

Matter of Velasquez v Kelly

2013 NY Slip Op 31351(U)

June 20, 2013

Supreme Court, New York County

Docket Number: 103453/2012

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

Index Number : 103453/2012
VELASQUEZ, OCTAVIO
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~~ Article 78 petition is granted in accordance with the accompanying memorandum decision.

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

Dated: JUN 20 2013


ALICE SCHLESINGER, 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
OCTAVIO VELASQUEZ,

Petitioner,

Index No. 103453/12
Motion Seq. No.001

-against-

RAYMOND 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,
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
SCHLESINGER, J.:

In this Article 78 proceeding, Octavio Velasquez is challenging the action of The Board of Trustees of the New York City Police Pension Fund in denying him line-of-duty accident disability retirement (ADR) benefits pursuant to NYC Administrative Code §13-252. Officer Velasquez was appointed to the NYPD on August 31, 1998.

All went well until he suffered injuries to his left knee. There were three events that contributed to the injuries. The first of these, and seemingly the most important for these proceedings, occurred on May 14, 2006, at the precinct station "when he slipped on a loose floor tile that was missing grout" (¶12 of Petition). As a result, he suffered a dislocation of his left knee and a torn ligament.

A line of duty injury report was filled out. There appears to have been at least one witness to the event. That person, another Officer, stated the following:

At TPO I personally observed PO Velasquez walking away from the desk and he unexpectedly slipped on a loose cracked tile with missing grout injuring his left knee.

The report also contained a statement from the petitioner and a finding "upon conclusion of the investigation" by Sgt. Roland Vilches, the supervising officer, that Officer Velasquez in fact injured his left knee "as a result of slipping on a loose cracked tile with missing grout."

Petitioner was taken to the Emergency Department of New York Presbyterian Hospital where, after an X-ray, he was diagnosed with a patellar dislocation. Specifically, it was noted that the left patella was laterally displaced and that Officer Velasquez was suffering from a suprapatellar effusion.

At that same hospital, on October 27, 2006, the petitioner had surgery on his left knee performed by Orthopedic Surgeon Dr. Christopher Ahmad. Dr. Ahmad performed a left knee diagnostic arthroscopy, lateral release and medial patellar femoral ligament reconstruction, with soft tissue patellar stabilization and hamstring gracilis autograft.

But all was not made well by this surgery, as was made clear in a December, 2006 Summary Report written by Dr. Ahmad. There, he stated that Officer Velasquez was still suffering from left patellar instability. His limitations included no extended sitting or ambulation.

In fact, on August 16, 2007, Dr. Arnold Goldman, a Department Orthopedic Surgeon, authorized additional surgery, specifically a left knee patella reconstruction with tendon graft. The patient's prognosis, however, was "good".

But then another event occurred that negatively impacted Officer Velasquez's left knee. Petitioner had returned to full time police work, when, while on the job and in an attempt to arrest an individual for theft, the individual resisted and in the course of this resistance, threw petitioner to the floor and inflicted various injuries, including injury to the Officer's left knee.

A line of duty report was completed which concluded by saying that the Officer was taken to Jacobi Medical Center by EMS on November 10, 2008. The knee was X-rayed one week later and in a progress note, after a physical examination, Dr. Ahmad gave the Officer's status as "post left knee patella stabilization with new injury". At that point, he was considered to be totally disabled. Dr. Ahmad requested an MRI of the left knee, which was done on December 1, 2008.

In a follow-up progress note of January 22, 2009, Dr. Ahmad noted continued symptoms of pain and weakness. He ordered continued physical therapy. The doctor ended his report with these words: "This is an exacerbation of a preexisting injury."

Because Officer Velasquez failed to respond to physical therapy, anti-inflammatory medications and cortisone injections, Dr. Ahmad suggested a second left knee surgery. This surgery was performed on May 1, 2009. However, even with extensive physical therapy, Officer Velasquez continued to experience pain and crepitus in the knee.

On February 5, 2010, Officer Velasquez submitted an application for Accident Disability Retirement. This application was considered and disapproved by the Medical Board on April 2, 2010. The Board recommended disapproval for both kinds of disability, ordinary and accidental. Despite noting that the Officer continued to complain of pain, the Board at that time believed the physical examination "demonstrates very little in terms of

objective findings to support his subjective complaints." The Board also found that petitioner had full range of motion and no evidence of atrophy and minimal crepitus.

This recommendation went to the Board of Trustees on June 9, 2010, who deferred a decision and put the matter down for July 14, 2010. On that date the Trustees remanded the application back to the Medical Board for further review of new medical reports.

On September 24, 2010, the Medical Board reexamined the petitioner and again found no disability. Specifically, the Board found that neither the clinical, the documentary, nor the radiographic evidence demonstrated a permanent disability.

But on October 5, 2010, Officer Velasquez began treating with Dr. Beth Shubin Stein at the Hospital for Special Surgery. She is a board certified Orthopedic Surgeon with a specialty in patellofemoral instability. From the very beginning of their relationship, she recommended a special kind of "unloading" procedure. However, petitioner did not receive approval for this surgery with Dr. Stein until early March 2011. Therefore, on December 8, 2010, when the Trustees hearing the case once more remanded it back to the Medical Board, the latter, on March 4, 2011, decided to defer any recommendation because of the anticipated surgery. The Board felt its evaluation should be put off for "six months after his surgery to evaluate for any residual disability."

On April 28, 2011, Dr. Stein performed the operation. It primarily involved a left knee arthroscopic patellar debridement. This time, his condition seemed to improve, but the improvement did not last. On August 12, 2011, Dr. Stein reported the following. Up until three weeks ago, petitioner "was doing wonderfully and had no pain". However, then "he misstepped into a hole and planted all of his weight onto it while twisting and he says he has had increased pain ever since that time even with the brace." He had "really flared

the knee" with his latest misstep.

Unfortunately, progress did not occur. On October 6, 2011, Dr. Stein set out what had occurred in a letter. She stated that her patient had limitations due to muscle atrophy, secondary to surgery. She opined that he was not capable of performing duties required of a police officer on foot patrol.

On October 28, 2011, the Medical Board reviewed petitioner's application as they said they would. This time they found the objective evidence which had not been there before. The Board related the history of the Officer's misstep into a hole and how everything had changed for the worse after that. The Board, in summary, found that Officer Velasquez was "significantly worse since the recent surgery". Therefore, with a reasonable degree of medical certainty, the Board made a finding that the Officer was disabled. They then rescinded their previous decision and recommended approval of Velasquez's own application for Accident Disability Retirement. "The final diagnosis is Failed Tibial Tubercle Osteotomy of Left Knee. The competent causal factor is the line of duty injury of May 14, 2006."

But what happened after that to provoke this Article 78? It was the decision by the respondent Trustees on April 11, 2012, that they were not convinced that what the officer had experienced on May 14, 2006 was truly an "accident" as that word and concept has been defined by the Court of Appeals as a "sudden, unexpected event". See, e.g., *Matter of Pratt v. Regan*, 68 NY2d 746 (1986); *Matter of Starnella v. Bratton*, 92 NY2d 836 (1998).

It seems there was a disconnect between what the Trustees were concerned about and wanted, as expressed in the minutes of their February 8, 2012 meeting, and what they got or rather did not get at a later meeting on April 11. On February 8, two of the Trustees

expressed their concern that the May 2006 incident was not so much an accident but "just a misstep in part of the place where he is usually working." However, the PBA representative, Mr. McGrath, who appeared to be the Officer's advocate, explained that the Officer had tripped on a broken tile in the precinct. He suggested that the fact that this was his regular precinct did not necessarily impute knowledge to the Officer of a broken tile. He said that he, McGrath, did not know how long the tile was broken or if the Officer knew of it. In fact, he did not know if "it makes any difference." But to the Trustee, it did make a difference. Another Trustee then said "we would like to get a little bit more information as to the nature of the circumstances." And that's how it was left with McGrath saying, "Sure. I will do that. I will take a table and provide that information next time."

But he did not. Nor did anybody. On March 14, 2012, the Board deferred any action and adjourned the matter to April 11, 2012. On that day, I do not believe that the PBA representative, McGrath, was present. However, the same Trustee who had expressed the earlier reservation stated that she had reviewed:

the memo book from the Seelig law offices that was submitted for Officer Velasquez. It addresses the accident/incident issue but I do not think it addresses questions that I had at the last meeting and I believe the Comptroller's office asked as well.

What we were looking for was information about how long this condition existed, if the officer had ever seen the tiles before, was it a minor issue, was it more significant.

So without any new information on that, I still do not think it is an accident.

By a vote of 6-6, the Medical Board's recommendation was rejected and instead the Trustees found an ordinary disability, in other words, not one in the line of duty.

This Court does understand the Board's concern. Pursuant to cases, such as *Matter of Nicholas v. Safir*, 297 AD2d 220 (1st Dep't 2002), *lv denied* 99 NY2d 503, where the petitioner/officer tripped over an indentation in a tile floor in a precinct house where she worked, the Court denying her accident disability said the following:

There is no evidence in the record as to the size or depth of the indentation, or even that it was more than trivial [photographs were not taken until after a renovation]. Nor is there evidence that the indentation was of recent origin or that the petitioner had been unaware of it.

The Trustees wanted this information but no one supplied it to them. Although I believe they should have made that request again, I do understand what occurred. However, such a disconnect should not result in an adverse decision for Officer Velasquez, who on the merits seems to be entitled to line of duty retirement benefits. I make this comment based on the contemporaneous report of the incident. Also, it is clear that petitioner is not a malingerer as evidenced by his many attempts to return to work.

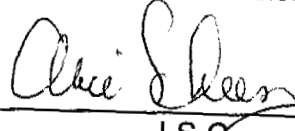
Therefore, I am annulling the Board's decision and remanding the matter. Counsel for the petitioner has agreed to obtain whatever information he can despite the intervening years, to respond to the Trustees' concerns. I am directing the Board to be cooperative in this regard and specifically to be open to the submission of the Officer's own affidavit, which would attest to his knowledge or lack thereof of the broken tile. If this injury was truly the result of a sudden, unexpected circumstance, which it appears to have been, then petitioner should receive the retirement benefits to which he is entitled.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Article 78 petition is granted and the case is remanded for further processing consistent with the terms of this decision.

Dated: June 20, 2013

JUN 20 2013



J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT

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