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

PRESENT: _____ PART _____

Justice

Barrington Mywett

- v -

Raymond Kelly

INDEX NO. 111502-05

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is denied pursuant to attached Rem

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).

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

Dated: 6/13/06

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 62
Justice

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BARRINGTON MYVETT,

Petitioner,

INDEX NO. 111502/05
MOTION DATE
MOTION SEQ. NO. 01

-against-

RAYMOND KELLY, as Police Commissioner of the City of New York, and as Chair 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.

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The following papers, numbered 1 to 4, were read on this petition under Article 78 of the New York Civil Practice Law and Rules:

	Papers Numbered
Notice of Petition	1
Notice of Amended Petition	2
Notice of Motion to Dismiss	3
Affirmation in Opposition	4

Background

Petitioner Barrington Myvett (Myvett) brings this Article 78 for a judgment ordering respondents Raymond Kelly, the Board of Trustees of the Police Pension Fund, Article II, the New York City Police Department, and the City of New York (respondents) to process Myvett's application for accidental disability retirement (ADR) benefits pursuant to General Municipal

Law 207-k, known as the Heart Bill, and to do so forthwith. Respondents cross-move for an order dismissing the petition for failure to state a cause of action, pursuant to 3211 (a) (7), and in the alternative, should the cross-motion be denied, respondents request time to file a verified answer to the petition pursuant to CPLR §7804 (f).

Myvett was a paid member of the NYPD from 1979 until his terminal leave expired on June 8, 2005. On May 27, 2005, he underwent an evaluation of his heart known as myocardial perfusion imaging (MPI). Myvett's physician was notified of the results of the MPI by the HIP facility for the first time on June 21, 2005, revealing an "inferior and inferoapical ischemia with infarct," a serious heart condition (Amended Petition, Exhibit A). Myvett's physician ordered Myvett to head posthaste to the hospital for an angiogram, which revealed the bad news that Myvett suffered from coronoary artery disease. Four days later, Myvett underwent surgery for the insertion of a coronary stent for treatment of unstable angina (Amended Petition, Exhibit B). On June 30, 2005, Myvett filed an application for ADR benefits which respondents refused to accept on grounds that the application was filed 22 days after Myvett's retirement date. These facts are not in dispute.

In dispute is the timeliness of Myvett's application for ADR benefits. Respondents argue that Myvett is not entitled to these benefits since he was retired before he submitted his application, and the statute requires the application be submitted by a paid member of a paid police department. Respondents also argue that a party seeking mandamus to compel, as does Myvett in the instant petition, must demonstrate a clear right to the relief sought, a burden respondents claim Myvett has failed to meet.

Discussion

Pursuant to Article §78, a petitioner seeking mandamus to compel must have a clear legal right to the relief demanded and there must exist a corresponding duty on the part of the administrative agency to grant that relief (*Matter of Scherbyn v Waye-Finger Lakes Board of Cooperative Educational Services*, 77 NY2d 753, 757 [1991]). Mandamus to compel requires the performance of a positive duty, not one that is discretionary. The right to the performance of that duty must therefore be "free of reasonable doubt and controversy" (Siegel, New York Practice, 4th ed., § 558, p 959).

Pursuant to CPLR §7804 (f), the respondent in an Article 78 may raise an objection in point of law by setting forth in the answer, or by a motion to dismiss the petition, and if the motion is denied, "the court shall permit the respondent to answer, upon such terms as may be just . . ." However, the statute "does not contemplate successive hearings on issues of fact, at least unless the court finds some good reason for so ordering" (*R. Bernstein Co. v Popolizio*, 97 AD2d 735 [1st Dept 1983]). "[I]f it is plain from all the papers that the respondent has nothing with which to answer and that further proceedings would be wasteful, the court should not prolong the petitioner's agony. It should be able to close the case out with a judgment" (Siegel, New York Practice 4th ed., §567, at 980). When the papers fully set forth the relevant circumstances and make it clear that the dispositive issue presented is one of law only, "it is difficult to see what appropriate purpose is served by permitting the denial of the motion to be followed by an answer that raises no new factual or legal issue and will merely lead to a second motion addressed to an already determined issue" (*230 Tenants Corporation v Board of Standards and Appeals*, 101 AD2d 53, 57 [1st Dept 1984]).

