

Matter of Gemignani v Kelly

2012 NY Slip Op 32597(U)

October 10, 2012

Supreme Court, New York County

Docket Number: 102405/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 102405/2012
GEMIGNANI, JOHN
vs.
KELLY, RAYMOND
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). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED

OCT 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

PK

_____, J.S.C.

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

C

Dated: 10/10/12

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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

Petitioner,

Index No. 102405/12

For a Judgment pursuant to Article 78 of the Civil
Practice Law and Rules

-against-

DECISION/ORDER

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,

Respondents.

FILED

OCT 15 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner John Gemignani brought this petition pursuant to Article 78 of the Civil Practice Law and Rules seeking to annul the decision of respondents denying him a line of duty Accident Disability Retirement ("ADR") pension and declaring that decision arbitrary and capricious, upgrading his non-line-of duty Ordinary Disability Retirement pension to a WTC ADR pension or remanding the action to respondents for reconsideration in a fair and lawful manner. For the reasons set forth below, the petition is granted to the extent that the action is remanded to respondents.

The relevant facts are as follows. Petitioner became a New York City police officer in January 1988. Petitioner sustained repeated line-of-duty (“LOD”) injuries to his back. Specifically, he injured his back on July 2, 1994 and August 27, 1997. He did not report sick as a result of either of these injuries. On August 12, 2008, petitioner sustained a LOD back injury and reported sick. He saw several doctors, including a Dr. John Bendo, a board-certified orthopedic surgeon, and was variously diagnosed with “lumbar radiculitis with possible herniated disc” and “sever right L5 radiculopathy secondary to disc extrusion at L4-5.” Petitioner’s symptoms abated, and he returned to full duty at work on October 10, 2008. On May 6, 2009, he sustained an injury to his lower back when, while executing a warrant, he slipped on a wet substance on the floor. He again saw several doctors including Dr. Bendo who recommended surgery. Petitioner underwent a “Posterolumbar Laminotomy Decompression, L4-5 Right side And Comprehensive External Neurolysis” operation. Dr. Bendo examined petitioner on August 19, 2009, October 7, 2009 and December 19, 2009 and concluded each time that petitioner was disabled and was unable to return to work.

On December 10, 2009, petitioner filed an ADR application based on his LOD back injury of May 2009. As is customary, the Police Commissioner filed an Ordinary Disability Retirement (“ODR”) on petitioner’s behalf. On December 30, 2009, petitioner also filed an ADR application under the Heart Bill as a precaution in case his cardiac tests indicated a disabling heart condition. On December 31, 2009, petitioner retired. He had not returned to work since the event on May 6, 2009. On April 23, 2010, petitioner’s Heart Bill application was disapproved by the Medical Board. In the meantime, petitioner saw Dr. Michael D. Robinson, a board-certified physiatrist with a subspecialty in pain medicine who treated him for back pain,

and Dr. Bendo, who stated that the only possible further intervention was a spinal cord implant. On August 25, 2010, the petitioner appeared before the Medical Board in connection with his back injury. The Medical Board denied petitioner's ADR application, citing his ability to use a treadmill during a stress test as evidence of his lack of disability and finding, upon physical examination, "multiple discrepancies with weakness ranging from L1 to S1. Where [sic] on the MRI and at surgery he had only L5 involvement." Petitioner continued to be treated for pain and on January 10, 2011, had a temporary spinal cord stimulator implanted in his back. On January 26, 2011, the Medical Board reviewed petitioner's new medical evidence and deferred rendering a decision until the implantation of a permanent spinal cord stimulator, which took place on March 14, 2011. On April 20, 2011, the Medical Board again reviewed the case, recommended disapproval of the ADR application but approval of the ODR application. The Medical Board found that petitioner was disabled "due to a degenerative condition not caused by a specific line of duty injury." In a report dated July 11, 2011, Dr. Bendo specifically stated that petitioner "does not have degenerative disc disease... He is out on permanent/total disability as a result of the herniated disc he sustained while on the job." Dr. Robinson stated in a report dated August 23, 2011 that petitioner's pain was "unequivocally related to the injury sustained on May 6, 2009... While he may have arthritic changes in his spine (degenerative disc and joint disease), his symptoms are absolutely not related to this." On September 7, 2011, the Medical Board again reviewed the case and stated that Dr. Bendo's report conflicted with his operative note and that he had not operated for a herniated disc. As a result, the Medical Board reaffirmed its decision of April 2011. In a report dated December 7, 2011, Dr. Bendo responded to the Medical Board's comment, saying "MRI scan of the lumbar spine on May 28, 2009, showed evidence of a

