

Matter of Gorczynski v Kelly

2011 NY Slip Op 32920(U)

November 2, 2011

Supreme Court, New York County

Docket Number: 113567/2010

Judge: Anil C. Singh

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

HON. ANIL C. SINGH
PRESENT: SUPREME COURT JUSTICE
Justice

PART 61

BERNADETTE GOECZYNSKI

INDEX NO. 113567/2010

- v -

RAYMOND KELLY, et al.

MOTION DATE _____

MOTION SEQ. NO. 001

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is decided in accordance with the annexed memorandum decision and order.

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

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: 11/2/11

ACS
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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: IAS PART 61

----- X

In the Matter of the Application of

BERNADETTE F. GORCZYNSKI,

Petitioner,

Index No.:
113567/2010

-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,
Article II and THE CITY OF NEW YORK,

Respondents,

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).

For a judgment pursuant to Article 78,
CPLR, to review and annul the determination
made by respondents denying petitioner a
pension of three quarters of petitioner's
salary as required by Administrative Code
§ 13-252, and for a further order directing
payment of such pension retroactive to
the date of petitioner's retirement,
and for such other appropriate relief.

----- X

ANIL SINGH, J.:

In this Article 78 proceeding, petitioner Bernadette F.
Gorczyński seeks a judgment annulling the action of the
respondents, which denied her a line of duty accident disability
retirement (ADR), pursuant to Administrative Code § 13-252, and
ordering respondents to retire petitioner with a line of duty
accident disability retirement allowance, retroactive to the date
of her service retirement. In the alternative, petitioner

requests that the determination be annulled and remanded to respondents for being arbitrary, capricious, unreasonable and unlawful, or that the court direct a hearing on the matter, or that petitioner be allowed to present testimony to the Board of Trustees in order to prove her entitlement to ADR. Respondents seek dismissal of the petition, and contend that they acted reasonably, lawfully and properly in denying petitioner an ADR.

Petitioner also seeks an order, pursuant to CPLR 2307 (a), directing respondents to serve and file all materials in connection with the petitioner's claims.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner was appointed to the uniformed force of the New York City Police Department (NYPD) on January 25, 1982 and became a member of the Police Pension Fund (PPF) thereafter. Petitioner has been suffering from gastrointestinal issues since she started with the NYPD. Respondents provide documentation indicating that petitioner's absences between 1982 and 1995 were related to her gastrointestinal problems.¹

In 1997, tests revealed that petitioner was suffering from

¹ The NYPD uses codes to indicate the reason for the officer's illness, i.e. petitioner was absent from June 24, 1983 through July 5, 1983 due to a biliary tract disorder. Respondents' Answer, ¶ 11.

Barrett's esophagus² and antral gastritis.³ Petition, ¶ 18. As a result of her severe gastroesophageal reflux disease (GERD)⁴, in 1998, petitioner underwent a laparoscopic partial fundoplication.⁵ In 2000, testing showed that petitioner's fundoplication was found to be intact and that a short segment Barrett's esophagus was present. Petitioner was placed on medication.

Petitioner was assigned to respond to the World Trade Center attacks on September 11, 2001. She was involved in the rescue and recovery effort on and off for four months. In April 2002, petitioner retired on service retirement, meaning that she did not ask for disability-based retirement.

Between 2002 and 2007, petitioner underwent studies which revealed the continued presence of a Barrett's esophagus and also a small sliding hiatal hernia. Among other things, procedures in

²Barrett's esophagus is a serious complication of GERD.

³An abnormal narrowing of the antrum of the stomach.
[Http://www.medical-dictionary.com](http://www.medical-dictionary.com)

⁴Gastroesophageal reflux disease (GERD) happens when a muscle at the end of the esophagus does not close properly. This allows stomach contents to leak back into the esophagus and irritate it. <http://www.nlm.nih.gov/medlineplus/gerd.html>

⁵ "A surgical procedure in which the upper portion of the stomach is wrapped around the lower end of the esophagus and sutured in place as a treatment for the reflux of stomach contents into the esophagus." [Http://www.merriam-webster.com/medlineplsu.fundoplication](http://www.merriam-webster.com/medlineplsu.fundoplication)

October 2007 indicated that her previous fundoplication seemed loose and that she showed chronic inflammation in her lower esophagus. On November 16, 2007, petitioner was seen by Dr. Joseph Genovese, a pulmonary medicine specialist, whose impression was the following, in pertinent part:

GERD with symptoms well controlled prior to exposure at the World Trade Center site. Since working at the World Trade Center site she has had constant symptoms including nocturnal coughing, indigestion, belching, vomiting, loss of enamel from her teeth and fatigue ... [b]ased on her current symptoms ... there does not appear to be any way this patient would work as a police officer ... [t]he patient's airway disease is not disabling based on American Thoracic Society criteria. I would recommend surgical evaluation for a repeat fundoplication due to the severity of her symptoms.

Petitioner's Exhibit L, at 2.

On December 3, 2007, petitioner submitted an application for ADR, alleging that she was disabled as a result of her work at the World Trade Center. Her application states the following:

I complain of pulmonary problems, I have GERD which causes and includes nocturnal coughing, indigestion, belching, vomiting and fatigue. I also complain of chronic rhinosinusitis with a drip and small airway disease. All these issues prevent me from performing the full duties of a police officer and I request accident disability retirement under chapter 93 of the laws of 2005.

Respondents' Exhibit 5, at 2.

On February 6, 2008, the Police Commissioner also applied for Ordinary Disability Retirement (ODR) on petitioner's behalf for her pulmonary, GERD and sinusitis conditions. Respondents'

Exhibit 6. It appears that petitioner is only contesting the denial of ADR for her GERD in this proceeding.

Medical Board's First Review:

The Medical Board Police Pension Fund (Medical Board) first interviewed petitioner and considered her application for ADR on February 29, 2008. Respondents' Exhibit 8. The Medical Board reviewed petitioner's file, which consisted of medical reports and testing done from 1997 through 2007, including the most recent report from Dr. Genovese. The Medical Board interviewed petitioner, who explained how her GERD symptoms were relieved after her fundoplication, however, in the last several years they have returned. Petitioner now again reports having "burning in her throat, tightening of her throat, sometimes regurgitation of food and difficulty in swallowing." *Id.*, ¶ 19. After interviewing petitioner at the meeting, the Medical Board concluded that petitioner "seems to have recurrence of gastroesophageal reflux ... [s]ince the officer has well documented history of severe GERD preceding her exposure to the World Trade Center, this cannot be ascribed to her exposure. Her lung disease is not severe enough to disable the officer" *Id.*, ¶ 21. The Board then determined that the petitioner is disabled from performing the full duties of a New York City Police Officer and concluded that the petitioner suffered preexisting GERD. The Medical Board then approved the Police

Commissioner's application for ODR and disapproved petitioner's application for ADR under the World Trade Center Bill.

Medical Board's Second Review:

In light of "new evidence," the Board of Trustees remanded petitioner's case to the Medical Board for further review. The Medical Board again reviewed the petitioner's application for ADR on December 5, 2008, which includes a letter dated February 28, 2008, from Dr. Mark Shikowitz, a laryngologist. Petitioner had seen Dr. Shikowitz after complaining about her inability to smell or taste, which apparently started after September 11, 2001. Dr. Shikowitz examined petitioner and concluded that she has had a deviated nasal septum which she has probably had all of her life. As such, her complaints of lack of smell and taste, "may be secondary to the inhalation of noxious material at that time." Petitioner's Exhibit O, at 2. Dr. Shikowitz continued that petitioner did not show any signs of significant reflux.

The Medical Board also reviewed two letters dated June 20, 2008 and October 24, 2008 from Dr. Genovese. In his letters, Dr. Genovese urged the Medical Board to consider petitioner for ADR based on her work at the World Trade Center. He wrote how the petitioner had no symptoms immediately prior to September 11, 2001 and that, "[i]t appears obvious that the hiatal hernia and her current symptoms recurred only after exposure to WTC site and are in fact the competent causal factor for her current

disability. Her symptoms appear permanent and she may in fact need further corrective surgery." Petitioner's Exhibit R, at 1.

