

Matter of Gunther v Kelly

2010 NY Slip Op 33301(U)

November 24, 2010

Supreme Court, New York County

Docket Number: 104546/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 104546/2010
GUNTHER, CHARLES F.
 VS.
KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. 104546/10
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

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

and petition

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: NOV 24 2010


 HON. JUDITH J. GISCHE J.S.C.

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):

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 1418).

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

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In the matter of the application of
CHARLES F. GUNTHER,
Petitioner,

DECISION/ ORDER
Index No.: 104546/10
Seq. No.: 001

-against-

Present:
Hon. Judith J. Gische
J.S.C.

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, NEW YORK CITY
POLICE DEPARTMENT and THE CITY OF
NEW YORK,

Respondents

For a judgment pursuant to
ARTICLE 78 of the CPLR

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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Notice of Pet, Verified Pet w/exhs	1
Respondents' Verified answer w/exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an article 78 petition brought by Charles F. Gunther ("Gunther") a retired
NYPD uniformed police officer. Gunther contends that he sustained a line of duty injury
and that his application for accident disability retirement ("ADR") should have been
granted. Gunther seeks an order and judgment vacating the decision by the Board of

Trustees of the Police Pension Fund, Article II ("Board of Trustees") made on December 9, 2009 denying that application on the basis that the denial was arbitrary, capricious and without a rational basis.

Respondents have answered the petition and seek the dismissal of this action on the basis that their determination is supported by substantial evidence, rationally based and neither arbitrary nor capricious.

Since an Article 78 proceeding is a special proceeding it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th Dept 1977]).

Underlying Facts

Gunther became a police officer with the NYPD in December 1964. Over the course of his years on the force, Gunther sustained several injuries. Each of these accidents occurred while on duty:

1973 - he slipped on steps injuring his forearm and back

1979 - he injured his back and neck during an arrest

1981 - his patrol car was struck from the rear; injuries to his back and neck

1993 - a taxi struck his patrol car; head and back injuries

1995 - another taxi struck his patrol car; injuries to his back and neck

2001 - patrol car in head on collision with another vehicle; back and neck injuries

Gunther filed a line of duty injury report in connection with each of these accidents and it is unrefuted that he was treated and released for his injuries in each instance.

Gunther began experiencing persistent back pain and on July 17, 2003 consulted with a doctor who ordered an MRI of the thoracic spine. In his report, Dr. Milbauer observed "degenerative changes of th intervertebral discs, most marked in the mid/lower thoracic spine . . ." bulges and some scoliosis. Gunther then underwent a second MRI on November 3, 2004, this time for his lumbar spine. Dr. Milbauer observed that narrowed disc space, bulges, some disc deformities, but no fractures.

On November 16, 2004, Gunther filed two applications for disability retirement. One for accident disability retirement ("ADR") stating that due to his various injuries, he was experiencing constant pain and limited motion in his neck and back and he had difficulty getting into and out of cars (application No. 1277). He also provided a statement he could not sit for extended periods of time and his back would, on occasion go "out" when ascending or descending stairs. He also stated that "there are times I am in extreme pain and can hardly move, especially in the morning. Therefore, I cannot properly perform my police duties." The other application (no. 1276) was for ordinary disability retirement ("ODR") based upon hearing loss. The police Commission later submitted an ODR application on his behalf for the neck and back injuries.

After filing his ADR application, Gunther underwent a third MRI, of the cervical spine. Dr. Milbauer reported disc bulges, some asymmetrical changes, a narrowing or stenosis of the spinal canal and some protrusions. Gunther then consulted with an orthopedic (Dr. Chang) who reported that Gunther had some problems standing up

straight. Dr. Chang observed that Gunther had a limited range of motion bending forward and in his neck. The range of motion in the neck was 5-10 degrees when touching chin to chest and 10-20 degrees when rotating from side to side. Dr. Chang also observed that Gunther was having hip discomfort and showing early signs of arthritis.

Gunther was examined by the Medical Board for the Police Pension Fund Article II ("Medical Board") on May 25, 2005 and a memorandum was prepared recommending ordinary disability retirement ("ODR") based upon his hearing loss application and a final diagnosis of "sensorineural hearing loss."

Gunther's own application for ADR for the back and neck injuries was, however, denied. In preparing its memorandum to the Board of Trustees of the Police Pension Fund ("Board of Trustees"), the Medical Board stated that it had reviewed Gunther's medical records, taken into accounts Gunther's complaints of pain, and physically examined him but found that his condition was due to "Osteoarthritis, Cervical, Thoracic and Lumbar."

On November 9, 2005, the case went to the Board of Trustees who then remanded it to the Medical Board with instructions that the board consider "that his condition was caused by his numerous line of [duty injuries]." After that remand, Gunther consulted another orthopedic (Dr. Unis) on November 23, 2005 and again on March 6, 2006¹. Dr. Unis opined that Gunther's complaints of pain were "related to his six on the job injuries . . ."

¹The report contains a typographical error indicating that the second visit was on "March 6, 2005."

When the Medical Board met again on May 17, 2006, they considered the new evidence Gunther had provided, including Dr. Unis's diagnostic reports and its own earlier findings. Once again, they disapproved Gunther's ADR application stating that the "vast spread of the arthritis in the cervical, thoracic, lumbar, hips hypertrophic facet joints and the kyphotic deformity, particularly in the midthoracic, is a generalized condition rather than a very specific post traumatic condition..." On October 11, 2006 the Board of Trustees remanded the case back to the Medical Board with instructions that he be reevaluated because "he has had 76 line-of-duty injuries ranging from RMP accidents to fighting to subdue prisoners. We believe the injuries are post-traumatic in nature, they are not a generalized condition."

Between the time of the Board of Trustees remand and the next time Gunther's case appeared before the Medical Board, he consulted with yet another doctor (Dr. Goldman) who diagnosed Gunther with a herniated disc in his cervical spine and a stenosis (or narrowing) of the spinal canal, with other deformities. In his opinion, the injuries were causally related to Gunther's on the job accidents.

When the Medical Board next met to reconsider Gunther's application (April 11, 2007), it was once again denied for the following reasons:

"the documentary and clinical evidence substantiate that [Gunther] is disabled, from performing the full duties of a New York City Police Officer based on diffuse degenerative disease of the thoracic spine, also noting that he has diffuse generalized conditions in other joints. The Medical Board also finds that the line of duty injuries did not play a role in this disability."

The Board of Trustees met on September 12, 2007 and remanded the case back to the Medical Board for the following reasons:

“The two doctors . . . [Drs. Goldman and Unis] went through with specificity about four pages relating the MRIs to the injuries and, yes, believed they were causally related to the injuries. Yet, the Medical Board on the April 11th date, they just give you one line, they said they had reviewed evidence and said we find line-of-duty injuries do not play a significant role in his disability. There is no specificity. They don’t explain why they believe these injuries are not related to the line of [duty injuries].”

Gunther submitted new evidence on June 24, 2009 and the Medical Board met to reconsider his application on July 8, 2009. In its report, the Medical Board noted that Gunther, after each line of injury accident, “returned to full duty.” They reviewed the medical reports by his doctors and interviewed Gunther again. The Medical Board observed that Gunther had a history of osteoarthritis of the cervical spine immediately following his first accident in 1979 and that it was confirmed by an x-ray they examined. They noted that his condition was progressive, but allowed him to work full duty. Thus, once again, the Medical Board found no correlation between the line of duty injuries to the “current generalized arthritic condition.”

Gunther’s attorney submitted a letter (November 6, 2009) directly to the Board of Trustees, asking them to grant Gunther an ADR pension because it was incredible that Gunther was “suffering from a chronic, degenerative disease of the spine that moved from a virtually asymptomatic condition to a disabling condition without any effect by a traumatic motor vehicle accident and injury. We must also believe that the LOD injury in no way aggravated a chronic condition. If it is held that the LOD injury did, in any way, **aggravate** the degenerative condition, then, by the explicit standard in [In re Tobin v. Steisel, 64 NY2d 254 (1985)], the member is entitled to accident disability insurance

as a matter of law" (*emphasis in original*).

When the case before the Board of Trustees on November 9, 2009, one member of the board submitted a memorandum and requested an upgrade from ODR to ADR; the case was adjourned thirty days. On December 9, 2009, the board approved ODR benefits only, notifying Gunther on December 10, 2009 of their decision.

Gunther contends he is entitled to ADR for two reasons. First, he contends that his disability is the natural result or sequella of his numerous line of duty injuries. Alternatively, he argues that just because he had osteoarthritis and (according to the Medical Board) that condition was not created by any one accident, he is still entitled to ADR under the authority of Tobin v. Steisel, 964 NY2d 254 [1985]. He claims that under Tobin, an accident which precipitates the development of a latent condition or aggravates a preexisting condition is a cause of disability within the meaning of the New York City Administrative code. Thus, even if it is true, as claimed by the Medical Board claims, that he has had a longstanding arthritic condition, that condition was latent and did not get "activated" or flare up until his accident in 2001.

Defendants rely on x-rays taken in 1979 showing that Gunther had osteoarthritis. The x-rays were taken after he injured his back while doing an arrest. Thus, according to defendants, there is insufficient evidence that Gunter's line of duty injuries caused his generalized degenerative arthritic condition. They point out that Dr. Chang's report indicates "the vast spread of the arthritis in the cervical, thorac, lumbar, hips [etc. which] demonstrate a generalized condition rather than a very specific post traumatic condition." Defendants also note that the Medical Board found that Gunter reported "diffuse generalized conditions in other joints."

Gunther, now age 63, has retired with an ODR pension which is taxable. An ADR pension is for more money and tax free.

Discussion

The issue framed by this petition is whether Gunther, who has been found to be disabled, and allowed to retire with an Ordinary Disability Pension, was actually disabled as a result of one or more of his line of duty accidents. If so, this would entitle him to an Accident Disability Pension.

The award of accidental disability retirement benefits is a two-step process. The first step involves fact finding by the Medical Board and then, after it has examined the applicant, considered the evidence and otherwise completed its investigation, a decision by the Medical Board whether the applicant is disabled. If the Medical Board concludes the applicant is disabled, then it proceeds to make a recommendation to the Board of Trustees about whether the disability was "a natural and proximate result" of an accidental injury received in the line of duty (In re Bornstein v. NYCERS, 88 NY2d 756 [1996]).

If, however, the Medical Board finds that the petitioner is not disabled, then there is no need for the Medical Board to further decide whether the injury was the proximate cause of an injury received in the line of duty. The burden of proving that his disability are causally connected to his most recent line of duty accident (2001) or the cumulative effect of all his line of duty accidents rests solely on Gunther. Thus, Gunther had to convince the Medical Board that he was physically incapable of performing the duties attendant to his job as a uniformed police officer and that his incapacitation was the natural and proximate result of one or all of those accidents (NYCAC § 13-252; Evans

v. City of New York, 145 AD2d 361 [1st Dept 1988]; In re Drayson v. Board of Trustees, 37 A.D.2d 378 [1st Dept 1971]). Petitioner's burden with respect to ODR benefits is similar, except once he proved a disability, he did not then have to prove that the injury was sustained while in the line of duty (NYCAC § 13-251).

In deciding that Gunther is disabled, but suffering from a generalized condition and not a specific post traumatic condition, the Medical Board observed that Gunther exhibited signs of having osteoarthritis as far back as 1979. They also observed that Gunther was examined, treated and released after each of his line of duty accidents and resumed his usual duties. Even after his most recent accident (the September 21, 2001 head on collision), Gunther returned to work. According to Gunther this was only because the accident occurred several days after the attacks on the World Trade Center and he had no choice. Even so, Gunther did not see a doctor or seek any further medical attention until 2003. At that examination, Dr. Weintraub noted that although Gunther had some "good and bad days..." and he had a history of "low back discomfort" it was mild and the symptoms disappeared after exacerbation. Dr. Weintraub diagnosed him with having a "lumbar strain syndrome" and did not recommend an MRI, unless Gunther had further complaints.

Other doctors who examined Gunther afterwards observed degenerative changes and some spinal deformities not unusual for someone his age and with his activity level. In his report Dr. Wang observed that Gunther's complaints were "generalized" rather than due to a very specific post traumatic condition. Dr. Goldman was the most emphatic of the doctors, drawing a direct connection between the prior injuries and Gunther's present condition.

Where, as here, the medical evidence is subject to conflicting interpretations, the court must defer to the expertise of the Medical Board in resolving such conflict and to the judgment of the Board of Trustees in adopting the Medical Board's findings (see Matter of Borenstein v. New York City Employees' Retirement Sys., *supra*).

Gunther's case was remanded several times. He was allowed to put in additional reports and to amplify the record. Before his application went to the Board of Trustees for the final time, Gunther's attorney put in a detailed statement about why his client's application should be granted. With each remand, the Board of Trustees gave instructions and asked for clarification from Medical Board about why it was recommending ODR, not ADR. The Medical Board's reports to the Board of Trustees were not perfunctory or superficial; each one detailed the medical evidence they had considered. In each instance, they made new observations responding to the Board of Trustees request for clarification. They also explained they did not see a causal connection between the line of duty injuries and Gunther's present condition.

At the last meeting of the Board of Trustees, one member suggested the ADR should be awarded, primarily based upon Gunther's long term, loyal and unflinching service to the public and his fellow officers. That, however, was ultimately rejected as a reason to award the enhanced benefit.

An accident which precipitates an injury may be a proximate cause of that injury, and the governing statute requires only that petitioner's disability be "a natural and proximate result of an accidental injury" (Tobin v. Steisel, 64 NY2d 254 [1985]). Although Gunther contends that his arthritis was aggravated or "set off" by the last injury he had in 2001 (or his other injuries before that), Gunther did not disprove or rule

out that his disability was simply the natural progression of his osteoarthritic condition. In other words, he did not prove his arthritis was aggravated by the injuries he sustained while on duty and that the symptoms he is presently experiencing (aches, pains, limited range of motion, stiffness, etc.) are not due to his age and the progression of that condition. The Medical Board's decision is that his disability is not causally related to the injuries he sustained, but degenerative in nature. There is a rational basis for the Medical Board's determination and the Medical Board may rely on its own expertise after considering the opinions of other doctors which it did (In re Drayson v. Board of Trustees, supra). Even if the court would have made a different decision than the one made, the court cannot substitute its judgment for that of the Board of Trustees (Matter of Appleby v. Herkommer, 165 AD2d 727 [1st Dept 1990]).

Given the completeness of these reports, the Board of Trustees' decision to rely on the Medical Board's recommendation that ADR be denied, was neither arbitrary nor capricious, and the Board of Trustees decision was supported by credible evidence (Canonico v. Kelly, 38 A.D.3d 444 [1st Dept. 2007]). The decision to deny petitioner's motion for ADR benefits is rationally based and there is substantial evidence supporting the Medical Board's recommendation to the Board of Trustees that only ODR be awarded. Since there are no triable issues of fact are raised, the petition is denied and this action dismissed.

Conclusion

In accordance with the foregoing,


It is hereby

Ordered, Declared and Adjudged that the petition is hereby denied and this

action is dismissed; and it is further

Ordered that this constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York
 November 24, 2010

So Ordered: 

Hon. Judith J. Gische, JSC

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel representing the party must
appear in person at the Judgment Clerk's Book (Room
4100)