

Matter of Pugh v Kelly
2013 NY Slip Op 30880(U)
April 24, 2013
Supreme Court, New York County
Docket Number: 101000/2012
Judge: Kathryn E. Freed
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SCANNED ON 4/26/2013

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

HON. KATHRYN FREED

PRESENT: JUSTICE OF SUPREME COURT

PART 5

Justice

Index Number : 101000/2012

PUGH, JENNIFER

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

Cal: # 149

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

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

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

FILED

APR 26 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-27-12

APR 24 2013



HON. KATHRYN FREED
JUSTICE OF SUPREME COURT, J.S.C.

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 5

-----X
In the Matter of the Application of JENNIFER PUGH,

Petitioner,

DECISION/ORDER

Index No.: 101000/2012

Seq. No.: 001

For a Judgment under CPLR Article 78

-against-

PRESENT:

Hon. Kathryn E. Freed

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 New York City Police Pension
Fund, The Board of Trustees of the New York City
Police Pension Fund, the City of New York Police
Department, and the City of New York,

FILED

APR 26 2013

Respondents.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. KATHRYN E. FREED:

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.....1.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....2.....
ANSWERING AFFIDAVITS.....4.....
REPLYING AFFIDAVITS.....3.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....(respondents' memo of law).....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner seeks a judgment pursuant to CPLR Article §78, annulling the determination
of the respondents denying petitioner Accident Disability Retirement and mandating that respondents

grant petitioner Accident Disability Retirement. Petitioner also seeks costs, disbursements and reasonable attorney's fees. Respondents oppose.

After a review of the instant petition, all relevant statutes and case law, the Court denies the petition.

Factual and procedural background:

Petitioner was appointed a uniformed officer of the New York City Police Department, (hereinafter, "NYPD"), on January 27, 1995, and served continuously until her retirement for ordinary disability. Prior to her appointment, she passed both physical and mental examinations administered by the Department, and was consequently determined to be fit to perform full duties associated with being a police officer.

In support of her petition, petitioner provides a chronological summary of her lower back injuries, and the surgery and treatment, associated with same. It is important to note, that petitioner contends that not all medical reports referencing her treatment were available to her at the time of the instant petition. However, she assures the Court that they will be provided as soon as they do become available. The Court notes that these "missing" documents as well as others related to petitioner's treatment are annexed as exhibits to respondents' Verified Answer.

In December 2001, petitioner sustained injury to her back during childbirth as a result of being administered a spinal block in lieu of an epidural block for anesthetic purposes. Petitioner began seeing Dr. Jia-Rhon Chen, a chiropractor commencing March 10, 2003, complaining of "intermittent numbness, pain and tingling in the right hand and both legs." Dr. Chen diagnosed "lumbar radiculopathy and reflex sympathetic dystrophy," and concluded that petitioner should be placed on limited duty (Respondents' Verified Ans., Exhibit # 3).

Petitioner underwent an MRI of the lumbosacral spine on April 4, 2003. Said MRI revealed "1) slight dextroscoliosis; 2) L5-S1 right foraminal disc bulge; and that 3) cauda equina appears unremarkable and gadolinium enhanced images were recommended but refused by the patient" (Respondents' Verified Ans., Exhibit # 5). On May 20, 2005, petitioner sustained a Line-Of-Duty injury as a result of a multi-vehicle accident. She was immediately transported to Elmhurst Hospital via ambulance. According to ambulance records, she complained of pain to her neck, right shoulder and arm. Elmhurst Hospital Emergency Department's records indicate that her chief complaint was "neck pain radiating to right shoulder." She did not mention any pain emanating from her back and was ultimately diagnosed with neck strain.

The "Patrol/Command Supervisor's Report of Injury" relating to said accident, states "The T/P/O MOS was a passenger in dept vehicle accident and did sustain injuries to right shoulder and neck. MOS was treated and released from Elmhurst W/Tylenol" (Respondents' Verified Ans., Exhibit # 9). Additionally, the Line- Of- Duty- Injury Report and the FDNY Ambulance Call Report are also annexed as exhibits.

Petitioner also alleges that the car accident exacerbated her pre-existing back condition. On May 26, 2005, an MRI was performed on her lumbosacral spine. This MRI was compared to the previous MRI taken on April 2, 2003. The more recent MRI indicated "[n]o significant interval changes compared to the previous scan were described." The impression was "No significant interval change in the previously identified with neural foramina disc herniation at the L5-S1 level, which contracts the exiting nerve root" (Respondents' Verified Ans., Exhibit # 5).

Petitioner was re-examined by Dr. Chen on June 2, 2005, wherein in pertinent part, Dr. Chen concludes under the section entitled "Treatment or Disposition," that petitioner "may return to

limited duty” (Respondents’ Verified Ans. Exhibit #3). Petitioner again advises the Court that documentation associated with these examinations will be provided. On August 16, 2005, petitioner received an initial clinical evaluation by Dr. Glenn Jakobsen , whose report stated “Tenderness and spasm are palpated in the neck and lower back muscles” (Respondents’ Verified Ans., Exhibit # 15).

Petitioner had an MRI of the lumbar spine on November 29, 2005, taken by Dr. Ralph Diamond, who sent the results to Dr. Jakobson, via letter, on December 2, 2005. Said letter states that in pertinent part that the impression of the MRI indicates “L3/4 and L4/5, posterior disc bulges; L5/S1 posterior disc herniation extending to narrow the right foramina with impression and posterior displacement on right S1 root” (Notice of Petition, Exhibit “H”).

Petitioner was also examined by Dr. Alexander deMoura, M.D. on April 21, 2006 and April 27, 2006. On the 27th, Dr. deMoura diagnosed “degenerative disc changes in L5-s1, lumbar radiculitis and lumbar herniated nucleus pulposus”(Petition, Exhibit “J”). Consequently, Dr. deMoura recommended surgery. At this time, petitioner was examined by the Medical Board and was found not to be disabled. On March 1, 2008, petitioner underwent a lumbar discography performed at L4-5 and L5-S1 by David Adin, D.O, which revealed “non-typical back pain rated a 4 on a scale of 0-10...The L5-S1 level revealed typical back pain rated a 10 on a scale of 0 to 10”. (Petition Exhibit “K”).

On March 25, 2009, petitioner had surgery performed by Dr. DeMoura of a Combined Anterior/Posterior Spinal Fusion at L5-S1. On December 10, 2009, petitioner had an MRI of the lumbar spine without contrast by Dr. Ortiz which indicated “Anterior interbody fusion L5-S1 with posterior fusion with instrumentation” (Petition Exhibit “M”). In June 2010, petitioner was involved in another motor vehicle accident but claims to have been uninjured.

On November 15, 2006, February 7, 2007, February 6, 2008, March 14, 2008 and June 30, 2010, petitioner met with the Medical Board Police Pension Fund Article II to request accident disability retirement due to the line of duty injuries she sustained. On September 20, 2010, petitioner was examined by Dr. Gasalberti for a "follow-up visit." It appears that she underwent another MRI, although she fails to provide a date said MRI was taken. Nevertheless, she states that the MRI showed "anterior interior fixation at L5-S1." Dr. Gasalberti recommended "EMG/nerve condition studies," "lumbar trasforaminal epidural steroid injections, a series of three," in addition to therapy twice a week for four weeks (Petition Exhibit "N").

On October 27, 2010, petitioner met with the Medical Board Police Pension Fund Article II to request Accident Disability Retirement due to the Line of Duty injury she sustained. The Medical Board issued a decision recommending approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of petitioner's own application for Accident Disability Retirement.

On January 3, 2011, petitioner had an office visit with Dr. deMoura. He opined that "Patient had MRI done on December 2, 2005 which demonstrated L3/L4 and L4/L5, posterior disc bulges. L5/S1 Posterior Disc herniation extending to narrow the right foramina with impression and posterior displacement on right S1 root" (Petition Exhibit "R"). On March 1, 2011 petitioner had an MRI of the cervical spine without contrast by Allen Rothpearl, M.D. On April 7, 2011, petitioner was re-evaluated by Dr. Gasalberti, who opined that the MRI of the lumbar spine indicates "changes at the L5-S1 vertebral body, there appears to be loss of 90% height, interval change at the L5 level...MRI of the cervical spine revealed straightening of the normal lordosis, bulging at C4-5, bulging at C5-6, and bulging at C6-7" (Petition Exhibit "T").

On June 1, 2011, petitioner met with the Medical Board based on her application for Accident Disability Retirement being remanded due to new evidence. The Medical Board reaffirmed its previous decision to deny petitioner's application. The Medical Board determined that "The 2003 MRI results were the same as the MRI done six days later after her line of duty injury indicating that no further back injury was sustained to her lumbosacral spine on May 20, 2005." Additionally, because petitioner denied experiencing back pain as per the emergency room report, and the Line-Of-Duty report, the Medical Board stated that it "does not find that the line of duty injury of May 20, 2005 caused the L5-S1 herniation that led to spinal fusion."

Respondents assert that following the subject accident, petitioner took the period of May 24 through June 3, 2005 off from work. When she returned, she did not take any additional medical leave until September 6, 2005, at which time she took a month, followed by sporadic single days. The last medical day recorded was taken on February 6, 2006. Petitioner subsequently filed an Accident Disability Retirement Application, (hereinafter, "ADRA"), on March 7, 2006, stating that as a result of her Line-Of-Duty accident, she suffered "constant pain" to her neck and back. She also stated that "walking, standing and sitting for long periods of time is difficult and painful" and that she had "lost mobility to bend and twist or run." The Police Commissioner submitted an Ordinary Disability Retirement Examination Order, (hereinafter, "ODR"), dated June 13, 2006, directing the Medical Board to examine petitioner in an effort to ascertain whether she was permanently disabled, "so as to be unfit to perform police duty and should be retired."

The Medical Board first considered petitioner's case on July 26, 2006. The Board noted in pertinent part that on April 15, 2003, she was examined by NYPD neurologist Dr. Nicholas Tsirilakis. Dr. Tsirilakis noted that since receiving the epidural anesthesia two years earlier,

petitioner had developed recurrent and severe headaches associated with photophobia. He suggested that her symptoms were psychosomatic in nature and recommended a return to full duty. On July 27, 2005, petitioner was examined by Dr. Russell Miller, an Orthopedic Surgeon. He noted that petitioner was capable of lifting a fifty pound child. While noting some mild decrease in range of motion of her neck, he recommended that petitioner be placed on limited duty. On March 7, 2006, petitioner was again examined by Dr. Miller, who concluded that no clinical findings existed which would preclude petitioner from being placed on full duty, and thus, made the recommendation that she return to full duty.

Positions of the parties:

Petitioner argues that respondents' actions denying her application for a Line-of-Duty accident disability pension is arbitrary, capricious, unreasonable, unlawful and contrary to the provisions of the Constitutions of the United States and the State of New York. She also argues that the Board of Trustees failed, neglected and refused to utilize the proper legal test of entitlement to a Line-Of-Duty pension applicable to the circumstances, in that her May 20, 2005 accident exacerbated her pre-existing lower back condition. Petitioner also argues that the action of the Board of Trustees was contrary to the competent evidence she submitted, which established that she had indeed sustained a Line-Of-Duty disability. She further argues that the Board of Trustees failed, neglected and refused to accord and provide her with a fair and reasonable opportunity via notice and hearing, to establish her entitlement to a Line-Of-Duty pension.

Respondents argue that the Medical Board's determination is supported by credible medical evidence, and is therefore, not arbitrary or capricious. They state that the Medical Board, on nine separate occasions, considered petitioner's ODR and ADR ("Accident Disability Retirement)

applications, and examined her relevant medical history and treatment. Additionally, the Medical Board interviewed her and had her physically examined on seven occasions. Respondents provide the specific dates commensurate with said examinations. Respondents also argue that while they do not dispute the fact that petitioner suffered nerve damage on the right side of her body and experienced long term spinal headaches due to the administration of the wrong anesthesia during childbirth, a comparison of pre-accident and post-accident MRIs indicate that her current back ailment is not a result of the subject accident.

Thus, respondents argue that petitioner has failed to meet her burden of establishing that she was disabled as a result thereof. Respondents also argue that petitioner failed to produce any finding by her own consulting physicians which established a causal link between the accident which resulted in pain to her neck, right shoulder and right arm and the type of damage observed in her lumbar region.

Respondents also argue that petitioner failed to produce medical evidence substantiating her claim that the Line-Of-Duty accident exacerbated her pre-existing back condition. They argue that the post accident MRIs reveal that petitioner already had a degenerative condition in her lumbar region. More importantly, respondents emphasize the fact that petitioner failed to report injury to her back at the hospital immediately following her accident. However, she amended her statement regarding her injuries to report that she had experienced numbness throughout her body and the sensation of pins and needles in her legs, some thirteen months post accident. Respondents cite several cases standing for the proposition that courts have repeatedly held that a Board of Trustees can properly allot minimal weight to later accounts that are merely self serving descriptions of an accident which diverges significantly from the description given at the time the accident actually

occurred.

Conclusions of law:

It is axiomatic that in an Article 78 proceeding, the court's function is to determine whether the action of an administrative agency, had a rational basis or was arbitrary and capricious (*see* Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 230-231 [1974]). Therefore, in an Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary and capricious (*see* Matter of Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756, 760 [1996]; Matter of Canfora v. Board of Trustees of Police Pension Fund of Police Department of City of New York, 60 N.Y.2d 347, 351 [1983]; Pell supra at 230-231).

The Medical Board's determination regarding the disability in question, will not usually be disturbed if it is supported by substantial evidence which, in the context of disability cases, has been construed "to require some credible evidence" (Matter of Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d at 760; *see also* Matter of Rubiano v. New York City Employees' Retirement System, 268 A.D.2d 261 [1st Dept. 2000]; Matter of Kuczinski v. Board of Trustees of New York City Fire Dept., Art.1-B Pension Fund by Safir, 8 A.D.3d 283, 294 [2d Dept. 2004]).

The term "credible evidence" has been defined as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered....[and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (Matter of Meyer v. Board of Trustees of the New York City Fire Dept., Art.1-B Pension Fund by Safir, 90 N.Y.2d 139, 146-147 [1997]). With respect to this standard, the required

quantum of credible evidence has been found lacking when the denial “was premised only on a summary conclusion of no causation and lacked any factual basis” (Matter of Meyer, supra at 147; *see also* Matter of Brady v. City of New York, 22 N.Y.2d 601, 605-606 [1968]).

The case of Matter of Borenstein, supra at 760-761, indicated the two stages utilized in a Medical Board’s fact finding process” (1) the “threshold matter” of determining “whether the applicant is actually ‘physically or mentally incapacitated for the performance of city-service’ ” and (2) the “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’ ”).

Once the Medical Board certifies that an applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny the application (*see* Matter of Borenstein, supra at 760). If the evidence reviewed by the Medical Board is subject to conflicting interpretations, the Medical Board alone has the authority to resolve the conflict (*Id.*; *see also* Matter of Demarco v. New York City Employees’ Retirement System, 211 A.D.2d 594 [1st Dept. 1995]; Matter of Cassidy v. Ward, 169 A.D.2d 482 [1st Dept. 1991]; Matter of Mininni v. New York City Employees’ Retirement System, 279 A.D.2d 428 [2d Dept.2001], *lv denied* 96 N.Y.2d 722 [2001]).

However, it is incumbent upon the Medical Board to evaluate the evidence submitted by petitioner. Indeed, determinations of the Medical Board and the Board of Trustees have been annulled and the matter remanded for further review where the medical issues presented by petitioner have been found to not be sufficiently addressed or where the medical evidence failed to sustain the determination (*see* Matter of Rodriguez v. Board of Trustees of New York City Fire Department, 3 A.D.3d 501 [2d Dept. 2004]).

In the case at bar, the court is aware that it may not substitute its own judgment for that of

the Medical Board (Matter of Borenstein, supra at 761); *see also* Matter of Schwarzrock v. Board of Trustees of the New York City Fire Dept. Article 1-B Pension Fund by Safir, 238 A.D.2d 596, 597 [2d Dept. 1997], *lv denied* 91 N.Y.2d 803 [1997]). However, upon reviewing the medical evidence presented, the Court finds that the Medical Board's determination was correct in the face of said evidence. Therefore, the Court finds that the Medical Board's decision had a rational basis, and thus, was not arbitrary or capricious. After reviewing the various MRIs, pre and post accident, one can legitimately conclude that petitioner's back condition was not caused by the accident and did not leave her disabled.

Furthermore, the aforementioned MRI taken April 2, 2003, prior to the subject accident revealed "a shallow right foraminal disc bulge at L5/S1 somewhat impinges upon the right neural foramen and right subarticular space." This is indicative of a pre-existing degenerative condition to petitioner's lumbar region. The May 26, 2005 MRI, which was taken subsequent to the subject accident revealed that "at the L5-S1 level, there is a right neural foramina disc bulge impinging the existing nerve root." The post accident finding was that there was "no significant interval change in the previously identified neural foramina disc herniation at the L5-S1 level, which contacts the existing nerve root." In consideration of these results, the Court agrees with respondents that the fact that there was no significant change six days post accident undermines petitioner's claim that the accident caused her injury.

Moreover, in consideration of the aforementioned MRI results, the Court finds that petitioner failed to proffer sufficient medical evidence to substantiate her other claim that the subject accident exacerbated her pre-existing back problem. It is also important to note and consider the fact that at the hospital, petitioner complained only of neck pain radiating to her right shoulder, and did not

mention any back pain. Petitioner amended her statement concerning her injuries emanating from the accident *thirteen months* after the accident, to include numbness and a feeling of pins and needles.

Indeed, courts have been inclined to give minimal weight and/or credence to subsequent accounts of an accident that differ significantly from the description given at the time of the actual accident (*see* Matter Morgan v. Kerik, 305 A.D.2d 288 [1st Dept. 2003]; Bisiani v. Kelly, 59 A.D.3d 261 [1st Dept. 2007]).

The Court finds that the Medical Board rendered adequately addressed the medical evidence proffered concerning petitioner's symptoms and complaints, and rendered an appropriate decision based upon said evidence.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the instant petition is denied; and that the Medical Board's recommendation that petitioner's application for Accident Disability Retirement be upheld; and it is further

ORDERED that respondents shall serve a copy of this order on petitioner and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: April 24, 2013

APR 24 2013

ENTER:

FILED
 APR 26 2013
 NEW YORK
 COUNTY CLERK'S OFFICE

Hon. Kathryn E. Freed

J.S.C.

HON. KATHRYN FREED
 JUSTICE OF SUPREME COURT