

Aubin-Pino v Kelly

2014 NY Slip Op 30855(U)

April 2, 2014

Sup Ct, New York County

Docket Number: 101438/13

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

SHIRLEY AUBIN-PINO,

Petitioner,

INDEX NO. 101438/13

MOTION DATE 1/31/14

- v -

MOTION SEQ. NO. 001

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.

The following papers, numbered 1 to 4 were read on this Article 78 petition

Notice of Petition: Verified Petition — Exhibits A-H

No(s). 1-2

Verified Answer — Exhibits 1-16

No(s). 3-4

Upon the foregoing papers, this petition is decided in accordance with the annexed memorandum decision and judgment.

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).

HON. MICHAEL D. STALLMAN

Dated: 4/2/14
New York, New York


_____, J.S.C.

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

1. Check one:.....
2. Check if appropriate:..... PETITION IS:
3. Check if appropriate:.....

- | | |
|---|---|
| <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| <input type="checkbox"/> GRANTED X DENIED | <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| <input type="checkbox"/> DO NOT POST | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
SHIRLEY AUBIN-PINO,

Petitioner,

Index No. 101438/13

- 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,

**Decision and
Judgment**

Respondents

UNFILED JUDGMENT

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141B).

HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul the administrative determination that denied her application for accident disability retirement (ADR) benefits. Petitioner, a retired New York City police officer and member of the Police Pension Fund, Article II, suffered injuries when, on October 4, 2010, she tripped over a purportedly defective sidewalk. Petitioner alleges that her injuries constitute an "accident" under New York City Administrative Code § 13-252, which governs ADR for police officers. Respondents contend that the Court should deny the petition because the injuries did not arise from an "accident" under the public pension laws.

Petitioner seeks an order:

(1) annulling the action of respondents in denying petitioner a line of duty ADR pursuant to Administrative Code §13-252 and declaring said action to be arbitrary, capricious, unreasonable and unlawful;

(2) directing respondents to retire petitioner with the line of duty ADR allowance retroactive to the date of petitioner's retirement plus interest, or in the alternative

(a) directing a hearing on the factual and/or medical issues raised, or in the alternative

(b) directing that the Board of Trustees of the New York City Police Department Article II Pension Fund allow petitioner and/or petitioner's representatives to present such testimony and or evidence as is necessary at a hearing held before the Board of Trustees in order to prove petitioner's entitlement to a line of duty accident disability pursuant to the Administrative Code §13-252;

(3) directing respondents serve and file all reports, recommendations, certificates and all other documents submitted to the Police Department Article II Pension Fund Board of Trustees, in connection with the retirement of petitioner; and

(4) directing respondents serve and file copies of any and all records, reports or notes relating to petitioner which are on file with the Police Department Article II Pension Fund and/or Police Department.

BACKGROUND

Petitioner was appointed as a police officer with the New York City Police Department (NYPD) on July 1, 2002 and thereafter became a member of the Police Pension Fund (PPF). Petitioner alleges that, on September 15, 2003, she injured her neck, back, right arm and right foot in a line of duty incident in the NYPD 77th

precinct. Petitioner stated in the line of duty injury report,

“[W]hile issuing a summons to a civilian, a 1997 Nissan 4DS jumped onto the sidewalk, knocking a light pole and was headed towards us. The vehicle stopped between the stoop and the parked police van. I sustained a bruise to my Right Knee and substantial pain to Neck, back and Right Arm and Right Foot from flying parts of the Nissan.”

(Petition Ex. A.) Petitioner returned to full duty after the September 15, 2003 incident.

On October 4, 2010, petitioner alleges that, she injured her lower back during another line of duty incident. In the October 4, 2010 line of duty injury report, petitioner stated,

“[W]hile walking to [Radio Mobile Patrol (RMP)] from the 84th [precinct], I tripped over an uneven part of the sidewalk and fell hurting my left and right wrist and the right knee. [T]he left wrist started to swell and [bruise], the right knee was scraped.”

(Petition Ex. B.)

On January 10, 2012, petitioner filed an application for ADR, which is based on a line of duty disabling injury. Its payment is calculated as three-quarters of an employee’s final average salary.¹ In the application, petitioner alleged that due to the line of duty injury on October 4, 2010, she suffers from “constant pain to [her] back

¹ According to the petition, for employees hired before July 2000, final average salary is based upon the highest of the employee’s (a) final 12 months; (b) average of the final 36 months; or (c) average of three best consecutive calendar years. (Petition at 5, n 5.) For employees hired after July 2000, it is based on their final 12 months of service. (*Id.*)

* 5]
...numbness down [her] left to right legs [and] pain, pins & needles radiates from [her] back down both legs [and] [a]s a result [is] unable to perform full police duties.” (Petition Ex. D.)

On March 21, 2012, petitioner requested that the October 4, 2010 line of duty injury report be amended to include injuries to her back, which amendment the NYPD granted based on medical evidence and an examination conducted by the NYPD surgeon. (See Answer Ex. 7.) By order dated July 20, 2012, the Police Commissioner submitted an ordinary disability retirement (ODR) application, which is based on an employee being disabled for reasons other than an accident and is calculated by the employee’s years of service², on behalf of petitioner.³ (See Answer Ex. 9.) It directed the Medical Board to examine petitioner. (*Id.*)

On February 19, 2013, following an interview, physical examination and review of petitioner’s medical records, the Medical Board found petitioner disabled

² According to the petition, ODR is calculated as 33 1/3 % of an employee’s final average salary if retiring with less than 10 years of service; it is a full 50 % with 10-20 years of service and there is an additional credit for every year beyond the employee’s 20th year. (Petition at 5, n 4.) ODR also includes full medical benefits, except where the employee retired with less than 5 years of service. (*Id.*)

³ Petitioner alleges that, “where the NYPD determines the [employee] is no longer physically or mentally fit for full [p]olice duty and that his or her physical or mental condition is unlikely to change, the NYPD will, on its own, file an involuntary application for ODR (under the provisions of the Administrative Code of the City of New York). This Commissioner’s [a]pplication is filed on the [employee’s] behalf and without his or her consent or participation.” (Petition at 8, n 9.)

and recommended approval of petitioner's application for ADR and disapproved the Police Commissioner's application for ODR. (Petition Ex. F.) The Medical Board determined that the "final diagnosis [was] Failed Back Syndrome Status Post Surgery with Residual. The competent causal factor is the line of duty injury of October 4, 2010." (*Id* at 16.)

By letter dated May 2, 2013, the PPF informed petitioner that the Board of Trustees of the New York City Police Department Article II Pension Fund (Board) would review the Medical Board's recommendation regarding her ADR application. (*See* Answer Ex. 12.) On June 12, 2013, the Board reviewed petitioner's ADR application and the Police Commissioner's ODR application. (*See* Petition Ex. G.) After discussing petitioner's application, the Board decided to table the matter. (*Id.*)

On July 18, 2013, the Board again discussed petitioner's ADR application and reached a tie vote (six-to-six) on whether to approve petitioner's application. (*See* Petition Ex. H.) The tie vote resulted in denial of petitioner's ADR application and in approval of the Police Commissioner's ODR application. (*See Matter of City of New York v Schoeck*, 294 NY 559 [1945].) By letter dated July 18, 2013, the Board informed petitioner that the Board had denied her ADR application and awarded her ODR. (*See* Answer Ex. 16.)

Thereafter, on October 28, 2013, petitioner commenced this Article 78

proceeding challenging respondents' denial of her ADR application.

DISCUSSION

The standard of review for an Article 78 proceeding is not only whether a determination was arbitrary and capricious, but “whether a determination was made in violation of lawful procedure, was affected by an error of law or . . . an abuse of discretion.” (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986], quoting CPLR 7803 [3]). “Where, as here, the decision to deny accident disability benefits to a retired police officer is the result of a tie vote by respondent Board of Trustees of the Police Pension Fund, the determination is subject to judicial annulment only if it can be determined on the record that the retiree is entitled to greater benefits as a matter of law.” (*Matter of Mejia v Kerik*, 301 AD2d 385 [1st Dept 2003].)

“[T]he Board of Trustees, while bound by the Medical Board's determination of disability, is entitled to make its own determination regarding causation.” (*Matter of Calzerano v Board of Trustees of N.Y. City Police Pension Fund Art. II*, 245 AD2d 84, 84 [1st Dept 1997].) “The Board of Trustees determination as to causation may not be disturbed by a court as lacking rational basis or as arbitrary and capricious if it is based on ‘substantial evidence,’ defined in this context as based on ‘some credible evidence.’” (*Matter of Picciurro v*

Board of Trustees of N.Y. City Police Pension Fund, 46 AD3d 346, 348 [1st Dept 2007] [citation omitted].) “Credible evidence has been defined as ‘evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered’ and is ‘evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion.’” (*Matter of Cusick v Kerik*, 305 AD2d 247, 248 [1st Dept 2003] [citation omitted].)

Respondents argue that the petition should be dismissed because (1) the circumstances of petitioner’s injuries did not rise to the level of an “accident” as defined by the Court of Appeals and (2) the Board’s determination denying petitioner’s ADR application was based on credible evidence and was neither arbitrary nor capricious.

Under Administrative Code § 13-252, an applicant is entitled to accident disability benefits “if medical examination reveals that incapacitation was suffered ‘as a natural and proximate result of an accidental injury received in such city-service, while a member, and that such disability was not the result of wilful negligence on the part of such member.’” (*Matter of Starnella v Bratton*, 92 NY2d 836, 838 [1998].) The Court of Appeals defines “accident” as “sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.” (*See Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City*

of *N.Y., Art. II*, 57 NY2d 1010, 1012 [1982].) However, “not every line of duty injury will result in an award of accident disability.” (*Matter of McCambridge v McGuire*, 62 NY2d 563-567-568 [1984].) The statute does not apply to “injuries sustained while performing routine duties but not resulting from unexpected events.” (*Id.*) There must be a precipitating accidental event “which was not a risk of the work performed.” (*Id.*)

Courts have found that ADR is not available for injuries caused by a trip where tripping is a foreseeable risk of the work being performed as opposed to a sudden, unexpected, out of the ordinary event. (*See e.g. Matter of Wallen v Safir*, 261 Ad2d 183 [1st Dept 1999] [police officer failed to show tripping over a raised plank of plywood covering part of a precinct house stairway landing was a sudden and unexpected event]; *Matter of Montgomery v Brown*, 178 AD2d 247 [1st Dept 1991] [police officer tripping on a curb in front of the station house was not an accident because it was not “sudden, fortuitous mischance, unexpected, out of the ordinary”]; *Matter of Sciabarassi v Safir*, 298 AD2d 329 [1st Dept 2002] [tripping on a roof depression was not unexpected for a police officer whose duties included inspecting radio towers on roofs]; *see also Matter of Piccinini v DiNapoli*, 68 AD3d 1212, 1212-1213 [3d Dept 2009] [security service assistant for the State University of New York Police Department who tripped on uneven

section of sidewalk while performing routine patrol was not entitled to ADR because petitioner's injury was not the result of a sudden and extraordinary event that was unrelated to ordinary risks of employment].) In the instant case, petitioner's injuries caused by tripping on an uneven sidewalk were a foreseeable risk of her work as a police officer. Therefore, it was not arbitrary and capricious for the Board to deny petitioner's ADR application. Petitioner has failed to establish, as a matter of law, that her injuries were the result of a sudden, unexpected circumstance and not a risk of the work she performed.

Respondents also argue that petitioner's request for a hearing before the Court should be denied and that a hearing before the Board is not warranted. CPLR 7804 (h) provides that, "if a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith." The instant case does not present any triable issues of fact. Therefore, petitioner's request for a hearing before the Court is denied.

Petitioner's request for a hearing before the Board is also denied. The Court of Appeals has determined that to satisfy due process, an applicant must be given an opportunity before the Board to present evidence and to controvert conclusions of the Medical Board, not to personally appear before the Board. (*See Matter of Meschino v Lowery*, 31 NY2d 772, 774-75 [1972]; *see also Matter of Rinaldi v*

Board of Trustees of the N.Y. City Employees' Retirement Sys., 88 AD2d 870 [1st Dept 1982] [finding that “[i]t is enough if the petitioner is afforded the opportunity to submit evidence in support of his claim and an opportunity, at least before the trustees, to controvert the medical board’s conclusions”]; *Calzeroni v Board of Trustees of the Police Pension Fund*, 877 FSupp 161, 164 [SDNY 1995] [“Due Process requires only an opportunity to be heard, that is, to present argument and evidence which support the applicant’s position to the Board Due Process does not guarantee an opportunity to be heard in person.”].)

CONCLUSION

Accordingly, it is hereby

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

Dated: April 2, 2014
New York, New York

ENTER:

J.S.C.

RON. MICHAEL D. STALLMAN

UNFILED JUDGMENT

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