

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

PRESENT: ALICE SCHLESINGER
ALICE SCHLESINGER
Justice

PART 1A Part 16
16

Stefanie H. Fich

INDEX NO. 121065/03

- v -

Raymond Kelly, et al.,

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 001

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

RECEIVED
JUN 24 2004
IAS MOTION
SUPPORT OFFICE

FILED

JUL 15 2004

COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUN 16 2004

Alice Schlesinger

ALICE SCHLESINGER J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

THIS IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Case 03

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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

STEFANIE H. RICH,

Petitioner,

Index No. 121065/03
Mot. Seq. 001

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

- 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
SCHLESINGER, J.S.C.

Petitioner Stephanie H. Rich commenced this Article 78 proceeding to annul the decision by respondents which denied petitioner's application for Accident Disability Retirement (ADR) benefits and limited her to Ordinary Disability Retirement (ODR) benefits payable at a much lower rate. Respondents have opposed the petition. Petitioner asserts that she is entitled to the higher rate of Accident Disability benefits because, even though she was not involved in a single line-of-duty "accident," she qualifies for ADR under the terms of the "Heart Bill," codified as General Municipal Law §207-k. As confirmed by the Court of Appeals in *Uniformed Firefighters Association, et al., v. Beekman, et al.*, 52 NY2d 463 (1981), the Heart Bill reflects a legislative determination to treat heart-related disabilities suffered by New York City uniformed personnel in the same manner as accident-related disabilities for purposes of eligibility for ADR benefits.

The Heart Bill, provides in relevant part that:

[A]ny condition of impairment of health caused by diseases of the heart, resulting in total or partial disability or death to a paid member of the uniformed force of a paid police department or fire department ... who successfully passed a physical examination on entry into the service of such respective department, which examination failed to reveal any evidence of such condition, shall be presumptive evidence that it was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence.

The issue to be determined here is whether respondents correctly applied the terms of the Heart Bill when it denied petitioner's application for ADR benefits.

Background

The proceedings below were extensive, and some review is essential to the determination of this case. Stephanie H. Rich joined the New York City Police Department on January 3, 1983. Prior to her appointment, she passed all requisite physical and mental examinations. She worked continuously and ultimately attained the position of Detective Investigator. She retired in early 2000 at 47 years of age, having been born in August 1952.

On February 9, 2000, in connection with her retirement, Detective Rich submitted an application for Accident Disability Retirement (ADR) benefits under the provisions of the Heart Bill (General Municipal Law §207-k), wherein she stated: "I complain of a heart condition." At the same time, the Police Commissioner submitted an application on behalf of Detective Rich for Ordinary Disability Retirement (ODR) benefits.

Detective Rich, shortly before her actual retirement, had submitted to a battery of

noninvasive tests conducted by Vascular Diagnostic Associates on January 27, 2000. Those tests included an echocardiogram, a Duplex Doppler examination, a nuclear stress test, and a pulmonary function test. On that same day, Detective Rich was also examined by Dr. Martin J. Kaplitt. Dr. Kaplitt summarized the findings made by him and those revealed by the tests in a letter to Detective Rich's private physician, Dr. Mervin Sakowitz, which included copies of the test results. Dr. Kaplitt included in his findings about Detective Rich mention of early signs of heart-related issues, stating as follows:

[The] patient demonstrates mild to moderate plaque formation at the carotid arteries bilaterally. The left I/C ratio reflects normal velocities throughout. The elevated rapidity of the right carotid artery flow suggests a possible stenosis of approximately 40%. We recommend a repeat of this study in one year to reevaluate this condition.

However, the cardiac tests revealed no abnormal findings or exercise induced myocardial ischemia or infarction. Further, on March 21, 2000, the Police Department performed its own resting electrocardiogram on Detective Rich which revealed some sinus tachycardia but no axis deviation and was otherwise normal. Based on the above diagnostic tests and medical history and an examination performed on May 22, 2000, the Medical Board of the Police Pension Fund recommended to the Funds' Board of Trustees that both applications for ADR and ODR be disapproved.

The picture changed significantly on February 16, 2001, just about one year after Detective Rich had retired from the Department, when she suffered a major heart attack. In fact, while in the Emergency Room at Winthrop University Hospital, where she was admitted and diagnosed as suffering from an acute exterior wall myocardial infarction,

Detective Rich went into cardiac arrest four times and had to be resuscitated with electrical shocks. While at Winthrop, she came under the care of Dr. Joshua DeLeon, a cardiologist and Director of the Coronary Care Unit, which care continued until the patient's discharge on February 23rd.

