

Matter of Dodd v Kelly
2007 NY Slip Op 34468(U)
November 13, 2007
Supreme Court, New York County
Docket Number: 104848/2007
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 104848/2007

DODD, MICHAEL

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 6.15.07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

his judgment...
did notice of...
obtain entry, court...
appear in person at the...
Clerk's Desk (noon...)

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

Dated: 11/12/07

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of
MICHAEL DODD,

Petitioner,

Index No. 104848/07
Mtn Seq. 001

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

-against-

RAYMOND KELLY, as 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, RHONDA CAVAGNARO, General
Counsel of the Police Pension Fund,
NEW YORK CITY POLICE DEPARTMENT and
THE CITY OF NEW YORK,

Respondents.

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WALTER B. TOLUB, J.:

Petitioner Michael Dodd joined the New York City Police
Department (NYPD) on August 31, 1998, and served continuously
until his retirement. On the morning of September 11, 2001,
petitioner responded to the emergency calls for assistance at the
World Trade Center and was positioned in the North Tower when the
second ill-fated jetliner struck the South Tower. Petitioner was
present when each of these towers collapsed, and began having
trouble breathing after inhaling the debris and toxins created by
the collapse of the buildings. He also manifested additional
stress-related symptoms. At petitioner's request, a line of duty
injury report ("LOD") was completed and approved on September 12,

2001 (Notice of Petition, Exhibit A).

On September 25, 2002, petitioner filed an application ("the 2002 Application" for accident disability retirement ("ADR") benefits pursuant to New York City Administrative Code §13-252. The application claimed post-traumatic stress disorder ("PTSD") resulting from the events of September 11, 2001. On September 16, 2003, the Supervising Chief Surgeon of the Police Department, Dr. Eli Kleinman, recommended that petitioner be examined by the Medical Board (Verified Answer, Exhibit 11). The recommendation indicated, among other things, that petitioner had been on restricted duty since October 29, 2001, that the restriction was the result of a line of duty injury, and that the application was for accident disability (id.).

On November 7, 2003, petitioner was examined by the Medical Board Police Pension Fund, Article II (the "Medical Board"). The Medical Board unanimously concluded that

[b]ased on the review of the records and today's examination, it was felt by the members of the Article II Medical Board that there were significant objective findings precluding the officer from performing the full duties of a New York City Police Officer with his self-described symptoms. However, the relationship to the World Trade Center tragedy is not clear to his exposure to trauma just before the disaster. In light of that, the Article II Medical Board unanimously recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the officer's own application for Accident Disability Retirement. This is due to the fact

that there is a question of secondary gain at this time due to his reluctance to have sought treatment and to take it at this time if the symptoms are that intense. The final diagnosis is Panic Disorder with Depressive and Anxious Features.

(Verified Answer, Exhibit 14).

Based on the Medical Board's November, 2003 determination, the Board of Trustees, on March 10, 2004, denied petitioner's application for an ADR, and instead, granted him an ODR. Petitioner was retired from the Police Department on April 25, 2004. It appears that no appeal was taken on this decision.

Creation of the "WTC Law"

In June of 2005, then Governor Pataki signed New York City Administrative Code §13-252.1 into law, which has since become known as the World Trade Center Disability Law (the "WTC law"). The newly enacted provision created, where a rescue worker developed certain disorders and met certain criteria, a rebuttable presumption that the disorder was acquired during participation in the rescue, recovery and/or cleanup operation undertaken at the World Trade Center site. However, to be eligible for relief under the provision, the rescue worker had to have participated for at least 40 hours during a specified time in the operation, or, had to have sustained a documented physical injury between September 11 and September 12, 2001, thereby precluding the worker from performing the required 40 hours of service (§ 13-

252.1(1)(a)).¹ Furthermore, an individual obtaining reclassification under the WTC law would only receive an ADR from the date of reclassification, not from the date of their retirement, as an ADR awarded under the WTC law is not retroactive (§ 13-252.1(2)(c)).²

On December 9, 2005, petitioner, as a prerequisite for

¹The Text of this provision reads, in pertinent part, as follows:

1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, any condition or impairment of health caused by a qualifying condition or impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence. A member shall be eligible for the presumption provided for under this paragraph notwithstanding the fact that the member did not participate in World Trade Center recovery and cleanup operations for a minimum of forty hours, provided that: (i) the member participated in the rescue, recovery, or cleanup operations at the World Trade Center site between September eleventh, two thousand one and September twelfth, two thousand one; (ii) the member sustained a documented physical injury at the World Trade Center site between September eleventh, two thousand one and September twelfth, two thousand one that is a qualifying condition or impairment of health resulting in disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours; and (iii) the documented physical injury that resulted in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours is the qualifying condition or impairment of health which the member seeks to be eligible for the presumption provided for under this paragraph.

²By contrast, an ADR under Administrative Code §13-252 is retroactive to the date of retirement.

applying for an ADR under the new WTC law, filed a 9/11 Notice of participation form ("the Notice"). In the Notice, petitioner claimed that he sustained the requisite physical injury that brought him under the purview of the WTC law, thereby exempting him from the 40-hour minimum service requirement. Petitioner then reapplied for an ADR, seeking relief under either New York City Administrative Code § 13-252 or § 13-252.1 (the WTC law).³

The Medical Board reviewed petitioner's resubmitted application for an ADR on April 21 2006. The resulting review led to the determination that petitioner was suffering from "post traumatic stress disorder - late onset", and the recommendation for an ADR under the WTC law. In pertinent part, the Medical Board noted:

6. [...] The Board reviewed [petitioner's] history and noted that he had letters from his treating therapist which mentioned that he responded on September 11, 2001 and that he was there before the second building was destroyed. The letters all commented on his courage as a first responder who continued to work while the second tower was struck [...] Based upon his personal life trauma, his presence and work at the World Trade Center on September 11, 2001 has to be reconsidered. The credibility factors, while still strong and prominent, cannot take away from this individual and the fact that he can develop Post Traumatic Stress Disorder, late onset.

7. Based on the review of the history, the medical records

³ It is not clear to this court why petitioner, and in particular, petitioner's counsel, indicated that relief was being sought under both Administrative Code provisions.

and the clinical findings, it was felt by all the members of the Article II Medical Board that there were significant objective findings precluding the officer from performing the full duties of a New York City Police Officer. In light of that, the Article II Medical Board unanimously recommends approval of the officer's own application for Accident Disability Retirement pursuant to Chapter 93 of the Laws of 2005 (World Trade Center Disability Law). The diagnosis is Post Traumatic Stress Disorder, Late Onset. (Notice of Petition, Exhibit C).

The Board of Trustees reviewed petitioner's case on November 8, 2006 and granted petitioner an ADR, albeit apparently not under the WTC law:

In reference to POLICE OFFICER MICHAEL DODD, this officer also has the attorney Jeffrey Goldberg and he did submit a letter to us stating that he is not looking for the presumption under the World Trade Center law, much like the earlier case of OFFICER DORAN.

He is requesting accident based on the events of September 11th, for which we have some evidence in the record that OFFICER was present at the World Trade Center on September 11th.

He also did not complete the 40 hours, but he was subsequently found disabled for post-traumatic stress disorder.

So based on the Law Department's opinion earlier of the application of all the other accident disability laws, irrespective of the World Trade Center presumption, we are prepared to grant accident in this case.

(Petition, Exhibit D).

Shortly after the November 8, 2006 decision, petitioner began receiving an ADR pension (3/4 of which is tax-free). As

the ADR was understood to have been awarded under New York City Administrative Code § 13-252, since the benefits were not made retroactive to his 2004 retirement date, petitioner commenced an Article 78 proceeding captioned, Michael Dodd v. Raymond Kelly, et al. (Index No. 103270/2007). That proceeding was discontinued by stipulation in May of 2007.⁴

On March 23, 2007, petitioner received a letter from Rhonda Cavagnaro, General Counsel of the New York City Police Pension Fund ("the Fund"). The letter informed petitioner that the Fund, in reviewing his file in connection with preparing a response to the then pending Article 78 proceeding, decided to downgrade his ADR to an ODR. The letter further indicated the Fund's intention to determine whether it was going to seek repayment of the monies already paid to petitioner. The letter, in pertinent part, reads as follows:

In preparing a response to the Article 78 proceeding filed on your behalf against the Police Pension Fund (PPF) for retroactive retirement benefits, the Fund had occasion to review your file and must inform you that your retirement status is being returned to that of an Ordinary Disability Retirement. [...]

The review of your file revealed that you were upgraded from an ODR to ADR at the November 8, 2006 Board of Trustees

⁴The court notes two things about the May stipulation withdrawing the Article 78 action. First, it appears that there is a scrivener's error in that the date of the stipulation reads May 2006. Second, the withdrawal of the proceeding was made with prejudice (Notice of Petition, Ex. J).

[*9]

meeting. Your case was originally placed on the Board's calendar because you submitted an application for reclassification under the WTC Disability Law (Chapter 93 of the Laws of 2005; NYC AC 12-252.1). The Article II Medical Board found you to be disabled by a qualifying condition under that law and thus sent a report to the Trustees affirming your disability under that presumption statute and allowing for the upgrade to ADR; however, the Medical Board only makes a determination as to the disability under that statute and it is the Board of Trustees that determines whether the member has met all of the other eligibility requirements, such as the 40 hours of participation in rescue, recovery, and cleanup operations (during a specified time period), or a documented physical injury between 9/11/01 and 9/12/01 that precluded the member from performing the 40 hours.

The Board of Trustees appears from the record to have been aware that you do not meet those other eligibility requirements and made a record of such fact based on correspondence from your attorney, Jeffrey Goldberg, as well as your Notice of Participation; but they also appear to have been under the mistaken impression that you still had an "active", pending ADR application pursuant to NYC AC § 13-252 from 2003 that could be acted on. That, however, was not the case. You, in fact, have been retired for Ordinary Disability since April 2004 and you never instituted a legal proceeding challenging that final disposition by the Board of Trustees. Therefore, you had no "active" or pending application that could have allowed the Board to retire you under the general ADR provisions of NYC AC § 13-252. Accordingly, that "action" taken by the Board at the November 8, 2006 meeting is null and void.

Pursuant to NYC AC § 13-252, the Fund is placing your case on the April 11, 2006 Board of Trustees meeting to clarify the record on this matter, as well as your application for

reclassification under the WTC Disability Law. After that meeting, the Fund will determine if it is necessary to recoup any over payment [sic] you may have received since November 2006 [...]

(Notice of Petition, Exhibit E).

Petitioner became aware that his pension check was reduced to the ODR pension amount on or about April 1, 2007, and subsequently commenced the instant application on April 9, 2007. By this application, petitioner seeks a judgment annulling respondents' decision to rescind the ADR granted in October, 2006 and an order reinstating petitioner's line of duty accident disability retirement allowance. Petitioner additionally seeks an order pursuant to CPLR 2307(a) directing the production of various documents responsive to the review of petitioners' case.

Prior to the hearing of this application, the Board of Trustees, at one of their regular meetings held on April 11, 2007, discussed petitioner's case. The Board of Trustees did not discuss petitioner's injuries. They only addressed whether petitioner was eligible to apply for the reclassification and ultimately took the position that, since petitioner did not qualify for reclassification under the WTC law and was already retired, there was no proper application before them at the November 8, 2006 meeting that they could vote on. As such, the Board of trustees concluded that their actions at that meeting were void. The minutes of this meeting, in pertinent part, read as follows:

[...] As you may recall, this case was before the Board last month and it was approved. The Medical Board had determined that Michael Dodd was disabled and entitled to accident disability retirement benefits.

However, upon review of this matter, and I have consulted with the Police Pension Fund counsel, Rhonda Cavagnaro, on this, we determined that Mr. Dodd is not, in fact, entitled to ADR benefits. He filed an application for reclassification under the World Trade Center Bill, obviously, subsequent to retirement. The Medical Board found that he was disabled, but did not find - there is no evidence that this officer qualifies for benefits under the World Trade Center Law, therefore, since he was retired at the time he filed for classification, he wasn't, in fact, permitted to do that.

The action of the Board of Trustees approving the determination of the Medical Board is therefore null and void.

[...]

Executive Director Welsome: I think the member did not qualify under the requirement that he serve at least 40 hours at one of the sites in the rescue, recovery or cleanup or suffering a physical injury on September 11th or 12th that precluded him from going back to work, 40 hours. So the requirements were not met. Therefore, the member was not eligible for reclassification.

(Verified Answer, Exhibit 22).

Discussion

It is well established that in an Article 78 proceeding, judicial review is limited to determining whether the decision made by an administrative is arbitrary and capricious, or lacks a rational basis (Slesinger v. Department of Housing Preservation

and Development of City of New York, 39 AD3d 246, 246 [1st Dept 2007]). In the instant application, based on the submissions before the courts, there appears to be multiple instances among the respondent agencies where the decisions rendered were arbitrary and capricious.

At the outset, there appears to have been a significant amount of confusion with respect to which law petitioner was seeking reclassification under. Petitioner retired from the Police Department in 2004. As such, respondents correctly note that he could not have sought reclassification of his retirement status under New York City Administrative Code § 13-252, as he was no longer a member of the Police Pension Fund. However, petitioner's 2004 retirement had no bearing on an application made under the WTC law, which expressly allows retired officers to apply for the newly created relief (see, New York City Administrative Code § 13-252.1 2(a)).

That having been said, it appears from the papers, and notably, the annexed transcripts, that evidence existed which was reviewed by the Medical Board, but apparently never considered by either the Board of Trustees or the Fund. This court therefore perceives the decision of the Board of Trustees which denied petitioner an ADR under the WTC law, as arbitrary and capricious. The same conclusion is reached with respect to the court's perception of the Fund's decision to downgrade petitioner's ADR

to an ODR, a decision which was largely predicated upon the contention that petitioner did not qualify for an ADR under the WTC law. As such, it is only proper that the issue as to whether petitioner is entitled to an ADR under the WTC law, be remanded for reconsideration. Accordingly, it is

ADJUDGED that petitioner's application is granted solely to the extent of annulling respondents' decision to rescind the ADR granted in October, 2006, based on the arbitrary and capricious determination that petitioner, who was not eligible for an ADR under New York City Administrative Code § 13-252, was also ineligible for an ADR under New York City Administrative Code § 13-252.1 2(a) (the "WTC law"); and it is further

ORDERED that the matter is remitted to the Board of Trustees of the Police Pension Fund, Article II who shall conduct an additional review of petitioner's ADR application under the WTC law, and if necessary, conduct an additional hearing before issuing an expanded determination on the subject application; and it is further


ADJUDGED that the cross-application advanced by respondents for consolidation of the instant proceeding with a proceeding which has since been discontinued, is denied as moot; and it is further

ORDERED that the portion of petitioner's application which seeks the production of various documents concerning petitioner's

case (see, Order to Show Cause), is granted. To the extent not already provided, respondents are directed to produce the requested documentation within 30 days of service of a copy of this Order and Judgment. In the event that any of the sought after material is protected by privilege, respondents are directed to produce a privilege log with respect to any documents in which privilege is claimed.

This memorandum opinion constitutes the Judgment and order of the Court.

Dated: 11/13/09


HON. WALTER B. TOLUB, J.S.C.

UNFILED JUDGMENT
This judgment has not been filed by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel must appear in person at the County Clerk's office (Room 418) and pay the required fee.