persistent central disc herniation... at L4-5.” He continued that for various surgical and medical reasons “the central herniation was left intact.” In light of this report, petitioner’s attorney requested that the case be remanded to the Medical Board. The case was not remanded.

Petitioner then commenced the instant proceeding.

When the Medical Board reviews an application for an ADR, it must determine if the applicant is disabled and can no longer serve and, if so, whether he was disabled as a result of an accident which occurred while he was in service. *See Meyer v Board of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 144 (1997). “In an [A]rticle 78 proceeding challenging [a] disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary and capricious.” *Borenstein v New York City Employees’ Retirement System*, 88 N.Y.2d 756, 760 (1996). Such a determination has a rational basis if it is supported by “some credible evidence.” *Id.* at 761. “As long as there was any credible evidence of lack of causation [showing that the disability was not caused in the line of duty] before the Board of Trustees, its determination must stand.” *Meyer*, 90 N.Y.2d at 145-46 (citation omitted). “As a general rule, it is not arbitrary and capricious for the Board of Trustees to rely upon the Medical Board’s recommendation of no causal connection though the Medical Board did not examine the pension fund member itself.” *Id.* (citation omitted). Moreover, the First Department has repeatedly held that if there is conflicting medical evidence, it is for the Medical Board to resolve such a conflict. *See Demarco v New York City Employees’ Retirement System*, 211 A.D.2d 594 (1st Dept 1995); *Manza v Malcolm*, 44 A.D.2d 794 (1st Dept 1974).

In the instant case, the Medical Board’s determination lacked a rational basis. The Board’s decision must be based on “some credible evidence.” In the instant case, the Medical

Board based its determination, in part, on its understanding that Dr. Bendo did not operate on or because of a herniated disc. Although the medical terminology is confusing to a layperson, it appears that Dr. Bendo did operate to relieve pain caused by a herniated disc even though he left the herniation intact. The Medical Board's assumption that the surgery did not address a herniation may have been in error but its refusal to consider Dr. Bendo's clarifying statement was arbitrary and capricious. Furthermore, the Medical Board violated the NYPD guidelines which state that, "In instances where more than a single cause of a disabling condition conceivably exists, the Medical Board MUST clearly indicate its cognizance of this fact and provide a brief statement as to why it considered a particular one as the basic factor e.g., in instances where both line of duty and degenerative arthritis are conceivable causes of a disabling back condition and the Board recommends ordinary retirement, it should state clearly and concisely why it discounted the effect of said injury on member's medical status." Those guidelines describe exactly the case at issue and the Medical Board failed to give an explanation of why it found that the cause of petitioner's disability was degenerative and not the LOD slip of May 6, 2009. Accordingly, the case is remanded to respondents for further consideration in light of Dr. Bendo's statement of December 2011.

Because the Medical Board found that petitioner's disability was caused by a degenerative condition, it did not need to consider whether petitioner's injury of May 2009 was an "accident" for purposes of an ADR pension. However, upon remand, if the Medical Board finds that the cause of petitioner's disability is in fact his slip and fall on May 6, 2009, it is directed to address this issue.

Accordingly, the petition is granted to the extent the action is remanded to respondents

