

Matter of Arevalo v Kelly
2010 NY Slip Op 30026(U)
January 7, 2010
Supreme Court, New York County
Docket Number: 108269/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Juan B. Lobo

PART 6

Index Number : 108269/2009
 AREVALO, FABIO
 vs.
 KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE 10/5/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-10
11-32

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition

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

~~MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER~~ & JUDGMENT

TO APPEAR IN PERSON AT THE JUDGMENT CLERK'S DESK (ROOM 1016).

Dated: 1/7/10

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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In the Matter of the Application of
FABIO AREVALO,

Petitioner,

Index No. 108269/09

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 II,
NEW YORK CITY POLICE DEPARTMENT and
THE CITY OF NEW YORK**

UNFILED JUDGMENT
The Board of Trustees of the Police Pension Fund, Article II, of the City of New York, and the New York City Police Department, and the City of New York, appear in person at the Supreme Court of the State of New York, New York County, on this 14th day of February, 2009.

Respondents.

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

Petitioner Fabio Arevalo 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 denied.

On February 28, 1994, petitioner was appointed to the NYPD's uniformed force; he served continuously as a member of the NYPD until he filed for ADR on February 27, 2006. On February 11, 2009—after three reviews of petitioner's application by the Medical Board—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, that

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 first displayed psychological problems in 1995 after he slapped his wife and displayed his firearm to his wife and child in violation of NYPD regulations. Petitioner and his wife eventually, but briefly, separated. Petitioner expressed feelings of anger and depression to an NYPD therapist. The NYPD placed him on psychological restricted duty for seven months.

On September 11, 2001, petitioner arrived at the World Trade Center soon after the towers fell and performed rescue, recovery, and clean-up operations. Petitioner later responded to the Far Rockaway plane crash. According to a 2005 report from the NYPD's Psychological Evaluation Section ("PES"), the crash site reminded him of 9/11 and caused emotional and psychological disturbance for which he received medical treatment from a private practitioner, Dr. Michael Wainston. He continued to work, however, and, according to the 2005 PES report, performed his duties excellently. He also showed no signs of anxiety or depression to his co-workers; to the contrary, during this period, he was friendly, outgoing, and cooperative.

In August of 2002, petitioner trained to be a dog handler for the NYPD. One of the dogs attacked petitioner and wounded his leg. Petitioner reported to the PES that this incident caused him nightmares and—combined with his memories of 9/11 and the Far Rockaway Crash—made him feel helpless and depressed. According to the PES, however, he continued to work full duty and exhibited no signs of psychological problems.

In March 2005, petitioner's wife filed for divorce. Thereafter, petitioner became suicidal. On one occasion, he ingested two Valium and drove around with a bottle of alcohol and his firearm, contemplating suicide. As a result, he was admitted to the Columbia Presbyterian Medical Center ("Columbia Presbyterian") for seventeen days and went on disability. On April 5, 2005, he was readmitted to Columbia Presbyterian for trying to jump off the Queensborough Bridge. During the second admission, he was diagnosed with Major Depressive Disorder ("MDD") that worsened due to the divorce. Post Traumatic Stress Disorder ("PTSD") was a secondary diagnosis.

On August 4, 2005, petitioner disclosed to the PES that two days prior he had “a complete meltdown” and wanted to commit suicide.

On August 8, 2005, the PES released its psychological evaluation of petitioner. It ruled out Post-Traumatic Stress Disorder. The PES determined that the basis of petitioner’s severe depression and suicide ideation was his divorce. On November 21, 2005, the Medical Board Police Pension Fund Article II—after interviewing petitioner and reviewing medical records—adopted the PES’s findings; rejected a PTSD diagnosis from Dr. Wainston; determined that petitioner was incapable of performing full police duties; and, recommended ODR. On February 27, 2006, petitioner filed for ADR, maintaining that his psychological conditions were caused by his 9/11 efforts. The Medical Board re-examined petitioner and recommended a disapproval of petitioner’s application for ADR.

On November 12, 2007, the Medical Board reexamined petitioner and his records. The re-examination occurred because Dr. Christie Jackson, a clinical psychologist involved with petitioner since April 2005, submitted a letter diagnosing him with PTSD, as the direct result of his employment with the NYPD, and MDD. The Medical Board again recommended a disapproval of petitioner’s application for ADR and found that Dr. Jackson’s diagnosis conflicted with a contemporaneous diagnosis from Columbia Presbyterian of MDD that worsened as the result of marital discord. In the summer of 2008, Dr. Jackson wrote another letter in which she again diagnosed petitioner with PTSD. On August 25, 2008, the Medical Board considered and again rejected the PTSD diagnosis. On February 11, 2009, the Board of Trustees adopted the Medical Board’s findings and denied petitioner’s ADR application.

Petitioner argues that the Board's findings were arbitrary and capricious, because it did not adopt the conclusions of petitioner's doctors and did not explain the reasons for doing so; it did not discuss evidence in support of its conclusion; and, it failed to recognize that the World Trade Center disaster logically caused petitioner's PTSD.

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 New York § 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, 380 (1st Dep't 1971). An "accident which precipitates the development of a latent condition or aggravates a 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).

Section 13-152.1 of the Administrative Code creates a rebuttable presumption of accidental disability for any condition or impairment of health caused by a qualifying condition, where the officer participated in WTC recovery efforts for at least forty (40) hours. "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) (citations omitted), aff'd., 51

A.D.3d 536 (1st Dep't 2008). 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 A.D.3d 336 (1st Dep't 2008). Courts have annulled determinations of the Medical Board 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). But, the courts must not review the facts regarding the weight of the evidence, unless there is a "substantial evidence" question. In re Pell v. Bd. of Ed., 34 N.Y.2d 222, 230 (1974). "[D]ispute[s] between the opinions of medical experts . . . [are] for the Medical Board to resolve." In re Cassidy v. Ward, 169 A.D.2d 482, 483 (1st Dep't 1991) (citation omitted); see also In re of Muffoletto v. N.Y. City Emples. Ret. Sys., 198 A.D.2d. 7 (1st Dep't 1993) ("conflicting medical evidence proves no occasion for judicial interference").

The Medical Board's conclusions were supported by credible medical evidence that rebutted the WTC presumption. The Medical Board noted that petitioner's first psychological difficulties in 1994 occurred due to marital difficulties. It noted that petitioner's serious suicidal ideation occurred after he was confronted with impending marital dissolution. The Board noted that petitioner was neither harmed nor threatened with immediate harm on 9/11, thus he did not satisfy the threshold criteria for a PTSD diagnosis. The Board heavily relied on the August 2005 evaluation by the PES, which rejected a PTSD diagnosis and diagnosed petitioner with MDD. This evaluation went beyond petitioner's self-reporting and considered petitioner's records from Columbia Presbyterian. The 2005 PES report was credible medical evidence on which the Board could rely in making its determination to disapprove petitioner's application for ADR.

Moreover, the Medical Board adequately addressed and rationally rejected petitioner's proffered medical evidence. Petitioner presented to the Board letters from two doctors and his discharge note from Columbia Presbyterian. Each diagnosed him with PTSD; though at Columbia Presbyterian PTSD was a secondary diagnosis. Each of these diagnoses was rationally rejected. Dr. Wainston's letter was rejected because it lacked context and did not detail his psychiatric examination of petitioner. Dr. Jackson's diagnosis was rejected because it conflicted with a contemporaneous diagnosis by Columbia Presbyterian (as noted above, Columbia Presbyterian's diagnosis of PTSD was secondary to MDD). The Medical Board has thus adequately addressed petitioner's medical evidence. The Board is entitled to weigh conflicting medical opinions without judicial interference.

Petitioner is correct in that he is entitled to the WTC presumption. However, he is incorrect in arguing that his psychological problems, plus involvement in the 9/11 recovery efforts, automatically entitled him to ADR. The presumption in the WTC statute is rebuttable, not conclusive. In the case at hand, there was credible medical evidence on which the Board relied that rebutted the presumption. Therefore, the PFF's decision to deny ADR for petitioner and grant ODR is affirmed.

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

Dated: January 7, 2010



 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).