

Medina v Shea

2020 NY Slip Op 32834(U)

August 27, 2020

Supreme Court, New York County

Docket Number: 161811/2019

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

ADRIANNA MEDINA

INDEX NO. 161811/2019

- v -

MOT. DATE

DERMOT F. SHEA, et al

MOT. SEQ. NO. 001

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is an Article 78 proceeding brought by petitioner Adrianna Medina to annul the determination made by respondents Dermot Shea, Kevin Holloran, the Board of Trustees of the Police Pension Fund and the City of New York (respondents or Board) that denied petitioner accidental disability retirement pension pursuant to New York City Administrative Code Sec. 13-252. Respondents have answered the petition and oppose the relief sought.

The relevant facts are as follows. On February 14, 2015, petitioner was riding as a passenger in a police van when the van hit a bump in the road that caused her to become airborne and hit her head on the ceiling of the van. Petitioner alleges that she immediately felt pain to her head, neck, and lower back. Petitioner sought medical treatment from Dr. Daniel Wilen in 2015 and 2016. Petitioner underwent an MRI of her lumbar spine on February 26, 2015 that revealed retrolisthesis, degenerative disc disease, disc bulges and stenosis in the lumbar/sacral area of the spine. Petitioner continued with a course of physical therapy during 2015. In March 2016, petitioner was evaluated by Dr. Jeffrey Goldstein, an orthopedic surgeon, who diagnosed her with "diffuse back pain syndrome". The following month, in April 2016, petitioner underwent a lower extremity EMG test that revealed evidence of left L3-4, L4-5 and L5-S1 radiculopathy. In 2017, petitioner was examined by Dr. Michael Gerling. Dr. Gerling's exam revealed restriction of motion due to pain in the cervical and lumbar spine, difficulty standing on one foot and heel/toe walking, unsteady Romberg test, decreased sensation in the C5-T1 spine and right L4-S1 spine and abnormal motor testing.

On July 18, 2017, petitioner was evaluated by the Police Pension Fund Medical Board which concluded that petitioner "was not permanently incapable of performing her full duties of a New York City Police Officer". The following month petitioner underwent a second EMG test of the lower extremities which revealed radiculopathy at L5-S1 and bilateral C5-6 and C6-7.

Dated: 8/27/20

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Since petitioner's pain was not improving, Dr. Gerling recommended that petitioner undergo a lumbar discectomy to relieve the "neurologic symptoms" with no guarantees of improved neurologic function. In December 2017, petitioner underwent a lumbar laminectomy and decompression at L5-S1. Dr. Gerling's post-operative report to the NYPD Medical Division on February 9, 2018 indicated that petitioner would be "unable to perform light duty at this time". In February 2018, petitioner underwent an MRI of the lumbar spine.

In August 2018, the Police Pension Fund Medical Board reviewed petitioner's application a second time and found the petitioner disabled from performing the duties of a police officer but concluded that the course of the disability was not related to the February 14, 2015 accident injuries. The Medical Board concluded:

In summary, Officer Adrianna Medina's subjective complaints of pain and limited use of her right leg are significantly worse after surgery. Radiologic evidence post-surgery is also worse than previously. In her present condition, Office Medina is unable to perform the full duties of a New York City Police Officer. The Article II Medical Board is unable to ascribe causality to her disability and makes reference to the MRIs in February 2015, October 2015 and September 2017 as compared to her MRI post-surgery in February 2018

On March 19, 2019, the Police Medical Board conducted their final examination of petitioner and came to the same conclusion as they previously did in August 2018. The Medical Board found that "the record does not support a finding of causality by the officer's line of duty injury of February 14, 2015. In light of this, the Article II Medical Board reaffirms its previous decision and recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the Police Commissioner's application for Accidental Disability Retirement".

This Article 78 ensued.

Petitioner argues that she is entitled to Accidental Disability Retirement (sometimes "ADR") pursuant to NYC Administrative Code 13 section 252 and contends that despite the medical evidence showing significant physical deficits that would preclude her from performing the duties of a police officer, the Police Pension Fund Medical Board concluded that petitioner was not "permanently incapable of performing the full duties of a New York City Police Officer". Petitioner further claims that the Medical Board's July 18, 2017 determination was not supported by all petitioner's medical records and failed to contemplate the actual limitations that petitioner's conditions would cause her in performing the duties of a police officer. Finally, petitioner argues that she was disabled prior to her surgery, the objective medical evidence supports the conclusion that she was disabled prior to the December 14, 2017 surgery and that the injuries petitioner suffered were caused by the accident of February 14, 2015.

Respondents contend that based on the medical evidence, interviews and physical examinations conducted by the Police Pension Fund Medical Board, respondents properly denied petitioner's application because her spinal radiculopathy condition did not occur as a result of a specific line of duty injury in February 2015. Respondents further argue that the credible medical evidence supports the Medical Board's March 19, 2019 recommendation that petitioner's disability was not causally related to the February 14, 2015 incident. Finally, respondents contend that petitioner's disability was not casually related to the February 14, 2015 line of duty incident, but was the result of the spinal surgery and therefore the Medical Board's March 19, 2019 recommendation was rational and reasonable and petitioner's request for remand should be denied.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary, capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being

of determinations made after *quasi-judicial* hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

"It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion. *Matter of Arrocha v Board of Education of the City of New York*, 93 NY2d 361, 690 N.Y.S.2d 503 [1999]

"As long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand". *Meyer v Board of Trustees*, 90 NY2d 139, 659 NYS2d 215 [1997] To "annul the challenged determination by the Board of Trustees, it had to be established that there was no credible evidence to support the Board's rejection of petitioner's claim for ADR benefits, and that his injuries arose out of a sudden, fortuitous event which is out of the ordinary, and injurious in impact". *Matter of Starnella v Bratton*, 92 NY2d 836, 677 NYS2d 62 [1998]

To apply for ADR benefits, an officer must be "physically or mentally incapacitated for the performance of duty and ought to be retired" and the officer's disability must be "natural and proximate result of an accidental injury received in ... city-service". *Matter of Bitchatchi v Bd. of Trs. of the N.Y.C. Police Dep't Pension Fund, Art. II*, 20 NY3d 268, 958 NYS2d 680,[2002] Petitioner must demonstrate that the incident was an "accident" within the meaning of section §13-252 of the Administrative Code of the City of New York. *Hopp v Kelly*, 4 AD3d 176, 772 NYS2d 31 [1st Dept. 2004] An "injury is accidental if it occurs as the result of an unexpected event, rather than as the result of activities undertaken in the performance of ordinary employment duties". *Matter of Lichtenstein v Board of Trustees*, 57 NY2d 1010, 457 NYS2d 472 [1982]. Based on this definition, "an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury" within the meaning of the Administrative Code of the City of New York, § B18-43.0. Therefore, not every line of duty injury will support an award of accidental disability retirement benefits.

The requirements for receipt of ADR benefits are set forth under New York City Administrative Code §13-252, which states:

Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of willful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of willful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith (NYC Administrative Code §13-252)

The determination of an ADR application involves a two-tier administrative process. *Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 650 NYS2d 614[1996] The review by the

Medical Board is the first step, who will make a recommendation as to whether the disability was caused by an accidental injury in the performance of police duties, and they are the sole arbiter to decide whether the applicant is "physically or mentally incapacitated" from performing full duty as a police officer. *Campazzi v Ward*, 181 AD2d 431, 580 NYS2d 756 [1st Dept. 1992]. The second step is the consideration by the Board of Trustees, which includes the review of the report and recommendation of the Medical Board, and it has the ultimate authority whether a disability is the result of an accident in the performance of duty (*Meyer, supra*).

Here, respondents reviewed petitioner's history, entire medical record and clinical findings and reasonably concluded that the record did not support a finding of causality with petitioner's line of duty injury of February 14, 2015. Although petitioner suffered injuries to her lumbar and cervical spine, she was working in a limited capacity and was not disabled pre-surgery. Moreover, Drs. Wilen and Gerland both recommended conservative treatment such as physical therapy and a home exercise regimen, and a review of the medical records do not contain a finding that petitioner was in fact disabled pre-surgery. The Medical Board conducted three evaluations on July 18, 2017, August 7, 2018 and March 19, 2019 and found that the record did not support a finding of causality by the officer's line of duty injury of February 14, 2015. While the court is sympathetic to petitioner's plight, petitioner elected to undergo surgery knowing the risks involved as evidenced by Dr. Gerlan's medical records.

Based on the foregoing, the Medical Board's conclusion was reasonable considering all the credible evidence. The Court cannot substitute its judgment for the Medical Board.

Accordingly, it is hereby **ORDERED** that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 8/27/20
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.