

Matter of Heinichen v Kelly

2013 NY Slip Op 30924(U)

April 26, 2013

Supreme Court, New York County

Docket Number: 102737/2012

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: York Justice

PART 2

Index Number : 102737/2012
HEINICHEN, RAYMOND
vs.
KELLY, RAYMOND W.
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

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 IS DENIED WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/26/13

Levy, J.S.C.

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

-----X

In the Matter of the Application of
RAYMOND HEINICHEN,

Petitioner,

Index No. 102737/2012

-against-

Raymond W. Kelly, as 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 CITY OF NEW YORK,

Respondents,

For a Judgment pursuant to Article 78, CPLR, to review
and annul the determination made by respondents
denying petitioner a pension of three quarters of petitioner's
salary as required by Administrative Code § 13-252,
and for a further order directing payment of such pension
retroactive to the date of petitioner's retirement, and for such
other appropriate relief.

-----X

YORK, J.:

Before the court is an application of petitioner Raymond Heinichen ("Petitioner"): (1)
for a judgment pursuant to Article 78, CPLR (a) reviewing and annulling the action of the
respondents, denying petitioner a line of duty accident disability retirement allowance pursuant
to the Administrative Code § 13-252 and declaring that action to be arbitrary, capricious,
unreasonable and unlawful; (b) directing and ordering the respondents to retire petitioner with a
line of duty accident disability retirement allowance, retroactive to the date of petitioner's

retirement plus interest ; or in the alternative; (c) directing a hearing on the factual and/or medical issues raised, or (d) directing that the Board of Trustees allow petitioner and/or his representatives to present such testimony as is necessary at a hearing held before the Board in order to prove his entitlement to an accident disability retirement; (2) and for an Order, pursuant to §7804(e) and § 2307(a) of the CPLR, directing the respondents to serve and file: (a) all reports, recommendations, certificates and all other documents submitted to the Board in connection with the retirement of petitioner and (b) copies of any and all records, reports or notes relating to petitioner on file with the Police Department Article II Pension Fund and/or Police Department. Respondents seek dismissal of the petition on the grounds that petitioner failed to meet his burden to show his injuries were caused by an accident, and therefore respondents acted reasonably, lawfully, and properly in denying petitioner accident disability retirement.

BACKGROUND

Petitioner was a police officer from January 28, 1988 until his retirement from service. On September 19, 2006 he suffered a disabling injury to his right thumb and hand attempting to close a stuck drawer by applying an extra amount of force. The drawer abruptly closed and the petitioner's thumb forcibly struck the drawer's face causing a fracture of the right thumb. Petitioner underwent multiple surgeries and treatments by a neurologist and rheumatologist.

The NYPD Commissioner applied for petitioner's ordinary disability retirement ("ODR"). On August 11, 2009 the Medical Board for the Police Pension Fund Article II ("Medical Board") disapproved both the petitioner's application for accident disability retirement ("ADR") and the Police Commissioner's application for ODR. The Board of Trustees of Police Pension Fund Article II ("Board of Trustees") remanded the matter back to the Medical Board to

consider new medical evidence. On December 6, 2011, the petitioner was examined by the Medical Board which unanimously approved his application for ADR and rejected the Police Commissioner's application for ODR. The final diagnosis was "internal derangement of right wrist and radiculopathy [of] right arm." The Medical Board established that the cause of disability was the petitioner's line of duty injury of September 19, 2006. On February 8, 2012, at Executive Session, the Board of Trustees discussed the petitioner's application, and tabled the matter. On March 14, 2012 it returned to the petitioner's case, and postponed the decision until April 11, 2012. The Board of Trustees reached a tie vote and, accordingly, denied the petitioner's application for ADR. Upon petitioner's request to withdraw the Commissioner's application for ODR, he was granted a regular service pension effective May 31, 2012. On May 15, 2012, petitioner commenced this proceeding.

DISCUSSION

According to the New York City Administrative Code §13-252, an applicant for ADR must demonstrate to the Medical Board that he or she is a member of the police force, is physically or mentally incapacitated for the performance of 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 his or her willful negligence. The Medical Board determines whether a member of police force suffers a disability and makes a recommendation as to the accidental or incidental causation of the disability. The recommendation is forwarded to the Board of Trustees for an ultimate determination. The Board of Trustees must accept the opinion and conclusions of the Medical Board with respect to member's disability, but may review evidence to determine the cause of the disability and whether such disability arose out of the performance of duty.

In a February 8, 2012 meeting of the Board of Trustees a member of the Board, Raymond Sarola, suggested that the incident of September 19, 2006 does not qualify as an accident since it was not an unforeseeable, unexpected mischance. In addition, he expressed the opinion that officer Heinichen's injury resulted from his own willful negligence – another ground to deny ADR under Administrative Code §13-252 (Petition, Exh.L). In a subsequent hearing on March 14, 2012, Mr. Sarola did not return to the issue of willful negligence, and this ground is not mentioned in respondents' memorandum of law. The only issue in dispute is whether what happened on September 19, 2006 can be described as an accident. Petitioner's account of events was not questioned, also corroborated by the written witness statement of a fellow police officer. Participants in the Board of Trustees meeting had a lively discussion, based on their own experience, on how unusual it is to have a desk drawer stuck and what is to be done in this situation. Mr. Sarola insisted that an injury was the result of a foreseeable and indeed expected event – petitioner's application of a considerable amount of force to slam shut a drawer. (Petitioner, Exh. M., P.72). Christopher McGrath, representative of Patrolmen's Benevolent Association, disagreed. He explained that the stuck drawer was an unexpected precipitating event, while Heinichen's application of force was reasonable (*id.*, P.75). Mr. Sarola retorted that if Heinichen just looked at the stuck drawer and did not try to force it, he would not have injured himself (*id.*, P.77). Mr. McGrath volunteered: "I think this is something that's a common experience we all had experienced with a stuck drawer. It is only natural, we try to force it a little bit before we take the trouble of looking to see what the problem is. I know I have done that myself." (*id.*). The members of the Board of Trustees were equally divided on the matter, and as a result the ADR was denied.

The Board of Trustees made a determination that the incident does not qualify as an accident under the Administrative Code. “The denial of accidental disability benefits in consequence of the tie vote can be set aside on judicial review only if the courts conclude that the retiree is entitled to the greater benefits as a matter of law. 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, the decision of the board of trustees denying accidental disability benefits as a consequence of a tie vote must stand.” Canfora v Bd. of Trustees of Police Pension Fund of Police Dept. of City of New York, 60 NY2d 347, 351-52; 469 N.Y.S.2d 635 [1983].

As the Court of Appeals acknowledged, the definition of an accident follows common sense “Although the term ‘accident’ is not specifically defined by the statute, we adopt the commonsense definition of a ‘sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.” Matter of Lichtenstein v Board of Trustees of the Police Pension Fund of the Police Dept of the City of New York, 57 NY2d 1010, 457 N.Y.S.2d 472 [1982]. Ultimately the issue is whether the Board of Trustees decision defies common sense. The case law provides some guidance on determinations in similar, but not identical situations. Working at a desk in the police precinct is part of routine police work. In a number of cases injuries related to this activity, while in the line of duty, were not found to be accidents. Russell v. Board of Trustees of New York City Police Pension Fund, 288 A.D.2d 19, 732 N.Y.S.2d 13 [1st Dep’t 2001] (petitioner, a police detective, was injured when her wheeled swivel chair, which she was rolling backward to plug in the cord for an electric typewriter, was stopped by a wire on the floor, causing petitioner and the chair to topple over; such an occurrence is not so out-of-the-ordinary or unexpected as to constitute an accident as a matter of law). Gamman v Kelly, 11 AD3d 389, 390; 784 N.Y.S.2d 44 [1st Dept 2004] (as petitioner moved her chair away from her desk, it slid

backwards out from under her causing her to fall; in the absence of evidence that the chair was defective this fall is analogous to a fall down stairs as a result of one's own misstep and not an accidental injury as a matter of law). See, also, Nedwick v McCall, 308 AD2d 653; 764 N.Y.S.2d 154 [3d Dept 2003] (holding that petitioner police officer's injury incurred while he was attempting to open a locked door which he assumed was unlocked was not an accident).

In the present case the court cannot find, as a matter of law, that hitting a thumb on a drawer while trying to shut the drawer is an unexpected and unusual event constituting an accident in the sense of Administrative Code §13-252. The determination of the Board of Trustees remains undisturbed.

Petitioner's request for a factual hearing before the court or the Board of Trustees is not warranted, since there are no factual issues in dispute. The Board followed petitioner's account of events, and did not contest the medical record. The branch of the petition compelling respondents' production of documents is moot, since relevant documents are annexed to respondents' papers.

CONCLUSION

For the foregoing reasons it is

ORDERED and ADJUDGED that the petition of Raymond Heinichen is denied in its entirety and the petition is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/26/13

ENTER:

Loy

LOUIS B. YORK J.S.C.
J.S.C.