

**Kiess v Kelly**

2009 NY Slip Op 33269(U)

March 19, 2009

Sup Ct, NY County

Docket Number: 112221/08

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

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In the Matter of the Application of

JOSHUA KIESS,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law  
and Rules,

-against-

Index No. 112221/08

DECISION AND  
JUDGMENT

RAYMOND KELLY, 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, NEW  
YORK CITY POLICE DEPARTMENT and THE CITY OF  
NEW YORK,

Respondents.  
-----X

JANE S. SOLOMON, J.:

The petitioner Joshua Kiess (petitioner) brings this Article 78 proceeding for a judgment reviewing and annulling the action of the respondents herein denying petitioner a line of duty accident disability retirement allowance, pursuant to the Administrative Code of the City of New York § 13-252, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and directing and ordering the respondents to retire petitioner with a line of duty accident disability retirement allowance; and directing that the Board of Trustees of the Police Department Article II Pension Fund allow petitioner and/or his representatives to present such testimony as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to an accident disability retirement.

On January 20, 2004, the petitioner was appointed a New York City police officer.

On November 24, 2006, the petitioner was driving a police vehicle, responding to an emergency

**FILED JUDGMENT**  
Take Judgment (see that been taken by the County Clerk) and return of party to be returned by the County Clerk. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 715).

situation, when it was struck in the driver's door by a taxicab. The petitioner was treated for back and knee injuries, and released from the hospital. Between the date of the collision, and May 2007, the petitioner underwent a series of diagnostic films including x-rays, MRIs and a discogram of his spine and received treatment for back pain.

On May 25, 2007, the petitioner submitted an application for accident disability retirement, claiming back injuries. At the Police Commissioner's request, an application for ordinary disability retirement also was submitted.

On July 10, 2007, the Medical Board considered both applications, and found, unanimously, that based on its "review of the history, the clinical findings, the present complaints, and the physical examination, it is the opinion of the members of the Article II Medical Board that there are no significant objective findings precluding the officer from performing the full duties of a New York City Police Officer" (Medical Board minutes, Ex. L to Petition, paragraph 13).

The petitioner continued to be treated for back pain. On January 29, 2008, in light of new evidence, the Medical Board again examined both the petitioner and the materials presented to it. The Medical Board looked at the new evidence, physically re-examined the petitioner, and found a lack of objective findings to support petitioner's claimed inability to perform his full duties. The Medical Board once again recommended the denial of both applications. The petitioner subsequently resigned from his position as a police officer.

On May 14, 2008, the Board of Trustees reviewed petitioner's case, concurred with the Medical Board's findings, and denied the applications for a disability pension.

The petitioner argues that the action of the Board of Trustees failed to use the

[\* 3]  
proper legal test, was contrary to the competent evidence, and failed to accord him a fair and reasonable hearing.

In opposition to the petition, the respondents argue that credible medical evidence supports both the Medical Board's, and Board of Trustees' decisions.

Judicial review of the determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Therefore, a court may not substitute its judgment for that of an administrative agency when there is a rational basis for the agency's determination (*Matter of Nehorayoff v Mills*, 95 NY2d 671 [2001]). The Board of Trustees of the Police Pension Fund is bound by its Medical Board's determination as to whether an applicant is disabled (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). The Medical Board's determination is conclusive if it is supported by some credible evidence and is not irrational (*id.* at 761)

Here, the Medical Board performed two physical examinations of the petitioner, and considered all of the medical evidence submitted, including the diagnostic film reports. Contrary to the petitioner's contention, the Medical Board, on the two occasions that it considered the petitioner's case, made an evidentiary-based decision explaining its rationale. It was the Medical Board's expert opinion, based on the medical records, the clinical findings, the present complaints, and the physical examinations, that the petitioner's injuries do not disable him from performing his duties as a police officer (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 [1997]).

"The court cannot weigh the medical evidence and substitute its own judgment for

that of the Medical Board" (*Matter of Campbell v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 47 AD3d 926, 928 [2d Dept 2008]). Based on the credible evidence before the Medical Board, physical examinations and the imaging reports, the determination of the Board of Trustees that the petitioner's back injuries do not disable him from performing his duties as a police officer, is neither arbitrary nor irrational (*Matter of Ramsey v City of New York*, 8 AD3d 392 [2d Dept 2004]; *Matter of Toole v Board of Trustees of N.Y. City Police Pension Fund*, 306 AD2d 55 [1st Dept 2003]; *Matter of Morris v New York City Employees Retirement Sys.* 309 AD2d 526 [1st Dept 2003]).

Although the medical conclusions of the petitioner's physicians differed from those of the Medical Board, the resolution of such conflicts is within the sole province of the Medical Board (*Matter of Tobin v Steisel*, 64 NY2d 254 [1985]). Furthermore, the Medical Board was not required to accept the opinion of petitioner's examining physicians (*Matter of Meehan v Kelly*, 50 AD3d 523 [1st Dept 2008]). While the opinions of petitioner's experts may have supported conclusions at variance with those reached by the Board, the latter's resolution of the conflicting medical evidence cannot be said to have been erroneous as a matter of law (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept. Art. 1-B Pension Fund*, 90 NY2d 139, [*supra*]; *Matter of Gullo v Kelly*, 50 AD3d 449 [1st Dept 2008]). Respondent's determination was based on "some credible evidence" and was not arbitrary or capricious (*Matter of Josey v New York City Police Dept.*, 50 AD3d [1st Dept 2008]).

Finally, a hearing is not required where conflicting medical evidence is presented regarding whether or not petitioner is entitled to accident disability retirement. The Medical Board alone has the authority to weigh such evidence (*Matter of Ramsey v City of New York*, 8

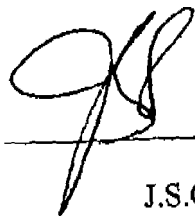
AD3d 392 [*supra*]). Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of this court.

Dated: March 19, 2009

ENTER:



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J.S.C.

**JANE S. SOLOMON**

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**