

Matter of Severe v Bratton

2015 NY Slip Op 32042(U)

January 7, 2015

Supreme Court, New York County

Docket Number: 100669/2014

Judge: Cynthia S. Kern

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1/12/15
B

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100669/2014

SEVERE, JEAN

vs

BRATTON, WILLIAM J.

Sequence Number : 001

ARTICLE 78

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

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is decided in accordance with the annexed decision.

FILED
JAN 12 2015
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/7/15

OK, J.S.C.

- 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
COUNTY OF NEW YORK: Part 55

-----X

In the Matter of the Application of

JEAN SEVERE,

Petitioner,

Index No. 100669/14

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

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,

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

**DECISION/ORDER
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Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	3

Petitioner Jean Severe brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge the determination made by respondents 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 ("PPF"), the Board of Trustees of the PPF (the "Board of Trustees") and the City of New York (the "City") denying petitioner's application for

line of duty accident disability retirement benefits. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner was appointed to the uniformed force of the New York City Police Department (“NYPD”) as a police officer on July 1, 2003. Petitioner alleges that on or about January 4, 2009, he suffered a Line of Duty (“LOD”) injury when his Radio Motor Patrol (“RMP”) was struck on the passenger side by a civilian vehicle. After the accident, petitioner was treated for injuries to his neck and back at Bellevue Hospital and was discharged. Subsequently, petitioner returned to full duty. On or about June 14, 2009, petitioner alleges he again suffered an LOD injury when his RMP was involved in another accident. After the accident, petitioner was treated for injuries to his neck and back at Kings County Hospital and was discharged. Due to his injuries, on or about June 19, 2009, petitioner began a course of treatment with a chiropractor, which allegedly lasted until May 2012. Additionally, on or about July 24, 2009, petitioner began a course of treatment with an orthopedic surgeon which included, *inter alia*, two surgeries and physical therapy.

On or about June 14, 2010, petitioner filed an application for Accident Disability Retirement (“ADR”) (the “2010 ADR Application”). Specifically, petitioner complained of constant pain to his left shoulder and that he had “lost mobility and strength of [his] left arm. There is a feeling of tingling down my left arm to my fingers.” Petitioner further stated that “[a]s a result, [he was] unable to perform full police duty.” At the same time, respondents filed an application for Ordinary Disability Retirement (“ODR”) on behalf of petitioner (the “2010 ODR Application”).

On or about July 6, 2010, while the two disability applications were still pending,

petitioner allegedly suffered a third LOD injury to his arm when a metal object inside an air conditioning vent in the ceiling fell on his arm. After the incident, petitioner was treated for injuries to his left arm at Lutheran Hospital and was discharged. On or about August 6, 2010, the PPF's Article II Medical Board (the "Medical Board") considered the two disability applications and examined both petitioner's physical condition and the evidence submitted in support of his application. The Medical Board found that petitioner "maintained a defensive posture" and displayed "subjective guarding" throughout the physical examination rendering it "totally useless" and "completely unreliable." However, the Medical Board found that petitioner's "medical records showed that he underwent a relatively simple arthroscopic procedure which went relatively well and showed little in terms of other anatomic findings that would preclude him from performing full duty." Thus, the Medical Board concluded that petitioner was not disabled and disapproved both the 2010 ADR Application and the 2010 ODR Application.

Thereafter, petitioner's application for ADR was considered by the PPF's Board of Trustees (the "Board of Trustees") and remanded back to the Medical Board for the consideration of new evidence. On February 11, 2011, the Medical Board reconsidered both disability applications by examining the newly available medical evidence, interviewing the petitioner and conducting a physical examination of the petitioner. The Medical Board concluded that the clinical and documentary evidence plus its physical examination of petitioner did not demonstrate that petitioner was precluded from performing the full duties of a police officer. Specifically, the Medical Board found that during the physical examination, petitioner's "anterior and posterior shoulder showed no signs of atrophy" and that petitioner's shoulder girdle was "intact on all planes." Thus, the Medical Board reaffirmed its prior decision and recommended

disapproval of the 2010 ADR Application and the 2010 ODR Application.

Thereafter, petitioner's applications were again considered by the Board of Trustees and remanded back to the Medical Board for the consideration of new evidence. On or about September 16, 2011, the Medical Board reconsidered both disability applications by examining the newly available medical evidence, interviewing the petitioner and conducting a physical examination of the petitioner. The Medical Board concluded that petitioner was not disabled due to the injuries complained of in his left shoulder and neck. However, the Medical Board concluded that petitioner was suffering from "cubital syndrome left elbow and bilateral carpal tunnel syndrome," which was unrelated to his LOD injuries and which would interfere with his functioning as a police officer. Thus, the Medical Board rescinded its prior decision and recommended approval of the 2010 ODR Application and disapproval of the 2010 ADR Application.

Thereafter, petitioner's applications were again considered by the Board of Trustees at a meeting held on February 8, 2012. At that meeting, Christopher McGrath, a consultant to the Patrolmen's Benevolent Association ("PBA"), argued that the matter should be remanded back to the Medical Board for the consideration of new evidence, which allegedly included a new magnetic resonance imaging ("MRI") report of petitioner's left shoulder showing "some partial tears." The Board of Trustees denied the request for a remand but could not agree on whether to grant petitioner's 2010 ADR Application and its vote resulted in a tie. Thus, petitioner's 2010 ADR Application was denied and petitioner was awarded the benefit of ODR.

Less than a week later, on or about February 13, 2012, petitioner filed a second application for ADR complaining of the same injuries and alleging that he was unable to perform

the full duties of a police officer (the “2012 ADR Application”). At the same time, respondents filed a second application for ODR on behalf of petitioner (the “2012 ODR Application”). While those applications were pending, on or about April 13, 2012, petitioner retired from the NYPD on an ODR pension.

On or about May 18, 2012, the Medical Board considered petitioner’s 2012 ADR Application by examining the available medical evidence, interviewing petitioner and conducting a physical examination of petitioner. The Medical Board again concluded that there were no objective findings precluding the petitioner from performing full duties of an NYPD officer with regard to petitioner’s left shoulder or cervical spine. During the physical examination of the petitioner, the Medical Board further found that the “MRI scan that he recently had...showed degenerative disc disease...but no evidence of cord impingement...consistent with the normal aging of the cervical spine but not consistent with any nerve root pathology.” Thus, the Medical Board recommended disapproving both applications.

Thereafter, petitioner’s application was considered by the Board of Trustees at its meeting on November 14, 2012 at which the applications were remanded to the Medical Board for the consideration of new evidence. On or about January 25, 2013, the Medical Board reconsidered the two 2012 disability applications by examining the newly available medical evidence, interviewing the petitioner and conducting a physical examination of the petitioner. The Medical Board again concluded that there were no significant objective physical findings that would support an orthopedic disability for either petitioner’s left shoulder or his cervical spine and thus, recommended disapproving both applications.

Thereafter, petitioner’s 2012 applications were considered by the Board of Trustees at its

meeting on July 18, 2013 at which the applications were remanded to the Medical Board for the consideration of new evidence. On or about December 13, 2013, the Medical Board again reconsidered petitioner's 2012 disability retirement applications and concluded that although there were "minimal residual" findings in petitioner's left shoulder following his latest surgery, they were not sufficient to preclude the petitioner from performing the full duties as a police officer. Specifically, the Medical Board found

the [petitioner] underwent an additional operative procedure on the left shoulder which did not help him. The final evaluation by his orthopedic surgeon...revealed a satisfactory result; although the [petitioner] feels the surgery did not help his pain...Today's shoulder examination reveals mild residuals which would not preclude him from performing full duty. He is still disabled by his bilateral carpal tunnel syndrome which is a previously approved [ODR] and not part of this application.

Thus, the Medical Board reaffirmed its earlier decision and again recommended disapproval of both disability applications.

On or about March 12, 2014, the Board of Trustees, by a unanimous vote, adopted the Medical Board's recommendation and denied both the 2012 ADR Application and the 2012 ODR Application. Thus, petitioner remained retired under ODR. Petitioner then commenced the instant Article 78 proceeding seeking to challenge the denial of his ADR application.

When the Medical Board reviews an application for ADR, it must determine if the applicant is disabled and can no longer serve and, if so, whether he was disabled as a result of a service-related accident. *See Meyer v. Board of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 144 (1997). Whether a police officer applying for ADR is actually disabled is a threshold issue to be determined by the Medical Board and must be sustained by this court as

long as such determination is supported by “some credible evidence.” *Matter of Borenstein v. New York City Employees’ Ret. Sys.*, 88 N.Y.2d 756, 76-61 (1996). The issue of whether an applicant has the injury claimed and whether that injury incapacitates the applicant from the performance of city-service is solely for the Medical Board to determine and its determination on said issue is binding on the Board of Trustees. *Id.* Where the Medical Board issues a report to the Board of Trustees “detail[ing] what medical proof ha[s] been considered, specific[s] the nature of respondent’s complaints and outline[s] the results of its physical examinations of respondent, concluding that respondent’s physical condition was not disabling for duty,” a court may not substitute its judgment for that of the Medical Board. *Id.*

In the instant action, the Board of Trustees’ decision denying petitioner’s 2012 ADR Application must be upheld as such determination was supported by some credible evidence. During its review of petitioner’s applications, the Medical Board repeatedly detailed the history of petitioner’s complaints and treatment, reviewed and addressed all relevant medical documentation and performed physical examinations of petitioner’s left shoulder and neck. The Medical Board also reviewed and addressed all relevant medical documentation and performed physical examinations of petitioner’s left shoulder when he appeared before the Medical Board three times from 2010 through 2011. Based on the evidence, the Medical Board concluded that petitioner had not met his burden of substantiating that he was unable to perform full police duties due to an orthopedic condition in his left shoulder and neck. Specifically, the Medical Board noted that the MRI test undergone by petitioner in 2011 demonstrated that his left shoulder injuries were due to post-surgical changes and that “there were clearly no re-tears.” Additionally, after a surgery performed on petitioner in 2013, the post-operative diagnosis was “left shoulder

anterior subluxation,” which the Medical Board concluded meant that “[n]o labral pathology was identified.” The Medical Board further relied on a post-surgical visit petitioner had with his doctor during which the doctor noted petitioner was “doing well” and that petitioner’s “range of motion and strength continued to improve.” Regarding petitioner’s neck, the Medical Board found that two MRI scans undergone by petitioner demonstrated that petitioner had degenerative changes in his cervical spine that were consistent with the normal aging process but were not clinically significant. Additionally, during its physical examination of petitioner, the Medical Board noted that petitioner exhibited “subjective guarding” but found no significant objective physical findings that would be consistent with a disability due to an orthopedic condition. Finally, the Medical Board noted that petitioner’s neck showed “normal alignment” and no evidence of atrophy.

To the extent petitioner asserts that he is disabled due to his neck and shoulder injuries because his treatments have not helped and he feels continuous pain, such assertion is without merit as he has failed to point to any credible evidence in the record to identify an objective physical condition in his left shoulder and neck that would prevent him from performing the full duties of a police officer.

Further, to the extent that the petition requests a hearing or a trial before this court on the factual or medical issues, such request must be denied. CPLR § 7804(h) provides that “if a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith.” However, the instant case presents no triable issues of fact. Rather, the only issue before this court is a legal one - whether respondents’ determination to deny petitioner’s application for ADR based on the fact that petitioner was not disabled was based on some credible evidence.

Finally, to the extent that the petition requests a hearing before the Board of Trustees, such request must also be denied as petitioner has failed to show that due process requires a hearing. Courts have held that due process does not require that the petitioner personally appear before the Board of Trustees as an applicant must only be given an opportunity to controvert the conclusions of the Medical Board, not to personally appear before the Board of Trustees. *See Meschino v. Lowery*, 31 N.Y.2d 772 (1972)(upholding the Board of Trustee's decision to permit the applicant to present documentary or testimonial evidence but not to permit him to have a full adversarial hearing); *see also Rinaldi v. Bd. of Trs. of the New York City Employees' Ret. Sys.*, 88 A.D.2d 870 (1st Dept 1982)(holding that an applicant must be given an opportunity to controvert the Medical Board's conclusions but does not specify that a personal appearance by the applicant is required). As petitioner was given an opportunity to submit evidence in support of his ADR application and to controvert any findings made by the Medical Board, a hearing is not warranted.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 1/7/15

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