caused by a disease of the heart is service related." *Matter of Liston v. City of New York*, 161 A.D.2d 491 (1st Dept 1990). Thus, in order to be entitled to ADR under the Heart Bill, petitioner must show that he is disabled from the performance of duties of a police officer by a disease of the heart. Upon such a showing, the presumption arises that such a condition was incurred in the performance of duty, unless rebutted by competent evidence to the contrary. "[C]ompetent evidence which demonstrates that a heart condition which, in the absence of [definitive] hypertension or coronary disease, is not stress-related or induced by occupational factors is sufficient to rebut the statutory presumption and...the Medical Board is not required to identify the cause of the condition." *Gumbrecht v. McGuire*, 117 A.D.2d

531 (1st Dept 1986).

Initially, petitioner has shown that he has a disabling health condition caused by a disease of the heart. Therefore, the presumption that petitioner's heart condition is service related arises and the burden shifts to respondents to show that the disease of the heart was not incurred in the performance of petitioner's work-related duties. In this case, respondents have rebutted the presumption by relying on competent evidence showing that petitioner's disease of the heart was not incurred in the performance of his duty. The court finds that the Board of Trustees' denial of petitioner's ADR application was rational as it relied on the finding of the Medical Board that petitioner's heart condition was not work-related. After reviewing all of the medical evidence submitted by petitioner, the Medical Board concluded that there was no definitive evidence of stress-related heart disease and found that the evidence presented showed that petitioner's heart ailments were not caused by the performance of his police officer duties. The Medical Board reasoned,

Various measurements of [petitioner's] left ventricular septum and posterior wall of the left ventricle were markedly variable and somewhat inconsistent. For instant, the last echocardiogram reports normal measurement for the posterior wall and an abnormal measurement for the interventricular septum. This would imply asymmetric left ventricular hypertrophy which is not typical of hypertension. In the absence of verifiable consistent echocardiographic evidence of left ventricular hypertrophy, it is the unanimous decision of this Article II Medical Board to rescind the previous decision and to recommend approval of the Police Commissioner's application for [ODR] and disapproval of [petitioner's] own application for [ADR].

Furthermore, the Medical Board noted, based on the evidence offered by petitioner, that there is an absence of stress-related pathologies such as significant hypertension, coronary artery disease

