

Matter of Brown v Board of Trustees of the N.Y. City Police Pension Fund
2011 NY Slip Op 32679(U)
October 13, 2011
Sup Ct, NY County
Docket Number: 113641/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

Index Number : 113641/2010
BROWN, JOHN
VS.
BD OF TRUSTEES OF THE NYC
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION
CAL # 15

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for reargue

PAPERS NUMBERED
1
2

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/13/11
[OCT 13 2011]

[Signature]
BARBARA JAFFE J.S.C.
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X

In the Matter of the Application of JOHN BROWN,

Index No. 113641/10

Petitioner,

Motion Date: 8/2/11

Motion Seq. No.: 002

For an Order and Judgment Pursuant to Article 78, CPLR,

DECISION & JUDGMENT

-against-

THE BOARD OF TRUSTEES OF THE NEW YORK
CITY POLICE PENSION FUND, ARTICLE II, THE CITY
OF NEW YORK, MICHAEL BLOOMBERG, Mayor of
the City of New York, and RAYMOND KELLY, Police
Commissioner of the City of New York,

Respondents.

-----X

BARBARA JAFFE, JSC:

For petitioner:
Ronald Podolsky, Esq.
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New York, NY 10009
347-298-3269

For respondents:
Ilyse Sisolak, ACC
Michael A. Cardozo
Corporation Counsel
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By amended notice of motion dated May 31, 2011, petitioner moves pursuant to CPLR 2221 for an order granting him leave to reargue a prior decision and order dated May 31, 2011, in which I denied petitioner's Article 78 petition and dismissed the proceeding, thereby upholding respondents' denial of petitioner's application for an accidental disability retirement (ADR) pension. Respondents oppose.

In the May 2011 decision, I held as follows, as pertinent here:

Here, the Medical Board's conclusion that petitioner was not disabled was based on its examinations of him and review of his medical reports including any new evidence

submitted to it on remand, which reflected that petitioner's restricted lung functions were related to his weight and not to any intrinsic lung disease. Particularly significant is petitioner's improvement in lung function after his weight-loss surgery and his physician's opinion that he was able to resume full police duties, and the fact that petitioner subsequently missed only four days of work during the four years before he retired. The Medical Board's opinion was thus based on credible evidence . . . The sole evidence to the contrary, the letter from petitioner's pulmonologist, was based on the erroneous assumption that petitioner's lung capacity had not improved after he lost weight. However, even if petitioner's pulmonologist's opinion was based on a correct assumption, the Medical Board was entitled to disregard it.

I thus concluded that petitioner had failed to demonstrate that respondents' denial of his ADR application was arbitrary, capricious, or irrational.

Petitioner now alleges that I overlooked or misapprehended certain facts related to his eligibility for an accidental disability pension. (Affirmation of Ronald Podolsky, Esq., dated May 22, 2011). He asserts that I erroneously characterized the NYPD's Commissioner's application for an ordinary disability retirement pension on petitioner's behalf as a mere inquiry, and that the Board's conclusion that petitioner was disabled in 2004, six years before his ADR application, based on his reduced lung function, but was not disabled in 2010 based on the same reduced lung function is illogical.

In opposition, respondents maintain that petitioner failed to identify any relevant facts which I allegedly overlooked or misapprehended, and that petitioner was found disabled in 2004 based on his sleep apnea and not due to pulmonary disease which he claimed in his 2009 application. (Affirmation of Ilyse Sisolak, ACC, dated June 9, 2011).

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). Whether to grant re-

argument is committed to the sound discretion of the court, and a motion to re-argue may not “serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

As I detailed in the decision, the Board found in 2004 that petitioner was disabled by obstructive sleep apnea, not restrictive airway disease, and observed that he subsequently had lap band surgery. When the Board re-examined petitioner in 2005, it reviewed a note from a pulmonologist stating that since the surgery, petitioner’s apnea had nearly completely resolved and that petitioner “no longer [had] a problem from a pulmonary perspective,” and later received a letter from the pulmonologist in which he stated that petitioner no longer had any apnea-related symptoms and was able to resume full police duties. The Board thus, in 2005, rescinded its finding that petitioner was disabled.

Between 2005 and 2009, petitioner missed only four days of work due to illness, and in 2009 applied for an ADR, alleging that he suffered from a pulmonary condition or derangement. The Board reviewed his medical records and observed that his lung capacity had improved after his weight loss and worsened once he re-gained weight, noting that “considering that six years have passed, there should have been actual deterioration in these readings since there is normally a fall in pulmonary function over time,” and that November 2007 and May 2008 CT scans of petitioner’s chest showed no significant pulmonary disease, that his lungs were clear with minimal linear scarring in his right lower lobe, and that most importantly, there were no interstitial fibrotic changes or bronchiectasis. Petitioner’s pulmonary function tests also showed consistent normal diffusion capacity, indicating an absence of interstitial lung disease.

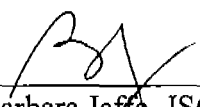
Thus, not only did the Board's 2004 determination that petitioner was disabled relate solely to his obstructive sleep apnea, it subsequently found that the apnea had resolved due to the lap band surgery. The Board thus rescinded its determination that he was disabled, and in his 2009 application, petitioner no longer claimed that he suffered from sleep apnea. Consequently, the Board's 2010 finding that petitioner was not disabled due to any pulmonary condition or disease had no relation to its 2004 determination and was thus neither illogical nor irrational. In any event, petitioner made the same arguments in the original motion, which were addressed in my previous decision.

And, on page 11 of the decision, I wrote that the NYPD had submitted an ODR application on petitioner's behalf, not just an inquiry.

Petitioner has therefore failed to demonstrate that I overlooked or misapprehended any matter of fact or law, and has not established entitlement to an order granting him leave to reargue. Accordingly, it is hereby

ORDERED, that petitioner's motion for leave to reargue is denied.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: October 13, 2011
New York, New York

OCT 13 2011

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK