

Matter of Schmoll v Kelly
2014 NY Slip Op 31419(U)
May 30, 2014
Sup Ct, New York County
Docket Number: 101124/13
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

Index Number : 101124/2013
 SCHMOLL, HELMUT
 vs
 KELLY, RAYMOND
 Sequence Number : 001
 ARTICLE 78

PART _____

INDEX NO. _____
 MOTION DATE 5/16/14
 MOTION SEQ. NO. 1

The following papers, numbered 1 to 6, were read on this motion to/for ARTICLE 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) <u>1-3</u>
Answering Affidavits — Exhibits _____	No(s) <u>4-5</u>
Replying Affidavits _____	No(s) <u>6</u>

Upon the foregoing papers, it is ordered that this motion is

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

**THIS MOTION IS DECIDED IN ACCORDANCE
 WITH THE ACCOMPANYING MEMORANDUM DECISION &
 Order**

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: 5/30/14


 _____ J.S.C.
JOAN B. LOBIS

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
NEW YORK COUNTY**

-----X
In the Matter of the Application of
HELMUT SCHMOLL,

Petitioner,

Index No. 101124/13

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

Decision and Order

-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.

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141B).-----X

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Helmut Schmoll, a retired police officer, brings this proceeding under Article 78 of the Civil Practice Law and Rules. He seeks to annul the determination of the Respondent, the Board of Trustees of the Police Pension Fund, Article II (Board of Trustees or Agency), which denied him an Accident Disability Retirement pension. For the following reasons, the petition is granted.

Helmut Schmoll joined the New York City Police Department (NYPD) in 1993. On October 15, 2008, Officer Schmoll injured his right knee when he slipped on a wet substance while inspecting subway track. He underwent two arthroscopic surgeries for the injury, one in April 2009 and another in April 2012. He continued to serve on restricted duty.

In January 2010, it was recommended that a determination be made whether Officer Schmoll was incapacitated for performance of duty and, therefore, ought to be retired. Later that same month, he was seen by an NYPD orthopedic surgeon who found that the officer's prognosis for full duty was fair. Three months later, the same doctor repeated his examination and prognosis.

In April 2010, Officer Schmoll applied for retirement benefits based on his October 2008 injury. He sought Accident Disability Retirement (ADR) under Section 13-252 of the New York City Administrative Code. That type of retirement provides a recipient a tax-free pension of three quarters of his final salary. E.g., Bitchatchi v. Bd. of Trs. of N.Y. City Police Dep't Pension Fund, Art. II, 20 N.Y.3d 268, 275-76 (2012). As a result of that application, the NYPD automatically submitted an application on his behalf for Ordinary Disability Retirement (ODR) under Section 13-251. It allows a retiree with more than ten years of service to receive a taxable pension of one half of his final salary. See 20 N.Y.3d at 275. In his ADR application for enhanced retirement benefits, Officer Schmoll related that he was in constant pain. He also stated that he was unable to run when climbing or descending stairs.

In considering these ODR and ADR applications, the Agency's medical board repeatedly examined Officer Schmoll and reviewed his medical records. On several occasions, the medical board recommended that the applications be disapproved. Officer Schmoll repeatedly challenged those recommendations, each time submitting additional medical evidence to support his claim. In November 2012, he retired from the NYPD on service retirement based on twenty years of service.

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On January 18, 2013, Officer Schmoll was examined for a final time. Following that examination, the medical board orally issued its determination that the officer was not precluded from performing full duty and reaffirmed its prior decision recommending disapproval of the applications for ODR and ADR benefits. In light of the medical board's finding and recommendation, the Board of Trustees voted on May 8, 2013, to disapprove the applications. Upon notification from the Agency of the disapproval, Officer Schmoll brought this proceeding.

Officer Schmoll seeks to annul the Agency's determination denying him ADR benefits. He claims that the determination is arbitrary and capricious. He challenges the absence of a member of the medical board from Officer Schmoll's examination on January 18, 2013. He also claims that the medical board impermissibly failed to articulate the rationale behind its finding that he was not physically incapacitated. The officer avers that the determination is tainted by the Board of Trustees' reliance on the medical board's legally deficient recommendation that included the finding that Officer Schmoll was not incapacitated.

