

<b>Matter of Kuhn v Kelly</b>
2010 NY Slip Op 30370(U)
February 23, 2010
Supreme Court, New York County
Docket Number: 114366/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER  
Justice

PART 15

Kuhn, Bryan

INDEX NO. 114366109

- v -

MOTION DATE \_\_\_\_\_

Kelly, Raymond

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED
<u>1-4</u>

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**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).

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

Dated: 2-23-10

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 15

-----X

In the Matter of the Application of  
BRYAN KUHN,

Petitioner,

-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

HON. EILEEN A. RAKOWER:

Index No.  
114366/09

DECISION  
and ORDER

Mot. Seq.  
001

Petitioner Bryan Kuhn ("Petitioner"), a retired New York Police Department ("NYPD") officer, brings the instant Article 78 Petition seeking to annul the decision of Respondent Board of Trustees of the Police Pension Fund ("Board of Trustees") to deny Petitioner accidental disability retirement ("ADR"), and to instead award him ordinary disability retirement ("ODR") upon his separation from service with the NYPD.

Petitioner was appointed to the NYPD on February 28, 1994 and, pursuant to New York City Administrative Code ("NYC Admin. Code") §13-214, became a member of the New York City Police Pension Fund. On September 11, 2006, Petitioner filed an ADR application claiming that he suffered from Post-Traumatic Stress Disorder ("PTSD"), constant fatigue, depression, inability to concentrate, anxiety, and "flashbacks as a result of the World Trade Center Disaster." Petitioner claimed that, since the 9/11 attacks he has been "unable to function as a full duty police officer." Earlier, on May 30, 2006, Petitioner submitted a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations. Petitioner claims in his petition that while performing search and

rescue duties at the World Trade Center site ("WTC"), "he discovered dead bodies and personal remains of victims" of the 9/11 attacks.

On May 31, 2007, the Police Commissioner signed an Ordinary Disability Examination Order directing the Medical Board to examine Petitioner to ascertain whether he was disabled from performing police duties. The Medical Board examined Petitioner on July 6, 2007. The Medical Board reviewed progress notes from March 22, 2006 through September 29, 2006 from Petitioner's psychiatrist; reports from social worker Alan Mackie dated May 19, 2006 through October 17, 2006; reports from internist Dr. Alicia Weissman dated September 20, 2006 through September 28, 2006; and 2007 reports from the NYPD's Psychological Evaluation Section ("PES").

A number of reports noted that Petitioner first had an episode of depression in 1998, which resulted in his being placed on restrictive duty. While Petitioner denied suicidal ideation during this earlier episode, Petitioner did at the time state that he would feel better having his firearms removed because he feared feeling "an impulse to do something foolish."

According to the PES report, Petitioner was referred to PES by a superior officer on February 16, 2006 based upon a second episode of depression. Petitioner stated that he felt depressed and overwhelmed. Petitioner was upset with a recent assignment, and was also stressed because both his father and his mother-in-law were recently diagnosed with cancer. Petitioner would later disclose that, on the day he was referred to PES, Petitioner had sat in his car with his firearm on the seat next to him, and contemplated committing suicide by shooting himself.

The Medical Board also interviewed Petitioner. The Medical Board reported that "[Petitioner] came in and stated immediately that it has taken a long time to come out since September 11, 2001. But, it finally came out.... The officer was attempting to impress the physicians during his examination today with all his symptoms from the past coming from September 11, 2001." The Board further noted that "[w]hat the officer did reveal was extremely poor self image and an emphasis on appearing masculine to his wife and others, and how he blamed stresses and circumstances for his depressive episodes. It appears that he had a long history of mood disorders that occurred when having to fulfill daily responsibilities of adult living."

Based upon its review of the medical evidence and its interview with Petitioner, the Medical Board unanimously found that Petitioner was unable to perform the duties of a police officer; and recommended approval of ODR and disapproval of ADR.

On November 14, 2007, the Board of Trustees remanded Petitioner's case to the Medical Board for consideration of new evidence. Petitioner's case was again reviewed by the Medical Board on February 15, 2008. The new evidence reviewed by the Medical Board consisted of a November 6, 2007 letter from social worker Alan Mackie. Mackie stated that Petitioner was receiving treatment at the Center for Stress Reduction. Further, Mackie opined that Petitioner's symptoms of depression were exacerbated by his experience at the WTC site in the aftermath of the 9/11 attacks. The Medical Board also interviewed Petitioner again.

The Medical Board was unswayed by the new evidence offered by Petitioner, finding that there was "very little credibility" to Petitioner's assertion that his depression was related to his service at the WTC site. Nevertheless, the Medical Board deferred its decision pending additional documentation from the World Trade Center Treatment Program at the Mt. Sinai School of Medicine ("Mt. Sinai WTC Program"), into which Petitioner had recently enrolled.

The Medical Board reviewed Petitioner's ADR application again on May 2, 2008. Petitioner provided a note dated February 19, 2008 from Dr. Pamela Bassin, a psychiatrist in the Mt. Sinai WTC Program. Dr. Bassin opined that Petitioner had a history of irritability, fatigue, insomnia, avoidance, emotional numbing, intrusive thoughts and nightmares in relation to his experience at the WTC site. The note states that Petitioner "denies having any such symptoms prior to 9/11 and no functional impairment at his job or socially prior to 9/11."

After review of the note from Dr. Bassin, the Medical Board reaffirmed its prior determination that Petitioner should be awarded ODR. The Medical Board stated that it "finds poor credibility in these short statements that deny the officer's chronology of symptoms of recurrent major depressive disorder," and further found that the note "do[es] not explain how these symptoms that have persisted for ten years are related to the exposure to the [WTC] site, nor do they explain the officer's ability to perform full duty for the five years following his exposure to the [WTC] site."

On October 8, 2008, the Board of Trustees remanded Petitioner's ADR application based upon the presentation of new evidence. The Medical Board reviewed Petitioner's application once again on December 5, 2008. The new evidence presented by Petitioner consisted of letters dated September 29, 2008 and October 6, 2008 from Dr. Phillip Seibell, a psychiatrist from the Mt. Sinai WTC Program. Dr. Seibell opined that Petitioner's depressive symptoms intensified as a direct result of his experience at the WTC site after 9/11. Although Petitioner worked for five years following 9/11 without incident, Dr. Seibell concluded that "his symptoms intensified throughout that period, ultimately rendering him unable to work."

Based on the foregoing, the Medical Board rescinded its prior recommendation that Petitioner be awarded ADR. In so doing, the Medical Board reasoned as follows:

In summary, the legal concept that work at the World Trade Center site may intensify or aggravate a previous condition, or that the symptoms could be delayed for any number appears, evidently apply to this officer. It does in the opinion of physicians seem illogical trauma to the body or the psyche in other area, does not get fully delayed so that the individual is fully functional for a great number of years. However the law does allow the legal argument that the officer who worked more than 40 hours be given the right to claim that he had Post Traumatic Stress Disorder (PTSD). [*sic*]

On February 11, 2009, the Board of Trustees addressed Petitioner's ADR application. Chairperson Rosemary DeBellis stated on the record that she found the Medical Board's findings to be "convoluted and confusing," and the matter was remanded to the Medical Board to "actually answer" whether Petitioner's "underlying psychiatric condition [was] aggravated by the events of 9/11...."

The Medical Board addressed Petitioner's ADR application for the final time on April 24, 2009. In that meeting, the Medical Board concluded that there was "little credibility" to Petitioner's claim that he suffered from PTSD as a result of his participation at the WTC site. As for whether his depressive disorder was caused or aggravated by service at the WTC site, the Medical Board stated that it

“found minimal credibility in the officer’s self report and a biased report by the Mount Sinai group,” both of which explained that Petitioner’s depression was exacerbated by his service at the WTC site after 9/11. Accordingly, the Medical Board rescinded its previous decision and recommended that Petitioner be awarded ODR and denied ADR.

On July 8, 2009 the Board of Trustees voted on Petitioner’s ADR application. The result was a tie vote of 6-6 which, pursuant to *City of New York v. Schoeck*, 294 N.Y. 559 [1945], results in the applicant being awarded ODR. This petition ensued.

NYC Admin. Code §13-252.1 provides any individual who participated in rescue operations at the World Trade Center on September 11, 2001 with a presumption that his or her disability was incurred in the course of said rescue operations. The First Department has held that this presumption is rebutted where there is “credible evidence” in the record to support the Medical Board’s determination that a retiree’s disability was not the natural and proximate result of his or her service at the WTC site (*Jefferson v. Kelly*, 51 A.D.3d 536, 537 [1st Dept. 2008]) (citations omitted). Further, where, a retiree is awarded ODR by virtue of a tie vote of the Board of Trustees, a reviewing court may only overturn the award if it finds that the disability was the natural and proximate result of a service-related accident as a matter of law (*see Canfora v. Board of Trustees*, 60 N.Y.2d 347, 352 [1983]).

Here, the Court cannot conclude as a matter of law that Petitioner’s service at the WTC site following the 9/11 attacks either caused Petitioner’s most recent depressive episode, or exacerbated a preexisting condition. There is evidence in the record that Petitioner suffered a bout with depression in 1998, years prior to the 9/11 attacks. Moreover, the fact that Petitioner did not have any depressive or other psychological episodes which precluded him from active duty with the NYPD for a five year period following 9/11 lead the Medical Board to question the credibility of Petitioner’s assertion of a causal link between 9/11 and his most recent depressive episode. Accordingly, there is some credible evidence in the record which would rebut the presumption afforded by §13-252.1. Finally, the difference of medical opinion between the Medical Board and some of Petitioner’s treating psychologists as to whether Petitioner suffered from PTSD precludes the finding that Petitioner had PTSD as a matter of law, much less that his alleged PTSD was, as a matter of law, the proximate result of his service at the WTC site. In short,

[\* 7]

since the record admits more than one inference as to the cause of Petitioner's disability, this Court is bound to uphold the Board of Trustees' award of ODR (*see Romanelli v. Board of Trustees*, 210 A.D.2d 232, 233 [2nd Dept. 1994]).

Wherefore, it is hereby

ADJUDGED that Petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 23, 2010

  
EILEEN A. RAKOWER, 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).