

Matter of Stanulis v Kelly
2010 NY Slip Op 32004(U)
July 26, 2010
Supreme Court, New York County
Docket Number: 100220/10
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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In the Matter of the Application of
EDWARD STANULIS,

Petitioner,

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

Index Number 100220/10

Submission Date 5/26/10

Mot. Seq. No. 001

**DECISION, ORDER
& JUDGMENT**

-against-

RAYMOND KELLY, as the Police Commissiонер
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,

Respondents.
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Appearances: **For Petitioner:**
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Papers considered in review of this petition

Papers
Notice of Petition and Affidavits Annexed
Verified Answer, Brief

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) 2, 3

HON. SALIANN SCARPULLA, J.:

Petitioner Edward Stanulis ("Stanulis") brings this Article 78 petition to annul the denial by respondents (herein collectively as "the Board") of his accident disability retirement allowance ("ADR") pursuant to the Administrative Code § 13-252. Stanulis argues that the Board's determination was arbitrary and capricious and further asks the

Court for a judgment directing the Board to retire him with a line of duty ADR retroactive to the date of his retirement. Stanulis also seeks a subpoena pursuant to CPLR 2307 directing service of the record and minutes of the proceedings below; however, that branch of the petition is moot based on the documents annexed to the Board's papers.

Stanulis has been an uniformed officer of the New York Police Department ("NYPD") since January 26, 1988. At the time of his appointment, Stanulis passed all physical and mental examinations and demonstrated both physical and mental fitness to perform full duties as a police officer. On March 6, 2007, Stanulis filed an ADR application alleging that he was disabled from performing police duties due to physical incapacitation of his right arm, which had allegedly developed over the course of performance of his police duties. The Police Commissioner concomitantly signed an Ordinary Disability Examination Order directing the Board to examine petitioner and his medical record in order to determine whether he was disabled from performing police duties by a psychological condition, warranting Ordinary Disability Retirement ("ODR").

On July 3, 2007, the Board, comprised of three medical professionals, interviewed and examined Stanulis based on petitioner's application for ADR and the Police Commissioner's Examination Order for ODR. The Board issued a unanimous opinion denying both the ADR and ODR disability. On October 30, 2007, Stanulis was reexamined by the Board, which adhered to its July 3, 2007 decision. On April 9, 2008, the Board's Executive Session remanded the case for further review by the Board.

On August 19, 2008, the Board examined Stanulis' application for the third time and determined him disabled, but not due to the injuries to his right arm and shoulder, as proposed by Stanulis' treating physicians, but due to a separate spinal condition, cervical spondylosis.

The Board, however, omitted any review of the connection between Stanulis' disability and his line-of-duty accidents, most importantly a January 1, 2003 car accident, which caused injuries to his head, arms and neck, allegedly precipitating his cervical and ulnar pathology. On December 10, 2008, the Board's Executive Session remanded the ADR application for the Medical Board to specifically consider whether Stanulis' medical condition was a natural and proximate cause of his job performance.

Upon the second remand, in the decision dated February 10, 2009, the Board adhered to its denial of ADR relying on the results of an MRI taken about three weeks after the subject car accident. The MRI of the cervical section of the spine showed previously developed degenerative arthritic changes, which could not have been caused that soon by the January 1, 2003 car accident. The Board did not deem any injury caused by the car accident to be either independently disabling or sufficiently related to the disabling condition of cervical spondylosis.

Stanulis challenges the Board's final determination in this Article 78 petition on the grounds that the Board failed to consider that the January 1, 2003 car accident could have aggravated Stanulis' prior existing arthritic spinal condition. In opposition, the

Board argues that in reaching its decision, it had relied on credible medical evidence and was thus neither arbitrary nor capricious in denying Stanulis ADR and approving the Police Commissioner's ODR application.

Discussion

ADR benefits are provided to members of the New York City police force who become "physically or mentally incapacitated from the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member," if such disability was not the result of willful negligence on the part of the applicant. Administrative Code § 13-252. If a line-of-duty injury either precipitates the development of a latent condition or aggravates a preexisting condition, resulting in a disability, the disabled member is entitled to ADR. *See Matter of Tobin v Steisel*, 64 N.Y.2d 254, 259 (1985). ADR provides greater payment benefits than ODR, approaching three quarters of the member's salary at the time of retirement.

In an Article 78 proceeding challenging an administrative determination denying ADR benefits, the Board's determination must stand as long as there was any credible evidence of lack of causation. *See Matter of Meyer v Bd. of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 145 (1997). Credible evidence is evidence that tends to support the proposition for which it is offered and is "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion." *Matter of Meyer*, 90 N.Y.2d at 147; *see also Matter of Borenstein v New York City Employees' Retirement*

Sys., 88 N.Y.2d 756, 761 (1996). A reviewing court may not weigh the credible evidence presented to the Board, but must limit itself only to determine existence thereof. *See Matter of Muffoletto v New York City Empl. Retirement Sys.*, 198 A.D.2d 7, 7 (1st Dep't 1993). In *Matter of Meyer*, the Court of Appeals found that a report by a single medical expert, who never examined the applicant, was sufficient credible evidence to permit the Board to discount other expert opinions provided by treating physicians, because the report contained "an articulated, rational, and fact-based medical opinion." *Matter of Meyer*, 90 N.Y.2d at 148.

Here, the Board considered several times all of the empirical evidence, *i.e.*, MRI and nerve conductivity tests, together with Stanulis' doctors' reports. In denying ADR, the Board analyzed the medical evidence and opinion in relation to Stanulis' job-related accidents, and its decision was not arbitrary or capricious. Specifically, after three examinations and two remands, the Board carefully reviewed all of the Stanulis' submissions. The Board articulated an alternative, non-job related cause of the cervical spondylosis and determined that the January 1, 2003 car accident had no resulting effect on this chronic, arthritic condition.

While Stanulis argues that the Board's conclusion that the car accident did not aggravate the cervical spondylosis is "an extraordinarily improbable scenario," Stanulis did not attach any medical opinion that would expressly support this assertion of medical impossibility or improbability. A report by Dr. Steven Touliopoulos of University

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Orthopedics of New York, PLLC, dated October 28, 2008, although thorough in description of Stanulis' condition, does not make any connection between cervical spondylosis and Stanulis' right arm and shoulder limitations. This is partly because Dr. Touliopoulos offers a different theory of Stanulis' disability that does not prominently feature cervical spondylosis as causing disability, relying instead on non-arthritic, acute medical conditions arising out of the January 1, 2003 car accident, as well as another October 6, 2006 work-related accident. The Board had the benefit of Dr. Toulipoulis' report when reviewing Stanulis' application, but disagreed with it.

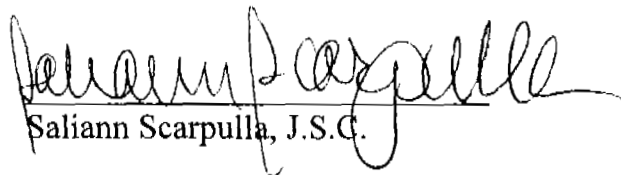
In the face of disagreement between medical professionals, this Court has neither the authority under the Article 78 nor the medical expertise to review *de novo* the Board's medical opinion. The Court finds that in reaching its decision, the Board relied on credible medical evidence. Therefore, the Court will not disturb the Board's February 10, 2009 ruling, which affirmed granting Stanulis ODR.

In accordance with the foregoing, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements to respondent.

This constituted the Decision, Order, and Judgment of the Court.

Dated: July 26, 2010
New York, New York


Saliann Scarpulla, J.S.C.

UNFILED JUDGMENT
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