

Matter of Richter v Kelly
2012 NY Slip Op 31994(U)
July 18, 2012
Supreme Court, New York County
Docket Number: 113520/2011
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDGE GEOFFREY D. WRIGHT
Justice

PART 62

Index Number : 113520/2011
RICHTER, ROY T.
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s) 1

Answering Affidavits — Exhibits _____ | No(s) 2

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, *memos of law* it is ordered that this motion *is* Petition is decided 3/4
in accordance with the annexed written 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).

GEOFFREY D. WRIGHT
AJSC

Dated: 7-18-2012

_____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

----- X
In the Matter of the Application of
ROY T. RICHTER, As President Of The
Captains Endowment Association Of The
City Of New York Police Department, Inc.,
And As Trustee Of The Board Of Trustees Of The
Police Pension Fund, Article II, And THE
CAPTAINS ENDOWMENT ASSOCIATION OF
THE CITY OF NEW YORK POLICE
DEPARTMENT, INC., and LEA C. DANN,

Petitioners,

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

Index No.:
113520/2011

-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).**

Geoffrey D. Wright, J.:

In this Article 78 proceeding, petitioners Roy T. Richter (Richter) and Lea C. Dann (Dann) seek a judgment annulling the action of 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 (Board of Trustees), and the City of New York (collectively, respondents), which denied Dann line-of-duty accident disability retirement (ADR) benefits pursuant to the Administrative Code of the City of New York (Administrative Code) § 13-252 and General Municipal Law § 207-k (The Heart Bill), and declaring such action to be arbitrary and capricious. In the alternative, petitioners ask this court to direct the respondents to retire Dann with ADR benefits

retroactive to the date of her retirement. Or the alternative, petitioners seek a hearing on the matter herein. Petitioners also seek an order, pursuant to CPLR 2307 (a), directing respondents to serve and file all materials in connection with Dann's claims.

Respondents seek dismissal of the petition and contend that they acted reasonably, lawfully and properly in denying petitioner ADR in accordance with the Heart Bill. If the court should reach a different conclusion, respondents seek to have the case remanded to the Medical Board "for clarification of its determination that petitioner Dann is unable to perform the duties of a Police Surgeon, in light of her continued practice of medicine." Answer, ¶ 57.

BACKGROUND AND FACTUAL ALLEGATIONS

Dann was appointed to the uniformed force of the New York City Police Department (NYPD) as a police surgeon on February 26, 1982. Pursuant to Administrative Code § 14-102, "Surgeons of police" are considered members of the police force. Richter is the President of the Captains Endowment Fund of the City of New York Police Department, Inc.

After a brief break in service in 1987, Dann was reappointed in 1988 until she retired in May 2011 due to a disabling heart condition.¹ Dann was a member of the Police Pension Fund (PPF) and made all of her required contributions. Prior to her appointment as a police surgeon, Dann passed a physical examination which did not reveal any evidence of a heart condition. Petition, ¶ 14. Her job responsibilities included working part-time at the Police Department Medical Division clinic. She also was required to be on call approximately once a month, which meant that "she may have been required, for example, to make field trips to hospitals where police officers were being treated, or attend to police officers during emergencies." Answer, ¶ 40.

On May 13, 2011, after seeing a cardiologist and having tests performed, Dann was required to undergo a cardiac catheterization. Dann, after being seen by a NYPD surgeon, was diagnosed as suffering from "moderate mitral

¹ Dann bought back her pension time and also had accrued time as a New York City employee, giving her a pension equated date of 1978.

regurgitation, severe LAD disease s/p/o percutaneous coronary intervention." Petitioners' Exhibit M, at 1. The NYPD surgeon noted that Dann's prognosis was "poor for [full-time duty]," and she was placed on restricted duty. *Id.* On May 18, 2011, Dann filed an application for ADR, contending that she is eligible under the Heart Bill. The Heart Bill offers members of the NYPD and the FDNY the presumption that disabling or fatal heart conditions which developed during their career are the result of the stress of their particular employment.

Dann wrote on her application, "I complain of a heart condition. Therefore I request accident disability retirement under the Heart Bill '207K.'" Respondents' Exhibit 5, at 2. In addition to Dann's application for ADR, the Police Commissioner filed an application on Dann's behalf for ODR.

Medical Board's Review:

The Medical Board of the Police Pension Fund (Medical Board) considered Dann's application for ADR pursuant to the Heart Bill on May 20, 2011. Respondents' Exhibit 6. The Medical Board reviewed Dann's file, which consisted of Dann's medical record, and also interviewed her.

After discussing the record, the Medical Board summarized that Dann, "had moderate mitral regurgitation and severe left anterior descending artery disease and underwent successful percutaneous coronary intervention to the left anterior descending artery." *Id.*, ¶ 6.

After interviewing Dann, the Medical Board noted that, approximately six months prior, Dann started experiencing shortness of breath. Since Dann had a family history of heart disease, she decided to see a cardiologist. Besides the family history, Dann did not have any other risk factors, such as hypertension or diabetes. The Medical Board concluded, in pertinent part:

Based on a review of the exhibits, the history and physical examination, it is the recommendation of the Article II Medical Board that the surgeon's own application for Accident Disability Retirement under the provisions of the Heart Bill 207-K be approved and the Police Commissioner's application for Ordinary Disability Retirement be disapproved. The final diagnosis is

Arteriosclerotic Heart Disease with
Significant Long Stenotic Lesion
Involving the Left Anterior Descending
Artery and Stents that were Placed in
that Artery as Described.

Id., ¶ 10.

As set forth above, the Medical Board approved Dann's application for ADR under the Heart Bill and disapproved the application for ODR.

Thereafter, the Board of Trustees met three times to discuss Dann's application for ADR under the Heart Bill. In the meeting held on August 11, 2011, members of the Board of Trustees spoke, and displayed various memos which affirmed that police surgeons, who are part of the police force, have always been eligible to receive benefits under the Heart Bill. They noted that a case from the Appellate Division, First Department, *Matter of Callas v Codd* (Sup Ct, NY County, July 31, 1974, Rosenberg, J., Index No. 1682/1974, *affd* 47 AD2d 812 [1st Dept 1975]), specifically held that police surgeons were entitled to receive benefits under the Heart Bill. See Petitioners' Memorandum of Law, Exhibit 1. The New York City Law Department (Law Department) spoke during the meetings and opined that, despite the Appellate Division case, the legislative history of the Heart Bill, as spelled out by the Court of Appeals, allegedly does not support the notion that police surgeons should receive the benefits of the Heart Bill.

During the meeting held on September 14, 2011, some members of the Board of Trustees testified that, historically, at least 10 police surgeons have received benefits under the Heart Bill. And, the duties of those police surgeons were similar to petitioner's. Police Officer Alejandro, member of the Board of Trustees, summarized as follows:

Without any change in the statute,
without any change in the title, without
any change in duties, I think to suddenly
just come out of the blue and say there's
been a reinterpretation by the Law
Department, regardless of the political
changes that may have occurred during
that time and the political opinions of
the leaders in the administration,

current administration at the time, there's been no change in that statute of duties or title, but we are going to reinterpret the law and we are going to treat this beneficiary differently than all others who preceded, I think really kind of begs the question that this member is being treated in an arbitrary and capricious manner.

Petitioners' Exhibit R, at 63.

Others testified that, since they did not believe police and fire department surgeons performed the same duties as police and fire members do, the Legislative did not intend for the surgeons to receive the Heart Bill benefits. They stated that every case should be looked at individually. The Law Department also introduced a memo regarding a fire department surgeon, from the second department, whom they also did not believe should be eligible for the Heart Bill.

Despite the Medical Board's recommendation to award Dann ADR under the Heart Bill, the Board of Trustees' vote resulted in a tie vote for ODR and ADR. In the case of a tie, ODR is ultimately awarded (see *Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension Fund* (98 NY2d 548, 552 [2002])), and Dann was informed on October 1, 2011 that she was not eligible for ADR under the Heart Bill.

Dann then filed this Article 78 petition.

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 benefits based on accidental disability. Administrative Code § 13-252; see *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 (1996). First, the petitioner must be examined by a Medical Board which determines whether the applicant is physically or mentally incapacitated for duty. The Medical Board is the sole determiner of 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

* 7]
whether the disability was the result of a natural and proximate line-of-duty accident.

The Heart Bill creates a presumption that an officer's heart disease resulting in disability was incurred in the performance of duty, unless rebutted with competent evidence. The Heart Bill acknowledges,

not only that heart conditions are an occupational hazard for police officers and firemen, but also that this is a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as a result of the continuous stress and strain of the job

Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO v Beekman, 52 NY2d 463, 471 (1981). When an applicant applies for ADR, in general, he has the burden of proving to the Medical Board that he incurred a disability, and that this disability was incurred during his employment. *Matter of Evans v City of New York*, 145 AD2d 361, 361 (1st Dept 1988). However, under the Heart Bill, the burden of lack of causation is on the respondents. The statute provides, in pertinent part:

a. [A]ny condition of impairment of health caused by diseases of the heart, or by a stroke, resulting in total or partial disability or death to a paid member of the uniformed force of a paid police department or fire department, where such paid policemen or firemen are drawn from competitive civil service lists, who successfully passed a physical examination on entry into the service of such respective department, which examination failed to reveal any evidence of such condition, shall be presumptive evidence that it was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence.

