

Matter of Attari v Kelly
2013 NY Slip Op 30999(U)
May 3, 2013
Supreme Court, New York County
Docket Number: 102923/12
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART _____

Index Number : 102923/2012
ANNOPAM ATTARI
vs.
KELLY, RAYMOND
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~~ Article 78
petition is denied and the
proceeding is dismissed in
accordance with the accompanying
memorandum decision.

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

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: MAY 03 2013

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

- 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

ANOOPAM ATTARI,

Petitioner,

Index No. 102923/12
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, NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

-----X

SCHLESINGER, J.:

Before this Court is an Article 78 application by Anoopam Attari. Ms. Attari was a police officer for 11 years until she retired on an Ordinary Disability Retirement in 2010. Her claim is that she was and is entitled to an Accident Disability Retirement, not for psychological reasons, which is the basis of her present retirement, but rather for orthopedic reasons.

Ms. Attari suffered some injury while on the job, in two motor vehicle accidents. Both times, on June 6, 2006 and September 4, 2007, she was in an RMP (radio motor patrol car) in the passenger seat when her car collided with another. Both times, she went to a hospital Emergency Room where she was tested pursuant to complaints of pain and treated and released.

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Ms. Attari first applied for ADR on March 23, 2007. That application was denied. She then applied, perhaps three more times, the last time being on January 21, 2009.¹ The Medical Board each time recommended denial and, as was the case with the other applications, the Pension Board accepted those recommendations. This Article 78 proceeding is timely as it challenges the final denial of petitioner's application for ADR by the Board on February 8, 2012. That denial accepted the Medical Board's recommended denial of ADR, the last time Ms. Attari appeared before that body on October 19, 2011.

The petitioner's very fine attorney documents the findings of Ms. Attari's private and Department physicians and the results of the many MRI's, EMG's and other tests she took. He also notes that on two occasions she failed to qualify to carry a firearm, which resulted in having the firearm taken from her. He points out that these orthopedic surgeons, on multiple occasions, recommended spine surgery based on their findings and her complaints. The record amply demonstrates unrelenting pain in Ms. Attari's back, neck, arms and legs since the first accident.

Counsel argues that this last denial by the Pension Board, in following the Medical Board's recommendation, is arbitrary and capricious and should not be maintained by this Court. Specifically he urges that the Medical Board has ignored clear findings on various

¹The Court is not certain of how many new applications were made because the Pension Board kept returning the matter to the Medical Board for the latter to consider new evidence. The Medical Board actually saw petitioner on seven occasions, April 18, 2007, October 31, 2007, February 27, 2008, September 24, 2008, August 12, 2009, January 20, 2010 and October 19, 2011. On all but one of those appearances, the Board conducted its own physical examination. The exception was on October 31, 2007 when the Board recommended deferral of their examination for three months pending receipt of the old and new MRI scans of the cervical and lumbar spine and the line of duty report from the September 4, 2007 accident.

scans, as well as findings by a NYPD Orthopedic Surgeon. Dr. Russell Miller, who found Ms. Attari unfit for full duty.

However, equally fine counsel for the respondent Pension Board argues that the Medical Board did in fact read and consider all of the reports. However, significant to their recommendations of denial after each interview, were findings made by the three allegedly independent physicians constituting the Medical Board, based on their own physical examinations.

Specifically in that regard, at the last appearance Ms. Attari made to the Board, on October 19, 2011 the Board documented that "on physical examination today", Ms. Attari ambulated with a nonantalgic gait, she was able to heel and toe walk, forward flexion of the lumbar spine was 70°, extension was to 20°, rotation bilaterally was to 40°, all with complaint of pain and range of motion. Further, regarding her neck, forward flexion was to 20°, extended to 20°, rotated bilaterally to 40° and tilt bilaterally to 20°, also with complaints of pain. "She had diffuse tenderness and pain that was out of proportion throughout the entire neck". Tenderness was found upon insertion of the neck muscles into the trapezius, in the intrascapular muscles and in the thoracic lumbar musculature. Also, she was tender at the sciatic joint notches, the sciatic joints bilaterally, the lumbar paravertebral muscles, and the muscles of the buttocks. "This pain was out of proportion to light touch". There were complaints of pain with subminimal pressure on the vertex in the neck and in the lower back. Motor testing could not be assessed as the doctors felt that Ms. Attari was unwilling to make an effort because of complaints of pain while attempting this test. There was also decreased tenderness of the right upper extremity and bilateral lower extremities, secondary to varicosities which were extremely tender. The left

ankle appeared to have full range of motion with no obvious soft tissue swelling. But the ankle joint was tender throughout, particularly along the lateral aspect. There was tenderness along the anterior talofibular ligament. Deep tendon reflexes were 2+ and symmetric. She had negative straight leg raising at 90° bilaterally. Finally, examination of her shoulders revealed forward flexion to 160° and abduction to 140°, with full external and internal rotation.

The last time before the October date that Ms. Attari appeared before the Medical Board, on January 20, 2010, the physical examination showed that her gait was non-antalgic and that she was able to heel and toe walk. She did a minimal flexion of the knee but no deep knee bends. Also, and apparently significant to the examining doctors, they found no evidence of atrophy or fasciculations. Nor was there clonus or pathological reflexes.

Returning to her last visit to the Board in October 2011, a comparison by these doctors of the reports of the MRI studies in November 2010 to those of October 2007 showed a disc bulge at L1-L2, which was unchanged, a disc bulge at L4-L5 causing flattening of the thecal sac, also unchanged, and no disc herniation.

As to the cervical spine, the November 2010 study showed a small broad-based paracentral disc protrusion at the C5-C6 level causing mild narrowing of the central canal without contacting (*sic*, probably meaning “contracting”) or compressing the cervical cord. This last finding was a new onset compared to the July 2007 MRI.

I believe that Ms. Attari truly has been in a great deal of pain since her accidents. To remedy that pain, she has tried physical therapy, has been prescribed significant pain medication and nerve relaxers, and has had numerous epidural injections into her spine.

But unfortunately, pain is a subjective symptom of injury. And I think the extensive record here documents, at least implicitly, that some members of the Department and more significantly for these purposes, the Medical Board, do not believe that there are objective reasons for her pain. I think it is clear that either the doctors evaluating Ms. Attari for ADR purposes either simply do not believe her complaints or feel she is grossly exaggerating them, or believe that her pain has a psychological basis.

I say this because the Petition itself documents events such as the denial by Dr. Lichtenstein of the NYPD's Medical Division on November 15, 2006, to Ms. Attari (then Officer Attari) of authorizations for spinal surgery; they "denied any further authorizations for therapy or medical care; and he told petitioner he would have her arrested if she persisted with her claims of injury" (§15).

On March 16, 2007, Officer Attari was served with Departmental "Charges and Specifications" for misconduct for reporting sick for spinal injuries. And in fact, on April 21, 2008, she was found guilty of failing to report for duty when she had called in sick, despite orders not to do that. Her penalty was forfeiture of 15 vacation days. (§18).

On January 19, 2006, Officer Attari was charged by the Department for misconduct for exaggerating injuries and reporting sick based on her spinal injuries. And though findings made on March 15, 2010, found her not guilty of this charge, she was still found guilty for failing to report for duty when she, against orders, called in sick and also guilty of failing to call in at the end of a physical therapy session to sign out of her tour. Instead, she called in from her home. In any event, for these infractions, she was suspended 30 days without pay and put on a one year's probation (§45).

The above events are referenced to support what I stated earlier, that right or wrong, the Department and significantly here the Medical Board, independent though it may be, essentially predicated its repeated findings of no disability on their belief that the pain was exaggerated or feigned or imagined but without an objective basis.

So the issue to be addressed here, did the Medical Board have a right to reach this conclusion. I find that it did.

Counsel for petitioner is correct when he cites to cases such as his own, *Matter of Kiess v. Kelly*, 75 AD3d 416 (1st Dep't 2010), for the proposition that the Medical Board is obliged to seriously consider medical evidence submitted to it, including there an EMG that demonstrated radiculopathy. Further, there the Medical Board was unable to explain their own findings where the Officer had no range of motion and could not walk on the left toes and heels because of pain. The court felt that the Medical Board's report was conclusory and did not justify its conclusion that there were no objective findings supportive of their recommendation of no ADR.

But here, I do find that the Medical Board did consider the submitted evidence. Here it also relied on the results of its own physical examinations, such as a finding of no atrophy and no clonus and on Ms. Attari's ability to walk normally as well as on her toes and heels, at her January 2010 appearance.

There must be some credible evidence to support the Board's determination. But it's own physical examination can be that evidence. *Matter of Toole v. Board of Trustees of NYC Police Pension Fund*, 306 AD2d 55 (1st Dep't 2003).

The Board here did review the reports and MRI scans, but it had a right to make its own findings, which did not include herniated discs but rather bulges in the cervical and lumbar spines. This the Board can do even though other evidence comes to a different conclusion. (*Matter of Creegan v. Board of Trustees of NYC Police Pension Fund*, 7 AD3d 335 (1st Dep't, 2004).

Further, counsel for respondent relied on two cases to support the Medical Board here, and I believe they do. In *Matter of Goffried v. Kelly*, 13 AD3d 72 (1st Dep't 2004), the petitioner was seen by the Medical Board on six separate occasions. Here there were seven appearances. The Court found that on each of these occasions the Board had reviewed the evidence submitted by petitioner, which included MRI's and EMG's, similar to what was submitted here. Further, the Board conducted its own orthopedic examination, as was done here. And finally, in *Goffried*, as here, the Board found no evidence of a disabling disease of the cervical or lumbar spine. The Board, the Court said (at p. 73) "was entitled to rely upon its own physical examinations which provided credible evidence for its determination."

Finally, in *Matter of Khurana v. Kelly*, 73 AD3d 497 (1st Dep't 2010), lv denied, 15 NY3d 715, the court accepted the Board's opinion that petitioner was not disabled. One of the things relied upon was the Board's own physical examinations.

Perhaps the Board had a predisposition here to find no ADR on Ms. Attari's seventh appearance. However, it did what it was supposed to do. It reviewed the medical evidence, formed a different conclusion than other doctors as to what the MRI films showed, and interviewed and examined the applicant. From all of this investigation, while it documented pain, it did not find an objective basis for it.

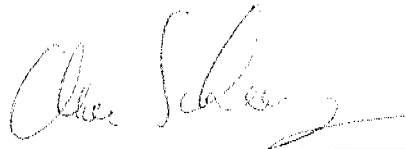
Based on the above facts and circumstances, this Court, whatever its own opinions, cannot substitute those opinions for those of the Board. Therefore, I do not find a valid ground for disturbing the Pension Board's acceptance of the Medical Board's recommendation of no ADR.

Accordingly, it is hereby

ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed. The Clerk is directed to enter judgment in favor of the respondents without costs or disbursements.

Dated: May 3, 2013

MAY 03 2013



J.S.C.

ALICE SCHLESINGER

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