Matter of Loud v Kelly
2010 NY Slip Op 30116(U)
January 12, 2010
Supreme Court, New York County
Docket Number: 101609/09
Judge: Joan A. Madden
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SCANNED ON 1/22/2010

[* 1]

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

PRESENT: Hon Joan A. Madden, Justice

PART 11

Index Number : 101609/2009
LOUD, JOHN
vs.
KELLY, RAYMOND W.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. ______
MOTION DATE 6/4/09
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this ~~motion~~ application is decided in accordance with the annexed Memorandum, Decision Order + Judgment.

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

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: January 12, 2010

J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

---------------------------------------X Index No. 101609/09

In the Matter of the Application of
JOHN LOUD,

Petitioner,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,

-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, and THE CITY OF NEW YORK,

Respondents.

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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).

JOAN A. MADDEN, J.:

Petitioner, a retired police officer, seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondents' denial of an accident disability retirement allowance (ADR) based on the finding that petitioner was not disabled as a result of a psychological disorder arising out of his service in connection with the events of September 11, 2001, and annulling respondents' denial of his application to amend his application to include disabling coronary artery disease. Respondents, the Board of Trustees of the New York City Police Pension Fund, Article II (the Trustees),[1] and Raymond Kelly, as Chairman of the Trustees, seek dismissal of the petition. As set forth below, the petition is granted to the extent of remanding the matter to the New York City Police Pension Fund Article II Medical Board (hereinafter "Medical Board") for further proceedings consistent with this decision.

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[1]The Trustees have been sued here as "THE BOARD OF TRUSTEES of the Police Pension Fund, Article II."

Background

From 1968 until his service retirement on November 26, 2002, petitioner served continuously as a member of the New York City Police Department (NYPD) uniformed force. Petitioner avers that within an hour of commencement of the September 11, 2001 (9/11) terrorist attack on the World Trade Center (WTC) site, he commenced rescue, recovery and clean up work there. Petitioner contends that at this time, he observed the physical destruction and loss of life caused by the collapse of the WTC towers, and learned that 23 NYPD members had perished. Until October 1, 2002, petitioner worked at the WTC site and 40 Fulton Street providing assistance and counseling. Petitioner claims that thereafter, in his capacity as vice president of the Police Benevolent Association (PBA), he attended the funerals of many police officers who perished in the 9/11 attack, and counseled their families. Petitioner further claims that as a result of his rescue, recovery and clean up work, he developed Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD), and, since July 2002, his treatment has included in- and outpatient psychiatric treatment and medication for depression, psychosis, sleep and mood stabilization.

On November 19, 2002, petitioner submitted an application for ADR as a result of a psychological condition, noting that his psychological problems were brought on by the events of the 9/11 tragedy, and thereafter commenced service retirement. On February 20, 2003, petitioner withdrew his November 19, 2002 ADR application.

On or about January 30, 2006, petitioner filed a Notice of Participation in the World Trade Center Rescue, Recovery or Clean Up Operations. On March 14, 2006, petitioner filed a second application for ADR, based on his psychological condition, and the Police Commissioner

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submitted an application for ordinary disability retirement (ODR)[2] on petitioner's behalf. Petitioner has submitted a copy of his March 14, 2006 ADR application, in which he complained of constant fatigue, inability to concentrate, anxiety and flashbacks as a result of the WTC disaster. Petitioner further stated that since the date of the disaster, he has been unable to function as a full-duty police officer.

In furtherance of his ADR application, petitioner submitted to the Medical Board two letters, dated April 2, 2006 and January 3, 2007, from Mr. Eugene F. Moynihan, who treated petitioner with psychotherapy in 1997 and again in 2002. In the April 2006 letter, Mr. Moynihan stated that before petitioner's retirement, petitioner found himself weeping uncontrollably in his office, with the door closed, and breaking down while at ceremonies and in the presence of the families he was counseling, which caused him to apply for a service retirement prematurely, as he was too "modest and ashamed to seek a disability retirement" (Pet., Exh. D).