The Heart Bill creates a presumption that a disabling or fatal heart condition "suffered by a New York City police officer or fireman was accidentally sustained as a result of his employment if not rebutted by contrary proof" (*Uniformed Firefighters Association v Beekman,* 52 NY2d 463, 472-473 [1981]). General Municipal Law §207-k states, in pertinent part

> . . . any condition or 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 . . . where such paid policemen . . . are drawn from competitive service lists, who successfully passed a physical examination on entry into the service of such . . . 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 First Department has established that when petitioner's heart-related disability may have been incurred while petitioner was still a paid member of a paid police department and, through no fault of petitioner, the disability was not detected until a year after petitioner was retired, it was an abuse of discretion by the Board of Trustees to refuse to remand the matter to the Medical Board for consideration (*Matter of Mulheren v Board of Trustees*, 307 AD2d 129, 135 [1st Dept 2003]). The First Department has established that when petitioner did not include a heart condition on the original application due to a faulty diagnosis, the petitioner should not have been penalized by refusal to accept an amended application for ADR, pursuant to the Heart Bill (*Matter of Mulheren, 307 AD2d 129, id.* at 134).

On the particular facts of this case, the refusal to accept Myvett's application for ADR does not rebut the statutory presumption that Myvett was suffering from a disabling heart disease at the time of his retirement. Indeed, it is not disputed that this condition could only have been incurred while Myvett was a paid member of a paid police department, since the diagnostic test that revealed the condition was performed prior to Myvett's retirement. Myvett's HIP provider

failed to furnish his physician with the MPI diagnostic results confirming a serious heart condition for some three and a half weeks and Myvett was made aware of his condition for the first time 13 days after the date of his retirement, an untimely delay and a surprising one, given the gravity of the diagnosis, but a delay for which Myvett is not to be blamed. Furthermore, given that his application followed his retirement by a mere 22 days, the Medical Board cannot be heard to complain that this lag would delay the processing of his application and his being seen by the Medical Board (*Mulheren v Board of Trustees, supra*).

Respondents urge that the Heart Bill requires that an applicant for ADR benefits be a paid member of a paid police force. However, respondents do not cite to authority, nor is this court aware of any, for a statutory filing requirement imposed by the Heart Bill.

As established by *Mulheren v Board of Trustees*, the time of diagnosis of a heart-related disability is not dispositive under the Heart Bill, provided the disability was incurred while the applicant was a paid member of a paid police force (*Matter of Mulheren v Board of Trustees*, 307 AD2d 129 [1st Dept 2003]). The petitioner in *Mulheren* suffered from a heart condition that went undetected until nearly one year after her retirement and was not even mentioned in the initial application. The *Mulheren* court found that the refusal to remand the matter to the Medical Board was an abuse of discretion, and remanded the application to the Medical Board to ascertain whether petitioner was disabled due to a heart condition, whether the condition arose while petitioner was a paid member of the police department, and whether it was incurred in the discharge of duties *(Mulheren, id.* at 134).

The court notes that *Cochran,* authority cited by petitioner, does not compel a different result (*Matter of Sandra Cochran v New York City Employees' Retirement System*, 131 AD2d

351 [1st Dept 1987]). There, the First Department interpreted section 2 of Laws of 1981 (ch 1044, §2) governing New York City Tier 1 applicants for membership in a retirement plan, which plan had a statutory filing requirement that the court interpreted to preclude filing by mail. That case is readily distinguishable from the matter at issue here. Additionally, respondent's cite *Doctor's Council v New York City Employee's Retirement System* for the proposition that "where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists" (*Doctor's Council v New York City Employee's Retirement System,* 71 NY2d 669 [1988]). However, the rebuttable presumption of the Heart Bill is unambiguous on its face.

Lastly, the relevant issues are fully set forth in the cross-motion and the dispositive issue presented is one of law only. Accordingly, since permitting respondents to answer would serve no appropriate purpose, the court declines to grant respondents leave to file an answer.

Conclusion

For the foregoing reasons it is

ORDERED that respondents' determination denying petitioner's application is annulled and vacated and the matter is remanded for a determination in accordance with the terms of General Municipal Law §207-k and consistent with this decision; and it is further

ORDERED that the cross-motion to dismiss is denied in the entirety; and it is further

ORDERED that respondents are ordered to process Myvett's application for ADR benefits pursuant to General Municipal Law §207-k and to do so immediately.

This constitutes the decision and judgment of this court.

Dated: 6/13/06

J.S.C.

Check one [X] FINAL DISPOSITION **[ ] NON-FINAL DISPOSITION**

UNFILED JUDGMENT

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