

Matter of Barry v Kelly
2007 NY Slip Op 32769(U)
August 29, 2007
Supreme Court, New York County
Docket Number: 0100433/2007
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Marcy S. Friedman
Justice

PART 57

Index Number : 100433/2007

BARRY, CHRISTOPHER

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Art. 78

THE FOLLOWING P...

PAPERS NUMBERED

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

1
2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT

Memos of Law
Cross-Motion: Yes No

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 118) motion

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

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

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

Dated: 8-29-07

[Signature]
J.S.C.

Hon. Marcy S. Friedman

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

In the Matter of the Application of
CHRISTOPHER BARRY,
Petitioner,

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

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

INDEXED
10/23/06
1B
This Judgment has not been entered by the County Clerk
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
UNFILED JUDGMENT

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 accident disability retirement benefits and instead awarding ordinary disability retirement benefits. Petitioner claims that he is entitled to accident benefits, based on a psychological disability resulting from his participation in the recovery and clean-up operations following the attacks on the World Trade Center on September 11, 2001.

After examining petitioner and reviewing medical and other records on March 6, 2006 and June 5, 2006, the Medical Board Police Pension Fund, Article II ("Medical Board"), by a determination dated June 5, 2006, recommended denial of petitioner's application for accident disability benefits and approval of ordinary disability benefits. On September 13, 2006, the Board of Trustees concurred with the Medical Board's recommendation.

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 [1st 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].)

In reaching its determination, the Medical Board is also bound by New York City Administrative Code § 13-252.1, also known as the World Trade Center disability law, which was enacted in 2005 and provides a presumption of accidental disability for police officers injured during their participation in the post-9/11 World Trade Center rescue, recovery or clean-up efforts. Conditions covered by § 13-252.1 include “[d]iseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions.” (§ 13-252.1[c][iv].)

It is undisputed that petitioner participated in the World Trade Center clean-up. Petitioner claims that he is entitled to accident disability benefits based on Post-Traumatic Stress

Disorder resulting from his work in connection with the clean-up, and that the Medical Board determination should be set aside because it failed to apply the World Trade Center disability law presumption.

In its first report dated March 6, 2006, the Medical Board notes that petitioner was seen by the Police Department's Psychological Evaluation Section ("PES") in 1995, following an incident in which he pulled out his firearm during an argument with his girlfriend. According to PES, that event was deemed to be an isolated incident and the case was closed. (Report of Gwen Papp, dated Dec. 7, 2005, Ex. 2 to Verified Answer.) The Medical Board further notes that petitioner was again referred to PES in 2005 after he was hospitalized after taking sleeping pills. The Medical Board also considered reports from NYPD staff psychologist Dr. Gwen Papp, social worker Barbara Probst, and hospital records variously describing petitioner as suffering from bipolar disorder or major depression, post traumatic stress disorder. The Medical Board then deferred decision on petitioner's application pending the submission of additional reports.

The Board's final report, dated June 5, 2006, indicates that it reviewed a letter from psychiatrist Dr. Barbara Silverman which, without discussion, states that petitioner's diagnosis is bipolar disorder. The Medical Board also reviewed a report from the Guidance Center, where petitioner was being treated, which gave a diagnosis of post traumatic stress disorder. However, the Medical Board found that the report offered no supporting evidence for the disorder. Based on its review of the material and an interview with petitioner, the Medical Board concluded that petitioner's diagnosis was bipolar disorder.

There is no indication in the Medical Board's reports that the Medical Board considered the presumption created by Administrative Code § 13-252.1. While respondents' brief suggests

that the presumption would be applicable and that evidence before the Medical Board was sufficient to rebut the presumption, it is not clear that the Medical Board itself considered the presumption and either decided that it was not applicable based on the nature of petitioner's disability or determined that it was applicable but was rebutted by the evidence. While the Medical Board noted that petitioner "had difficulties dating back to at least high school" and opined that "Bipolar Disorder is a recurrent disorder related to neuroendocrine and genetic factors" (Medical Board report dated June 5, 2006, Ex. J to Petition), it was nonetheless incumbent upon the Medical Board to consider the applicability of the World Trade Center presumption.

Further, it is unclear on this record that the Medical Board applied the proper standard of causation. In concluding that petitioner had a long standing disorder and rejecting medical evidence of a work-related trauma, it appears that the Board neglected to consider the "causation rule" that "[a]n accident which precipitates the development of a latent condition or aggravates a preexisting condition is a cause of disability within the meaning of the Administrative Code of the City of New York." (Matter of Tobin v Steisel, 64 NY2d 254, 257 [1985]; Matter of Petrella v Board of Trustees of the Police Pension Fund, 141 AD2d 361, 363 [1st Dept 1988].)

Thus, the issue of whether credible evidence supports the administrative decision in this case cannot be determined unless the Medical Board clarifies the basis for its conclusion. (See Matter of Meyer, 90 NY2d at 152.) The matter should be remanded for the Medical Board to consider the World Trade Center disability law presumption and the above causation rule.

Accordingly, the petition is granted to the extent that it is

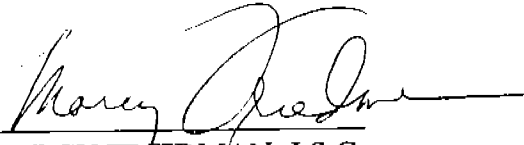
ORDERED that the determination of the Board of Trustees dated September 13, 2006 is

annulled; and it is further

ORDERED that matter is remanded to respondents for reconsideration, including consideration of the issues specified in this decision.

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

Dated: New York, New York
August 29, 2007


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
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