Regarding petitioner's 1997 treatment, Mr. Moynihan stated that he treated petitioner over the course of five months with petitioner reporting, among other things, weight loss, teariness and difficulty sleeping. Petitioner was also prescribed, by a psychiatrist, Ativan for sleep, and Paxil. Thereafter, petitioner resumed his sleeping regime, maintained his weight and was terminated from therapy. According to Mr. Moynihan, in and after 2002, petitioner attended psychotherapy sessions and was prescribed Trazadeon, Effexor, Risperidol, Eskalith, Wellbutrin, Ativan and Abilify, none of which appeared to have effectively addressed his depression,

[2]ODR is available to a member of the NYPD when a medical examination shows that the member is physically or mentally incapacitated for the performance of duty and ought to be retired (*see* Administrative Code of City of NY [Administrative Code] § 13-251). ADR benefits are greater than ODR benefits.

delusional thinking and suicidal ideation symptoms.

In his January 3, 2007 letter, Mr. Moynihan stated, among other things, that upon re-entering treatment in September 2002, petitioner was emotionally distraught, labile and depressed "as an obvious result of his experiences and reactions to the 9/11 attacks" (Pet., Exh. D). Mr. Moynihan also stated that he found it obvious that petitioner suffered from PTSD symptoms and the compromised ability to function normally as a direct result of his work-related experiences, as petitioner was, before 9/11, functional and able to rise to the position of PBA vice president, despite prior depressive episodes.

Petitioner also submitted to the Medical Board records reflecting his outpatient treatment at Stony Brook Hospital, Department of Psychiatry (Stony Brook), from October 1, 2002 through February 19, 2006, where he was discharged with a final diagnosis of "major depressive disorder, recurrent, severe with psychotic features" (Pet., Exh. C.). The extensive treatment record reveals that, among other things, petitioner suffered nightmares and ruminated about 9/11 (*see* Pet., Exh. C [10/01/03 note]). The record also reflects that petitioner believed that he had fleas on his body, and that his home was infested with fleas, which, apparently, was untrue.[3] Petitioner was discharged to the care of a psychiatrist, Dr. Frank Dowling, on February 19, 2006.

On February 20, 2006, petitioner was hospitalized in South Oaks Hospital, a psychiatric facility, due to escalating suicidal ideation. The South Oaks Hospital record reflects that four days before his admission, petitioner stated, razor blade in his hand, that he felt like killing himself. On March 3, 2006, petitioner was discharged from South Oaks Hospital, to outpatient

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[3]While petitioner argues that the Stony Brook record demonstrates that he was consistently diagnosed with PTSD and MDD, on many of the records the diagnosis was depression, with frequent notations to rule out bipolar affective disorder and PTSD.

hospital care, with a diagnosis of major depression, recurrent and PTSD. The discharge summary notes that petitioner's wife suffered with breast cancer, that petitioner was retired, and that he witnessed the 9/11 aftermath.[4]

Dr. Dowling submitted two letters to the Medical Board. Among other things, the first letter, dated April 3, 2006, states that Dr. Dowling first saw petitioner on February 10, 2006 for treatment of severe major depression and that the events of 9/11 were too much for petitioner to bear, and caused depression and anxiety symptoms which made him unable to function at work. Dr. Dowling also remarked that petitioner's recent medications included Remeron and Zoloft, and that given that petitioner's symptoms had lasted for several years, it was likely that his chronic depression and traumatic stress symptoms would continue. Dr. Dowling opined that, given petitioner's excellent work and health history prior to September 11, 2001, it was clear to more than a reasonable degree of medical certainty that petitioner suffered from a work-related psychological disability, and remained unable to function as a police officer for the foreseeable future, with petitioner's disability the cause of his retirement from service.

