

Matter of Amoroso v Kelly

2013 NY Slip Op 31289(U)

June 17, 2013

Supreme Court, New York County

Docket Number: 100123/13

Judge: Cynthia S. Kern

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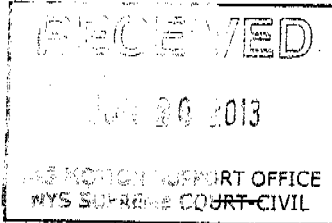
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 100123/2013
AMOROSO, CHRISTOPHER
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

is decided in accordance with the annexed decision.

FILED

JUN 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/17/13

OK, 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: Part 55

-----X
In the Matter of the Application of

CHRISTOPHER AMOROSO,

Petitioner,

Index No. 100123/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-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.

FILED

JUN 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>3</u>

Petitioner Christopher Amoroso brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge the determination made by respondents Raymond W. Kelly ("Mr. Kelly"), as Police Commissioner of the City of New York and as Chairman of the Board of Trustees of the Police Pension Fund ("PPF"), the Board of Trustees of the PPF (the "Board of Trustees") and the City of New York (the "City") denying

petitioner's application for disability retirement benefits. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner was appointed as a police officer with the New York City Police Department ("NYPD") on July 1, 1998 and thereafter became a member of the PPF. In a line of duty ("LOD") report filed by petitioner, he alleged that on February 19, 2011, he injured his left shoulder when he tripped on a raised piece of metal in the sidewalk while walking in front of his station house toward his patrol vehicle (the "LOD injury"). On August 18, 2011, petitioner filed an application for Accident Disability Retirement ("ADR Application") alleging that as a consequence of the LOD injury, he is unable to perform the full duties of a police officer as he suffers from constant pain to his left shoulder and that he "lost mobility and strength of [his] left arm." At the direction of Mr. Kelly, an application for Ordinary Disability Retirement ("ODR Application") on behalf of petitioner was submitted on March 19, 2012.

On April 27, 2012, the PPF's Medical Board (the "Medical Board") considered petitioner's two disability applications. After reviewing the medical documents and interviewing and examining petitioner, the Medical Board concluded that petitioner was disabled from performing the full duties of a police officer. The Medical Board opined that the competent causal factor for petitioner's disability was the LOD injury and recommended approval of the ADR Application and denial of the Police Commissioner's ODR Application. At a meeting on September 12, 2012, the Board of Trustees discussed the ODR Application. Specifically, Board Member Carolyn Wolpert ("Ms. Wolpert") noted that "I simply look at these photos, and this hole and this piece of metal are so large that I don't understand how it could be sudden and

unexpected at that point that one would fall in a hole like this.” At that meeting, the Board of Trustees approved the ODR Application but adjourned the discussion of the ADR Application. Notification of the ODR Application’s approval was mailed to petitioner by letter dated September 12, 2012.

By letter dated September 25, 2012, petitioner was notified that his ADR Application would be reviewed by the Board of Trustees at a meeting on October 10, 2012. At that meeting, petitioner presented the Board of Trustees with additional photographs of the alleged accident location. The Board of Trustees could not agree whether the circumstances as outlined in the ADR Application rose to the level of an “accident.” Specifically, Christopher McGrath (“Mr. McGrath”), a consultant to the Patrolman’s Benevolent Association alleged that the incident should be considered an accident because petitioner did not expect to trip over a piece of metal in the sidewalk while on duty, even though he stated that it is well-known that the precinct was in an area where the sidewalk was broken up and not well maintained. Ms. Wolpert also noted that after reviewing the photographs, the sidewalk defect upon which petitioner allegedly tripped, appeared large and obvious and was a defect petitioner had likely noticed before, as it was directly in front of the precinct. Ms. Wolpert further opined that “the Court of Appeals said that an accident is something that is sudden, fortuitous, mischance, unexpected, out of the ordinary” and that as each case turns on its own facts, there is no evidence in the record to support the assertion that the incident was an accident. Ms. Wolpert cited to First Department cases involving trips and falls on defects where the court found that the incident was not sudden and unexpected and therefore did not constitute an accident. The Board then voted six to six on whether to grant petitioner’s ADR Application. Thus, the ADR Application was denied and

petitioner was awarded the benefit of ODR. Notification of the Board of Trustees' decision was sent by certified mail by way of letter dated October 22, 2012. Petitioner then commenced the instant Article 78 proceeding seeking to challenge the Board of Trustees' denial of his ADR Application.

When the Medical Board reviews an application for ADR, it must determine if the applicant is disabled and can no longer serve and, if so, whether he was disabled as a result of a service-related accident. *See Meyer v. Board of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 144 (1997). The Court of Appeals has defined the term "accident" as used in the PPF statutes 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 N.Y.2d 1010, 1012 (1982). If an injury is sustained during a routine duty, it has been defined as an *incident*, as opposed to injuries sustained by "precipitating event[s]...which are not a risk of the work performed," which would be considered *accidents*. *McCambridge v. McGuire*, 62 N.Y.2d 563, 567-68 (1984). "It is the precipitating cause of the injury, rather than the job assignment at the time, that determines entitlement to accidental disability benefits." *Hallihan v. Ward*, 169 A.D.2d 542 (1st Dept 1991), citing *McCambridge*, 62 N.Y.2d at 567. While the Board of Trustees is bound by the Medical Board's determination of disability, "it is not bound by the Medical Board's determination that said disability resulted from a service-related accident" and it must independently decide both "whether petitioner's disability resulted from a line-of-duty injury (*causation*), and whether the line-of-duty incident that caused the injury was an '*accident*' as defined by law and relevant statutes." *Canfora v. Bd. of Trs. of the Police Pension Fund of the Police Dep't of the City of New York*, 60 N.Y.2d 347, 351 (1983).

The Medical Board's opinion as to causation is advisory and the Board of Trustees may "accept that opinion or reject it and make a contrary finding." *Russo v. Bd. of Trs. of the New York City Fire Dep't, Article 1-B Pension Fund*, 143 A.D.2d 674, 676 (2d Dept 1988), citing *Matter of City of New York v. Schoeck*, 294 N.Y. 559 (1945). Furthermore, the initial burden is on the petitioner to establish that his disability was caused by a service-related accident. See *Danyi v. Bd. of Trs. of the New York City Employees' Ret. Sys.*, 176 A.D.2d 451 (1st Dept 1991); see also *Drayson v. Bd. of Trs. of the Police Pension Fund of the Police Dep't of the City of New York*, 37 A.D.2d 378 (1st Dept 1971), *aff'd*, 32 N.Y.2d 582 (1973). In reviewing a six-to-six determination by the Board of Trustees denying an application for ADR, the court may only set such determination aside if it can conclude as a matter of law that the disability was the natural and proximate result of a service-related accident. See *Bisiani v. Kelly*, 39 A.D.3d 261 (1st Dept 2007). If there is any credible evidence that petitioner's injury was not the result of a service-related accident, the court must uphold the Board of Trustees' determination. See *Meyer*, 90 N.Y.2d 139.

In the instant action, the Board of Trustees' decision denying petitioner's ADR Application must be upheld as this court cannot conclude as a matter of law that petitioner's disability was the natural and proximate result of a service-related "accident." The Board of Trustees' determination was based on credible evidence such as photographs of the accident location which were provided by petitioner and the Medical Board's examination of petitioner, which led the Board of Trustees to determine that petitioner's trip and fall on the metal piece lodged in the sidewalk was not "sudden, fortuitous mischance, or out of the ordinary" and that petitioner failed to sustain his burden of proving that his injury was the result of an "accident."

The Board of Trustees relied on testimony that petitioner had walked in front of the precinct many times, thereby likely noticing the protruding piece of metal, and thus that it was not unexpected or out of the ordinary. The First Department has found that trip and falls on foreign objects or defects in one's path are not always "accidents" pursuant to the PPF statutes. In *Nicholas v. Safir*, 297 A.D.2d 220 (1st Dept 2002), petitioner "tripped over an indentation in a tile floor in the precinct house where she was on duty." In finding that petitioner was not entitled to ADR as her injury was the result of an *incident*, not an *accident*, the court stated that there was "no evidence in the record as to the size or depth of indentation...[n]or is there evidence that the indentation was of recent origin or that petitioner had been unaware of it" and that petitioner "did not establish, as a matter of law, that her injury was the result of a sudden, unexpected circumstance." *Nicholas*, 297 A.D.2d at 220, citing *Starnella v. Bratton*, 92 N.Y.2d 836 (1998). Furthermore, in *Wallen v. Safir*, 261 A.D.2d 183 (1st Dept 1999), the First Department found that petitioner, who suffered from a disabling LOD ankle injury when he tripped over a raised plank of plywood covering part of a precinct house stairway landing, failed to demonstrate that the injury was caused by an "accident" as he did not show it was caused by a sudden unexpected event. Thus, this court cannot say that, as a matter of law, petitioner's trip and fall was an "accident" pursuant to the PPF statutes.

Petitioner's assertion that the Board of Trustees' failed to properly apply the First Department's decision in *Finazzo v. Safir*, 273 A.D.2d 75 (1st Dept 2000) is without merit. In *Finazzo*, petitioner police officer tripped in a construction hole in the precinct parking lot while on duty. Although the First Department found that as a matter of law, petitioner's fall was an accident for the purposes of the PPF statutes, such finding is without basis here as the

determination of whether petitioner's trip and fall was an "incident" or an "accident" is a factual determination that must be made on a case by case basis. Furthermore, the instant case is distinguishable as it is more similar to *Nicholas* and *Wallen* because the defect on which petitioner tripped and fell was located right in front of the precinct and had been there for an extended period of time. Thus, the Board of Trustees determined that it was located in an area where petitioner likely walked many times before and so the defect was not unexpected or out of the ordinary. However, the defect in *Finazzo* was located in the precinct parking lot and presumably it was temporary as it was a construction hole. Thus, it was not clear that petitioner saw or should have seen the defect prior to his accident and so the First Department found petitioner's trip and fall to be a sudden and unexpected event.

Further, to the extent that the petition requests a hearing or a trial before this court on the factual or medical issues, such request must be denied. CPLR § 7804(h) provides that "if a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith." However, the instant case presents no triable issues of fact. Rather, the only issue before this court is a legal one - whether petitioner's disability was the result of a service-related accident as a matter of law. Finally, to the extent that the petition requests a hearing before the Board of Trustees, such request must also be denied as petitioner has failed to show that due process requires a hearing. Courts have held that due process does not require that the petitioner personally appear before the Board of Trustees as an applicant must only be given an opportunity to controvert the conclusions of the Medical Board, not to personally appear before the Board of Trustees. See *Meschino v. Lowery*, 31 N.Y.2d 772 (1972)(upholding the Board of Trustee's decision to permit the applicant to present documentary or testimonial evidence but not to permit

[* 9]

him to have a full adversarial hearing); *see also Rinaldi v. Bd. of Trs. of the New York City Employees' Ret. Sys.*, 88 A.D.2d 870 (1st Dept 1982)(holding that an applicant must be given an opportunity to controvert the Medical Board's conclusions but does not specify that a personal appearance by the applicant is required). As petitioner was given an opportunity to submit evidence in support of his claim and to controvert any findings made by the Medical Board, a hearing is not warranted.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated:

6/17/13

Enter: _____

CR
J.S.C.

FILED

JUN 20 2013

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