

Matter of Mazziotti v Kelly
2011 NY Slip Op 31311(U)
May 2, 2011
Supreme Court, New York County
Docket Number: 108795/10
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of

MICHAEL MAZZIOTTI,
Petitioner,

INDEX NO. 108795/10
MOTION DATE 04-06-2011
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

-against -

UNFILED JUDGMENT

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, NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK, Respondents. 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).

The following papers, numbered 1 to 10 were read on this petition to/for Art. 78

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3, 6-7</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4,5, 8,9</u>
Replying Affidavits _____	<u>10</u>

Cross-Motion: Yes X No

Upon the foregoing papers, It is ordered and adjudged that the petition to review and annul the action of the respondents denying the petitioner his line of duty accident disability retirement pension pursuant to Administrative Code §13-252.1, known as the World Trade Center [WTC] Disability Law and directing respondents to reconsider the petitioner's application in a fair and lawful manner, is granted.

The petitioner seeks a judgment pursuant to CPLR Article 78, reviewing and annulling the denial of line of duty Accident Disability Retirement (hereinafter referred to as "ADR") pension he sought pursuant to Administrative Code §13-252.1, known as the World Trade Center Disability Law. He seeks to have the respondents reconsider his application for pension benefits in a fair and lawful manner. Petitioner seeks an Order pursuant to CPLR §2307[a], directing respondents to serve and file: all reports, recommendations, certificates and all other documents submitted to the Pension Board of Trustees of the Police Department of the City of New York in connection with the retirement of the petitioner that are not included in the petition; copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the Police Department that are not included in the petition.

As a police officer, the petitioner and his partner had been assigned to cover the lower Manhattan area train lines from South Ferry to Canal Street. On September 11, 2001, they responded to a call in One World Trade Center to assist a disabled woman

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

and brought her to an office on the 20th floor, just before the building was struck by the first of two planes hijacked by terrorists. Petitioner and his partner evacuated the 20th through 29th floor of One World Trade Center and were descending a staircase with evacuees when a second explosion sent debris and soot on them. After arriving at the ground floor they went over to Two World Trade Center, which had also been struck by a hijacked plane, carrying and escorting injured people out of the building. They set up a triage area by the Millennium Hotel, and entered Two World Trade Center three more times to assist with the evacuation. The officers were caught by the blast when Two World Trade Center began to fall, and rushed themselves and other evacuees to 20 Vesey Street for refuge, their police car was crushed by the falling towers. The petitioner was recognized for his heroism on September 11, 2001 by the Commanding Officer of his District, Captain Stephen A. Savas (Pet. Exh. A).

The petitioner was given one week off for sick leave and then was required to return to work at the World Trade Center site in the search for missing persons. After returning from sick leave, petitioner worked beyond 40 hours a week, with overtime for 2000 additional hours in 12 hour shifts with no relief. Petitioner served 175 tours digging through rubble at ground zero after September 11, 2001 (Pet. Exh. J). The petitioner had been treated for injuries to his back, eye and skin irritations but did not seek immediate psychological treatment (Ans. Exh. 2). The petitioner claims he initially attempted to "self-medicate" with "alcohol" to deal with his guilt and depression over the loss of approximately 37 other policemen he knew that died at the scene, and firemen he saw on the staircases while evacuating the buildings on September 11, 2001.

Petitioner eventually sought mental health treatment related to September 11, 2001, being initially diagnosed with symptoms related to post-traumatic stress in 2003, but he did not seek a referral for treatment. Dr. Steven Cole, states the initial diagnosis of post-traumatic stress was based on petitioner's treatment at the Long Island World Trade Center Monitoring and Treatment Program at the Long Island Occupational & Environmental Health Center, State University of New York, Stony Brook (Ans. Exh. 14). The Long Island World Trade Center Monitoring did not have a treatment component in 2003. The petitioner claims he sought treatment and was provided with a referral to Dr. Steven Cole on November 21, 2005. Dr. Cole initiated treatment with prescription medication for petitioner's post-traumatic stress disorder in 2005, and continued treatment in 2006, 2007 and 2008 (Ans. Exh. 15). Petitioner was awarded disability benefits from the Social Security Administration in 2008. Petitioner was granted social security disability benefits on March 18, 2008, for "major depression, a panic disorder, and post-traumatic stress disorder," from an onset date of October 27, 2005 (Pet. Exh. G). The petitioner continues to be under a physician's care, in group and individual therapy, and is taking medications for his symptoms (Ans. Exhs. 14-17, 19).

The petitioner retired from the police force on September 2, 2002, after serving for almost 32 years. He was born on September 11, 1950, appointed an officer on October 7, 1970, and pursuant to Administrative Code §13-214 was a member of the Police Pension Fund (hereinafter referred to as "PPF") making all necessary contributions as required by law. The petitioner filed his application for ADR benefits on September 19, 2006. The application for ADR pension benefits was based on post-traumatic stress. The petitioner states in his application, "I complain of constant fatigue, depression, being unable to concentrate, anxiety and flashbacks as a result of the World Trade Center Disaster." The Police Commissioner filed an application for Ordinary Disability Retirement (hereinafter referred to as "ODR") pension on petitioner's behalf.

The petitioner submitted to four examinations by the Medical Board of the Police Pension Fund Article II (hereinafter referred to as the "Medical Board"). The Medical Board submitted reports on December 4, 2006 (Ans. Exh. 3), December 17, 2007 (Ans. Exh. 5), July 13, 2009 (Ans. Exh. 7), and December 14, 2009 (Ans. Exh. 9). The four reports disapproved the applications for ADR and ODR pension benefits.

On February 14, 2007, the Board of Trustees of the Police Pension Fund (hereinafter referred to as the "Board of Trustees") remanded petitioner's application after the December 7, 2006 report, for reevaluation and reconsideration of new evidence (Ans. Exh. 4). On May 14, 2008, the Board of Trustees remanded petitioner's application for reevaluation and reconsideration of new evidence and sent a letter to the Medical Board on June 4, 2008, stating the reason for the remand was new evidence (Ans. Exh. 6). On October 14, 2009, the Board of Trustees granted a third remand to the Medical Board based on statements on the record by Christopher McGrath, consultant to the Patrolmen's Benevolent Association (PBA), detailing petitioner's service at the World Trade Center and subsequent medical treatment (Ans. Exh. 8). A letter was sent to the Medical Board dated October 22, 2009, giving as a reason for the remand, "New Evidence and as per Verbatim minutes." After the disapproval of benefits in the December 14, 2009 report of the Medical Board, the petitioner sought a fourth remand at a meeting of the Board of Trustees on February 25, 2010. That application was denied based on three prior remands and the fact that the petitioner had been retired for eight years (Ans. Exh. 10). The petitioner then commenced this Article 78 proceeding challenging the denial of his application for ADR benefits.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious (*Matter of Pell v. Board of Education*, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]; *Davis v. Hernandez*, 13 A.D. 3d 90, 786 N.Y.S. 2d 444 [N.Y.A.D. 1st Dept. 2004]). The award of ADR benefits is a two step process, requiring a determination by the Medical Board that the applicant is actually incapacitated or disabled and then a recommendation to the Board of Trustees concerning whether the disability was a result of an accidental injury received in service of the city. A determination by a Medical Board will be sustained if it is supported by substantial evidence of lack of causation, has a rational basis, and is not arbitrary and capricious. The decision of the Board of Trustees as to the cause of an officer's disability will be sustained if its factual findings are supported by substantial evidence and is not arbitrary and capricious. The Medical Board determination will remain undisturbed where it resolves conflicts in the medical evidence and relies on its own examination of the petitioner (*Matter of Borenstein v. New York City Employee's Retirement System* 88 N.Y. 2d 756, 673 N.E. 2d 899, 650 N.Y.S. 2d 614 [1996]; *Canfora v. Board of Trustees of the Police Pension Fund New York, Article II*, 60 N.Y.2d 347, 457 N.E. 2d 740, 469 N.Y.S. 2d 635 [1983]). The burden of proof concerning each element of the ADR claim is generally on the applicant (*Picciurro v. Board of Trustees of the New York City Police Pension Fund, Article II*, 46 A.D. 3d 346, 847 N.Y.S. 2d 553 [N.Y.A.D. 1st Dept. 2007]).

Pursuant to New York City Administrative Code §13-252.1(a), a condition or impairment that is caused by a qualifying World Trade Center condition is, "presumptive evidence that it was incurred in the performance and discharge of duty," unless there is competent evidence to the contrary. The World Trade Center [WTC] Disability Law shifts some of the burden of proof onto the Medical Board. The Medical Board bears the burden of rebutting this presumption with credible evidence (N.Y. C. Administrative Code §13-252.1(a); *Mulet v. Kelly*, 49 A.D. 3d 336, 852 N.Y.S. 2d 762

[N.Y.A.D. 1st Dept., 2008]; *Jefferson v. Kelly*, 51 A.D. 3d 536, 857 N.Y.S. 2d 161 [N.Y.A.D. 1st Dept., 2008]). Credible evidence is defined as coming from a credible source and being, "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Matter of Meyer v. Board of Trustees of the New York City Fire Department*, 90 N.Y. 2d 139, 681 N.E. 2d 382, 659 N.Y.S. 2d 215 [1997]).

The Medical Board is required to consider all relevant medical evidence before rejecting the petitioner's claim, and must clearly state the reasons for its recommendations. An unsubstantiated conclusion and failure to include uncontradicted evidence submitted by the petitioner concerning a psychological condition is not a basis to determine the condition (*Keiss v. Kelly*, 75 A.D. 3d 416, 905 N.Y.S. 2d 67 [N.Y.A.D. 1st Dept., 2010]; *Flynn v. Kelly*, 17 Misc. 3d 1125A, 851 N.Y.S. 2d 69 [Sup. Ct., N.Y., 2007]).

The petitioner submitted to the Medical Board reports from Steven Cole, M.D., the Supervising Psychiatrist of Long Island Occupational & Environmental Health Center, State University of New York, Stony Brook; Dr. Lynn R. Bernstein, a licensed clinical psychologist and Dr. Minna Barrett, a psychologist. All the reports conclude that the petitioner is suffering from post-traumatic stress (Ans. Exhs. 14 - 17). The report of Dr. Lynn R. Bernstein dated April 15, 2009, indicates that at least eight (8) objective tests were administered, resulting in findings of below average visual/constructional skills, below average basic attention and concentration, below average sequential mental tracking, and problems with "mental processing speed, fine motor speed and coordination, visual attention to detail, sustained concentration, and divided attention." The April 15, 2009 report of Dr. Lynn R. Bernstein concluded in a diagnosis of post-traumatic stress disorder, depression and anxiety (Ans. Exh. 16).

The Medical Board has cited as a basis for denying any benefits, the panic attack that occurred in November of 2000 and related counseling, after the petitioner lost a union election (Ans. Exhs. 2 & 12). The Medical Board also relied on a letter dated September 22, 2006, from Arthur Knour, Ph.D., director of the Psychological Evaluation Section (hereinafter referred to as "PES"), which states that petitioner is not a case in PES records and there is no hold on his firearms (Ans. Exh. 13). The December 14, 2009, report of the Medical Board, finds that although the petitioner was in "the thick of the attack on September 11, 2001," the treatment provided was based on subjective and not objective findings (Ans. Exh. 9).

The respondents claim that the Medical Board's determination is based on credible evidence and that while there is differing medical opinion and the evidence is subject to conflicting interpretations, the determination should not be deemed arbitrary and capricious.

The January 23, 2010 affidavit of Michael Mazziotti states that none of the four appearances before the Medical Board lasted longer than ten minutes and little to no questions were asked of him concerning his current psychological state or treatment for September 11, 2001 experiences (Pet. Exh. C). Petitioner claims that the records submitted to the Medical Board were taken out of context and the determination contains false statements, including those concerning a primary treatment for alcohol abuse instead of post-traumatic stress and depression.

Upon review of all the papers submitted this Court finds that the respondents have failed to sufficiently overcome the World Trade Center presumption. The Medical

Board states that the petitioner's treatment was based on subjective findings, but completely ignores the objective tests performed by Lynn R. Bernstein, Ph.D. . There were no separate or independent reports submitted for evaluation by the respondents. The one paragraph letter dated September 22, 2006, from Arthur Knour, Ph.D., director of PES does not evaluate the petitioner's records, it only states that PES did not have an open file. The Medical Board in denying both ADR and ODR pension benefits does not address the finding of the Social Security Administration on March 18, 2008, which states that the petitioner is entitled to disability benefits based on his, "major depression, panic disorder and post-traumatic stress disorder." The Medical Board does not provide any details concerning its conclusions that petitioner's evidence is subjective. Although conflicting interpretations of evidence will result in a finding in favor of the Medical Board, in this case, the determination does not reflect consideration of all relevant medical evidence or clearly state the reasons for the determinations.

The Board of Trustees determination on February 25, 2010, that the petitioner's application should be denied based on the Medical Board's denial on three prior remands, and the length of time he had been retired is arbitrary and capricious. The Board of Trustees determination was not based on substantial or credible evidence.

Accordingly, it is the decision and order of this Court that the petition is granted, the respondents' February 25, 2010, denial of petitioner's application for ADR pension benefits is annulled and the case is remanded to The Board of Trustees of the Police Pension Fund for further hearing and determination on the applications.

Accordingly, it is ORDERED AND ADJUDGED that the petition is granted, the February 25, 2010 determination of the Board of Trustees of the Police Pension Fund is annulled and it is further

ORDERED, that the case is remanded to the Board of Trustees of the Police Pension Fund for reconsideration of the petitioner's application in a fair and lawful manner, and for remand to the Medical Board of the Police Pension Fund Article II, and it is further

ORDERED, that to the extent not already provided, the respondents are directed to provide the petitioner with all reports, recommendations, certificates and all other documents submitted to the Article II Pension Board of Trustees of the Police Department of the City of New York in connection with the retirement of the petitioner not included in the petition or answer; and it is further

ORDERED, that to the extent not already provided the respondents are directed to provide the petitioner with copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Board of Trustees of the Police Department not included in the petition or answer.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

This constitutes the decision and judgment of this court.

Dated: May 2, 2011


MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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