In his second, September 26, 2006 letter, Dr. Dowling addressed petitioner's pre-9/11 depression episodes, noting that petitioner had recovered from those very well, functioned effectively and safely, and even excelled at work. Dr. Dowling stated that it was the 9/11 stress symptoms that made petitioner unable to function effectively as a police officer. Dr. Dowling further stated that petitioner obtained the position of PBA vice president after many years of hard

[4]According to Mr. Moynihan, after discharge from South Oaks, petitioner was followed up for two weeks at Mather Hospital Partial Hospitalization (Mather Hospital) and then discharged back to Mr. Moynihan's care. No records from Mather Hospital concerning petitioner's mental health treatment were submitted here or, it appears, to the Medical Board.

work and dedication, and never would have left the position with three years remaining on his term unless unable to function in his role as police officer.

Over 25 years before petitioner submitted his ADR application in 2006, petitioner sought counseling through the NYPD and was interviewed by Dr. Martin Symonds, an NYPD psychiatrist. In a memorandum dated May 6, 1980 (the 1980 Symonds Memo), Dr. Symonds wrote that petitioner was being examined for psychological fitness to perform full duty with return of his firearms, which had been recently safeguarded by the Counseling Unit. Dr. Symonds noted that petitioner had "no gross signs of psychopathology indicative of serious mental illness . . . observed, expressed or clinically elicited" and "[n]o signs of depressive, suicidal or homicidal behavior thoughts or attitudes" (Ans., Exh. 3). Dr. Symonds also stated that what emerged as the interview progressed was that petitioner:

> "has a rigidity of character structure with traits of perfectionism. These characterological traits have not impaired his ability to function effectively and satisfactorily as a police officer doing full duty with firearms. Recently he has been deluged with environmental stressors. His car was stolen, his rental property suffered extensive fire damage, and his next door neighbor who seems impulsive, explosive and immature has been giving him a 'hard time.' In addition he has the stress of taking care of other members of his family *e.g.*, brothers and sisters.
>
> He seems to be unusually and rigidly bound by his feelings of responsibility, ethics and morality. He has tried to continually give way and açcede to external demands but because of his rigidity and perfectionism he has begun to feel trapped and sought help from counseling services.
>
> In essence I find [petitioner] suffering from an adjustment disorder (environmental stress) from a psychiatric point of view his underlying personality traits are not materially or substantially present to significantly interfere with full performance of duty with firearms. In view of his external stresses and his voluntarily seeking help from Counseling Services, I recommended to him that he obtain counseling and psychotherapy from Dr. Cavanaugh"

(*id.*).

The First Medical Board Review

On June 19, 2006, the Medical Board unanimously recommended disapproval of the ADR and ODR applications. In support, the Medical Board examined the 1980 Symonds Memo, stating that it revealed that petitioner sought emotional help, and had his firearms secured, after enduring a number of environmental stressors, and that Dr. Symonds opined that petitioner was suffering from adjustment stress disorder, which did not significantly interfere with his full performance of duty with firearms.

The Medical Board also reviewed the intake evaluation from Stony Brook, dated October 1, 2002 (Stony Brook Intake Evaluation), noting that it stated that petitioner had endured recurrent depressive episodes since age 15, and had prior psychiatric treatment with lithium and a past history of alcohol abuse, with the current episode of depression precipitated by his wife battling breast cancer.

The Medical Board further reviewed petitioner's withdrawn 2002 ADR application, stating that it contained notes from the Director of NYPD's Psychological Evaluation Unit (PEU), Arthur Knour, Ph.D., dated November 22, 2002, stating that petitioner was not a PEU case, and that his status psychologically was full duty with firearms. The Medical Board also reviewed an April 2006 note from Dr. Knour stating the same thing.

The Medical Board reviewed the South Oaks Hospital discharge summary and remarked that the diagnosis was major depression recurrent, with petitioner's wife's illness as a precipitating event. The Medical Board also reviewed the April 2, 2006 letter from Mr. Moynihan, stating that it noted that petitioner was first seen and followed by Mr. Moynihan for treatment in 1997, and reentered treatment in 2002 with symptoms of depression. The Medical

Board remarked that there was a report from Dr. Dowling, a psychiatrist, dated April 3, 2006, which stated that petitioner was first seen by him on February 10, 2006.

The Medical Board noted that it had interviewed petitioner, who stated that he had retired, at age 61, on full duty and in possession of his firearms. The Medical Board stated that petitioner was friendly, alert and cooperative with a good mood range and affect appropriate to thought content.

The Second Medical Board Review

On January 8, 2007, the Medical Board again reviewed petitioner's case. The Medical Board referred to its previous June 19, 2006 minutes, and reviewed new evidence, consisting of the September 26, 2006 letter from Dr. Dowling and the January 3, 2007 letter from Mr. Moynihan. The Medical Board stated that Dr. Dowling's letter suggested that the petitioner's symptoms were the result of the 9/11 disaster, and made petitioner unable to function effectively as a police officer, despite having made progress in his recovery from depression. Regarding Mr. Moynihan's January 3, 2007 letter, the Medical Board found it similar to his April 2, 2006 letter, but stated that it concludes that given petitioner's "'experiences before[,] during and after the 9/11 attacks, it is obvious to me that he suffers from [PTSD] symptoms'" (Pet. Exh. K, at 2, quoting Pet. Exh. D).

The Medical Board again interviewed petitioner. The Board's comments are similar to those from its prior interview. The Medical Board also found that its examination revealed no evidence of a psychiatric disability, but deferred its decision pending review of Moynihan's progress notes from September 2002.

On March 19, 2007, the Medical Board concluded its second hearing. At this time, the

Medical Board had received additional records from Mr. Moynihan, including 2002 progress notes indicating that petitioner suffered various symptoms such as depressive moods and thoughts, difficulty sleeping, and concentrating and a 30-pound weight loss. The Medical Board stated that the records did not appear to be contemporaneous clinical notes, and did not document that petitioner would not be able to continue his police duties. The Medical Board remarked that the January 3, 2007 Moynihan letter noted prior treatment of petitioner, presumably in 1997, but that no clinical notes were offered.[5]

The Medical Board again noted that the 1980 Symonds Memo offered a diagnosis of adjustment disorder, but that Dr. Symonds concluded that petitioner was able to continue to perform full duty with firearms. The Medical Board further noted that the Stony Brook Intake Evaluation stated that petitioner had periods of adjustment difficulty, at times of stress, since age 15. The Medical Board stated that it had fully reviewed all of the material presented, opined that there were no significant objective findings precluding petitioner from performing the full duties of a New York City police officer, and reaffirmed its prior disapprovals.

<u>The Third Medical Board Review</u>

On February 25, 2008, the Medical Board reviewed petitioner's case. According to the Medical Board report, the Trustees requested that the Medical Board again review the records from Stony Brook, South Oaks Hospital, Dr. Dowling and Mr. Moynihan, and interview petitioner concerning his experiences regarding the 9/11 disaster.

The Medical Board reviewed the Stony Brook Intake Evaluation, and stated that it reveals

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[5]The court notes that the Medical Board specifically requested only Moynihan's September 2002 contemporaneous progress notes, and not the 1997 notes.

that petitioner had a history of depressive symptoms and starting in July 2002, loss of appetite, weight loss and anhedonia. The Medical Board commented that "[a]pparently these symptoms started in the context of counseling families and attending funerals as an aftermath of the 9/11 disaster and in petitioner's capacity as an officer of the PBA" (Pet. Exh. B, at 2). The Medical Board remarked that the notes also indicated that petitioner's wife was in treatment for cancer, and that petitioner was concerned with her prognosis. It further remarked that the Stony Brook note indicated that petitioner had prior episodes of depression at 15 year of age, when he briefly felt suicidal, and at a point 20 years prior to the review, when he thought of suicide. The Medical Board noted that 10 years before, petitioner was prescribed lithium for depression, suicidality and anxiety by a psychiatrist, and that the other psychiatric reports that the Trustees asked the Medical Board to review neglected to include these elements of petitioner's past history.

The Medical Board stated that it again reviewed petitioner's "whereabouts" during the 9/11 period (*id.*), and that petitioner stated that on the morning of 9/11 he drove to the WTC site and was present at the collapse of the second tower, spent some time at the site, and thereafter attended a number of funerals and counseled the victim's families. The Medical Board remarked that petitioner stated that he was very frustrated that he could not right the wrong of 9/11, and that his inability to obtain a disability retirement pension materially affected the financial status of his family.

The Medical Board stated that the 1980 Symonds Memo offered the impression that petitioner had "a rigidity of character structure with traits of perfectionism that had not impaired his ability to function effectively as a police officer," and that petitioner appeared to be "unusually and rigidly bound by his feelings of responsibility, ethics and morality" (*id.*). The

Medical Board noted that in 1980, petitioner appeared to have an adjustment disorder due to environmental stressors, and that "according to Dr. Symonds, petitioner's 'underlying personality traits are not so materially or substantially present to significantly interfere with [full] performance of his duty'" (*id.*, quoting 1980 Symonds Memo). The Medical Board found that petitioner's comment concerning his frustration at not being able to right the wrong of 9/11 echoed Dr. Symond's impressions that petitioner is "'unusually and rigidly bound by his feelings of responsibility, ethics and morality'" (*id.* at 2-3).

The Medical Board assessed petitioner as cooperative, friendly, alert and able to present his ideas in a logical and straight-forward manner. It also noted that petitioner's affect was appropriate to thought content, his mood had good range and his insight and judgment were adequate.

The Medical Board reported that it had again considered all of the material presented to it, including the fact that petitioner retired on full duty with firearms, and had a number of episodes of treatment in the past for depression and anxiety. The Medical Board opined that the stressors petitioner described, counseling bereaved officers and attending funerals, especially for a police officer with many years of experience, do not rise to level suggested for a diagnosis of PTSD, which would involve actual or threatened death or serious injury or other threat to one's physical integrity. Finally, the Medical Board reaffirmed its previous decisions.

On October 8, 2008, the Trustees met and adopted the Medical Board's recommendation, disapproving the ADR and the ODR applications. The Trustees also denied petitioner's request to amend his ADR application to include heart disease disability, stating that the circumstances present in *Matter of Mulheren v Board of Trustees of Police Pension Fund, Art. II* (307 AD2d

129 [1st Dept 2003]), relied upon by petitioner, were not present in petitioner's case.

Petitioner subsequently commenced this Article 78 proceeding, seeking to annul and reverse respondents' determination denying him ADR and refusing to amend his application to include disabling CAD. Petitioner argues that respondents' contention that the Medical Board's conclusion that petitioner is not disabled from PTSD and MDD, but suffers from a life-long, non-disabling adjustment disorder, is not based on credible evidence. Petitioner contends that the Medical Board dismissed and failed to adequately address critical evidence from petitioner's medical providers that he suffered from 9/11-related PTSD and MDD, to articulate why it disagreed with the diagnoses of petitioner's medical providers, and to conduct a mental status examination.

Petitioner further contends that the Medical Board disregarded and failed to explore his 9/11 rescue work and to comment on his time at the WTC site, choosing to disregard that petitioner's work was more extensive than attending funerals, and involved significant environmental exposures and psychological effects. Petitioner also contends that the Medical Board improperly focused on a single point in time, November 26, 2002, the date he retired, thereby violating the WTC Bill, which contemplates providing disability pensions where a member later becomes disabled from a qualifying health condition. Petitioner argues that the Trustees improperly adopted Medical Board's disapproval without discussion, comment, or a complete psychiatric evaluation.

With respect to its denial of his request to amend his ADR application to add coronary artery disease, petitioner argues that the Trustees' reasoning for its denial is legally insufficient as the Trustees did not consider medical evidence that demonstrated that petitioner's symptoms of

heart disease existed prior to his NYPD retirement, or whether petitioner's request to amend was warranted by substantial equitable considerations.

In opposition, respondents contend that the Medical Board considered and addressed all of the objective medical evidence from outside sources in reaching its decision, conducted its own interviews and examinations, and that the evidence supporting the Medical Board's determination exceeds the "some credible evidence" standard. Respondents assert that the Medical Board "pointed out that contrary to petitioner's allegation that he was disabled, petitioner worked for over 34 years as a police officer, despite his number of episodes of treatment in the past for depression and anxiety that dated back to the age of 15" (Resp. Memo. of Law, at 9-10 [citation and internal quotation marks omitted]). Respondents further assert that the Medical Board found that despite petitioner's history of psychological difficulties, which manifested as an adjustment disorder caused by environmental stressors, petitioner had not sought assistance with the PEU since 1980 and retired in possession of his firearms.

In addition, respondents assert that in denying petitioner's application to amend its ADR application to include a disability due to coronary artery disease, the Trustees considered the medical evidence and petitioner's reasons for not including the disability in its earlier applications and found that no substantial equitable grounds existed to permit the amendment.

Discussion

The Medical Board has the sole power to determine whether disability prevents the applicant from performing his duties (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). Ordinarily, in an Article 78 proceeding challenging a disability determination, the Medical Board's disability determination will not be disturbed if it

is supported by substantial evidence (*id.*). This standard has been construed as requiring "some credible evidence" (*id.*). Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). Once the Medical Board certifies that an applicant is not disabled for duty, the Trustees must accept the determination and deny the application (*id.*).

A reviewing court may not substitute its judgment for that of the agency's determination, but must decide if the agency's decision is supported on any reasonable basis (*Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of N.Y.*, 98 AD2d 635, 636 [1st Dept 1983]). However, courts have annulled and remanded for further review determinations of the Medical Board and the Board of Trustees "where the medical issues presented by a petitioner were not adequately addressed" (*Matter of Brady v Board of Trustees New York City Police Pension Fund*, 2008 NY Slip Op 32529[U] [Sup Ct, NY County] [citing *Matter of Rodriguez v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501 (2d Dept 2004)]). Courts have also remanded such determinations where the medical evidence did not sustain the determination, the record did not reveal a rational evaluation of the medical evidence, or where the basis of a determination was not adequately articulated (*id.*, *see also Matter of McAdams v Kelly*, 17 Misc 3d 1112[A], 2007 NY Slip Op 51938[U] [Sup Ct, NY County 2007]); *Matter of Weller v Kelly*, Sup Ct, NY County, Feb. 23, 2007, Schlesinger, J., Index No. 109357/2006, Slip Op, at 11 [stating that the Medical Board may not "cherry pick portions of letters and reports it received (or) disregard information, without inclusion or comment, that do not support its

position"]; *Mladen v Kelly*, 2007 NY Slip Op 32063[U] [Sup Ct, NY County 2007] [Trustees' rationale not in record]).

Under Administrative Code § 13-252.1 (WTC Bill), an NYPD member found disabled by the Medical Board can seek ADR benefits if he or she participated in the rescue, recovery, or clean up operations at the WTC within the first 48 hours after the first plane hit the WTC (Administrative Code § 13-252.1 [1] [a]). WTC Bill § 13-252.1 (1) (a) provides that:

> "if any condition or impairment of health is caused by a qualifying [WTC] condition as defined in section two of the retirement and social security law, it 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."

Qualifying conditions include PTSD, anxiety, depression, or any combination of these conditions, and "new onset diseases resulting from exposure as such diseases occur in the future including chronic psychological disease" (Retirement and Social Security Law § 2 [36] [d]). A member of the pension system who participated in the WTC rescue, recovery or clean up operations may file for reclassification of her or his retirement status if he or she develops a qualifying condition (Administrative Code § 13-252.1 [2] [a]).

Here, the court finds that the record reveals that the Medical Board failed to adequately address crucial evidence regarding petitioner's diagnosis of PTSD and MDD by various mental health professionals, including those at an outpatient and in-patient psychiatric facility, as well as the conclusion of two treating health care professionals who found that as a result of his psychological disability, petitioner was disabled from performing police work.

