

<b>Matter of Cruz v Kelly</b>
2012 NY Slip Op 30494(U)
January 30, 2012
Supreme Court, New York County
Docket Number: 108869/2010
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LUCY BILLINGS

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_  
*Justitia*

PART 46

Index Number : 108869/2010  
**CRUZ, SYLVIA**  
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  
2

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~~ and adjudged that:

*The court grants the petition to the extent of remanding the proceeding to respondents for reevaluation and otherwise 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: 1/30/12

*Lucy Billings*

**LUCY BILLINGS** 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

In the Matter of the Application of  
SYLVIA CRUZ,

Index No. 108869/2010

Petitioner,

DECISION AND ORDER

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

- 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 OF  
NEW YORK,

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon.  
To obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1410).

Respondents

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Respondent Board of Trustees of the Police Pension Fund granted petitioner, a former New York City Police Officer, ordinary disability retirement on March 10, 2010, based on a diagnosis of personality disorder. On November 29, 2007, petitioner applied for reclassification of her ordinary disability retirement to accident disability retirement (ADR) due to depression, anxiety, and post-traumatic stress disorder (PTSD) she sustained from her work at the World Trade Center site after the terrorist attacks September 11, 2001. On October 13, 2008, respondents' medical board recommended denial of ADR on the grounds that she did not suffer from a disorder and was disabled

[\* 3]

from functioning before 2007, and other factors relating to her health and problems she faced at work caused her mental difficulties, rather than her service as a police officer on or after September 11, 2001. The medical board reviewed petitioner's application twice more, but reaffirmed its determination. Adopting the findings of the medical board, respondent Board of Trustees denied petitioner ADR benefits March 10, 2010.

In this proceeding pursuant to C.P.L.R. Article 78, petitioner seeks to annul the determination denying her ADR as arbitrary and capricious or to require respondents to review her application once again or grant another hearing. C.P.L.R. § 7803(3); N.Y.C. Admin. Code § 13-252.1. Petitioner also seeks respondents' production of specified documents, but nowhere indicates the grounds for this request.

Even though petitioner benefits from the presumption of an accidental disability due to work at the World Trade Center site on and following September 11, 2001, respondents need only present relevant, credible evidence supporting a contrary conclusion to rebut the presumption. They need not attack the conclusions by petitioner's treatment providers directly and show that they are unsupported or unscientific. As explained below, respondents nonetheless fail to sustain their determination.

## 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," the police officer is eligible for ADR. N.Y.C. Admin. Code § 13-252. Incapacity resulting from "a qualifying World Trade Center condition as defined in section two of the retirement and social security law," is presumptive evidence of an injury incurred as a "result of an accident" in the performance of service. N.Y.C. Admin. Code § 13-252.1(1)(a); Maldonado v. Kelly, 86 A.D.3d at 518. See Macri v. Kelly, \_\_ A.D.3d \_\_, 2011 WL 6757484 at \*3 (1st Dep't Dec. 27, 2011). PTSD is a qualifying condition. N.Y. Retire. & Soc. Sec. Law § 2(36)(a), (b), and (d).

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. 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; Macri v. Kelly, 2011 WL 6757484 at \*4; Cusick v. Kerik, 305 A.D.2d 247, 248 (1st Dep't 2003).

The presumption of an accidental disability from work in the line of duty at the World Trade Center site on or following September 11, 2001, provided by Administrative Code § 13-252.1(1)(a) shifts the burden of proof to respondents to show that the disabling condition did not arise from work at the World Trade Center site after the terrorist attacks. Macri v. Kelly, 2011 WL 6757484 at \*3; Maldonado v. Kelly, 86 A.D.3d at 519. Credible medical evidence that the applicant's condition from

work at the site on or following September 11, 2001, did not cause her disability thus is required to rebut the presumption. N.Y.C. Admin. Code § 13-252.1; Maldonado v. Kelly, 86 A.D.3d at 519; Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 86 A.D.3d 427 (1st Dep't 2011); Velez v. Kelly, 84 A.D.3d 693 (1st Dep't 2011); Claudio v. Kelly, 84 A.D.3d 667.

