

**Matter of Fitzpatrick v Kelly**

2014 NY Slip Op 30286(U)

January 21, 2014

Sup Ct, New York County

Docket Number: 100532/13

Judge: Jr., Alexander W. Hunter

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 2/29/14  
[\* 1]  
**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

Index Number : 100532/2013

FITZPATRICK, WILLIAM

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

PART 33

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

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

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

The following papers, numbered 1 to 21, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1-18

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 19-20

Replying Affidavits \_\_\_\_\_ No(s). 21

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the  
Decision and Judgment annexed hereto.*

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: 1/21/14

  
\_\_\_\_\_  
ALEXANDER W. HUNTER J.D., 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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33**

-----X  
In the Matter of the Application of  
William Fitzpatrick,

Index No.: 100532/13

Petitioner,

Decision and Judgment

-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, The Board of Trustees  
of the Police Pension Fund, Article II, New York City Police  
Department, and the City of New York,

Respondents.

-----X  
**HON. ALEXANDER W. HUNTER, JR.**

The application of petitioner for an order pursuant to CPLR Article 78, annulling the determination of respondents denying the application of petitioner for accident disability retirement ("ADR") pension pursuant to General Municipal Law § 207-k (the "Heart Bill"), is denied and the proceeding is dismissed without costs and disbursements to either party. The motion by respondents to dismiss the petition is granted.

Petitioner was appointed as a uniformed police officer in the New York City Police Department ("NYPD") on July 18, 1996 and served continuously until he retired on ordinary disability. On April 14, 2009, petitioner was treated by his physician for shortness of breath. Petitioner was subsequently diagnosed as having idiopathic cardiomyopathy.

On June 8, 2009, petitioner was seen by a NYPD cardiologist. Petitioner was placed on limited or restricted duty. On April 13, 2011, NYPD surgeon Dr. Eli Kleinman determined that petitioner was disabled due to his weak heart. His prognosis for returning to work was considered poor. On April 28, 2011, petitioner filed an application for ADR pension under the Heart Bill. The Heart Bill provides police officers with a statutory presumption that a disabling heart condition developed during their career is a result of occupational stress. Disability is evidenced by ventricular wall thickness of 1.4cm or greater, in the presence of hypertension.

Petitioner was examined by the Medical Board of the Police Pension Fund. The Medical Board determined that petitioner neither suffered from coronary artery disease nor hypertension. The final diagnosis was idiopathic cardiomyopathy, not hypertensive cardiomyopathy. On June 3, 2011, the Medical Board concluded that petitioner was disabled from performing the full duties of a police officer. The Medical Board disapproved the ADR pension of petitioner and

recommended to the Board of Trustees of the Police Pension Fund approval of ordinary retirement disability ("ODR") pension.

Petitioner sought reconsideration of his ADR pension application. He submitted a July 1, 2011 report of his cardiologist which stated that, although his ventricular wall thickness was 1.2cm, petitioner met the criteria for hypertensive or hypertrophic cardiomyopathy.

On October 21, 2011, the Medical Board reconsidered the ADR pension application of petitioner. The Medical Board noted that: (1) petitioner did have some documentation of untreated hypertension for an unstated period but, with treatment, his blood pressure was within normal range; (2) petitioner had a history of upper respiratory infection or bronchitis for a period of two or three weeks before he developed shortness of breath; and (3) a November 18, 2010 echocardiogram revealed the ventricular wall thickness of petitioner to be 1.2cm. Based on the above findings, the Medical Board affirmed its previous decision and recommendation.

Petitioner informed the Board of Trustees of a more recent echocardiogram taken on July 7, 2011 that revealed his ventricular wall thickness to be 1.3cm. Petitioner requested that the Medical Board reconsider its October 21, 2011 decision. The Board of Trustees remanded the matter back to the Medical Board.

On May 11, 2012, the Medical Board interviewed and examined petitioner. The physical examination of petitioner revealed a normal blood pressure reading of 110/80. The Medical Board diagnosed petitioner with idiopathic cardiomyopathy and noted that hypertension was not the cause of the cardiomyopathy. Left ventricular hypertrophy of significant degree was not documented. The Medical Board reaffirmed its previous decision and recommendation.

