

<b>Matter of Colon v Kelly</b>
2010 NY Slip Op 31211(U)
May 13, 2010
Supreme Court, New York County
Docket Number: 117992/2009
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis  
Justice

PART 6

Index Number : 117992/2009  
COLON, LISA  
vs.  
KELLY, RAYMOND  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/29/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1-26  
27-46

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION

**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: 5/13/10

[Signature]  
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  
LISA COLON, and as widow of decedent  
WILLIAM TITUS

Petitioner,

Index No. 117992/09

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, ART. II, THE BOARD  
and THE CITY OF NEW YORK

**UNFILED JUDGMENT**  
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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
Respondents: -----X

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

Petitioner Lisa Colon brings this proceeding under Article 78 of the C.P.L.R. as the widow and beneficiary of Detective William Titus ("Titus") to annul the decision of respondent The Board of Trustees of the Police Pension Fund (the "PPF"), which denied petitioner an accidental death benefit ("ADB"). 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. In addition, petitioner seeks an order compelling respondents' production of certain records; however, that branch of the petition is moot based on the documents annexed to respondents' papers. For the reasons stated below, the petition is granted.

On July 15, 1986, Titus was appointed to the NYPD's uniformed force; he served continuously as a member of the NYPD until he was diagnosed with esophageal cancer in 2002. Titus

passed away from the cancer on August 24, 2003. Six years after his death and after a review by the Medical Board, the PPF disapproved petitioner's application for ADB, which is given to the surviving spouse of a member of the police force whose death stems from a line of duty injury. The Medical Board denied the application based on its determination that medical evidence had rebutted a statutory presumption that Titus' cancer was caused by exposure to airborne toxins at Ground Zero.

After September 11, 2001, Titus performed rescue, recovery, and clean-up operations at Ground Zero for over forty hours. On April 12, 2002, Titus underwent a barium swallow. According to his medical records, "complaints of sensation of food and liquid getting stuck at the level of the mid thorax" prompted the test. The test was apparently inconclusive, although the barium pill did remain lodged in Titus's distal esophagus for "a very short period of time." On May 18, 2002, Titus underwent an esophagogastroduodenoscopy performed by Lawrence Mancino, M.D. Dr. Mancino found an abnormal mass at the gastroesophageal junction and obtained multiple biopsies. According to the biopsy report, dated May 21, 2002, Titus had "[m]oderately differentiated invasive gastric adenocarcinoma." On May 30, 2002, Titus consulted with Manjit S. Bains, M.D., of Memorial Hospital for Cancer and Allied Diseases. According to Dr. Bains's records, Titus had a 4 cm mass at his gastroesophageal junction. He had been suffering from gas pains since late September 2001 and had had difficulty swallowing food since March 2002. Dr. Bains noted that Titus had lost 17 pounds since late September 2001. Dr. Bains further noted that Titus had "[q]uestionable asbestos exposure as he is a policeman who spent four months doing recovery at Ground Zero." Dr. Bains recommended chemoradiation therapy.

Titus underwent chemotherapy until September 2002. On October 16, 2002, Dr. Bains performed an esophagectomy to remove the mass. On June 20, 2003, David H. Ilson, M.D., of Memorial Hospital for Cancer and Allied Diseases, suspected a tumor recurrence after Titus complained of difficult and painful swallowing. On July 9, 2003, Ravinder Grewal, M.D., a radiologist with Memorial Hospital for Cancer and Allied Diseases, confirmed the presence of a tumor in Titus' thorax. On August 1, 2003, an application for ODR was submitted on Titus' behalf, which was approved in December 2003. On August 23, 2003, Titus passed away. On September 26, 2008, petitioner, as the beneficiary of Titus, filed an application for ADB.

The Medical Board reviewed the ADB application on October 15, 2008. The Board examined Titus' records and determined that "the biopsy of May 18 2002 with an eight month history of symptoms referable to this huge 4 cm tumor at biopsy" indicated that Titus' role at Ground Zero was not the cause of the tumor. The PPF remanded this determination on January 14, 2009, directing the Medical Board to determine if Titus' work at Ground Zero aggravated a pre-existing condition. On March 4, 2009, the Medical Board maintained that "the dismal prognosis of esophageal cancer at the time of discovery" precludes a finding that Titus' exposure to toxins at Ground Zero had an impact on his cancer. On August 12, 2009, the PPF denied petitioner's application for ADB. This petition followed.

Petitioner argues that the Medical Board's findings were arbitrary and capricious, because the Medical Board did not adequately rebut the statutory presumption for ADB afforded to Titus as a participant in the World Trade Center ("WTC") rescue, recovery, and clean-up operations. Petitioner further argues that the application was entitled to a hearing and that the Medical Board acted in bad faith.

Respondents argue that the Medical Board's determination was based on its own expertise as well as credible medical evidence and was, therefore, not arbitrary and capricious.

"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. Emples. Ret. Sys., 88 N.Y.2d 756, 760 (1996) (citations omitted). ADB is available to a surviving spouse of a deceased police officer when evidence demonstrates that the death was caused by an accident, which occurred in the line of duty, and that the death was not the result of willful negligence on the part of the applicant. Administrative Code of City of New York § 13-244. If the applicant for ADB claims that the officer died due to his or her efforts during the WTC rescue, recovery, and clean-up operations, Section 13-252.1 of the Administrative Code allows for what is commonly known as the "WTC presumption." The presumption states that, in pertinent part, that any member of the NYPD who participated in the WTC rescue, recovery, or clean-up operations and "dies from a qualifying World Trade Center condition. . . unless the contrary be proven by competent evidence . . . shall be deemed to have died as a natural and proximate result of an accident sustained in the performance of duty and not as a result of willful negligence on his or her part." Administrative Code of City of New York § 13-252.1(3). Respondents have the burden of proffering competent medical evidence to rebut the WTC presumption. In re Mulet v. Kelly, 2006 N.Y. Slip Op. 30186(U) (Trial Order) (Sup. Ct. N.Y. Co. Oct. 16, 2006) (DeGrasse, J.), aff'd., 49 A.D.3d 336 (1st Dep't 2008). Courts have annulled determinations of the Medical Board that were "premised only on a summary conclusion of no causation and lacked any factual basis." In re Meyer v. Bd. of Trs. of the New York City Fire Dep't., 90 N.Y.2d 139, 147 (1997) (citations omitted).

The Medical Board's determination was entirely conclusory and did not rebut the WTC presumption. The Medical Board's determination, which was premised on its understanding of the growth of cancer cells, lacked any discussion of the science of or the Medical Board's own theory of cancer growth or, more specifically, why the tumor in Titus' gastroesophageal junction on May 18, 2002 was likely present on September 10, 2001. In short, there was no scientific factual basis cited by the Medical Board to support its determination. The Medical Board ignored the fact that Titus' complaints about gas and his weight loss began after September 11, 2001. Furthermore, the Medical Board did not discuss Dr. Bains' records noting that Titus may have been exposed to asbestos during his work at Ground Zero operations. The fact that Dr. Bains made note of it suggests that Titus' Ground Zero work could have played a role in his development of cancer.

Accordingly, it is hereby


ADJUDGED that the petition is granted and the decision by the PPF to deny petitioner ADB is vacated; and it is further

ORDERED that this matter is remanded to the Medical Board for a new determination consistent with this decision, order, and judgment.

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

Dated: May 13, 2010

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon.  JOAN B. LOBIS, J.S.C.  
obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).