

Matter of Barry-Pepe v Kelly
2012 NY Slip Op 32863(U)
October 24, 2012
Sup Ct, New York County
Docket Number: 106744/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.

PART 46

Index Number : 106744/2011

BARRY-PEPE, EILEEN

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for annul respondents'
petition determination

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1

2

3

Cross-Motion: ☐ Yes ☒ No

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

The court denies the petition and dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 7803(3) and (4), 7806.

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: 10/24/12

Lucy Billings

LUCY BILLINGS

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 46

-----X

In the Matter of the Application of
EILEEN BARRY-PEPE,

Index No. 106744/2011

Petitioner,

For a Judgment Under C.P.L.R.
Article 78

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 New York City Police
Pension Fund, the CITY OF NEW YORK
POLICE DEPARTMENT, and the CITY OF NEW
YORK,

Respondents

-----X

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner, a former New York City Police Sergeant,
sustained several injuries to her right knee from March 1, 1993,
to March 8, 2007, while on duty. Petitioner retired May 17,
2008, but applied for accident disability retirement (ADR) May
12, 2008, based on her last right knee injury March 8, 2007.
Respondent Kelly also applied for petitioner's ordinary
disability retirement.

Respondents' medical board initially reviewed petitioner's
application December 5, 2008, and after remands from respondents'
Pension Fund, reviewed it four more times. For each review, the
medical board considered treatment reports and notes from

petitioner's treating and examining physicians, but concluded that no objective medical findings demonstrated that petitioner could not fully perform her duties. Ultimately, the medical board unanimously recommended disapproval of both petitioner's application for ADR and respondent Kelly's application for ordinary disability retirement.

In this proceeding pursuant to C.P.L.R. Article 78, petitioner seeks to annul respondents' determination February 11, 2011, denying her ADR and ordinary disability retirement as arbitrary and to require respondents to grant her ADR or, alternatively, review her application again or grant her a hearing with an opportunity to present testimony. C.P.L.R. § 7803(3); N.Y.C. Admin. Code §§ 13-251, 13-252. Petitioner also seeks respondents' production of specified documents, but nowhere indicates the grounds for this request.

II. APPLICABLE STANDARDS

In reviewing respondents' determination regarding disability, the court must defer to the medical board's determinations of causation and uphold a determination if rationally based and not arbitrary, an abuse of discretion, or contrary to law. Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d 756, 760 (1996); Claudio v. Kelly, 84 A.D.3d 667 (1st Dep't 2011); Jefferson v. Kelly, 51 A.D.3d 536 (1st Dep't 2008). See Linden Airport Mgt. Corp. v. New York City Economic Dev. Corp., 71 A.D.3d 501, 502 (1st Dep't 2010); Valentin v. New York City Police Pension Fund, 16 A.D.3d 145 (1st

Dep't 2005); City of New York v. O'Connor, 9 A.D.3d 328 (1st Dep't 2004). Physical or mental incapacity to perform city service qualifies a police officer for ordinary disability retirement. N.Y.C. Admin. Code § 13-251. If that incapacity is "a natural and proximate result of an accidental injury received in such city-service," the police officer is eligible for ADR. N.Y.C. Admin. Code § 13-252.

The medical board's medical examination must establish disability. N.Y.C. Admin. Code §§ 13-251 This determination by the medical board must be supported by substantial evidence, which must be credible, relevant evidence reasonably adequate to support a fact or conclusion. Seiferheld v. Kelly, 70 A.D.3d 460, 462 (1st Dep't 2010), aff'd, 16 N.Y.3d 561 (2011); Jennings v. New York State Off. of Mental Health, 90 N.Y.2d 227, 239 (1997); Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 760. See McCabe v. Hevesi, 38 A.D.3d 1035, 1036 (3d Dep't 2007). Credible evidence is evidence from a reliable source, which must reasonably tend to support the fact or conclusion for which the evidence is offered, without being either conjecture or simply a conclusion itself. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d 139, 147 (1997); Cusick v. Kerik, 305 A.D.2d 247, 248 (1st Dep't 2003).

III. PETITIONER'S CLAIM OF DISABILITY

The parties do not dispute that petitioner sustained injuries to her right knee in five separate incidents from March

1, 1993, to March 8, 2007, while on duty. The parties do dispute whether those injuries prevented her from performing her duties as a police officer.

A. The Basis for Petitioner's Challenge to Respondents' Denial

The evidence petitioner relies on to demonstrate her disability does not establish injuries that prevent her from performing her duties as a police officer. Stephen Rokito M.D. first treated petitioner March 19, 2007, with an initial examination revealing mild tenderness, a small joint effusion, and crepitus in her right knee. Dr. Rokito diagnosed anterior cruciate ligament deficiency, meniscus tears, and possible patellar chondromalacia. Dr. Rokito noted that follow-up examinations through May 21, 2007, revealed essentially the same symptoms and yielded a conclusion that petitioner was disabled from full work, but on May 21, 2007, he indicated that she could perform light duty work. An examination March 24, 2008, revealed the same range of motion in her right knee as previous examinations, joint stability, and normal strength. Dr. Rokito recommended that petitioner receive physical therapy and avoid activities requiring deep knee flexion.

Benzion Benatar M.D. treated petitioner from March 1, 2007, to August 5, 2010, and found crepitus in the patellofemoral joint of her right knee and pain when kneeling. Magnetic resonance imaging (MRI) showed chondromalacia in petitioner's right knee. These conditions prevailed throughout Dr. Benatar's treatment of petitioner, but she later developed a patellar fissure and joint

tenderness in her right knee. On December 9, 2009, Dr. Benatar indicated that petitioner's injuries caused her symptoms, but did not specify whether he found those symptoms in his examination or merely reported petitioner's complaints. Dr. Benatar prescribed physical therapy, which alleviated her symptoms, and pain medication. His more recent examinations revealed more disabling symptoms in her lumbar spine, but he did not draw any conclusion between those symptoms and her knee. Finally, on June 28, 2010, Anne Kelly M.D. found reduced range of motion in petitioner's right knee with pain and tenderness and diagnosed patellar chondral defect of the lateral facet and traumatic fissures of the medial facet.

Petitioner also submits letters from medical professionals substantiating examinations or treatment after her retirement, but lacking details about symptoms and any limitations on functioning or otherwise failing to demonstrate that her knee condition caused disability. On July 9, 2010, orthopedic surgeon Douglas Padgett M.D. reported that he examined petitioner and found a stiff, painful knee gait and knee pain and crepitus when she used stairs, but a full range of motion and no pain with passive motion. Stephen O'Brien M.D., another orthopedic surgeon, examined petitioner August 23, 2010, and found her 100% disabled, but without attributing her disability to her right knee. Dr. O'Brien's examination of petitioner's right knee revealed patellar tenderness with pain, but full range of motion and no ligamentous instability.

Further evidence suggests medical conditions other than petitioner's right knee that contribute to an overall disability. On December 1, 2009, Gina Caso M.D. reported that petitioner was under Dr. Caso's care for medical conditions, but without further specification beyond excluding her hip, which respondents specifically found to be a cause of petitioner's pain. On January 26, 2010, Janine Kelly D.C. reported that she examined petitioner's lumbar spine and prescribed a lumbar spine MRI. On February 9, 2010, and June 15, 2010, Stephen Geiger M.D. examined petitioner's lumbar spine due to her complaints of lower back pain.

Although MRIs of petitioner's right knee confirmed chondromalacia, patellar tears, fissures, and joint effusion, the findings were otherwise normal. The totality of petitioner's medical reports thus substantiates abnormal conditions in her right knee, but does not support her claimed restrictions on her ability to perform work as a police officer. Finkelstein v. Kelly, 41 A.D.3d 122, 123 (1st Dep't 2007); Dittrich v. Board of Trustees, Police Pension Fund, Art. II, 37 A.D.3d 342 (1st Dep't 2007); Schwartz v. Kelly, 36 A.D.3d 563, 564 (1st Dep't 2007); Dezendorf v. Bratton, 245 A.D.3d 113, 114 (1st Dep't 1997).

B. The Basis for Respondents' Denial of ADR

Respondents denied petitioner's application for disability retirement on the ground that there were no objective findings that precluded her from performing full duty, despite mild atrophy and chondromalacia in her right knee. Respondents noted

that petitioner experienced these conditions before her last line of duty injury March 8, 2007. Respondents found a full range of motion in her right knee, allowing her to squat fully without pain.

The medical diagnostic studies of petitioner's right knee and her treating physicians' medical examination records, undeniably credible evidence, support the medical board's determination that petitioner's condition was not disabling. Hughes v. Kelly, 93 A.D.3d 604 (1st Dep't 2012); Khurana v. Kelly, 73 A.D.3d 497 (1st Dep't 2010); Itjen v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 41 A.D.3d 284, 285 (1st Dep't 2007); Finkelstein v. Kelly, 41 A.D.3d at 123. Respondents also based their denial of petitioner's disability retirement on the further credible evidence from the medical board's examination of petitioner. Keiss v. Kelly, 75 A.D.3d 416, 417 (1st Dep't 2010); Khurana v. Kelly, 73 A.D.3d 497; Goffred v. Kelly, 13 A.D.3d 72 (1st Dep't 2004). Upon considering all this relevant evidence, the medical board stated the reasons for its recommendation. Hughes v. Kelly, 93 A.D.3d at 605; Keiss v. Kelly, 75 A.D.3d at 417. Subsequently, upon remand from the Pension Fund, the medical board reviewed petitioner's application several times and reviewed all the new evidence petitioner presented each time. Khurana v. Kelly, 73 A.D.3d 497; Goffred v. Kelly, 13 A.D.3d 72. Therefore the medical board's determination was rationally based, Hughes v. Kelly, 93 A.D.3d 604; Creegan v. Board of Trustees of N.Y. City

Police Pension Fund Art. II, 7 A.D.3d 335 (1st Dep't 2004), and not arbitrary. Rodriguez v. Kelly, 8 A.D.3d 70 (1st Dep't 2004).

IV. CONCLUSION

On this record, petitioner has failed to establish that respondents' denial February 11, 2011, of ADR and ordinary disability retirement to her violated lawful procedure, was affected by any other error of law, was arbitrary, lacked a rational basis, or was unsupported by the evidence presented. C.P.L.R. § 7803(3) and (4). Therefore the court denies the petition and dismisses this proceeding. C.P.L.R. § 7806.

Since petitioner has not explained her reason or purpose in requesting that respondents produce documents, the court denies this request as unsupported. If her request is not academic in light of this disposition, because she needs those documents in the further administrative proceedings, she may present her request to respondents in conjunction with any such proceedings. This decision constitutes the court's order and judgment denying the petition and dismissing this proceeding.

DATED: October 24, 2012



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.