

**Matter of Bitchatchi v Board of Trustees of the N.Y.
City Police Pension Fund**

2010 NY Slip Op 30700(U)

March 23, 2010

Supreme Court, New York County

Docket Number: 115266/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 115266/2009

BITCHATCHI, KAREN

vs

BOARD OF TRUSTEES

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5

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 1415).

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

Dated: 3/23/10


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

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 1735)

In the Matter of the Application of
KAREN BITCHATCHI,

Index No.
115266/09

Petitioner,

DECISION
and ORDER

-against-

BOARD OF TRUSTEES OF THE NEW YORK CITY
POLICE PENSION FUND, ARTICLE II,

Mot. Seq.
001

Respondent.

-----X
HON. EILEEN A. RAKOWER:

Petitioner Karen Bitchatchi ("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 her ordinary disability retirement ("ODR") upon her separation from service with the NYPD.

Petitioner was appointed to the NYPD on August 30, 1993 and, pursuant to New York City Administrative Code ("NYC Admin. Code") §13-214, became a member of the New York City Police Pension Fund. In 1980 (while she was in high school), Petitioner experienced rectal bleeding and was subsequently diagnosed with ulcerative colitis¹. Because prescribed medications had adverse side effects and ceased to be effective in treating the condition over time, Petitioner underwent surgery in 1983 which removed her colon and large intestine and left her with an ileostomy². Roughly four-and-a-half months later, Petitioner underwent a second surgery which attached the small intestine to the rectum and reversed the

¹Ulcerative colitis is an inflammatory bowel disease that causes chronic inflammation of the digestive tract, and is characterized by abdominal pain and diarrhea.

²An ileostomy is a small opening which is created in the abdomen so that waste can travel through the small intestine and exit the body through the opening into a pouch.

ileostomy. After the surgery, Petitioner states that she had normal bowel function, did not experience any symptoms of ulcerative colitis, did not require medication for bowel function, and was able to work and attend school. Petitioner states that from the time of her appointment to the NYPD until September 2002, Petitioner was in good health, was able to perform the duties of a police officer, and never reported sick for ulcerative colitis.

On September 11, 2001, Petitioner responded to the World Trade Center site (“WTC site”) and participated in rescue and recovery operations. Petitioner assisted in the rescue and recovery effort by removing debris from Ground Zero on the date of the attacks and several days thereafter, totaling over 50 hours of service at the WTC site between September 11 and September 21, 2001. In addition, Petitioner worked a security detail on Canal Street on October 21, 2001 for over 15 hours. Petitioner states that at no time was she provided with a respirator or any other protective gear during her service at the WTC site. Petitioner filed a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations on November 8, 2005.

Petitioner states that on September 17, 2002, she noted discomfort and a cyst in the area between the vagina and the rectum. Ten days later, Petitioner visited her gynecologist, who removed the cyst. A biopsy disclosed that the cyst was cancerous. Petitioner was referred to a cancer specialist. The specialist performed a colonoscopy on October 10, 2002. The colonoscopy disclosed that Petitioner had cancer. Petitioner began a regimen of radiation and chemotherapy on November 24, 2002. On February 25, 2003, Petitioner underwent surgery for removal of a cancerous tumor, a partial vaginectomy and performance of an ileostomy. After her release from the hospital on March 2, 2003, Petitioner began a regimen of post-operative chemotherapy, which lasted from April through July of 2003.

Based on her condition, Petitioner was placed on sick report since September 27, 2002. On May 23, 2005, Petitioner was recommended for “survey” - an assessment as to whether she was disabled from performing the duties of a police officer. On June 3, 2005, the Police Commissioner directed the Medical Board to examine Petitioner.

The Medical Board first examined Petitioner on August 24, 2005. After the first Medical Board meeting, Petitioner applied for ADR. The matter was remanded several times by the Board of Trustees for consideration of additional

evidence. On May 23, 2007, after reviewing Petitioner's medical records, interviewing Petitioner, and reviewing a letter from Dr. Martin W. Oster, Petitioner's current doctor, the Medical Board recommended denial of ADR and an award of ODR. The Medical Board found that the fact that Petitioner was previously diagnosed with ulcerative colitis, and had had a colectomy constituted "competent evidence with regard to [Petitioner's disability] not being World Trade Center related and thus an adequate rebuttal to the World Trade Center Bill's presumption."

On December 12, 2007, the Board of Trustees awarded Petitioner ODR and denied ADR.

Petitioner commenced an Article 78 proceeding on April 9, 2008 challenging the Board of Trustees's denial of ADR. By Order dated January 12, 2009, the Hon. Sheila Abdus-Salaam remanded Petitioner's ADR application back to the Board of Trustees on the grounds that it

did not adequately consider whether, even assuming that petitioner had a pre-disposition to rectal cancer by virtue of her history of ulcerative colitis (the medical records show that the condition was corrected in 1983), the exposure to the toxins at the site caused or precipitated the development of the cancer (*see generally Petrella v. Board of Trustees of Police Pension Fund*, 141 AD2d 361 [1988]; *McAdams v. Kelly*, 17 Misc.3d 1112(A)[2007]).... While the Board stated that it had considered Dr. Oster's statements, it did not explain why his opinion had been rejected and why the Board believed that there was competent evidence to rebut the presumption that petitioner had developed rectal cancer as a result of her work at the [WTC] site....

Pursuant to Justice Abdus-Salaam's remand, the Medical Board considered Petitioner's ADR application once again on June 10, 2009, specifically addressing Dr. Oster's letters dated September 28, 2006 and March 6, 2007. In his 2006 letter, Dr. Oster opined that

[Petitioner] had had a history of ulcerative colitis for many years which led to a colectomy in 1987 with the removal of her colon. Despite this, she developed her rectal cancer in late 2002 and it is very possible that her exposure to pollutants at Ground Zero at the 9/11 site may have contributed to her developing cancer. This would fit in with the 'two hit' hypothesis which states that more than one mutational event is needed to induce cancer, in this case, the two events being colitis followed by exposure to carcinogens at the 9/11 site.

In his 2007 letter, Dr. Oster stated as follows:

I believe it is impossible to know how long the cancer was present prior to its diagnosis, but at only 2 cm in size [at the time of its discovery on 10/10/02], it certainly could have developed after September 2001 and not been present before then. Her past history of ulcerative colitis put her at risk for developing cancer in the colon, which, however, had been removed with her colectomy. The rectal area that was left behind after surgery was also at risk for developing cancer, but had not done so over the more than ten years since her colectomy in 1983. In my medical opinion, given all of the above, it is very probable that her rectal tissue was at risk for cancer and it was the toxic exposures at the WTC site which ultimately caused her cancer.

Responding to Dr. Oster's findings, the Medical Board emphasized that Dr. Oster opined that Petitioner's rectal cancer was consistent with the "two hit" *hypothesis*, stating that such a finding "is not a statement of fact." "On the other hand," the Medical Board continued, "the development of adenocarcinoma at the site of an endoanal anastomosis, which is the procedure that was undergone by Officer Bitchatchi (for treatment of ulcerative colitis) is well-documented." The Medical Board further found that "the 2 cm size of the cancer at the time of its discovery on October 10, 2002, 13 months following exposure leaves the Medical Board to believe that based on clinical data surrounding colon adenocarcinoma tumor growth, it is highly likely that the tumor was present prior to September 11,

2001.” Based on the foregoing, the Medical Board concluded that both Petitioner’s prior ulcerative colitis and the development of the tumor at the time of its discovery evidenced that Petitioner’s rectal cancer predated her exposure at the WTC site.

On September 9, 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. On September 14, 2009, the New York City Police Pension Fund sent Petitioner a letter informing her that her application for ADR was denied by the Board of Trustees. Petitioner subsequently commenced the instant petition.

In the instant petition, it is undisputed by the parties that Petitioner (1) is unable to perform the duties of a police officer due to a physical disability; and (2) that Petitioner served at the WTC site in such a capacity as to entitle her to the benefit of NYC Admin. Code §13-252.1, which provides that any member of service who participated in rescue and/or recovery operations at the World Trade Center site for the qualifying period (as those terms are defined by Retirement and Social Security Law §2(36)) is entitled to a presumption that his or her disability was incurred in the course of such operations. Accordingly, the only issue before the court is whether the Board of Trustees had a rational basis to conclude that Petitioner’s service at the WTC site neither caused nor exacerbated her condition.

The First Department has held that the WTC 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)). Where a conflict of medical opinion exists, the Board of Trustees is entitled to rely upon the Medical Board’s determination with respect to causation of Petitioner’s injuries (*see Casiano v. Brown*, 209 A.D.2d 182, 183 [1st Dept. 1994]). The Board of Trustees is entitled to rely on the expert opinion of the Medical Board so long as that opinion is based on evidentiary proof that reasonably tends to support the conclusion of a lack of causation between the accident and the disabling condition (*Meyer v. Board of Trustees of the New York City Fire Dep’t*, 90 N.Y.2d 139, 149 [1997]).

Where, as here, the retiree has been awarded ODR as a consequence of a tie vote of the Board of Trustees,

a reviewing court may only disturb such finding if it determines as a matter of law that causation is established, i.e., that the disability was the natural and proximate result of a line-of-duty accident. Respondent's determination must stand if the record contains any credible evidence of lack of causation

(*Picciurro v. Board of Trustees of the N.Y. City Police Pension Fund, Art. II*, 46 A.D.3d 346, 348 [1st Dept. 2007]) (citations omitted).

Here, the Court finds that the Medical Board failed to adduce credible medical evidence sufficient to overcome the statutory presumption that Petitioner's rectal cancer was either caused by her exposure at the WTC site, or precipitated by it. As noted above, the basis for the Medical Board's conclusion that Petitioner's rectal cancer predated Petitioner's service at the WTC site was the "2cm size of the cancer at the time of its discovery on October 10, 2002...." The Medical Board took this position "based on clinical data surrounding colon adenocarcinoma tumor growth." However, there is nothing in the record other than the Medical Board's conclusory statement that its determination is supported by unspecified "clinical data" to support the proposition that the cancer (a 2cm mass found 13 months after Petitioner's WTC site exposure) was of such a degree as to indicate pre-9/11 origination (*see Meyer* at 147) ("credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered").

Similarly unavailing was the Board's conclusory finding that "the development of adenocarcinoma at the site of an endoanal anastomosis, which is the procedure that was undergone by Officer Bitchatchi (for treatment of ulcerative colitis) is well documented." Here, the Board contends "the development of carcinoma has been documented to be as long as 25 years following the anastomosis in one study." Further, the Board references one journal, "World Journal of Gastroenterology, 2009, February 21; 15(7): 769-773. The Medical Board finds this documentation, which is not a hypothesis or guess, but rather published data to be competent evidence to rebut the premise of the World Trade Center Bill Presumption."

Detailed reading of the referenced article, however, does not support the Board's conclusion. Indeed, the article is self limiting, stating "[g]iven the paucity

of data in this realm, the long-term fate of the ATZ [anal transition zone] in the surgical management of ulcerative colitis has yet to be determined.” The journal goes on to state that it

is well documented that chronic inflammation may lead to dysplasia and dysplasia may ultimately lead to neoplasia in patients with long-standing ulcerative colitis. The retained ATZ following stapled RPC IPAA [restorative proctocolectomy and ileal pouch anal anastomosis] is therefore at risk for chronic inflammation from recurrent or persistent disease, dysplasia, and possibly malignancy.

It is important to note, here, that this does not describe petitioner, who, in 1990, no longer exhibited chronic inflammation. According to Dr. Altman, “her general status is excellent, her bowel function is completely normal . . . She has been cured of ulcerative colitis and restored to excellent general health.”

The journal goes on to say that overall, “dysplasia within the ATZ is uncommon and the risk of developing cancer following RPC IPAA is even more unlikely with only 19 reported cases in the literature.” These 19 cases were referenced in a table by name, year, type of procedure (handsewn or stapled), preoperative diagnosis, pathological diagnosis, years to carcinoma and the site of the carcinoma. Indeed, the table reveals one individual with a preoperative diagnosis of ulcerative colitis, who developed carcinoma after 25 years at the ATZ site.

The Medical Board relies on this article as its sole authoritative source, to conclude that petitioner was predisposed to this cancer prior to her World Trade Center exposure and that based on the size of the tumor, the cancer itself was highly likely to have been present before September 11, 2001. However the scientific causal connections supported by the literature annexed are vague and elusive as applied to petitioner.

Wherefore, it is hereby

ORDERED and ADJUDGED that Petitioner's application is granted and the respondent Board of Trustees' determination of November 12, 2003, denying Petitioner ADR and granting her ODR benefits on a tie vote is annulled and petitioner is entitled to the greater benefit as a matter of law; and it is further

ORDERED and ADJUDGED that this matter is remanded to respondents to grant Petitioner ADR and to recompute Petitioner's retirement allowance in accordance herewith.

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

Dated: March 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 1419).