III. PETITIONER'S ACCIDENT DISABILITY RETIREMENT CLAIM

Petitioner claims entitlement to ADR based on depression, anxiety, and PTSD caused by her recovery work after the terrorist attacks. She maintains that respondents' denial of ADR failed to apply the required standards in evaluating the cause of her disability, reaching a conclusion contrary to the evidence.

A. The Basis for Petitioner's ADR Claim

Petitioner guarded the World Trade Center site on September 12, 2001, then worked at the Staten Island landfill until June 2002, and suffered related symptoms of irritability, anxiety, hypervigilance, insomnia, and fatigue during that period. She presented evidence that she suffered from depression, anxiety, and PTSD, which her experts concluded arose from her service on and after September 11, 2001.

The World Trade Center Mental Health Monitoring and Treatment Program screened petitioner September 18, 2006. David Schwam M.D. of that program began treating her October 26, 2006, for PTSD. Dr. Schwam found petitioner's work relating to the attacks on September 11, 2001, caused her anxiety and other

\* 7]

stressors and prescribed medication and psychotherapy. In a treatment note March 9, 2007, Dr. Schwam reported petitioner's PTSD symptoms of social withdrawal and emotional numbing, as well as persistent anxiety improved with the medications.

In a letter dated September 10, 2008, Faith Ozbay M.D., another psychiatrist at the World Trade Center Mental Health Monitoring and Treatment Center, treated petitioner for chronic PTSD, with symptoms of panic attacks and claustrophobia. Dr. Ozbay prescribed medication for depression and anxiety, which impaired her ability to perform the duties of a police officer. In a letter dated October 8, 2008, Dr. Ozbay noted petitioner's nightmares and diminished attention, but found mild improvement with the medications. In a third letter dated January 7, 2009, Dr. Ozbay recounted petitioner's reports of experiencing irritability, anxiety, claustrophobia, nightmares, insomnia, hypervigilance, and memory and attention deficits since 2002, but failing to seek treatment because of the stigma attached to mental health problems. Petitioner also reported, however, that her symptoms improved mildly over time, but she required medication. Dr. Ozbay concluded petitioner could no longer perform police work due to anxiety, attention deficits, and claustrophobia.

Ali Khadivi Ph.D. examined petitioner July 11, 2009, and performed psychological tests that showed she suffered from anxiety and PTSD, but not a personality disorder. Dr. Khadivi pointed out that records from her past employment as a teacher

and earlier in her police career did not manifest a personality disorder. Based on collateral reports from a friend and a relative of petitioner, Dr. Khadivi determined that petitioner exhibited PTSD symptoms in 2001 and confirmed that petitioner did not seek treatment because of the associated stigma and fear of its negative consequences on her job. Like Dr. Ozbay, he concluded that petitioner could no longer perform police work.

B. Respondents' Rebuttal Evidence

Given petitioner's evidence, respondents bore the burden to rebut the presumption that her service in recovery operations on or after September 11, 2001, caused her disabling conditions. The presumption prevails "unless the contrary be proved by competent evidence." N.Y.C. Admin. Code § 13-252.1(1)(a). As set forth above, the evidence sufficient to rebut the presumption need only be relevant, credible evidence supporting the medical board's contrary conclusions. The medical board need only demonstrate this requisite support for the board's own conclusions and need not demonstrate that the conclusions by petitioner's treatment providers are unsupported or unscientific. Maldonado v. Kelly, 86 A.D.3d at 519; Claudio v. Kelly, 84 A.D.3d 667; Kelly v. Kelly, 82 A.D.3d 544 (1st Dep't 2011); Jefferson v. Kelly, 51 A.D.3d at 537.

