

Rivera v Sewell

2022 NY Slip Op 34324(U)

October 21, 2022

Supreme Court, New York County

Docket Number: Index No. 151813/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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LAUREANO RIVERA,

Petitioner,

- v -

KEECHANT SEWELL, THE BOARD OF TRUSTEES OF
THE NEW YORK CITY POLICE PENSION FUND, ARTICLE
II

Respondent.

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INDEX NO. 151813/2022

MOTION DATE 8/02/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

The following Article 78 Petition seeks to review and annul “the action of Respondents herein denying Petitioner accident disability retirement pursuant to the City of New York Administrative Code 13 – 252, and declaring said action to be arbitrary, capricious, unreasonable, and unlawful; and directing and ordering the Respondent to retire Petitioner with an accident disability retirement allowance... or in the alternative directing a remand of Petitioner’s case to the Board of Trustees to conduct an investigation ... of the events surrounding Petitioner’s left shoulder injury.”

Article 7803(3), “[t]he only questions that may be raised ... whether a determination was made ...arbitrary and capricious.”

“On August 6, 2014, petitioner allegedly injured his left shoulder after he slipped and fell on a wet floor at the Fifth Precinct located at 19 Elizabeth Street in Manhattan. On August 23,

2019, a week before his retirement, petitioner filed an application for accident disability retirement” (see NYSCEF Doc. No. 17 Pars. 32, 37).

A process ensued that started with the Police Commissioner, an Examination Order to the Medical Board, and a Board of Trustees Decision. Respondents’ answer states:

“Notwithstanding that the Medical board concluded that Petitioner was disabled, the Board of Trustees was required to determine whether the disability was the result of an incident or accident. Petitioner’s case was discussed by the Board of Trustees at its meetings on September 8, 2021, October 13, 2021 and November 10, 2021. Credible evidence supports the determination by the Board of Trustees that Petitioner’s injury was not caused by accident. In sum, the members determined that Petitioner had not shown that this incident on August 6, 2014, was an accident but was rather an incident, as the contemporaneous reports stated that Petitioner walked onto the wet floor in the muster room in disregard of the verbal warning of the custodians waxing the floor and signs posted. Petitioner had not shown that the injury was the result of an unexpected event in the performance of his ordinary course of duties. Rather, the injury was caused by his own affirmative actions in attempting to walk across a wet, slippery floor as detailed in the record that there were warning signs, everyone knew of the work being done, the custodial staff verbally warned Petitioner of the floor condition, and yet Petitioner elected to walk across the floor anyway” (see NYSCEF Doc. No. 17 Par. 48).

In order to qualify for accident disability retirement, a police officer must show that he or she 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, and that such disability was not the result of willful negligence on the part of such member” (see Administrative Code 13 – 252).

“Although the term ‘accident’ is not specifically defined by the statute, we adopt the commonsense definition of a ‘sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact. According to this definition, an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties,

considered in view of the particular employment in question, is not an accidental injury within the meaning of the [Administrative Code]” (see *Lichtenstein v. Bd. of Trustees of the Police Pension Fund*, 57 N.Y.2d 1010 [N.Y. 1982]).

Respondents’ memorandum of law states, “[t]o overturn a 6 – 6 decision, the Court must find that the ‘factual findings are not supported by substantial evidence or [the pension fund’s] final determination and ruling is arbitrary and capricious’ *Russo v. bd. of Trs. Of the New York City Fire Dep’t, Article 1 – B Pension Fund*, 143 A.D.2d 674, 676 [2d Dep’t 1988]; accord *Canfora*, 60 N.Y.2d at 351. As construed by the courts, a determination is supported by ‘substantial evidence’ if it is supported by ‘some credible evidence’ see *Borenstein v. New York City Employees’ Ret. Sys.*, 88 N.Y.2d 756, 760 (1996) (see NYSCEF Doc. No. 21 P. 9). Additionally, the courts have made it clear that an injury arising from an alleged dangerous condition that the applicant was aware of does not constitute an accident for purposes of ADR see *Matter of Hope v. Kelly*, 4 A.D.3d 176 (1st Dep’t 2004).

Petitioner essentially agrees with said position acknowledging that the decision for this court is addressed in *Matter of Lichtenstein*. The Court of Appeals defined an “accident” in the context of disability pensions as follows:

“Although the term ‘accident’ is not specifically defined by the statute, we adopt the commonsense definition of a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact. According to this definition, an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury” (see *Matter of Lichtenstein v. Board of Trustees*, 57 N.Y.2d 1010, 1012 [Ct. Appeals, 1982]).

In *Matter of McCambridge v. McGuire*, 62 N.Y.2d 563 [Ct. Appeals, 1984]), the Court of Appeals further refined the definition of accident by stating: “To be distinguished are injuries sustained while performing routine duties but not resulting from unexpected events.”

In *Matter of Starnella v. Bratton*, 92 N.Y.2d 836, 839 [Ct. Appeals, 1998], the Court of Appeals further clarified its definition of “accident” by excluding mere “missteps” not caused by some extraneous force or factor:

“Indeed, slipping and falling on wet pavement on a rainy day is no less a sudden and unexpected event than Sergeant Gasparino’s misadventure involving a pool of water in the bathroom. However, Officer Starnella’s injuries did not result from such a risk. A fall down the stairs as a result of one’s own misstep, without more, is not so out – of – the – ordinary or unexpected as to constitute an accidental injury as a matter of law.”

Thus, it is left for this court to determine based on the facts presented whether the Petitioners disability was the natural and approximate result of a service-related accident.

The court has had an opportunity to review numerous documents submitted including, line of duty injury reports, medical board minutes, and various letters (see NYSCEF Doc. Nos. 3 – 11). The Board of Trustees reviewed all the relevant documents, applied the definitions of incident to accident, and determined a logical answer that has a rational basis on the facts. Such a finding where petitioner knew the floor was wet, warning signs were present and verbal warnings occurred create a rational basis and credible evidence that this was an incident and not an accident as alleged by petitioner.

ORDERED that the Petition to review and annul “the action of Respondents herein denying Petitioner accident disability retirement pursuant to the City of New York Administrative Code 13 – 252, and declaring said action to be arbitrary, capricious, unreasonable, and unlawful; and directing and ordering the Respondent to retire Petitioner with

an accident disability retirement allowance... or in the alternative directing a remand of Petitioner’s case to the Board of Trustees to conduct an investigation ... of the events surrounding Petitioner’s left shoulder injury,” is DENIED in its entirety.

10/21/2022

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE