

**Matter of Mallozzi-Petrizzo v Kelly**

2012 NY Slip Op 30458(U)

January 27, 2012

Supreme Court, New York County

Docket Number: 106870/2010

Judge: Lucy Billings

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

LUCY BILLINGE

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

PART 46

Index Number : ~~106780/2010~~  
 106870/2010  
**MALLOZZI-PETRIZZO, ELLEN**  
 VS.  
**KELLY, RAYMOND**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

*The court denies the petition and dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 7803(3) and (4), 7806.*

**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: 1/27/12

*Lucy Billings*  
 \_\_\_\_\_  
 LUCY BILLINGE 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 46

-----X  
In the Matter of the Application of  
ELLEN MALLOZZI-PETRIZZO,

Index No. 106870/2010

Petitioner,

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

DECISION AND ORDER

- against -

RAYMOND KELLY, as Police Commissioner  
of the City of New York, and as  
Chairman of the Board of Trustees of  
the Police Pension Fund, Article II;  
BOARD OF TRUSTEES of the Police  
Pension Fund, Article II; and CITY  
NEW YORK,

UNFILED JUDGMENT

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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).

Respondents

-----X  
LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner, a former New York City Police Officer, injured  
her right knee October 29, 1992, while in the police academy, and  
her right ankle and right knee June 16, 2008, while she responded  
to a call summoning the police. Respondent Board of Trustees of  
the Police Pension Fund granted petitioner ordinary disability  
retirement benefits. Respondent Commissioner then directed  
respondents' medical board to evaluate petitioner for the higher  
accidental disability retirement (ADR) benefits due to her right  
knee injury.

Respondents' medical board considered treatment notes and  
surgical reports from petitioner's treating physician and

physical therapist and reports from respondents' examining physician. Citing petitioner's ongoing pain symptoms, the medical board concluded October 16, 2009, that petitioner sustained a line of duty injury June 16, 2008, and could no longer perform the duties of a police officer. The medical board unanimously recommended approval of ADR and disapproval of ordinary disability retirement.

At proceedings December 9, 2009, respondent Board of Trustees noted the medical board's approval of ADR, but tabled the question to allow for additional evidence. At proceedings February 25, 2010, the Board of Trustees viewed a photograph of the stairs on which petitioner tripped. Finding no defect in the stairs, the Board of Trustees granted ordinary disability retirement, but denied ADR by a 6 to 6 vote.

In this proceeding pursuant to C.P.L.R. Article 78, petitioner seeks to annul respondents' determination February 25, 2010, denying her ADR as arbitrary and to require respondents to grant her ADR or, alternatively, review her application again or grant her a hearing. C.P.L.R. § 7803(3); N.Y.C. Admin. Code § 13-252. Petitioner also seeks respondents' production of specified documents, but nowhere indicates the grounds for this request.

## II. APPLICABLE STANDARDS

In reviewing respondents' determination regarding disability, the court must defer to the medical board's determination of causation and uphold it if rationally based and

not arbitrary, capricious, an abuse of discretion, or contrary to law. Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d 756, 760 (1996); Maldonado v. Kelly, 86 A.D.3d 518, 519 (1st Dep't 2011); Claudio v. Kelly, 84 A.D.3d 667 (1st Dep't 2011); Jefferson v. Kelly, 51 A.D.3d 536 (1st Dep't 2008). See Linden Airport Mgt. Corp. v. New York City Economic Dev. Corp., 71 A.D.3d 501, 502 (1st Dep't 2010); Valentin v. New York City Police Pension Fund, 16 A.D.3d 145 (1st Dep't 2005); City of New York v. O'Connor, 9 A.D.3d 328 (1st Dep't 2004). Physical or mental incapacity to perform city service qualifies a police officer for ordinary disability retirement. N.Y.C. Admin. Code § 13-251. If that incapacity is "a natural and proximate result of an accidental injury received in such city-service while a member, and . . . such disability was not the result of wilful negligence on the part of such member," the police officer is eligible for ADR. N.Y.C. Admin. Code § 13-252. While not defined in the Administrative Code, "wilful negligence" is construed as consciously disregarding the consequences of actions. Sullivan-Dorsey v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 288 A.D.2d 131, 132 (1st Dep't 2001); Robinson v. New York State & Local Police & Fire Retirement Sys., 192 A.D.2d 951, 952 (3d Dep't 1993).

The medical board's medical examination must establish disability. N.Y.C. Admin. Code §§ 13-251, 13-252. Thus the medical board's fact finding process requires (1) determining whether the applicant is physically or mentally incapable of

performing city work and (2) whether an "accidental" injury while in service proximately caused the applicant's disability to perform that work. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d 139, 144 (1997); Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 760. The medical board's determination must be supported by substantial evidence, which must be credible, relevant evidence reasonably adequate to support a fact or conclusion. Jennings v. New York State Off. of Mental Health, 90 N.Y.2d 227, 239 (1997); Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 760. See McCabe v. Hevesi, 38 A.D.3d 1035, 1036 (3d Dep't 2007). Credible evidence is evidence from a reliable source, which must reasonably tend to support the fact or conclusion for which the evidence is offered, as long as it is neither conjecture nor simply a conclusion itself. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 147; Cusick v. Kerik, 305 A.D.2d 247, 248 (1st Dep't 2003).

### III. PETITIONER'S CLAIM OF ACCIDENTAL INJURY ENTITLING HER TO ADR

The parties do not dispute that petitioner is disabled from performing work as a police officer. The parties do dispute, however, whether her injury June 16, 2008, was accidental. In claiming entitlement to ADR based on her right knee injuries sustained in the line of duty, petitioner maintains that respondents' denial of ADR failed to apply the required standards in evaluating whether she sustained her disability in the line of

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duty, reaching a conclusion contrary to the evidence, and depriving her an opportunity for a fair hearing.

Not every line of duty injury is accidental. McCambridge v. McGuire, 62 N.Y.2d 563, 567-68 (1984); Hopp v. Kelly, 4 A.D.3d 176 (1st Dep't 2004). While Administrative Code § 13-252 does not define accidental or accident, the latter term is construed as "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 57 N.Y.2d 1010, 1012 (1982). See Starnella v. Bratton, 92 N.Y.2d 836, 838 (1998); McCambridge v. McGuire, 62 N.Y.2d at 568; Baird v. Kelly, 25 A.D.3d 311, 312 (1st Dep't 2006); Rosenthal v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 252 A.D.2d 388, 389 (1st Dep't 1998). To constitute an accident, an unexpected occurrence other than a risk of the duties performed must have caused the injury. Starnella v. Bratton, 92 N.Y.2d at 838-39; McCambridge v. McGuire, 62 N.Y.2d at 568. To reverse the Board of Trustees' determination that an accident did not cause petitioner's disabling injury, petitioner must show that their determination was not supported by credible evidence. Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II, 57 N.Y.2d at 1012; Picciurro v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 46 A.D.3d 346, 348 (1st Dep't 2007); Hopp v. Kelly, 4 A.D.3d 176.

A. The Basis for Respondents' Denial of ADR

The sole basis for respondents' denial of ADR was a photograph of the stairs on which petitioner fell, which the Board of Trustees found did not show any defective condition. Falling down stairs from a misstep alone is not so extraordinary or unanticipated as to constitute an accident as defined in this context. Starnella v. Bratton, 92 N.Y.2d at 839; Rosenthal v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 252 A.D.2d at 389. See Gray v. Kerik, 15 A.D.3d 275 (1st Dep't 2005); McCabe v. Hevesi, 38 A.D.3d at 1036. Even though the medical board recommended ADR, the Board of Trustees is not bound by that recommendation insofar as it depends on non-medical determinations. Picciurro v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 46 A.D.3d at 348; Luisi v. Safir, 262 A.D.2d 47, 48 (1st Dep't 1999); Calzerano v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 245 A.D.2d 84 (1st Dep't 1997). Petitioner's failure to mention any defect in the stairs in any of her statements concerning the cause of her injury further supports respondents' conclusion. Gamman v. Kelly, 11 A.D.3d 389 (1st Dep't 2004); Kuhn v. Bratton, 240 A.D.2d 171, 172 (1st Dep't 1997). Officer Concepcion, who witnessed petitioner's fall, likewise did not report a defect in the stairs. Petitioner's amendment July 14, 2008, to her line of duty injury report sought only to include injuries to her lower back and right foot.

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B. The Basis for Petitioner's Challenge to Respondents' Denial

Petitioner challenges respondents' determination by presenting an unsworn letter dated April 26, 2010, by John J. Flynn P.E., an expert engineer, recounting that on April 20, 2010, he, petitioner, and her attorney visited the building where petitioner was injured June 16, 2008. Based on his inspection, Flynn concluded that the irregularity of the stairs' risers and treads where petitioner fell did not comply with specified building code requirements and caused her fall. Although an adjudicatory body may not consider an engineer's opinion regarding the applicability of and compliance with legal requirements, an adjudicator may consider the engineer's factual findings regarding the structure's condition. Buchholz v. Trump 767 Fifth Ave., 4 A.D.3d 178, 179 (1st Dep't 2004), aff'd, 5 N.Y.3d 1 (2005); Reyes v. Morton Williams Associated Supermarkets, Inc., 50 A.D.3d 496, 497 (1st Dep't 2008); Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180, 183 (1st Dep't 2006); Measom v. Greenwich & Perry St. Hous. Corp., 268 A.D.2d 156, 159 (1st Dep't 2000). Flynn's letter also is unsworn hearsay, but hearsay evidence that does not qualify as an exception to the rule against hearsay may constitute substantial evidence supporting an administrative adjudication, as long as the evidence is "sufficiently relevant and probative." Foster v. Coughlin, 76 N.Y.2d 964, 966 (1990); Gray v. Adduci, 73 N.Y.2d 741, 742 (1988); Perez v. Wilmot, 67 N.Y.2d 615, 616-17 (1986); 49th St. Mgt. Co. v. New York City Taxi & Limousine Commn., 277

\* 9]  
A.D.2d 103, 106 (1st Dep't 2000).

Flynn's opinion, however, lacks probative value. 101 Maiden Lane Realty Co., LLC v. Tran Han Ho, 88 A.D.3d 596 (1st Dep't 2011); Quinones v. Ksieniewicz, 80 A.D.3d 506 (1st Dep't 2011). No evidence indicates that, when Flynn inspected the stairs where plaintiff fell, they were in the same condition then, in April 2010, as when plaintiff fell in June 2008. Gilson v. Metropolitan Opera, 15 A.D.3d 55, 59 (1st Dep't 2005), aff'd, 5 N.Y.3d 574 (2005); Machado v. Clinton Hous. Dev. Co., Inc., 20 A.D.3d 307 (1st Dep't 2005); Budd v. Gotham House Owners Corp., 17 A.D.3d 122, 123 (1st Dep't 2005); Santiago v. United Artists Communications, 263 A.D.2d 407, 408 (1st Dep't 1999). Even though petitioner accompanied Flynn on his inspection, her affidavit dated December 10, 2010, fails to cure this deficiency. She attests that she visited the building where she was injured June 16, 2008, three times since her injury and that the stairs appeared to be in the same condition as when she fell, but she does not indicate when those three visits occurred. Nor does she attest to this comparison when she accompanied Flynn during his inspection. In fact, petitioner never describes any defect in the stairs, nor even claims they were defective, but merely attests that she "unexpectedly tripped." Aff. of Ellen Mallozzi-Petrizzo ¶ 3. Petitioner thus fails to proffer new evidence on the issue of an accidental injury to be considered on a remand to the administrative agency. E.g., Auringer v. Department of Bldgs. v. City of N.Y., 24 A.D.3d 162, 163-64 (1st Dep't 2005);

Luisi v. Safir, 262 A.D.2d at 49-50; Poster v. Strough, 299 A.D.2d 127, 142-43 (2d Dep't 2002). See Rizzo v. New York State Div. of Hous. & Community Renewal, 6 N.Y.3d 104, 111 (2005); ADC Contr. & Constr. Corp. v. New York City Dept. of Design & Constr., 25 A.D.3d 488 (1st Dep't 2006); Kirmayer v. New York State Dept. of Civ. Serv., 24 A.D.3d 850, 852 (3d Dep't 2005).

Since the Board of Trustees denied ADR based on a 6 to 6 vote, the court may reverse that determination only if the evidence establishes that petitioner's disability arose from a service related accident as a matter of law. McCambridge v. McGuire, 62 N.Y.2d at 568; Picciurro v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 46 A.D.3d at 347; Bisani v. Kelly, 39 A.D.3d 261; Furlong v. Safir, 295 A.D.2d 248 (1st Dep't 2002). Just as the prior record failed to meet this high standard, the evidence petitioner now presents, combined with the prior record, fares no better. Picciurro v. Board of Trustees of N.Y. City Police Pension Fund, Art. II, 46 A.D.3d at 348; Hopp v. Kelly, 4 A.D.3d 176. See Luisi v. Safir, 262 A.D.2d at 50. The engineer's report and petitioner's more recent claims of defective stairs still fall far short of establishing an accidental injury as a matter of law. Bisani v. Kelly, 39 A.D.3d 261; Morgan v. Kerik, 305 A.D.2d 288, 289 (1st Dep't 2003).

#### IV. CONCLUSION

Upon this record, even as supplemented by petitioner's new evidence, petitioner has failed to establish that respondents' denial February 25, 2010, of ADR to her violated lawful

procedure, was affected by any other error of law, was arbitrary, lacked a rational basis, or was unsupported by the evidence presented. C.P.L.R. § 7803(3) and (4). Therefore the court denies the petition and dismisses this proceeding. C.P.L.R. § 7806.

Since petitioner has not explained her reason or purpose in requesting that respondents produce documents, the court denies this request as unsupported. If her request is not academic in light of this disposition, because she needs those documents in the further administrative proceedings, she may present her request to respondents in conjunction with any such proceedings. This decision constitutes the court's order and judgment denying the petition and dismissing this proceeding.

DATED: January 27, 2012

*Lucy Billings*  
\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

**UNFILED JUDGMENT**  
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