Respondents rely on the lack of evidence that petitioner received any treatment after her service September 11, 2001, until June 2006, when she visited the World Trade Center Mental Health Monitoring and Treatment Program, at her union's urging of

all its members. Over a year later, on July 2, 2007, petitioner was hospitalized after she suffered a panic attack at work. On July 3, 2007, Catherine Lamstein Psy.D., a psychologist for respondent New York City Police Department's Psychological Evaluation Section, initially examined petitioner, who reported anxiety attacks, caused by traveling over bridges and into Manhattan; social withdrawal; and insomnia. Petitioner further experienced olfactory hallucinations of burning flesh and nightmares about finding body parts. Dr. Lamstein identified concerns about other causes of petitioner's stress: a tumor, possible infertility, being disciplined at work, and caring for an ill parent. Dr. Lamstein also reviewed petitioner's records from the World Trade Center Mental Health Monitoring and Treatment Program.

Based on interviews and psychiatric testing, Dr. Lamstein concluded that petitioner underperformed as a worker, exaggerated, and was not completely truthful, masking the actual extent of her psychological distress. Dr. Lamstein diagnosed petitioner with anxiety disorder, concluded she could no longer perform full duty as a police officer, and placed petitioner on restricted duty due to her psychological condition. Eli Kleinman M.D., the Police Department's Supervising Chief Surgeon, confirmed that diagnosis in a report dated August 18, 2008.

The determinations by both respondents' experts, that petitioner's conditions resulted from difficulties at work, health concerns, and familial stresses, formed the basis for

respondents' denial of ADR. See, e.g., Maldonado v. Kelly, 86 A.D.3d at 519; Kelly v. Kelly, 82 A.D.3d 544; Casiano v. Brown, 209 A.D.2d 182, 183 (1st Dep't 1994). Other plausible conclusions do not warrant reversal of the agency's determination. Jennings v. New York State Off. of Mental Health, 90 N.Y.2d at 239. Even though petitioner's evidence contradicts respondents' evidence, the sole authority to resolve conflicting medical evidence rests with the medical board. Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 761; Kelly v. Kelly, 82 A.D.3d 544; Kiess v. Kelly, 75 A.D.3d 416, 417 (1st Dep't 2010). The medical board, upon its review as early as its report October 13, 2008, relied on the lack of medical evidence regarding petitioner's mental disorder for five years following September 11, 2001, despite the reports by Dr. Ozbay and Dr. Khadivi that address that issue. Although the medical board's failure to consider the reports of petitioner's treating professionals would mandate a reversal of its determination, Kiess v. Kelly, 75 A.D.3d at 417, the record here shows that it did consider that evidence insofar as it summarized each new report petitioner submitted. V. Answer Exs. 4, 7, 11. The standards for the medical board's rebuttal do not require the board to attack each report directly and break it down.

The Board of Trustees adopt their determinations by a simple majority of votes. N.Y.C. Admin. Code § 216(b); Caruso v. New York City Police Dept. Pension Funds, Arts. 1 & 2, 72 N.Y.2d 568, 573 (1988). A tie vote on ADR claims constitutes a denial of the

ADR claim and therefore a determination of only ordinary disability retirement. Caruso v. New York City Police Dept. Pension Funds, Arts. 1 & 2, 72 N.Y.2d at 573; Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 60 N.Y.2d 347, 351-52 (1983); Kenney v. New York City Tr. Auth., 275 A.D.2d 639, 640 (1st Dep't 2000). Since a denial of ADR by a deadlocked vote does not produce any more of a factual determination to be reviewed than a majority vote that simply accepts the medical board's finding, the deadlock does not provide a ground for the court to act as the tiebreaker and reverse the ADR denial. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 144-45; Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 60 N.Y.2d at 352; Maldonado v. Kelly, 86 A.D.3d at 518 n.2.

Consequently, to set aside the 6 to 6 tie vote denying petitioner's ADR application, V. Answer Ex. 15, the court may not apply any lower standard than had the denial been by a unanimous vote accepting the medical board's recommendation; the court may reverse the denial only if disability from the service related condition may be determined as a matter of law. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 145; Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 60 N.Y.2d at 352; Macri v. Kelly, 2011 WL 6757484 at \*4; Cusick v. Kerik, 305 A.D.2d at 248. Respondents' evidence that petitioner's work

difficulties, health concerns, and family stresses, rather than her work related to the attacks September 11, 2001, caused her disabling condition, Wahl v. Board of Trustees of N.Y. City Fire Department, 89 N.Y.2d 1065, 1067 (1997); Claudio v. Kelly, 84 A.D.3d 667; Kelly v. Kelly, 82 A.D.3d 544; Jefferson v. Kelly, 51 A.D.3d 536, if credible, would require the court to uphold the denial, Meyer v. Board of Trustees of N.Y. City Fire Dept., Art 1-B Pension Fund, 90 N.Y.2d at 145; Cusick v. Kerik, 305 A.D.2d at 248, and preclude the court from finding that, absent her World Trade Center work, petitioner would not be disabled.

C. The Medical Board's Unfounded Diagnosis and Its Failure to Consider Petitioner's Treating Physicians' Findings

As indicated, the medical board's recommendation to deny petitioner ADR October 19, 2009, relied on the lack of documented symptoms or treatment before 2006 and her work difficulties and health concerns causing anxiety, to rebut the World Trade Center presumption. The medical board adhered to these same grounds, stemming directly back to the records and reports from the World Trade Center Mental Health Monitoring and Treatment Program and Dr. Lamstein, each time the board reviewed petitioner's subsequent reports from her treatment providers. Although Dr. Kleinman's report also supports the grounds for respondents' denial of ADR, his report summarily concurs with and endorses Dr. Lamstein's conclusions.

The medical board diagnosed petitioner with a personality disorder as the condition on which her ordinary disability retirement is based, even though Dr. Lamstein and Dr. Kleinman

diagnose petitioner with anxiety disorder. Neither doctor, nor any of petitioner's treatment records, indicate petitioner suffered from a personality disorder. Thus respondents' diagnosis is not supported by credible evidence. Macri v. Kelly, 2011 WL 6757484 at \*4; Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 86 A.D.3d at 428. Dr. Schwam, Dr. Ozbay, and Dr. Khadivi instead uniformly found that petitioner exhibited symptoms of PTSD during the period she worked at the World Trade Center site and the Staten Island landfill. Dr. Khadivi and Dr. Ozbay also explained that petitioner did not seek treatment because of the stigma attached to seeking help and her fear of removal from duty.

The medical board never addressed these findings, even though the lack of symptoms and treatment were a basis for respondents' denial of ADR. Failing to consider relevant medical evidence from sources other than respondents' own experts undermines the medical board's conclusion, Macri v. Kelly, 2011 WL 6757484 at \*5, and is an established basis for a remand. Kiess v. Kelly, 75 A.D.3d at 417. A medical conclusion that is not based on such an examination is no more supported by relevant, credible evidence than a conclusion lacking other medical support. Jennings v. New York State Off. of Mental Health, 90 N.Y.2d at 239; Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 147; Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 760. The medical board's denial of ADR premised on evaluations that

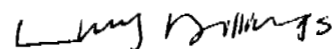
did not fully address the treating psychiatrists' findings likewise lack a rational basis. Macri v. Kelly, 2011 WL 6757484 at \*6; Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 86 A.D.3d at 427-28; Cusick v. Kerik, 305 A.D.2d at 248, 253.

IV. CONCLUSION

This record thus leaves open a significant question whether respondents' denial March 10, 2010, of petitioner's application for accident disability retirement complied with lawful procedure; was supported by a rational basis, including relevant evidence; and was not arbitrary. C.P.L.R. § 7803(3) and (4). Therefore the court remands this proceeding to respondents to reevaluate petitioner considering the findings of her treating psychiatrists. 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 the remand and review. This decision constitutes the court's order and judgment granting the petition to the extent set forth and otherwise denying the petition and dismissing this proceeding.

DATED: January 30, 2012



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LUCY BILLINGS, J.S.C.