

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

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

MATTHEW KESSLER,

Petitioner,

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

**NOTICE OF ENTRY
OF ORDER**

-against-

Index No. 101239/2018


JAMES O'NEILL, 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 and THE BOARD OF
TRUSTEES of the New York City Police Pension Fund,
Article II,

Respondents.

-----X

PLEASE TAKE NOTICE, that an Order of the Hon. Shlomo S. Hagler, dated July 22,
2019, of which the within is a true copy, was duly entered and filed in the Office of the Clerk of
the County of Kings on July 26, 2019

DATED: Port Washington, New York
November 12, 2019


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EA
7/26/19
E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. SHLOMO S. HAGLER, J.S.C.
Justice

PART 17

Index Number : 101239/2018
KESSLER, MATTHEW
vs
JAMES O'NEILL, AS THE POLICE
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). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is ^{in part} granted and ^{petition} remanded consistent with the decision dictated on the record today.

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

RECEIVED
JUL 26 3
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED
JUL 26 2019
NEW YORK COUNTY
COUNTY CLERK

Dated: 7/22/19

Hon. SHLOMO S. HAGLER, J.S.C., 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

1 SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 17
2 -----x
3 In the Matter of the Application of
MATTHEW KESSLER,

4 Petitioner, INDEX NO.
101239/2018
5 -against-

6 JAMES O'NEILL, as the Police
Commissioner of the City of New York,
7 and as Chairman of The Board of
Trustees of the Police Pension Fund,
8 Article II and THE BOARD OF TRUSTEES
of the New York City Police Pension
9 Fund, Article II,

10 Respondents.
-----x
11 July 22, 2019
12 60 Centre Street
New York, New York

13 B E F O R E :

14 HON. SHLOMO S. HAGLER,
15 Supreme Court Justice.

16 A P P E A R A N C E S :

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FILED
OCT 11 2019
COUNTY CLERK'S OFFICE
NEW YORK

24 KAREN MENNELLA
25 Senior Court Reporter

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1 THE COURT: Good afternoon. This is actually an
2 interesting issue as well. Are the parties ready to
3 proceed?

4 MR. McENANEY: We are, Your Honor.

5 MR. CAIRA: Yes, Your Honor.

6 THE COURT: So, Counsel for Petitioner, are you
7 ready to argue the petition?

8 MR. McENANEY: I am, Your Honor. Good afternoon.

9 THE COURT: Good afternoon.

10 MR. McENANEY: Your Honor, this is an accident
11 disability retirement application that was denied by the
12 Police Pension Fund. We're claiming that Respondents failed
13 to fulfill their statutory duty in their analysis of
14 injuries and medical records that were before them. That
15 the Medical Board, in particular, failed to provide any sort
16 of rational basis for its conclusory assertions as to
17 disability and causation in this matter.

18 In particular, it's actually on the last page of
19 the accident disability retirement application, which
20 mirrors the case law of this department. That paragraph
21 states that the Medical Board is to discuss fully all
22 preexisting conditions and/or injuries relevant to or
23 related to the disability and the extent to which such
24 preexisting conditions contributed to or caused the
25 disability.

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1 There is no question, Your Honor, that on
2 January 10, 2011 the Petitioner sustained a line-of-duty
3 injury when his HMP was rear ended at an estimated 60 miles
4 per hour, causing his lower back and bilateral knee injuries
5 which put him out sick for approximately a week. There is
6 also no question that the Petitioner suffered an LLB injury
7 to his back while restraining an large, emotionally
8 disturbed person on April 30, 2012.

9 In addition, there are three attributions of
10 causation of lumbar radiculopathy, diagnosis of lumbar
11 radiculopathy. And these attributions were made by an
12 orthopedist, neurologist and a pain management doctor.
13 Despite these diagnoses, despite the MRIs which support that
14 there is lumbar radiculopathy. And two EMG and QV (ph)
15 studies done a year or two apart, which also confirmed that
16 there's lumbar radiculopathy, the Medical Board ignored
17 these attributions in causation. Nowhere in the reports are
18 they described or is any reason for rejecting the findings
19 of those three treating physicians given -- you can comb
20 through them, you won't find them.

21 In addition, the New York Police Department's own
22 medical division authorized in 2015 12 sessions of physical
23 therapy for the Petitioner for injuries he sustained in his
24 January 10, 2011 line of duty M.B.A. high speed impact.
25 There is no indication that any of these findings or facts

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1 was considered by the Medical Board in reaching their
2 conclusions. The diagnoses -- the final diagnoses of the
3 Medical Board, the reason that they retired him on ordinary
4 was that he has Huntington's Disease. Now, there is a board
5 certified that this may have been the cause of his leg
6 locking for injury. This despite the fact that a board
7 certified clinical geneticist doctor gallon letter
8 affirmatively stated that his leg injury was in no way
9 related to Huntington's Disease, that he did not have
10 juvenile onset Huntington's Disease. This is ignored. No
11 where does the board address this or explain it away. If
12 you look at Page 7 of my brief, Your Honor, at Paragraph 23,
13 you could see where the board actually number one, it misses
14 the first line-of-duty injury. It does not mention the 2011
15 line-of-duty injury. It only mentions the 2012 line-of-duty
16 injury, which is to say they didn't consider the car
17 accident in this first determination. They admit here that
18 the line-of-duty injuries manifested as low back pain with
19 bilateral symptomatology including lower back pain with
20 radiation to the both legs and alteration of his gait. The
21 board states that there has not been an anatomical
22 explanation for these symptoms until genetic testing was the
23 done in which he was diagnosed, as was his mother, with
24 Huntington's Disease in 2015. So the medical board decides
25 this despite the treating physicians' opinions and

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1 attributions of causation that it is Huntington's Disease
2 which is causing his leg pains with no explanation, without
3 any form of address to the MBA in 2011.

4 They state here the objective evidence consists of
5 near normal lumbar spine MRI. It's not defined what near
6 normal lumbar spine MRI means. It sounds -- I think the
7 reasonable interpretation of that is abnormal lumbar spine
8 MRI and an EMG which showed left-sided radiculopathy. So
9 they state there's an EMG showing left-sided radiculopathy
10 and there's no further except an allegation of symptom
11 magnification. From there they reached a conclusory
12 assertion that the final diagnosis is Huntington's Disease
13 with clinical manifestations. Here, Judge, they don't
14 identify what the clinical manifestations are. There's no
15 record here for the court to base an affirmation of this
16 denial.

17 Moving further on, at Page 9 an additional report
18 the board provides OLGZ conclusory assertions that the
19 Petitioner was disabled due to Huntington's Disease with
20 clinical manifestations, which again are undisclosed, and
21 states that the board fails to identify -- I'm sorry -- that
22 the objective medical evidence and MRI is not consistent
23 with significant radiculopathy. Here again these are kind
24 of equivocal findings here. It's difficult to know what
25 they're actually saying, but they're clearly not saying

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1 there's no radiculopathy, Your Honor. Saying there's no
2 significant radiculopathy requires more. What do you mean
3 by significant? What would qualify as significant? And
4 also why is this not significant? Nothing is provided to
5 the court. Again, the court is deprived of a record on
6 which to base an affirmance. He asserts -- they also assert
7 clinical manifestations of Huntington's Disease again and
8 don't provide what those clinical manifestations were. They
9 failed to identify any of it. There's also the glaring
10 omission of any discussion of the board certified clinical
11 geneticist who says this is not the caused by Huntington's
12 Disease and that there is no juvenile onset of Huntington's
13 Disease.

14 Your Honor, in addition, the Medical Board's
15 determination was made in violation of law. If we look at
16 Page 13 of my brief, Sections 13, 251 and 252 of the New
17 York State Administrative Code require that the Medical
18 Board report and retire members from ordinary disability not
19 less than 30 nor more than 90 days after the execution of
20 filing of an application for ADR. The Medical Board waited
21 over a year even to examine the Petitioner. A year during
22 which the Huntington's Disease, to the extent that it
23 exists, if it exists, would have advanced. The reason
24 behind this law is so that the Petitioner can be examined
25 within a medically relevant period close to the date of his

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1 line-of-duty injuries. That opportunity was lost.

2 Your Honor, for these reasons, we recommend, at a
3 minimum, that the Medical Board's findings are not entitled
4 to deference under Borenstein and they failed to consider
5 all the relevant medical evidence and the Board failed to
6 clearly state the reasons for it's conclusions and
7 recommendations. Under the First Department case of matter
8 of Kise (ph), that's a 2010 case in the First Department, we
9 believe that remand is required under these circumstances.

10 Thank you, Your Honor.

11 THE COURT: Counsel on the motion.

12 MR. CAIRA: Thank you, Your Honor.

13 Your Honor, the Medical Board here considered
14 Officer Kessler's case on three separate occasions reviewing
15 the medical evidence each time, conducting their own
16 physical examination of Mr. Kessler in an interview with him
17 and ultimately came to the determination that the
18 line-of-duty injuries which he sustained -- I'll give that
19 the rear ending accident that occurred in 2011 was at the
20 speeds that were we discussed earlier. However, he only
21 missed one week of work.

22 THE COURT: So let me just get to that, because it
23 looks like there's a factual question with regard to that.
24 Because I heard 60 to 70 miles an hour, which is not a mild
25 fender bender. 60 to 70 miles and hour is a significant

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1 speed. And I think the Medical Board did state that it was
2 not a very -- I think they said a mild. What's the word.

3 MR. CAIRA: Very slow speed, Your Honor, I saw.

4 THE COURT: Not mild. Slow speed.

5 MR. CAIRA: There are two reports for that. But
6 regardless of the speed, the injuries resulting from that
7 accident were not, in the grand scheme of things, that
8 severe.

9 THE COURT: What was the injury in the first car
10 accident?

11 MR. CAIRA: We had first accident January 2011
12 Petitioner filled out his line-of-duty report complaining of
13 pain to both knees, neck and right buttocks. He later
14 amended that to include injuries to his lower back and his
15 right hip and left and right knee. These amendments were
16 accepted by the NYPD. He followed up at Kings County
17 Hospital's emergency room for these injuries. He had an
18 x-ray of the chest, CT scans of the head, spine, abdomen and
19 pelvis. All these were negative for fractures. He was
20 given a prescription for Percocet and discharged. And as
21 counsel has said, he ended up missing about one week of work
22 and then began a course of physical therapy.

23 We're not looking at any surgeries or any long-term
24 time missed from work as a result of that incident. If the
25 court could look at the 2012 incident involving the inmate,

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1 the injuries there were even less severe. I don't have
2 those reports in the emergency room. I only have the
3 emergency room reports in the record. I have no evidence of
4 any subsequent treatment for that. In that case he received
5 pain for those injuries, but he was given I believe it was
6 an over-the-counter medication. And, I'm sorry, it was
7 Motrin and Flexeril and he was discharged the same day for
8 those injuries.

9 THE COURT: So I believe he had some back injury
10 with regard to that; is that correct? 2012 incident.

11 MR. CAIRA: Yes, Your Honor. According to the
12 aided report that was filled out he was punched in the left
13 side of the face and he complained of pain and swelling to
14 the face and to the lower back as he fell to the ground.
15 There was some involvement with the lower back, Your Honor.
16 You are correct.

17 I think an important point of information to direct
18 the court's attention to is what happened following those
19 line-of-duty injuries. And again, the last line-of-duty
20 injury is April 30, 2012, discharged the same day. But the
21 record reflects December of 2014 Officer Kessler had some
22 pain to his thighs, and he had no acute injury. And
23 that's -- he went to Huntington Hospital. He had some
24 scans, including of his lumbar spine, and that was found to
25 be unremarkable. He was given pain medication and he was

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1 discharged. He continues to receive treatment. And this,
2 Your Honor, is consistent with the onset of his diagnosis of
3 Huntington's Disease starting to affect him.

4 Later on in the record we have Officer Kessler
5 complaining of memory problems, emotional stability
6 problems, psychological symptoms, which are connected to his
7 diagnosis of Huntington's Disease. And as the Medical Board
8 explained, there is no physical reason for these symptoms
9 relating to his line-of-duty injuries.

10 THE COURT: So what is a near normal lumbar spine?

11 MR. CAIRA: Sorry?

12 THE COURT: What is a near normal lumbar spine?
13 That's what the Medical Board stated he had.

14 MR. CAIRA: And that's consistent with the scans
15 that he did receive following these incidents, Your Honor.

16 THE COURT: What does near normal mean? Does that
17 mean abnormal? Does that mean a little problematic? Does
18 that have to be explained? I don't know what a near normal
19 lumbar spine is.

20 MR. CAIRA: In my non-medical expertise, Your
21 Honor, I would say it's closer to normal than to be
22 abnormal.

23 THE COURT: Is there explanation as to their
24 findings on the MRI with regard to this near normal lumbar
25 spine?

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1 MR. CAIRA: Which MRI, Your Honor, are you
2 referring to?

3 THE COURT: I believe it says he had done MRI's of
4 the lower back. I don't believe -- I believe there was one
5 in 2015, but there was other prior MRI's as well.

6 MR. McENANEY: I think there were two, Your Honor.

7 THE COURT: I don't know when the first one was
8 conducted. I'm not sure if that was done early on. But the
9 only date I have for MRI examination was in 2015. One was
10 earlier. And I'm just reading from the Medical Board's
11 history. And Counsel for Petitioner read it into the
12 record. There was also a left-sided radiculopathy.

13 MR. McENANEY: Yes. That was December 2014.

14 THE COURT: That the EMG showed a left-side
15 radiculopathy. So how is there no causation if we have a
16 near normal lumbar spine, which I don't know what that
17 means, and there was left-sided radiculopathy? Did the
18 Medical Board explain those two objective tests?

19 MR. CAIRA: Your Honor, these line-of-duty
20 incidents were many years before Officer Kessler appeared at
21 the Medical Board and was able to return to full duty
22 following those incidents. And these were not debilitating
23 injuries at the time they happened or following.

24 THE COURT: Did the Medical Board explain that the
25 MRI's were not a competent producing cause of injury and was

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1 the EMG a competent producing cause of injury in both the
2 first or second incident? Did they rule out that in any
3 way? Did they address it in any way? Does this have to go
4 back to the Medical Board to consider that?

5 MR. CAIRA: Your Honor, as Exhibit UU used the
6 most -- the third and the most recent medical reports,
7 opinions.

8 THE COURT: Exhibit what?

9 MR. CAIRA: Double U. The letter U, letter U.

10 THE COURT: UU. I have UU.

11 MR. CAIRA: Your Honor, I have that. My mistake.
12 I'm trying to direct you to PP, the April 11, 2017 medical
13 report.

14 MR. McENANEY: So that's the second to last.

15 THE COURT: April 11, 2017?

16 MR. CAIRA: Well, in PP, Your Honor, this exhibit
17 here, the Medical Board does consider all of this evidence.
18 They're not ignoring --

19 THE COURT: Can you show me, please, where?

20 MR. CAIRA: With respect to the EMG?

21 THE COURT: The EMG as well as the MRI in 2015.

22 MR. CAIRA: Paragraph No. 6.

23 THE COURT: I have six.

24 MR. CAIRA: Exhibit PP. The Medical Board
25 references the EMG study.

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1 THE COURT: I apologize. I didn't understand what
2 you said. Just repeat that. I just read Paragraph 6.

3 MR. CAIRA: Yes, Your Honor. This is the evidence
4 the Medical Board considered. And they considered all this
5 evidence in coming to their conclusion. They just disagreed
6 with Officer Kessler's physicians that --

7 THE COURT: So I just read that they just
8 interpreted the EMG. They don't say that it's not causally
9 related. I don't see that.

10 MR. CAIRA: Well, their conclusion, Your Honor, is
11 that his disease is the cause of his disability. They had
12 the opportunity to consider the medical evidence.

13 THE COURT: Paragraph 6 it says it reveals a
14 radiculopathy on the -- more on the left. Whatever that
15 means. I'm not a doctor, but there is a finding that there
16 was radiculopathy L4 to L5 and more on the left. Then it
17 talks about insertional activity and fibrillation potential.

18 I'm not sure what all that means, quite frankly,
19 but it seems to me that it shows that there was objective
20 finding. It doesn't vitiate the finding. It actually
21 supports the finding of radiculopathy. Whether it's more on
22 the left or the right it's irrelevant for my purposes.

23 MR. CAIRA: Your Honor, we have symptoms, too, the
24 Medical Board's examination revealed.

25 THE COURT: Can you show me where they explain that

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1 near normal MRI? Actually, paragraph -- okay. Actually,
2 Paragraph 9 says it. You're correct, it's a different
3 paragraph. Okay. Okay. I stand corrected. Paragraph 9
4 does discuss it.

5 MR. McENANEY: Your Honor, but Paragraph 9 it
6 states the MRI of the lumbar spine a diagnostic study were
7 not consistent with any significant lumbar radiculopathy.
8 They don't describe what significant is. They don't
9 describe why they believe that the MRI electrodiagnostic
10 study were not consistent. They simply assert that
11 conclusion without any basis in fact. They don't articulate
12 the reason why they don't think it is significant or
13 consistent with the significant finding of lumbar
14 radiculopathy. And we have three doctors saying that there
15 is significant lumbar radiculopathy. They don't address any
16 of those medical doctors's opinions or why they disagree
17 with them. They provide no factual basis for why they came
18 to the conclusion at all.

19 Again, that's not a record that's susceptible to
20 judicial review, because they're hiding the rationale.
21 There's nothing produced. Nothing provided for the court to
22 say, okay, this was based on rational evidence. Critical
23 evidence.

24 THE COURT: They cannot define the radiculopathy is
25 significant or not significant?

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1 MR. McENANEY: There's no indication what they mean
2 by that or why. Why is it insignificant? There's a finding
3 of radiculopathy. They admit it as a finding of
4 radiculopathy. They confirm that the MEG testing showed the
5 radiculopathy. There are three doctors saying this is the
6 cause of his symptoms and these are causally related to his
7 2011 line-of-duty injury. This is --

8 THE COURT: So you're saying that the word
9 significant is not sufficient as a matter of law if they
10 review the MRI and the EMG and then they review the patient,
11 as well as the history, and find that it's not significant
12 lumbar radiculopathy they have to state in more objective
13 terms what it means significant?

14 MR. McENANEY: They have to explain why they think
15 it's insignificant. And they haven't done that. It's just
16 an assertion. We think it's insignificant. It provides the
17 court with no basis for review. Why do you think it's
18 insignificant? That's what's required under Meyer. You
19 have to articulate the basis for your conclusions. That's
20 not an articulation. It's an assertion and it's conclusory.
21 It's not followed with any explanation we think this
22 because. It's just we think this.

23 THE COURT: Okay. So, Counsel, conclusory or not
24 conclusory, is there anymore information that the court
25 would have to determine whether or not there was significant

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1 radiculopathy, lumbar radiculopathy?

2 MR. CAIRA: That same paragraph, Paragraph No. 9,
3 mentions symptoms that Officer Kessler had that no one is
4 making the argument are consistent with radiculopathy. This
5 hypersensitivity to light and touch in the groin and knee
6 area, these are disabling factors that Officer Kessler
7 presented that are inconsistent with whatever degree of
8 radiculopathy he was demonstrating at that time.

9 THE COURT: I didn't understand what you just said.
10 If there is a marked hypersensitivity, why would that be an
11 insignificant lumbar radiculopathy?

12 MR. CAIRA: Well, the Medical Board determined that
13 that was -- those were symptoms that were more consistent
14 with the Huntington's Disease diagnosis.

15 MR. McENANEY: Your Honor, if I may?

16 THE COURT: One second. Where does it say that?
17 It says Medical Board finds the examination consistent with
18 the diagnosis of the officers known disease called
19 Huntington's Disease, an additional finding; is that with
20 regard to the genetic disease?

21 MR. CAIRA: I'm reading the next sentence after
22 that saying what is not consistent with lumbar
23 radiculopathy.

24 THE COURT: Why not? I don't understand that.
25 Where does it say that? You're saying hypersensitivity means

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1 that it's insignificant lumbar radiculopathy?

2 MR. CAIRA: No, Your Honor. I'm saying that
3 symptom which was found as a factor in finding him disabled
4 is connected to the Huntington's Disease.

5 THE COURT: Okay. Is the Medical Board required to
6 show that there was no causal connection to the line-of-duty
7 injury accidents or incidents that occurred or just enough
8 to point to the Huntington's Disease? Are you saying it's
9 sufficient just to point to Huntington's Disease and not
10 rule out causal connection between the line-of-duty
11 incidents that were alleged in 2012, I believe, and
12 thereafter?

13 MR. CAIRA: Well, that is -- the burden is on the
14 Petitioner to prove the injuries were the natural and
15 proximate cause.

16 MR. McENANEY: We have three doctors attesting that
17 it is the natural proximate cause that the line-of-duty
18 injury caused this lumbar radiculopathy. And in addition,
19 Judge, one of the other problems with stating that the
20 lumbar radiculopathy is not significant, look, the Medical
21 Board is required to describe, required to review and
22 required to explain when they're making a disability
23 determination how the injuries that are established as
24 line-of-duty injuries would not prevent the police officer
25 from performing the duties of a police officer.

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1 So we're saying here that these --

2 THE COURT: Counsel, I agree with you. I'm trying
3 to get did the Medical Board explain it's conclusion that
4 the examination is not consistent with that of a lumbar
5 radiculopathy? Noting the objective evidence, but the
6 objective evidence ^{shows} ~~was there was~~ radiculopathy. There was
7 whatever near normal MRI. And how would that be related to
8 that?

9 It was not a significant lumbar radiculopathy. You
10 have to do more than just state that premise or conclusion.
11 I think you have to do more than that. They have to explain
12 the reason why they believe the MRI, which they consider
13 near normal, which I don't know what that means, it's either
14 normal or not normal, and say there's no causal relationship
15 between the line-of-duty accidents and the officer's current
16 disability. They make the conclusion, but they don't tell
17 me why.

18 I understand that they believe that it's due to
19 genetic disease. Is that enough? Are they saying that it's
20 the genetic disease that's causing the trouble, therefore
21 they don't have to get into the objective tests which may
22 rule out the causal relationship between the line-of-duty
23 accident and the officer's current disability. Are you
24 saying it's enough just to say genetic and that's it?

25 MR. CAIRA: I think the standard, Your Honor, is

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1 some credible evidence. And the genetic disease that
2 Officer Kessler was diagnosed with was some credible
3 evidence to base this disability or defining disability.

4 THE COURT: Okay. I'm going to vacate the Medical
5 Board's determination and send him back for review. I don't
6 know what a near normal MRI is. I don't understand, and
7 they have not explained, why their finding was that the
8 examination was not consistent with that of a lumbar
9 radiculopathy. The noted objective evidence, the MRI of the
10 lumbar spine, the EMG study were not consistent with any
11 significant lumbar radiculopathy. I'm not sure what that
12 means.

13 MR. McENANEY: May I make one final point, Your
14 Honor?

15 THE COURT: Yes.

16 MR. McENANEY: If the court agrees, I think it
17 should also be addressed whether the line-of-duty injuries
18 if, in fact, there is Huntington's Disease may have
19 exacerbated that condition.

20 THE COURT: Did you allege that? Do you plead it
21 was exacerbation? I don't remember I don't remember that
22 being in your papers.

23 MR. McENANEY: I don't believe that that's in our
24 petition, Your Honor. But I believe that the Medical Board
25 is required to make that analysis and that the court has the

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1 authority to direct them to do so.

2 THE COURT: I thought you have to raise it at
3 least. I don't remember you raising it.

4 MR. McENANEY: Exacerbation?

5 THE COURT: Usually you do raise exacerbation.
6 Actually, I've reviewed cases where there was an
7 exacerbation issue. I don't remember you even raising that
8 issue that they failed to consider if it was an exacerbation
9 whether the Huntington's Disease exacerbated his current
10 condition. Did you raise that?

11 MR. McENANEY: I think we're required to do that
12 analysis, regardless.

13 THE COURT: I don't believe you've raised it in any
14 of your papers. Can you show me where you state that in
15 your papers?

16 MR. McENANEY: No, I don't think we did, Your
17 Honor.

18 THE COURT: I think that's a waiver and you have to
19 make the -- right now I don't see it in any of your papers.
20 And right now I'm only remanding it back for the purpose of
21 them clarifying the record with regard to what they believe
22 is near normal MRI. Why is it not consistent with any
23 significant lumbar radiculopathy.

24 If anything, the finding that was above seems to
25 say there was a marked hypersensitivity to even light touch.

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1 So that would be consistent with radiculopathy rather than
2 inconsistent with radiculopathy. If the answer is that the
3 Medical Board believes that the examination was consistent
4 with a diagnosis of Huntington's Disease, that's fine. But
5 at least the term there was no causal connection between the
6 line-of-duty accidents and the officer's current disability.

7 I don't make any rulings on exacerbation. If you
8 want to have the Medical Board consider that, you must make
9 that application. I can only review what's below. And
10 since I don't see any record below with regard to that
11 issue, this court will not direct that, as it would be on
12 the administrative record that I have before me.

13 MR. McENANEY: Your Honor, can we request that the
14 court order the Medical Board to articulate the reasons why
15 it disagrees with the attributions of causation of three
16 physicians that made them and the geneticist?

17 THE COURT: I don't think that's the standard. I
18 think they can look at any objective test. They can look at
19 their own medical examination. They need not oppose the
20 doctors's opinions. If they have other evidence, their own
21 examination and the like, they can use that. I'm not
22 limiting them to opposing colleagues that state a contrary
23 position. They can disagree with the colleagues or they
24 need not disagree with the colleagues.

25 MR. McENANEY: I don't disagree with that, Your

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1 Honor. But they are required under case law to state the
2 factual basis for their disagreement. They have to
3 articulate why they disagree with the finding of each
4 doctor. They just can't list that a doctor said something.

5 THE COURT: I think we're saying the same thing.
6 As long as they come to a conclusion that there was no
7 causal relationship to the line-of-duty accident and the
8 officer's current disability, we're fine. I don't need to
9 second guess how they do their job. I'm not a doctor. I'm
10 not going there.

11 I think that it's not sufficient, as Counsel
12 stated, just to conclude without any specificity as to the
13 reasoning behind their determination that it was not
14 consistent with any significant lumbar radiculopathy in the
15 face of what they call near normal MRI and an EMG that
16 says -- that finds radiculopathy, whether it's to the left
17 or to the right.

18 There is no clear record for the court to determine
19 whether or not they did their job. And for Petitioner to
20 see that they did the evaluation and can rule out the causal
21 connection between the line-of-duty accident and the
22 officer's current disability. I understand that they
23 believe -- the Medical Board believes that it's consistent
24 with the diagnosis of Huntington's Disease, that's fine. I
25 don't quarrel with that. If opposing doctors have a

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1 disagreement as to the medical causation, the case law is
 2 the case law. And even if it's tied, we know what happens
 3 in this regard, it gets denied. I think that's what
 4 happened here as ~~was~~^{well}. And I'm not quarreling with that,
 5 but there's not enough specificity for this court to make a
 6 determination. Counsel is correct.

7 Therefore, this court is granting the application
 8 vacating the determination and remanding consistent with
 9 this court's ruling. Thank you.

10 MR. CAIRA: Thank you, Your Honor.

11 *****

12 C E R T I F I C A T E

13
 14 I, Karen M. Mennella, a Senior Court Reporter for the State of
 15 New York do hereby certify that the foregoing is a true and
 16 accurate transcription of my original stenographic notes.

17
 18
 19 **FILED**

20 **OCT 11 2019**

21 **COUNTY CLERK'S OFFICE**
 22 **NEW YORK**

23 *Karen M. Mennella*

24 Karen M. Mennella,
 25 Senior Court Reporter

SO ORDERED;

[Signature]
 HON. **SELOMO S. HAGLER, J.S.C.**

DATED: 10/4/19

KAREN MENNELLA - OFFICIAL COURT REPORTER

New York County Clerk's Index No. 101239/2018

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

In the Matter of the Application of

MATTHEW KESSLER,

Petitioner,

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

-against-

JAMES O'NEILL, 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 and THE
BOARD OF TRUSTEES of the Police Pension Fund,
Article II,

ORDER WITH NOTICE OF ENTRY

**LAW OFFICE OF
JEFFREY L. GOLDBERG, P.C.**

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