In addition, in determining that petitioner is not disabled, the Medical Board relied on evidence indicating that before 9/11 petitioner was diagnosed with a non-disabling psychological

condition and was able to work as a police officer for over 30 years with such condition, but failed to adequately consider whether petitioner became disabled as a result of the events of 9/11. As the WTC Bill anticipates possible disability from a qualifying condition after 9/11, and retirement, it would appear that the initial relevant inquiry is whether petitioner was fit for performance of police duties in 2002 and thereafter, not before 9/11, or in 1980.

The Medical Board's focus on the 1980 Symonds Memo, which the Medical Board remarked addresses petitioner's 1980 response to external stressors, appears to avoid an evaluation of the effects on petitioner's health, if any, of petitioner's WTC service, over 20 years later. In addition, in 1980, Dr. Symonds noted that petitioner had no gross signs of psychopathology indicative of serious mental illness or signs of depressive or suicidal behavior, thoughts or attitudes. Unexplained is the stark contrast between Dr. Symonds's findings that petitioner did not exhibit such signs, and Dr. Symonds's opinion that petitioner's character or psychological traits were such that there would be no significant interference with petitioner's work, and the more recent evidence of petitioner's psychological condition, which includes several diagnoses of MDD and PTSD and his admission to a psychiatric facility for escalating suicidal ideation.

Furthermore, to the extent it considered the evidence submitted by petitioner regarding his post-9/11 psychological condition, the Medical Board focused on limited portions of the record without explaining its reasons for disregarding other crucial aspects of such record. For example, the references in the Medical Board's reports concerning the Stony Brook record are repeatedly to the intake evaluation, which comprises only the first four pages of the lengthy record. That record also includes a February 19, 2006 discharge summary, that states that

petitioner's experiences counseling suicidal police officers and their families *combined* with his wife's battling breast cancer led to petitioner's depressive episode and final diagnosis of severe major depressive disorder, recurrent with psychotic features (*see* Rep. Exh. 8, at "76"). Whether the Medical Board reviewed this diagnosis, or considers the condition described therein disabling, or simply disagrees with the diagnosis, or disagrees with the health care provider's conclusion about causation is not addressed in the Medical Board reports. Indeed, the Medical Board reports only discuss the portion of the Stony Brook record that attributes the cause of petitioner's condition to his wife's illness, seemingly ignoring the note about petitioner's counseling work. Similarly, regarding the South Oaks Hospital record, the Medical Board notes petitioner's wife's illness as a precipitant to the depression diagnosis, but does not mention the PTSD diagnosis.

Respondents also argue that certain medical reports that provide that petitioner suffered from PTSD are unpersuasive or conclusory, but fail to provide specific details supporting the respective provider's conclusions.

Regarding petitioner's claim of PTSD, the Medical Board opines that petitioner does not suffer from PTSD because the stressors petitioner described, counseling bereaved officers and attending funerals, especially for a police officer with many years of experience, do not rise to a level suggested for a diagnosis of PTSD, which would involve actual or threatened death or serious injury or other threat to one's physical integrity. However, the Medical Board provides no medical or other basis for this opinion, which ignores that petitioner was involved in the rescue and recovery on 9/11 and that petitioner was present when petitioner's experience at the WTC site when the second tower collapsed.

Next, in finding that petitioner was not incapacitated to fulfill his service as a police officer, the Medical Board noted that petitioner did not seek the assistance of the Police Department's PEU before his retirement and refers to letters from Dr. Knour of the PEU indicating that petitioner did not seek such assistance and retired on full duty status and without any restriction on his use of firearms. However, that petitioner retired without seeking PEU assistance is not necessarily probative of whether petitioner was then or later became disabled, particular when, as here, record demonstrates that petitioner was being treated outside of the NYPD before and at the time he retired.[6]

Thus, as the Medical Board disregarded, without explanation, crucial medical evidence indicating that petitioner suffers from a disabling medical condition following his service in connection with the events of 9/11, this matter must be remanded to the Medical Board for a new evaluation of petitioner's application for ADR. *See e.g. Matter of Weller v Kelly*, Sup Ct, NY County, Feb. 23, 2007, Schlesinger, J., Index No. 109357/2006, Slip Op, at 10 (remanding matter to Medical Board for further evaluation of petitioner's application for ADR where "critical evidence was overlooked, key facts were incorrect, and no explicit reasons were given for any of the Medical Board's three disapprovals. Nor were implicit reasons readily apparent.")