On March 1, 2001, Dr. DeLeon wrote a letter to Detective Rich's physician Dr. Sakowitz summarizing the patient's past history and current status. First, he described the severity of the heart attack and what had led up to it. The symptoms included increasing chest discomfort becoming severe and radiating to the jaw, associated with nausea and vomiting. Next, he described what occurred at the hospital, after the successful multiple resuscitations. Detective Rich had been referred to the cardiac catheterization lab, where she was found to have a subtotal left anterior descending stenosis. Additionally, the left circumflex and right coronary arteries were thought to have luminal irregularities and the acute ejection fraction was abnormally low, at approximately 40 to 45%. Detective Rich then underwent successful stenting of the left anterior descending lesion and had an essentially uncomplicated post-operative course.

In this letter, Dr. DeLeon includes as significant past medical history "approximately 50% stenosis in the right carotid artery." Under the section entitled "Family History," he notes that Detective Rich's father died at age 42 of a heart attack and that her mother currently suffers from coronary artery disease and has suffered a myocardial infarction (i.e., a heart attack) and has had bypass surgery.

While in the hospital and again on March 8, 2001, Detective Rich underwent additional echocardiograms. The latter was essentially normal with regard to the left ventricular size and systolic function, but the Doppler findings showed a trace of mitral

valve regurgitation. On March 26, 2001, in a second letter to Dr. Sakowitz, Dr. DeLeon summarized the echocardiogram findings and current status, stating that Detective Rich was "perhaps a bit improved but clearly with significant symptomatology."

When the above information was brought to the attention of the Board of Trustees, the Trustees decided on April 20, 2001 to remand Detective Rich's case to the Medical Board to reconsider whether she was eligible for some type of disability benefits. On November 16, 2001, a Medical Board different from the one that had originally examined Detective Rich, reexamined and interviewed her. This Board, via its report and recommendations, also thoroughly reviewed the new evidence presented, which included the two letters by Dr. DeLeon discussed earlier.

In the interview, it was brought out that Detective Rich had been on full duty as a Detective Investigator before her retirement and that she had said that it was the pain in her jaw, TMJ pain, that had been largely responsible for her decision to retire. She had been a habitual smoker and was attempting to stop. She further indicated that while working at the Police Department, she had had significant shortness of breath associated with activity and had been unable to climb one flight of stairs or walk more than a city block and that the shortness of breath had typically been associated with pain and lightheadedness. She further discussed her history of frequent jaw pain and pointed out that on the night before she suffered her heart attack, she had experienced very severe jaw pain, unrelieved by Ibuprofen.

Detective Rich was now involved in a program of cardiac rehabilitation but was still experiencing shortness of breath with exertion. She was on numerous medications. Her physical examination was essentially normal, including her heart and chest. However, a

1+ systolic bruit was detected over the left carotid artery.

Based on all this evidence, the Board made somewhat surprising recommendations.¹ Finding a diagnosis of coronary artery disease, the Board recommended rescinding the previous decision and now approving the Police Commissioner's application for ODR but continuing to disapprove Detective Rich's application for ADR benefits. They explained, "The decision is based on the development of symptomatic coronary disease, occurring one year after her retirement."

On February 13, the Board of Trustees received the above revised recommendation and decided once again to remand the case on the issue of eligibility for ADR benefits under the Heart Bill. The discussion about the case concerned the issue whether the heart attack which Detective Rich had suffered after her retirement was evidence of a preexisting heart condition, particularly considering that she earlier (before retirement) had been found to have carotid artery disease. In fact, Board member Detective Palladino stated: "I think what we want to find out here is, was the preexisting condition overlooked for coronary artery disease." Dr. Thomas, a participant, responded: "I think that's going to be a difficult issue, heart attack in an artery not that stenosed. We will look at the evidence."

The Medical Board was then sent two more recent letters from Detective Rich's physicians, an October 29, 2002 one from Dr. DeLeon, her cardiologist, and a November 26, 2002 one from her private physician since 1994, Dr. Sakowitz. Both attempted to address this issue. Dr. DeLeon essentially confirmed a preexisting heart

¹I say "surprising" because, as explained more fully below, there does appear to be an inconsistency in finding an "ordinary disability," presumably based on heart problems, but not an "accident-related" one under the Heart Bill based on the same heart condition.

condition. He first gave a summary of the events surrounding his patient's myocardial infarction, which had already been given to the second Medical Board, and then significantly opined that:

The severity of Ms. Rich's myocardial infarction, as well as the findings on cardiac catheterization, clearly indicate that she had preexisting coronary artery disease before her presentation to WUH [Winthrop University Hospital] in February 2001.

Dr. Sakowitz was less definitive but confirmed preexisting cardiac-related complaints. Specifically, he reviewed an office visit on July 14, 1998, wherein Detective Rich had complained of cardiac palpitations lasting a few hours and had said: "I felt nausea with some chest pressure and dizziness." However, Dr. Sakowitz added that Detective Rich's cardiac profile was at that time negative.

The Medical Board reviewing the case on remand, this time on March 7, 2003, consisted of two of the three doctors who had made recommendations at the prior remand, the chairman Dr. Dorothy Kunstadt, and Dr. Harold Bernarke of the Department of Health. Their report is only seven paragraphs with the first four paragraphs devoted to a review of Detective Rich's prior appearances before the Board and the letters from Drs. DeLeon and Sakowitz. The doctors on the Board then explained that they had interviewed the applicant "in order to try to elicit when she had any symptoms prior to the heart attack, which would have allowed either her treating physicians or the Board to have made a diagnosis of coronary artery disease." They indicated that Detective Rich had given answers in her interview consistent with Dr. Sakowitz's letter and had then gone on to describe how she had then been feeling. The physical exam was again essentially normal except for the right carotid bruit.

The report then concludes with the same recommendations as those made after the earlier remand with this explanation, which I quote in its entirety:

In summary, therefore, the officer had risk factors for coronary artery disease and evidence of arterial disease in her right carotid artery. She developed a myocardial infarction a little over a year after retirement. She has angiographically proven coronary artery disease. A review of previously presented noninvasive tests had failed to reveal definite evidence of myocardial ischemia. The Medical Board previously recommended that the Police Commissioner's application for Ordinary Disability Retirement be approved since she had suffered a myocardial infarction but had recommended disapproval of the officer's own application for Accident Disability Retirement under the provisions of the Heart Bill since her infarction occurred over a year after she retired. The Medical Board, **THEREFORE**, reaffirms its previous decision of approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the officer's own application for Accident Disability Retirement under the provisions of the Heart Bill. (Emphasis added).

On August 13, 2003, the Board of Trustees accepted the Medical Board's recommendation. Detective Rich then timely filed this Article 78 proceeding challenging the decision.

Analysis

I find that Detective Rich's challenge has merit and that the matter should be remanded to respondent. Specifically, I find that the recommendations made by the Medical Board and accepted by the Trustees below failed to adequately rebut the statutory presumption that the petitioner was suffering from a disabling heart condition incurred in the discharge of her duties and existing at the time of her retirement.

As quoted above, the Heart Bill (Gen. Mun. Law §207-k) establishes a presumption that a disabling heart condition existing at the time of retirement was sustained as a result of employment and thereby entitles the uniformed officer to accidental line-of-duty disability retirement benefits (ADR). *Beekman*, 52 NY2d at 471. It is a presumption that can, of course, be rebutted by "competent evidence" to the contrary, but it is not successfully rebutted by a mere failure to diagnose a condition in the first place.

Here, Detective Rich not only has the benefit of the statutory presumption, but substantial record evidence exists that she was, in fact, suffering from heart disease before she retired. From as far back as 1998, she had complained to her doctor of cardiac palpitations and other signs of chest discomfort. She had also complained of continual shortness of breath on even mild exertion. Despite her history of smoking, her physician felt the symptoms were worthy of investigation, including the wearing of a heart monitor which produced negative results. Detective Rich continued to have symptoms which led to further noninvasive tests in January of 2000, before her retirement, which also turned out to be negative. Significantly, however, she was diagnosed at that time with a 40% stenosis of her right carotid artery, suggesting either the existence of some kind of arterial disease or the accumulation of plaque which was causing the artery to narrow.

Finally, when Detective Rich did actually retire in early February of 2000, it was because of severe pain in her jaw, which she attributed to a previously diagnosed TMJ condition. It is noteworthy in this regard that, when she began feeling symptoms of the heart attack she was about to experience one year later on February 16, 2001, she suffered a severe pain in her jaw for which she could not obtain relief. This pain was then followed by the severe attack, wherein Detective Rich almost died, due to complications

by pulse-less ventricular tachycardia requiring four shocks to be resuscitated. After being stabilized, she was for the first time referred for an invasive cardiac test which confirmed coronary artery disease with a finding of a subtotal left anterior stenosis, among other problems, necessitating the successful stenting of this artery.

Significantly, the Medical Board made a diagnosis of coronary artery disease, stating in its last report of March 7, 2003 that Detective Rich "has angiographically proven coronary artery disease." The Board acknowledged in that same report that "a review of previously presented noninvasive tests had failed to reveal definite evidence of myocardial ischemia." In other words, they attributed the failure to diagnose the condition earlier to the limitations of the noninvasive testing which had been conducted early on (as opposed to the invasive tests conducted after the heart attack which yielded angiographic proof of heart disease).

