

<b>Matter of Halaby v Kelly</b>
2010 NY Slip Op 30201(U)
January 21, 2010
Supreme Court, New York County
Docket Number: 0100541/09
Judge: Marcy S. Friedman
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SCANNED ON 1/29/2010

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

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

Index Number : 100541/2009  
HALABY, NORMANDA  
vs.  
KELLY, RAYMOND  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. 100541/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion is for Article 78

PAPERS NUMBERED  
1  
2

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No *Memos of Law 1/1-1/3*


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

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

**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: 1-21-10

  
\_\_\_\_\_  
J.S.C.  
**MARCY S. FRIEDMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
In the Matter of the Application of

NORMANDA HALABY,

Index No.: 100541/09

*Petitioner,*

DECISION/ORDER

For a Judgment under Article 78 of the 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.*

**UNFILED JUDGMENT**  
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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).

\_\_\_\_\_ x  
In this Article 78 proceeding, petitioner, a retired police officer, challenges a decision of  
respondent The Board of Trustees of the Police Pension Fund, Article II (“Board of Trustees”),  
denying petitioner’s application for accident disability retirement (“ADR”) benefits and instead  
awarding ordinary disability retirement (“ODR”) benefits. Petitioner claims that she is entitled to  
ADR benefits, based on a psychological disability resulting from her participation in the rescue  
and recovery efforts following the attacks on the World Trade Center on September 11, 2001.

After examining petitioner, reviewing her medical records, and evaluating the reports of  
doctors who examined her, the Medical Board Police Pension Fund, Article II (“Medical Board”

[\* 3]

or “Board”), by a determination dated February 9, 2004, recommended denial of petitioner’s application for ADR benefits and approval of ODR benefits. (Petition, Ex. I.) On June 9, 2004, the Board of Trustees concurred with the Medical Board’s recommendation. (Id., Ex. J.) The Medical Board reevaluated petitioner’s case on June 5, 2006, February 26, 2007, and December 3, 2007, and adhered to its original determination on all three occasions. (Petition, Exs. M, O, S.) On June 11, 2008, the Board of Trustees again reviewed petitioner’s case and reaffirmed its prior decision to disapprove her application for ADR benefits and instead approve ODR benefits. (Id., Ex. U.) Petitioner now seeks to have this determination annulled.

A reviewing court may not set aside the determination of the Board of Trustees denying accidental disability retirement, as a result of a tie vote, “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.’” (Matter of Meyer v Board of Trustees of the New York City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139, 145 [1997], rearg denied 90 NY2d 936, quoting Matter of Canfora v Board of Trustees of the Police Pension Fund of the Police Dept. of the City of New York, Art. II, 60 NY2d 347, 352 [1983].) Moreover, “a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the ‘substantial’ threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require ‘some credible evidence.’” (Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756 [1996].) Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (Matter of Borenstein, 88 NY2d at 761; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1<sup>st</sup> Dept 1999], lv denied 95 NY2d 769 [2000].) The courts “cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board.” (Matter of

[\* 4]  
Santoro v Board of Trustees of New York City Fire Dept. Art. 1-B Pension Fund, 217 AD2d 660 [2d Dept 1995].)

In reaching its determination, the Medical Board is bound by New York City Administrative Code § 13-252.1, also known as the World Trade Center (“WTC”) disability law, which provides a presumption of ADR for police officers injured during their participation in the post-9/11 World Trade Center rescue, recovery or clean-up efforts. The WTC disability law applies to police officers who have a qualifying World Trade Center condition as defined in § 2 of the Retirement and Social Security Law, which includes “post-traumatic stress disorder, anxiety, depression, or any combination of such conditions.” (§ 13-252.1[2][a]; Retirement and Social Security Law § 2[36][d].)

It is undisputed that petitioner participated in the World Trade Center rescue and recovery efforts. Petitioner claims that she is entitled to ADR benefits based on post-traumatic stress disorder (“PTSD”) and major depressive disorder resulting from her work in connection with the recovery, and that the Medical Board did not properly apply the WTC disability law presumption.

In its first report, dated February 9, 2004, the Medical Board noted that petitioner was admitted to the Lutheran Medical Center Psychiatric Service in October 2002 for severe depression. The Medical Board found, based on an interview of petitioner by Psychological Services after her discharge, that petitioner had a history of panic attacks and somatic symptoms for three years prior to her hospitalization. The Medical Board also based this finding on the reports of Drs. Joel Tricarico and Mark Sisti, a psychiatrist and psychologist, respectively, who treated petitioner for Obsessive Compulsive Disorder (“OCD”) and anxiety prior to 9/11. (See Answer, Ex. 2, ¶¶ 6-7.) The Medical Board further relied on the report of Dr. Catherine Lamstein, a New York Police Department psychologist, diagnosing petitioner with OCD and

major depression, and stating that petitioner had been suffering from these psychological disorders for three years prior to 2002. (Id., ¶ 5.) While the Medical Board did not specify the basis for disapproving petitioner for accident disability benefits in its February 9, 2004 report, the Medical Board stated, in its reaffirmance dated June 5, 2006, that petitioner's active treatment for OCD prior to 9/11 rebutted the presumption of the WTC disability law. (Id., Ex. 10, ¶ 6.) In its last evaluation of petitioner on December 3, 2007, the Medical Board considered new psychiatric evidence that petitioner presented, which consisted of a letter by her psychiatrist, Dr. Edward Sodaro, diagnosing her with PTSD. (Id., Ex. 21, ¶ 4.) However, the Medical Board also reviewed medical opinions which documented petitioner's history of OCD, and found that there was competent evidence to rebut the WTC disability law presumption. (Id., ¶¶ 6-7.)

Petitioner contends that, contrary to the Medical Board's finding, she suffers from PTSD. She relies on "Psychiatric Updates" by Dr. Sodaro that she submitted to the Board. Specifically, Dr. Sodaro stated in his November 13, 2007 update that "[t]hough she had a previous condition of obsessive compulsive disorder," the condition that "she suffered since 9/11/01 is a completely different illness, clearly unrelated to obsessive compulsive problems and clearly meeting the criteria for a diagnosis of posttraumatic stress disorder." (Petition, Ex. R at 2.) This opinion is consistent with Dr. Sodaro's finding, in his January 18, 2007 update, that petitioner's "disability was not due to any pre-existing condition" and that "[h]er involvement in the 9/11 aftermath did not precipitate her prior obsessive compulsive problems." (Id., Ex. N at 3.)

The medical evidence before the Board, however, was conflicting in that while the reports relied on by petitioner stated that she sustained PTSD as a result of her 9/11 work, other medical evidence concluded that her condition was the result of her pre-existing OCD and anxiety. At the Board's most recent evaluation of petitioner on December 3, 2007, it reviewed all of the

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materials that were presented to it, including the 2004 testimony of Dr. Tricarico. Dr. Tricarico testified there that “the presence of [the 9/11] tragedy seemed to exacerbate her anxiety” and that “the exacerbation that occurred after 9/11” was “principally injuring [to] her psychologically.” (Petition, Ex. I at 3.) The other medical evidence that the Board had before it included a letter from Dr. Tricarico, dated November 13, 2003, that petitioner’s anxiety was exacerbated by 9/11 (Answer, Ex. 5), as well as a report from Dr. Sodaro, dated November 16, 2004, which stated the same. (*Id.*, Ex. 22 at 9.) However, the other medical evidence that the Board reviewed, particularly the psychiatric update letters from Dr. Sodaro, dated January 18 and November 13, 2007, were to the contrary. In these letters, as discussed above, Dr. Sodaro concluded that petitioner’s diagnosis is PTSD and that her OCD, which he opined pre-dated petitioner’s 9/11 work, was unrelated to the PTSD that she developed subsequent to 9/11. He also stated in these letters that she was not suffering from OCD at the time of 9/11 and that it “has not been active for great periods of time.” (*Id.*, Exs. N and R at 3.) These psychiatric updates were therefore inconsistent with Dr. Tricarico’s diagnosis of petitioner. They were also in conflict with Dr. Sodaro’s previous evaluation of petitioner, as set forth in his 2004 report, in that he no longer claimed that petitioner’s 9/11 work exacerbated her prior condition, but rather maintained that the PTSD she suffered from 9/11 is completely unrelated to her OCD.

It was for the Medical Board, and is not now for the court, to weigh this conflicting evidence. (See Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756, *supra.*) Thus, the Board of Trustees’ determination of June 11, 2008, based on the Board’s determination, should be upheld.

In so holding, the court notes that this is not a case in which respondent failed to apply the proper standard of causation and neglected to determine whether petitioner’s work aggravated a


pre-existing condition. (See Matter of Tobin v Steisel, 64 NY2d 254, 257 [1985]; Matter of Petrella v Board of Trustees of the Police Pension Fund, 141 AD2d 361, 363 [1<sup>st</sup> Dept 1988].)

As stated above, the medical evidence on which petitioner relies explicitly states that the suffering she has experienced from her 9/11 work is completely unrelated to her previous condition of OCD and did not exacerbate it.

Accordingly, it is hereby ORDERED that the petition is dismissed in its entirety.

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

Dated: New York, New York  
January 21, 2010

  
\_\_\_\_\_  
MARCY FRIEDMAN, 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 1419).