

**Matter of Joseph v Kelly**

2007 NY Slip Op 32694(U)

August 13, 2007

Supreme Court, New York County

Docket Number: 0111207/2006

Judge: Charles J. Tejada

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Charles J. Tejada, Justice PART 50N

In the Matter of the Application of  
DAVID JOSEPH,  
Petitioner,

11/207/06

INDEX NO. ~~112592/2006~~  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

-against-

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.

**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).

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


|  | <u>Papers Numbered</u> |
|--|------------------------|
| 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 the petitioner's CPLR Article 78  
motion is denied.

See attached decision and judgement.

Dated: August 14, 2007

ENTER:   
J.S.C.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION



disability was not caused by an injury sustained while on duty and does not have to determine the actual cause of the disability.

The instant petition arises from a 2002 decision issued by the Honorable Herman Cahn wherein petitioner was seeking similar relief after he was denied accident disability retirement allowance pursuant to New York City Administrative Code §13-252. Justice Cahn remanded petitioner's application for accident disability retirement benefits to the respondents, Board of Trustees of the Police Department Article II Pension Fund, for the purpose of determining whether the line of duty accident caused the condition (major depressive disorder) and for the Medical Board and the Board of Trustees to set forth more fully how they arrived at their decision on this issue. *Joseph v. Kelly et al.*, 109545/1999 (NY County, Cahn, JSC) The following is this Court's determination of the instant matter.

The qualifications for accidental disability retirement (ADR) and ordinary disability retirement (ODR) are set forth in the New York City Administrative Code (NY Admin Code) §13-251 and 13-252, respectively. NY Admin Code § 13-251 states that a member in city-service is entitled to ODR benefits if upon medical examination, "such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired." A member in city-service is entitled to ADR benefits if he/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...and that such disability was not the result of willful negligence..." Code § 13-252.

The Court of Appeals has defined the term "accident" as used in the public pension statutes to be a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" *Lichtenstein v. Board of Trustees*, 57 N.Y.2d 1010, 1012, 443 N.E.2d 946, 457 N.Y.S2d 472 (1982); See *Hall v. Kelly*, 234 N.Y.L.J. 107 (2005). In order for one to be considered for ADR benefits the petitioner has the burden of establishing that his injury resulted from a "service-connected accident". NY Admin. Code §13-252.

Petitioner claims that his injury resulted from, *inter alia*, an on duty incident wherein he alleges that he was the target and the victim of an unidentified sniper; that that incident caused him to suffer from a major depressive disorder; that ultimately he was unable to perform the full duties of a police officer; and, consequently, he should be granted accident disability retirement.

Pursuant to Article 78, denial of ADR "can only be set aside if the courts conclude that the retiree is entitled to [ADR] as a matter of law" *Meyer v. Board of Trustees*, 90 N.Y.2d 139, (1997). A Court may not set aside a decision unless it can conclude, as a matter of law, that the determination made was arbitrary, capricious, and the disability was the natural and proximate result of a service-related accident. This standard has been set by the Court of Appeals since *City of New York v. Shoeck*, 294 N.Y. 559 (1945).

The evidence indicates that the Board of Trustees' determination of the petitioner's application was neither arbitrary nor capricious and this Court cannot determine as a "matter of law" that the injury was caused by a natural and proximate result of a service-related accident as set forth by *Meyer v. Board of Trustees*, 90 N.Y.2d @ 145. A review of the evidence presented to this Court does show a thorough investigation of petitioner's claims in support of his request for ADR relief by the Board of Trustees.

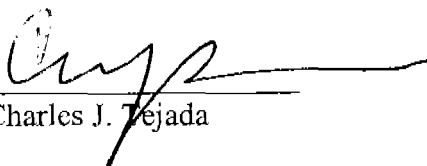
A review of the evidence before this Court reveals multiple medical and psychiatric records from the various Medical Board doctors and NYPD doctors as well as the petitioner's doctors who diagnosed petitioner both before and after the 1999 matter was remanded to the Board for clarification. Of particular significance is the fact that the Medical Board considered petitioner's claim on seven different occasions and re-affirmed its prior recommendation to deny petitioner's application for accidental disability retirement benefits but granted petitioner ordinary disability benefits, based upon a final diagnosis of Major Depressive Disorder with Psychotic Features. More significantly, the Board detailed its findings to highlight the confusing aspects of petitioner's claims of the alleged sniper incident (no broken glass, no caliber of alleged bullets, no witnesses to the incident), the fact that petitioner's symptoms were inconsistent with post traumatic stress disorder (e.g.: no startle reaction, petitioner described all vegetative symptoms associated with a major depressive disorder), no direct link between petitioner's psychiatric illness and the traumatic events that he stated he suffered; and, that the Board's ultimate conclusion was "due to the expertise and experience of the psychiatric examiner, that indicate his trauma was not related in any way to the eruption of the Major Depressive Disorder." Of further significance, according to the investigation conducted by Lieutenant Gilchrist, the investigator of petitioner's alleged 1996 sniper shooting incident, petitioner's behavior had not changed from the manner he conducted himself on the force before the incident to after the

“disabling” incident.

This Court finds that the Board has set forth more fully how they arrived at their decision on this issue and has adequately satisfied the “some credible evidence” standard. Consequently, since New York law mandates that a Court may not replace its judgment for that of the Medical Board, this Court holds that there is no legal authority upon which this Court may set aside the ultimate determination made by the Board of Trustees. See *Borenstein v. NYCERS*, 88 NY2d at 761 (“Although the Medical Board did consider respondent's subjective complaints of pain when determining disability, the record makes clear that it went beyond them. As the Medical Board found, the medical evidence submitted by respondent—including the MRI—was not dispositive on the issue of disability but was subject to conflicting interpretations. The Board alone had the authority to resolve such conflicts [see, *Matter of Tobin v Steisel*, *supra*, at 258-259; *Matter of Cassidy v Ward*, 169 A.D.2d 482, 483, 564 N.Y.S.2d 165]). In each of its two final reports submitted to the Board of Trustees, the Medical Board detailed what medical proof had been considered, specified the nature of respondent's complaints and outlined the results of its physical examinations of respondent, concluding that respondent's physical condition was not disabling for duty.”)

This constitutes the opinion, decision and order of this Court.

Date: August 13, 2007  
New York, New York

  
Hon. Charles J. Tejada

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