As confirmed by *Mulheren v. Board of Trustees of the Police Pension Fund*, 307 AD2d 129 (1st Dep't 2003), *lv. den.* 100 NY2d 515, the time of diagnosis of a heart-related disability is not important under the Heart Bill, as long as the disability was incurred while the applicant was still a member of the force. In *Mulheren*, the petitioner's heart condition, which resulted in urgent quadruple coronary bypass surgery, was not detected until almost one year after the officer's retirement. Indeed, the condition was not even mentioned in the officer's application for Accident Disability Retirement benefits, necessitating an amendment years later to include it. The Appellate Division remanded the case for reconsideration of the issue whether the officer had a heart-related disease at the time of retirement which had simply been undiagnosed or misdiagnosed.

The issues here are twofold. The first issue is, as in *Mulheren*, whether the officer suffered from a disabling heart disease, in this case coronary artery disease, at retirement, even though the disease was not diagnosed until much later. The second issue is whether the respective burdens of proof have been satisfied.

As to the first issue, by granting petitioner's application for Ordinary Disability benefits based on her heart condition, but denying Heart Bill ADR benefits, it certainly appears that the Board's denial was based on the fact that the heart condition was undiagnosed or misdiagnosed at the time of retirement, as in *Mulheren*. The events that happened here a year after the retirement are powerful evidence that Detective Rich's heart disease did not develop overnight and in fact existed on the date of her retirement. Her treating cardiologist explicitly confirmed this fact, stating that the severity of the infarction and the findings on cardiac catheterization "clearly indicate that she [Detective Rich] had preexisting coronary artery disease." Of course, he could not pinpoint the precise date when the disease began. Presumably, an earlier (i.e., pre-retirement) catheterization could have conclusively confirmed the disease, but while Detective Rich did have symptoms at that time, her physician concluded that they did not warrant such an invasive procedure.

But that is precisely the point of the rebuttable presumption standard in the Heart Bill, which leads to the second issue regarding the burden of proof. As noted above, the Heart Bill states that heart disease, suffered by a uninformed officer who passed a physical exam when hired, is "presumptive evidence that [the disease] was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence." Detective Rich has certainly met her burden in describing heart-related and diseased

artery-related symptoms before retiring. She has always been candid and forthcoming in the description of her symptoms and experiences. Her subsequent heart attack and diagnostic tests then provided the reasons for the attack, reasons which certainly appear to have been long standing.

In sharp contrast, the Medical Board did not even attempt to meet its burden of rebutting this presumptive evidence of heart-related disease incurred in the line of duty. Rather, in its final conclusory paragraph, after stating the obvious that Detective Rich's heart attack occurred over a year after she retired, the Board merely says that it "therefore reaffirms" its earlier decision granting ODR benefits but denying ADR benefits. The Board sheds no light as to why it reached this conclusion. The omission is particularly egregious since the Board was specifically put on notice of this issue and the relevant inquiry by the Trustees in the remand minutes of February 13, 2002, wherein the question was posed whether Detective Rich had a preexisting coronary artery disease which the Board had overlooked.

This question may well be a difficult one to answer, but by not even addressing it, the Board failed to rebut the statutory presumption of a heart-related disability incurred in the line of duty. As Chief Justice Wachtler said in his decision in *Beekman*, 52 NY2d at 472, the statutory presumption is based on sound reasons:

As noted, the theory behind the bill, as outlined by its proponents, is not only that heart conditions are an occupational hazard for police officers and firemen, but also that this is a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as result of the continuous stress and strain of the job.

The instant case is readily distinguishable from cases such as *Goldman v McGuire*, 101 AD2d 768 (1st Dep't 1984), *aff'd* 64 NY2d 1041 (1985), *Gumbrecht v. McGuire*, 117 AD2d 531 (1st Dep't 1986), *Stegmuller v Brown*, 216 AD2d 23 (1st Dep't 1995), *lv. den.* 87 NY2d 807 (1996), and *Vallas v Sofie*, 304 AD2d 353 (1st Dep't 2003). In all those cases, the Appellate Division found, after reviewing all the evidence, that the Board had successfully rebutted the presumption that heart-related problems experienced by the applicants had been incurred in the performance of duty. Significantly, in the *Vallas* matter, the court noted that the evidence was "competent to support the Medical Board's conclusion that petitioner suffered from [an illness] unaccompanied by coronary artery disease or hypertension." 304 AD2d at 353. In contrast here, coronary artery disease resulting in a near fatal heart attack is precisely the petitioner's proven diagnosis. A remand to respondent is therefore necessary so that the correct statutory standards in the Heart Bill may be applied.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted to the extent of annulling respondent's determination which denied petitioner's application for Accident Disability Retirement Benefits, and the matter is remanded for a new determination in accordance with the terms of General Municipal Law §207-k and this decision.

This constitutes the decision, order and judgment of the Court.


Dated: June 16, 2004

JUN 16 2004
FILED

JUL 15 2004

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J.S.C. ALICE SCHLESINGER
Horn 11