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| Matter of West v Kelly |
| 2013 NY Slip Op 30724(U) |
| March 22, 2013 |
| Supreme Court, New York County |
| Docket Number: 0113167/10 |
| Judge: Paul Wooten |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
COLLEEN WEST,**

Petitioner,

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

INDEX NO. 113167/10

MOTION SEQ. NO. 001

-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 and THE NEW
YORK CITY POLICE DEPARTMENT,
Respondents.**

FILED

APR 10 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

The following papers numbered 1 to 5 were read on this motion by petitioner for a judgment pursuant to Article 78.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo)
Replying Affidavits (Reply Memo)

| <u>PAPERS NUMBERED</u> | |
|---|----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1, 2, 3</u> |
| Answering Affidavits — Exhibits (Memo) | <u>4, 5</u> |
| Replying Affidavits (Reply Memo) | |

Cross-Motion: Yes No

Colleen West (petitioner) a retired New York City police officer, brings this Article 78 proceeding to annul the determination of the respondents which denied her application for an accident disability retirement pension (ADR) on the ground that there was insufficient medical evidence to substantiate her claim of disability. Petitioner argues that this determination was arbitrary and capricious and contrary to established law.

BACKGROUND

Petitioner was appointed to the New York City Police Department (NYPD) on July 12,

1988. On August 13, 2006, petitioner sustained injuries to her left arm, back and neck while performing a vehicle stop. The perpetrator attempted to flee the scene and struck the petitioner with his vehicle. The petitioner was treated at the New York Hospital Queens Emergency Room. As a result of this accident, petitioner was on sick report from August 14, 2006 through September 1, 2006; September 7, 2006 through October 13, 2006; November 13, 2006 through November 26, 2006 and December 17, 2007 through January 8, 2008. The NYPD paid for all of the petitioner's medical treatment, including treating physician examinations, diagnostic testing and physical therapy until she retired from active service on July 18, 2008.

On August 21, 2006, petitioner came under the care of Dr. Stephen H. Marcus, a board-certified orthopedic surgeon. Dr. Marcus initially diagnosed petitioner with a cervical and lumbosacral sprain and prescribed physical therapy and medication. Dr. Marcus continued to treat petitioner from 2006 through 2008. In his July 11, 2008 report, Dr. Marcus opined that petitioner could no longer perform her duties as a police officer.

On August 30, 2006, petitioner underwent an MRI of her lumbar spine. Linda Harkavy, M.D., a board-certified radiologist, reported a small left parasagittal disc herniation, mild disc bulging, and a small radial tear in the right lateral disc margin. On September 15, 2006, an MRI of the cervical spine was performed. Dr. Harkavy reported small disc herniations and slight anterior listhesis. On October 27, 2006, petitioner was examined by Dr. William B. Head Jr., M.D., a board-certified neurologist. Dr. Head diagnosed petitioner to be suffering with a cervical strain, a lumbosacral strain, cervical radiculopathy and lumbar radiculopathy. Dr. Head stated that petitioner's August 13, 2006 accident caused the aforementioned conditions.

On January 3, 2007, petitioner was placed on restricted duty by her NYPD District Surgeon, Norman Lanes, M.D. In the restricted duty form, Dr. Lanes diagnosed petitioner with neck and back injuries with a positive MRI.

On April 3, 2007, petitioner submitted an application for ADR in which she alleged that

as a result of the line of duty injury, she suffered from severe neck pain, back pain, numbness down her left arm, numbness down her left thigh and physical limitations. Petitioner claimed that she could no longer perform the full duty requirements of an NYPD officer. In response to petitioner's application, the Police Commissioner filed an application for Ordinary Disability Retirement ("ODR") on her behalf. On April 12, 2007, Dr. Head examined petitioner and reported that she suffered from multiple disc herniations at L5-S1, C4-5, C5-6 and C6-7, with bulges at L3-4 and L4-5, left cervical and left lumbosacral radiculopathy, as well as chronic muscle tension headaches. Dr. Head concluded that petitioner was permanently and totally disabled as a result of the aforementioned injuries, and recommended that she be retired from her position as a result of the injuries she suffered on August 13, 2006.

On May 29, 2007, the Police Pension Fund Medical Board (Medical Board) interviewed and examined petitioner. The Medical Board disapproved her application by stating that there were no significant findings precluding petitioner from performing the full duties of a New York City Police Officer. In a report dated October 22, 2007, Dr. Marcus took exception to that finding and asserted that the petitioner could not perform the strenuous activities of a full duty police officer. He observed that she had made an attempt to return to light duty and was unable to partake of activities more strenuous than that. Dr. Marcus opined that, in his medical judgment, "Police Officer West is unable to partake of the strenuous duties that full police activities require. It would be both unsafe for her and for the safety of others for her to do so" (Amended Verified Petition, exhibit J). Dr. Marcus added that petitioner had not made any significant improvements and he anticipated that she would continue to have symptoms in the future. On January 14, 2008, the petitioner was re-examined by Dr. Head who diagnosed her with cervical and lumbar herniations, cervical and lumbar strain, and cervical and lumbar radiculopathy based on his examination and objective medical tests. On January 22, 2008, the Medical Board reviewed petitioner's case and disapproved her application by stating that they

found "no objective orthopedic or neurological findings to demonstrate disability from either cervical or lumbar radiculopathy as seen on the officer's radiographs of the cervical and lumbar spine." Again Dr. Marcus disagreed, reporting on July 11, 2008 that the patient will be unable to perform the full duties as a police officer.

On July 18, 2008, petitioner retired from service after twenty years. The petitioner claims that she knew that the NYPD District Surgeon would not return her to full duty because of her neck and back impairments. After her August 13, 2006 LOD accident, petitioner was on sick report, limited capacity or restricted duty until February 8, 2008, the last day she reported to work. Just prior to her retirement, the petitioner submitted a new ADR application and the Police Commissioner again submitted an application for ODR. On November 4, 2008, the petitioner was examined by the Medical Board based on her new ADR application and was again disapproved for both ADR and ODR. On June 10, 2009, Dr. Marcus reported the following:

"The patient's symptoms have persisted from the onset of the accident until the most recent examination, which took place on June 3, 2009. The physical examination on that particular date revealed similar findings as those noted on multiple previous visits and they included positive compression test with pain in the neck. The patient demonstrated decreased range of motion of the lumbar spine with positive straight leg raising on the left. Decreased range of motion of the lumbar spine was noted. There was sciatic tenderness on the left side with normal motor and sensory examination. Because of the above-noted findings, this patient is certainly unable to perform such tasks as running after suspects, climbing multiple stairs, carrying injured adults, restraining suspects using handcuffs, engaging in hand-to-hand struggle, and carrying the extra weight that a police officer frequently needs to carry with bulletproof vests, etc. With regards to the Job Standard Test, this patient will not be able to partake of the Barrier Surmount, the Physical Restraint or the Victim Rescue. It is my considered medical opinion that Colleen West is not fit for duty as a police officer in the New York Police Department and that this will continue on a permanent basis" (Amended Verified Petition, exhibit L).

Dr. Marcus also completed a questionnaire for the Social Security Administration in

which he opined that the petitioner was incapable of even "low physical stress" jobs and that her pain was severe enough to interfere with her attention and concentration. An Administrative Law Judge (ALJ) from the Social Security Administration found that the petitioner's severe impairments consisted of "cervical disc disease with herniation and cord encroachment, lumbosacral spine disc disease with herniation and chronic headaches" and prevented her from performing police work or sedentary work on a sustained basis since she stopped working on February 8, 2008 (Amended Verified Petition, exhibit Q). The ALJ noted that these impairments were related to her August 13, 2006 injuries. On September 1, 2009 and again on March 9, 2010, the Medical Board once again found that the petitioner's documentary evidence and physical examination did not demonstrate that she was disabled from performing the full duties of a police officer. Petitioner claims that the Medical Board noted the contradictory reports submitted by petitioner's treating doctors, but failed to explain why they disagreed with the findings of those reports. By letter dated June 14, 2010, petitioner was notified by the Police Pension Fund Board of Trustees (Board of Trustees) that they reviewed and denied her application for ADR during its meeting on June 9, 2010. Moreover, the Board of Trustees noted that petitioner could commence an Article 78 proceeding within four months of receiving the letter should she contest the Board of Trustees' denial. Subsequently, this timely Article 78 proceeding was commenced.

DISCUSSION

Section 13-252 of the Administrative Code of the City of New York governs accident disability retirement for members of the NYPD pension fund. It provides that upon application by a member or by the Commissioner, the Medical Board shall certify to the Board of Trustees that the member is entitled to ADR if a medical examination and investigation by the Medical Board show that the 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.” The applicant has the burden of proving such incapacity and its causation to the Medical Board (see *Matter of Evans v City of New York*, 145 AD2d 361 [1st Dept 1988]; *Matter of Archul Bd. of Trustees of the New York City Fire Dept, Art. 1-B Pension Fund*, 93 AD2d 716 [1st Dept 1983]). It is well settled that the question of whether an applicant has the injury claimed and whether that injury incapacitates him from the performance of his duties is a decision solely for the Medical Board, and its determination on these issues is binding on the Board of Trustees (see *Matter of Borenstein v New York City Employees’ Ret. Sys.*, 88 NY2d 756, 760-61 [1996]; *Matter of Canfora v Bd. of Trustees of the Police Pension Fund of the Police Dept of the City of New York*, 60 NY2d 347, 351 [1983]). In an Article 78 proceeding challenging a disability determination, the Medical Board’s finding should be sustained unless it lacks a rational basis, or is arbitrary and capricious (*id.* at 351). The standard of review that has been consistently applied is that a determination by the Medical Board that the applicant is not disabled should not be disturbed if it is based on “some credible evidence” (see *Matter of Borenstein v New York City Employees’ Ret. Sys.*, 88 NY2d at 760-61). The Court of Appeals has construed the meaning of this phrase to be “evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered” and that it must be “evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion” (*Matter of Meyer v Bd. of Trustees of the New York City Fire Department*, 90 NY2d 139, 146 [1997]).

Here, the petitioner argues that the Medical Board’s denials are deficient as a matter of law because they do not adequately discuss, analyze or refute the findings of the petitioner’s treating physicians, specifically, the findings concerning petitioner’s severe pain and limitations of motion to her neck and back, the instability of her spine, and how this instability renders her unfit to return to full time duty. Petitioner also claims that the Medical Board ignored evidence that indicated that her NYPD district surgeon had determined that she was unable to return to

full time duty since her August 13, 2006 accident. Finally, although the petitioner concedes that it is not binding on the Medical Board, she argues that the findings of the Social Security Administration that she is permanently disabled from police work or sedentary work should have been considered by the Board.

Having reviewed the record and the documents submitted to the Medical Board, the Court agrees that the Medical Board did not adequately address all of the numerous medical reports and/or diagnostic tests submitted by the petitioner in support of her application. Thus, although the Medical Board found that the petitioner's physicians concluded she was disabled based solely on subjective symptoms, it ignored the numerous objective findings contained in the reports by Dr. Head and Dr. Marcus. The MRIs, EMGs, treating doctor reports and physical therapy reports all confirmed that the petitioner suffers from pain and limitation of motion to her neck and back. Subsequent to her accident, until the time she retired for service, the petitioner was not placed on active duty and her district surgeon authorized and paid for all medical treatment, including treating physician examinations, diagnostic testing and physical therapy sessions. The Medical Board noted all of this evidence in its reports but failed to state why it disagreed with those findings. The Medical Board did not even attempt to rebut the treating physicians' assertions that the petitioner's physical limitations prevented her from returning to work full time because her inability to perform her full duties would be unsafe for her and for the public. Petitioner's treating orthopedist, Dr. Marcus, addressed her inability to perform her full duties as a police officer in multiple reports that were submitted to the Medical Board. The reports detailed Dr. Marcus' findings on physical examinations and the correlation of his findings with objective test results. A review of the Medical Board minutes indicates they did not give adequate consideration to Dr. Marcus' findings nor did they explain why they felt the petitioner could return to full service despite her seemingly clear physical limitations. The Medical Board also ignored the findings of the Social Security Administration that determined

that the petitioner was totally disabled. While these findings are not binding on the Medical Board, the failure to even consider or address them is arbitrary and capricious.

Despite the consistent findings concerning petitioner's neck and back limitations and the objective testing noted above, as well as the determination by the District Surgeon that the petitioner could not return to full time duty, the Medical Board's denial of ADR was conclusory and did not include any meaningful evaluation of the evidence presented or an adequate explanation for its denial of petitioner's application for ADR. The Medical Board also failed to specify whether it disagreed with petitioner's health care providers as to the medical conditions that the petitioner suffered from or if the Medical Board had simply concluded that the petitioner's medical conditions were not disabling. Under the circumstances, the Court is persuaded that this matter should be remanded to the Medical Board and the Board of Trustees for reconsideration since their conclusion lacks credible evidence (*see Matter of Rodriguez v Bd. of Trustees of the New York City Fire Department*, 3 AD3d 501 [2d Dept 2004]).

Accordingly, the petition is granted to the extent that the determination denying the petitioner's application for accident disability retirement is hereby annulled and the matter remanded to the Medical Board and the Board of Trustees for reconsideration and further proceedings not inconsistent with this decision.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

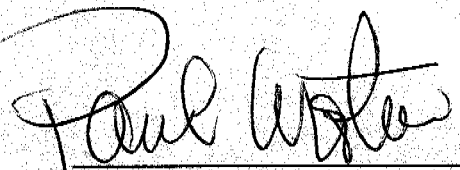
ORDERED that petitioner's Article 78 petition is granted to the extent that the determination denying the petitioner's application for accident disability retirement is hereby annulled and the matter remanded to the Medical Board and the Board of Trustees for reconsideration and further proceedings not inconsistent with this decision; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that the petitioner shall serve a copy of this Order, with Notice of Entry, upon respondents.

This constitutes the Decision and Order of the Court.

Dated: 3-22-13

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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