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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 113668/2011
ADORNO, ANTHONY
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 113668/11
MOTION DATE 4/6/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 were read on this Article 78 petition

Notice of Petition; Verified Petition — Exhibits A-Y	No(s). 1; 2
Answering Affirmation — Exhibits	No(s). 3
Replying Affidavit	No(s).

Upon the foregoing papers, it is ADJUDGED that this petition is decided in accordance with the annexed memorandum decision 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).

HON. MICHAEL D. STALLMAN

Dated: 7/12/12
New York, New York

_____, 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 if appropriate:..... PETITION 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: IAS PART 21

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In the Matter of the Application of
ANTHONY ADORNO,

Petitioner,

Index No. 113668/2011

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

- against -

Decision and Judgment

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,

Respondents.

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HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination of the Board of Trustees of the Police Pension Fund, Article II, which, by a tie vote, denied his application for accidental disability retirement (ADR). Respondents oppose.

I.

According to petitioner, he was appointed as an NYPD police officer on October 15, 1990 (according to respondents, he was appointed to a police officer with the New York City Transit Authority in May 1989, and transferred to the NYPD). It is undisputed that petitioner retired from the NYPD on August 11, 2011 on service retirement.

It is undisputed that, during his years on the police force, petitioner reported two line of duty incidents on April 21, 1997 and October 15, 1997. According to the April 1997 injury report, petitioner suffered a lower back/muscle sprain after falling through what appeared to be a solid, sound floor while engaging in a foot pursuit of a perpetrator on April 21, 1997. (Verified Answer, Ex 2.) According to the October 1997 injury reporter, petitioner suffered injuries to his head, neck, back, right shoulder, left hand, and left as a result of an automobile accident on October 15, 1997, which occurred while petitioner was a passenger in a police car. (*Id.*, Ex 3.) Petitioner contends that he experienced recurring spinal pain thereafter, and periodically sought chiropractic care beginning in 1999, which petitioner claims was paid for by the NYPD.

According to respondents, Police Commissioner Kelly submitted an Ordinary Disability Examination Order and Accident Disability Examination Order to the Medical Board of the Police Pension Fund. (Verified Answer, Ex 4.) On May 14, 2010, petitioner submitted an application for Accident Disability Retirement (ADR). (Verified Answer, Ex 6.)

On May 26, 2010, petitioner was evaluation by the Medical Board composed of Dr. DePalma, Dr. Bottner, and Dr. Schreiber, which concluded

"20. The two line of duty incidents of April 21, 1997 and October 15,

1997 are recognized. However it is noted that no treatment of low back complaints occurred until July 31, 1999, at which point treatment was for right low back and right buttock pain. The officer continued to work full duty calling in sick for three days in 2002 and returning to full duty again until January 20, 2004, which was the first episode of left-sided back pain which again resolved within a few days to the extent that the sergeant returned to full duty until going out due to low back complaints in November 2007... Noting the paucity of treatment between 1999 and 2007, with treatment limited only to a brief period in 1999, with no treatment in the intervening year and a half after the line of duty injuries in 1997 and the lack of any treatment until 2007 thereafter, Dr. Bottner and Dr. Schreiber are unable to attribute the sergeant's current disability to the line of duty injuries ten years prior to presentation for medical care in 2007 at which time an extruded disc was documented on MRI and a free extruded fragment was subsequently found at operation.

21. It is noted that the sergeant has two well-documented line of duty injuries. He took time off after each injury. He sought care in 1999 with a chiropractor. An MRI in 2004 revealed a large disc bulge. The Medical Board reviewed the MRI and concurred with the diagnosis. The sergeagent eventually had surgery. He was asked if he was ever free of pain from time of the initial injuries. He stated that the pain would come and go and it would be better and it would be less, but it never completely disappeared. It is Dr. DePalma's opinion that the continuity of care and the continuity of symptomatology delineates this as a line of duty injury which eventually required surgery and disabled the officer.

22. The Article Medical Board finds sufficient documentary and clinical evidence that the sergeant is disabled from performing the full duties of a New York City Police Officer. However, for reasons cited in paragraphs 20 and 21, Dr. Botttner and Dr. Schreiber feel that there is no causation to his two incidents and his disability. It is to be noted that Dr. DePalma is in disagreement with this. In light of this, the Article II Medical Board recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the sergeant's own application for Accident Disability Retirement. The final

diagnosis is Left Lumbar Radiculopathy Status Post L5-S1 Discectomy."

(Verified Petition, Ex L.) According to petitioner, Dr. DePalma is board certified in neurosurgery, Dr. Bottner is board certified in emergency medicine, and Dr. Schreiber is board certified in physical medicine and rehabilitation. (Verified Petition, Ex M.)

Following further submissions on petitioner's behalf from Dr. Yong Kim (Verified Petition, Ex P), the Board of Trustees remanded petitioner's case to the Medical Board for reconsideration. On remand, the Medical Board panel consisted of Dr. Bottner, Dr. DePalma, and Dr. Sierros (who petitioner maintains is board-certified in internal medicine with a specialty in pulmonary disease). The Medical Board stated, in pertinent part:

> "the Article II Medical Board reaffirms its previous decision with Dr. Sierros and Dr. Bottner recommending approval of the Police Commissioners' application for Ordinary Disability Retirement and disapproval of [the] sergeant's own application for Accident Disability Retirement and Dr. DePalma recommended approval of the sergeant's own application for Accident Disability Retirement and disapproval of the Police Commissioners' application for Ordinary Disability Retirement. The final diagnosis is Left Lumbar Radiculopathy Status Post L5-S1 Discectomy."

(Verified Petition, Ex R.)

The Board of Trustees remanded the matter to the Medical Board a third time, and on May 4, 2011, the Medical Board, again composed of Dr. Bottner, Dr.

DePalma, and Dr. Sierros, adhered to its prior determination, with Dr. DePalma dissenting. (Verified Petition, Ex V.)

On August 11, 2011, the Board of Trustees voted six-to-six on petitioner's application for ADR. (Verified Answer, Ex 35.) It is undisputed that petitioner requested to be retired on a service retirement pension if ADR was not awarded, and that the Board of Trustees withdrew the Police Commissioner's examination order for Ordinary Disability Retirement. (*Id.*)

Petition now challenges the respondents' denial of his application for ADR.

II.

The determination as to whether a retiring or retired police officer is entitled to ADR involves a two-step process. First, the Medical Board must determine whether or not the applicant is in fact physically or mentally incapacitated for the performance of City service. The Medical Board's determination on these issues is binding on the Board of Trustees. (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-61; *Matter of Canfora v Board of Trustees of the Police Pension Fund of Police Dept. of the City of N.Y., Art. II*, 60 NY2d 347, 351 [1983].) If the Medical Board finds that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disabling condition was the natural and proximate result of an accidental injury. (*See Matter of Borenstein*,

88 NY2d at 760.)

The second step involves the Board of Trustees. "[T]he Board of Trustees, while bound by the Medical Board's determination of disability, is entitled to make its own determination regarding causation." (*Matter of Calzerano v Board of Trustees of N.Y. City Police Pension Fund Art. II*, 245 AD2d 84, 84 (1st Dept 1997). In the exercise of sound discretion, the Board of Trustees may accept the Medical Board's opinion regarding causation or reject it and make a contrary finding. (*Matter of Russo v Board of Trustees of N.Y. City Fire Dept., Art.1-B Pension Fund*, 143 AD2d 674, 676 [2d Dept 1988].)

Here, it is undisputed that the injury that petitioner suffered in 1997 was a line-of-duty injury. Thus, the issue presented is whether petitioner's disability in 2009 was a natural and proximate cause of his line-of-duty injury in 1997.

A service-related injury is the natural and proximate cause of the pension member's disability if the injury directly caused the disability. In addition, "[a]n accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury." (*Matter of Tobin v Steisel*, 64 NY2d 254, 257 [1985].)

