

<b>Matter of Triola v Kelly</b>
2011 NY Slip Op 31839(U)
June 7, 2011
Supreme Court, New York County
Docket Number: 115052/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

CYNTHIA S. KERN  
J.S.C.

PRESENT: \_\_\_\_\_

PART 52

Index Number : 115052/2010

**TRIOLA, PATRICK**

VS.

**KELLY, RAYMON**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. 115052/10

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

MOTION SEQ. NO. 01

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

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

PAPERS NUMBERED

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

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

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

**FILED**

Cross-Motion:  Yes  No

JUL 08 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

Dated: 6/7/11

cgk  
CYNTHIA S. KERN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 52

-----X  
In the Matter of the Application of

PATRICK TRIOLA,

Petitioner,

Index No. 115052/10

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

-against-

**DECISION/ORDER**

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, THE NEW YORK CITY POLICE  
DEPARTMENT and THE CITY OF NEW YORK

**FILED**

**JUL 08 2011**

Respondents.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Patrick Triola brought this petition pursuant to Article 78 of the Civil Practice Law and Rules seeking to annul the decision of respondents denying him a line of duty World Trade Center Accident Disability Retirement ("WTC ADR") pension and declaring that decision arbitrary and capricious, upgrading his non-line-of duty Ordinary Disability Retirement pension to a WTC ADR pension or remanding the action to respondents for reconsideration in a fair and lawful manner. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner became a New York City police officer in October 1990. He had no history of breathing, gastrointestinal or sleep apnea problems prior to September 11, 2001. He responded to the World Trade Center (“WTC”) attacks on that date and then performed rescue, recovery and clean-up operations in the following months. He thereafter experienced breathing problems, which he first reported on January 5, 2002. From 2002 on, petitioner underwent repeated lung function tests as well as cardiac tests which all found his lung function mildly impaired. He was diagnosed with asthma, Reactive Airway Disease (RAD) and Gastro Esophageal Reflux Disorder (GERD) and was found to be suffering from sleep apnea. As his application for a WTC ADR pension wended its way through the administrative system, petitioner was examined and interviewed by the Medical Board, as well as examined and treated by his own doctors.

In November 2006, petitioner applied for a line of duty WTC ADR pension. On May 4, 2007, the Police Pension Fund Medical Board (the “Medical Board”) concluded that petitioner was disabled by his sleep apnea, which was not caused by exposure at the WTC site, and that although he suffered from GERD and RAD, both WTC conditions, neither of those was severe enough to be disabling. Petitioner subsequently submitted letters from two of his treating physicians, Dr. Stanley Rabinowitz and Dr. Howard Sacher, both of whom conclude that his symptoms were due to exposure to toxins at the WTC site. On November 16, 2007, the Medical Board, after reviewing this new evidence, concluded that petitioner was not disabled by his other conditions and that his sleep apnea was not related to the WTC attack. At that time the Medical Board specifically stated that “Officer Triola has a number of symptoms which are probably related to his exposure at the World Trade Center. The previous provided objective evidence did

not reveal that these conditions are severe enough to warrant disability. To the best knowledge of the Medical Board, there is no causal relationship between exposure to the World Trade Center toxins and the development of the sleep apnea syndrome.”

Petitioner subsequently submitted a memorandum jointly published by the U.S. Center for Disease Control and Prevention (“CDC”), the National Institute for Occupational Safety and Health (“NIOSH”) and the World Trade Center Medical Monitoring and Treatment programs (“WTC MM”) which stated that sleep apnea could be exacerbated by or related to other conditions caused by exposure to toxins at the WTC site. On April 9, 2008, the Police Pension Fund Board of Trustees (the “Board of Trustees”) reviewed petitioner’s case and remanded it to the Medical Board for still further evaluation based upon additional new evidence. On June 13, 2008, the Medical Board reviewed petitioner’s application again and again adhered to its original decision and stated that “although Police Officer Triola has significant sleep apnea and also has symptoms of reactive airway disease and GERD, *these illnesses are not severe enough to make his sleep apnea worse or be the cause of sleep apnea. As stated, there is no medical evidence that 9/11 exposure is a cause of sleep apnea.*” (Emphasis added.)

Petitioner retained counsel sometime after that and counsel communicated by letter with the Board of Trustees and the Commanding Officer of the NYPD Medical Division regarding petitioner’s case. On December 3, 2008, petitioner sent a letter to the Board of Trustees, enclosing eight medical journal articles discussing a scientific link between sleep apnea and GERD and asthma, the latter two of which have been shown to have a causal link with 9/11. He followed up with a ninth article the next day. None of the articles establish a direct link between sleep apnea and exposure to toxins, either generally or specifically at the WTC site. At its

December 2008 meeting, the Board of Trustees tabled petitioner's case. Further letters ensued and counsel submitted additional letters from petitioner's doctor and the results of additional pulmonary function tests. On January 14, 2009, the Board of Trustees reviewed petitioner's case and his application for a WTC ADR was again denied. He was retired on a non-line of duty Ordinary Disability pension.

Petitioner then commenced an Article 78 proceeding. Justice Marilyn Shafer found that respondents' denial of petitioner's application for a WTC Disability Pension did not meet applicable legal standards and remanded it to respondents for a fuller explanation of their reasoning. On July 2, 2010, the Medical Board adhered to its original decision for a third time, stating that there is only one reference in the medical literature relating sleep apnea and exposure to toxins and that exposure to WTC toxins "has not been documented to be one of those risk . . . factors." On August 11, 2010, petitioner's case came before the Board of Trustees again where it appears to have been tabled once again. By letters dated September 7, 2010, petitioner's counsel submitted letters from Dr. Rabinowitz and another treating doctor, Vrajesh Patel, both stating that they believe his medical conditions are causally related to his exposure to toxins at the WTC site. On September 8, 2010, the Board of Trustees upheld the Medical Board's decision and refused to upgrade petitioner's pension line. Petitioner subsequently filed the instant Article 78 proceeding.

In order to be entitled to a WTC ADR, petitioner has to show that he suffers from a "condition or impairment of health [which] is caused by a qualifying World Trade Center condition" and that he worked a certain number of hours at designated WTC sites after the attacks. Admin. Code §13-252.1(a). There are two types of qualifying World Trade Center

conditions: physical and psychological. The applicable statute defines a “qualifying physical condition” as follows:

(i) diseases of the upper respiratory tract and mucosae, including conditions such as rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, and upper airway hyper-reactivity, or a combination of such conditions; (ii) diseases of the lower respiratory tract including but not limited to tracheo-bronchitis, bronchitis, chronic obstructive pulmonary disease, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic; (iii) diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure; (iv) diseases of the skin such as conjunctivitis, contact dermatitis or burns, either acute or chronic in nature, infectious, irritant, allergic, idiopathic or non-specific reactive in nature, caused by exposure or aggravated by exposure; or (v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease.

If a petitioner suffers from a qualifying World Trade Center condition, there is a presumption that such condition “was incurred in the performance and discharge of duty.” Therefore, in order to be entitled to a WTC ADR, a petitioner need only prove that his disability was either a qualifying WTC condition or was caused by a qualifying WTC condition. In addition, he must show that he worked at the WTC site either within the first 48 hours after the WTC attacks or that he worked a minimum of forty hours at one of the qualifying WTC sites between September 11, 2001 and September 12, 2002. If the petitioner can establish those two facts, there is a rebuttable presumption that the disabling condition was incurred in the line of duty. The Medical Board then determines if the police officer is disabled and, if so, whether the disability is itself a qualifying WTC condition or caused by one. In the instant case, because the Medical Board determined that petitioner’s disabling condition was not a qualifying WTC condition nor caused by one, neither it nor the Board of Trustees needed to address whether petitioner had worked the requisite number of hours at a WTC site.

“In an [A]rticle 78 proceeding challenging [a] disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary and capricious.” *Borenstein v New York City Employees’ Retirement System*, 88 N.Y.2d 756, 760 (1996). Such a determination has a rational basis if it is supported by “some credible evidence.” *Id.* at 761. “As long as there was any credible evidence of lack of causation [showing that the disability was not caused in the line of duty] before the Board of Trustees, its determination must stand.” *Meyer v Board of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 145-46 (1997) (citation omitted). “As a general rule, it is not arbitrary and capricious for the Board of Trustees to rely upon the Medical Board’s recommendation of no causal connection though the Medical Board did not examine the pension fund member itself.” *Id.* (citation omitted). Moreover, the First Department has repeatedly held that if there is conflicting medical evidence, it is for the Medical Board to resolve such a conflict. *See Demarco v New York City Employees’ Retirement System*, 211 A.D.2d 594 (1<sup>st</sup> Dept 1995); *Manza v Malcolm*, 44 A.D.2d 794 (1<sup>st</sup> Dept 1974). In the only case to so far consider a Medical Board determination not to grant a WTC ADR when the disabling condition was sleep apnea, *Dement v Kelly*, Index No. 112762/2009 (Edmead, J., Sup. Ct. N.Y. Cty. Jan. 27, 2010), the court found that the Medical Board’s decision had a rational basis despite petitioner’s submission of his doctors’ opinions who provided “a plethora of evidence and findings” to the contrary. There was credible evidence on both sides and it was for the Medical Board to resolve the conflict. It did so by finding that the petitioner’s sleep apnea did not entitle him to a WTC ADR. The court held that the Medical Board had a rational basis for resolving the conflict in this way. *See Dement*, Index No. 112762/2009.

In the instant case, the Medical Board made three findings. It found that petitioner’s

GERD and RAD were not severe enough to have caused or exacerbated his sleep apnea, that exposure to WTC did not cause his sleep apnea directly and that exposure to WTC toxins does not cause sleep apnea. Each of these findings will be addressed in turn.

In the instant case, it was not arbitrary and capricious for the Medical Board to find that petitioner's sleep apnea was not caused or exacerbated by a qualifying WTC condition. The Medical Board concedes that petitioner likely suffered from several qualifying WTC conditions, such as RAD and GERD. However, the Medical Board concluded, based on the results of petitioner's medical exams, that those problems were not severe enough to cause his sleep apnea. The Medical Board relied on the results of repeated tests of petitioner's pulmonary function as well as other examinations of his respiratory and gastrointestinal systems, including both tests performed by the Medical Board and by petitioner's treating physicians. These tests, which showed that petitioner's GERD and RAD were both mild and were not severe enough to cause his sleep apnea, constitute credible evidence. Moreover, the record is replete with evidence that petitioner, who was 5'8" tall and weighed 225 pounds, was obese. Obesity is a well-documented cause of sleep apnea.

Although petitioner submitted credible evidence to the contrary, such as the opinions of his treating physicians that his sleep apnea was caused by his other conditions, that does not render the Medical Board's decision arbitrary and capricious. See *Demarco*, 211 A.D.2d 594; *Manza*, 44 A.D.2d 794. Moreover, petitioner's claim that the Medical Board did not properly assert that his GERD and RAD were not severe enough to cause his sleep apnea during the administrative process is without merit. In its June 13, 2008 decision, the Medical Board explicitly stated that "although Police Officer Triola has significant sleep apnea and also has

symptoms of reactive airway disease and GERD, *these illnesses are not severe enough to make his sleep apnea worse or be the cause of sleep apnea.*" (Emphasis added.) In its July 2, 2010 determination, which is the one challenged herein, the Medical Board does not restate that conclusion but explicitly reaffirms its prior decisions, including its June 2008 decision.

The court now turns to the Medical Board's finding that petitioner's sleep apnea was not caused directly by exposure to WTC toxins. This determination is also supported by credible evidence. The Medical Board again relied on the results of petitioner's medical tests and doctor's reports, which indicated that his exposure to toxins at the WTC site had not caused his sleep apnea and made repeated mention of his obesity, a known risk factor for sleep apnea. Petitioner's credible evidence to the contrary does not render the evidence the Medical Board cited unreliable or in-credible. Rather, as stated above, a conflict of medical opinions is for the Medical Board to resolve. *See Demarco*, 211 A.D.2d 594; *Manza*, 44 A.D.2d 794, *Dement*, Index No. 112762/2009. Where both sides present credible evidence, the Medical Board is free to make a reasoned determination.

Finally, the Medical Board's statement that "*there is no medical evidence that 9/11 exposure is a cause of sleep apnea*" is supported by the fact that no scientific studies affirmatively link sleep apnea directly to the WTC attacks. In the absence of scientific proof linking sleep apnea directly with the WTC attacks, it is rational of the Medical Board to conclude that exposure to WTC toxins is not a cause of sleep apnea. Petitioner's evidence to the contrary is mostly anecdotal in nature and does not constitute objective scientific evidence. The reports of petitioner's doctors that, in their experience, they have seen higher rates of sleep apnea among first responders than the general population is classic anecdotal evidence. The joint memo from

the CDC, NIOSH and WTC MM as well as a nearly identical document from the WTC MM alone which petitioner submitted stated that sleep apnea could be exacerbated by or related to other conditions caused by exposure to toxins at the WTC site. Neither of these memos reference any actual scientific studies. They merely list sleep apnea as a condition that can be exacerbated or related to other conditions caused by WTC exposure. Although petitioner did submit one article that links toxins to sleep apnea, it does not appear to be specific to toxins found at the WTC sites. Moreover, the lack of replicable, peer-reviewed studies constitutes a rational basis for the Medical Board's conclusion.

Accordingly, the petition is denied. This constitutes the decision, order and judgment of the court.

Dated: 6/7/11

Enter: CK  
J.S.C.

**CYNTHIA S. KERN**  
J.S.C.

**FILED**

JUL 08 2011

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