Respondents oppose the petition. In their answer, they contend that the Agency's determination was proper because the Board of Trustees was entitled to rely upon its medical board's finding and recommendation. They point to conflicting medical opinions regarding the officer's range of motion to argue that the determination was supported by credible medical evidence. They do not address Officer Schmoll's challenge to the missing board member at his examination on January 18, 2013, however.

In an Article 78 proceeding, a court reviews an administrative action to determine, among other things, whether an agency's decision is affected by an error of law. C.P.L.R. § 7803(3); see, e.g., S&R Dev. Estates, LLC v. Feiner, 112 A.D.3d 945 (2d Dep't 2013) (zoning board's determination annulled where it violated town code); Wells Fargo Bank, N.A. v. Mastromarino, 98 A.D.3d 662 (2d Dep't 2012) (allegation that county treasurer failed to provide actual notice in violation of county's administrative code stated cause of action that determination was affected by error of law).

Applying that standard, this Court considers whether the failure of a member of the medical board to attend Officer Schmoll's medical examination constituted an error of law and, therefore, renders the Agency's determination arbitrary and capricious. Section 13-123(a)(1) of the New York City Administrative Code mandates that there "shall be a medical board of three physicians." The board shall "arrange for" and "pass upon all medical examinations . . . and shall report . . . its conclusions and recommendations . . ." Id. § 13-123(a)(3); see, e.g., Meschino v. Lowery, 34 A.D.2d 255, 257 (1st Dep't 1970) (medical board is vested by law with the power to conduct medical examination of applicant). Section 13-123 allows for the creation of additional groups of examiners to facilitate the performance of the board's functions and duties, but the law explicitly mandates that those groups be comprised of "three physicians." Id. § 13-123(a)(2).

ADR benefits are available, in pertinent part, when an examination and investigation show that an applicant is physically incapacitated for the performance of duty as a natural and proximate result of an accidental injury received in the line of duty, and that incapacitation was not the result of the applicant's willful negligence. See id. § 13-252. An applicant for ADR benefits has

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the burden of proving the existence of the disability and that the disability is causally related to an injury sustained in the line of duty. See, e.g., Drayson v. Bd. of Trs., 37 A.D.2d 378, 380 (1st Dep't 1971). A medical board's conclusion that an applicant is not incapacitated is binding upon the Board of Trustees. See Canfora v. Bd. of Trs., 60 N.Y.2d 347, 351 (1983).

In this instance, it is unrefuted that a member of the medical board was absent from Officer Schmoll's January 2013 examination. Based on this record, the Court cannot say that the absent physician's presence would not have affected the result in this case were that physician to have observed the officer during the medical examination. Compare, e.g., Piotrowski v. McGuire Manor, Inc., 2014 WL 1717033 (4th Dep't May 2, 2014) (court's erroneous jury charge regarding proximate cause required reversal of judgment and new trial) with C.P.L.R. § 2001 (court may disregard mistake, omission, defect or irregularity if substantial right of party is not prejudiced). Indeed Respondents themselves in their memorandum of law in support of their answer opposing the petition concede that the medical board "has the responsibility of determining, after examining all of the evidence, whether petitioner had a right knee condition that disabled him." Absent any finding by the medical board that Officer Schmoll was incapacitated, the Board of Trustees did not have to reach nor does the record show that it addressed the issue of whether any incapacitation was proximately caused by a service-related injury. Instead, it simply relied on the medical board's finding of no incapacitation, which was based on an examination by two of the three physicians comprising that board. Under the facts in this case, the Agency's failure to comply with Section 13-123's requirement that medical boards operate in groups of three physicians requires that this Court reverse the Agency's determination. 2014 WL 1717033, at *2. Based on this analysis, the Court need not consider the remainder of Petitioner's arguments. Accordingly, it is

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ADJUDGED that Officer Schmoll's petition is granted; the determination is reversed,
and the proceeding is remanded for further proceedings consistent with this Court's determination.

Dated: *May 30*, 2014



JOAN B. LOBIS, J.S.C.

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