> "A reviewing court may not set aside a denial of ADR due to a tie vote on the issue of whether the petitioner's disability is causally related to the service-related injuries unless it can be determined as a matter of law

> on the record that the disability was the natural and proximate result of a service-related accident. [A]s long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand.'"

(*Matter of Santangelo v Kelly*, 81 AD3d 439, 439-440 (1st Dept 2011)(internal quotation marks and citations omitted).

A.

Petitioner argues that the majority opinion of the Medical Board, that petitioner's line of duty injuries in 1997 were not the proximate cause of his disability, was not based on credible evidence, because the opinion of Dr. DePalma, a board certified neurosurgeon, "should be trusted above 2 nonspecialists." (Verified Petition, Ex W.) Petitioner indicates that DePalma's opinion was supported by the opinion of petitioner's own physician, Dr. Yong Kim, a spinal surgeon. Petitioner analogizes to his case to a scenario where a police officer claiming disability for psychological reasons is evaluated by a panel composed of a psychiatrist and two other "non-psychological" doctors, and to a scenario where a police officer claiming disability due to heart problems is evaluated by a panel composed of a "heart specialist" and two "non-heart" doctors. (Verified Petition, Ex W.)

The Medical Board's determination as to causation must be based on "some credible evidence." (*See Matter of Goldman v McGuire*, 64 NY2d 1041 [1985].)

"Credible evidence has been defined as 'evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered' and is 'evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion.'" (*Matter of Cusick v Kerik*, 305 AD2d 247, 248 [1st Dept 2003], citing *Matter of Meyer v Board of Trustees of the N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 [1997].) The articulated, rational, and fact-based reports of the Medical Board constitute credible evidence. (*Matter of Meyer*, 90 NY2d at 152.)

To the extent that petitioner argues that Dr. Bottner and Dr. Schreiber cannot be credible sources because they are not specialists in the type of condition involved, this argument fails. Petitioner acknowledges that "there is no requirement that the Medical Board . . . arrange for each case which comes before it to be reviewed by a panel which includes a physician who is a specialist in treating the type of condition involved." (*Matter of Barber v Ward*, 194 AD2d 459, 459 [1st Dept 1993]; *Matter of Meehan v Kelly*, 50 AD3d 523, 524 [1st Dept 2008].) Thus, to afford the opinion of a specialist on a Medical Board panel controlling weight over the opinions of the other physicians would indirectly interfere with that holding.

Petitioner argues that once a specialist is assigned to the Medical Board panel, then respondents must offer some explanation as to why the opinions of the two non-

specialists were adopted over the minority view of the specialist. However, in that scenario, a practical consequence of granting controlling weight to the opinion of a single specialist of a panel of three physicians would be that the Medical Board would be inclined to compose panels either entirely of specialists, or with no specialists at all.

In *Matter of Meyer* (90 NY2d 139, *supra*), the Court of Appeals rejected a bright line rule that would credit the opinion of an examining physicians on the issue of causation over the rationally based opinion of a nonexamining physician who, nevertheless, has had the opportunity to make a professional medical judgment based on other medical data concerning the applicant for retirement benefits. The Court of Appeals stated, "This Court has never articulated such a rule and we discern no logical basis for adopting one." (*Id.* at 145-146.) The Court reasoned,

> "Given the general acceptance of a nonexamining physician"s expert opinion as credible evidence [in a civil or criminal trial], there is no reason to discredit the medical opinion of a nonexamining physician in this administrative context, where the rules of evidence are more relaxed and the scope of judicial oversight more limited."

(*Id.*)

The Court is unpersuaded that a bright line rule giving controlling weight to the opinion of one physician over others should be adopted here. Petitioner does not contend that Dr. Bottner, Dr. Schreiber, or Dr. Sierros would not be permitted to

testify in a civil or criminal trial on the question of causation.

Dr. Bottner and Dr. Schreiber's opinion as to the lack of causation was not based on conjecture. The two doctors of the Medical Board observed "the paucity of treatment between 1999 and 2007, with treatment limited only to a brief period in 1999, with no treatment in the intervening year and a half after the line of duty injuries in 1997 and the lack of any treatment until 2007 thereafter." (*See Matter of Calzerano*, 245 AD2d 84, supra.)

Finally, "[i]t is well settled that the courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." (*Matter of Santoro v Board of Trustees of New York City Fire Dept. Article 1-B Pension Fund*, 217 AD2d 660, 660 [2d Dept 1995].) At best, petitioner can only demonstrate a difference of opinion between the Medical Board and petitioner's physicians, which "provides no occasion for judicial interference." (*Matter of Muffoletto v New York City Employees' Retirement Sys.*, 198 AD2d 7, 7 [1st Dept 1993].)

Petitioner's reliance on *Matter of Day v Board of Trustees of the New York City Fire Department* (74 AD2d 507 [2d Dept 1980]) is misplaced. In *Matter of Day*, the petitioner, a 28-year veteran of the New York City Fire Department, injured his knee in the line of duty on June 25, 1977. A divided panel of the medical board recommended against accidental disability retirement due to the knee injury, but

unanimously recommended ordinary disability retirement based on hypertension. The Appellate Division, Second Department reversed the lower court's decision denying petitioner's application for accidental disability retirement, and remanded the matter to the Medical Board for reconsideration. The Appellate Division stated,

> "While a mere conflict of opinion among physicians is not a ground for interfering with a medical board recommendation based upon credible evidence, the board of trustees does have a responsibility, where evidence is conflicting, to reach an independent finding in a manner supported by a record adequate for purposes of judicial review."

(*Id.* at 507.) However, *Matter of Day* is inapposite because the matter was remanded for the Medical Board to consider the medical report of Dr. Eisenstein, an orthopedic surgeon whom petitioner had chosen. The Appellate Division stated,

> "It is the medical board's failure to have mentioned the Eisenstein report of examination, rendered 20 days after the Magliato report and only one week before the board's meeting, which indicates the possibility that the medical board never considered what can only be described as evidence crucial to petitioner's case. In this respect the medical board's report to the board of trustees was unnecessarily one-sided and conclusory."

(*Id.*)

Matter of Kiess v Kelly (75 AD3d 416 [1st Dept 2010]) is also distinguishable. There, the petitioner submitted the report of a spinal surgeon stating that petitioner was unable to return to work due to severe pain and had limited options for improvement through surgery, and the report of a board certified neurologist who

performed an EMG demonstrating radiculopathy, and who opined that petitioner was totally disabled from his injuries. By contrast, the Medical Board concluded that there "are no significant objective findings" preventing petitioner from performing the full duties of a police officer. In remanding the matter to the Medical Board, the Appellate Division, First Department stated, "Nowhere in its second report is the new evidence that the Medical Board was directed to consider expressly mentioned." (*Id.*) Here, petitioner is not claiming that the Medical Board had not considered all the medical evidence that petitioner wished to present to the Medical Board. The Medical Board has not ignored evidence; rather, two of the doctors have drawn differing conclusions as to causation than their colleague, conclusions which have factual support in the record.

B.

As petitioner points out, the Board of Trustees was entitled to make its own determination regarding causation. (*Matter of Calzerano*, 245 AD2d 84, *supra.*) However, its decision to adopt the majority opinion of the Medical Board as to the lack of causation was not arbitrary and capricious. (*See id.* at 451 ["The evidence of lack of medical treatment, immediate return to full duty, and the substantial lapse of time between the injuries and the onset of the ultimate disability constitute substantial

evidence of lack of causal connection"]; *see also Matter of Doyle v Kelly*, 8 AD3d 125 [1st Dept 2004] ["Some credible evidence of lack of causation . . . are the conservative treatment that petitioner received after the earlier accident and his return to full duty for some 14 years"]; *Matter of Duggan v Ward*, 160 AD2d 532, 533 [1st Dept 1990] ["The minimal amount of time petitioner was absent from duty following these injuries, as well as the substantial lapse of time between the injuries and the onset of the ultimate disability, constitute substantial evidence of a lack of causal connection"].)

III.

Accordingly, it is hereby

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

Dated: July 17, 2012
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

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).