

<b>Matter of Quinn v Kelly</b>
2010 NY Slip Op 30558(U)
March 12, 2010
Supreme Court, New York County
Docket Number: 111048/2009
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Ldois

PART 6

Index Number : 111048/2009  
**QUINN, TIMOTHY**  
 VS.  
**KELLY, RAYMOND**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE 12/11/09  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for Article 78 relief

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

PAPERS NUMBERED  
1-27  
1A-49A  
28-30

Cross-Motion:  Yes  No

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

Petition  
**MOTION DECIDED IN ACCORDANCE WITH**  
**ACCOMPANYING DECISION AND ORDER** and judgment

**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  
 408).

Dated: 3/12/10

JBL  
 J.S.C.

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  
NEW YORK COUNTY**

-----X  
In the Matter of the Application of  
TIMOTHY QUINN,

Petitioner,

Index No. 111048/09

For a Judgment under Article 78 of the  
Civil Practice Law and Rules

**Decision, Order,  
and Judgment**

-against-

RAYMOND KELLY, as the Police Commissioner of the  
City of New York, and as Chairman of the Board of  
Trustees of the Police Pension Fund, Article II, **THE BOARD**  
OF TRUSTEES of the Police Pension Fund, **Article II**  
NEW YORK CITY POLICE DEPARTMENT  
THE CITY OF NEW YORK

*Not to be construed by the County Clerk  
and copies of entry cannot be served based hereon. To  
appear in person at the Judgment Clerk's Desk (Room  
1412).*

Respondents.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Petitioner Timothy Quinn brings this proceeding under Article 78 of the C.P.L.R. to annul the decision of respondent The Board of Trustees of the Police Pension Fund (the "PPF"), which denied him a line of duty Accident Disability Retirement allowance ("ADR") and granted him Ordinary Disability Retirement ("ODR"). The other respondents are Raymond Kelly, as the police commissioner and as chairman of the PPF; the New York City Police Department (the "NYPD"); and the City of New York (the "City"). For the reasons stated below, the petition is denied.

On July 8, 1985, petitioner became an NYPD Police Officer. He is currently retired; his inability to be approved for ADR payments is the basis of this Article 78 petition. Petitioner argues that he is entitled to ADR as a result of his cardiomyopathy. The cause of petitioner's condition is disputed. The court notes that petitioner also suffers from coronary artery disease and reactive airways dysfunction

syndrome; however, he has never claimed that the two afflictions are disabling.

Before petitioner was permitted to work as an NYPD officer, he underwent physical and mental examinations. The physical examinations revealed no signs of cardiac ailments. On September 21, 2000, petitioner underwent a Dual Isotope Resting Thallium/Stress Myoview One Day Protocol after experiencing chest pain. According to a letter from Cary Hirsch, M.D., dated November 9, 2000, the stress Thallium test produced normal results; “[h]owever at peak exercise [petitioner] had frequent [pre-mature heart beats] with ventricular couplets and one 3-beat run of ventricular tachycardia.” Dr. Hirsch also conducted a physical examination of petitioner on November 9. Petitioner had a blood pressure of 144/80 and a pulse in the 60s with frequent pre-mature heart beats. Dr. Hirsch also noted that petitioner’s family medical history presented risk factors of coronary artery disease. Dr. Hirsch recommended a echocardiogram and prescribed Atenelol. An echocardiogram report, dated November 15, 2000, revealed dilation of the aortic root and left atrium; mild chordal bucking of the mitral valve, with mitral valve prolapse and mild mitral regurgitation; minimal left ventricular diastolic dysfunction; and a slightly thinning and mildly hypokinetic septum.

After the September 11, 2001 terrorist attacks, petitioner assisted in the clean-up operation; in May 2002, he was assigned to the Staten Island Landfill. After a few days of work, he began sneeze and cough, his eyes watered, and he felt nauseous. He soon came down with sinusitis and a respiratory viral infection. On December 12, 2003, petitioner underwent a cardiac catheterization. According to Dr. Hirsch’s diagnostic report, the test revealed cardiomyopathy and coronary artery disease. On April 15, 2004, petitioner underwent another echocardiogram, which revealed “moderate global systolic

dysfunction.” A rested gated blood pool scan, also conducted on April 15, revealed an enlarged and abnormally functioning left ventricle. Two Holter Monitors were performed in April 2004 and March 2005; both revealed premature ventricular contractions, but no ventricular tachycardia. On June 3, 2005, petitioner filed an ADR application.

The Medical Board reviewed the application and interviewed petitioner on or about June 10, 2005. The Board discussed the above-mentioned test results and noted petitioner’s complaints of fatigue and heart palpitations. The Board measured petitioner’s blood pressure at 110/70. The Board concluded that petitioner’s cardiomyopathy was disabling. The Board further concluded that the cause of the cardiomyopathy was unknown; therefore, petitioner, though entitled to ODR, was not entitled to ADR. Petitioner withdrew his ODR application, and on April 12, 2006, petitioner commenced an Article 78 proceeding to challenge the Board’s determination, under Index Number 105093/06. In a stipulation, petitioner agreed to withdraw the petition and respondents agreed to review the ADR application again. On August 25, 2006, the Medical Board disapproved the application, concluding that there was no known origin of petitioner’s cardiomyopathy. On November 1, 2006, the Honorable Kibbie F. Payne allowed the petition to be withdrawn and stated that petitioner could appeal the Medical Board’s August 25, 2006 determination once he received it.

On January 26, 2007, Raymond Catania, D.O., examined petitioner, and expressed in a letter his belief that petitioner’s cardiomyopathy was caused by his 9/11 recovery work. Dr. Catania also noted that petitioner suffered from breathing problems and coughing in May 2002, symptoms caused by a pulmonary viral infection. Dr. Catania believed that the pulmonary infection made petitioner

predisposed "to viral infection . . . and may be implicated in the development of viral cardiomyopathy[.]" Mayank Shah, M.D., who had been treating petitioner since 2002, also wrote a letter, dated April 27, 2007, in which he stated that petitioner possible had viral cardiomyopathy and his "heart condition and respiratory ailments are related to his work at [the] Staten Island Landfill in May 2002." On May 3, 2007, Frank L. Acerra, D.O., from Beth Israel Medical Center's pulmonary and critical care division, diagnosed petitioner with Reactive Airways Dysfunction Syndrome (RADS), a "syndrome [with] . . . clinical manifestations indistinguishable from asthma." As a result of these letters, the Medical Board re-reviewed petitioner's application for ADR on May 4, 2007. Petitioner did not claim that RADS was a disability. The Board measured petitioner's blood pressure at 120/80. The Board took note of petitioner's breathing problems and cardiomyopathy, but denied the application on the grounds that "there is no known causative relationship between exposure to the toxic fumes at the World Trade Center and cardiomyopathy." The Board also noted that petitioner was experiencing heart abnormalities months before he was assigned to 9/11 clean-up operations. Its final diagnosis was cardiomyopathy of unknown origin, and the Board denied the application.

On September 10, 2007, Dr. Catania sent a letter to the Board disputing the Board's finding that petitioner had cardiac abnormalities before September 11, 2001. Dr. Catania asserted that the evidence of cardiac disease occurred after 9/11. Dr. Hirsch, in an October 15, 2007 letter, wrote that petitioner did not have cardiomyopathy when he began treating him in 2000. Dr. Acerra also wrote a letter, dated June 26, 2008, stating that "[t]here is no doubt that [petitioner's] RADS resulted from a high level of inhalation exposure to a toxic substance during his work at the Staten Island Landfill in 2002." Dr. Acerra also expressed his belief that the cardiomyopathy resulted from the same toxic exposure. The letters led to a

new review by the Medical Board on September 19, 2008. The Board measured petitioner's blood pressure at 120/80. The Board again denied ADR. The Board agreed with Dr. Hirsch that a viral infection can result in cardiomyopathy, but noted that such causes of cardiomyopathy are not covered by the "Heart Bill." The Board doubted that the cardiomyopathy was caused by a viral infection, because petitioner had documented irregular heartbeats that were "the first manifestation of his cardiomyopathy." The Board further noted that there is no proven link between World Trade Center ("WTC") toxins and cardiomyopathy. Petitioner's RADS was acknowledged but not analyzed as a disability because he did not claim it to be one.

Petitioner argues that his cardiomyopathy entitles him to ADR, because the Medical Board has not adequately rebutted the presumption of ADR afforded to him through General Municipal Law § 207-k. Petitioner argues that no credible evidence supports the conclusion that the cardiomyopathy is of an unknown origin. He does not claim that he is disabled by coronary artery disease or RADS.

ADR benefits are available when an examination and investigation shows that the applicant is physically or mentally incapacitated for the performance of duty as a natural and proximate result of an accidental injury received in the line of duty, and that such disability was not the result of willful negligence on the part of the applicant. See Administrative Code of City of New York § 13-252. If the applicant for ADR claims that he is disabled by a cardiac disease, General Municipal Law § 207-k, commonly known as the "Heart Bill", provides for a presumption in favor of accidental line of duty causation as long as the applicant "successfully passed a physical examination on entry into the service of such respective department, which examination failed to reveal any evidence of such condition . . . unless

the contrary be proved by competent evidence.” In order to rebut this presumption, the Board must rule out stress as the cause of the heart ailment. In re Seldon v. Kelly, 21 A.D.3d 840, 840-41 (1st Dep’t 2005); see also In re Taribuono v. Board of Trustees of New York City, 240 A.D.2d 327 (1st Dep’t 1997). If an applicant claims that his heart ailment is related to a viral infection, he is not entitled to the “Heart Bill” presumption. See In re Seldon, 21 A.D.3d at 841. Without a presumption, the applicant for ADR benefits has the burden of proving that the disability is causally related to an injury sustained in the line of duty. See In re Drayson v. Bd. of Trs., 37 A.D.2d 378, 380 (1st Dep’t 1971).


“In an article 78 proceeding challenging the disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious.” In re Borenstein v. N.Y.C. Empl. Ret. Sys., 88 N.Y.2d 756, 760 (1996) (citations omitted). Courts have annulled determinations of the Medical Board and remanded for further review when medical issues presented by the petitioner are not adequately addressed or when medical evidence is insufficient to sustain the determination. See, e.g., In re Stack v. Bd. of Trs., 38 A.D.3d 562 (2d Dep’t 2007); In re Rodriguez v. Bd. of Trs., 3 A.D.3d 501 (2d Dep’t 2004). The courts must not review the facts regarding the weight of the evidence, unless there is a “substantial evidence” question. In re Pell v. Bd. of Ed., 34 N.Y.2d 222, 230 (1974). The Medical Board may validly rely on its own medical opinion, even where the petitioner presents evidence contrary to the Board’s opinion, so long as the opinion is rationally based in the record. See Tobin v. Steisel, 64 N.Y.2d 254, 259 (1985).

The Medical Board’s determination that petitioner’s cardiomyopathy was not caused in the line of duty was rationally based on sufficient evidence. The Board adequately ruled out stress as the

cause of petitioner's cardiomyopathy. At each review, petitioner's blood pressure was taken with normal results. Moreover, none of petitioner's doctors argued that the cardiomyopathy was stress related. Instead, petitioner's doctors argued that his cardiomyopathy was caused by a viral infection likely due to airborne toxins. Since viral causes of cardiomyopathy are not covered by the "I Heart Bill" presumption, the burden was on petitioner to prove that his cardiomyopathy was caused in the line of duty. Petitioner failed to present any studies or treatises that support his doctors' contentions that the cardiomyopathy was caused by 9/11 toxins. Furthermore, the Board correctly noted that petitioner was suffering from heart ailments that pre-date his 9/11 recovery work. The Board can validly rely on its own expertise in concluding that these heart ailments were manifestations of the cardiomyopathy.

The PPF's decision to deny petitioner ADR is affirmed and the petition is dismissed in its entirety. This constitutes the decision, order, and judgment of the court.

Dated: March 12, 2010


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 JOAN B. LOBIS, J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1478).