

**Ling Lin v O'Neill**

2019 NY Slip Op 33785(U)

December 30, 2019

Supreme Court, New York County

Docket Number: 452956/2017

Judge: Julio Rodriguez III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM

Justice

LING LIN,
Petitioner,

INDEX NO. 452956/2017
MOTION DATE 09/12/2019
MOTION SEQ. NO. 001

- v -

JAMES O'NEILL, 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

DECISION + ORDER ON PETITION

Respondents.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Petitioner Ling Lin, a New York City Police Department officer, 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 argues that the determination by respondents was arbitrary, capricious, and contrary to established law. Respondents submitted an answer to the petition and argue that the determination denying petitioner's ADR pension was supported by credible medical evidence and was not arbitrary and capricious.

Petitioner also sought certain records pursuant to CPLR 2307 (a). However, upon oral argument held on September 12, 2019, petitioner indicated that the documents and exhibits e-filed by respondents in answering the instant petition resolved the CPLR 2307 (a) relief requested.

Facts

Petitioner was appointed as a New York City Police Department police officer on January 23, 2007. Since then, and as noted in the petition, petitioner Mr. Lin suffered the following line-of-duty ("LOD") injuries:

"a. On September 16, 2010, while directing traffic at an accident, he was unexpectedly struck by a mini-van. He was treated at Lutheran Medical Center Emergency Room. Petitioner was on Sick Report for his LOD injury until September 25, 2010;

b. On September 18, 2011, attempting to install a heavy bench in a marked NYPD van. He was treated at Maimonides Medical Center Emergency Room. Petitioner was on Sick Report for his LOD injury until September 27, 2011;

c. On September 4, 2012, while responding to a radio call 10-85 (Officer needs assistance), he struggled with a perpetrator while attempting to place him in handcuffs. He was treated at Maimonides Medical Center Emergency Room. Petitioner was on Sick Report for his LOD injury until September 13, 2012; and

d. On October 15, 2015, while attempting to handcuff a violent Emotionally Disturbed Person (“EDP”) who was actively resisting, petitioner fell to the ground. He was treated at Lutheran Medical Center Emergency Room” (Petition at 2).

The Medical Board Police Pension Fund Article II (“Medical Board”) rendered the following decisions related to petitioner’s ADR and ordinary disability retirement (“ODR”) applications: 1) On May 19, 2015, the “Medical Board disapproved the ADR and ODR applications with a finding that ‘there is no objective findings or documentation that would preclude the officer from performing the full duties of a New York City Police Officer’” (Petition at 5 *citing* Ex J, Medical Board minutes); 2) On December 8, 2015, the “Medical Board recommended ‘deferral of final decision (given the officer’s recent line of duty injury on October 25, 2015) until the officer has time to recover from the recent line of duty event’” (*id.*); 3) On March 1, 2016, the Medical Board reaffirmed disapproval of the ADR and ODR applications (*id.*); and 4) On October 11, 2016, the Medical Board reaffirmed disapproval of the ADR and ODR applications (*id.*).

### 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 Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). The determination of a Medical Board in consideration of a disability determination will not be disturbed unless it is not rational or is arbitrary and 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” (*Pell v Board of Educ.*, 34 NY2d at 231). Deference is given to the agency 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 Goodacre v Kelly*, 96 AD3d 625 [1st Dept 2012]; *Agnelli v Kelly*, 96 AD3d 471 [1st 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 [1st Dept 2010] [internal quotations and citations omitted]).

Respondents argued that it reviewed petitioner’s disability retirement application four times and conducted multiple physical examinations of petitioner. More specifically, they pointed to the October 11, 2016 Medical Board report that stated petitioner’s “spinoneurological examination today revealed no motor or deep tendon reflex changes” (*see* Resp Answer, Ex 37). The Medical Board noted other findings in that report, including that “[t]here are some mechanical findings which may be effort related and there are some complaints of sensory diminution in the right S1 distribution. The MRI is not interpreted to reveal any supportive derangement with respect to the officer’s current complaints” (*id.*). Ultimately, respondents contend that the decision was supported by credible medical evidence and that the Medical Board sufficiently articulated an explanation for its determination.

However, petitioner supplied medical reports from various treating doctors that had a different opinion as to his condition. For example, Dr. Jonathann Kuo authored a report on April 20, 2017, where he stated that petitioner “presents with chronic low back pain radiating down the b[ilateral] l[ower] e[xtremities]. Describes it as a pulling sensation in both legs when walking with prolonged periods of time. Rates the pain 7/10 and describes it as sharp, achy, and shooting.... Pain interferes with sleep and work” (*see* NYCSEF Doc No. 2, at 163-167). Although petitioner relies on this report, this report was not before the Medical Board for its final disapproval on October 11, 2016.

Before the Medical Board, however, were 1) the report of Dr. Michael Gerling, who, on May 4, 2016, stated that petitioner’s disability status was “[p]ermanent partial”, that MRI imaging showed “slight reduction in the L5-S1 disc herniation [and] L4-L5 new larger disc herniation with annular tear noted”, and that his impression was “intervertebral disc displacement” (Petition, Ex D at 32) and 2) the report of Dr. Yongming Mao, who, on May 16, 2016, stated his impression that the “electrodiagnostic study reveals evidence of right L4-5, right L5-S1, and left L5-S1 radiculopathies, which is consistent with the diagnosis of bilateral sciatica, with more severe at right side” (Petition, Ex I at 3).

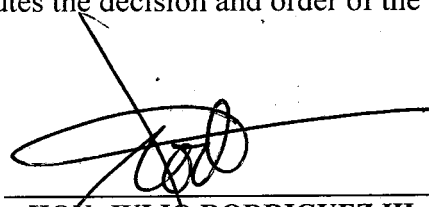
In the final decision dated October 11, 2016, the Medical Board noted the above reports, but only as follows: “The new medical evidence provided by the officer for this evaluation includes a report dated May 4, 2016 from Dr. Michael Gerling, an orthopedic surgeon. There is an EMG/NCV report dated May 16, 2016. It revealed a right L4-5, L5-S1 and left L5-S1 radiculopathy” (Resp Answer, Ex 37 at 2). There is no further reference to these two reports.

Petitioner argued that the Medical Board ignored all the reports that made use of objective findings. The law makes plain that the available medical evidence must be considered by the Medical Board (*see Kiess v Kelly*, 75 AD3d 416 [1st Dept 2010]). Here, the court finds that the Medical Board failed to “adequately explain[] its reasoning” (*Agnelli v Kelly*, 96 AD3d 471, 472 [1st Dept 2012]), most notably with respect to the reports of Drs. Gerling and Mao. This deficiency requires that this matter be remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees.

Accordingly, it is ORDERED, that the petition is granted in that the determination of the Board of Trustees dated October 11, 2016, 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.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

December 30, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE