

Matter of Gakhai v Kelly
2014 NY Slip Op 30963(U)
April 11, 2014
Sup Ct, New York County
Docket Number: 113428/11
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
PARAMJIT GAKHAL,

Petitioner,

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

INDEX NO. 113428/11

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 and THE BOARD OF TRUSTEES
of the Police Pension Fund, Article II,

Respondents.

FILED

APR 16 2014

COUNTY CLERK'S OFFICE
NEW YORK

The following papers numbered 1 to 6 were read on this motion by petitioner for a judgment pursuant to Article 78.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4, 5</u>
Replying Affidavits (Reply Memo) _____	<u>6</u>

Cross-Motion: Yes No

In this CPLR article 78 proceeding, Paramjit Gakhal (petitioner), a retired New York City police officer, challenges the respondents' denial of her application for an accident disability retirement (ADR) pension, finding that she is only entitled to an ordinary disability retirement (ODR) pension. Petitioner argues that this determination should be overturned because it was arbitrary, capricious and contrary to established law.

BACKGROUND

Petitioner was appointed to the uniformed force of the New York City Police Department (NYPD) on July 2, 2001 and served continuously until her ODR. On April 22, 2008, petitioner was assigned to Scooter Day One Training at the Police Academy Driver Education and

Training Unit at NYPD's Scooter Course at Floyd Bennett Field. Before attending the training, as petitioner had never driven a two-wheel or three-wheel scooter, the NYPD required that she obtain a Learner Permit for motorcycle training, which she did on April 17, 2006 (Verified Petition ¶ 5). While operating a two-wheel scooter for the first time, the Line Of Duty (LOD) Injury Report indicates that petitioner "lost control of the scooter causing it to accelerate at an unsafe speed. Thereafter, the scooter struck a metal barrier which caused her to be ejected and crash into a metal cargo container" (*id.* at ¶ 7). Petitioner maintains that she has no recollection of the accident (*id.* at ¶ 6). Since petitioner was transported to Kings County Hospital after she was injured, the LOD Injury Report was completed by supervisors at the scene. Sergeant Shawn Kahn, the Command Supervisor for the Police Academy Driver Education and Training Unit, stated on the LOD Injury Report that petitioner was on duty at the time of the accident, that there was no negligence on her part and that the injuries were considered "performance in Line of Duty" (*id.* at ¶ 7).

According to the statement of Police Officer W. Fradera, an eye-witness to petitioner's accident:

"[t]he instructors yelled out - hit the brakes while running towards her direction, but unfortunately she crashed into the metal barriers & catapulted onto the side of the bin due to the rate of speed. The speed of the scooter had continue to increase up until the point of impact. After hitting the bin, [petitioner] bounced back onto the floor with the metal barriers & scooter landing on top of her" and she lost consciousness (see Respondents' Exhibits "1" - "18" In Support, at exhibits 3, 4).

Petitioner was immediately taken to Kings County Hospital where she was admitted for observation with a concussion and C-6 cervical spine fracture. She was discharged from the hospital on April 23, 2008 (see Kings County Hospital records, respondents exhibit 5). On April 30, 2008 petitioner sought to amend her LOD Injury Report by submitting an affidavit wherein she amended the report to include injuries to her "left leg, left side, ribs, left knee, both hands,

shoulders, head and neck [sic]" (Verified Petition at ¶ 10; Petitioner's exhibit E).

On September 28, 2010, the Police Pension Fund Medical Board (Medical Board) considered petitioner's case. After reviewing petitioner's medical history and conducting an examination, the Medical Board approved petitioner's ADR application, finding that she was disabled from performing the full duties of a police officer due to "Internal Derangement of the Left Knee Status-Post Arthroscopy with Re-tear of the Medial Meniscus Noted on MRI. The competent causal factors is the line of duty injury of April 22, 2008" (see Medical Board Report, respondent's exhibit 6 at ¶ 33). On May 17, 2011, after reviewing petitioner's case again upon a request from the Police Pension Fund based upon additional medical evidence, the Medical Board reaffirmed its previous decision and recommended petitioner's ADR application (see Medical Board Report, respondent's exhibit 7 at ¶ 1, 8). The matter was then referred to the Board of Trustees for its review and final determination.

The Board of Trustees reviewed the petitioner's ADR application on five occasions. The Board of Trustees considered petitioner's case for the fifth and final time on August 11, 2011 (see Respondents' Exhibits "1" -"18" In Support, at exhibit 12). At that meeting, the Board of Trustees reviewed reports and concluded that petitioner's "injury was caused in training by the risk of the activity and there was no unexpected event causing the injury" (*id.* at p. 47). The Medical Board found that petitioner's injury was not caused by an accident within the meaning of the pension laws. By a tie vote of six-to-six, the Board of Trustees denied the petitioner's application for ADR and awarded petitioner ODR. An affirmative vote by seven of the twelve member Board is required to grant the Medical Board's ADR recommendation. This Article 78 proceeding followed on November 30, 2011.

Petitioner asserts that the Board of Trustee's determination should be overturned because it was arbitrary, capricious and contrary to established law, because her injury qualifies as an "accident" within the definition and meaning of the pension laws. Petitioner claims she

was a less experienced trainee, riding a two-wheeled scooter on her first attempt, and her accident was "out of the ordinary" because she never should have been told to use the two-wheeler scooter despite her objections.

Respondents maintain that petitioner failed to demonstrate that her injuries were caused by a sudden, unexpected or out of the ordinary event, which was not a risk of the work she performed. Rather, the Board of Trustees credited the contemporaneous descriptions of the incident and found that the petitioner's injury did not rise to the level of an "accident" as it is defined for disability retirement purposes.

DISCUSSION

Section 13-252 of the Administrative Code of the City of New York governs accident disability retirement for members of the NYPD pension fund. It provides that upon application by a member or by the Commissioner, the Medical Board shall certify to the Board of Trustees that the member is entitled to ADR if a medical examination and investigation by the Medical Board show that the member "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 while a member."

It is well settled that the Board of Trustees is entitled to rely on the Medical Board's recommendations as to causation, even in the face of conflicting evidence, and that its decision as to whether a police officer's disability is the result of an "accidental injury" should not be disturbed unless its factual findings are not supported by substantial evidence or unless its final determination is arbitrary and capricious (see *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 351 [1983]; *Matter of Hipple v Ward*, 146 AD2d 201, 207 [1st Dept 1989]; see also *Matter of Meyer v Board of Trustees of the New York City Fire Dep't*, 90 NY2d 139 [1997]; *Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760-61 [1996]).

The Court of Appeals has defined the term "accidental injury" as a "sudden fortuitous

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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 NY2d 1010, 1012 [1982]). The Court of Appeals has also said that not every line of duty injury will result in an award of accident disability (see *McC Cambridge v McGuire*, 62 NY2d 563, 567-68 [1994]). If an injury is sustained during the performance of routine work duty, it is considered an incident rather than an accident, as opposed to injuries sustained by "precipitating event[s]...which [are] not a risk of the work performed" (*id.*). More recently, the Court of Appeals has held that a petitioner's fall down stairs due to his own misstep was "not so out-of-the-ordinary or unexpected as to constitute an accidental injury as a matter of law" (*id.* at 839).

Petitioner has the ultimate burden of demonstrating that there was an accident and that a causally related disability resulted (see *Matter of Drayson v Board of Trustees of Police Pension Fund*, 37 AD2d 378 [1st Dept 1971]). Based on the above detailed record, the Court finds that the determination by the Board of Trustees denying the petitioner ADR has a rational basis in the record and was not arbitrary or capricious as a matter of law, and should be upheld.

CONCLUSION

For these reasons and upon the foregoing papers, it is,
ORDERED that petitioner's Article 78 petition is denied; and it is further,
ORDERED that the respondents shall serve a copy of this Order, with Notice of Entry, upon the petitioner, and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9-11-14

Enter:


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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