

Matter of Melendez v Kelly

2009 NY Slip Op 32876(U)

December 4, 2009

Supreme Court, New York County

Docket Number: 108266/09

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Juan B. Lda's listing

PART 6

Index Number : 108266/2009
MELENDEZ, JAMES
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 9/17/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Petition
Answering Affidavits — Exhibits Answer
Replying Affidavits _____

PAPERS NUMBERED
1-11
12-38

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion petition decided
in accordance with accompanying
decision, order, 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: 12/4/09 JBL J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of
JAMES MELENDEZ,

Petitioner,

Index No. 108266/09

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

**Decision, Order,
and Judgment**

-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 I
NEW YORK CITY POLICE DEPARTMENT and
THE CITY OF NEW YORK

Respondents.

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).

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner, James Melendez, brings this proceeding under Article 78 of the C.P.L.R. to annul the decision of respondent The Board of Trustees of the Police Pension Fund (the "PPF"), which denied him a line of duty Accident Disability Retirement allowance ("ADR"). The other respondents are Raymond Kelly, as the police commissioner and as chairman of the PPF; the New York City Police Department (the "NYPD"), and the City of New York (the "City"). For the reasons stated below, the petition is granted to the extent of annulling the PPF's determination to deny petitioner's application for ADR, and remanding the matter to respondents for further consideration.

On June 30, 1992, petitioner was appointed to the NYPD's uniformed force; he served continuously as a member of the NYPD until his retirement in 2006. On July 31, 2006, the

PPF approved petitioner's application for Ordinary Disability Retirement ("ODR"), but denied his application for ADR, which is given to a member of the police force whose disability stems from a line of duty injury. Petitioner asserts that he is entitled to an ADR pension as a result of his Post Traumatic Stress Disorder ("PTSD"), which he claims arises out of his work at the World Trade Center ("WTC") on September 11, 2001, and several days thereafter. Petitioner relies on Section 13-252.1 of the Administrative Code of the City of New York, entitled "Accidental disability retirement; World Trade Center presumption", which says, in pertinent part,

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.

Section 13-252.1(1)(a). While respondents do not dispute the fact that petitioner is qualified to be considered under this provision, they assert that the PPF's determination that petitioner's psychological disability was not caused or aggravated by his work during the rescue, recovery, or clean-up operations at the WTC is not arbitrary or capricious or an abuse of discretion. Respondents argue that the Medical Board, which repeatedly reviewed petitioner's medical history, had competent evidence to rebut the above presumption.

Petitioner acknowledges a history of psychological ailments and treatments. He was sexually assaulted at the ages of five and eighteen. At the age of ten, he was hospitalized for four months with juvenile rheumatoid arthritis. At fourteen, he saw a psychiatrist once and his mother reports that he was diagnosed with Bipolar Disorder. He was prescribed Buspar, which he stopped

using after one dose due to adverse side effects. At seventeen, he contracted a deadly parasitic infection while visiting Mexico. He reports that he was emotionally abused by his father and physically abused by his alcoholic stepfather during childhood. For a period in 1999-2000, petitioner was depressed about marital problems and attended counseling for six months.

On September 11, 2001, petitioner was a first responder to the WTC and thereafter performed rescue, recovery and clean-up operations. However, he was not disabled at that time, refused counseling, and continued to work full duty until September 2005. Petitioner told his doctors that since 9/11, he has suffered from flashbacks, nightmares, hyper-vigilance, exaggerated startled responses, impaired concentration, and memory loss from trauma. His symptoms of depression greatly increased when he and his wife separated and he encountered financial difficulties. During the period following the separation, petitioner abused alcohol, had suicidal thoughts, and attempted to commit suicide using his service revolver, but the gun misfired. Additionally, he experienced increased insomnia, depressed mood, decreased appetite, a 45-pound weight loss, and lapses in concentration. Petitioner was hospitalized from September 10, 2005 to September 16, 2005, and treated for depression. Petitioner had experienced manic episodes only twice, once in July 2005 and the other on November 2, 2005, during which he had an elevated mood, racing thoughts, hyper-energy, feelings of invincibility, impulsive spending sprees, significantly less sleep, and feelings of sharper senses of memory. In 2006, during group therapy at an outpatient facility, petitioner began to recall more precise memories from the WTC tragedy. After recalling such memories, his anxiety spiked. Petitioner was later hospitalized at the New York State Psychiatric Institute ("NYSPI") from November 16, 2005 to January 9, 2006, and was diagnosed with Major Depressive Disorder ("MDD") and PTSD.

After being released from NYSPI, petitioner was assessed by NYPD physicians and psychiatrists. On February 17, 2006, petitioner was evaluated by Catherine M. Lamstein, Psy.D., of the Psychological Evaluation Section of the NYPD ("PES"), and found to have recurrent and severe MDD, with mood congruent psychotic features that had since resolved; chronic PTSD, with numerous life incidents; and, alcohol abuse. After an interview that same day, the Supervising Chief Surgeon of the NYPD gave petitioner the same diagnosis. On March 2, 2006, petitioner filed an ADR application, alleging that he was disabled from performing police duties due to psychological troubles he developed as a result of his work at the WTC sites. On March 8, 2006, petitioner filed a "Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations" form, which certified that he worked at least forty (40) hours at WTC sites. On May 17, 2006, the Police Commissioner directed the Medical Board to examine petitioner's medical records to determine whether he should retire with ODR or ADR. On July 31, 2006, the Medical Board interviewed and examined petitioner and approved him for ODR, but not ADR, with a diagnosis of Bipolar Disorder. On November 13, 2006, this determination was reviewed by the PPF and remanded to the Medical Board along with additional evidence submitted by petitioner. On March 5, 2007, the Medical Board again interviewed and examined petitioner, but still recommended only ODR. Additional interviews took place on August 4, 2008, with the same determination. On December 30, 2008, petitioner's attorney requested that the PPF reconsider petitioner's pending ADR application. On January 9, 2009, petitioner was diagnosed by his psychotherapist as suffering from chronic PTSD with delayed onset, and recurrent and severe MDD without psychotic symptoms, all of which have been exacerbated by present life issues. On February 11, 2009, the PPF denied petitioner's application for ADR, again concluding that he suffered from Bipolar Disorder.

Petitioner contends that he did, in fact, suffer a line of duty injury and therefore is eligible for ADR. ADR would entitle petitioner to a higher rate of disability pay. He does not deny a history of mental illness, but asserts that his PTSD is an aggravation of a prior existing condition that had not disabled him until after his experience at the WTC. Respondents, on the other hand, believe that petitioner's disabilities are not causally related to the WTC tragedy, but rather are related to his preexisting conditions and personal life events. Respondents concluded that petitioner suffers from Bipolar Disorder and rejected his application for ADR.

ADR benefits, which are greater than ODR benefits, are available when an examination and investigation shows that the applicant is physically or mentally incapacitated for the performance of duty as a natural and proximate result of an accidental injury received in the line of duty, and that such disability was not the result of willful negligence on the part of the applicant. See Administrative Code of City of NY § 13-252. An applicant for ADR benefits has the burden of proving the existence of the disability and that the disability is causally related to an injury sustained in the line of duty. See In re Drayson v. Bd. of Trs., 37 A.D.2d 378 (1st Dep't 1971). An "accident which precipitates the development of a latent condition or aggravates preexisting condition is a cause of disability within the meaning of [the] Administrative Code" In re Petrella v. Bd. of Trs., 141 A.D.2d 361, 363 (1st Dep't 1988), citing In re Tobin v. Steisel, 64 N.Y.2d 254, 257 and cases at 259 (1985). If the applicant worked at a WTC site following 9/11, the Administrative Code provides for a presumption in favor of accidental line of duty causation, as long as the disability or "impairment of health" is a result of "performance or discharge of duty" related to participation in the WTC operations. Flynn v. Kelly, 17 Misc. 3d 1125(A) (Table) (Sup. Ct. N.Y. Co. Oct. 19, 2007); see Administrative Code § 13-252.1. "[T]he Court of Appeals has held that . . .

in order to rebut the [WTC] presumption, there must be some credible medical evidence in the record on which to base the determination that the (presumed) accidental injury did not cause the disability.” In re Jefferson v. Kelly, 14 Misc. 3d 191, 196-97 (Sup. Ct. N.Y. Co. 2006). Thus, respondents have the burden of proffering competent medical evidence to rebut the WTC presumption. In re Mulet v. Kelly, 2006 N.Y. Slip Op. 30186(U) (Trial Order) (Sup. Ct. N.Y. Co. Oct. 16 2006) (DeGrasse, J.), aff’d., 49 AD3d 336 (1st Dep’t 2008). Courts have annulled said determinations and remanded for further review when medical issues presented by the petitioner are not adequately addressed or when medical evidence is insufficient to sustain the determination. See, e.g., In re Rodriguez v. Bd. of Trs., 3 A.D.3d 501 (2d Dep’t 2004). “In an article 78 proceeding . . . the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious.” In re Borenstein v. N.Y.C. Emples. Ret. Sys., 88 N.Y.2d 756, 760 (1996) (citations omitted). The courts must not review the facts regarding the weight of the evidence, unless there is a “substantial evidence” question. Pell v. Bd. of Ed., 34 N.Y.2d 222, 230 (1974).

In making its final determination, the Medical Board must rely on evidence that supports a rational fact-based medical explanation. See In re Imperati v. Kelly, 2007 N.Y. Slip Op. 34175(U) (Trial Order) (Sup. Ct. N.Y. Co. December 17, 2008) (Figueroa, J.). “Ordinarily, the decision of the board of trustees as to the cause of an officer’s disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious.” In re Canfora v. Bd. of Trs., 60 N.Y.2d 347, 351 (1983) (citations omitted). So, to challenge a disability determination in an Article 78 proceeding, petitioners need to demonstrate that the decision of the Medical Board lacks a rational basis, is arbitrary or capricious. Borenstein, 88 N.Y.2d at 760 (citations omitted). In the context of disability cases, the

Medical Board's determination must be based on "some credible evidence" in order for its determination to stand undisturbed. *Id.* See also In re Rubiano v. N.Y.C. Emples. Ret. Sys., 268 A.D.2d 261 (1st Dep't 2000). Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered." In re Meyer v. Bd. of Trs., 90 N.Y.2d 139, 147, rearg. denied, 90 N.Y.2d 936 (1997). Such credible evidence or competent evidence has been held to be sufficient to overcome the legal presumption in the law. In Matter of Goldman v. McGuire, 64 N.Y.2d 1041 (1985), the Court applied the standard to a similar presumption in General Municipal Law § 207-K, commonly known as the "Heart Bill". By analogy, the same standard of review applies here. Moreover, in determining the application, the Medical Board must examine all of the relevant facts. Brady v. City of New York, 22 N.Y.2d 601 (1968). This is no less true if the condition disabling the applicant is latent or an aggravation of a pre-existing disorder. In re Tobia v. Stewel, 64 N.Y.2d 254 (1985); In re Petrella v. Bd. of Trs., 141 A.D.2d 361 (1st Dep't 1988).

The fundamental flaw in the Medical Board's findings is the final determination that petitioner suffers from Bipolar Disorder. There is scant support for this diagnosis. The earliest evaluation of Mr. Melendez was performed after 9/11 and was done at Columbia Presbyterian Medical Center ("CPMC"). As part of the history from CPMC, in a record from September 10, 2005 (the earliest medical documentation included in the motion), it is noted that Mr. Melendez remembered taking Buspar for one day at age 14 for unclear reasons. His diagnosis upon admission to CPMC was "PTSD, MDD, without psychotic features, r/o initial depressive episode in bipolar illness." In a later evaluation dated October 5, 2005, petitioner reports a history of depression. His discharge diagnosis was MDD, single, without psychotic features, PTSD. The November 16, 2005

inpatient screening note from NYSPI states that petitioner's mother was the informant about his diagnosis of Bipolar Disorder when he was 14. His discharge diagnosis summary from NYSPI was recurrent MDD in partial remission, and PTSD. The police department's own evaluations are not to the contrary. There is only one reference to Bipolar Disorder in the police department's evaluations, and that is in Dr. Lamstein's February 17, 2006 notes regarding Mr. Melendez's description of his history, wherein she wrote: "[a]t age 14 he saw a psychiatrist once, was diagnosed with bipolar disorder and prescribed Buspar, but only took it once due to adverse side effects". But, her diagnostic impression was MDD, PTSD, and alcohol abuse. There is no diagnostic impression of Bipolar Disorder. None of the additional sources, police or otherwise, make such a diagnosis, except for the Medical Board. There is no competent evidence that Mr. Melendez has Bipolar Disorder. At best, there is the undocumented diagnosis of petitioner at age 14 and no mention of manic behavior supported by a medical opinion relating the behavior to Bipolar Disorder. Yet, the Medical Board has repeatedly cited this condition, for which there is no competent evidence in the record, as their final diagnosis. The unfounded assertion by the Medical Board does not overcome the WTC presumption. Therefore, the Medical Board's determination must be annulled and the matter must be remanded to the respondents for further consideration.

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

Dated: December 4, 2009



JOAN B. LOBIS, 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).