Petitioner also seeks to annul respondents' denial of his application to amend his ADR application to include a disabling coronary artery disease. Petitioner did not include a heart condition in his initial application for ADR submitted in November 2002 or in his subsequent

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[6]To the extent that the Medical Board relies on its own assessment of petitioner's mental status, such assessment is not entitled to judicial deference since although the Medical Board interviews the applicant, it does not perform full psychological examination. *Brady*, 2008 NY Slip Op 32529[U], n 5, citing *McAdams v Kelly*, 117 Misc 3d 1112 [a], *2.

application submitted in January 2006. However, the Board of Trustees "has discretion to expand a retired member's pending disability application to include heart disease where the disability from heart disease occurred at the time the applicant retired and where 'substantial equitable considerations warrant such actions'" *(Matter of Mulheren v Board of Trustees of Police Pension Fund, Art. II* (307 AD2d 129 [1st Dept 2003]).

Section 207-K of the New York General Municipal Law (the Heart Bill), upon which petitioner relies, provides that where a paid police or fire officer is partially or totally disabled by "diseases of the heart," and at the time he or she commenced service there was no evidence of any condition based upon physical examination, it shall be "presumptive evidence" that the condition "was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence" (General Municipal Law § 207-k [a]).

In support of his application, petitioner provides hospital records from 1994 and August 2002, and a letter from Dr. Steven L. Grainer, dated October 25, 2007. Dr. Grainer's letter states that petitioner's diagnosed coronary artery disease was "most likely a condition that was occurring for some period of time prior to" petitioner's initial contact with that medical group (Pet. Exh. S, at 3). While petitioner argues that it is evident that petitioner's pre-retirement 2002 atypical chest pain establishes that petitioner's CAD and CAD symptoms existed prior to his NYPD retirement in November 2002, this is not clear from the record.

In addition, petitioner's contention that he constantly complained of chest pain, shortness of breath, and mid-chest tightness and left-arm numbness throughout the 1990s and 2002 is without sufficient evidentiary support. The attending admission note from the medical record petitioner submits from Mather Hospital, dated August 8, 2002, reveals that petitioner was

[* 21]

admitted for chest pain, but denied any prior similar symptomatology (Pet., Exh. R). The cardiology notes from that 2002 record also indicate that petitioner's nuclear stress test was negative (*id.*). Moreover, the North Shore University Hospital record includes a "Cath lab Report–Interventional Report" from 2006, noting that petitioner had no prior cardiac history.

Next, in contrast to the circumstances in *Mulheren* (207 AD2d 129, *supra*), on which petitioner relies, here, it cannot be said that substantial equitable circumstances warrant an expansion of petitioner's application to include heart disease. In particular, unlike in *Mulheren,* in this case, there is no evidence that petitioner failed to include the heart disease in his original application based on a incorrect diagnosis. Furthermore, the petitioner in *Mulheren,* included symptoms of heart disease in his initial application, which is not the case here. Accordingly, it cannot be said that the Trustees acted arbitrarily or capriciously in denying petitioner's request to amend his ADR application to include coronary artery disease.

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of petitioner's application for ADR; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent of directing that the Medical Board conduct a further evaluation of petitioner's application for ADR and issue an expanded determination on the subject application and, upon issuance of an expanded determination, the Medical Board shall present the expanded determination to the Board of Trustees, and the petition is otherwise denied.

DATED: January 2, 2010

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).