General Municipal Law § 207-k (a).

In general, the Medical Board has been able to successfully rebut the Heart Bill presumption when the

medical reports established that the heart condition was due to congenital defects, childhood disease, or was caused by conditions that are not related to work stress. See *Matter of Quilty v Ward*, 193 AD2d 439, 440 (1st Dept 1993); *Matter of Simmons v Herkommer*, 98 AD2d 651, 652 (1st Dept 1983), *affd* 62 NY2d 711 (1984). Neither the Medical Board nor the Board of Trustees is required to establish the cause of the heart condition, only that it was not caused by her duties as a police officer. *Matter of Stegmuller v Brown*, 216 AD2d 23, 23 (1st Dept 1995). In the present situation, the Medical Board did not attempt to rebut the Heart Bill's presumption of causation, and Dann was considered to be disabled, and eligible for ADR under the Heart Bill.

While the Board of Trustees is bound by the Medical Board's determination of disability, it is "not bound by the medical board's determination that said disability resulted from a service-related accident. The function and duty of determining 'circumstances' of the disqualification and of determining the amount of the allowance as provided by the code is conferred upon the board of trustees." *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Department of City of New York, Article II*, 60 NY2d 347, 351 (1983).

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006), citing to *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); see CPLR 7803 (3). "The arbitrary and capricious standard asks whether the determination in question had a rational basis [internal quotation marks and citations omitted]." *Matter of Mankarios v New York City Taxi and Limousine Commission*, 49 AD3d 316, 317 (1st Dept 2008).

In the present situation, the Board of Trustees did not accept the findings by the Medical Board that Dann was eligible for ADR under the Heart Bill. The Board of Trustees argues that it has provided credible evidence to support its determination that Dann is not entitled to benefits under the Heart Bill. "Ordinarily, the decision of the board of trustees as to the cause of an officer's

disability will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious." *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Department of City of New York, Article II, 60 NY2d at 351.*

As explained below, the action of the Board of Trustees to deny petitioner ADR under the Heart Bill was arbitrary and capricious. Contrary to its claim in the court papers, it has not provided any credible evidence as to why petitioner should not be entitled to benefits under the Heart Bill.

As previously mentioned, the petitioner, who undisputedly is part of the police force, is presumed to have incurred her heart condition during her performance of duty, unless the contrary is proved by competent evidence. The Medical Board did not even attempt to introduce medical evidence to rebut the presumption, and agreed that petitioner was disabled and should be given ADR under the Heart Bill.

The Board of Trustees, during all of their meetings, never introduced medical evidence alleging that petitioner's heart condition was not related to her job. Even in the papers submitted to the court, respondents do not submit any medical, or other evidence, indicating how petitioner's heart condition was not related to the duties of her work.

The Board of Trustees acknowledged in its meetings that previous police surgeons have received benefits under the Heart Bill, yet did not try to distinguish Dann's duties from those of her predecessors. In other ADR/ODR cases, the Board of Trustees will remand the matter to the Medical Board in light of new evidence for the Medical Board to review its prior determination. See e.g. *Matter of Francese v Kelly*, 2010 NY Slip Op 31147(U) (Sup Ct, NY County 2010) (Medical Board reviewed petitioner's records three extra times on remand from the Board of Trustees). However, this did not occur in Dann's case.

In her argument, Dann cites to *Matter of Callas v Codd* (47 AD2d 812 [1st Dept 1975]), in which the Court affirmed a lower court's decision to grant death benefits under the Heart Bill, to the widow of a police surgeon who died of a heart attack. The lower court discussed how police surgeons are members of the police force and how these surgeons are also entitled to the benefits of the Heart Bill, by reason

of the presumption included in the Heart Bill. The court noted the following, in pertinent part:

The respondent argues that the intent of the legislature was to provide additional benefits to those policemen or firemen who suffered a greater susceptibility to heart disease by reason of their particular occupational hazards and stresses. However, the respondent does not dispute the petitioner's argument that other members of the police department whose careers may be confined to relatively un Hazardous administrative duties or service in specialized departments such as communications, police laboratory or police records, etc., would qualify for the presumption provided by Section 207-K.

Clearly, Section 207-K was enacted to enable those who would qualify thereunder to be entitled by means of the presumption to benefits which they would otherwise have been denied.

See Petitioners' Memorandum of Law, Exhibit 1.

While acknowledging this case, respondents argue that the legislative intent of the Heart Bill was such that it should apply to police officers and firefighters, who have "unique stresses," and that these stresses create the presumption that their heart condition is job-related. Respondents continue, "[t]here is no reason to extend this benefit to Police Surgeons simply because they are members of the uniformed force." Respondents' Memorandum of Law, at 9. Respondents cite to *Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO v Beekman* (52 NY2d at 468), which states the following, in pertinent part:

For many years, however, the police and firemen's associations have urged the Legislature that this requirement creates an unrealistic, if not impossible, burden of proof in cases where death or disability results from a heart condition. It is their position that statistical and medical studies show that heart conditions are an occupational hazard for firemen and police officers serving in large metropolitan areas. They claim that such conditions are the result of a gradual process attributable to the continuous

stress and sudden bursts of physical and mental strain routinely required in the line of duty and that it is unrealistic to look for particular incidents as the cause.

Respondents' discussion of the legislative intent of the Heart Bill is misplaced. It is the Legislature, not the court, which included all members of the police force as potential recipients of the benefits of the Heart Bill. And, if respondents do not provide evidence to rebut the presumption, as in this case, the court cannot re-write the Heart Bill to exclude certain members of the police force.

Moreover, respondents' arguments only point out that the purpose of the Heart Bill was so that members of the police force would not be required to point to one particular incident which caused their heart conditions. It is just assumed that the gradual strain of their jobs may lead to a disabling heart condition. As set forth by the Court of Appeals, "[t]he practical application of the statute by the boards shows that they understood it to have the effect of dispensing with the need for heart disability applicants to point to particular accidents as the cause of the condition." *Uniformed Firefighters Association Local 94, IAFF, AFL-CIO v Beekman*, 52 NY2d at 471-472.

As such, it was not Dann's responsibility to argue why the jobs of police surgeons are just as demanding as those of other members of the police force. Even so, respondents did not even attempt to discuss why petitioner's job was not allegedly a stressful one, nor did they set forth the exact responsibilities of petitioner's job. Although claiming that the Heart Bill evaluations were performed on a case-by-case basis, they did not discuss why petitioner's responsibilities could have differed from those of the prior police surgeons who were approved for the Heart Bill, or those members of the police force who have sedentary jobs.

Although, as previously mentioned, even though the Board of Trustees is bound by the Medical Board's determination of disability, respondents also argue, for the first time to this court, that Dann is evidently not disabled since she is still working. However, while respondents have alleged that petitioner is still working elsewhere, neither the Medical Board, Board of Trustees nor the respondents have differentiated between what petitioner used to do for the NYPD and what she is allegedly doing now. Moreover, respondents have not provided any medical

12] testimony to challenge her disability determination. The only information in the record is provided by doctors who considered petitioner to be suffering from a disabling heart condition which would place her on restricted duty within the police force. As such, it is too late now for the respondents to have the issue remanded to the Medical Board, for "clarification of its finding of disability," as respondents request in their papers.

Furthermore, respondents allege that their determination should be upheld or else Dann will receive a retirement allowance equal to three quarters of her final \$143,000 salary, largely tax free. However, it is the Administrative Code, along with the NYPD, which creates benefits for its members through its pension fund, not the court. If the respondents are dissatisfied with what Dann will receive for her years of service, they will have to be the ones to change the way the pensions are distributed in the future.

In conclusion, while the Board of Trustees is bound by the Medical Board's finding of disability, it did not provide a rational basis as to why petitioner should not be granted the benefits under the Heart Bill. The Board of Trustees makes conclusory statements alleging that petitioner's job was not stressful, without providing any examples. Accordingly, as they have failed to rebut the Heart Bill presumption, the determination to deny Dann ADR benefits based on the Heart Bill is reversed. See e.g. *Matter of Jones v Board of Trustees of New York Fire Department Article 1-B Pension Fund*, 123 AD2d 628, 630 (2d Dept 1986) (finding "judicial authority to direct the Board to award accident disability retirement benefits upon a finding that the applicant is entitled thereto as a matter of law").

CPLR 2307 (a)

Petitioners also seeks an order, pursuant to CPLR 2307 (a), directing respondents to serve and file all materials in connection with Dann's retirement. Petitioners do not address this request in their petition, nor do they support it in their memorandum of law. As such, it appears that the petitioners have abandoned this claim, and the court thereby denies it.

CONCLUSION

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent that respondents' September 14, 2011 determination to disapprove Lea C. Dann's application for ADR based on the Heart Bill is vacated and annulled, and the respondents are directed to grant Lea C. Dann ADR benefits in accordance with the foregoing.

Dated: July 19, 2012

GEOFFREY D. WRIGHT

GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

UNFILED JUDGMENT

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