

Matter of Betancourt v Kelly

2012 NY Slip Op 30510(U)

February 28, 2012

Sup Ct, NY County

Docket Number: 101203/11

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Motion

PART 19

Index Number : 101203/2011

BETANCOURT, KEVIN

vs.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is determined in
accordance with the accompanying decision/order

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).

Dated: 2/28/12

Saliann Scarpulla
SALIANN SCARPULLA *S.C.*

- Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
- Check if appropriate: DO NOT POST REFERENCE
- SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
In the Matter of the Application of
KEVIN BETANCOURT,

Index No.: 101203/11
Submission Date: 9/21/11

Petitioner,

- against-

**DECISION, ORDER
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, and
THE CITY OF NEW YORK,

Respondents,

----- X
For Petitioner:
Ungaro & Cifuni
291 Broadway, Suite 1400
New York, NY 10007

For Respondents:
Michael A. Cardozo, Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Papers considered in review of this petition:

- Notice of Petition/Petition 1
- Answer 2
- Memoranda of Law 3, 4

UNFILED JUDGMENT

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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Kevin Betancourt ("Betancourt"), a retired police officer, seeks an order annulling a decision of respondent Board of Trustees of the Police Pension Fund, Article II ("Board of Trustees"), denying his application for accidental disability retirement benefits ("ADR"). Betancourt requests that the court enter a judgment directing respondents to retire him with ADR, retroactive to the date of his retirement. In the alternative, Betancourt requests that the court direct a hearing on

the matter, or that Betancourt be allowed to present testimony to the Board of Trustees to prove his entitlement to ADR.

Betancourt served as a police officer with the New York City Police Department from 1995 until his retirement in October 2010. Betancourt sustained back-related injuries in two separate line of duty events, in March 2005 and December 2006. On March 18, 2005, while assisting an intoxicated man off the ground, Betancourt strained his lower back. Following the March 2005 injury, Betancourt received chiropractic treatment and epidural steroid injections. He was seen by Dr. Jonathan Levin, an orthopedic surgeon, who recommended an MRI of the lumbar spine. The MRI indicated a "shallow midline disc protrusion" at L5-S1, a disc bulge at L4-5, degenerative disc disease at T11-12, with a disc bulge, and a "small synovial cyst in the posterior paraspinal soft tissues adjacent to the left L5-S1 facet joint." Betancourt was last seen by Dr. Levin on May 20, 2005, and then received three steroid injections in June and July 2005. Betancourt reported continuing pain, but he returned to full duty in 2006.

On December 7, 2006, while on duty, Betancourt injured his back when he fell down the steps of a rooftop landing. He was seen by Dr. Ira Rashbaum, a physical medicine and rehabilitation physician, who, noting that Betancourt previously injured his back in March 2005 and re-injured it in December 2006, recommended an MRI of the lumbosacral spine.¹ The MRI showed a "moderate protrusion at the L5-S1 level." Dr.

¹Dr. Rashbaum's report incorrectly identifies the date of the first injury as March 17, 2004.

Rashbaum referred Betancourt for physical therapy, and prescribed an ankle brace and pain medication. Betancourt was placed on limited duty. Surgery was recommended by two doctors, and on April 19, 2007, Dr. William Main, an orthopedic spine surgeon, performed surgery on Betancourt, which included spinal fusion at the L5-S1 level, and lumbar laminectomy with instrumentation and bone graft. Betancourt continued to have pain after the surgery, and remained on restricted duty. On September 10, 2007, Betancourt filed an application for ADR. At about the same time, the Police Commissioner filed an application on Betancourt's behalf for Ordinary Disability Retirement ("ODR").

The Medical Board first considered Betancourt's ADR application on February 6, 2008. After interviewing Betancourt, and reviewing medical records, the Medical Board deferred its decision, pending receipt of updated information about the April 2007 surgery. In its Feb. 6 Report, the Medical Board noted that Betancourt sustained back injuries in the line of duty on March 18, 2005, and on December 6, 2006, and outlined the medical treatment received by Betancourt for his back injuries. The Medical Board next met on May 28, 2008 to consider Betancourt's application, and again deferred a decision, pending possible further surgery.

Betancourt underwent a second spinal surgery on August 6, 2008. Dr. Jeffrey Spivak, an orthopedic surgeon, performed the surgery, which involved a discectomy at L3-L4. Dr. Spivak reported that the surgery diminished, but did not eliminate,

Betancourt's pain, and recommended consideration of additional fusion surgery. In July-2009, a third surgery, for "failed back surgery syndrome and intractable back and leg pain," was performed by Dr. Michael Dubois, and involved implantation of a spinal cord stimulator lead.

The Medical Board met for a third time, on October 21, 2009, to consider Betancourt's ADR application. After reviewing medical records, and interviewing Betancourt, it recommended approval of Betancourt's ADR application, and disapproval of the Police Commissioner's ODR application. The final diagnosis was "Status Post Laminectomy x2 with Residuals and Status Post Spinal Cord Stimulator Implant. The competent causal factor is the line of duty injury of March 18, 2005."

On March 10, 2010, the Board of Trustees, after twice tabling Betancourt's case to obtain further information, remanded the matter to the Medical Board for reevaluation and reexamination, based on new evidence, consisting of letters from Dr. Levin, Dr. Main, and Dr. Spivak. The Medical Board met again on April 7, 2010, and deferred a decision, pending clarification of the Board of Trustees' remand. On July 21, 2010, the Medical Board met for a final time, and reaffirmed its prior determination that Betancourt was disabled as a result of the line of duty injury on March 18, 2005, and it again recommended approval of Betancourt's application for ADR, and disapproval of the Police Commissioner's application for ODR. On October 13, 2010, by a 6-6 tie vote, the Board of Trustees denied Betancourt's application for ADR, finding that his injury was

“exertional.” Because the ADR application was denied based on a tie vote, the application for ODR was granted.

Discussion

To be eligible for ADR, a police officer must show that he or she is disabled and that the disability is “a natural and proximate result of an accidental injury” sustained in the line of duty. Administrative Code of the City of New York § 13-353; *see Matter of Meyer*, 90 N.Y.2d 139, 144 (1997). Thus, consideration of a police officer’s application for ADR involves a two-step process. *See Matter of Borenstein v. New York City Empls. Retirement Sys.*, 88 N.Y.2d 756, 760 (1996). First, the three physician members of the Medical Board, after examining the applicant and “investigating all essential information in connection with a disability retirement application, determine[] whether the member is disabled for performance of duty and ought to be retired.” *Matter of Meyer*, 90 N.Y.2d at 144 (citations omitted). The Medical Board is the sole determiner of whether the applicant is injured and whether this disability prevents the applicant from performing his or her duties. *See Matter of Picciurro v. Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 46 A.D.3d 346, 348 (1st Dept 2007). “If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was ‘a natural and proximate result of an accidental injury received in . . . city-service.’” *Matter of Borenstein*, 88 N.Y.2d at 760 (citation omitted); *see Matter of Meyer*, 90 N.Y.2d at 144.

- The second step in the process involves the Board of Trustees. The Board of Trustees is bound by the Medical Board's determination of whether an applicant is disabled, but it has the authority to make its own determination regarding causation. *See Matter of Borenstein*, 88 N.Y.2d at 760; *Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 N.Y.2d 347, 351 (1983); *Matter of Calzerano v. Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 245 A.D.2d 84, 84 (1st Dept 1997).

Here, it is not disputed that Betancourt is permanently disabled from performing police work, and that his disability is the result of an injury sustained in the line of duty. The Medical Board determined that the cause of his disability was the line of duty accident in March 2005, and it recommended approval of Betancourt's application for ADR. The Board of Trustees, while accepting the Medical Board's finding of causation, concluded that the March 2005 injury appeared to be "exertional," and, therefore, was not "accidental" for purposes of ADR.

"Not every line of duty injury will result in an award of accident disability. The injury must be the result of a 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.'" *Matter of McCambridge v. McGuire*, 62 N.Y.2d 563, 567-568 (1984), quoting *Matter of Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N. Y.*, 57 N.Y.2d 1010, 1012 (1982). In contrast, "injuries sustained while performing routine duties but not resulting from unexpected

events” are not considered accidental. *Matter of McCambridge*, 62 N.Y.2d at 568; see *Matter of Kenny v. DiNapoli*, 11 N.Y.3d 873, 874 (2008). Critical to the determination of whether an injury was the result of a line of duty accident is that “there was a precipitating accidental event . . . which was not a risk of the work performed.” *Matter of McCambridge*, 62 N.Y.2d at 568; see *Matter of Starnella v. Bratton*, 92 N.Y.2d 836, 839 (1998).

While the Court of Appeals has urged a “common sense approach” to defining “accidental” (*Matter of Lichtenstein*, 57 N.Y.2d at 1012), courts’ efforts to interpret what is “routine” and what is “unexpected” in specific and varied factual situations are still ongoing. See *Matter of Carr v. Ward*, 119 A.D.2d 163, 169 (1st Dept 1986) (Sandler, J., concurring). Courts have found that “injuries sustained while performing routine duties but not resulting from unexpected events” include “back strains sustained while putting a tire in the trunk of a city vehicle (*Matter of Menna v. New York City Employees' Retirement System*, 59 N.Y.2d 696), while leaning over to place a ticket on a car (*Matter of Lichtenstein v. Board of Trustees, supra*), while lifting trash cans (*Matter of Valentin v. Board of Trustees*, 59 N.Y.2d 702), or a loss of hearing sustained as a result of practice sessions on the pistol range (*Matter of Schussler v. Codd*, 59 N.Y.2d 698).” *Matter of McCambridge*, 62 N.Y.2d at 568. Other injuries not qualifying as “accidental” include falling after an individual being assisted by a police officer lunged at the officer (*Matter of Kempkes v. DiNapoli*, 81 A.D.3d 1071 [3d Dept. 2011]), falling off a fence while

chasing a suspect (*Matter of Melendez v. New York State Comptroller*, 54 A.D.3d 1128 [3d Dept 2008]), and psychological injuries resulting from assaults over years of undercover work (*Matter of Hipple v. Ward*, 146 A.D.2d 201 [1st Dept. 1989]).

On the other hand, courts have found accidental injuries to include those resulting from losing one's balance and falling while getting up from a chair (*Matter of McCambridge*, 62 N.Y.2d at 567-568), slipping on wet pavement while getting into a patrol car (*id.*), tripping over a tangle of wires in a police station locker room (*Matter of Flannelly v. Board of Trustees of N.Y. City Police Pension Fund*, 278 A.D.2d 113 [1st Dept 2000]), and tripping in a construction hole in a precinct parking lot (*Matter of Finazzo v. Safir*, 273 A.D.2d 75 [1st Dept 2000]); *see also* *Matter of Starnella v. Bratton*, 92 N.Y.2d 836 (1998)(slip on water in bathroom was accidental but fall down stairs due to own misstep was not); *see generally* *Matter of Brown v. Kelly*, 2011 N.Y. Slip. Op. 31644(U)(Sup. Ct., N.Y. Co. 2011)(noting, with examples, courts' focus on whether injuries were due to officer's own actions).

However, "the determination of which activities constitute the regular duties of a police officer is a matter within the particular expertise of the Board [of Trustees], [and] its findings are entitled to deference." *Matter of Marchisotto v. Kelly*, 58 A.D.3d 555, 556 (1st Dept 2009). In this case, the court cannot say as a matter of law that the March 2005 incident, in which Betancourt was injured while assisting an intoxicated man on the ground, was an accidental event and not a risk of Betancourt's regular police duties, and

it, therefore, must defer to the Board of Trustees' determination that the March-2005 injury was not "accidental."

In addition, generally, the Board of Trustees' determination "as to the cause of an officer's disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious" (*Matter of Canfora*, 60 N.Y.2d at 351), and when a tie vote results in disapproval of an application for ADR, a reviewing court may not set aside the Board of Trustees' decision "[u]nless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident." *Id.* at 352; see *Matter of Meyer*, 90 N.Y.2d at 145. Moreover, "a Medical Board's disability determination will not be disturbed if it is supported by substantial evidence which, "in disability cases . . . has been construed to require 'some credible evidence.'" *Matter of Borenstein*, 88 N.Y.2d at 760. Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered," and is "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion." *Matter of Meyer*, 90 N.Y.2d at 147 (citations omitted); see *Matter of Cusick v. Kerik*, 305 A.D.2d 247, 248 (1st Dept 2003). Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. *Matter of Borenstein*, 88 N.Y.2d at 760. Courts "cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." *Matter of Santoro v. Board of Trustees of N.Y.*

City Fire Dept. Art. 1-B Pension Fund, 217 A.D.2d 660, 660 (2d Dept. 1995). However, “[f]or a reviewing court to uphold a determination of no causation, the decision must be based ‘on objective medical evidence or a rational, fact-based medical explanation.’” *Matter of Meyer*, 90 N.Y.2d 139, 147 (1997).

When the medical evidence does not sustain the determination, or when the petitioner’s medical issues were not adequately addressed, determinations of the Medical Board and the Board of Trustees have been annulled and remanded for further review. See *Matter of Kiess v. Kelly*, 75 A.D.3d 416 (1st Dept 2010); *Matter of Stack v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 A.D.3d 562 (2d Dept 2007); *Matter of Gorczynski v. Kelly*, 2011 N.Y. Slip. Op. 32920(U) (Sup. Ct., N.Y. Co. 2011). “[F]airness 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 be properly rejected.” *Matter of Kiess*, 75 A.D.3d at 417 (internal quotation marks and citations omitted); see *Matter of Kelly v. Board of Trustees of Police Pension Fund, Art. II*, 47 A.D.2d 892, 893 (1st Dept 1975). It also is proper for courts “to set aside an administrative determination where it is evident that the administrative body in reaching its decision may have applied an erroneous legal standard.” *Matter of McCambridge*, 62 N.Y.2d at 570 (Jasen, J., dissenting in part).

Here, it appears that both the Medical Board and the Board of Trustees failed to apply the proper standard of causation. See *Matter of Tobin v. Steisel*, 64 N.Y.2d 254,

260 (1985); *Matter of Torres v. Kelly*, 2011 N.Y. Slip. Op. 30580(U) (Sup. Ct., N.Y. Co. 2011). In concluding that the “competent causal factor” of Betancourt’s disability was the March 2005 line of duty accident, the Medical Board neglected to consider the “causation rule” that “an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury.” *Matter of Tobin*, 64 N.Y.2d at 259; see *Matter of Petrella v. Board of Trustees of Police Pension Fund*, 141 A.D.2d 361, 363 (1st Dept 1988). “[E]vidence establishing that an accident exacerbated an underlying condition, thereby rendering the employee disabled, would be sufficient, if accepted [to establish causation].” *Matter of Tobin*, 64 N.Y.2d at 259 (citations omitted).

Contrary to respondents’ contention, the record includes repeated references to the December 2006 back injury, including Betancourt’s ADR application, which identifies December 6, 2006,² as the date of his injury. The Medical Board itself recognized that Betancourt injured his back on two separate occasions in the line of duty. Medical records show that, after Betancourt injured his back in March 2005, he received non-surgical treatment, including chiropractic treatment, and epidural injections, from March 2005 to about July 2005, and that, although he continued to have pain, Betancourt returned to full duty in 2006. There are no records of further treatment after July 2005,

²Although both the Feb. 6 Report and the ADR application identify December 6, 2006 as the date of the second injury, it is not disputed that, as the line of duty injury report states, the correct date is December 7, 2006.

until Betancourt re-injured his back in the line of duty in December 2006. Immediately after the December 2006 accident, Betancourt's back condition worsened, he was placed on limited duty, and subsequently underwent three surgeries. While the medical records identify both the March 2005 and December 2006 incidents as dates of injury, and note that Betancourt's pain did not abate after the first injury, none of the treatment records includes any doctor's opinion as to the causal relationship of Betancourt's disability, or need for surgery, to either line of duty injury.

