

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

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 114620/2006

DEFRONZO, CRAIG

INDEX NO. _____

vs

KELLY, RAYMOND

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Art 78

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No *Memos*

M1, M2, M3

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

JUL 23 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-26-07

MJ
MARCY S. FRIEDMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

In the Matter of the Application of
CRAIG DeFRONZO,
Petitioner,

Index No.: 114620/06

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

- *against* -

DECISION/ORDER

RAYMOND KELLY, as the Police
Commissioner of the City of New York, et al.,
Respondents.

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this Article 78 proceeding, petitioner, a retired police officer, seeks to annul a decision of respondent Board of Trustees of the Police Pension Fund, approving the recommendation of the Medical Board Police Pension Fund, Article II ("Medical Board") that petitioner be denied accident or ordinary disability retirement benefits. Petitioner claims that, as the result of a line of duty accident, he is disabled from full duty police work and is entitled to accident disability retirement benefits.

Petitioner served as a police officer with the New York Police Department from 1995 until his retirement in September 2005. On September 30, 2003, petitioner sustained a line of duty accident injury to his left, dominant hand. He underwent surgery and received post-operative treatment, including physical therapy. In June 2004, petitioner applied for accident disability retirement. At a hearing on August 2, 2004, the Medical Board examined petitioner and reviewed medical records in connection with petitioner's injury and subsequent treatment, including progress reports. The Medical Board then deferred a decision on petitioner's

application in order for petitioner to receive further therapy. On February 28, 2005, the Medical Board again examined petitioner and reviewed medical records, including x-rays and other records, which indicated that petitioner was experiencing numbness and some decrease in strength in his left hand and fingers. The Medical Board noted that petitioner indicated that his left 5th finger was not moving properly and did not flex fully, and that the strength of his left hand had decreased which resulted in his inability to properly handle his firearm. The Medical Board also reported that, on physical examination, the 5th finger was tested and there was full extension at the MP joint and flexion to 90 degrees. The Board also noted that when the officer attempted to make a fist, his small finger lacked the full flexion, but then stated that it was possible to let him flex the small finger fully into the palm. While noting that the strength of the left hand appeared to be perhaps slightly decreased, the Board opined that this could have been voluntary. Based on its review of the records and its physical examination of petitioner, the Medical Board recommended disapproval of both petitioner's application for accident disability and the Police Commissioner's application on petitioner's behalf for ordinary disability.

Following a remand to consider new evidence, the Medical Board again met on July 11, 2005 to consider petitioner's application. The Medical Board considered a report from Dr. Russell Miller, an orthopedic surgeon who examined petitioner with respect to firearms qualification, and notes from Dr. Gregory Perrier, an orthopedic surgeon who examined petitioner on June 2, 2005 and June 20, 2005. In his notes, Dr. Perrier concluded that petitioner had a permanent functional loss of use of the left hand. He further noted that petitioner was unable to negotiate the duties of a full time police officer that require grasping, pulling and using a firearm with his left hand. The Medical Board, after reviewing records and examining

petitioner, reported that “there were no significant objective findings precluding the officer from performing the full duties of a New York City Police Officer” and recommended disapproval of disability benefits.

Petitioner’s application was again remanded to the Medical Board on March 27, 2006 for consideration of new evidence, including a report from Dr. Perrier, which stated that petitioner had a permanent functional loss of use of the left hand and should remain on desk duty. The Medical Board again recommended disapproval of disability benefits. On June 14, 2006, the Board of Trustees concurred with the recommendation of the Medical Board.

As explained by the Court of Appeals in Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756, 760 [1996]:

The award of accidental disability retirement benefits to a NYCERS applicant is a two-step process (see, Administrative Code of City of NY § 13-168 [a]). The first step involves fact finding by the NYCERS Medical Board (see also, Administrative Code § 13-123 [a] [composition of Medical Board]). After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually “physically or mentally incapacitated for the performance of city-service.” (Administrative Code § 13-168 [a].) If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was “a natural and proximate result of an accidental injury received in such city-service” (id.).

