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

HON. CAROL EDMEAD

PART 35

Index Number : 113017/2009

VALES, STEVEN

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 113017-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

UNFILED JUDGMENT

The judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To enter judgment, counsel or self-represented party must appear in person at the Judgment Clerk's Desk (Room [illegible]).

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the application of petitioner for an order and judgment, pursuant to CPLR Article 78, nullifying respondents' determination is denied, and the petition is hereby dismissed in its entirety; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for respondent.

This constitutes the decision and order of this court.

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

Dated: 2/23/10

HON. CAROL EDMEAD 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
COUNTY OF NEW YORK: PART 35

x

In the Matter of the Application of

STEVEN VALES,

Petitioner,

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.

x

Index No. 113017/2009

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Steven Vales ("petitioner") moves for an order and judgment, pursuant to CPLR Article 78, (1) nullifying the denial of his disability pension application by respondents 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"), The Board of Trustees, New York City Police Department (the "NYPD") and the City of New York (collectively, "respondents"), (2) compelling respondents to consider his application, and (3) remanding the matter to respondents to consider the legal arguments presented by petitioner. In the alternative, petitioner seeks an order directing the respondents to serve and file (1) all documents submitted to the Board of Trustees in connection with petitioner's retirement, not

included herein, and (2) copies of all medical records, reports or notes relating to petitioner that are on file with the Article II Pension Fund and/or NYPD, not included herein.

Background

On September 11, 2001, petitioner, a detective in the Emergency Services Unit ("ESU") of the NYPD, was a first-responder after the World Trade Center ("WTC") terrorist attack. Petitioner alleges in his Verified Petition that immediately following the completion of his rescue, recovery and clean-up work at the WTC, he complained of and was diagnosed as having suffered hearing loss as well as breathing problems. In November 2002, he decided to take a 20-year service retirement without applying for a disability pension. Petitioner alleges that his hearing continued to worsen thereafter.

On February 2, 2009, petitioner filed an application for Accident Disability Retirement under the World Trade Center Law, pursuant to New York City Administrative Code ("Admin. Code") §13-252.1 (the "WTC Disability Law"). In the application, petitioner stated: "As a result of my participation in the WTC disaster, I suffered ringing in both ears and loss of hearing in both ears. As a result, I am unable to perform full police duty, I request accident disability retirement" (see the "Application"). The application included supporting documentation, as well as a letter from Chet Lukaszewski, Esq. ("Mr. Lukaszewski"), petitioner's attorney.[1]

In a letter dated May 27, 2009, S. Andrew Schaffer, Deputy Commissioner, Legal Matters for the NYPD, informed Mr. Lukaszewski that petitioner's WTC application was not accepted because hearing loss is not one of the qualifying conditions covered by the WTC Disability Law (see the "May 27, 2009 letter").

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[1]Subsequently, Mr. Lukaszewski sent respondents follow-up letters in support of petitioner's application.

In a letter dated May 28, 2009, Mr. Lukaszewski once again requested that the NYPD accept petitioner's Application. Thereafter, petitioner filed the instant Verified Petition.

Petitioner argues that respondents' denial of his application was arbitrary, capricious, and legally deficient. Citing caselaw, petitioner contends that respondents interpreted the WTC Disability Law in an inappropriately narrow manner, to the detriment of petitioner, despite their duty to act fairly and equitably and in the interest of Pension Fund members, and despite the purpose and intent of the law, which is to protect WTC rescue workers. Respondents inappropriately decided that a condition must be specifically listed in the WTC Disability Law in order for it to be considered a WTC condition. Petitioner contends that the WTC Disability Law indicates that it applies to "any condition or impairment of health caused by a qualifying condition or impairment of health resulting in disability to a member who participated in WTC rescue, recovery or cleanup operations for a minimum of forty hours" (Admin. Code §13-252.1).

Petitioner goes on to cite several cases in which the Court criticized respondents for denying petitioners a WTC disability pension. Petitioner argues that respondents' interpretation of the WTC Disability Law defeats the Legislature's intent of protecting injured WTC rescue workers. By denying petitioner the right to apply for a WTC pension on the ground that the statute does not allow for conditions not listed on "the limited list of qualifying conditions which the drafters thought to include when writing the statute only a few years after the WTC attacks," respondents acted contrary to the legislative intent, which has produced a grossly unfair result, petitioner argues.

Petitioner also cites cases wherein the Court has held that respondents have acted improperly in disability pension matters in general. Petitioner argues that the decisions may be

relevant, as all involve respondents' being found to have not met applicable standards of review, to have misapplied a standard, or to have acted contrary to the purpose and intent of the pension laws. Petitioner also argues that the fact that there is almost no appellate case law related to the WTC Disability Law further supports that respondents acted arbitrarily and without legal basis.

Respondents oppose and seek to dismiss the petition, arguing that petitioner failed to demonstrate that respondents' rejection of his application was arbitrary or capricious, or a violation of lawful procedure, or an abuse of discretion, or affected by an error of law. Respondents contend that for an application pursuant to the WTC Disability Law to be considered, the applicant must allege that he is disabled from one of the qualifying WTC conditions as set forth in the Retirement and Social Security Law ("RSSL") §2(36), or at the very least, allege that the disabling condition or impairment of health was caused by one of these qualifying WTC conditions. Here, petitioner's Application does not meet this basic requirement. Specifically, hearing loss is not one of the qualifying WTC conditions set forth in RSSL §2(36), and is therefore not a disabling condition for which petitioner would be entitled to the benefits under the WTC Disability Law.

Respondents note that even though some of the medical evidence presented by petitioner in his Petition indicated that he suffered hearing loss prior to his retirement in November 2002, petitioner did not submit an application pursuant to Admin. Code §13-252, in which he could have alleged that his hearing loss was an accident caused by WTC exposure. Petitioner's failure to even allege that he suffered from a disabling condition or impairment of health that was *caused* by one of the qualifying WTC conditions also precludes him from qualifying for benefits under the WTC Disability Law.

Respondents further argue that the plain language of the WTC Disability Law does not permit this Court to interpret this Law to include hearing loss as one of the qualifying WTC conditions since RSSL §2(36) specifically defines the qualifying WTC conditions. The statutory language of the WTC Disability Law is clear and unambiguous and must be given effect. Moreover, New York Courts have uniformly stressed the necessity of abiding by statutorily prescribed requirements as a means of preserving the integrity of public retirement systems. Indeed, the Courts have consistently rejected attempts, on equitable grounds or otherwise, to modify or alter the requirements of the pension laws, respondents argue.

Finally, respondents argue that the cases petitioner cites are not precedent, and that none of the cases petitioner cites broadly defines "qualifying WTC conditions" beyond those specifically listed in RSSL §2(36).[2]

In reply, petitioner points out that he never contended that the matters in the cases he cited were on point; instead, petitioner sought to illustrate how the Supreme Court has regularly found these respondents to have acted improperly in disability pension matters, a number of which involve WTC applications. And, while these cases are all matters where applications were accepted and denied, perhaps the Court will deem the decisions relevant for consideration, as all involve the respondents' being found to have not met applicable standards of review, to have misapplied a standard, or to have acted contrary to the purpose and intent of the pension laws. Petitioner also distinguishes the cases on which respondents rely.

Petitioner further argues that respondents failed to overcome his arguments regarding the

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[2]The Court notes that respondents discuss an earlier application submitted by petitioner on June 8, 2006, in which petitioner alleged that he was disabled due to, *inter alia*, "diseases of the upper respiratory tract." On August 8, 2007, respondents denied petitioner's application. Petitioner does not contest that decision herein.

legislative intent of the WTC Disability Law. The rule that the Courts are not free to modify, alter or relax the requirements of pension laws apply to those pension laws that are clear on their face, and whose strict interpretation would not produce a result contrary to the laws' intent, petitioner contends. When the plain meaning of a statute has produced results that are plainly at variance with the policy of the legislation as a whole, the Courts have followed the statute's purpose instead, petitioner argues.[3]

While the cases related to the WTC Disability Law are limited, there is a large body of caselaw related to the disability pension law known as the Heart Bill (General Municipal Law §207-k), which, like the WTC Disability Law, creates a presumption of causation in favor of applicant police officers diagnosed with heart ailments. In connection with the Heart Bill, Courts have indicated that the statutory intent in disability pension cases cannot be ignored if the plain language of a law would controvert said intent. Thus, the lawmakers' intent in connection with the WTC Disability Law should not be ignored.

Discussion

CPLR §7803 states that the court review of a determination of an agency consists of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion *(see Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept

[3]The Court notes that the parties dispute whether NYPD "Chief Allee" was awarded a WTC disability pension for hearing loss. Petitioner alleges Chief Allee was awarded such a pension; respondents contend that Chief Allee received an ADR pension for hearing loss pursuant to Admin. Code §13-252, not the WTC Disability Law (see petitioner's MOL, p. 8; respondents' MOL, pp. 6-7, footnote 3). In reply, petitioner argues that respondents "failed to comment on the fact that Chief Allee was granted a disability pension for World Trade Center related hearing loss; thus evidencing that conditions other than those listed as qualifying conditions, do in fact disable WTC rescue workers" (reply, pp. 6-7).

1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv den*ied 70 NY2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and . . . without regard to the facts" *(Pell v Board of Education*, 34 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Pell* at 231).

This same standard applies to Article 78 proceedings challenging a disability determination (*Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760 [1996]). Thus, the Court's review of the decision to deny pension benefits is limited to whether the decision was "based on 'some credible evidence' and was not arbitrary or capricious (*id.* at 761). "This standard is set because the court lacks the expertise to 'weigh the medical evidence or substitute [its] own judgment for that of the Medical Board'" (*Kringdon v Kelly*, Sup Ct, New York County, October 30, 2006, Gische, J., Index No. 101941/06, quoting *Borenstein* at 761). The court's function is completed on finding that a rational basis supports an agency's determination (*Howard v Wyman*, 28 NY2d 434, 438 [1971]). Further, where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]).

Admin. Code §13-252.1, titled "Accidental disability retirement; World Trade Center presumption," creates a presumption of accidental disability and provides in relevant part:

> (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by *a qualifying World Trade Center 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.
(Emphasis added)
(*Serrano v Kelly*, 14 Misc 3d 1203, 831 NYS2d 362 [Sup Ct New York County 2006]).

RSSL §2(36) provides in relevant part:

(a) "Qualifying World Trade Center condition" shall mean 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 qualifying period . . .

(b) "Qualifying condition or impairment of health" shall mean a qualifying physical condition, or a qualifying psychological condition, or both . . .

(c) "Qualifying physical condition" shall mean one or more of the following: (i) diseases of the upper respiratory tract and mucosae, including conditions such as rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, and upper airway hyper-reactivity, or a combination of such conditions; (ii) diseases of the lower respiratory tract, including but not limited to tracheo-bronchitis, bronchitis, chronic obstructive pulmonary disease, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic; (iii) diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure; (iv) diseases of the skin such as conjunctivitis, contact dermatitis or burns, either acute or chronic in nature, infectious, irritant, allergic, idiopathic or non-specific reactive in nature, caused by exposure or aggravated by exposure; or (v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease.

Where a police officer has applied for benefits under the WTC Disability Law, he or she must demonstrate that he is disabled by any condition or impairment of health caused by a qualifying WTC condition (*McAdams v Kelly*, 2007 WL 2965402, 4 [Sup Ct, New York County 2007] [holding that the "'World Trade Center Bill' provides that any illness, physical or mental, *as specified in the law,* that results in disability to a police officer who participated in World Trade Center rescue, recovery, or cleanup operations . . . shall be presumptive evidence that the disability was incurred in the performance and discharge of duty and the natural and proximate

result of an accident, unless the Department can prove the contrary by competent evidence" (emphasis added)]).

The caselaw makes clear that the Courts strictly construe the definition of a qualifying WTC condition, pursuant to RSSL §2(36)(c). In *Guerra v Scoppetta*, 2009 WL 3125615, 5 [Sup Ct, New York County 2009]), the Court held that the petitioner was not entitled to benefits under the WTC Disability Law because kidney disease was not listed in RSSL §2(36)(c) as a "qualifying physical condition." The Court noted that RSSL §2(36) defines "qualifying World Trade Center condition" to include in subsection (c) various "qualifying physical conditions," including various respiratory and pulmonary diseases, and "(v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease." Petitioner also attempted to fall within the qualifying condition of a "new onset disease," asserting that he was exposed to toxins at the World Trade Center site. However, the Court stated, "kidney disease is not among the possible new onset diseases specified in RSSL §2(36)(c)." The Court noted that petitioner conceded that the condition he developed was not a "qualifying condition" under the WTC Disability Law. Thus, the Court concluded that "upon the instant record, it cannot be said that petitioner has met his initial burden of establishing that he was disabled by a qualifying condition . . . to invoke the [WTC] presumption "(*id.* at 6).

In *Serrano v Kelly* (2006 WL 3691277, 3 [Sup Ct, New York County 2006]), the Court held that petitioner's reliance on Admin. Code §13-252.1 was misplaced, because "atrial fibrillation" was not included in the definition of a "qualifying condition or impairment of health" in subsection (c), and "petitioner has not shown that he suffers from any of the diseases

listed as a 'qualifying condition or impairment of health.'"

Here, the Court is constrained to affirm respondents' denial of petitioner's Application, because, contrary to petitioner's arguments, respondents' determination was not arbitrary, capricious or legally deficient. It is undisputed that petitioner applied for accidental disability retirement under the WTC Disability Law, based on a loss of hearing in both ears (*see* the Application). It further is undisputed that "hearing loss" is not included in the definition of "qualifying condition or impairment of health" in RSSL §2(36)(c). Respondents' clearly articulated their reason for denying petitioner's Application in the May 27, 2009 letter:

> As you are aware, Administrative Code §13-252.1 lists qualifying medical conditions by which an eligible employee would be found to be disabled. Hearing loss is not one of these qualifying conditions. It is the opinion of this office, as well as the New York City Law Department, that the list of qualifying conditions in the law is complete.

Thus, "[g]iven the clear and consistent explanation of [respondents], which is supported by credible evidence, the Court lacks discretion to remand the matter to respondents for further consideration" (*Serrano* at 4).

Further, petitioner's argument that respondents misinterpreted the WTC Disability Law lacks merit. As discussed above, the Court's review herein is limited to determining whether respondents' decision was rationally based (*Bornstein* at 761; *Pell* at 231). Here, petitioner provides no evidence that the list of qualified conditions in the WTC Disability Law is merely suggestive and not exhaustive, as a matter of law. Instead, the caselaw petitioner cites in support of his argument is either distinguishable or not on point.

For example, in *Triola v Kelly* (Sup Ct, New York County, November 7, 2009, Shafer, J., index No. 106490/09), the petitioner submitted an application pursuant to the WTC Disability

Law, claiming that he was disabled due to a number of *qualifying* WTC conditions, as well as sleep apnea, which is *not* a listed as a qualifying WTC condition. After considering the petitioner's application, the Medical Board determined that the petitioner was not disabled from any of the qualifying WTC conditions. The Board further determined that while petitioner was disabled from sleep apnea, there was a lack of credible evidence that the condition was *caused* by a qualifying WTC condition, specifically petitioner's reactive airway dysfunction syndrome ("RADS") and/or reflux disease ("GERD"), or by WTC exposure. In vacating and annulling the respondents' determination, the Court held that it "can discern no medical or scientific evidence, credible or otherwise, that supports the Medical Board's determination that petitioner's sleep apnea syndrome *is not causally related* to his RADS, GERD and bronchitis, which the Medical Board has determined was caused by WTC exposure (*id.* at 14) (emphasis added). However, contrary to petitioner's arguments, the Court did not go as far as to rule on whether sleep apnea is a qualifying condition; nor did the Court rule on whether the list of qualifying conditions in RSSL §2(36)(c) was exhaustive or merely suggestive. Instead, the Court clarified its holding in the last paragraph of the decision:

> This is not to say that there is a definite scientific or medical link between sleep apnea and WTC exposure, RADS, GERD or chronic bronchitis. The court is simply stating that there is no credible evidence specified on the record that could support the Medical Board's conclusion at this time. For this reason, the court finds that a remand is appropriate.
> (*Id.* at 15)

Further, unlike the matter in *Triola*, here there is no evidence in the record indicating that plaintiff's hearing loss was causally related to any one of the qualifying WTC conditions.

In *DeTemple v Kelly* (Sup Ct, New York County, June 15, 2009, Lehner, J., index No.

116429/2009), the petitioner requested that the Court either annul the Board of Trustees' denial of his request to amend his accidental disability retirement application to include a heart condition, or direct the Board to reconsider the petitioner's request for the amendment. The evidence in the record demonstrated, that instead of voting on petitioner's request for an amendment, the Board acted to "so move," which the Court found to be inappropriate. The Court did not reach the merits of petition; it only remanded the matter to the Board "so there can be a vote by the entire Board as to whether or not the petitioner is able to amend this application," *i.e.* render a proper determination (*id.* at 15-16).

McGrath v Kelly (Sup Ct, New York County, June 10, 2009, Kornreich, J., index No. 113535/2008) involved a dispute over whether respondents properly determined that the petitioner, who suffered from psychological disorders, had not participated in the WTC disaster and clean-up. The Court annulled respondents' determination on the ground that they had not properly considered all of the evidence, including the petitioner's copies of overtime slips purporting to establish that he had met the 40-hour requirement of the WTC Disability Law.

In *Kringdon v Kelly* (Sup Ct, New York County, October 30, 2006, Gische, J., index No. 101941/06), the Court held that the Medical Board had not properly determined whether the petitioner suffered post traumatic stress disorder, which is among the qualified psychological conditions listed in Admin. Code §13-252.1, and whether the condition was caused by her service at the WTC on 9/11.

The rest of the cases petitioner cites similarly fail to demonstrate that respondents misinterpreted the WTC Disability Law so as to preclude ailments not specifically listed as a qualifying condition. Accordingly, his Petition is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of petitioner for an order and judgment, pursuant to CPLR Article 78, nullifying respondents' determination is denied, and the petition is hereby dismissed in its entirety; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for respondent.

This constitutes the decision and order of this court.

Dated: February 23, 2010

Carol Robinson Edmead, J.S.C