

Matter of Silva v Kelly
2013 NY Slip Op 30925(U)
April 9, 2013
Supreme Court, New York County
Docket Number: 104025/11
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
ANTHONY SILVA,**

Petitioner,

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

INDEX NO. 104025/11

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 and THE BOARD OF TRUSTEES
of the Police Pension Fund, Article II,
Respondents.**

FILED
MAY 01 2013
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COUNTY CLERK'S OFFICE**

The following papers numbered 1 to 4 were read on this motion by petitioner for a judgment pursuant to Article 78.

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

Cross-Motion: Yes No

In this CPLR article 78 proceeding, Anthony Silva (petitioner), a retired New York City police officer, challenges the respondents' denial of his application for an accident disability retirement pension (ADR), finding that he is only entitled to an ordinary disability retirement pension (ODR). Petitioner argues that this determination should be overturned because it was arbitrary, capricious and contrary to established law.

BACKGROUND

Petitioner was appointed to the uniformed force of the New York City Police Department (NYPD) on October 15, 1990. On September 16, 2006, petitioner sustained injuries to his

shoulders and back when he lost his footing and fell backwards while unloading metal barriers from a NYPD truck. The original Line of Duty Injury Report was prepared on September 16, 2006. In that report, the petitioner states that "[w]hile unloading a metal barrier at above location, I fell backward on rear of truck and landed on my back. I am currently feeling pain and a tingling sensation in my shoulders and back" (see Verified Petition, exhibit A). The report indicates that the petitioner had lost his footing and fell onto the rear of the truck. He was taken to Bellevue Hospital and was diagnosed with a bruise to both shoulders. Petitioner returned to work on September 18, 2006, though his personal records demonstrate that from June 19, 2007 through his retirement on October 14, 2010, petitioner was either on sick leave or light duty due to sprains and strains of the shoulder and upper arm. Petitioner had arthroscopic surgery on his right shoulder on June 20, 2007.

On February 4, 2008, nearly a year and a half after the original Line of Duty Injury Report was submitted, petitioner submitted a letter to the NYPD requesting an amendment to his description of the incident, adding to his previous account that "the truck unexpectedly moved forward from a stopped position" causing him to "los[e] his footing and [he] was thrown off balance, falling backwards onto the rear bed of the truck" (Verified Petition, exhibit B). On February 21, 2008, the NYPD Supervising Chief Surgeon recommended petitioner for a survey to ascertain whether he was incapacitated for the performance of duty. The survey recounted petitioner's complaint and treatment, noted that he had not made significant improvement and stated that he was unable to return to full duty.

On August 4, 2008, petitioner was examined by the Police Pension Fund Medical Board (Medical Board). The Medical Board deferred reaching a decision for three months pending petitioner's completion of his physical therapy sessions and undergoing EMG nerve conduction studies. On November 24, 2008, the Medical Board disapproved the petitioner's applications. Subsequently, the Police Pension Fund Board of Trustees (Board of Trustees) remanded the

case to the Medical Board. On March 23, 2009, the Medical Board reviewed petitioner's case and conducted a physical examination. The Medical Board rescinded its earlier decision and approved the petitioner's ADR application, finding that he was disabled from performing the full duties of a police officer due to his right shoulder impairment which was caused by the September 6, 2006 incident. The matter was then referred to the Board of Trustees for its review and final determination.

The Board of Trustees considered the petitioner's ADR application on multiple occasions. It first considered the petitioner's case on February 11, 2009, when it remanded the case to the Medical Board. The Board of Trustees tabled the petitioner's case on June 10, 2009 and again on July 8, 2009 to consider new affidavits from two of the police officers who had been present in the truck with the petitioner on the day of the incident. One of the police officers, Officer John Vitellio (Officer Vitellio), was the driver of the truck. Both of the affidavits stated that the truck jerked forward unexpectedly while the petitioner was removing the barriers, and it was the sudden movement of the truck that caused the petitioner to lose his balance and fall. Previously the driver of the truck had stated only that the petitioner had lost his balance.

The Board of Trustees considered petitioner's case for the final time on December 8, 2010. At that meeting, the Board of Trustees reviewed the September 6, 2006 Line-of Duty Injury Report and concluded that petitioner's injuries were not caused by an accident within the meaning of the pension laws. By a six-to six vote, the Board of Trustees denied the petitioner's application for ADR. This Article 78 proceeding followed.

In support, petitioner argues that the Board of Trustee's determination was arbitrary and capricious and an abuse of discretion. He claims that he met his burden of proof of establishing that he was injured in an accident because the truck unexpectedly moved forward from a stopped position. Petitioner attempts to distinguish his injuries from cases where petitioners sustained injuries during the performance of routine duties not resulting from unexpected

events. These injuries are classified as having been the result of an incident and therefore ADR is not available. In contrast, injuries sustained by unexpected events, which were not a risk of the work performed, are considered accidents. Petitioner cites to the affidavit of Officer Vitellio, wherein he states that when placing the truck into drive, it "unexpectedly caused the truck to jerk forward" while the petitioner was unloading metal barriers (Verified Petition, exhibit D). Petitioner asserts that while unloading metal barriers was clearly a part of his work assignment, he had no reason to expect the truck to suddenly jerk forward and the barriers to collapse all around him. Petitioner also asserts that, since the contemporaneous September 16, 2006 Line of Duty Injury Report did not include all of the necessary facts, it was perfectly appropriate for him to amend his report on February 4, 2008, and to subsequently submit sworn statements from his two co-workers. Petitioner maintains that this additional information was necessary to establish that his injury was caused by an accidental event, and it was not a risk of the work he performed that day.

Respondents maintain that petitioner failed to demonstrate that his injuries were caused by a sudden, unexpected or out of the ordinary event, which was not a risk of the work he performed. Rather, the Board of Trustees credited the contemporaneous descriptions of the incident and found that the petitioner's injury did not rise to the level of an accident as it is defined for disability retirement purposes, but was the result of an "unfortunate misstep" (Verified Answer, exhibit 24 at 50-51). They argue that the Board of Trustees properly credited the contemporaneous evidence over the later submitted amendment and affidavits, which they term "self-serving" (Respondents' Memorandum Of Law at 8).

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."

It is well settled that the Board of Trustees is entitled to rely on the Medical Board's recommendations as to causation, even in the face of conflicting evidence, and that its decision as to whether a police officer's disability is the result of an "accidental injury" should not be disturbed unless its factual findings are not supported by substantial evidence or unless its final determination is arbitrary and capricious (see *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 351 [1983]; *Matter of Hipple v Ward*, 146 AD2d 201, 207 [1st Dept 1989]; see also *Matter of Meyer v Board of Trustees of the New York City Fire Dep't*, 90 NY2d 139 [1997]; *Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760-61 [1996]).

The Court of Appeals has defined the term "accidental injury" as a "sudden fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Lichtenstein v Bd. Of Trs. Of the Police Pension Fund of the Police Dep't of the City of New York*, 57 NY2d 1010, 1012 [1982]). The Court of Appeals has also said that not every line of duty injury will result in an award of accident disability (see *McCambridge v McGuire*, 62 NY2d 563, 567-68 [1994]). If an injury is sustained during the performance of routine work duty, it is considered an incident rather than an accident, as opposed to injuries sustained by "precipitating event[s]...which [are] not a risk of the work performed" (*id.*). More recently, the Court of Appeals has held that a petitioner's fall down stairs due to his own misstep was "not so out-of-the-ordinary or unexpected as to constitute an accidental injury as a matter of law" (*id.* at 839).

Based upon the papers it appears that the parties agree that if the petitioner simply lost his balance and/or misstepped, as originally indicated in the Line Of Duty Injury report, his injuries would have been caused by an incident and he would therefore not be entitled to ADR.

It is for this reason that the petitioner sought to introduce an amended Line of Duty Injury Report and the two affidavits from his co-workers in order to establish that the truck unexpectedly moved forward and that it was the sudden movement that caused him to lose his balance and fall. The Board of Trustees refused to credit the later submitted materials and relied solely upon the contemporaneous accounts. The issue before the Court is whether the Trustees' refusal to consider the later submitted materials was arbitrary and capricious.

Here, the petitioner requested an amendment to his Line Of Duty Injury Report on February 4, 2008, nearly a year and a half after the incident occurred, indicating only that specific details were omitted from the original account. While the original signed Line Of Duty Injury Report only indicated that he fell backward, the new revised statement mentioned the movement of the truck as a cause of the injury. The Board of Trustees was entitled to be skeptical of this late revision. Similarly, the affidavits submitted by the two police officers were dated three years after the incident and were significantly altered from their contemporaneous statements which did not mention the movement of the truck.

Based on the above detailed record, the Court finds that the determination by the Board of Trustees denying the petitioner ADR was not arbitrary or capricious as a matter of law, and should be upheld. Petitioner has the ultimate burden of demonstrating that there was an accident and that a causally related disability resulted (*see Matter of Drayson v Board of Trustees of Police Pension Fund*, 37 AD2d 378 [1st Dept 1971]). Because the petitioner offered divergent accounts of what caused his injuries at different times, he failed to meet his burden of showing that his injuries were caused by the unexpected movement of the truck (*see Matter of Danyi v Board of Trustees of N.Y. City Employees' Retirement Sys.*, 176 AD2d 451, 451-52 [1st Dept 1991]; *Matter of Becker v Ward*, 169 AD2d 453 [1st Dept 1991]). The Board of Trustees was entitled to rely on contemporaneous accounts of petitioner's line of duty injury (*see Gray v Kerik*, 15 AD3rd 275, 275 [1st Dept 2005]; *Matter of Morgan v Kerik*, 305 AD2d

288, 289 [1st Dept 2003]; *Matter of Reichfeld v Safir*, 259 AD2d 298, 298 [1st Dept 1999]).
Certainly, it cannot be said that the amended statements are more reliable than the original ones (see *Morgan*, 305 AD2d at 389). As such the Court finds that the Board of Trustees acted reasonably in disregarding these later submissions in favor of the contemporaneous accounts.

CONCLUSION

For these reasons and upon the foregoing papers, it is,
ORDERED that petitioner's Article 78 petition is denied; and it is further,
ORDERED that the respondents shall serve a copy of this Order, with Notice of Entry, upon the petitioner, and upon the Clerk of the Court who is directed to enter judgment accordingly.
This constitutes the Decision and Order of the Court.

Dated: 4-9-13

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MAY 01 2013
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