

At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 6th day of July 2007.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

In the matter of the Application of
GLENN HEALY,

Petitioner,

DECISION AND ORDER

For a Judgement pursuant to Article 78
of the Civil Practice Laws and Rules

- against -

Index No. 3354/07

NICHOLAS SCOPPETTA, as Fire Commissioner of the City of New York and as Chairman of the Board of Trustees of the New York City Fire Department Article I-B Pension Fund, THE BOARD OF TRUSTEES of the New York City Fire Department, Article I-B Pension Fund, and THE CITY OF NEW YORK,

Defendants.

The following papers numbered 1 to 2 read on this motion:

Papers Numbered

Order to Show Cause/
Affidavits (Affirmations) Annexed _____

1

Verified Answer/Affirmations in Opposition _____

2

Affirmations in Reply _____

3

Affirmation in Sur-Reply _____

4

Petitioner in this case was previously granted an Order directing that the petitioner's application for accident disability retirement benefits be "remanded to the respondents for re-evaluation which is to include an evaluation by an outside impartial consultant other than Dr. Delavagas". Respondents now move the Court pursuant to CPLR §2221(d) for leave to re-argue the prior decision, or in the alternative, for an Order granting leave to appeal the decision pursuant to CPLR § 5701(c).

Discussion

CPLR §2221(d) which governs motions for leave to reargue requires that the motion: 1) be identified specifically as such; 2) 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; and 3) be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. The rule does not apply to motions to reargue a decision made by the appellate division or the court of appeals.

The motion to reargue must be based upon matters of law or fact which were allegedly overlooked or misapprehended by the court in arriving at its determination of the prior motion. Thus, the moving party should be able to point out where in the papers submitted on the original motion the overlooked or misapprehended fact was asserted or the overlooked or misapprehended argument was made. A motion to reargue may not include or be based on any facts not offered on the prior motion. Motions to reargue are made to the sound discretion of the Court and the denial of a motion to reargue is not appealable. See CPLR §2221.

"[A] motion for reargument is addressed to the sound discretion of court which decided the prior

motion and may be granted upon a showing that the court overlooked or misapprehended facts or law or mistakenly arrived at its earlier decision.”, Marini v. Lombardo, 17 A.D.3d 545, 793 N.Y.S.2d 460, (2d Dept., 2005).

After reviewing the papers submitted, the Court again concludes that the petitioner is entitled to have his application for accident disability retirement benefits re-considered by the respondents, and the Court similarly abides by its original decision that the petitioner be re-examined by an “outside, impartial consultant”, other than Dr. Delavagas. The Court finds it difficult for respondent to successfully argue that a doctor who relies on said respondent for a portion of his income does not have a vested interest in keeping and maintaining that source of income.

The Court also finds equally unpersuasive, respondents’ argument that they do not have to consider the medical treatment that the petitioner received subsequent to his retirement because it is irrelevant and unrelated. The medical treatment that the petitioner received after his retirement, which includes another surgical procedure, was all performed on the same knee that the petitioner had been claiming and complaining about both prior to and throughout this litigation. If the petitioner wanted respondent to consider a “new” unrelated back injury that the petitioner sustained after he retired, the respondent would be justified in refusing to consider the claim. However, in this case the treatment records that the petitioner claims deserve review all relate to the same knee injury that the respondents had been considering all along. There is no suggestion, much less any proof that the petitioner re-injured the same knee after he retired. To the contrary, it appears that the treatment that the petitioner received to his knee post-retirement is directly related to whatever knee injury he sustained pre-retirement. As such, the Court

declines to change its prior ruling, and similarly declines to grant the respondent leave to appeal this Order.

Conclusion

Accordingly, it is

ORDERED, that the respondent's motion is, in all aspects, denied. This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE

J. S. C.

HON. BERNADETTE BAYNE

FILED
KINGS COUNTY CLERK
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