

Matter of Bonet v Kirkpatrick
2017 NY Slip Op 31992(U)
March 16, 2017
Supreme Court, Clinton County
Docket Number: 2016-1181
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON X

In the Matter of the Application of
ALFREDO BONET, #05-A-6384,
Petitioner,

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #09-1-2016-0469.42
INDEX #2016-1181**

-against-

MICHAEL KIRKPATRICK, Superintendent,
DR. KOENIGSMAN, Deputy Commissioner and
Chief Medical Officer, The State of New York Dept.
of Corrections and Community Services¹,
Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Alfredo Bonet, verified on September 9, 2016 and filed in the Clinton County Clerk's Office on September 14, 2016. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the determination to discontinue a nerve medication previously prescribed.

This Court issued an Order to Show Cause on September 27, 2016. The Court has received and reviewed the respondents' Answer and Return, together with a Confidential Exhibit containing medical records of the petitioner, as well as a Letter-Memorandum submitted by Christopher J. Fleury, Esq., Assistant Attorney General, dated December 7, 2016. No Reply was received from the petitioner.

The petition challenges the determination by Nurse Practitioner Amber Lashway to discontinue the petitioner's prescription for 600 mg of Neurontin. Petitioner filed an Inmate Grievance #CHA-7166-16 alleging that he had been advised that as a result of a new policy, he was no longer eligible to receive the Neurontin as it was deemed not medically necessary. On March 15, 2016, the Inmate Grievance Resolution Committee (hereinafter

¹ Petitioner erroneously named "Community Services" instead of "Community Supervision."

referred to as “IGRC”) denied the grievance and stated: “The grievant is advised Neurontin is no longer medically indicated for him. EMG test was negative.” Resp. Ex. B.

The petitioner appealed the IGRC decision and on April 13, 2016, the Superintendent affirmed the IGRC response as follows:

“The grievant alleges that his medication (Neurontin) was discontinued inappropriately by medical staff at Clinton annex. The grievant is requesting a copy of the policy that authorizes the discontinuation of Neurontin.

An investigation was conducted by the Nurse Administrator. The DOCCS policy is to have sound evidence of Neuropathy before allowing the use of Neurontin. The grievant had an Electromyography (EMG) that had negative results and as a result Nuerontin (*sic*) is no longer indicated for him. The grievant may request copies of medical policies through the FOIL office.

Upon conclusion of the investigation the grievants (*sic*) medication was discontinued in accordance with departmental policy and there is no evidence of staff malfeasance.” Resp. Ex. C.

On March 14, 2016, the petitioner appealed the Superintendent’s decision to the Central Office Review Committee (hereinafter referred to as “CORC”). On August 24, 2016, the CORC issued the following decision:

“Upon full hearing of the facts and circumstances in the instant case, and upon recommendation of the Division of Health Services, the action requested herein is hereby accepted only to the extent that CORC upholds the determination of the Superintendent for the reasons stated.

CORC notes that the grievant was seen by his provider on 1/27/16, 2/9/16 and 6/27/16 and is approved for a follow up appointment. It is noted that Neurontin was discontinued on 1/27/16 because his provider determined it was not medically necessary based on a negative EMG. CORC further notes that his 2/12/16 x-rays revealed degenerative disc disease and that he was notified of the results via correspondence dated 8/18/16.

CORC asserts that, consistent with Health Services Policy Manual Item #6.01, the Facility Health Services Directors (FHSD) have the sole responsibility for providing treatment to the inmates under their care.

With regard to the grievant's appeal, CORC has not been presented with sufficient evidence of improper medical care or malfeasance by staff and advises him to address further concerns via sick call." Resp. Ex. E.

The gravamen of the petition is that while the medical staff determined that Neurontin was no longer medically necessary based upon a negative Electromyography (hereinafter referred to as an "EMG") test, the petitioner denies having had an EMG on his left foot which he asserts is causing him pain in addition to his back pain. The petitioner admits to having had x-rays on his back but he seeks to have additional testing, such as an MRI to confirm his condition.

Respondents argue that the petitioner has failed to exhaust his administrative remedies prior to commencing the instant action. Specifically, respondents argue that "Petitioner claims that Respondent failed to provide him with proof of the EMG test. However, Petitioner does not allege nor does he provide any evidence that he has ever made a written request to obtain a copy of the EMG report pursuant to DOCCS Health Services Manual #4.04." Letter-Memo, p. 4. In addition, the respondents argue that the Court is limited to review whether the determinations regarding the petitioner's grievance was arbitrary and capricious or an abuse of discretion.

Preliminarily, the petitioner has exhausted his administrative remedies prior to commencing the instant action. As evidenced by Exhibit D attached to the petition, the results for tests completed on September 16, 2014 were provided. A close review of the EMG test results indicate that the petitioner complained of tingling in his left hand and in the 4th and 5th digits. The EMG indicated that it tested areas related to his hand and arm (e.g., ulnar, radial, biceps, triceps). Similarly, the Nerve Conduction Studies (hereinafter

referred to as “NCS”) compared his right and left wrists and elbows. The testing the petitioner underwent on September 16, 2014 clearly did not reflect any test on his left foot nor on his back as he continually raised in his grievance and appeals thereafter. As such, the petitioner did what was reasonably expected in challenging the determination of Nurse Practitioner Lashway.

“ ‘Judicial review of the denial of an inmate grievance is limited to whether such determination was arbitrary and capricious, irrational or affected by an error of law [citations omitted].’ ” *Shoga v. Annucci*, 122 AD3d 1180, 1180.

While the confidential medical records provided to this Court presumably represent the medical records reviewed by the Nurse Administrator during the grievance appeal process, clearly the different medical complaints were overlooked by staff. In September 2014, the petitioner presented with tingling and numbness in his left hand. As such, the petitioner was referred for an EMG and NCS of his left hand. The 2014 EMG and NCS results were normal. Yet, despite the normal testing results, the petitioner was prescribed Neurontin at some unknown time for an unknown reason as the medical records provided fail to indicate such basis. The medical records do contain a notation on January 14, 2016: “MUST TAPER & D/C NEURONTIN PER POLICY. PT HAD EMG/NCS 9-16-14 RESULTS WERE NORMAL.” Resp. Confidential Ex. There are indications on the Referral History that the petitioner was referred or seen on October 20, 2015 and December 28, 2015; however, there are no notes provided to indicate what occurred or what the petitioner complained of at those visits. Yet, on March 17, 2016, the notes indicate that the petitioner presented as:

“F/U CHRONIC LUMBAR/KNEE/MUSCOSKELETAL PAIN. ULTRAM D/C SECONDARY TO HARDING/DIVERSION. PT NOW ON MOTRIN & NEURONTIN. STATES VARICOSE VEINS IN RIGHT LEG ARE SWELLING MORE. REQUESTING TO HAVE AN ORTHO REFERRAL FOR CHRONIC KNEE PROBLEMS.” Resp. Confidential Ex.

It is of note that there are no indications that the petitioner received an EMG on his left foot or back. The only reference to an EMG occurred in September 2014 for his left hand and the results were found to be normal. It is also clear that the petitioner had been prescribed Neurontin at some unknown date and for unknown reasons, although the petitioner asserts it was for foot and back pain. There are no medical records provided to controvert such claim by the petitioner.

Based upon the records provided to the Court, it is clear that on January 14, 2016, Nurse Practitioner Amber Lashway determined that the petitioner's EMG/NCS test results obviated the continuation of Neurontin. However, the EMG/NCS test results were conducted sixteen (16) months previous to the determination and on the petitioner's hands and arms. Nonetheless, the IGRC, Superintendent and CORC's determinations were apparently made without any further inquiry into the factual time line of the petitioner's medical history or his assertions. As such, the determination of the CORC is arbitrary and capricious.

Notwithstanding the foregoing, the Court will not direct the respondents to reinstate the petitioner's medication(s) as the medical professionals are tasked with supervising the petitioner's medical care. However, the respondents are directed to examine the petitioner pertaining to the complaints raised herein and should the medical professionals deem further testing necessary, same should be completed without reference to the September 2014 EMG/NCS previously conducted.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ADJUDGED**, that the petition is granted as indicated above.

Dated: March 16, 2017
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice