

Dzierzawski v Kelly
2011 NY Slip Op 32228(U)
August 12, 2011
Sup Ct, NY County
Docket Number: 113168/10
Judge: Martin Schoenfeld
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Schnefeld

PART 28

Index Number : 113168/2010
DZIERZAWSKI, EDWARD
 VS.
KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that 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: 8/12/11

28
 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 28

-----X
EDWARD DZIERZAWSKI,

Petitioner,

**MEMORANDUM DECISION
AND ORDER**

-against-

Index No.: 113168/10

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 and THE BOARD OF TRUSTEES of the
New York City Police Pension Fund, Article II,

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appear in person at the Judgment Clerk's Desk (Room
141B).

Respondents.

-----X
For Petitioner:
Jeffrey L. Goldberg, P.C.
2001 Marcus Avenue
Lake Success, New York 11042

For Respondent:
Michael A. Cardozo
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007

HON. MARTIN SCHOENFELD, J.:

In this proceeding brought pursuant to CPLR Article 78, Petitioner Edward Dzierzawski (Petitioner) seeks an order to: (1) annul the Board of Trustees decision denying him Accident Disability Retirement (ADR) pursuant to the New York City Administrative Code §13-252.1; (2) direct Respondents to retire him with an ADR allowance; (3) remand for review Petitioner's ADR application; and (4) direct respondents pursuant to CPLR 2307(a) to serve and file reports, minutes and medical records pertinent to the Petitioner's retirement application.

BACKGROUND

Petitioner served as a member of the New York City Police Department (NYPD) from June 30, 1992 until his retirement for ordinary disability on June 9, 2010. On September 11,

2001, Petitioner was a first responder to the World Trade Center (WTC) terrorist attack and for days thereafter was assigned to rescue, recovery and clean-up operations at the WTC disaster site and the Staten Island landfill. Around that time, Petitioner began an extra-marital affair about which he experienced intense guilt. Although he and his wife attempted a reconciliation, Petitioner ultimately decided to remain with his girlfriend. His wife moved to Florida with his children. In 2005, Petitioner suffered from elevated anxiety and depression. In October 2007, Petitioner was referred to the NYPD Police Organization Providing Peer Assistance Program ("the POPPA Program"). At the POPPA Program, he received treatment for depression and anxiety from October 23, 2007 until May 2008.

On December 13, 2007, Petitioner was evaluated by Frank G. Dowling, M.D., the POPPA Program Medical Advisor. Petitioner told Dr. Dowling that he had more anxiety and alcohol use after September 11, 2001, but also stated that his WTC experience was not particularly troubling to him. Dr. Dowling concluded that Petitioner suffered from Major Depressive Disorder and Anxiety Disorder. In accordance with procedure, the POPPA Program referred Petitioner to NYPD Psychological Evaluation Section ("PES") in May 2008 because he was not restored to full police duties with firearms after six months with the POPPA Program.

On September 3, 2008, Marisa Barra, PhD, PES Psychologist, reported that Petitioner was not ready to return to work on a restricted or full time schedule because he had significant anxiety, depressed mood, difficulty sleeping and eating, and poor concentration. She noted in her report that Petitioner stated he felt "'at the end of rope, just broke down' due to the stressors of a transfer to the Internal Affairs Bureau, his wife and children moving to Florida, and relationship troubles." According to her report, Dr. Barra learned from Petitioner that he had more anxiety

and alcohol misuse after 9/11, but that 9/11 itself was not a trigger for him, just a point of reference. The PES Director, Arthur Knour, PhD agreed that Petitioner could not return to work. PES recommended that the Police Commissioner apply for Ordinary Disability Retirement (ODR) on Petitioner's behalf.

ODR is available to a member of the NYPD when a medical examination shows that he "is physically or mentally incapacitated for the performance of duty and ought to be retired." Admin. Code §13-251. In the application for ODR on Petitioner's behalf, Dr. Eli J. Kleinman, MD, stated that Petitioner's lifelong experience with anxiety and depression intensified in about 2005 as a result of his marital problems.

On October 24, 2008, Petitioner filed an ADR application under the WTC Disability Law. ADR, which offers greater benefits than ODR, is "available when examination and investigation shows that the member" should be retired because he is physically or mentally unable to perform his work duties "as a natural and proximate result of an accidental injury received *in the line of duty*" that was not caused by his "willful negligence." *Jefferson v. Kelly*, 14 Misc.3d 191, 195 (Sup. Court, N.Y. County 2006), *aff'd* 51 A.D.3d 536 (1st Dept. 2008) (citing Admin. Code §13-252) (emphasis added). The WTC Law provides that a police officer who was involved in the "rescue, recovery, or clean-up operations" for a requisite number of hours at a WTC site during the specified time period on or after September 11, 2001, and who is suffering from a qualifying disabling condition or impairment of health, including some psychological impairments, is entitled to the **presumption** that the disability was caused by his work at the WTC. NYC Admin. Code §13-252.1. To rebut the presumption, "there must be some credible medical evidence in the record" to support the determination that "the (presumed)

accidental injury did not cause the disability.” *Jefferson v. Kelly*, 14 Misc.3d at 197. In Petitioner’s application for ADR, he stated that he suffered from constant fatigue, depression, anxiety, flashbacks and paranoia due to his WTC experiences, which prevented him from performing his full police duties.

On January 12, 2009, the Police Pension Fund Medical Board (Medical Board) reviewed Petitioner’s applications for the first time. It conducted a brief interview with the Petitioner and reviewed reports from Dr. Barra and Dr. Dora Zaretsky, a psychiatrist who examined Petitioner, as well as a consultation report from Dr. Davidow and progress notes from Daniel Melore, a social worker, and Dr. Zinoviy Benzar, a psychiatrist. Dr. Davidow’s report attributed Petitioner’s major depressive disorder to “divorce and feeling guilty about leaving his children.” Based upon these reports, the Medical Board recommended rejecting Petitioner’s ADR application and approving the ODR application. The Medical Board’s final diagnosis was Mixed Anxiety Disorder, Depressive Disorder and Alcohol Abuse in Remission. It then sent the applications to the Board of Trustees (BOT) for consideration.

On April 25, 2009, Daniel Melore LCSW, Petitioner’s treating therapist since the POPPA Program in October 2007, wrote a report supporting Petitioner’s ADR application. Mr. Melore linked Petitioner’s disability to the trauma he experienced working at the WTC disaster sites. He explained that in the beginning of therapy, Petitioner identified family and work stressors as contributing to his symptoms, but did not talk about his WTC site experiences. The psychological effects of 9/11 on Petitioner were brought to Mr. Melore’s attention by a POPPA support group leader. Mr. Melore and Petitioner then began discussing Petitioner’s experiences at WTC. Petitioner told Mr. Melore that his life changed after 9/11 and Mr. Melore diagnosed

Petitioner with having PTSD and Major Depression.

On May 13, 2009, the BOT remanded Petitioner's application to the Medical Board in light of this new evidence. On June 29, 2009, the Medical Board reviewed its previous decision concerning Petitioner's application for ADR and the "new evidence," submitted by Petitioner. The Medical Board re-interviewed Petitioner and reviewed Mr. Melore's report as well as a May 5, 2009 letter from Dr. Dora Zaretsky, which attributed Petitioner's symptoms to the WTC disaster. The Board noted that Mr. Melore's initial notes on Petitioner did not support the presumption that Petitioner's disability was a result of his WTC experience and that Mr. Melore's subsequent report was inconsistent with the notes. Similarly, the Medical Board found Dr. Zaretsky's letter inconsistent with reports previously reviewed by the Medical Board indicating that Petitioner's symptoms developed in response to various stressors, including family problems and a transfer at work. The Board opined that despite the new evidence, the previous submissions still provided sufficient evidence to rebut the WTC Disability Law presumption and it reaffirmed its previous decision.

On November 6, 2009, Mr. Melore wrote another report addressed to the BOT stating that Petitioner's disabling psychological symptoms continued to be present even with him being out of work. He stated that his work at the WTC site and the Staten Island landfill "compromised his functioning at work and had an adverse effect on his relationships with his family." He diagnosed Petitioner as suffering from PTSD, Major Depression and Panic Disorder with agoraphobia.

On November 9, 2009, the BOT approved Petitioner's ODR application but remanded his ADR application to the Medical Board once again in light of this new evidence. On February 1,

2010, the Medical Board reviewed Petitioner's application for a third time. Petitioner did not appear before the Medical Board on this occasion. The Medical Board found that the new report was similar to the report submitted previously by Mr. Melore. It concluded again that Petitioner's work history was sufficient evidence to rebut the WTC presumption. Specifically, the Board found that; "[t]he history of adequate work adjustment for a number of years following the World Trade Center disaster and the development of disabling symptoms in the context of the long history of chronic anxiety, transfer to a new job in the Police Department and serious marital and family difficulties offer sufficient evidence to rebut the presumption inherent in the World Trade Center disability Law." The Board reaffirmed its recommendation to the BOT that it not grant ADR in Petitioner's case.

By letter dated May 10, 2010, Petitioner's attorney requested that the BOT upgrade Petitioner's pension to ADR based on the fact that even if Petitioner suffered from a pre-existing condition, the events of the WTC tragedy triggered his underlying symptoms to render him disabled. Attached to the letter were the findings of research conducted by the WTC Medical Working Group of New York City which studied the late onset of PTSD by emergency responders to September 11, 2001. According to the letter the report found, among other things that the "risk for developing probable PTSD was higher among those who were . . . [a]mong rescue and recovery workers, working at the WTC site for a long time or doing tasks outside of their trained area of expertise." The report, according to the letter, notes "a higher incidence of PTSD in mid-term studies (5-7 years after 9/11) than the short term studies (1-3 years after 9/11)" and asserts that Petitioner fits into the time frame noted. On June 9, 2010, after reviewing

this new submission, the BOT in a 6 to 6 vote denied Petitioner's ADR application.¹

Petitioner now brings this Article 78 petition arguing that Respondents' denial of ADR for Petitioner was arbitrary and capricious. For reasons set forth below, the Court does not agree and, therefore, dismisses the Petition

DISCUSSION

When considering Article 78 petitions, courts may not weigh the evidence or substitute their own judgment for that of the board that made the decision. *Borenstein v. New York City Employees' Retirement System*, 88 N.Y.2d 756, 761 (1996); *Appleby v. Herkommer*, 165 A.D.2d 727, 728 (1st Dept. 1990). Where there is a conflict in the medical testimony, it is not the court's job to resolve it. *Borenstein*, 88 N.Y.2d at 761; *Muffoletto v. New York City Employees' Retirement System*, 198 A.D.2d 7 (1st Dept. 1993). Courts should sustain an administrative decision "unless it lacks a rational basis, or is arbitrary or capricious. *Borenstein*, 88 N.Y.2d at 760; *Jefferson v. Kelly*, 51 A.D.3d 536, 537 (1st Dept. 2008).

Here, the Medical Board considered the Petitioner's application three times and each time found that the submitted medical records as a whole supported a rebuttal of the presumption that his disability was caused by his WTC duties. In particular, the Medical Board found that the records from Drs. Barra and Davidson indicated that Petitioner's anxiety and depression worsened around 2005 as a result of his marital and job-related issues. The Board noted that in

¹Under *Matter of the City of New York v. Schoeck*, 294 NY 559 (1945), when the Board of Trustees is deadlocked six to six on an ADR application, the ADR application is denied and the Petitioner is retired on ODR. In considering a subsequent Article 78 petition, "the reviewing court may not set aside the Board of Trustees' denial of accidental disability retirement resulting from such a tie vote unless 'it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service related accident.'" *Meyer v. Board of Trustees of the New York City Fire Dept.*, 90 N.Y.2d 139, 145 (1997).

her September 3, 2008 report, Dr. Barra diagnosed Petitioner with “generalized anxiety disorder, panic disorder, dysthymic disorder and alcohol abuse early full remission” and noted that Dr. Barra found that Petitioner’s October 2007 symptoms were “apparently exacerbated in the context of marital and family difficulties including separation from his children.”

Likewise, the Medical Board relied upon a report from Dr. Davidow which diagnosed Petitioner with major depressive disorder and attributed it to his current stressors: “divorce and feeling guilty about leaving his children.” The Medical Board acknowledged that Dr. Zaretsky’s September 16, 2008 report attributed Petitioner’s symptoms to 9/11, but it concluded that her report lacked a full history of domestic turmoil that was noted by Dr. Barra.

Moreover, it is clear that the Medical Board considered Mr. Melore’s April 25, 2009 report which set forth a primary diagnosis of PTSD for Petitioner and explained why Petitioner was initially reluctant to speak of his experiences at the WTC despite the trauma he suffered. The Board, however, concluded that this report was inconsistent with Mr. Melore’s progress notes, which had been submitted to the Board previously, and gave more weight to the notes. The Medical Board also considered Dr. Zaretsky’s report that also attributed Petitioner’s symptoms to his work at the WTC. The Medical Board found that Zaretsky’s report too was inconsistent with the reports previously reviewed by the Board. It concluded that the credible weight of the evidence supported a finding that Petitioner’s disability was a result of family problems and a job transfer, and was not caused by his duties at the WTC.

Petitioner argues that the Medical Board applied an incorrect standard of causation. He stresses that causation, under this statute, includes when an accident that “produces an injury by precipitating the development of a latent condition or by aggravating a preexisting condition is

the cause of that injury.” *In the Matter of Tobin v. Steisel*, 64 N.Y.2d 254, 259 (1985) (citations omitted); *Petrella v. Board of Trustees*, 141 A.D.2d 361 (1st Dept. 1988). He states that the Medical Board did not give proper consideration to a finding of PTSD stemming from his WTC experience which caused Petitioner’s intense anxiety and depression.

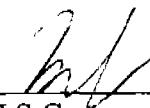
This argument is unconvincing considering the circumstances here. The Medical Board thoroughly reviewed Petitioner’s evidence three times, finding that there was credible evidence rebutting the presumption of causation. It reviewed Petitioner’s symptoms – increase in depression and anxiety beginning around 2005 – and considered both possible causes: his work at the WTC and his marital and job stressors. After considering all evidence presented, it determined that as a whole the medical records rebutted the presumption inherent in the WTC Law. To make this finding, the Medical Board relied upon the factual details and the diagnoses set forth in Dr. Barr’s and Dr. Davidow’s reports as well as Petitioner’s concerns as reflected in the progress notes submitted by Mr. Melore.

Resolution of conflicts or weight of the medical evidence was in the purview of the Medical Board and the BOT was entitled to rely on its expertise. *See Tobin v. Steisel*, 64 N.Y.2d 254, 259 (1985). The Court cannot now substitute its own judgment for the Board’s decision as it was rationally based on the record. *See Jefferson v. Kelly*, 51 A.D.3d at 537. Therefore, the Court denies Petitioner’s Article 78 petition and dismisses the proceeding.

In accordance with the foregoing, it is

ADJUDGED that the petition is dismissed.

Dated: New York, New York
August 12, 2011



J.S.C.

UNFILED JUDGMENT

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