After examining petitioner, the Medical Board deferred its final decision pending the results of recent testing petitioner had done with respect to her GERD. The Medical Board did not believe that petitioner's pulmonary status was severe enough to be considered disabling.

Medical Board's Third Review:

On July 31, 2009, the Medical Board reviewed petitioner's application for ADR for a third time. This review consisted of investigating new reports and letters from doctors who had examined petitioner. One such report came from Dr. Paul Bermanski, who reported that petitioner's GERD symptoms appeared to be under control but then she returned to him in 2006 with complaints of symptoms. He concluded that there is "evidence of return of upper GI symptoms experienced in her past exacerbated by weakening of Nissan Fundoplication." Petitioner's Exhibit T.

Dr. Douglas Brand, a gastroenterologist, submitted a report in which he stated that the petitioner suffers from worsening GERD, and that he "[a]dvised patient that I feel her symptoms are very likely a result of her 9/11/01 exposure and that I am supportive of her effort to gain disability support." Petitioner's Exhibit Z, at 2. Dr. Shikowitz submitted another letter dated May 1, 2009, in which he advised the Medical Board

that he believes that petitioner's complaints about losing her sense of smell and taste are related to her exposure to the World Trade Center Site. Petitioner's Exhibit AA.

After interviewing petitioner, the Medical Board decided that there was no reason to change its prior decision, in which it approved ODR for petitioner based on her GERD, and denied her application for ADR. The Medical Board summarized that the final diagnosis is GERD, "which was previously diagnosed and treated prior to the World Trade Center." Respondents Exhibit 11, at 6.

Medical Board's Fourth Review:

On October 14, 2009, the Board of Trustees remanded the matter to the Medical Board for purposes of evaluating new evidence. The Medical Board reviewed the petitioner's application for ADR for the fourth and final time on February 19, 2010. In its evaluation, it reviewed another letter from Dr. Brand and a medical report from Dr. Yvette Lam, a fellow in Gastroenterology. Dr. Brand reiterated that the petitioner had experienced good results with her 1997 surgery, "completely abolishing" her previous symptoms. Since the symptoms returned after September 11, 2001, Dr. Brand believes that the exposure is the cause of her current symptoms. Petitioner's Exhibit CC, at 2. Dr. Lam noted that petitioner's diagnosis "includes refractory GERD nonerosive reflux disease, low LES pressure secondary to nonfunctional partial fundoplication and also World

Trade Center exposure related GERD as well as extraintestinal manifestations of GERD." Petitioner's Exhibit U, at 3.

The Medical Board reiterated the "importance" of an earlier report dated December 5, 2008, written by Dr. Bermanski, who had concluded that the return of her past upper GI symptoms were "exacerbated by weakening of Nissan Fundoplication."

Respondents' Exhibit 13, ¶ 5. The Medical Board interviewed petitioner, who, on interview, explained that there was still "evidence of reflux, a loosening of her fundoplication, but no Barrett's esophagus." *Id.*, ¶ 8.

The Medical Board again reaffirmed its previous decision and recommended ODR but disapproved the ADR application. The Medical Board stated that "there is no evidence that [her GERD] is secondary to World Trade Center exposure but due to progressive problems with her previous surgery." The Medical Board based this determination on all the evidence, according to their report, but specifically pointed to Dr. Bermanski's report which notes that since the fundoplication was loosened and not functioning, her previous symptoms returned.

On July 14, 2010, the Board of Trustees adopted the Medical Board's recommendation and disapproved petitioner's ADR application. Minutes of the Board of Trustees Meeting, Respondents Exhibit 23. In the minutes, the Board of Trustees pointed out that the petitioner had a history of GERD and also

had a previous fundoplication. It decided that her time at the World Trade Center did not aggravate or make her condition worse. It also believed that petitioner was out of work prior to September 11, 2001 due to her symptoms.⁶ Although the Board of Trustees voted 6-6 to upgrade petitioner to ADR, in the case of a tie, ODR was ultimately awarded. Petitioner ultimately withdrew her ODR application, and she retired on service.

The court notes that, in the respondents' record, there is a letter from Dr. Brand dated May 20, 2010 in which he strongly advises the Medical Board the following, in pertinent part:

I would like to summarize the data that support my conviction that her worsening of symptoms shortly after her exposure to the WTC site was caused by that exposure, rather than by a weakening of her Nissen fundoplication, performed in 1997. While the Disability Board maintains that her post-WTC exacerbation of symptoms was caused by a wearing of the Nissen fundoplication, I maintain that there is no evidence that such a weakening or loosening has occurred and that there is substantial evidence, both from [petitioner's] case and from hundreds of persons similarly exposed, that WTC exposure is frequently associated with either new onset or an exacerbation of past GERD symptoms.

Respondents' Exhibit 51, at 1.

Dr. Brand also summarized the results of her most recent endoscopy which does not show any loosening of the fundoplication. He also noted that the timing of petitioner's symptoms plus the objective symptoms do not support the

⁶Petitioner's counsel argues that any limited duty prior to September 11, 2001 was the result of other medical conditions.

conclusion that petitioner's fundoplication caused the exacerbation of her symptoms.

Although the letter is in the record, the respondents do not mention it in the minutes from the Board of Trustees meeting from July 14, 2010.

Petitioner then filed this Article 78 petition. Petitioner contends that the Board of Trustees should not have adopted the Medical Board's determination because the Medical Board failed to consider competent medical evidence and neglected to apply the proper standards of presumption and causality. Respondents allege that petitioner has not met her burden of establishing that she was disabled by any condition other than her pre-existing GERD.

DISCUSSION

Similar to other city pension funds and retirement systems, there is a two step process when a member of the police force pursues retirement based on accidental disability. See *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 (1996); New York City Administrative Code (NYC Code) § 13-252. First, the petitioner must be examined by a Medical Board who determines whether the applicant is physically or mentally incapacitated for duty. The Medical Board is the sole determiner for whether the applicant is injured and whether this disability prevents the applicant from performing his duties.

Id., at 760. Second, if the applicant is deemed disabled, the Medical Board makes a recommendation to the Board of Trustees whether the disability was the result of a natural and proximate line of duty accident. This second step only occurs if the Medical Board finds that the applicant is disabled. *Id.* Causality is the only issue in this case, since the Medical Board determined that petitioner is disabled.

In an Article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious. *See Matter of Borenstein*, 88 NY2d 756, *supra*. "Ordinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require 'some credible evidence' [internal citations omitted]." *Id.* at 760. Credible evidence has been generally defined as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered ... [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion [internal citations omitted]." *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 (1997). When conflicting medical opinions are

presented, the opinion of the Medical Board takes precedence. *Matter of Borenstein*, 88 NY2d at 760. Where, as here, the determination of the Board of Trustees has resulted in a tie vote, the court may not disturb the final award, "as long as there was any credible evidence of lack of causation before the Board of Trustees" *Matter of Meyer*, 90 NY2d at 145.

The WTC Bill, Administrative Code § 13-252.1, creates a presumption of accidental death or disability due to certain conditions which arise in police pension fund members who participated in the rescue, recovery or clean up operations of the World Trade Center attacks. Unlike accidental death or disability benefits, where the causation burden to show that the member was disabled or died as a result of a work-related injury falls on the petitioner, under the WTC Bill, the burden of causation is on the respondents. The statute provides:

Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence.

Administrative Code § 13-252.1.(1[a]).

There are certain criteria which members must meet before

they can apply for benefits under the WTC Bill, such as length of time spent at the site and type of medical condition. Diseases of the gastroesophageal tract are qualifying conditions.

Although petitioner filled out the paperwork alleging that she worked the required hours and performed the covered duties at the World Trade Center site, respondents have not yet verified this paperwork. Respondents explain that since "petitioner was not entitled to ADR under the WTC Law based on a rebuttal of the WTC Law presumption, the [Police Pension Fund] has yet to initiate the verification process." Respondents' Answer, ¶ 20.

Although no definition has been standardized for what constitutes proof by competent evidence for purposes of rebutting the WTC presumption, a recent New York County Supreme Court case, affirmed by the Appellate Division, First Department, has held that the credible evidence standard is essentially the same. *Matter of Jefferson v Kelly*, 14 Misc 3d 191 (Sup Ct, NY County 2006), citing *Matter of Goldman v McGuire*, 64 NY2d 1041 (1985). The court in *Matter of Jefferson v Kelly* (14 Misc 3d at 196-197), noted, "in order to rebut the presumption, there must be some credible medical evidence in the record on which to base the determination that the (presumed) accidental injury did not cause the disability."

However, determinations of the Medical Board and Board of Trustees have been annulled, and the matter remanded to the

Medical Board for further review, when the medical findings do not sustain the Medical Board's determination, or when the petitioner's medical issues were not adequately addressed. See *Matter of Rodriguez v Board of Trustees of N.Y. City Fire Department, Art. 1-B Pension Fund*, 3 AD3d 501 (2d Dept 2004).

Applying this standard to the present case, due to the letter in respondents' record dated May 20, 2010, the court finds that the Medical Board did not have the opportunity to adequately address the petitioner's medical issues. In sum, the Medical Board concluded that petitioner's disabling condition was caused by her pre-existing GERD returning as a result of time due to a loosened fundoplication. Allegedly this need for further surgery was the cause of the symptoms, not her WTC exposure. The Board of Trustees also agreed with the Medical Board and mentioned that there was nothing in the file that would indicate that her condition was aggravated by working at the World Trade Center.

However, in the last report attached in the record, Dr. Brand claims that the latest testing indicates that there is no evidence that petitioner's fundoplication had loosened. This most recent test and theory would thereby invalidate the respondents' entire basis for their rationale as to why petitioner's symptoms had returned. As the letter is in the respondents' record, it was obviously considered by some of the respondents. It was dated prior to the Board of Trustees' final

determination. Additionally, there were multiple forms of evidence to demonstrate that petitioner's condition may have been aggravated by working at the World Trade Center, yet the Board of Trustees noted in their minutes that there no such evidence in the file.

As set forth in *Matter of Kiess v Kelly* (75 AD3d 416, 417 [1st Dept 2010]), "[w]hile the Medical Board is entitled to resolve conflicts in the medical evidence and rely on its own physical examinations of the applicant, fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees before petitioner's claim to accident disability retirement may be properly rejected ... [internal quotation marks and citations omitted]." Since the respondents do not address or even explain why Dr. Brand's letter, which appears to be of probative value, was included in the record, it is clear that the Medical Board did not consider all of the submitted medical evidence. Moreover, as previously mentioned, it is respondents' burden to rebut causation on a World Trade Center presumption. As such, in light of Dr. Brand's letter dated May 20, 2010, coupled with the fact that many of the other physicians also adamantly believed that petitioner's work at the WTC site caused the return of her symptoms, "fairness demands" that the matter be remanded to the Medical Board for new medical findings and a new determination by the Board of

Trustees.

CPLR 2307(a) and Petitioner's Other Requests for Relief:

Petitioner also seeks an order, pursuant to CPLR 2307(a), directing respondents to serve and file all materials in connection with the petitioner's retirement. Petitioner does not address this request in her petition, nor does she support it in her memorandum of law. As such, it appears that the petitioner has abandoned this claim, and the court therefore denies it.

Likewise, petitioner has also requested a hearing in court on the factual issues raised herein or, alternatively, with the Board of Trustees, but did not address these requests. Nonetheless, this additional relief is denied. As properly argued by respondents, the appropriate relief for petitioner at this time is for the matter to be remanded to the original fact finder for additional review.

In a case where the Board of Trustees was the respondent, the Appellate Division, First Department, held that it was "improper to order a jury trial in this case, for as above stated, it was solely within the province of the Board of Trustees to determine the facts, and court's function is limited merely to review the action taken by the Board of Trustees to determine whether it was arbitrary and capricious. There is no room, in a situation such as this, for a jury trial or verdict." *Matter of Brady v City of New York*, 26 AD2d 278, 279-280 (1st

