

**Matter of McAuley v Kelly**

2009 NY Slip Op 32948(U)

December 14, 2009

Supreme Court, New York County

Docket Number: 109386/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PART \_\_\_\_\_

Index Number : 109386/2009

MCAULEY, SOLVIEG

vs.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO.

109386-09

MOTION DATE

MOTION SEQ. NO.

#007

MOTION CAL. NO.

were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

5, 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**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).

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: \_\_\_\_\_

12/14/09



HON. EILEEN A. RAKOWER <sup>L.S.C.</sup>

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  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of  
SOLVIEG McAULEY,

Index No.  
109386/09

Petitioner,

DECISION  
and ORDER

-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,

Mot. Seq.  
001

Respondents.

-----X  
HON. EILEEN A. RAKOWER:

Petitioner Solvig McAuley ("Petitioner"), a retired New York Police Department ("NYPD") officer, brings the instant Article 78 Petition seeking to annul the decision of Respondent Board of Trustees of the Police Pension Fund ("Board of Trustees") to deny Petitioner accidental disability retirement ("ADR"), and to instead award her ordinary disability retirement ("ODR") upon her separation from service with the NYPD.

Petitioner was appointed to the NYPD on August 30, 1993 and, pursuant to New York City Administrative Code ("NYC Admin. Code") §13-214, became a member of the New York City Police Pension Fund. Petitioner contends that she was rendered disabled from discharging the duties of an NYPD officer as a result of lung cancer, obstructive lung disease and GERD, which she claims resulted from her work at the World Trade Center site ("WTC site") following the 9/11 attacks. Petitioner states that she was a first responder to the WTC site on 9/11, and was assigned to rescue, recovery and clean-up operations for several days after the attacks.

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On February 11, 2002, Petitioner reported difficulty breathing, tightness in her chest, cough and congestion. The NYPD approved Line of Duty ("LOD") injury status as a result of Petitioner's service at the WTC site. She was hospitalized the same day; testing subsequently revealed a 3.5 centimeter mass in the basal segment of her right lung, obstructing the right lower lobe bronchi. She underwent a thoractomy to remove the carcinoid tumor from her lung.

On May 7, 2004, the Medical Board examined Petitioner to determine if she was eligible for ODR. This was prompted by the NYPD's Supervising Chief Surgeon, who sent a memorandum to the Police Commissioner recommending that Petitioner be examined due to her carcinoid tumor and subsequent surgery. After reviewing Petitioner's February-March 2002 hospitalization records, and reports pertaining to subsequent CT scans and an echocardiogram; and conducting an interview and physical examination of Petitioner, the Medical Board determined that there was no longer evidence of any metastatic tumor in Petitioner's lung. Based upon this finding, the Medical Board found that Petitioner was not disabled from performing the duties of an NYPD officer.

On January 6, 2005, Petitioner submitted an application for ADR ("1/05 application"). In response, the Police Commissioner filed an application for ODR on Petitioner's behalf on February 10, 2005. Petitioner's ADR application claimed that her service at the WTC site on 9/11 and the following days caused her to suffer from pulmonary problems such as wheezing, shortness of breath, fatigue, cough, and tightness in the chest, which she alleged disabled her from performing the duties of an NYPD officer.

The Medical Board reviewed Petitioner's 1/05 application on March 11, 2005. The Medical Board reviewed the following: notes from Petitioner's attending pulmonologist; notes from Petitioner's primary care physician; the report of pulmonary function tests ("PFT") performed in August 2003, June 2004 and February 2005. After reviewing these records, and conducting another interview and physical examination of Petitioner, the Medical Board determined that the objective evidence was insufficient to substantiate a diagnosis of Reactive Airway Disease ("RADS"). This was based in part upon the Medical Board's assessment of the PFT reports. Accordingly, the Medical Board recommended that the Board of Trustees disapprove both Petitioner's ADR application, and the Police Commissioner's application for ODR.

On August 10, 2005, the Board of Trustees remanded the matter to the Medical Board for reconsideration based upon new evidence that was to be submitted.

The Medical Board reviewed Petitioner's case again on October 7, 2005. The Medical Board reviewed a letter from the World Trade Center Medical Monitoring Program Clinical Center at Mount Sinai, dated February 22, 2005; as well as the February 3, 2005 report, which was reviewed previously. Based on its review of the new evidence, the Medical Board determined that there was sufficient evidence to demonstrate that Petitioner was disabled from performing the duties of an NYPD officer. However, the Medical Board determined that Petitioner was disabled due to a restriction of her lung capacity from her February 2002 surgery, and recommended that the Board of Trustees grant ODR but deny ADR.

On February 8, 2006, the Board of Trustees once again remanded Petitioner's case to the Medical Board for reconsideration in light of new medical evidence to be submitted by Petitioner.

The Medical Board reviewed Petitioner's case again on September 22, 2006. After reviewing Petitioner's Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations; Petitioner's history of medical treatment; and conducting another interview and physical examination, the Medical Board reaffirmed its prior recommendation.

On March 9, 2007, Petitioner's attorneys provided the Board of Trustees with a memorandum of law setting forth the factual and legal bases for their contention that Petitioner was entitled to ADR.

On March 14, 2007, the Board of Trustees remanded Petitioner's case to the Medical Board once again based upon the introduction of new evidence.

The Medical Board reviewed Petitioner's case again on October 19, 2007. The Medical Board reviewed a report from a home care provider regarding medical equipment being utilized by Petitioner; a report from a January 22, 2007 PFT; and prior medical documentation; and conducted another interview and physical examination of Petitioner. The Medical Board reaffirmed its prior recommendation.

On May 14, 2008, the case was again remanded by the Board of Trustees in light of new evidence, and to specifically address whether Petitioner's cancer and subsequent surgery were caused by her service at the WTC site.

Petitioner's case was reviewed by the Medical Board for the sixth and final time on December 12, 2008. In addressing whether Petitioner's pulmonary disability was connected to her service at the WTC site, the Medical Board noted that the tumor in Petitioner's lung was 3.5 centimeters when it was discovered in February of 2002. In the opinion of the Medical Board, based on the size of the tumor and its grade of malignancy, the tumor was not related to her service at the WTC, as it would take far longer than five months for such a tumor to develop. Accordingly, the Medical Board reaffirmed its prior recommendation that the Board of Trustees grant Petitioner ODR but deny her ADR.

On March 11, 2009, the Board of Trustees adopted the Medical Board's recommendation and denied Petitioner's application for ADR by a 6-6 vote. Petitioner then commenced this Article 78 proceeding.

In the instant petition, it is undisputed by the parties that Petitioner (1) is disabled; and (2) that Petitioner served at the WTC site in such a capacity as to entitle her to the benefit of NYC Admin. Code §13-252.1, which provides that any individual who participated in rescue and/or recovery operations at the World Trade Center on September 11, 2001 is entitled to a presumption that his or her disability was incurred in the course of such operations ("WTC presumption"). Accordingly, the only issue before the court is whether the Board of Trustees had a rational basis to conclude that Petitioner's service at the WTC site neither caused nor exacerbated her condition.

The First Department has held that the WTC presumption is rebutted where there is "credible evidence" in the record to support the Medical Board's determination that a retiree's disability was not the natural and proximate result of his or her service at the WTC site (*Jefferson v. Kelly*, 51 A.D.3d 536, 537 [1st Dept. 2008]) (citations omitted). Moreover, where a conflict of medical opinion exists, the Board of Trustees is entitled to rely upon the Medical Board's determination with respect to causation of Petitioner's injuries (*see Casiano v. Brown*, 209 A.D.2d 182, 183 [1st Dept. 1994]).

As stated by the Court of Appeals in *Canfora v. Board of Trustees*,

The denial of accidental disability benefits in consequence of the tie vote can be set aside on judicial review only if the courts conclude that the retiree is entitled to the greater benefits as a matter of law. Unless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident, the decision of the board of trustees denying accidental disability benefits as a consequence of a tie vote must stand.

(60 N.Y.2d 347, 352 [1983]).

Applying the foregoing principles to the case at bar, the court finds that it cannot disturb the determination of the Board of Trustees that Petitioner's respiratory disability was caused by the surgery performed to remove a tumor from Petitioner's lung; and that the tumor was not the result of Petitioner's service at the WTC site, as evidenced by its relatively advanced level of development at the time of its discovery in February 2002. This finding is supported by at least some credible evidence in the record (*see Lahm v. Bloomberg*, 29 A.D.3d 461, 462 [1st Dept. 2006]; *rev'g* 2004 N.Y. Misc. LEXIS 3145 [Sup. Ct. N.Y. Cty. 2004]).

Wherefore, it is hereby

ADJUDGED that Petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 14, 2009

  
EILEEN A. RAKOWER, J.S.C.

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