

<b>Matter of Teran v Kelly</b>
2007 NY Slip Op 30009(U)
March 1, 2007
Supreme Court, New York County
Docket Number: 0109358
Judge: Marcy S. Friedman
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PRESENT: Hon. Marcy S. Friedman

PART \_\_\_\_\_

Justice

*Matter of*  
DIANA TERAN  
- v -  
RAYMOND KELLY

INDEX NO. 109358/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Art 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion:  Yes  No

*memos of law m1, m2, m3  
petition is*

Upon the foregoing papers, it is ordered that this ~~motion~~

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

**UNFILED JUDGMENT**  
his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or a qualified representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: 3-1-07



**Hon. Marcy S. Friedman** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY -- PART 57

In the Matter of the Application of  
DIANA TERAN,

*Petitioner,*

for a Judgment pursuant to Article 78  
of the Civil Practice Law and Rules,  
*against*

RAYMOND KELLY, Police Commissioner  
of the City of New York, et al.,

*Respondents.*

**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  
41B).  
Index No.: 109358/2006

DECISION/ORDER

Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

In this Article 78 proceeding, petitioner, a retired police officer, challenges a decision of respondent Board of Trustees of the Police Pension Fund ("Board of Trustees"), denying petitioner's application for accidental disability retirement benefits and instead awarding ordinary disability retirement benefits. Petitioner claims that she is entitled to accidental benefits, based on a psychological disability resulting from the attacks on the World Trade Center on September 11, 2001.

After examining petitioner and reviewing medical and other records, the Medical Board Police Pension Fund, Article II ("Medical Board"), by a determination dated January 16, 2006, recommended ordinary disability benefits, concluding that the diagnosis for petitioner was Depression with Anxiety and Panic and that her disability was not service connected. On March 8, 2006, the Board of Trustees denied petitioner's application for accident disability benefits and approved retirement with ordinary disability benefits.

Petitioner has the burden of proving her entitlement to disability benefits. (Matter of Hipple v Ward, 146 AD2d 201 [1<sup>st</sup> Dept 1989], lv denied 74 NY2d 614.). In order to establish

entitlement to accidental retirement disability benefits, petitioner must show that he or she “is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service.” (Administrative Code § 13-252.) An accident is defined as a “ ‘ sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact’ [citation omitted].” (Matter of Lichtenstein v Board of Trustees, 57 NY 2d 1010, 1012 [1982].) For an accident to be found, there must have been a “precipitating accidental event \* \* \* which was not a risk of the work performed.” (Matter of Starnella v Bratton, 92 NY2d 836, 839 [1998], rearg denied 92 NY2d 921, citing Matter of McCambridge v McGuire, 62 NY2d 563, 567-568 [1984].)

A reviewing court may not set aside the determination of the Board of Trustees denying accidental disability retirement “unless ‘it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident.’ ” (Matter of Meyer v Board of Trustees, 90 NY2d 139, 145 [1997], rearg denied 90 NY2d 936, citing Matter of Canfora v Board of Trustees, 60 NY2d 347, 352 [1983].)

Moreover, “a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence [citations omitted]. While the quantum of evidence that meets the ‘substantial’ threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require ‘some credible evidence’ [citations omitted].” (Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756 [1996].) Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (Id. at 760; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1<sup>st</sup> Dept 1999], lv denied 95 NY2d 769 [2000].) The courts “cannot weigh the medical

evidence or substitute their own judgment for that of the Medical Board.” (Matter of Santoro v Board of Trustees, 217 AD2d 660 [2d Dept 1995].)

Here, the Medical Board’s determination was based on credible evidence that petitioner’s disability retirement was not the result of a line-of-duty accident. In November 2005, petitioner was evaluated by Cecile Irvine, a psychologist from the New York City Police Department’s Psychological Evaluation Section. Dr. Irvine found that petitioner had a psychological disability which prevented her from performing full duty police work and found that the disability was not the result of a line-of-duty accident. Although petitioner’s psychotherapist, Robert Driscoll, submitted a letter in which he stated that petitioner was suffering symptoms of Post Traumatic Stress Disorder brought on by her duties in connection with the events of September 11, 2001, Dr. Irvine noted in her report that there was no evidence to support the claim of petitioner’s psychotherapist that petitioner’s injuries were the result of her work in connection with the events of September 11, 2001.

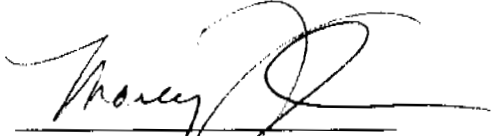
Petitioner’s claim that she is entitled to a line-of-duty accident disability retirement is based solely on the fact that she was working at Police Headquarters on September 11, 2001, at the time of the attacks on the World Trade Center. It is uncontested, however, that she was sent home just after the attacks because she was pregnant. Petitioner did not witness the attacks on the World Trade Center or the collapse of the buildings, and she did not participate in any rescue or recovery work at the World Trade Center site after September 11. According to petitioner, she began to have symptoms, including panic attacks, in the spring of 2002 after she had given birth. She continued to work until November 2004 when her symptoms worsened and she went out on sick leave.

Thus, under the circumstances of this case, in which petitioner was performing routine police duties during a time of a city-wide emergency, petitioner's contention that the September 11 attacks on the World Trade Center constituted a line-of-duty accident for purposes of entitling her to accident disability retirement is unsupported either by the facts or by any legal authority. Further, contrary to petitioner's apparent claim, Administrative Code § 13-252.1, which provides a presumption of accidental disability for police officers injured during their participation in World Trade Center rescue, recovery or clean-up efforts, does not apply to petitioner, as she was not involved in any of the World Trade Center rescue, recovery or clean-up efforts.

Accordingly, the petition is dismissed in its entirety.

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

Dated: New York, New York  
March 1, 2007

  
\_\_\_\_\_  
MARCY FRIEDMAN, J.S.C.

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