

Matter of Kiess v Kelly
2012 NY Slip Op 32545(U)
October 4, 2012
Sup Ct, New York County
Docket Number: 110044/2011
Judge: Alice Schlesinger
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 110044/2011
KIESS, JOSHUA
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

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~~ Article 78 petition is granted and the matter is remanded for further processing in accordance with the accompanying memorandum decision.

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

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: OCT 04 2012

Alice Schlesinger
ALICE SCHLESINGER, J.S.C.

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

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).

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

-----X
IN THE MATTER OF THE APPLICATION OF
JOSHUA KIESS,

Petitioner,

Index No. 110044/11
Motion Seq. No.001

-against-

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.

-----X
SCHLESINGER, J.:

The Article 78 petition now before this Court presents a somewhat unique set of facts. Police Officer Joshua Kiess was injured while on the job on November 24, 2006. Subsequently, he applied for Accident Disability Retirement ("ADR"). On two separate occasions, the Medical Board examined Officer Kiess and reviewed his records. At least they say they did. But not only did that Board recommend against approval of Officer Kiess' application for ADR, it also recommended against any finding of disability or an award of Ordinary Disability Retirement ("ODR").

Yet it seemed apparent, based on a number of objective tests, MRI's, EMG's, and opinions expressed by the officer's board certified treating physicians in the fields of spinal surgery and neurology, that Officer Kiess had extremely serious structural problems at several parts of his spine, and that medical evidence was not truly considered by the Board.

The Medical Board's final disapproval was on January 29, 2008. Officer Kiess resigned from the force on April 30, 2008. He did this, he says, because of a recent memo sent out by the Department to the effect that there would be a serious reevaluation of officers, such as Officer Kiess, who were on limited duty to try and get them back on the streets on full duty. Officer Kiess believed he was not able to do that and that if he were forced to, he would endanger himself, his brother and sister officers, and the public. So he resigned. Following this, on May 14, 2008, when the matter came before the Pension Board, the application was not considered on its merits. Rather, it was dismissed because Kiess was no longer a member of the Pension Fund.

Because Officer Kiess believed that the Medical Board had not properly considered all of his presenting evidence, he challenged their findings in an Article 78 proceeding in Supreme Court. The Department disagreed and argued that the Board had acted in accordance with its role and had arrived at its conclusion by evaluating the evidence. The procedural history, as described above, was presented to that court and noted by it in a decision agreeing with the respondent Department.

Counsel for Officer Kiess appealed the denial of the Article 78 to the Appellate Division. That court was given the same procedural history, which included the January 29 denial by the Medical Board, the April 30 resignation by the Officer, and the May 14, 2008 dismissal by the Pension Board. But argument before the court was again on the merits. In other words, counsel discussed whether the Medical Board had acted properly in its denial in the face of objective evidence, in fact very persuasive evidence, that the Officer was in fact disabled as a result of an automobile accident. That accident had occurred on November 24, 2006, when the Police vehicle that Officer Kiess was

driving, on his way to an emergency, was hit by a taxicab on the driver's side.¹

On July 1, 2010, the Appellate Division reversed the Supreme Court and remanded the action to the respondent Board of Trustees. 75 AD3d 416. The appeals court annulled the findings of the Medical Board, stating that: "It does not appear that the Medical Board, following the remand from the Board of Trustees to consider new evidence," did that. Specifically, the Appellate Division ordered "new medical findings and reports by the Medical Board and a new determination by the Board of Trustees...". 75 AD3d at 417 (citations omitted). The court specifically pointed to a report by a spinal surgeon who had opined that Officer Kiess was unable to return to work due to severe pain and a report from a neurologist who had performed an EMG demonstrating radiculopathy and had opined that Kiess was totally disabled from his injuries. The court also said that the Medical Board's decision was deficient in that: "The Medical Board simply referred to its prior minutes, set forth the results of tests performed in physical examination, and, without further explanation, concluded that, upon review of all materials presented, it was of the opinion that there 'are no significant objective findings' preventing petitioner from performing the full duties of a police officer." *Id.* Nowhere did the Medical Board consider the new evidence which it was directed to consider by the Board of Trustees. Nor was the new evidence even mentioned.

However, on remand to the Pension Board, the remand to the Medical Board sparked controversy. At this time a new argument, one allegedly overlooked by counsel

¹Petitioner's counsel states in his Reply memo that the jurisdictional issue related to the resignation of Officer Kiess was also presented in oral argument to the Appellate Division.

for the City before both the Supreme Court and the Appellate Division, was presented. That argument was that both previous courts, as well as the instant court, lacked any jurisdiction to even hear this case because, in light of Officer Kiess' resignation, he no longer had the requisite status to receive any kind of pension. He had resigned and had received a check back for \$21,000.00 from the Pension Fund, and that ended the matter, the City claimed. In other words, judicial jurisdiction was now gone, as of April 30, 2008.

This position was expressed in a memo from counsel to the Board of Trustees when it first heard the matter on remand. Some of the Board felt, in light of this position, that the controversy should not be sent again to the Medical Board. The matter was tabled. After all, if the Trustees refused the further remand, was not that a direct rejection of the Appellate Division's order and was it not arguably contemptuous of that order? When the matter was heard again, reason prevailed and the matter was remanded to the Medical Board.

On March 8, 2011, the Medical Board, despite the clear and explicit instructions from the appeals court, and despite the fact that Officer Kiess had appeared at the office of the Medical Board on the designated remand date to be examined, and despite the fact that one of the physician members of the three person board was new to this controversy, the Medical Board neither saw nor examined petitioner, it neither re-reviewed (nor reviewed in the first instance) the reports from the spinal surgeon and the neurologist, or at least the Board failed to say they did. Rather, they once again recommended disapproval of any disability award. In this regard, the Board stated precisely what had been stated before on January 29, 2011. The finding was reversed. However, this time, the rationale was limited to paragraph 5, together with a misstatement in paragraph 4 where the panel said, "The

Medical Board reviewed all new evidence that was submitted." In fact, at that time no new evidence was submitted. It was the previously submitted evidence that the Board was ordered to consider.

Finally, the Pension Board dismissed the proceeding on counsel's recommended rationale, that jurisdiction was lacking.

That is the history. Not surprising, the positions before me now are the same ones articulated after the remand² and, at least according to counsel for Officer Kiess, argued also before the Appellate Division.

Petitioner argues that the Medical Board did not do its job once again and that this time it was particularly egregious, after having received explicit instructions by the Appellate Division as to what to consider. He argues that it is clear they did not do that. He urges this Court to reinforce the order by the higher court and once again remand, making it clear that the Medical Board cannot ignore the strong medical evidence presented, and in considering such evidence must reconsider its earlier decisions.

Counsel for respondent says that course should not be followed as the courts have lost jurisdiction because of the Officer's April 30, 2008 resignation. Mandamus does not lie, they argue, because again there is no jurisdiction. Finally, they say, even though it could be said that this argument should have made earlier, they, as the City, cannot by law be estopped from making the argument now.

I find the City's arguments unavailing. As argued by counsel for the Officer, Kiess was a member of the Department on January 29, 2008. That is the date when the Medical

²Petitioner's counsel also wrote to the Board advising that they had jurisdiction and urging them to follow the Appellate Division's instructions.

Board issued its decision disapproving his application. The Board did this, according to the Appellate Division, because it gave no weight and effect to the objective tests and medical opinions and evidence presented by the Officer. That is the date, and the days leading up to it, when the Medical Board, according to the Appellate Division, inadequately evaluated the case. That is the date, and the days before, when the Medical Board had an obligation to seriously consider the evidence which, as suggested by the higher court, would have led to a different result.

If the Board had done that, if it had acted properly and recommended ADR, of course Officer Kiess would not have resigned from the force and there would have been no issue of jurisdiction. However, because the Medical Board acted improperly in failing to properly consider the medical evidence submitted to them, Officer Kiess was forced under the circumstances to resign from the Department.

Clearly, the Appellate Division was aware of these facts, whether or not there was explicit argument on the issue. Yet those historical facts did not deter the court from trying to correct what was perceived as an injustice. If Officer Kiess had suffered a disability as a result of the automobile accident, then he is entitled to ADR benefits. To deprive him of such would be an injustice. This Court agrees with the Appellate Court that this is a result that should not be maintained.

On January 29, 2008, Officer Kiess was a member of the Department and its Pension Fund. At that time he was deprived of an impartial, thorough and fair hearing of his claims to an Accident Disability Retirement Award. On the final remand to the Medical Board, this time by the Appellate Division, unfortunately the same inadequacies were repeated. Again, the reports of the officer's doctors, two board certified specialists, were

never seriously considered. Nor was Kiess even given a new physical examination, despite the fact that one of the three member physicians had never even seen him. Therefore, it is clear, the rights of Officer Kiess were once again ignored. Hopefully on this third try, that will not happen.

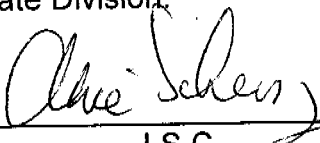
Therefore, the matter is remanded so that the Medical Board can conduct a new physical examination and can seriously evaluate the specific medical evidence referred to by the Appellate Division, which includes the reports of the board certified spinal surgeon and the board certified neurologist. This evidence was clearly not considered on the remand. If all that is done in a conscientious, open-minded and fair way, it would seem that Officer Kiess should receive the ADR benefits to which he appears to be entitled.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Article 78 petition is granted to the extent of remanding this matter for further processing in accordance with the accompanying memorandum decision and the prior dictates of the Appellate Division.

Dated: October 4, 2012

OCT 04 2012



J.S.C.

ALICE SCHLESINGER

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).