

Chiarantano v Sewell

2024 NY Slip Op 30739(U)

March 7, 2024

Supreme Court, New York County

Docket Number: Index No. 153057/2022

Judge: Arlene P. Bluth

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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**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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DANIEL CHIARANTANO,

Petitioner,

- v -

KEECHANT SEWELL, as the Police Commissioner of the
City of New York, and as Chairperson of the Board of
Trustees of the Police Pension Fund, Article II, and THE
BOARD OF TRUSTEES of the Police Pension Fund,
Article II,

Respondents.

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INDEX NO. 153057/2022

MOTION DATE 03/04/2024¹

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for ARTICLE 78.

Petitioner’s request to annul the denial of his claim for Accident Disability Retirement (“ADR”) is denied.

Background

Petitioner started working as a police officer in 1986 and worked for the NYPD until May 21, 2021, retiring with the rank of sergeant. He contends that he passed all of the required physical examinations prior to his appointment with the NYPD. Petitioner alleges that he was forced to retire in May 2021 because of his age, but that prior to his retirement he started suffering from heart related ailments. He contends he was not able to collect the required medical

¹ The Court recognizes that this proceeding was pending before different judges over the last few years. Although the undersigned was only recently assigned to this matter, the Court apologizes on behalf of the Court system for the lengthy delay in the resolution of this proceeding.

documentation to confirm that he had a disabling heart condition for purposes of seeking ADR prior to his retirement date.

Petitioner underwent a coronary angiogram in June 2021 and later received two stents. He admits he waited until December 13, 2021 to file for ADR. Petitioner argues that he was unable to get cardiac treatment because of COVID-19 restrictions prior to his retirement and so he could not establish his entitlement to ADR before he retired. Petitioner insists that caselaw compels the Court to overlook the fact that he did not apply for ADR prior to his retirement.

In opposition, respondents observe that petitioner was required to submit his ADR application under the Heart Bill prior to his retirement but he waited almost six months after his retirement to do so. They observe that courts have created an exception to this requirement but that this exception does not apply here. Respondents maintain that the exception applies where there is an already-pending ADR application that is then amended to include a claim under the Heart Bill.

Respondents point out that petitioner was told as early as November 30, 2020 that he would have to retire on May 21, 2021 and that petitioner took the appropriate steps for his retirement. They contend that he signed a designated beneficiary form, a pension statement, and a pension application to receive his service retirement benefits.

In reply, petitioner emphasizes that the delay in the diagnosis of his heart-related ailment was due to the COVID-19 pandemic and that he underwent open-heart surgery.

Discussion

Administrative Code §13-252 provides, in part, that:

“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 wilful negligence on the part of such member and that such member should, therefore, be retired.”

For purposes of this proceeding, the key phrase is that the application must be from “a member in city-service.” General Municipal Law § 207-K (also known as the Heart Bill) similarly requires that the applicant be a “member of the uniformed force of a paid police department.” In other words, there is no question that petitioner was required to submit his application prior to his retirement. Nor is there a disagreement that Courts have, on occasion, overlooked this rule. The question for this proceeding is whether that exception should apply to petitioner.

In *Mulheren v Bd. of Trustees of Police Pension Fund, Art. II* (307 AD2d 129, 761 NYS2d 49 [1st Dept 2003]), the Appellate Division, First Department found that “The Board of Trustees admits that it has discretion to expand a retired member's pending disability application to include heart disease where the disability from heart disease occurred at the time the applicant retired and where ‘substantial equitable considerations warrant such action,’ and that it has exercised such discretion on at least one prior occasion” (*id.* at 132).

The Court views *Mulheren* to stand for the proposition that a Heart Bill claim can be added to an already pending claim where equitable considerations warrant. Here, petitioner did not have an already-pending ADR application at the time of his retirement and so the Court is not compelled to grant the petition. The parties also discuss *Diaz v Kelly* (98 AD3d 425, 949 NYS2d 664 [1st Dept 2012]), but in that proceeding, the petitioner was permitted to *amend* his ADR application, not file a brand new one after the deadline.

Respondents point to two Supreme Court cases in which applicants unsuccessfully petitioned to have their untimely ADR Heart Bill requests considered (*see Lavio v Kelly*, 2010 WL 2572592 [Sup Ct, NY County 2010]; *In re Bertone v Kelly*, 2006 WL 8424715 [Sup Ct, NY County 2006]).

Based on these cases, the Court denies the application as petitioner did not have a pending application for ADR benefits when he retired and, therefore, the discretion to amend such an application is not possible. As the judge in the *Bertone* matter noted while analyzing the *Mulheren* decision, the applicant “did not have an application for disability pension benefits pending before the Board of Trustees” and “[t]here was no application to expand” (*Bertone*, 2006 WL 8424715 at *3). The Court recognizes that petitioner cites to a Supreme Court case entitled *Myvett v Kelly* (uploaded as NYSCEF Doc. No. 12) in which the same judge who decided *Bertone* ordered respondents to consider a Heart Bill application. But the application in *Myvett* was only 22 days late whereas the petitioner here filed his six months after his retirement. And as respondents point out, *Myvett* appears to be an outlier—the binding, appellate cases deal with amending an ADR application, not whether one could be filed in the first instance.

To find, as petitioner requests, that equitable considerations merit permitting not only the amending of an ADR application but the initial application itself would potentially eviscerate the requirement that members apply while they are still in service. At the very least, it would generate significant litigation about what constitutes an appropriate equitable consideration. After all, the purpose of requiring that an application be filed prior to retirement is to ensure that respondents have an opportunity to properly evaluate the claimed disability and the causal connection to applicant’s service.

As the judge in the *Lavio* matter observed “A rule that would require acceptance of a post-retirement ADR application to consider a possible pre-retirement heart condition based on a claim that the condition could have been diagnosed while petitioner was still employed, would read the current employment limitation out of the Heart Bill” (*Lavio*, 2010 N.Y. Slip Op. 31526[U]).

Moreover, while the Court acknowledges that the COVID-19 pandemic certainly hindered patients’ ability to get medical appointments, the fact is that, here, petitioner knew he had to retire in May 2021 due to his age. And so, given that notice, he pursued a typical retirement and sought his pension benefits despite seeking medical consultation about heart-related issues prior to his retirement. This is not a situation in which petitioner was incapacitated and therefore incapable of timely filing his ADR application. In other words, the Court finds that equitable considerations do not merit overlooking the fact that petitioner waited until six months after his retirement to apply for ADR.

Respondents supplied the administrative record on this docket and so the Court denies petitioner’s request for documents.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

3/7/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT

<input type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: