

Gonzalez v Kelly

2013 NY Slip Op 30951(U)

April 30, 2013

Supreme Court, New York County

Docket Number: 104348/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
BENITO GONZALEZ,

INDEX No. 104348/12

Petitioner,

MOTION DATE _____

-against-

MOTION SEQ. No. 001

RAYMOND KELLY, et al.,

MOTION CAL No. _____

Respondents.

The following papers, numbered 1 to _____ were read on this motion _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits-- Exhibits... 1

Answering Affidavits-- Exhibits _____

UNFILED JUDGMENT

Replying Affidavits _____

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).

CROSS-MOTION: YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/30/13

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X

In the Matter of the Application of
BENITO GONZALEZ,
Petitioner,

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

-against-

Index No. 104348/12

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,
KEVIN HOLLORAN, as Executive Director of the
New York City Police Pension Fund, THE BOARD
OF TRUSTEES of the Police Pension Fund,
Article II, and THE CITY OF NEW YORK,
Respondents.

-----X

DONNA M. MILLS, J.:

In this Article 78 proceeding, petitioner Benito Gonzalez seeks a judgment annulling the determination of respondents 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, Kevin Holloran, as Executive director of the New York City Police Pension Fund, The Board of Trustees of the Police Pension Fund ("the Board of Trustees"), and the City of New York (collectively "respondents") which denied his accident disability retirement, ("ADR") application pursuant to § 13-252 of the Administrative Code of the City of New York ("Administrative Code"). Petitioner also asks the Court to direct the Board of Trustees to grant her ADR benefits outright or for another reconsideration of her application.

Petitioner was appointed as a Police Officer with the New York Police

Department ("NYPD") on July 5, 1989, and became a member of the Police Pension Fund ("PPF") thereafter. Petitioner alleges, and it is undisputed that he was injured when his right thumb struck the ground while he was demonstrating a takedown technique during a training class on March 4, 2010. On the Line of Duty Injury Report, petitioner described the incident as follows: "At [time and place of occurrence], I was demonstrating a takedown technique to the Basic Plainclothes Class when my right thumb struck the ground, causing pain." Petitioner repeats the same facts in an Aided Report and Witness Statement also completed on March 4, 2010, by Police Officer Manuel Correa. In the Witness Statement, Officer Correa stated that , "At [time and place of Occurrence], Det. Gonzalez was demonstrating a takedown technique during the 4-day Basic Plainclothes Course conducted at the Police Academy, when his right thumb struck the ground, causing pain."

By order dated February 8, 2012, the Police Commissioner submitted an Ordinary Disability Retirement ("ODR") application on behalf of petitioner. It directed the Medical Board to examine petitioner with respect to his "right wrist and thumb derangement" to determine whether he was permanently disabled so as to render him unfit to perform police duty.

By application dated March 13, 2012, petitioner filed for ADR. In the application, petitioner alleged that as a result of the line of duty injury to his right hand on March 4, 2010, he suffered constant pain and limited range of motion and mobility, as well as loss of grip and strength. Consequently, petitioner alleged that he was unable to perform the full duties of a police officer.

On March 13, 2012, the Medical Board considered petitionenr's ADR application

and the Police Commissioner's application for ODR. The Medical Board examined all of the available medical evidence, interviewed petitioner. And conducted a physical examination of petitioner. Following the interview, physical examination, and review of petitioner's medical records, the Medical Board recommended approval of petitioner's ADR application and disapproval of the Police Commissioner's ODR application. The Medical Board determined that the "final diagnosis [was] Internal Derangement Right Thumb Status Post Surgery to Multiple Injuries Right Hand. The competent causal factor is the line of duty injury of March 4, 2010."

The Board of Trustees was not convinced that petitioner's injuries were caused by an accident as defined by relevant statutes and case law. By letter dated August 9, 2012, petitioner was informed that the Board of Trustees denied his ADR application, and the ODR application was withdrawn because of petitioner's service retirement. Specifically, the Board of Trustees, found that petitioner's thumb injury was an inherent risk of the takedown training exercise he was performing.

The qualifications for ADR and ODR for police officers are set forth in New York City Administrative Code § 13-252 and 13-251, respectively. The statutory scheme entitles a police officer to ADR if he 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 ... and that such disability was not the result of willful negligence...." Code § 13-252. For an officer to become entitled to ADR, the Trustees must determine not only that she was unfit for duty and was injured in a line-of-duty accident, but also that such accident proximately caused the disability. Drayson v. Board, 37 A.D.2d 378, 380 (1st Dept.1971). Although the Trustees make this

determination, they rely on the Medical Board's recommendations to determine all medical issues.

In the usual Article 78 proceeding, the review of the Board's decision is limited to whether their decision was supported by "some credible evidence" and was not arbitrary and capricious. Drayson, supra at 380. See also Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756, 760 (1996) This standard is set as courts cannot "weigh the medical evidence or substitute their own judgment for that of the Medical Board." Borenstein, supra at 761 (citing Brady v. City of New York, 22 N.Y.2d 601; Appleby v. Herkommer, 165 A.D.2d 727 (1st Dept.1990)). Ordinarily, the decision of the Trustees as to the cause of an officer's disability "will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious." Canfora, supra at 351. However, where, as in this case, the Trustees deny ADR pursuant to a 6-6 tie vote, the standard of judicial review must be different as the Trustees have made no findings. Denial of ADR in consequence of a tie vote "can only be set aside if the courts conclude that the retiree is entitled to [ADR] as a matter of law." Meyer v. Board of Trustees, 90 N.Y.2d 139, 145 (1997). Thus, the Court may not set aside the denial of ADR unless the Court can conclude as a matter of law that disability was the natural and proximate result of a service-related accident . No such conclusion can be drawn here.

"It is well settled that 'an incident does not qualify as an accident justifying the award of accidental disability retirement benefits where the injury results from an expected or foreseeable event arising during the performance of routine employment duties.' " (McKenna v Hevesi, 26 AD3d 584, 585 [3d Dept 2006]). It is undisputed that

petitioner's incident occurred while he was conducting his ordinary job duties while demonstrating a training exercise at the Police Academy.

Upon my review of the record, I cannot characterize the subject incident as a " 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' " (Matter of Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 57 N.Y.2d 1010, 1012, 457 N.Y.S.2d 472, 443 N.E.2d 946 [1982], quoting Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am., 6 A.D.2d 97, 100, 175 N.Y.S.2d 414 [1958], affd. 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 [1959]). To the contrary, "it was the result of a training program constituting an ordinary part of petitioner's job duties and the normal risks arising therefrom" (Matter of Felix v. New York State Comptroller, 28 A.D.3d 993, 994, 813 N.Y.S.2d 267 [2006]; see Matter of McKenna v. Hevesi, 26 A.D.3d 584, 585, 807 N.Y.S.2d 716 [2006]; Matter of Marsala v. New York State & Local Employees' Retirement Sys., 14 A.D.3d 984, 985, 788 N.Y.S.2d 517 [2005], lv. denied 4 N.Y.3d 709, 797 N.Y.S.2d 421, 830 N.E.2d 320 [2005]). Petitioner's assertions regarding the his thumb sliding between two of the abutting mats and forcibly striking the concrete floor, causing his injury, even if accepted, would not transform the incident into an accidental event (see Matter of Felix v. New York State Comptroller, supra at 994, 813 N.Y.S.2d 267; Matter of McKenna v. Hevesi, supra at 585, 807 N.Y.S.2d 716).

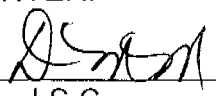
Therefore, I find that it was neither irrational nor an error of law for the respondents to deny ADR on the grounds that petitioner's fall and injury was not an accident. The risk of injuring yourself during a physical training exercise that petitioner was engaged in cannot be considered sudden, unexpected, and out of ordinary, and it

cannot be said that petitioner is entitled to ADR as a matter of law (See In re Mejia v. Kerik, 301 A.D.2d 385 (1st Dep't 2003).

Accordingly, it is hereby

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

Dated: 4 / 30 / 13

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.