

Matter of Velez v Kelly
2009 NY Slip Op 32454(U)
October 19, 2009
Supreme Court, New York County
Docket Number: 101597/2009
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 101597/2009

VELEZ, FRANCISCO

vs

KELLY, RAYMOND

Sequence Number : 002

VACATE

INDEX NO. 101597/2009
MOTION DATE 7/1/09
MOTION SEQ. NO. 002
MOTION CAL. NO. 10

... is motion to/for

Art 78

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PEITION IS DECIDED IN ACCORDANCE WITH THE JUDICIAL DECISION, OPINION AND JUDGMENT.

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: 10/19/09

[Signature]

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):

capricious, unreasonable and unlawful, and for an order directing respondents to allow petitioner to present such testimony as necessary in order to establish his entitlement to ADR; and for certain discovery. Respondents oppose. For the reasons which follow, the petition is denied in its entirety.

Factual Allegations

According to the verified petition, petitioner was appointed to the New York City Police Department on June 16, 1969, and served continuously as a member of the force until his retirement (Ver. Pet. ¶ 4). It alleges that petitioner was a first responder to the World Trade Center disaster on September 11, 2001, and participated in the rescue, recovery, and clean-up operations for multiple days where he was exposed to and inhaled toxins and contaminated debris (Ver. Pet. ¶ 6). He has been diagnosed with throat cancer (Ver. Pet. ¶ 6).

On April 5, 2007, he completed the Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations, indicating that of the four locations, he had worked at the World Trade Center site from September 15, 2001 to December 15, 2001, approximately 15 hours a day, and that his duties were "supervision of police personnel" (Ver. Ans. Ex. 1). On May 11, 2007, he submitted an application for Accident Disability Retirement (ADR) under the World Trade Center presumption ("WTC Disability Law," NYC Admin. Code § 13-252.1), stating that while assigned to the site, he was exposed to and inhaled numerous toxins and contaminants (Ver. Ans. Ex. 2). On August 22, 2007, the Medical Board Police Pension Fund, Article II, after an interview and examination, granted his application for ADR under the World Trade Center Disability presumption (Ver. Pet. ¶ 8; Ex. A).

The Board of Trustees of the Police Pension Fund then began its review of the case. It "tabled" the matter in March 12, 2008, April 9, 2008, July 9, 2008, and August 13, 2008, each time

in order to obtain verification that petitioner was at the site for the minimum 40 hours required for the statutory presumption to apply (Ver. Ans. Ex. 20, Police Pension Fund Executive Session, 3/12/2008, pp. 21-22; Ex. 21, Police Pension Fund Executive Session, April 9, 2008, p. 25; Ex 22, Police Pension Fund Executive Session, 7/9/2008, p. 13; Ex. 23, Police Pension Fund Executive Session, 8/13/2008, p. 23). On September 10, 2008, the Board again reviewed the application (Ver. Pet. Ex. C). The acting chair of the Board of Trustees noted that the case needed to be tabled because there was still no verification of the 40 hours, and that newly found records were being reviewed (Ver. Pet. Ex. C, Police Pension Fund Executive Session, 9/10/2008, p.26).

According to petitioner's attorney, although not apparent from the transcript, the Board also reviewed counsel's August 28, 2008 letter in which he argued that the statement by petitioner's commanding officer swearing to his presence at Ground Zero was sufficient in itself to meet the statutory language in § 13-252.1. Counsel also argued that while petitioner's time records had not been located, his Pension Fund overtime records sufficiently established the tours of duty he worked subsequent to September 11, 2001 (Ver. Pet. Ex. C [Goldberg letter to Sullivan, 8/28/08]).

The Board of Trustees again reviewed petitioner's case on November 12, 2008 (Ver. Pet. Ex. D). On that date, one of the trustees noted that the matter had been tabled eight times to verify his qualification for the WTC Disability, and asked for a vote, based on the request of petitioner's attorney. A sergeant from the Police Pension Fund summarized what efforts had been made. Petitioner claimed to have worked at the site about 15 hours a day from September 16, 2001 to December 15, 2001 (Ver. Pet. Ex. D, Police Pension Fund Executive Session, 11/12/2008, p. 49). The roll calls, command logs, command field posts, and "detailed rosters" for Ground Zero were examined but "[w]e came up with zero hours of the 40 that we could verify that he was definitely at

any defined sites.” (Ver. Pet. Ex. D, Police Pension Fund Executive Session, 11/12/08, p. 49). The Board discussed the affidavit of petitioner’s commanding officer that swore the petitioner worked “over 40 hours at Ground Zero between September 11, 2001, and September 12, 2002,” and was “personally observed” by the commanding officer “during at least 6 12-hour tours, for a total of 72 hours at Ground Zero.” One of the trustees argued that “to the extent we weren’t able to maintain those [time] records,” the statement of the commanding officer “would be sufficient for this board.” (Ver. Pet. Ex. D, Police Pension Fund Executive Session, 11/12/08, p. 50). The sergeant representing the Pension Fund noted however, that although petitioner claimed to have worked at the site up to December 15, 2001, the documentation that has been found shows that from November 2, 2001 to December 15, 2001, he was present at his command at the 62nd Precinct, either as the desk officer or platoon commander on those tours (Ver. Pet. Ex. D, Police Pension Fund Executive Session, 11/12/08, pp. 49, 50).

One of the trustees concluded that there still was insufficient evidence to verify petitioner’s presence at the site, and that the application would be denied, based on a “6/6” vote (Ver. Pet. Ex. D, Police Pension Fund Executive Session, 11/12/08, p. 50). The Board then considered the November 7, 2008 letter from petitioner’s attorney reiterating his arguments as well as noting that in the Fire Department 1B Pension Fund, an affidavit by a superior officer is all that is required to verify the 40-hour requirement (Ver. Pet. Ex. D, Goldberg letter to Sullivan, 11/7/08).

Petitioner argues that the Board failed to use the proper legal test to determine entitlement to an ADR WTC Disability Pension; that its determination was contrary to the evidence; and that the Board failed to provide petitioner with a fair and reasonable opportunity to establish his entitlement. For these reasons, he argues that his petition should be granted on the ground that the denial of an

ADR pension is arbitrary and capricious, and unreasonable and unlawful.

Respondents oppose the petition and seek its dismissal. They argue that they acted reasonably and lawfully when they denied petitioner's application for an ADR pension, and that there is credible evidence to support the finding that while petitioner was disabled, he had not established that he worked the requisite hours at the disaster site to invoke the statutory presumption.

Analysis

Under the New York City Administrative Code, a member of the police department who is found disabled by the Medical Board can seek ADR benefits if he or she participated in the rescue, recovery, or clean-up operations at one of the World Trade Center site for a minimum of 40 hours, between September 11, 2001 and September 12, 2002. (NYC Admin Code § 13-252.1 [1] [a]). There is a presumption that the disabling condition was incurred in the performance of the police officer's official duties while working at the site, and was the result of an accident not caused by the member's own willful negligence (NYC Admin. Code § 13-252.1).²

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of N.Y.*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a

²If an active member who worked at one of the sites retires on either a service retirement or on an ordinary disability retirement ("ODR") pension, and afterwards develops a qualifying condition as set forth in this section of the Code, the member may file for reclassification (NYC Admin. Code § 13-252.1 [2] [a]).

decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232). The court is to dispose of an Article 78 proceeding in the same manner as it would a motion for summary judgment (CPLR 409[b]).

Here, the Medical Board found petitioner to be disabled and qualified under the WTC Disability Law for an ADR pension. The vote of the Board of Trustees, however, taken after many adjournments to permit petitioner to gather more evidence in support of his claim, was a tie vote, 6-6. A tie signifies that there was no factual determination by the Board, and it has been held that in this situation, the denial of ADR benefits can be set aside by the court only if it finds that the petitioner is entitled to greater benefits as a matter of law (*Meyer v Board of Trustees of the N.Y.C. Fire Dept.*, 90 NY2d 139, 145 [1997]). If there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand, given that the court may only disturb the final award by finding causation established as a matter of law (*Meyer*, at 145).

Here, there is sufficient credible evidence that petitioner’s medical condition, although disabling, does not comply with the WTC Disability Law requirements that he have worked 40 hours at the WTC site. Petitioner relies on *Matter of McAdams v Kelly*, 2007 NY Slip Op 51398 (U), (Sup. Ct. NY Co. 2007) (Feinman, J.), but the facts of that case are notably different from the one at bar. In *McAdams*, the issue was not so much a dispute of whether the petitioner had met the minimum number of hours at the site, but rather about the nature of the duties performed. Upon remand, this court directed that the Board “make specific findings regarding the work McAdams

performed while on standby ... and whether that work qualified as rescue, recovery, and/or cleanup.”

In this instant case, the basic dispute is about the number of hours worked and whether there was competent proof that Velcz worked 40 hours at the WTC site. To the extent that his claim was belied by documents placing him at the 61st Precinct at times he claimed to be at the site, this is a classic weighing of competing evidence. The court’s role in this Article 78 proceeding is not to re-evaluate the evidence, but only to ensure that the action taken is supported by a rational view of the record, even if it is not the only rational view of the record.

None of the documents recovered from the Police Department records show petitioner’s presence at the site during the applicable year. Certain of the documents apparently show, contrary to his statement in his April 5, 2007 Notice, that he was *not* working at the site from November 2 to December 15, 2001. Other time records remain missing, although according to petitioner’s attorney, the Pension Fund has overtime records showing the tours he worked subsequent to September 11, 2001 (Ver. Pet. Ex. D, Goldberg Letter to Sullivan, 11/7/2008, p. 2). However, these records have not been supplied to show that plaintiff was in fact working at the site for a total of 40 plus hours, and it must be concluded that they, like the other documents found by respondents, do not show that he worked at the site.

Petitioner argues that because respondents cannot show he did not work at the site for the required number of hours, it was arbitrary and capricious and contrary to law to fail to find that he worked at the site and qualified for the ADR benefit. However, this approach shifts the burden of proof to respondent, when, in fact it was petitioner’s burden in the first instance to establish by credible evidence that he qualified. The respondents were not required to accept as true petitioner’s bare bones statement that worked for three months at the site given that documentary evidence

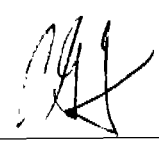
established the lack of accuracy of that statement. Nor were they required to act solely on the say so of his commanding officer, and affidavits of two other members of his precinct, which only state in general terms that each of them observed petitioner between September 11, 2001 and September 12, 2002, at the site at different times totaling more than 40 hours. It is also true that none of the affidavits declared explicitly that petitioner was engaged in actual rescue, recovery, or clean-up, or provided either approximate or exact times or days when he was seen at the site working. While there is some evidence in the record to support petitioner's claim, the assessment of the competing evidence is not for this court. Once the court determines that respondents' determination that petitioner failed to establish his entitlement to the presumption under the WTC Disability Law has some support in the record, the Board's determination should be upheld.

Petitioner's argument that the Board failed to provide him with a fair and reasonable opportunity to establish his entitlement lacks merit (*see Matter of Meschino v Lowery*, 31 NY2d 772 [1972]). It is therefore

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER



Dated: October 19, 2009
New York, New York

J.S.C.

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).