On December 7, 2012 petitioner submitted to the Board of Trustees a letter from his attorney and a letter from his physician in support of his ADR pension application. The letters suggested that prior blood pressure readings of petitioner met diagnostic criteria for hypertension. The attorney for petitioner also requested a remand back to the Medical Board.

On December 12, 2012, the Board of Trustees considered the May 11, 2012 recommendation of the Medical Board. The vote to approve the ADR pension application was split six-to-six. The Board of Trustees denied the ADR application of petitioner and a resolution was passed awarding petitioner ODR pension benefits.

Petitioner avers that: (1) the actions of respondents were arbitrary and capricious; (2) respondents failed, neglected and refused to use the proper legal test of entitlement for ADR; and (3) he has a documented history of hypertension.

Respondents move to dismiss the petition on the grounds that its determination was neither arbitrary nor capricious and was supported by credible medical evidence in the record. Respondents aver that: (1) the record demonstrates that petitioner does not present with

significant stress-related heart pathologies to warrant ADR pension under the Heart Bill; (2) the Medical Board properly addressed and discounted the inconsistent and unsubstantiated medical evidence of hypertension; and (3) the Board of Trustees was justified in relying on the findings of the Medical Board.

In reply, petitioner avers that: (1) respondents ignored key facts and the statutory intent of the Heart Bill; (2) he suffered from abnormal thickening of his left ventricular wall and has a history of high blood pressure; and (3) it was error for the Board of Trustees to not remand the matter back to the Medical Board for further review and consideration.

It is well established that “courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board. Only if the Board of Trustees’ determination is ‘wholly irrational’ should the court step in and upset the Board’s determination.” **Appleby v. Herkommer**, 165 A.D.2d 727 (1st Dept. 1990) (internal citations omitted).

Pursuant to the Administrative Code § 13-252, ADR pension requires an applicant establish that he or she is “a member in city-service” who “is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result” of an “accidental” injury received in city-service. The determination of physical incapacity shall be made by the Medical Board. **See Borenstein v. New York City Emples. Ret. Sys.**, 88 N.Y.2d 756, 760 (1996). The issue of causation shall be determined by the Board of Trustees. **Id.**; **See Canfora v. Bd. of Trustees**, 60 N.Y.2d 347 (1983). Where there are divergent medical opinions, this does not render the opinion of the Medical Board arbitrary and capricious. **See Borenstein**, 88 N.Y.2d at 761.

Pursuant to the Heart Bill, an applicant for ADR pension must show that he is disabled from the performance of the duties of a police officer by a disease of the heart. Upon such a showing, a statutory presumption arises that such a condition was accidentally incurred in the performance of duty, unless rebutted by competent evidence to the contrary. **See General Municipal Law § 207-k; Uniformed Firefighters Assn.**, 52 N.Y.2d 463, 472 (1981). Competent evidence, which demonstrates that a disabling heart condition exists in the absence of hypertension or coronary artery disease, is sufficient to rebut the statutory presumption. **See Gumbrecht v. McGuire**, 117 A.D.2d 531 (1st Dept. 1986). The opinion of the Medical Board constitutes competent evidence sufficient to rebut the statutory presumption. **Lo Pinto v. Ward**, 124 A.D.2d 497 (1st Dept. 1986). The Board of Trustees is entitled to rely on the opinion of the Medical Board. **Matter of Quinn v. Kelly**, 92 A.D.3d 589 (1st Dept. 2012).

Here, the statutory presumption afforded under the Heart Bill was sufficiently rebutted by the Medical Board, which determined that the cardiomyopathy of petitioner was neither the result of coronary artery disease nor hypertension. Accordingly, this court sustains the determination of the Board of Trustees denying petitioner ADR pension benefits.

Accordingly, it is hereby

ADJUDGED that the application of petitioner for a judgment pursuant to CPLR Article 78, annulling the determination of respondents denying the application of petitioner for ADR benefits pursuant to General Municipal Law § 207-k, is denied and the proceeding is dismissed without costs and disbursements to either party. The motion by respondents to dismiss the petition is granted.

Dated: January 21, 2014

ENTER:



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

**ALEXANDER W. HUNTER JD**

**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).