The second step in the process involves the NYCERS Board of Trustees (see also, Administrative Code § 13-103 [b] [composition of Board of Trustees]). If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant’s claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board’s recommendation regarding causation.

It thus is well settled that the Board of Trustees is bound by the Medical Board's determination of whether an applicant for disability benefits has a disability. (See Matter of Borenstein, 88 NY2d 756, *supra*; Matter of Canfora v Bd. of Trustees, 60 NY2d 347 [1983].) Moreover, "[o]rdinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence [citations omitted]. While the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require 'some credible evidence' [citations omitted]." (Matter of Borenstein, 88 NY2d at 760.) Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (*Id.*; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1st Dept 1999], *lv denied* 95 NY2d 769 [2000].) The courts "cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." (Matter of Santoro v Board of Trustees, 217 AD2d 660 [2d Dept 1995].)

Here, petitioner's orthopedic surgeon, Dr. Perrier, concluded that petitioner was unable to perform the duties of a full time police officer because he could not handle a firearm. Also, in a May 20, 2005 report, NYPD medical consultant Dr. Miller placed petitioner on restricted duty, noting that petitioner had failed to qualify for firearms. In its July 11, 2005 determination, the Medical Board noted Dr. Miller's report but concluded, after considering other evidence and examining petitioner, that there were no significant objective findings precluding full duty. Again in its final March 27, 2006 determination, the Medical Board concluded that there were no significant findings precluding petitioner from performing the full duties of a police officer.

The Medical Board does not, however, articulate the basis for the finding that petitioner

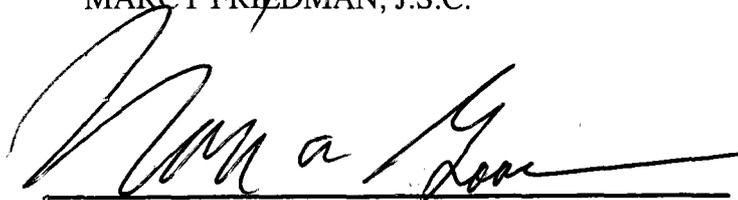
was able to perform full duty police work without qualifying for firearms. It is unclear whether the Medical Board concluded that petitioner was not disabled and that there was no objective basis for finding that he could not qualify for a firearm, or whether the Board concluded that petitioner was disabled from handling a firearm but that full duty did not require the capacity to handle a firearm. The issue of whether credible evidence supports the administrative decision in this case cannot be determined unless the Medical Board clarifies the basis for its conclusion. (See Matter of Meyer v Board of Trustees of the New York City Fire Dept., 90 NY2d 139, 152 [1997].) The matter therefore should be remanded for the Medical Board to explain the basis for its conclusion that petitioner can perform the full duties of a police officer.

It is accordingly ORDERED that the petition is granted to the extent of remanding the matter to respondents for further proceedings and the issuance of a determination consistent with this decision.

This constitutes the decision and judgment of the court.

Dated: New York, New York
June 26, 2007


MARCY FRIEDMAN, J.S.C.


CLERK

FILED

JUL 23 2007

**COUNTY CLERK'S OFFICE
NEW YORK**

New York County Clerk's Index No. 114620/06

<p>SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK</p> <p>In the Matter of the Application of</p> <p>CRAIG DeFRONZO</p> <p>Petitioner,</p> <p>For a Judgment under Article 78 of The Civil Practice Law and Rules</p> <p>-against-</p> <p>RAYMOND KELLY, as 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,</p> <p>Respondents.</p>
<p>[REDACTED] JUDGMENT</p>
<p>JEFFREY L. GOLDBERG, P.C. Attorney for Petitioner 2001 Marcus Avenue Lake Success, NY 11042 (516) 775-9400</p>

FILED

JUL 23 2007

AT 1:40 P
N.Y., CO. CLERK OFFICE