

Matter of Mulet v Kelly
2006 NY Slip Op 30186(U)
October 16, 2006
Supreme Court, New York County
Docket Number: 0105095/2006
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. LELAND DEGRASSE**

PART 25

Index Number : 105095/2006

MULET, JOHN

INDEX NO. 105095/06

vs

KELLY, RAYMOND

MOTION DATE 7/27/06

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. 77

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

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).

OCT 16 2006

Dated: _____

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):

allowance. Petitioner also seeks an order directing respondents to serve and file all documents and reports submitted to them, or on file, regarding his retirement, as well as copies of minutes of all relevant meetings pursuant to CPLR 2307 (a).

BACKGROUND

Petitioner was appointed to the New York City Police Department ("NYPD") on August 31, 1998, and was, at all times relevant, a member of the NYPD pension plan. Petitioner alleges that he worked at the World Trade Center disaster site for approximately 30 hours from September 11, 2001 to September 12, 2001. Thereafter, on September 20, 2001, petitioner was assigned to escort the families of victims of the World Trade Center by ferry to Ground Zero. In December 2003, petitioner underwent a health screening test administered by the World Trade Center Mental Health Intervention Program at Mount Sinai Hospital. Based on his response to a questionnaire concerning post-traumatic stress disorder ("PTSD"), petitioner was diagnosed with PTSD. In February 2005, petitioner applied for ADR benefits based on post-traumatic stress disorder. In his application, petitioner indicated that his disability was caused by the "World Trade Center Attack." Petitioner also stated that his "mental state leaves [him] unable to perform the duties of a police officer." At the same time, the Police Commissioner submitted an application for ordinary disability retirement on petitioner's behalf.

On September 30, 2005, after reviewing the submissions, the Medical Board Police Pension Fund Article II ("the Medical Board") unanimously recommended approval of the Police Commissioner's application for ordinary disability retirement ("ODR"), and disapproval of petitioner's application for ADR. The Medical Board concluded that although petitioner's disabling

psychological condition made him unsuitable for police work, he was suffering from "Mixed Personality Disorder with Anxious Features and Mild Depression," and not from PTSD. The Medical Board unanimously recommended approval of the Police Commissioner's application for ODR and disapproval of petitioner's application for ADR. On December 14, 2005, the Board of Trustees accepted the recommendation of the Medical Board and retired petitioner on an ODR pension.

Petitioner now moves for a judgment pursuant to CPLR Article 78.

DISCUSSION

It is well settled that in reviewing an agency's decision the only determination to be made is "whether a determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; *see also Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 230-231 [1974]). 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 or capricious (*see Matter of Canfora v Bd. of Trustees*, 60 NY2d 347, 351 [1983]). A court may not substitute its own judgment for that of the Medical Board (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]).

Petitioner contends that respondents' denial of his application for ADR benefits was arbitrary, capricious and contrary to law in that respondents' actions were "contrary to the competent evidence establishing that the petitioner has sustained a [line of duty] disability." Petitioner further argues that ADR benefits would have entitled him to 75% of his final pay. Whereas now, he is receiving substantially less benefits under ODR.

It is petitioner's contention that the denial of his application for ADR benefits was "arbitrary, capricious, unreasonable, unlawful, and contrary to the provisions of the Constitution of the United States and the State of New York statutes, laws, ordinances, rules and regulations applicable in these circumstances in that: (i) ... the Board of Trustees failed[,] neglected[,] and refused to use the proper legal test of entitlement to a [line of duty] pension ... (ii) the action of the Board of Trustees was contrary to the competent evidence establishing that the petitioner has sustained a [line of duty] disability ... and (iii) the Board of Trustees failed, neglected and refused to accord or provide petitioner with a fair and reasonable opportunity by way of notice and hearing or otherwise to establish [his] entitlement to a [line of duty] pension."

Respondents oppose the instant petition on the ground that "ample credible medical evidence supports respondents' determination that petitioner failed to establish that his psychological disability was the natural and proximate result of a line of duty accident." Respondents further argue that pursuant to §13-252.2 of the Administrative Code, petitioner bears the burden of establishing that he was injured in a line of duty accident, and that such accident was the proximate cause of his disability.

In his reply, petitioner asserts that respondents have failed to proffer competent evidence to rebut the World Trade Center presumption set forth in §13-252.1 of the Administrative Code. Specifically, petitioner argues that it appears that the Board of Trustees merely adopted the recommendation by the Medical Board which, in turn, failed to give proper weight to the reports of petitioner's treating therapist and psychologist. Moreover, petitioner asserts that the Medical Board "offered no explanation as to why it disagreed with petitioner's doctors' opinions that 9/11 was a contributing factor to his disability."

ADR benefits are provided to members of the Police Pension Fund 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" (Administrative Code § 13-252). A determination of the Board of Trustees denying a petitioner ADR benefits may be set aside upon judicial review "only if it can be determined as a matter of law on the record that the disability was a natural and proximate result of a service-related accident" (*Matter of Kmiotek v Bd. of Trustees*, 232 AD2d 640; *see also Matter of Canfora*, 60 NY2d at 352; *Matter of Flynn v Bd. of Trustees*, 201 AD2d 730 [1994]). Generally, the applicant for ADR benefits has the burden of establishing that a causal relationship exists between the service-related accident and the claimed disability (*see Matter of Nicolosi v Bd. of Trustees*, 198 AD2d 282, 283 [1993], *lv denied* 83 NY2d 752 [1994]; *Matter of Draves v Bd. of Trustees*, 203 AD2d 568, 569 [1994]). However, the World Trade Center presumption on which petitioner relies, provides that a police officer who is disabled as a result of "participat[ing] in the World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours" is entitled to an evidentiary presumption that the injury was incurred in the performance of official duties, "unless the contrary be proved by competent evidence" (Administrative Code §13-252.1). Under the statute, a qualifying disability shall include "[d]iseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions" (Administrative Code §13-252.1 [c] [iv]). Thus, contrary to respondents' contention, it is respondents who have the burden of proffering competent medical evidence to rebut the World Trade Center presumption (*see e.g. Matter of Goldman v McGuire*, 101 AD2d 768 [1984]).

In reaching its conclusion that petitioner's disability was not caused by a line of duty injury, the Medical Board asserts that its opinion was based on petitioner's history, medical records, clinical findings, complaints and physical examination. Specifically, the Medical Board based its opinion on a letter, dated January 27, 2005, from Ally Neuman, LMSW (petitioner's therapist) and Laurie Malkoff, M.D. (petitioner's psychiatrist). Drs. Neuman and Malkoff first evaluated petitioner in December 2003, when he began attending Mount Sinai Hospital's World Trade Center Medical and Mental Health Screening Program. In their letter, Drs. Neuman and Malkoff stated, in pertinent part:

"At the time of my initial assessment [petitioner] presented with depressed mood, avoidance of reminders of 9/11 and Ground Zero, recurring nightmares, irritability, lack of concentration, apathy and emotional numbness. Once a very capable and optimistic person, he became unmotivated, alienated from friends and co-workers, and lost confidence in his abilities as a police officer....

"[Petitioner's] initial course of treatment of psychotherapy and psychopharmacology (Zoloft 100 mg qd) was very successful, and in the course of approximately five months, he had a complete resolution of symptoms. [Petitioner's] first child was born [in] April 2004. At this time, he took approximately 6 weeks off from work and a 3-month break from psychotherapy, continuing medication management only.

"[Petitioner] reports that about a month after his return to work in early June, he was not permitted by his chief to change his hours of work to accommodate his childcare needs. This was an enormous stressor to [petitioner], as he had no alternative for childcare. He began to have a recurrence of the same symptoms that he presented with in December '03, including intrusive images of his experiences at Ground Zero (e.g. images of pictures of family members posted on walls). In the context of increased anxiety, insomnia, irritability and decreased concentration, working in the Ground Zero area served as a reminder of his post 9/11 trauma and likely further exacerbated his symptoms. He requested to continue psychotherapy in August 2004. His Zoloft was increased to 150 mg. Ambien 10 mg was added for insomnia. [Petitioner] became increasingly concerned that his anxiety (including bilateral hand tremor while driving to work in the morning, lack of concentration, insomnia and loss of confidence impacted his ability to execute the responsibilities of a police officer, especially while handling a gun. [Petitioner] reported his concerns to his administration and was subsequently put on light duty. As his symptoms worsened, [petitioner] was put on medical leave. During this time [petitioner] reported a resolution of symptoms and was only maintained on medications and bi-monthly psychotherapy. When he was ordered to return to work, his symptoms recurred.

[Petitioner] was prescribed Ativan 0.5 mg, which helped to reduce his anxiety but caused a side effect of sedation in the afternoon when he was driving home. Lower doses of Ativan did not adequately treat his anxiety.

"In my opinion, [petitioner's] current work environment presents a stressor triggering a recurrence of chronic posttraumatic stress disorder. His symptoms will be very difficult to treat as long as he is exposed to this work environment, and, therefore his prognosis is poor."

The Medical Board also based its opinion on a psychological report, dated June 14, 2005, by Dr. Marisa Barra, a psychologist, practicing at the New York City Police Department, Psychological Evaluation Section ("PES"). Dr. Barra evaluated petitioner for six months on a weekly and biweekly basis beginning in December 2004. In her report, Dr. Barra stated, in pertinent part:

"[Petitioner], a married 35-year-old police officer who has been on the job for six years, was referred to [PES] by the Early Intervention Unit (EIU) in August 2004. EIU reported that [petitioner] was experiencing breathing problems and Posttraumatic Stress Disorder (PTSD) symptoms including difficulty sleeping, nightmares about 9/11, irritability, and poor memory and concentration. It was reported that his work performance was diminished as well.

...

This writer spoke to the Integrity Control Officer of DCCA and he reported that [petitioner] was 'quiet, nice guy, hadn't expressed any problems.' The Lieutenant said that [petitioner] seemed like he 'was in a bit of a down mood, but he always seemed that way.' This writer also spoke to [petitioner's] direct supervisor at Youth Services and he reported that [petitioner] hadn't been to work, and when he wasn't out sick, he would often call for an emergency day off for child care issues. The Sergeant said that [petitioner] 'does his work, does data entry, talks to everyone here.' He reported that [petitioner] was 'a good worker, can give him other assignments, no problem.' The Sergeant said that sometimes [petitioner] will say he had a headache, sit quietly for a few minutes, then return to work. [Petitioner] never complained to his supervisor that he couldn't do the work. The Sergeant said that if [petitioner] takes an emergency day off, it is because he always says its issues with his baby.

"In March 2005, [petitioner] was administered two tests as part of the ongoing evaluation, a memory test used to assess the validity of memory complaints and the Rorschach inkblot test. There was no indication of any memory deficits. Results of the Rorschach test indicated that [petitioner] has significant psychopathology. There was no clear sign of malingering on the Rorschach test. [Petitioner] is an angry and obsessive man, with poor defenses. His grip on reality is unstable. His perceptions

can be fluid and his thinking can become illogical at times. Along with this instability, there is a tremendous amount of anxiety. As an attempt to control his anxiety, his thinking can become rigid and obsessional. [Petitioner] appeared to have difficulty controlling his emotions, and seemed to become overwhelmed by anxiety during testing.

"[Petitioner was kept out sick and interviewed weekly and biweekly by the undersigned. Throughout April, he reported that he had been 'feeling better physically and mentally.' He reported improvements in sleep, appetite, and fatigue. He reported that his memory was 'still not great' and his concentration was still poor at times. He indicated that he was not 'on the edge of snapping like [he] was' anymore. ... During recent interviews, [petitioner's] affect and presentation were unremarkable, even when talking about 9/11. When recounting his experiences on 9/11, he spoke in a pleasant conversational tone as if he was reading a story, not recounting a traumatic event. When [petitioner] was interviewed in June 2005, he indicated that he was feeling better and the anti-depressant medication was discontinued. He indicated that since the stress is no longer the primary focus in therapy, he is free to explore other issues. When asked what those were, he reported seeing 'shadows' in his 'real peripheral vision' when he gets wound up. When asked to elaborate, he said, '[i]t was like a person standing there, standing next to me, if I try to look at it, goes away.' He said it was 'a black figure' that he didn't recognize. Thus, [petitioner] is now revealing subtle but significant perceptual disturbances. These disturbances are manifestations of his chronic difficulties in his personality structure. His anxiety and inability to function are secondary to these personality difficulties although he prefers to believe the anxiety is related to job stress.

"The undersigned was initially concerned about the possibility that [petitioner] was malingering. He often emphasized his problem with childcare, and reported an extreme reaction to being in the 'city' even if it was Queens or the Bronx. He said that he had a panic attack when the wheels of his car crossed into the city line. Also, [petitioner] was not a first responder and did not describe himself as such. He was involved in talking with families of the deceased and scheduling ferry trips for the families to Ground Zero. He also reported feeling 'fine' when not at work, and if he returned to work, his symptoms returned immediately. [Petitioner] does not present as a traumatized person. He socializes, is the primary caretaker for his son, and is making plans to return to school. However, after evaluating [petitioner] for six months and giving Rorschach testing, he is not seen as a malingerer. [Petitioner] is an individual with a great deal of personality disturbance who cannot tolerate even the ordinary stresses of working as a New York City Police Officer. He may focus on the Police Department as the reason for his very intense anxiety, but this is only a rationalization, a way to cope. His recent complaints of perceptual illusions show that his psychopathology is much more deeply rooted, and is not a function of anything that happened to him on the job. Thus, while [petitioner] is not malingering, he does not suffer from PTSD. [Petitioner] is psychologically

unsuitable for work as a Police Officer, and his prognosis for ever returning to Full Duty is poor.”

The Medical Board also considered the “First Endorsement” report, dated June 14, 2005, by Dr. Arthur Knour, Director of the New York City Police Department Psychological Evaluation Section. After reviewing petitioner's complete file and discussing the case with Dr. Barra, Dr. Knour stated, in pertinent part:

“[Petitioner] underwent a period of counseling, and he took psychotropic medications from January 2004 until April 2004. He and his treating professionals said that the reason he needed the help was because he was suffering from a reaction to his activities after 9/11. More specifically, for about a month after 9/11 [petitioner] was assigned to the Family Center, which served as a kind of headquarters or coordinating area where the families of all the deceased could get information and aid, and the City could gather accurate records. [Petitioner] found his experience at the Family Center so overwhelming that according to his treating doctors at Mt. Sinai Hospital he developed Post Traumatic Stress Disorder. While not underestimating the sadness at that Center in the first weeks after 9/11, it is questionable to what degree the experience of working there would be defined as a “trauma” in the sense that it would cause PTSD. It is also questionable what degree of contact most of the police personnel at the Center had with the family members. [Petitioner] was in no way doing counseling with the family members. Instead he described, for example, how he was ‘haunted’ by the pictures of the ‘missing’ 9/11 victims at the Armory in the first days after 9/11.

“When [petitioner’s] wife gave birth to their first child in April 2004, the officer took about six weeks off of work, and he said he was feeling great (his treatment providers wrote that by April 2004 he had a ‘complete resolution of symptoms’). He was still taking an anti-depressant medication. He returned to work (on full duty) in June 2004 without any significant psychiatric symptoms. However, he had a conflict with his command; he could not get the tour that he wanted. He wanted to work the third platoon, i.e. from 4 p.m. until 12 a.m. so that he and his wife could handle both their jobs (his wife was a physician) and childcare, but his command needed him to come to work earlier than 4 p.m. [petitioner’s] treating doctors referred to this inability to get his childcare needs accommodated as ‘an enormous stressor’ to the officer. According to the doctors it caused a recurrence of his symptoms, in fact a recurrence of PTSD. The symptoms were so severe that he felt unable to work as a full duty police officer, and in fact eventually he could not even go to restricted duty work. However, it does not really make sense that a conflict with ones job over work hours would cause a recurrence of post traumatic symptoms. This chronology raised questions about the possibility of exaggeration or malingering of symptoms as Psy.

Barra noted in her report, but through Rorschach testing and further interviewing malingering was ruled out.

"Psychological evaluation indicated that rather than experiencing PTSD, [petitioner] was a marginally functioning individual with a very low stress tolerance. There was also a fragile and unstable quality to the way he organized his perceptual experience, and this was associated with his intense anxiety. For example, recently [petitioner] disclosed that he was bothered by seeing shadows of what seemed like people in his peripheral vision. As long as [petitioner] limited his activities, and the demands on him, his anxiety was manageable, but he could not cope with the ordinary stressors of police work. Concur with Psy. Barra's opinion that [petitioner] is psychologically unsuitable for full duty police work."

The Medical Board also based its opinion on its own examination of petitioner, which was conducted on September 30, 2005. In its examination report the Medical Board stated, in pertinent part:

"On interview today, the officer sat still with a look of anxiety. His speech was quite slow. He admitted having taken three tablets of Ativan 0.5mg before coming to the examination and that his wife had driven him to the Article II Medical Board exam. He admitted later on that when he came to the psychologist two days previously he had taken two Ativan - one full milligram total and had driven here by himself. He still takes Zoloft 100mg a day, Ativan and Ambien to sleep. There was no evidence of delusional ideation or of hallucinations. He denied suicidal and homicidal ideation. He was alert, though apparently sedated. He contradicted himself a number of times and admitted to an addiction to Ativan and Ambien. In his initial interview the officer stated that what disturbed him is that he had stopped dreaming and that he had not had a dream in three years. He stated that he had about three nightmares a year that were about the same. Today, when asked about this nightmare, the officer stated that it was a nightmare that described him feeling helpless in water, and unable to stay on top of the water because he was wearing a heavy vest that kept pulling him down. The dreams seem to correlate with his fear and anxiety about performing police work and feeling helpless to do something about it. This picture of a man who functions fairly well at home, a sociable man who goes out with his wife and friends and manages well, but becomes frozen with anxiety when he has to do police work gives a picture of a man with personality characteristics that make him unsuitable for police work. He cannot perform the duties of a police officer at this time. ..."

The information before this court reveals that the Medical Board reviewed petitioner's entire records, including petitioner's history, medical records, and complaints. Petitioner also conducted

its own clinical evaluation of petitioner on September 30, 2005. The Medical Board concluded that although petitioner's disabling psychological condition made him unsuitable for police work, he was suffering from "Mixed Personality Disorder with Anxious Features and Mild Depression," and not from PTSD. The Medical Board therefore determined, based on the evidence before it, that petitioner's application for ADR benefits should be denied. As long as there is any credible evidence that the disability was not caused by a service related injury, the determination of the Board of Trustees must stand (*see Matter of Canfora*, 60 NY2d at 351). That petitioner's doctors (Ally Neuman and Laurie Malkoff) reached different conclusions from the Medical Board is not grounds for annulling respondents' determination. The court may not "substitute its own judgment for that of the Medical Board" (*Matter of Borenstein*, 88 NY2d at 761, quoting *Matter of Santoro v Bd. of Trustees*, 217 AD2d 660, 660-661 [1995]). Moreover, in instances of conflicting medical evidence, it is not arbitrary or capricious for the Board of Trustees to rely on the opinion of its own medical experts (*Matter of Muffoletto v New York City Employees' Retirement Sys.*, 198 AD2d 7 [1993]; *Matter of Harper v McCall*, 277 AD2d 589, 590 [2000]).

Thus, the court finds that respondents' determination is supported by competent medical evidence, and is neither arbitrary nor capricious.

Accordingly, petitioner's application is denied and the instant petition is dismissed.

This constitutes the decision, order and judgment of the court.

DATED: OCT 16 2006



 J.S.C.
HON. LELAND DeGRASSE

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).