The evidence thus raises the possibility that the December 2006 accident exacerbated Betancourt's earlier injury to the point that Betancourt became completely disabled. There is no indication, however, that the Medical Board, having found that Betancourt's disability was caused by the March 2005 incident, ever considered whether the December 2006 accident aggravated Betancourt's preexisting condition. Nor did the Board of Trustees.

In October 2009, the Medical Board recommended ADR, based on its determination that Betancourt was disabled as a result of the line of duty injury in March 2005, and without addressing the December 2006 injury. In March 2010, the Board of Trustees, after receiving "updated reports" from three treating physicians, Drs. Spivak, Main, and Levin, remanded the matter to the Medical Board for consideration of which line of duty incident was the cause of Betancourt's disability. In their letters, Dr. Spivak and Dr. Main stated, without discussion, that Betancourt was permanently disabled as a

result of his line of duty accident in March 2005. Dr. Levin, who did not treat Betancourt after the second injury, stated only that he treated Betancourt from April through July 2005, "for a work related injury that occurred on March 18, 2005." Although the Board of Trustees, in remanding the matter to the Medical Board, requested further information as to which incident caused Betancourt's disability, it did not request, and the Medical Board did not subsequently consider, information with respect to aggravation.

After reconsideration, the Medical Board reaffirmed its previous decision that the cause of Betancourt's disability was the March 18, 2005 line of duty injury, noting that an MRI taken after the 2005 incident revealed a herniated disc, and that his later fusion surgery was at the L5-S1 level, which was "the original site of disc as seen on the 2005 MRI." Upon its final review, on October 13, 2010, the Board of Trustees did not further consider the issue of causation, but instead determined that the March 2005 incident was not an "accident."

In view of the above, it cannot be said that the Medical Board's determination as to causation was based on the substantial credible evidence before it. Consequently, it should be remanded to consider whether Betancourt's March 2005 injury was aggravated or exacerbated by his December 2006 injury. *See Matter of Meyer v. McGuire*, 64 N.Y.2d 1152, *supra* (application remanded in light of failure to address whether petitioner's injury precipitated or aggravated preexisting back condition); *Matter of Brown v. Board of Trustees of Police Pension Fund of Police Dept. of City of N. Y.*, 111 A.D.2d

75 (1st Dept 1985) (application remanded where respondents did not consider whether line-of-duty injury aggravated preexisting condition to the extent that it became disabling); *Matter of Costello v. Board of Trustees of Police Pension Fund, Art. II*, 63 A.D.2d 894 (1st Dept 1978) (remand for consideration of whether later accidents contributed to aggravation of earlier injury); compare *Matter of Lloyd v. Kelly*, 73 A.D.3d 490 (1st Dept 2010) (aggravation considered but rejected where no treatment sought for second injury until three months later); *Matter of Mazzei v. Hevesi*, 45 A.D.3d 1103 (3d Dept 2007) (medical expert expressly considered whether preexisting condition was aggravated by accident but discounted possibility based on medical records); *Matter of Kenny v. Safir*, 280 A.D.2d 314 (1st Dept 2001) (aggravation expressly considered and rejected based on medical evidence).

Accordingly, the petition is granted to the extent that it is

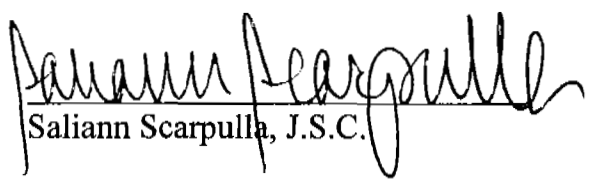
ORDERED and ADJUDGED that the determination of the Board of Trustees, dated October 13, 2010, denying Betancourt accidental disability retirement, is vacated and annulled; and it is further

ORDERED that the matter is remanded to respondents for further consideration and proceedings consistent with this decision.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
February 28, 2012

ENTER:


Saliann Scarpulla, J.S.C.

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).