

Matter of Watts v Kelly
2010 NY Slip Op 34075(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 104719/09
Judge: Marilyn G. Diamond
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

INDEX NO. 104719/09

Matter of the Application of PAUL WATTS,

MOTION DATE

Petitioner,

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

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO.

RAYMOND KELLY, as 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.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Petitioner, a retired New York City police officer, brings this article 78 proceeding to annul the determination of the respondents which denied his application for an accident disability retirement pension ("ADR") on the ground that there was insufficient medical evidence to substantiate his claim of disability. Petitioner argues that this determination was arbitrary and capricious and contrary to established law.

Background

Petitioner was appointed to the New York City Police Department ("NYPD") on April 30, 1993. He became a Detective on the Warrant Enforcement Squad. On June 13, 2006, while attempting to arrest a suspect, the petitioner allegedly injured his back while lifting a bed under which he believed the suspect to be hiding. The petitioner was brought to a hospital emergency room three days later where he complained of lower back pain. No neurological or motor deficits were found. On June 24, 2006, the petitioner sought treatment from an orthopedic surgeon, Dr. Gary Gonya, at which time he was diagnosed with a lumbar strain. He was advised to start physical therapy and prescribed anti-inflammatories. An MRI performed on August 2, 2006 revealed "very mild" disc bulging at the L2-3 and L3-4 levels, a disc bulge at L4-5 that caused "mild" canal stenosis, and a disc herniation at L5-S1 with "mild" encroachment upon the thecal sac. In a August 22, 2006 follow-up report, Dr. Gonya indicated that the petitioner had shown no signs of significant improvement and recommended authorization for the petitioner to receive epidural steroid injections. Continuing to complain of severe lower back pain, the petitioner went to a neurosurgeon, Dr. Alan Mechanic, on September 14, 2006. Dr. Mechanic recommended that the petitioner consider undergoing back surgery.

On September 8, 2006, petitioner submitted an application for ADR in which he alleged that as a result of the line of duty injury he had suffered to his back and/or spine, he was permanently disabled from performing the full duty requirements of an NYPD officer. In response to petitioner's application, the Police Commissioner filed an application for Ordinary Disability Retirement ("ODR") on his behalf. On

March 21, 2007, the Police Pension Fund Medical Board examined and evaluated the petitioner and found that "the clinical and documentary evidence fails to substantiate that Paul Watts is disabled from performing the full duties of a New York City police officer." The petitioner continued to seek treatment and was evaluated by Dr. David Matusz, a spinal surgeon, on June 15, 2007. Dr. Matusz found that the petitioner's herniations were causing him neural foramina stenosis at L4-L5 and L5-S1 and recommended that the petitioner undergo spinal surgery. The petitioner underwent a laminectomy and laminoplasty on July 18, 2007.

Following the surgery, the petitioner sought continued treatment from Dr. Matusz and from a neurologist, Dr. Leonard Langman. Both Dr. Matusz and Dr. Langman examined the petitioner on numerous occasions and repeatedly found that he suffered from back pain, had difficulty bending, twisting or lifting objects weighing more than 20-25 pounds and should avoid sitting or standing for a period of time greater than 45 minutes. Both doctors indicated that the petitioner's physical activity be curtailed and expressed their belief that he would not be able to return to his job as a police officer. Following the submission of this new medical evidence, the petitioner's application for ADR was remanded by the Police Pension Fund Board of Trustees back to the Medical Board for further evaluation. On February 13, 2008, the petitioner was examined by the Medical Board, which again found that he was not disabled from performing his full duties as a police officer. The Board found that there was "no objective orthopedic or neurological evidence which would point to a deficit in the Detective's physical examination. The flexion/extension films demonstrate no instability of the spine." Thus, the Medical Board concluded that "there are no significant objective findings precluding the Detective from performing the full duties of a New York City Police officer."

The petitioner continued to seek treatment from Drs. Matusz and Langman, who continued to believe that he was unable to return to work as a police officer. On June 4, 2008, Dr. Langman wrote a report on behalf of the petitioner which indicated that the petitioner was totally and permanently disabled as a result of his injury. Dr. Langman's report indicated in detail his belief that while the spinal surgery could be considered successful in terms of alleviating the petitioner's pain and restoring some of his range of motion, as well as his neurological and motor functions, it was not sufficient to render the petitioner fit for the physical and dangerous nature of his full duties as a police officer. Dr. Langman noted in his report that the petitioner had both "motor and reflex changes in the lower extremities and that any attempt on his part to perform the physical activities attendant to the duties of a full time police officer could result in the destabilization of his spine and/or paraparesis." Similarly, Dr. Matusz concluded, in a report dated June 9, 2008, that the petitioner still had significant limitation in his range of motion and suffered lower back pain which prohibited him from engaging in certain activities of normal daily living and made it inadvisable that he return to his job as a police officer. Dr. Matusz indicated that the petitioner was at risk of making himself worse by engaging in "any significant activity including lifting.....at which point, he may be a danger to himself, with those around him." Based on this additional evidence, the Board of Trustees again remanded the petitioner's application to the Medical Board.

The petitioner continued to seek treatment from Dr. Matusz, who continued to advise him that any return to police work was inadvisable and could put him and/or his co-workers in danger. The petitioner also sought an additional medical opinion from Dr. George DiGiacinto, who the petitioner's counsel describes as a "nationally renowned spinal surgeon." Dr. DiGiacinto submitted a report to the Medical Board in which he indicated that the petitioner was a candidate for lumbar fusion surgery and that based on the results of petitioner's examinations, MRI's and complaints of severe lower back pain, he was unable to return to his full duties as a police officer.

