

**DeJesus v Kelly**

2012 NY Slip Op 32609(U)

October 12, 2012

Sup Ct, New York County

Docket Number: 102346/2012

Judge: Carol E. Huff

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

PRESENT: CAROL E. HUFF  
Justice

PART 32

Index Number : 102346/2012  
DE JESUS, MARGARET M.  
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 _____	<input type="checkbox"/> No(s). _____
Answering Affidavits — Exhibits _____	<input type="checkbox"/> No(s). _____
Replying Affidavits _____	<input type="checkbox"/> No(s). _____

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

is decided in accordance  
with accompanying memorandum 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).

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

Dated: OCT 12 2012

  
\_\_\_\_\_, J.S.C.  
**CAROL E. HUFF**

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 32

-----X

MARGARET M. DeJESUS, : Index No. 102346/12  
 :  
 Petitioner, :  
 :  
 - against - :  
 :

RAYMOND KELLY, as POLICE COMMISSIONER, :  
NEW YORK CITY POLICE DEPARTMENT, and as :  
CHAIRMAN OF THE BOARD OF TRUSTEES, :  
POLICE PENSION FUND, ARTICLE II, and the :  
BOARD OF TRUSTEES, POLICE PENSION FUND, :  
ARTICLE II, :

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141B).

Respondents, :

Proceeding Pursuant to Article 78 of the Civil Practice Law :  
and Rules.

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner, a former New York City Police Officer, seeks to annul the determination of respondent Board of Trustees, Police Pension Fund Article II (the "Board"), dated October 5, 2010, which denied her applications for retirement disability.

Petitioner became a police officer on June 30, 1995. On May 16, 2008, she filed an application for Ordinary Disability Retirement (ODR) because of pain in her neck and migraine headaches. On the same date she filed for Accident Disability Retirement (ADR) because of pain in her back allegedly resulting from a line-of-duty injury. On September 12, 2008, the Police Commissioner also filed an application on behalf of petitioner for ODR, based on neck pain and migraine headaches.

In connection with all three applications, petitioner was examined by the Medical Board on October 8, 2008, and in its reports of that date it recommended disapproval of the applications on the ground that insufficient evidence existed of a medical condition that precluded petitioner from performing her duties. The Board reviewed the findings and, on December 23, 2008, remanded the applications to the Medical Board for reconsideration in light of new evidence. The Medical Board reexamined petitioner on February 25, 2009, again recommended disapproval, and again the Board, on December 17, 2009, remanded the matter in light of additional new evidence. The Medical Board examined petitioner for the last time on June 30, 2010, and again recommended disapproval of her applications for the same reason. The Board adopted the Medical Board's recommendations at its August 11, 2010 meeting. During this process the Medical Board conducted its own examinations of petitioner three times and reviewed more than thirty outside medical reports.

In an Article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious. . . . Ordinarily a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the "substantial" threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require "some credible evidence."

Borenstein v New York City Empl. Retirement Sys., 88 NY2d 756, 760 (1996) (citations omitted).

In addition to the Medical Board's own stated findings, at least several of the outside medical reports contain "some credible evidence" that petitioner was not so disabled as to be unable to perform her duties. The reports indicate various normal findings along the lines of the Medical Board's conclusions. See, e.g., Report of Dr. Syed Rahman dated 2/12/2008; Report of

Dr. Joshua S. Fink dated 11/10/2008; Report of Dr. Robert Small dated 12/3/08. Moreover, the Medical Board's findings were more than conclusory. For example:

[Petitioner] walked with a slow non-antalgic gait. She was able to heel and toe walk. She declined to do a deep knee bend. Deep tendon reflexes were 1-2+ and symmetrical. There was no clonus. Manual motor testing with the exception of the right hand grip, which was 4+/5, was 5 throughout the upper and lower extremities bilaterally. There was no evidence of atrophy or fasciculations. In range of motion, she was able to forward flex in the cervical area. She had difficulty extending lateral motions in normal limits. In the lower lumbar area, she forward flexed to 60 degrees. . . .

Medical Board Recommendation, June 30, 2010, ¶ 16.

With respect to the different conclusions reached by petitioner's medical providers, the Court notes that 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." Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1<sup>st</sup> Dept 2007), *aff'd* 11 NY3d 859 (2008).

The Court also notes the following. On August 1, 2008, while her disability retirement applications were pending, petitioner took a vested separation from the Police Department (that is, she could collect her vested pension beginning when she would have been eligible for regular service retirement, in this case in 2015). On March 4, 2009, she applied for reinstatement to the Department. On the Police Candidate Questionnaire, in answer to the question, "Do you consider yourself to be in good health?" petitioner checked "yes." Her application for reinstatement was denied for reasons not related to the ongoing disability applications.

Petitioner also contests the determination on the grounds that the Board was improperly constituted and did not vote in accordance with required procedures. Respondents have, however, produced copies of proxies used by the presiding officer on behalf of other Board members. In any event, "If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant's claim." Borenstein, supra, at 760. The Board could not have reached a different determination however constituted or following any other procedure.

Finally petitioner argues that the denial of her disability claims violates the New York State Constitution, Article V, Section 7, which states that "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." However, petitioner has failed to demonstrate that she is entitled to a disability pension subject to the protection of the Constitution.

The determination of the Board approving the recommendation of the Medical Board denying petitioner disability retirement benefits is supported by some credible evidence, and petitioner's other arguments are unavailing. Accordingly, it is

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

Dated: **OCT 12 2012**

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**CAROL E. HUFF**  
J.S.C.