

**Matter of Rivera v Kelly**

2009 NY Slip Op 33254(U)

January 29, 2009

Supreme Court, New York County

Docket Number: 103790/08

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER PART 8  
Justice

In the Matter of the Application of ANNETTE RIVERA,

INDEX NO. 103790`08

Petitioner,

MOTION DATE

MOTION SEQ. NO. 001

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

MOTION CAL. NO.

-against-

RAYMOND KELLY, as 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.

The following papers, numbered 1 to 7, were read on this petition under Article 78 of the Civil Practice Law and Rules:

	<u>PAPERS NUMBERED</u>
Notice of Petition – Exhibits	1,2
Memorandum of Law	3
Verified Answer – Exhibits	4
Memorandum of Law	6
Verified Supplemental Petition	7
Verified Supplemental Answer	

**FILED**  
FEB 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that the petition is dismissed.**

This is a petition under Article 78 of the CPLR, seeking review of the decision by the Board of Trustees of the New York City Police Pension Fund, Article II, which denied petitioner's application for Accident Disability Retirement, pursuant to § 13-252 of the Administrative Code of the City of New York for an orthopedic condition, and granted, instead, petitioner's application for ordinary disability retirement pursuant to § 13-251 for a somatization disorder.

Background

Petitioner was appointed to the uniformed force of the NYPD on August 30, 1993. In August, 1997, she reported that she had injured her wrist and arm while firing her weapon at the firing range two and a half months previously. She filed a "Line-of-duty Injury Report," seeking to designate the incident as a line of duty injury. Her request was denied due to her delay in reporting the incident. At the time, petitioner, who is 5'2" tall, weighed 190 pounds.

The record shows that, during the following years, petitioner suffered from a variety of physical ailments. She continued to experience pain in her neck and arm and tests revealed the presence of orthopedic abnormalities including small disc bulges, radiculopathy, disc herniations, stenosis, tendinitis, ganglion cysts and carpal tunnel syndrome. In February, 2005, while performing her firearms shooting qualifications at the firing range, petitioner felt pain in her neck and hand and almost dropped her gun. She stated that she had failed to inform the range personnel that she was on limited duty status due to a previous non-LOD injury to her neck and back. In June, 2005, she underwent surgery to alleviate the numbness and weakness in her right

hand. The orthopedic evaluation stated:

Ms. Rivera has right hand numbness and pain due to multiple etiologies. She has cervical spine disc herniations at three levels. She has evidence of ulnar tunnel syndrome caused by a space occupying and expanding ganglion cyst. She also has carpal tunnel syndrome.

Beginning in 2003, petitioner was also treated for sleep disorders based upon her complaints of sleep apnea, disordered breathing and excessive daytime sleepiness. Her report, in 2003, stated that her: "medical history is significant for obesity, asthma, an orthopedic problem, occasional urinary incontinence and neuralgias."

On May 18, 2005, petitioner applied for ordinary disability retirement, listing her disabling conditions as "right hand pain and numbness, neck pain and limitation of motion and sleep apnea." Two days later, she submitted an application for accident disability retirement, listing the identical conditions, but describing them as job-related.

The following week, petitioner returned to the firing range, firing 50 rounds and failing her qualifying examination. The NYPD surgeon who examined her before and after the examination, found her medically fit to remain on full duty. The following month she underwent surgery.

Both the Medical Board and the Board of Trustees considered petitioner's application for ordinary and accident disability 4 times, for a total of 8 separate considerations. The Medical Board deferred decision on its first consideration pending further information. On the second consideration, in October, 2005, the Board found that petitioner's diagnosis was that of a somatization disorder with right upper extremity manifestations and headache. As a result, she could not perform the full duties of a police officer and the Board recommended approval of her

application for ordinary disability and disapproval of her application for accident disability.

In February, 2006, the Board of Trustees of the Pension Fund granted petitioner's application for ordinary disability and remanded her request for accident disability. The Board deferred its third consideration of petitioner's request for accident disability, in October 2006, pending further documentation.

In February, 2007, the Board considered her application for the fourth time and found no evidence of an orthopedic disability and reaffirmed its decision. The Board noted, *inter alia*, that petitioner indicated that she still drops heavy objects but receives only a massage 4 times a year as treatment and does a home exercise program. She denied any pain or other disability and stated her right hand, which had a full range of motion, continues to improve. She performed full flexion of the cervical spine and was able to fully tilt and rotate with slight pain.

The Board of Trustees considered and "tabled" petitioner's applications twice thereafter. In Nov. 2007, it reaffirmed the denial of accident disability.

#### Discussion

Judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious or lacks a rational basis (*In re Application of Chelrae Estates, Inc v State Division of Housing and Community Renewal, Office of Rent Administration*, 255 AD2d 387, 389 [1<sup>st</sup> Dept. 1996] citing *Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]). An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and "[t]he function of the court . . . is to determine . . . whether the determination

had a rational basis in the record (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1<sup>st</sup> Dept. 1996] citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1<sup>st</sup> Dept. 1982]). Courts are not permitted to substitute their judgment for that of the administrative agency where the decision is rationally based on the record. (*In re Application of Royal Realty Co v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1<sup>st</sup> Dept. 1990]; *Matter of Levine v New York State Liq Auth*, 23 NY2d 863, 864 [1969][“Judicial review of an administrative action is limited to the record made before the agency”])

It cannot be said from this record that the Authority’s denial of petitioner’s application for accident disability retirement is arbitrary and capricious or that it lacks a rational basis.

Petitioner’s application is based upon designating the August 1997 incident at the firing range as a line-of duty injury and the genesis of petitioner’s orthopedic problems. However, that designation was specifically denied and petitioner herself, on different occasions, admitted her orthopedic problems were not line-of duty injuries. Moreover, her pre-surgery evaluation indicated the condition had multiple causes.

Petitioner also alleges her sleep disorders are related to her duties at Ground Zero following 9/11. However she has failed to substantiate this claim.

We have considered the other arguments of the parties and find them to be without merit.

Accordingly, it is

Ordered that the petition is dismissed.

This reflects the decision and order of the court.

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

1/29/09

~~MARILYN SHAFER~~  
~~J.S.C.~~

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
FEB 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK