

Matter of Doran v Kelly
2008 NY Slip Op 30023(U)
January 3, 2008
Supreme Court, New York County
Docket Number: 0103903/2007
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT.

PART 6

Index Number : 103903/2007

DORAN, CHRISTIAN

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. 103903/07

MOTION DATE 8/21/07

MOTION SEQ. NO. 01

MOTION CAL. NO. 05

The following papers, numbered 1 to 3 were read on this motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits (Reply Memo)

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this

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).

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

THE ASSOCIATED COUNTY CLERK'S OFFICE

Dated: 1-3-08

Edan Rosen
J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of CHRISTIAN DORAN,
Petitioner,

Index No. 103903/07
Motion Date: 8/21/07
Motion Seq. No.: 01
Motion Cal. No: 05

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
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
9070A)

-----X

PRESENT: EILEEN BRANSTEN, J.

This Article 78 proceeding calls into question whether exposure to debris while
working at the World Trade Center site on September 16, 2001, which caused a police
officer psychological injury and necessitated disability retirement, as a matter of law
constitutes an "accident" that entitles him to accidental disability retirement ("ADR").
Because respondents' determination that such exposure was not an accident is not arbitrary,
capricious or irrational, the determination must be upheld.

Background

After passing all required physical and mental tests, Christian Doran (“Officer Doran”) was appointed to the uniformed force of the New York City Police Department (“NYPD”) in February 1994. Verified Petition (“Petition”), at ¶ 4. His work was satisfactory at all times. *Id.*

On September 16, 2001, Officer Doran was assigned to the “bucket brigades” at Ground Zero, which entailed digging through rubble at the World Trade Center site in search of body parts and keepsakes of the thousands of victims of the September 11th terrorist attacks. *See*, Petitioner’s Reply Memorandum of Law (“Reply”), at 4. While lifting debris-filled buckets, Officer Doran became very lightheaded and dizzy. He was brought to a doctor at a triage area, who administered oxygen to lower Officer Doran’s extremely high blood pressure. Petition, at ¶ 6; Verified Answer (“Answer”), Ex. A.

Six months later, on March 19, 2002, Officer Doran was diagnosed with post traumatic stress disorder (“PTSD”) as a result of the World Trade Center disaster. He was granted Line of Duty designation for his PTSD. Petition, at ¶ 6.

Officer Doran underwent treatment for his PTSD. In June 2003, his social worker informed the NYPD Medical Division Psych. Department:

“Mr. Doran has a diagnosis of Post Traumatic Stress Disorder * * * and has episodes of major depression as a result of his involvement with the 9/11 disaster. His symptoms include: depression, sleep disturbance, flashbacks, nightmares, confusion and memory problems. * * * The client is compliant with all treatment goals and medication management.

“[Officer Doran] has shown some improvement. However, his symptoms persist and interfere with his daily function. Therefore, he is unable to return to full duty work. Ongoing care is recommended.”

Petition, Ex. G.

In early August 2003, the Social Security Administration awarded Officer Doran disability benefits.

Based on his PTSD, on August 18, 2003, Officer Doran submitted an ADR application to the Board of Trustees, Police Pension Fund, Article II, which would entitle him to 75% of his final pay. Answer, Ex. 4; *see also* New York City Administrative Code § 13-252. The Police Commissioner, in turn, submitted an application for Ordinary Disability Retirement (“ODR”) on Officer Doran’s behalf. Petition, at ¶ 14.

The Medical Board Police Pension Fund, Article II (“Medical Board”) examined Officer Doran on January 12, 2004, and after a full review of the materials presented, including submissions from his social worker, recommended approval of the Police Commissioner’s application for ODR and disapproval of ADR. The Medical Board’s final diagnosis was “Mixed Depression and Anxiety Disorder.” Petition, Ex. I.

Subsequently, Officer Doran’s attorney urged the Medical Board to reconsider and grant ADR benefits, emphasizing that “until the traumatic events relating to the September 11, 2001 disaster and subsequent recovery effort, there was no indication that [Officer]

Doran was suffering from an emotional or psychiatric disorder. Symptoms of mental disturbance manifested on the 'bucket brigade' to the point where the officer became non-functioning, although he had been fully effective before." Petition, Ex. J.

Officer Doran's social worker further confirmed that he had been under her care since July 2002 to "address significant symptoms directly related to 9/11 trauma." Petition, Ex. K. She explained that he had been diagnosed with PTSD, was unable to work and that he had "great difficulty functioning on a daily basis." *Id.*

On September 27, 2004, the Medical Board re-examined Officer Doran and considered his submissions. It concluded, once again, based on a final diagnosis of "Mixed Depression and Anxiety Disorder" that ODR was appropriate. Petition, Ex. M. Thereafter, the Board of Trustees reviewed the case and concurred with the Medical Board's recommendation.

Officer Doran commenced an Article 78 proceeding to challenge denial of his ADR application. The parties agreed that his application would be remanded because the Medical Board failed to comment on "the issue of 9/11 causation." Petition, at ¶ 21.

In June 2006, Officer Doran's case was reviewed once again by the Medical Board, which rescinded its earlier decision and recommended "approval of the officer's own application for [ADR] pursuant to Chapter 93 of the Laws of 2005 (World Trade Center Disability Law) and disapproval of the Police Commissioner's application for Ordinary

Disability Retirement. The final diagnosis [was] Mixed Depression and Anxiety Disorder.”

Petition, Ex. N.

In October 2006, Officer Doran sought yet another remand of his ADR application to the Medical Board for consideration pursuant to New York City Administrative Code § 13-252; rather than the 9/11 Law enacted as § 13-252.1. Officer Doran explained that he did not spend 40 hours working at the site, which would have qualified him for the presumption applicable under the World Trade Center Disability Law, but that nonetheless:

“his experiences, digging through the rubble at the scene of the collapsed Twin Towers in the wake of the unfathomable terrorist attack and searching for survivors and uncovering body parts and keepsakes of the thousands of deceased, constitute an ‘accident’ within the meaning of the pension law and entitles [Officer Doran] to ADR with or without the 9/11 law.”

Petition, Ex. O.

On November 2, 2006, Officer Doran filed a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations.

On November 8, 2006, the Board of Trustees reviewed Officer Doran’s application. It expressed concern that Officer Doran was not entitled to the benefits of the World Trade Center law, explaining that:

“Obviously if somebody doesn’t meet the criteria * * * an officer is clearly able to apply under regular ADR laws and those laws will determine whether or not the officer receives retirement benefits he or she seeks.

“In this case though the incident occurred on September 16th, not September 11th. And it’s our opinion that for purposes of ADR, an accident did not occur on September 16th that would form the basis of an award of accident disability retirement benefit[s].

“So in this case we have only line of duty for an incident that occurred on the 16th. There is no other evidence that the officer was present on the 11th or any other day within the year provided for in the [9/11] statute.

“So therefore we cannot approve it as an accident disability.”

Petition, Ex. Q.

The Board of Trustees tabled the matter to discuss it further with Officer Doran’s counsel, who once again requested that the application be remanded to the Medical Board for consideration. Petition, Ex. Q.

On December 13, 2006, the Board of Trustees reviewed the case another time and by a six-to-six tie, voted to retire Officer Doran with an ODR pension. Petition, at ¶ 29.

In this Article 78 proceeding, Officer Doran challenges the determination that he was not entitled to ADR retirement benefits, arguing that it is “arbitrary, capricious, unreasonable, [and] unlawful.” Petition, at ¶ 30. He contends that his assignment to Ground Zero to dig for body parts and keepsakes was an “accident” for pension purposes. Reply, at 10. He emphasizes that it “was the greatest mass killing on U.S. soil [and that he] was working at a scene of incomprehensible destruction in the wake of the most massive terrorist attack in history. * * * There [are] literally no words that can accurately describe the events

or the scene or what rescue workers saw and endured.” Reply, at 11. “Digging for body parts and keepsakes and rescue worker identification tags, * * * five days after 9/11,” Officer Doran points out, “was not an ‘ordinary job duty’ and [his] actions were far from ‘routine.’” Reply, at 14.

Respondents 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 (collectively “Respondents”), oppose the petition. They urge that exposure to the atrocities at Ground Zero does not constitute an “accident” as defined by public retirement statutes and relevant court opinions. They maintain that the determination to deny ADR “is consistent with precedent, reasonable, and neither arbitrary nor capricious.” Respondents’ Memorandum of Law (“Opp. Mem.”), at 3. Respondents assert that what occurred on September 11th itself, when the World Trade Center was unexpectedly attacked, may arguably constitute an “accident.” According to them, however, “nothing occurred at the World Trade Center site thereafter that could fairly be characterized under the law as an ‘accident.’” Opp. Mem., at 6 n.2.

Though sympathetic to Officer Doran and all police officers who respond to horrifying scenes--whether terrorism related or the result of gruesome crimes--because there is legal support for Respondents’ conclusion that Officer Doran was not incapacitated as

a result of an “accidental injury,” the petition must be denied and the proceeding dismissed.

Analysis

To obtain ADR, one must establish mental or physical incapacitation “as a natural and proximate result of an accidental injury received * * * in city service.” Administrative Code of City of New York § 13-252; *see also, Matter of Picciurro v. Board of Trustees of New York City Police Pension Fund*, ___ A.D.3d ___, 2007 WL 4388840, at * 2 (1st Dept. Dec. 18, 2007). Although the term “accident” is not defined by the provision, the Court of Appeals has made plain that ADR benefits are only appropriate if the injury results from a “sudden, fortuitous mischance, [that is] unexpected [and] out of the ordinary.” *See, Matter of Lichtenstein v. Board of Trustees of Police Pension Fund*, 57 N.Y.2d 1010, 1012 (1982) (“According to this definition, an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury within the meaning [of the Administrative Code]”); *see also, Matter of Picciurro v. Board of Trustees of New York City Police Pension Fund*, 2007 WL 4388840, at * 3.

Significantly, it “is the precipitating cause of the injury, rather than the job assignment at the time, that determines entitlement to accidental disability benefits.” *Matter of Hallihan*

v. Ward, 169 A.D.2d 542 (1st Dept. 1991); *Matter of McCambridge v. McGuire*, 62 N.Y.2d 563, 568 (1984).

For example, in *Matter of Whitton v. Spinnato*, 143 A.D.2d 274 (2d Dept. 1988), a police officer suffered from a mental disability after responding to a motorcycle accident and observing its horrible consequences as he attempted to aid its victims. *Id.* The Appellate Division, Second Department concluded that he did not meet his burden of establishing “accidental injury” because “it cannot be considered an ‘unexpected’ occurrence that [the officer] should have been called upon to respond to an auto accident where he observed the human suffering which occurred in the aftermath of the accident.” *Matter of Whitton v. Spinnato*, 143 A.D.2d, at 275; *contrast, Matter of McCambridge v. McGuire*, 62 N.Y.2d 563 (1984) (detective who lost his balance and fell and patrolmen who slipped on wet pavement were accidentally injured) .

Here, there is no denying that Officer Doran’s responsibilities on September 16, 2001 called upon him to witness horrible devastation. What he was exposed to at the site, however, was not “unexpected.” As a trained police officer, he was assigned the difficult task of sorting through the rubble, which everyone knew included body parts and keepsakes. Officer Doran’s very duty that day was to work at an atrocious, horrifying crime scene of an incredible magnitude. A “sudden * * * mischance” did not precipitate his injury. A difficult job assignment did.

Judicial reversal of an administrative order pursuant to CPLR Article 78 is limited to instances where the agency acted arbitrary or capriciously. *Matter of Pell v. Board of Educ.*, 34 N.Y.2d. 222, 231-232 (1974); *see also, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d 361, 363 (1999). So long as there is a rational basis supporting an administrative order, judicial review is narrowly circumscribed and the agency's decision must be upheld. *See, Matter of Pell v. Board of Educ.*, 34 N.Y.2d, at 231; *Matter of Guzman v. Safir*, 293 A.D.2d 281 (1st Dept. 2002), *lv. denied* 98 N.Y.2d 614 (Oct. 15, 2002).


There is no basis for holding that Respondents' conclusion that Officer Doran's injury was job-related but not the result of an "accident," which was arrived at after repeated consideration of the issue, is irrational, arbitrary or capricious. After all, not "every line-of-duty injury will support an award of accidental disability retirement." *Matter of Lichtenstein v. Board of Trustees of Police Pension Fund*, 57 N.Y.2d, at 1011-1012.

Accordingly, it is ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the Decision and Judgment of the Court.

Dated: New York, New York
January 14, 2008

UNFILED JUDGMENT
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 obtain entry of this document on the docket, you must
 appear in person at the County Clerk's Office, 140 West
 14th Street, New York, NY 10011, on or before
 1/14/08.


 Hon. Eileen D'Ansten