On September 24, 2008, the Medical Board, for the third and final time, denied the petitioner's application for ADR, as well as the Commissioner's application for ODR, on the ground that the petitioner

had not demonstrated that he was disabled from performing the full duties of an NYPD officer. In reaching this conclusion, the Medical Board pointed out that the petitioner had been returned to full duty by an NYPD orthopedic surgeon. The Medical Board dismissed the findings of Dr. Matusz as having been “based on subjective symptoms and not on gross neurological deficit.” As to the report of Dr. DiGiacinto, it was described as merely finding that petitioner has a limited range of motion and suffers from lumbar instability. The Medical Board did not address the fact that petitioner’s treating physicians had made identical findings that his continued condition made it unsafe for him to return to full time duty as a police officer. On December 10, 2008, the Board of Trustees declined to remand the case back to the Medical Board and denied the petitioner’s application for ADR, as well as the Police Commissioner’s application on behalf of petitioner for ODR. This article 78 proceeding then followed.

Discussion

Section 13-252 of the Administrative Code of the City of New York governs accident disability retirement for members of the NYPD pension fund. It provides that upon application by a member or by the Commissioner, the Medical Board shall certify to the Board of Trustees that the member is entitled to ADR if a medical examination and investigation by the Medical Board show that the 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.” The applicant has the burden of proving such incapacity and its causation to the Medical Board. *See Matter of Evans v. City of New York*, 145 AD2d 361 (1st Dept. 1988); *Matter of Archul v. Bd. of Trustees of the New York City Fire Dept, Art. 1-B Pension Fund*, 93 AD2d 716 (1st Dept. 1983). It is well settled that the question of whether an applicant has the injury claimed and whether that injury incapacitates him from the performance of his duties is a decision solely for the Medical Board, and its determination on these issues is binding on the Board of Trustees. *See Matter of Borenstein v. New York City Employees’ Ret. Sys.*, 88 NY2d 756, 760-61 (1996); *Matter of Canfora v. Bd. of Trustees of the Police Pension Fund of the Police Dept of the City of New York*, 60 NY2d 347, 351 (1983). In an article 78 proceeding challenging a disability determination, the Medical Board’s finding should be sustained unless it lacks a rational basis, or is arbitrary and capricious. *Id.* at 351. The standard of review that has been consistently applied is that a determination by the Medical Board that the applicant is not disabled should not be disturbed if it is based on “some credible evidence.” *See Matter of Borenstein v. New York City Employees’ Ret. Sys.*, 88 NY2d at 760-61. The Court of Appeals has construed the meaning of this phrase to be “evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered” and that it must be “evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion.” *Matter of Meyer v. Bd. of Trustees of the New York City Fire Department*, 90 NY2d 139, 146 (1997).

Here, the petitioner argues that the Medical Board’s denials are deficient as a matter of law because they do not adequately discuss, analyze or refute the findings of the petitioner’s treating physicians concerning the instability of his spine and how this instability renders him unfit to return to full time duty. The petitioner also claims that the Medical Board ignored evidence that indicated that although he was technically on full duty at the time his application was denied, his actual assignments were restricted to light duty work. Having reviewed the record and the documents submitted to the Medical Board, the court agrees that the Medical Board did not adequately address all of the numerous medical reports and/or diagnostic tests submitted by the petitioner in support of his application. Thus, although the Medical Board found that the petitioner’s physicians concluded he was disabled based solely on subjective symptoms, the Board ignored the numerous objective findings contained in the reports by Dr. Matusz and Dr. Langman. Nor did the Board discuss the effects of the petitioner’s spinal surgery or Dr. DiGiacinto’s conclusion that the petitioner would likely need lumbar fusion surgery if he failed to adequately limit or curtail his physical activity. Although the Medical Board acknowledged that the petitioner’s physicians had found that he had a limited range of motion and lumbar instability, it nevertheless failed to state why it disagreed with those findings and did not even attempt to rebut the treating physicians’ assertions that the petitioner’s precarious

health made it unsafe for him to return to full-time duty. Finally, in emphasizing that the petitioner had been returned to full duty by an NYPD orthopedic surgeon, the Medical Board ignored evidence, which the petitioner claims was readily available, indicating that petitioner was only assigned to light duty by his supervisors, who were aware of and recognized his limitations, and that the only reason the surgeon returned him to full duty was an internal memo from the NYPD which instructed surgeons to return members to full-duty status if they had been turned down by the Medical Board on two or more occasions. Under the circumstances, the court is persuaded that this matter should be remanded to the Medical Board and the Board of Trustees for reconsideration since its conclusion lacks credible evidence. See *Matter of Rodriguez v. Bd. of Trustees of the New York City Fire Department*, 3 AD3d 501 (2nd Dept 2004).

Accordingly, the petition is granted to the extent that the determination denying the petitioner's application for accident disability retirement is hereby annulled and the matter remanded to the Medical Board and the Board of Trustees for reconsideration and further proceedings not inconsistent with this decision.

The Clerk Shall Enter Judgment Herein.

Dated: 6/21/10



MARYLIN G. DIAMOND, J.S.C.
[] NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION