

<b>Matter of Frezzell v Kelly</b>
2012 NY Slip Op 31076(U)
April 19, 2012
Supreme Court, New York County
Docket Number: 110194/2011
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**CAROL E. HUFF**

Index Number : 110194/2011

FREZZELL, KENT

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

PART 32

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this ~~\_\_\_\_\_~~

motion is decided in accordance  
with accompanying memorandum decision

**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).

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

Dated: APR 19 2012

 \_\_\_\_\_, J.S.C.

**CAROL E. HUFF**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of the Application of : Index No. 110194/11  
KENT FREZZELL,

Petitioner, :

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

- against -

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 and :  
THE BOARD OF TRUSTEES of the New York City  
Police Pension Fund, Article II, :

Respondents. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination of respondent Board of Trustees of the Police Pension Fund, dated May 11, 2011, which denied him an accident disability retirement ("ADR"), and an order directing respondents to retire him with the ADR allowance retroactively. In the May 11 decision, by a six-to-six vote, the Board of Trustees granted petitioner an Ordinary Disability Retirement ("ODR") (a tie vote results in an award of ODR pursuant to City of New York v Schoeck, 294 NY 559 [1945]).

Petitioner had been a New York City Police Officer since June 30, 1992. In March 1996, he suffered an off-duty back injury while ice skating. At that time he underwent a CT scan of his spine, which revealed a herniated disc at L5-S1. On April 26, 1996, the NYPD placed him on limited capacity duty. He was restored to full duty on August 27, 1997.

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Petitioner remained on full duty until he suffered line-of-duty injuries on September 20, 2006, when his patrol vehicle collided with another patrol vehicle. After the accident he never returned to full duty. According to the Line-of-Duty Injury Report dated September 21, 2006, he suffered "minor injuries to his arms, neck, back and chest." Amended Verified Petition Ex. C. Thereafter petitioner received treatment for his back including pain management therapy.

On February 17, 2009, the Police Pension Fund Medical Board considered petitioner's application for ADR and ODR. The Medical Board disapproved both applications, finding there to be "no significant findings precluding this officer from performing the full duties" of a police officer. Amended Verified Petition Ex. C.

On April 21, 2009, petitioner underwent back surgery to replace disc L5-S1, the same disc implicated in the 1996 off-duty skating injury. On June 8, 2010, the Medical Board again considered and determined petitioner's case, awarding him an ODR and stating that petitioner's disability was "a result of his surgery for degenerative disc disease which was a non line of duty and progressive since 1996." Amended Verified Petition Ex. H.

Following that determination, petitioner's treating physiatrist, Andrew Brown, M.D., submitted a letter to the Medical Board stating that petitioner's "work related motor vehicle accident of 09/20/06 is the competent producing cause for his need for disc replacement." Amended Verified Petition Ex. J.

On December 7, 2010, the Medical Board again reviewed the case and confirmed its earlier decision granting an ODR and denying an ADR.

The Board of Trustees of the Police Pension Fund met on April 13 and May 11, 2011, to review the Medical Board's findings, and also reviewed statements from Dr. Brown and

orthopedist Jeffrey A. Goldstein, M.D., who stated their opinions that petitioner's disabling injuries were causally related to the 2006 line-of-duty accident. The Board of Trustees upheld the Medical Board's finding by a six-to-six vote.

“[T]he applicant for accident disability retirement . . . has the burden of establishing that the disability is causally connected to a line of duty accident.” Evans v City of New York, 145 AD2d 361 (1<sup>st</sup> Dept 1988). The Medical Board must determine whether the disabling injuries are causally connected to a line of duty accident and make a recommendation to the Board of Trustees, “the body ultimately responsible for retiring the pension fund member and determining the issue of service-related causation (Administrative Code §§ 13-353, 13-323[b]).” Meyer v Board of Trustees of the New York City Fire Dept., Article 1-B Pension Fund, 90 NY2d 139, 144 (1997). The Medical Board's finding must be based on “credible evidence.” Id. The Board of Trustees is entitled to rely on the Medical Board's independent findings even if it contradicts a petitioner's treating physicians. Tobin v Steisel, 64 NY2d 254 (1985). Where the Board of Trustees is deadlocked on this issue, “[o]n subsequent review in an article 78 proceeding, the reviewing court may not set aside the Board of Trustees' denial of accidental disability retirement resulting from such a tie vote unless ‘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 145, quoting Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of New York, 60 NY2d 347, 352 (1983).

The Medical Board here determined that petitioner's disability was caused by the degenerative condition petitioner incurred in connection with his herniated disc at L5-S1, which he injured in an off-duty accident in 1996. Its determination is supported by the credible


evidence of its own examination of petitioner, as well as petitioner's medical history that indicates a continuous harm resulting from the 1996 incident. It cannot be said that petitioner's disability was caused, "as a matter of law," by the 2006 incident.

Accordingly, it is

ADJUDGED that petition is denied and the proceeding is dismissed.

Dated:

APR 19 2012

  
**CAROL E. HUFF**  
J.S.C.

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