

**Matter of Trotta v Kelly**

2009 NY Slip Op 33272(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 112218-08

Judge: James A. Yates

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. JAMES A. YATES PART 50Y**  
**Justice**

**In the Matter of the Applcation of**  
**JOSEPH TROTTA,**

**Index No.: 112218-08**

**Petitioner,**

**Motion Seq.: 001**

**-against-**

**ORDER and**  
**JUDGMENT**

**RAYMOND KELLY, as the Police**  
**Commilssioner 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.**

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The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

**Papers Numbered**

**Notice of Motion/Order to Show Cause - Affidavits - Exhibits...** | \_\_\_\_\_  
**Answering Affidavits - Exhibits** \_\_\_\_\_ | \_\_\_\_\_  
**Replying Affidavits** \_\_\_\_\_ | \_\_\_\_\_

**Cross-Motion:**  **Yes**  **No**

**Pursuant to CPLR article 78, Petitioner seeks to annul Respondent's May 14, 2008 determination denying his application for accidental disability retirement (ADR) due to a heart condition. The Court is denying the petition because the**

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Medical Board properly considered the credible evidence before it when deciding that the Heart Bill presumption in General Municipal Law § 207-k did not apply.

(See attached Decision and Order.)

Dated **PT. 50Y FEB 26 2009**

ENTER: \_\_\_\_\_, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**PT. 50Y FEB 26 2009**

**HON. JAMES A. YATES**

**FILED**  
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NEW YORK  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50Y

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 In the Matter of the Application of :  
 :  
 JOSEPH TROTTA, :  
 :  
 Petitioner, :  
 :  
 For a Judgment under Article 78 :  
 of the New York 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. :  
 -----X

Decision and Order  
Ind. No. 112218/08

**FILED**  
 FEB - 6 2009  
 COUNTY CLERK'S OFFICE

Hon. James A. Yates, J.

In this CPLR article 78 proceeding, Petitioner seeks to annul Respondent's May 14, 2008 determination denying his application for accidental disability retirement (ADR) due to a heart condition. Petitioner argues that the determination was arbitrary and capricious because it did not apply the presumption of General Municipal Law § 207-k, also known as the "Heart Bill."

**Background**

Joseph Trotta was a uniformed police officer of the New York City Police Department (NYPD) since June 7, 1968. On April 17, 2000, Mr. Trotta submitted an application for ADR pursuant to Administrative Code § 13-252 and General Municipal Law § 207-k. Police Commissioner Kelly submitted an application for Ordinary Disability Retirement (ODR) on Mr. Trotta's behalf. In his ADR

application, Mr. Trotta stated that he "suffer[s] from a heart condition" (see Resp. Verified Ans., Nov. 12, 2008, exhibit 1). Mr. Trotta retired from the NYPD on May 6, 2000 with a service retirement.

On September 22, 2000, the Medical Board Police Pension Fund, Article II (Medical Board) examined Mr. Trotta and concluded that "although [Mr. Trotta] has complaints that are consistent with angina<sup>1</sup>, the objective evidence . . . does not definitively support the diagnosis. He has a strong history of smoking and chronic obstruction pulmonary disease may in part be contributory to [his] complaint of dyspnea<sup>2</sup>." (See Resp. Verified Ans., Nov. 12, 2008, exhibit 2.) Thus, the Medical Board denied the ADR and ODR applications.<sup>3</sup>

The Board of Trustees of the New York City Police Pension Fund (Board of Trustees) remanded the matter back to the Medical Board for further consideration on January 16, 2001. Accordingly, on June 16, 2006, the Medical Board reevaluated Mr. Trotta's case. It found that the new evidence<sup>4</sup> provided no

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<sup>1</sup> Angina is "[a] condition in which the heart does not get enough oxygen, resulting in chest pain and a feeling of suffocation" (Glossary, [http://www.ehealthmd.com/library/heartfailure/HF\\_glossary.html](http://www.ehealthmd.com/library/heartfailure/HF_glossary.html) [accessed Jan. 23, 2009]).

<sup>2</sup> Dyspnea is a term used to describe difficulty breathing or a sensation of not getting enough air (see *Breathing Difficulty*, MedlinePlus: A Service of the U.S. National Library of Medicine, <http://www.nlm.nih.gov/medlineplus/ency/article/003075.htm> [accessed Jan. 22, 2009]).

<sup>3</sup> The Medical Board had conducted a complete review of Mr. Trotta's medical records, history, complaints, clinical findings and physical examination (see Resp. Verified Ans., Nov. 12, 2008, exhibit 2).

<sup>4</sup> The new medical evidence consisted of five typed office notes. The first note was dated January 2, 2001 and stated that Mr. Trotta "continues to have intermittent episodes of chest discomfort, but is clinically stable at this time" (*id.* at exhibit 12).

The second note, dated April 20, 2001, stated that "there was no intrinsic lung disease, but based on patient's symptoms, [Dr. Seymour Huberfeld] feels that coronary angiography is

objective evidence of myocardial ischemia<sup>5</sup>, and therefore, it unanimously reaffirmed its September 22, 2000 decision denying the ADR and ODR applications.

On November 8, 2006, the Board of Trustees considered Mr. Trotta's case for a second time, and remanded it back to the Medical Board on November 13, 2006. The Medical Board reevaluated Mr. Trotta's case on November 9, 2007, reviewed

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appropriate . . . [After discussion, the patient] will consider the alternatives." (*Id.*)

The third note, dated April 23, 2001, considered Mr. Trotta's condition as stable. Mr. Trotta's blood pressure was measured at 124/80. The physical examination revealed no evidence of bruits, thyromegaly, or adenopathy in the neck. Mr. Trotta's chest was clear to auscultation and percussion, and his heart examination showed no murmurs, rubs, gallops, heaves or thrills ("an abnormal tremor accompanying a vascular or cardiac murmur felt on palpation" (see Taber's Medical Cyclopedic Dictionary [2002])). Examination of Mr. Trotta's abdomen was normal, and examination of his extremities revealed no clubbing (abnormal enlargement of the fingertips, usually associated with cyanotic heart disease (see *Health Guide*, New York Times, <http://health.nytimes.com/health/guides/disease/cyanotic-heart-disease/overview.html> [accessed Jan. 23, 2009])), cyanosis (bluish discoloration of extremities commonly observed in patients with reduced cardiac output (see Taber's, *supra*)), or edema, and his pulses were at 2+. (Resp. Verified Ans., Nov. 12, 2008, exhibit 12.)

The fourth note, dated March 14, 2001, describes an exercise stress test with thallium indicating normal myocardial perfusion (blood flow to the heart's walls and muscles (see *Myocardial Perfusion*, <http://www.cardio.com/site136.php> [Cardiovascular Inst of South, accessed Jan. 23, 2009])), and no evidence of obstructive coronary artery disease. "A gated SPECT image was performed at rest and revealed normal left ventricular function." (Resp. Verified Ans., Nov. 12, 2008, exhibit 12.)

Finally, the fifth note, dated June 14, 2006, states that Mr. Trotta has "[n]o significant past medical history" (*id.*).

<sup>5</sup> Ischemia is a decreased supply of oxygenated blood to a body organ or part, often marked by pain and organ dysfunction, as in ischemic heart disease (see Taber's, *supra*).

additional evidence<sup>6</sup>, and unanimously reaffirmed its denial of the ADR and ODR applications. On May 14, 2008, the Board of Trustees considered Mr. Trotta's case for the third time and voted to adopt the Medical Board's recommendation. Thereafter, on September 8, 2008, Mr. Trotta commenced this Article 78 proceeding, challenging only the ADR denial (see Pet. Notice of Petition, Sept. 8, 2008, at 1-2). The Court, therefore, is only addressing whether Respondent properly denied Petitioner's ADR application.

### Discussion

Generally, the applicant for ADR benefits has the burden of establishing both that he is disabled and that his disability resulted from an accidental injury received in city service (see e.g. *Matter of Danyi v Board of Trustees of N.Y. City Employees' Retirement Sys.*, 176 AD2d 451, 451 [1st Dept 1991]). The Heart Bill, however, entitles a police officer disabled due to heart disease to an evidentiary presumption that the disabling heart condition resulted from an accidental injury, and that the injury was received while performing official duties (see *Uniformed Firefighters Assn., Local 94, IAFF, AFL-CIO v Beekman*, 52 NY2d 463, 472-473 [1981]). But, the Heart Bill presumption applies only if it is demonstrated that a heart condition caused the disabling condition in the first instance (see *Appleby v Herkommer*, 165 AD2d 727, 728 [1st Dept 1990]).

The award of ADR benefits is a two-step process. First, the Medical Board "must certify whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service.'" Second, if the Medical Board finds the applicant disabled, it must recommend whether the disability was a "natural and proximate result of an accidental injury." (*Matter of Borenstein v N.Y. City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996], citing NYC Administrative Code §13-168 [a].) The

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<sup>6</sup> The new evidence was a nuclear stress test performed on October 13, 2006, and interpreted on October 16, 2006. The test revealed that: (1) Mr. Trotta achieved the maximum predicted heart rate for his age, (2) his cardiogram was essentially negative, and (3) although Mr. Trotta may have mild inferior ischemia, his left ventricle functioned normally. (See Resp. Verified Ans., Nov. 12, 2008, exhibit 16.) On November 9, 2007, the Medical Board also interviewed Mr. Trotta and conducted another physical examination. Although Mr. Trotta complained of chest pains, "[e]xamination of the heart was negative." (*Id.* at exhibit 15 ¶ 5-6.)

Board of Trustees undertakes the second step only if the Medical Board finds the applicant disabled. Since the Medical Board did not find Mr. Trotta disabled here, the Board of Trustees did not reach the second step. Thus, the issue of causality to an accidental injury received in city service is not an issue before this Court.

The threshold question of whether an applicant has the injury claimed, and whether that injury incapacitates the applicant from city service performance, is solely for the Medical Board, and its determination is binding on the Board of Trustees (see *Borenstein*, 88 NY2d at 760 ("If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant's claim")). "It is well settled that the courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board" (*Matter of Santoro v Board of Trustees of N.Y. City Fire Dept. Art.1-B Pension Fund*, 217 AD2d 660, 660 [2d Dept 1995]).

"The Medical Board's determination is conclusive if it is supported by any credible evidence and is not irrational" (*Matter of Inguanta v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 302 AD2d 527, 527 [2d Dept 2003]; see also *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]; *Borenstein*, 88 NY2d at 760 ("In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious"); *Matter of Schwarzrock v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 238 AD2d 596, 597 [2d Dept 1997]). Courts have held that the Medical Board's review of an applicant's submitted medical records and an examination of applicant constitute credible evidence, and that the Medical Board's determination of disability was, therefore, neither arbitrary nor capricious (see e.g. *Borenstein*, 88 NY2d at 760-761; see also *Matter of Drew v N.Y. City Employee's Retirement Sys.*, 305 AD2d 408, 409 [2d Dept 2003]; *Inguanta*, 302 AD2d at 527).

Here, the Medical Board performed two physical examinations of Mr. Trotta. In addition, the record demonstrates that the Medical Board considered all the medical evidence, including that submitted by Mr. Trotta revealing overall normal results.<sup>7</sup>

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<sup>7</sup> Dr. Stanley Shepko, Mr. Trotta's own physician, opined that although there was some borderline enlargement of the left

Although the medical conclusions of Mr. Trotta's treating physicians differed somewhat from those of the Medical Board, "the resolution of such conflicts is the sole province of the Medical Board" (*Drew*, 305 AD2d at 409; *see Borenstein*, 88 NY2d at 761; *Tobin*, 64 NY2d at 258-259; *Matter of Cassidy v Ward*, 169 AD2d 482, 483 [1st Dept 1991]).

Based upon the credible evidence before the Medical Board, its determination was not irrational (*see Meyer*, 90 NY2d at 149-150; *Borenstein*, 88 NY2d at 760; *Matter of Barnett v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 264 A.D.2d 840, 841 [2d Dept 1999]). Accordingly, the Board of Trustees properly denied Mr. Trotta's application for accident disability retirement.

This constitutes the Decision and Order of the Court

Dated: January 26, 2009

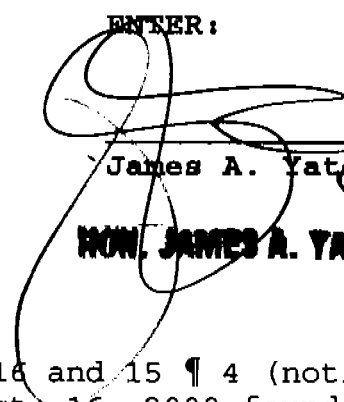
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ventricle (*but see id.* at exhibit 16 and 15 ¶ 4 (noting that nuclear stress test performed on Oct. 16, 2008 found normal left ventricle size and thickness)), Mr. Trotta's cardiac contractility was within normal limits. Further, Dr. Shepko opined that the Doppler examination revealed no significant stenosis (abnormal condition characterized by constriction or narrowing of a passage or orifice (*see Taber's, supra*)), or insufficiency of Mr. Trotta's four heart valves. (See Resp. Verified Ans., Nov. 12, 2008, exhibit 4 and 2 ¶ 3.)

The Medical Board did not give as much weight to two of Mr. Trotta's other personal physicians, Dr. Morton W. Levine and Dr. Grigory Klinger. In a report dated May 9, 2009, Dr. Levine essentially relies on Mr. Trotta's subjective complaints but fails to provide any objective medical evidence of heart disability (*see id.* at exhibit 5). Similarly, Dr. Klinger relies on subjective complaints, noting that Mr. Trotta's history continues to be "typical for angina, despite his negative workup to date" (*id.* at exhibit 12 [emphasis added]).