

Matter of Wagner v Kelly

2009 NY Slip Op 31290(U)

June 8, 2009

Supreme Court, New York County

Docket Number: 114923/08

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER

PART 19

Index Number : 114923/2008
WAGNER, DAVID
 VS.
KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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 this motion

motion is decided in accordance

with accompanying memorandum decision

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).

Dated: JUN 08 2009



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
 COUNTY OF NEW YORK : IAS PART 19

In the Matter of the Application of
 DAVID WAGNER,

Petitioner,

Index No.
 114923/08

For a Judgment pursuant to 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.

EDWARD H. LEHNER, J.:

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 141B).

Before the court is a motion by petitioner to set aside a determination by the
 Board of Trustees of the Police Pension Fund (the "Board") that denied his
 application for an accidental disability retirement pension ("ADR") and awarded
 him an ordinary disability retirement pension ("ODR").

Petitioner contends: that he was a police officer appointed in 1993 (petition
 ¶ 4); that he was assisting in work at the World Trade Center on and after

September 11, 2001; (Id. ¶ 6); that he was diagnosed with post-traumatic stress disorder ("PTSD")(Id. ¶ 6); that in October 2004, he was sent to the Medical Board of the Police Pension Fund, Article II ("Medical Board") to determine his capability to perform full police duties (Id. ¶ 7); that on November 5, 2004, the Medical Board rejected petitioner's ADR request but approved ODR, finding that he had "the symptoms of a major depressive disorder but also signs of a borderline personality disorder" (Medical Board Report dated November 5, 2004, ¶ 5); that on November 9, 2007 petitioner presented a letter from his doctor contending that petitioner's PTSD was a result of his work at the Ground Zero site (petition ¶ 9); that the Medical Board found that he was not able to perform the full functions of a police officer, that he had shown poor judgment and an inability to control his emotions, that the connection to September 11 was refuted by his ability to function on full duty for two years after September 11, 2001 and by a history of prior problems in 1993 before he became a police officer (Medical Board Report

dated November 16, 2007, ¶ 5); that the Medical Board reaffirmed its prior determination approving ODR and rejecting ADR (petition ¶ 10); that on July 8, 2008 the Board approved the Medical Board's recommendation (Id. ¶ 11, Exhibit 9); and that the Board's determination failed to properly evaluate the disability presumption under New York City Administrative Code § 13-252.1, was arbitrary and capricious and should therefore be set aside.

Respondent asserts: that petitioner has a history of psychological problems included threatening suicide (Answer ¶¶ 18, 28); threatening behavior (Id. ¶¶ 20-22, 29); depression as a result of deaths in his family (Id. ¶ 37) and his divorce (Id. ¶ 36); that he first mentioned alleged repercussions from his presence at Ground Zero in 2004 (Christina Conlan report at ¶ 6, Exhibit 4); that petitioner exhibited "a pattern of poor judgment and emotional dyscontrol under stress" (Id. at ¶ 9) and the examining physician recommended that he should not return to full duty; that after remand the Medical Board found that due to his poor judgment (including

refusal of treatment) and inability to control his emotions he was incapable of performing his full duties as a police officer (Medical Board report dated November 16, 2007 at ¶¶ 5, 6); that there is credible evidence supporting the Medical Board; and that therefore the petition should be dismissed.

"Following a medical examination, ... the ... Medical Board ... determines whether the member is disabled for performance of duty and ought to be retired If the Medical Board concludes that the member is disabled, it must further determine whether the disability is 'a natural and proximate result of an accidental injury received in ... city-service' and certify its recommendation on this issue to the Board of Trustees ... (and) the reviewing court may only disturb the final award by finding causation established as a matter of law, (and) as long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand" [Matter of Meyer v. Board of Trustees of the New York City Fire Department, 90 NY2d 139, 144-145 (1997)]. Moreover, substantial

evidence, "in disability cases ... has been construed to require 'some credible evidence' ... (and where the medical evidence) was subject to conflicting interpretation ... (t)he Board alone had the authority to resolve such conflicts" [Matter of Borenstein v. New York City Employees' Retirement System, 88 NY2d 756, 760-761 (1996)]. See also, Picciurro v. Board of Trustees of the New York City Police Pension Fund, 46 AD3d 346 (1st Dept. 2007); Gullo v. Kelly, 50 AD3d 449 (1st Dept. 2008); McMurrough v. Board of Trustees of the New York City Fire Department, Article 1-B Pension Fund, 227 AD2d 626 (2nd Dept. 1997).

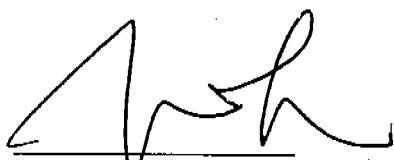
Administrative Code § 13-252.1 provides that "any condition or impairment of health caused by a qualifying condition ... resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident ... unless the contrary be proved by competent evidence."

The Medical Board found petitioner's psychological condition was not the result of an accident and was not caused or exacerbated by potentially toxic exposure and this "(c)redible evidence rebuts the World Trade Center presumption ... assuming it applies" [Matter of Mulet v. Kelly, 49 AD3d 336 (1st Dept. 2008)].

See also, Lahm v. Bloomberg, 29 AD3d 461(1st Dept. 2006).

Since "the Medical Board's determination was based upon 'some credible evidence' (it) was not arbitrary and capricious" [Matter of Borenstein v. New York City Employees' Retirement System, supra at p. 761], the court must and does hereby dismiss the petition. This decision constitutes the judgment of the court.

Dated: June 8, 2009



J.S.C.

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