

Carter v Bratton

2015 NY Slip Op 32041(U)

October 2, 2015

Supreme Court, New York County

Docket Number: 100631/2015

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100631/2015

CARTER, CLEE

vs

BRATTON, WILIAM J.

Sequence Number : 001

ARTICLE 78

PART 6

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

FILED

OCT 14 2015

The following papers, numbered 1 to _____, were read on this motion for the

Notice of Motion/Order to Show Cause — Affidavits — Exhibits NEW YORK

No(s) 1-3

Answering Affidavits — Exhibits _____

No(s) 4-6

Replying Affidavits _____

No(s) _____

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

*MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER
and the clerk of court
shall enter a judgment
of dismissal*

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

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OCT 14 2015

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/2/15

ACCOMPANYING DECISION AND ORDER
ON PETITION FOR WRIT OF HABEAS CORPUS

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
CLEE CARTER,

Petitioner,

Index No. 100631/2015

-against-

**Decision, Order, and
Judgment**

WILLIAM J. BRATTON, 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,

FILED

Respondents.

OCT 14 2015

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

COUNTY CLERK'S OFFICE
NEW YORK

Clee Carter, petitioner, appeals an order by respondents which denied her accidental disability retirement benefits (ADR) and granted ordinary retirement benefits. As relief, she seeks a judgment annulling respondents' determination and ordering respondents to retire her with an ADR status retroactive to her retirement date with back benefits and interest. Alternatively, she seeks a hearing on the medical issues or an order directing respondents to hold such a hearing.¹ Respondents oppose the petition. For the reasons below, the Court dismisses the petition.

Petitioner became a police officer on August 30, 1993. On June 17, 2012, she suffered a line of duty (LOD) injury when she tripped on the cracked edge of a sidewalk as she walked to her police car. She sustained injuries to her left knee, right hand, right wrist and arm, right elbow, and right hip. She initially went to North Central Hospital for her injury, and

¹ Petitioner also requested the record, but respondents rendered this moot by providing exhibits.

subsequently she was evaluated at Montefiore Medical Center Department of Orthopedics. She began a course of treatment with Louis C. Rose, an orthopedic surgeon, on July 16, 2012. On September 17, 2013, she filed an application for ADR indicating that she could no longer perform full duty due to her LOD injury. Contemporaneously, respondent Commissioner filed an application for ordinary disability benefits.

The Police Pension Fund Article II Medical Board (Medical Board) examined petitioner on August 25, 2014 and determined that she suffered from a post-LOD injury stemming from the June 17, 2012 injury. The Medical Board further recommended that respondents approve her for ADR. Respondent the Board of Trustees of the Police Pension Fund, article II (the Board) first reviewed petitioner's application on January 14, 2015. The Board members did not dispute that she was disabled due to her LOD injury. Instead, they debated whether petitioner's LOD injury additionally qualified as an accident such as to entitle her to ADR. In particular, discussing the conspicuousness of the crack and citing to New York case law, they questioned whether petitioner's trip was ordinary and in the normal course of her job or was sudden and unexpected. Unable to resolve the issue, the Board tabled the matter until February 11, 2015. On that date the Board voted 6-6, which effectively denied petitioner's application. See City of New York v. Schoeck, 294 N.Y. 559 (1945).

Petitioner withdrew her request for disability benefits, instead opting for ordinary retirement. Then, she commenced this proceeding. She argues the Board's determination was arbitrary, capricious, and unlawful. She alleges that the Board improperly decided that her injury was not an accident, and that the Board improperly denied her the right to a hearing. In opposition,

respondents state that the Board's decision was proper and in accordance with all applicable guidelines. They note that only the Medical Board's determination that petitioner is disabled was binding on them, but that they had the responsibility of determining 1) whether the disability stemmed from the LOD injury and 2) whether the injury was the result of an accident within the meaning of the laws governing disability retirement. Respondents allege that they applied the law properly because "tripping over the sidewalk in front of the precinct . . . was not a sudden fortuitous mischance, unexpected, and out of the ordinary."

In an article 78 proceeding challenging a denial of ADR, the court sustains the determination unless it is "arbitrary, capricious, an abuse of discretion or contrary to law." Jefferson v. Kelly, 51 A.D.3d 536, 537 (1st Dep't 2008). When the denial of ADR is the result of a tie vote, the court intervenes only if "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident." Meyer v. Bd. of Trustees, 90 N.Y.2d 139, 145 (1997)(internal quotations and citations omitted); see Devers v. Kelly, 127 A.D.3d 640, 640 (1st Dep't 2015). However, it is the responsibility of the Board to determine whether there was proximate cause and whether the injury resulted from an "accident." It is the petitioner who has the burden of demonstrating that she or he is entitled to ADR. Yurko v. DiNapoli, 122 A.D.3d 1047, 1048 (3rd Dep't 2014).

The fact that the injury occurred in the line of duty does not mean, by itself, that the applicant is entitled to ADR. Pastalove v. Kelly, 120 A.D.3d 419, 420 (1st Dep't 2014). ADR benefits are available when an examination and investigation shows that the applicant is physically or mentally incapacitated from the performance of duty as a natural and proximate result of an

“accidental injury.” See Administrative Code of City of New York § 13-252. An accident is defined as “a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact,” and an injury which is not the result of an unexpected event and occurs during the performance of normal duties does not constitute an accidental injury. Pastalove, 120 A.D.3d at 420 (citation and internal quotation marks omitted). When an officer slipped on a wet ramp while he exited a restaurant, with knowledge that the ramp was wet, the Court of Appeals determined that it was rational to conclude that the fall was not an unexpected event and the petitioner was not entitled to ADR. Kenny v. Di-Napoli, 11 N.Y.3d 873, 874 (2008). In deciding the issue of whether a fall is an accident, the board considers whether the applicant should have noticed or otherwise been aware of the obstacle over which he or she fell. See, e.g., Yurko, 122 A.D.3d at 1047 (petitioner’s fall into a pothole was not “accident,” as the pothole was readily observable); Gray v. Kerik, 15 A.D.3d 275 (1st Dep’t 2005)(when petitioner twisted his knee as he exited his patrol car, it was not an accident); Flood v. Kelly, 2013 Slip. Op. 32388(U) (Sup. Ct. N.Y. County 2013)(avail at 2013 WL 55000385)(court reversed denial of ADR benefits based on the finding that petitioner, who fell while traversing unfamiliar territory when his foot became lodged in crack in the pavement, had suffered an accident).

Based on the facts at hand, the Board’s decision is not arbitrary. The record shows that the members of the Board understood the law, which required it to determine whether petitioner’s injury resulted from an accident. In accordance with case law, it examined whether or not the crack in the sidewalk, the pothole, or other depression in the ground was conspicuous and thus “expected.” Moreover, the Board members debated the conspicuousness of the crack in the sidewalk at length and resolved, through the tie vote, that the crack was sufficiently visible to

render her fall as occurring in the ordinary course of duty. As there is no error of law or irrationality, it is

ORDERED that the petition is dismissed.

Dated: *Oct. 2,* 2015

FILED

OCT 14 2015

ENTER:



JOAN B. LOBIS, J.S.C.

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NEW YORK