

Matter of Rathour v Whinnery

2024 NY Slip Op 31194(U)

March 28, 2024

Supreme Court, Kings County

Docket Number: Index No. 536317/2022

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 536317/2022

Motion Date: 1-8-24

Mot. Seq. No.: 1

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In the Matter of the Application of
RAJA RATHOUR,

Petitioner,

-against-

DECISION/ORDER

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

-against-

MELANIE WHINNERY, as the Executive Director
of the New York City Employees' Retirement System,
THE BOARD OF TRUSTEES of the New York City
Employees' Retirement System, DR. JOSEPH BOTTNER
as the Chairman of the Medical Board of the
New York City Employees' Retirement System,
THE MEDICAL BOARD of the New York City
Employees' Retirement System, and THE NEW YORK CITY
EMPLOYEES' RETIREMENT SYSTEM,

Respondents.

KINGS COUNTY CLERK
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Upon the following e-filed documents, listed by NYSCEF as item numbers 1-35, 42-43,
45-85, the petition is decided as follows:

Petitioner RAJA RATHOUR moves: (1). For a judgment pursuant to Article 78 of the
CPLR: A) Reviewing and annulling the action of the respondents denying petitioner a
Performance-of-Duty Disability Retirement from the NYC Employees' Retirement System
("NYCERS"), pursuant to the RSS § 507-c, and declaring said action to be arbitrary, capricious,
unreasonable and unlawful; and B) Directing and ordering the respondents to retire petitioner
with a Performance-of-Duty Disability Retirement allowance under Retirement and Social
Security Law §507-c retroactive to his retirement; or C) In the alternative, remanding the matter
to the respondents for an appropriate review; (2). For an order, pursuant to CPLR § 2307(a),
directing the respondents to serve and file upon the date hereof: A) All reports,
recommendations, certificates and all other documents submitted to the NYCERS Board of
Trustees by the Department of Correction ("DOC") Health Management Division in connection

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with any retirement of the petitioner herein; B) Copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon any retirement application of the petitioner; and C) Copies of all medical records, reports or notes relating to petitioner which are on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division; and (3). For such other further relief as to this Court may deem just and proper.

Respondents oppose the petition in all respects.

Background:

Petitioner was an officer with the Department of Correction (“DOC”). He was injured while working at the DOC when he intervened in three separate inmate-related altercations. On or about September 1, 2016, petitioner filed an application with NYCERS for a Performance-of-Duty Disability Retirement pursuant to RSSL 507-c. By letter dated June 15, 2018, NYCERS informed petitioner of the Board of Trustees Resolution of June 14, 2018 and advised petitioner that he was officially retired from active service as a Correction Caption pursuant to RSSL 507-a, effective August 15, 2017.

Petitioner subsequently filed an Article 78 petition seeking to annul the NYCERS Medical Board’s decision denying him a Performance-of-Duty Disability Retirement. On March 5, 2020, by decision/order of a different Justice of this Court, petitioner’s request for an order annulling respondent NYCERS’ decisions dated March 20, 2017 and May 10, 2018 denying petitioner’s application for a RSSL 507-c Performance of Duty Disability Retirement was granted and NYCERS’ March 20, 2017 and May 10, 2018 decisions were annulled on the basis that they were arbitrary, capricious, unreasonable and unlawful. The matter was remanded, and the NYCERS’ Medical Board was directed to make an independent evaluation of petitioner’s disability to determine whether the inmate-related incidents that occurred on April 12, 2012, August 29, 2013 and November 25, 2013 were the “natural and proximate cause” of petitioner’s injuries (NYSCEF Doc No. 76, pg 12). The Court specifically directed the Medical Board to review the January 29, 2018 report and June 30, 2021 letter prepared by Dr. Kenneth McCullough, petitioner’s surgeon.

On November 6, 2020, the Medical Board reconvened to again consider the full record received from petitioner pursuant to the questions presented in the March 5, 2020 court decision and remand. The Medical Board considered the letter from Dr. McCulloch dated January 29, 2018 in which Dr. McCulloch opined that petitioner was “not only disabled from multiple body parts listed in his application...but all were casually related to his line of duty injuries.” Ultimately, the Medical Board disagreed with Dr. McCulloch’s findings of causation between his disability and the job-related incidents, instead finding that the medical “documentation in proximity to the last line of duty injury to the left knee and right shoulder on November 25, 2013, after which the member continued to work full duty, are not confirmatory of an acute process...In addition, comparisons of the MRI of the right shoulder December 13, 2013 to the operative report of [Dr. McCulloch] indicate a labral tear found intraoperatively on March 6, 2016, not found on the MRI which would indicate another injury to the right shoulder not the result of the line of duty incidents.” For this reason, the Medical Board did not find petitioner’s disabilities to be causally related to the incidents of April 9, 2012, August 29, 2013, and November 25, 2013 incidents.

On August 9, 2021, the Medical Board reconvened to review additional records submitted on July 16, 2021 on behalf of petitioner. The submission included, among medical records dated between May 6, 2021 and June 8, 2021, a report dated April 23, 2012 authored by Dr. Kenneth McCulloch. The Medical Board’s review resulted in an addendum to their November 6, 2020 recommendation. In its August 9, 2021 Report, the Medical Board noted, among other things, that:

The facts supplied by radiological exam as well treating sources prior to it being seen by Dr. McCulloch, all lead to the diagnosis of degenerative changes in the joint; arthritis. Arthritis is consistent with the findings in his bilateral knees, bilateral shoulders, bilateral hips as well as some complaints in his lower extremities. There is no evidence that these complaints are secondary to traumatic injury.

As humans age, they will all develop arthritis especially with an active life. Traumatic arthritis is only considered when there is evidence of an acute traumatic event precipitating the development of the disease. Acute traumatic injury is best diagnosed by MRI or CT, and then confirmed by the practitioner; not vice-versa.

MRI is much more specific in diagnosing tears both in the meniscus and in the rotator cuff rather than direct visual examination due to the trauma during the surgery itself. Dr. McCulloch adds pictures from the surgeries. Unfortunately, these pictures do not show acute traumatic changes prior to arthroscopic intervention. The changes during the procedure cannot be separated from injury prior to the arthroscopy. They are of no help in diagnosing the injury timeline. What is seen is degenerative changes of arthritis in many of the views submitted. There is no evidence that there is an acute component from injury even though it is over two years from the initial injury.

(NYSCEF Doc No. 78, pg 4)

Ultimately, the Medical Board reaffirmed its November 6, 2020 decision finding that after reviewing the additional records presented on July 16, 2021 and all of the previously submitted medical records, petitioner “is disabled from his duties under the provisions of Section 507-a due to the progression of degenerative changes/arthritis in both his knee and his shoulder. There is no medical evidence provided in his medical records that would lead [the Medical Board] to modify that determination.” (NYSCEF Doc No. 45, pg 17). Therefore, the Medical Board recommended the denial of petitioner’s application for Disability Retirement under the provisions of Section 507-c. On August 11, 2022, the Board of Trustees reconvened at a special board meeting to adopt a resolution denying Petitioner’s disability application.

Discussion:

[T]he decision of the [B]oard of [T]rustees as to the cause of an officer's disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious” (*Maxwell v New York City Employees’ Retirement System*, 210 AD3d 1095, 179 NYS3d 291, quoting *1096 Matter of Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 N.Y.2d 347, 351, 469 N.Y.S.2d 635; see *Matter of Boyd v. New York City Employees’ Retirement Sys.*, 202 A.D.3d 1082, 1082, 159 N.Y.S.3d 892; *Matter of Gibbs v. New York City Employees’ Retirement Sys.*, 161 A.D.3d 980, 981, 77 N.Y.S.3d 672). “Substantial evidence” in this context means “some credible evidence” (*Matter of Borenstein v. New York City Employees’ Retirement Sys.*, 88 N.Y.2d 756, 760, 650 N.Y.S.2d 614; see *Matter of Hernandez v. New York City Employees’ Retirement Sys.*, 148 A.D.3d 706, 707, 49 N.Y.S.3d 463).

Here, subsequent to remand, the conclusions of the Medical Board, which were adopted by the Board of Trustees, were supported by credible evidence. Specifically, the Medical Board made its determination after interviewing the petitioner, reviewing all of the medical records and reports of the petitioner's treating physicians, including the report and letter of Dr. Kenneth McCullough (*see Matter of Boyd v. New York City Employees' Retirement Sys.*, 202 A.D.3d at 1083, 159 N.Y.S.3d 892; *Matter of Gibbs v. New York City Employees' Retirement Sys.*, 161 A.D.3d at 981, 77 N.Y.S.3d 672).¹

It is well established that the resolution of conflicting medical evidence is within the sole province of the Medical Board, and here, it was entitled to credit the analysis of its own doctors over that of the petitioner's doctor (*see Matter of Bradley v. New York City Employees' Retirement Sys.*, 193 A.D.3d 847, 849, 148 N.Y.S.3d 141; *Matter of Servedio v. Lee*, 188 A.D.3d 891, 893, 136 N.Y.S.3d 55; *Matter of Giuliano v. New York Fire Dept. Pension Fund*, 185 A.D.3d 812, 815, 127 N.Y.S.3d 572).

Accordingly, it is hereby

ORDERED that the petition is DISMISSED.

This constitutes the decision and order of the Court.

Dated: March 28, 2024

2024 APR - 4 A 9:35
KINGS COUNTY CLERK
FILED



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

¹ One medical report dated December 15, 2016 from Dr. Scott Russinoff had been submitted in error by petitioner's prior counsel. Petitioner never treated with Dr. Russinoff. Petitioner's attorney explained to the respondents that this medical report does not pertain to petitioner's case. Subsequently, the Medical Board acknowledged the corrective information from petitioner's attorney in their November 6, 2020 report by stating as follows: "There is correspondence from the member's attorney received on July 21, 2020. This included a record of treatment of the right knee from Dr. Rusinoff [sic] in which it is indicated that the record submitted dated December 15, 2015 [sic] is not of the applicant and was submitted by accident."