

<b>Matter of Drew v Kelly</b>
2014 NY Slip Op 31493(U)
June 9, 2014
Supreme Court, New York County
Docket Number: 100680/2013
Judge: Margaret A. Chan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

Index Number : 100680/2013

DREW, CHRISTOPHER

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

PART 52

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 5, were read on this motion to/for Article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 3, 4

Replying Affidavits \_\_\_\_\_ | No(s) 5

Upon the foregoing papers, it is ordered that this motion is Art. 78 is

**MOTION DETERMINED PURSUANT TO  
ANNEXED DECISION AND ORDER**

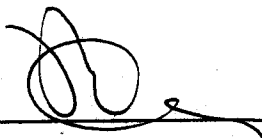
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**FILED**

JUN 11 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/9/14

  
\_\_\_\_\_, J.S.C.  
**HON. MARGARET A. CHAN**

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**

**PRESENT: Hon. Margaret A. Chan**  
*Justice*

**PART 52  
DECISION AND ORDER**

---

In the Matter of the Application of  
**CHRISTOPHER DREW,**  
**Petitioner,**

Index # 100680/2013

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

**RAYMOND KELLY, POLICE COMMISSIONER AND  
CHAIRMAN OF THE BOARD OF TRUSTEES OF THE  
POLICE PENSION FUND, ARTICLE II, THE BOARD OF  
TRUSTEES OF THE POLICE PENSION FUND, ARTICLE  
11, NEW YORK CITY POLICE DEPARTMENT AND THE  
CITY OF NEW YORK,**

**FILED**

JUN 11 2014

**Respondents.**

---

**COUNTY CLERK'S OFFICE  
NEW YORK**

Petitioner Christopher Drew, a retired New York City police detective, brought this Article 78 proceeding to annul the determination of the respondents that denied his application for an accident disability retirement (ADR) pension on the ground that there was insufficient medical evidence to substantiate a claim of disability. Petitioner argued that the determination by respondents was arbitrary and capricious and contrary to established law. Respondents submitted an answer to the petition and argued that the determination denying petitioner's ADR pension was supported by credible medical evidence and was not arbitrary nor capricious. The decision and order is as follows:

*Facts*

Petitioner was appointed a New York City Police Department police officer on January 20, 1987, and rose to the rank of detective during his tenure. On May 5, 2006, while attempting to climb over a chain link fence in pursuit of a criminal suspect, petitioner was caught by his shirt sleeve on the fence causing him to hang by his arm. Petitioner immediately reported an injury to his shoulder and neck. Petitioner directly went from the accident scene to an emergency room and from there was released with instructions to follow up with additional medical care.

On December 18, 2006, petitioner was examined by Dr. Howard Levy, an orthopedic surgeon. Dr. Levy's impression was "[r]ight shoulder possible labral tear and possible neuropathy" (Resp Answer, Exh 6). Petitioner was referred for a MRI of the right shoulder that revealed "right shoulder demonstrates mild tendinosis of the supraspinatus but no rotator cuff tear. There is bicipital tendinosis and degeneration of the biceps anchor and superior labrum with small nondisplaced split of the posterior inferior labrum with tiny paralabral cyst" (Resp Answer, Exh 7). In 2007 and 2008, petitioner underwent additional examinations by a neurologist and a different orthopedic surgeon, and petitioner had an MRI of his cervical spine. Petitioner was authorized for surgery of the right shoulder in December, 2008, that took place about a year later on January 19, 2010. The postoperative report indicated there was a right shoulder superior labrum tear and impingement syndrome that was operated on using a "SLAP repair" and "subacromial decompression" (Resp Answer, Exh 11; Petition, Exh F). Petitioner underwent physical therapy from March through October, 2010.

In June 2010, petitioner was placed on restrictive duty by NYPD orthopedic surgeon Dr. Russell Miller. In August 2010, Dr. Levy noted petitioner's limited recovery and recommended his retirement (*see* Resp Answer, Exh 14). The NYPD conducted a physical examination of petitioner in November 2010, and found no objective findings of a disability. It recommended disapproval of both petitioner's Ordinary Disability Retirement (ODR) as well as his Accidental Disability Retirement (ADR).

In February 2011, the Board of Trustees of the Police Pension Fund decided to remand petitioner's applications for ADR and ODR back to the Medical Board for further review based on additional evidence (*see* Resp Answer, Exh 16). Beyond reviewing the additional medical reports provided by petitioner, the Medical Board also conducted another physical examination on March 21, 2011. In its report, also dated on March 21, 2011, the Medical Board reaffirmed its decision to deny the ADR and ODR applications as it did not find that petitioner suffered from any disability (*see* Resp Answer, Exh 17).

In August 2011, petitioner's ADR and ODR applications were again remanded to the Medical Board for reevaluation in consideration of new evidence and again, in October 2011, the Medical Board reaffirmed its denial of the applications. Once more, in February 2012, petitioner's ADR and ODR applications were remanded to the Medical Board based on new evidence and the Medical Board reaffirmed its previous decision in favor of disapproval. The final determination was made in January 2013, after the Board of Trustees again considered petitioner's applications, but this time found there was no new evidence to consider. On January 11, 2013, the Board of Trustees informed petitioner that it again was denying his application for a disability retirement.

## Discussion

In a proceeding pursuant to CPLR Article 78, the scope of judicial review is limited to the issue of whether the administrative action has a rational basis for its determination (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). The determination of a Medical Board in consideration of an disability determination will not be disturbed unless it is not rational or is arbitrary or capricious (*see Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760 [1996]). "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v Board of Educ.* at 231). Deference is given to the agency in interpreting the regulations it administers because of its expertise in those matters, and its determination must be upheld as long as it is reasonable (*see Chin v New York City Bd. of Standards and Appeals*, 97 AD3d 485, 487 [1st Dept 2012]).

When the Medical Board makes a decision supported by credible evidence and the Board sufficiently sets forth the reasons for its conclusions it shall be upheld (*see id.*; *Goodacre v Kelly*, 96 AD3d 625 [1<sup>st</sup> Dept 2012]; *Agnelli v Kelly*, 96 AD3d 471 [1<sup>st</sup> Dept 2012]). Further, "[w]hile the Medical Board is entitled to resolve conflicts in the medical evidence and rely on its own physical examinations of the applicant, fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees before petitioner's claim to accident disability retirement may properly be rejected, and that the Medical Board clearly state the reasons for its recommendations" (*Matter of Kiess v Kelly*, 75 AD3d 416 [1<sup>st</sup> Dept 2010][internal quotations and citations omitted]).

Respondents argued that it reviewed petitioner's disability retirement application four (4) times and conducted multiple physical examinations of petitioner. More specifically, they pointed to the November 8, 2010 Medical Board report that stated petitioner had "well-healed portal sites" and functional range of motion of the elbow and wrist, and that his left upper extremity function was intact (*see Resp Answer*, Exh 14). A later examination, on March 21, 2011, found "minor discomfort" of the bicep tendon and "negative scapular winging" (*see Resp Answer*, Exh 25). By July 16, 2012, the Medical Board found that petitioner was in "no acute distress" and that the petitioner was not scheduled for any therapy, injections, or surgery at that time and had not undergone any recent physical therapy treatments (*see Resp Answer*, Exh 27).

Yet, petitioner supplied medical reports from various treating doctors that had a more guarded opinion of his recovery. After petitioner's right shoulder surgery and several months of physical therapy Dr. Howard Levy authored a report on August 16, 2010, that recommended physical therapy to improve petitioner's loss of motion and decreased strength in his shoulder but Dr. Levy concluded that petitioner will not fully recover from his injury (*see Pet*, Exh I). On January 19, 2011, Dr. Andrew Rokito stated that he too observed limited range of motion and indicated that petitioner's recent MRI found a degenerative change in the right shoulder (*see Pet*,

Exh M). Another report dated July 29, 2011, showed that an EMG/NCV test found evidence of right C6-7 radiculopathy (*see* Pet, Exh R). Dr. Russell Warren recommended further surgery related to his impression of bicep tendonitis (*see* Pet, Exh T). However, another one of plaintiff's treating doctors advised against the bicep surgery. Dr. Paul Lerner authored reports concerning petitioner's condition on October 20, 2011, February 3, 2012, and November 19, 2012, that concluded petitioner was disabled and not fit to work as a police detective based on objective medical findings (*see* Pet, Exh U, X, and FF).

Petitioner argued that the Medical Board ignored all the reports that made use of objective findings and argued that it was error for the Board of Trustees not to remand petitioner's final request for a fourth review to the Medical Board after he furnished a copy of the Dr. Lerner's November 19, 2012 examination report (the 11/19/12 report) to the Police Pension Fund. The report indicated that Dr. Lerner found limited range of motion of the neck and a limitation in abducting the right arm at the shoulder (*see* Pet, Ex FF). Moreover, Dr. Lerner referred to the duration of petitioner's injuries, indicating that he found them permanent after conservative and surgical intervention (*see id*). A copy of the minutes of the Board of Trustees meeting showed that the Board of Trustees determined that the 11/19/12 report was substantially the same as prior reports and was not based on any new evidence and thus, they did not remand the matter to the Medical Board for another review. The law makes plain that the available medical evidence must be considered by the Medical Board (*see Kiess v Kelly*, 75 AD3d 416). Thus, the failure of the Board of Trustees to remand the matter for the fourth time was in error.

It is hereby

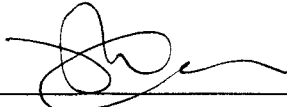
ORDERED, that the petition is granted in that the determination of the Board of Trustees dated January 11, 2013 is annulled and the matter is remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees consistent with this decision and order.

This constitutes the decision and order of the court.

**FILED**

JUN 11 2014

**Dated: June 9, 2014**



*Margaret A. Chan, J.S.C.*

**COUNTY CLERK'S OFFICE  
NEW YORK**