

Matter of Fesler v Kelly
2013 NY Slip Op 30078(U)
January 11, 2013
Sup Ct, NY County
Docket Number: 102406/12
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2

Index Number : 102406/2012
FESLER, ANDREW
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 _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN FAVOR OF PLAINTIFF
WITH 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).

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

Dated: 1/11/13

Luy

J.S.C.

- 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: PART 2

Index No. 102406/12

-----x
In the Matter of the Application of
ANDREW FESSLER,

Petitioner,

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

-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 and THE
BOARD OF TRUSTEES of the Police Pension Fund,
Article II,

Respondents.

For a Judgment pursuant to Article 78, CPLR, to review
and annul the determination made by respondents to retire
petitioner without providing for a pension for said
petitioner at not less than three quarters of his salary as of
the date of his service retirement as required by law, and
for a further order directing payment of such pension
retroactive to the date of his service retirement, and for
such other appropriate relief.

-----x
Louis, B. York, J:

Petitioner Andrew Fessler ("Petitioner") seeks a judgment pursuant to Article 78 of the
New York CPLR annulling the denial of his petition for accident disability retirement ("ADR")
benefits under the World Trade Center Disability Law, New York City Administrative Code
§13-252.1, (hereinafter "the WTC Law") and ordering respondents 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, and the Board of Trustees of the New York City Police Pension Fund
(collectively "Respondents") to review his ADR application again.

The WTC Law

The WTC Law provides accident disability retirement to Police Pension Fund members who worked at or around the World Trade Center site after September 11, 2001 ("9/11"), and developed health problems caused by qualifying World Trade Center conditions. Qualifying physical conditions are defined in the Retirement and Social Security Law as 1) diseases of the respiratory and gastroesophageal tracts, 2) certain skin conditions, and 3) "new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease." RSSL § 2.36(c)(v). Once a Police Pension Fund member applies for ADR benefits under the WTC Law, the Police Pension Fund's Board of Trustees submits the application to the Police Pension Fund's Medical Board.

The decision to approve an ADR application and thereby grant a Police Pension Fund member benefits depends on two separate inquiries. The Medical Board first determines whether an ADR applicant is actually disabled for performance of city-service. If it finds the applicant to be disabled, the Medical Board's second inquiry assesses whether the disability was "a natural and proximate result of an accidental injury" received during city service. Borenstein v. New York City Employees' Ret. Sys., 88 N.Y.2d 756, 760, 650 N.Y.S.2d 614, 616 (1996).

The WTC Law, in particular, places a low burden of proof on ADR applicants by adopting a rebuttable presumption of causation governing the Medical Board's second inquiry:

[I]f 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 can be proven by competent evidence.

N.Y.C. Admin. Code §13-252.1(a).

The WTC Law's threshold presumption of causation was created to benefit first responders in light of the difficulty of establishing a causal link between non-trauma injuries sustained at the

WTC sites and the toxins at those sites in the aftermath of 9/11. Bitchatchi v. Bd. of Trustees of New York City Police Dept. Pension Fund, No. 08-566, slip. op. at 12 (N.Y. Dec. 13, 2012) (avail at 2012 WL 6195798). Unlike ordinary ADR applicants, first responders who apply for ADR benefits pursuant to the WTC Law do not need to submit any evidence of causation; their injuries are presumed to come from their post-9/11 WTC exposure. Id.

Despite the above, the WTC Law “does not create a per se rule mandating ADR benefits for all eligible responders.” Id. Instead, a pension fund can rebut the presumption of proximate cause by the use of “competent evidence.” N.Y.C. Admin. Code §13-252.1(a). To satisfy its heightened burden, Police Pension Fund’s Medical Board cannot simply rebut the evidence that the applicant has presented. Instead, as the Court of Appeals recently emphasized, the Board must present its own “competent evidence” which affirmatively disproves causation. Bitchatchi, No. 08-566, slip. op. at 12 (N.Y. Dec. 13, 2012) (avail at 2012 WL 6195798); see id. at 13-14. “Competent evidence” or “credible evidence,” which the courts use interchangeably in this context, “proceeds from a credible source and reasonably tends to support the proposition for which it is offered.” Meyer v. Bd. of Trs. of the New York City Fire Department, Article 1-B Pension Fund, 90 N.Y.2d 139, 147, 659 N.Y.S.2d 215, 220 (1997). The evidence, of course, cannot be “merely a conclusion of law, nor mere conjecture or unsupported suspicion.” Id. The Board of Trustees may approve the Board’s determination if the Board has satisfied the credible evidence standard. Maldonado v Kelly, 86 A.D.3d 516, 519, 927 N.Y.S.2d 344, 347 (1st Dept. 2011) (rev’d on other grounds sub. nom., Bitchatchi v. Bd. of Trustees of New York City Police Dept. Pension Fund, No. 08-566, slip. op. at 16-17 (N.Y. Dec. 13, 2012)). Moreover, the Courts shall sustain “the Medical Board’s finding . . . unless it lacks rational basis, or is arbitrary or capricious.” Borenstein, 88 N.Y.2d at 760, 650 N.Y.S.2d at 616.

It is with this framework in mind that the Court reviews the current petition. Upon review, for the reasons below, the Court annuls the Board's finding and remands the matter for further review.

Facts

Petitioner became a member of the New York Police Department in 1984 and served continuously until his retirement in 2004. On September 11, 2001, Petitioner was a first responder at the World Trade Center site and participated in rescue, recovery, and clean-up operations for several days thereafter. In March of 2009, Petitioner was diagnosed with Crohn's Ileocolitis (hereinafter "colitis") and gastroesophageal reflux disease (hereinafter "GERD"). Petitioner applied for accident disability retirement under the WTC Law in November of 2009 claiming that his GERD and colitis prevented him from fully performing his police officer duties.

Respondents denied Petitioner's ADR application based on recommendations from the Medical Board, which reviewed Petitioner's ADR application on three separate occasions. The Medical Board first considered Petitioner's ADR application on July 30, 2010. Petitioner's application stated that "[a]s a result of the WTC Disaster Rescue, Recovery and clean up operations, I suffer from GERD & Crohn's Ileocolitis. I am unable to perform the full duties of a NYC Detective. I request Accident Disability Retirement." (July 2010 Report, ¶1). After it reviewed Petitioner's medical records and letters from his doctor, interviewed Petitioner, and conducted a physical examination, the Medical Board unanimously concluded that

there is little relationship of this disease [colitis] to the World Trade Center exposure and clean up.... [T]he onset of detective's disease is not unusual at some point in life and is following a usual course and will need to have continued medication. This does not appear to be in any way related to World Trade Center exposure.

(Id. at ¶10). The Medical Board therefore denied Petitioner’s ADR application.¹

The Medical Board examined Petitioner’s ADR application a second time on December 17, 2010 because Petitioner submitted new evidence for claims relating to sinusitis and ear, nose, and throat problems. Petitioner’s renewed application also requested ADR benefits relating to his colitis. The Medical Board interviewed Petitioner and conducted a physical examination before unanimously concluding that the new evidence did not change its original opinion regarding Petitioner’s colitis and that the new conditions included in the application were not disabling, therefore precluding an award of ADR benefits. The Medical Board thus reaffirmed its decision to disapprove Petitioner’s ADR application.

On September 9, 2011, the Medical Board reviewed Petitioner’s ADR application once again in light of new evidence in the form of a letter from Petitioner’s gastroenterologist, Dr. Weg. Dr. Weg’s letter addressed Petitioner’s colitis and concluded: “I understand that [Petitioner] had significant exposure at the World Trade Center site after 9/11. It is conceivable that those gastrointestinal illnesses would be related to such toxic exposures.” (September 2011 Report, ¶4). The Medical Board interviewed Petitioner and performed another physical examination. Though it recognized that Petitioner’s colitis may be disabling, the Medical Board once again denied his application for ADR benefits and found that his condition was not caused by exposure at the World Trade Center. The Police Pension Fund’s Board of Trustees accepted the Medical Board’s decision denying Petitioner’s ADR application. Petitioner subsequently commenced this proceeding.

Discussion

¹The Medical Board did not address petitioner’s GERD claim except for its comment that diseases of the gastroesophageal tract, including reflux diseases, are listed as qualifying conditions in the Retirement Social Security Law. See RSSL § 2.36(c)(iii). Petitioner does not seem to be challenging the Medical Board’s actions with respect to his GERD claim. Therefore, the Court shall not discuss it.

In this Article 78 proceeding, Petitioner first argues that the Medical Board erroneously denied his ADR application solely because his gastroenterological condition (colitis) is not listed as a WTC qualifying condition. According to Petitioner, the Medical Board misinterpreted the WTC Law when it recognized WTC qualifying conditions only as those explicitly listed in section 2.36 of the Retirement and Social Security Law. The Medical Board's third report concluded that Petitioner "has been diagnosed to have ileocolitis for which he needs continued treatment. Although this condition may be disabling, it is not under those conditions which are recognized as being caused by exposure at the World Trade Center." (September 2011 Report, ¶9). Petitioner contends that this is a misinterpretation of the applicable legal standard because such a narrow construction of the Retirement and Social Security Law's definition of "qualifying World Trade Center condition" contravenes the purpose of the WTC Law.

As support for this argument, Petitioner cites Dement v. Kelly, in which the First Department endorsed a broad interpretation of the Retirement and Social Security Law's list of qualifying WTC conditions. 97 A.D.3d 223, 947 N.Y.S.2d 72 (1st Dept. 2012). The Court reasoned that the Medical Board's narrow reading of the WTC Law

would defeat the avowed purpose of the statute, i.e., to protect 9/11 workers as result of their heroic efforts. Indeed, the full extent of the health challenges faced by these workers, arising from chronic, acute exposures to a toxic brew of substances at the site, may not be known for years. The statutory language 'an impairment of health caused by a qualifying [WTC] condition' must be interpreted in a manner consistent with the underlying purposes of the statute.

Id. at 231-32, 947 N.Y.S.2d at 78.

Accordingly, the Retirement and Social Security Law allows for this flexibility in the last portion of its definitions section, which permits recognition of "new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease." RSSL § 2.36(c)(v). By this language, this

section makes clear that because new qualifying diseases may manifest themselves in the future, the qualifying conditions list in sections (i)-(iv) is not an exclusive one. Thus, Petitioner's colitis can be treated as a qualifying condition. By denying that colitis is a qualifying condition simply because it is not on the list, the Board failed to conduct the kind of reasoned analysis that the WTC Law requires of it. For this reason, remand is appropriate.

If after a considered review the Medical Board concludes colitis comprises a "qualifying condition" under the expansive definition, it still can rebut the WTC Law's presumption with credible evidence that the colitis was not proximately caused by his exposure to the WTC sites. Admin. Code §13-252.1. Petitioner's second argument challenges the sufficiency of the Medical Board's conclusion on this issue as arbitrary, capricious and not supported by credible evidence. Petitioner contends that the Medical Board failed to offer credible evidence to support its finding of no causation because its conclusion lacked evidentiary support and was merely a conclusion of law. The Medical Board's opinion constitutes credible evidence if it presents objective medical evidence that affirmatively rebuts the WTC Law's presumption causation. Bitchatchi, No. 08-566, slip. op. at 12 (N.Y. Dec. 13, 2012). Applying this standard to the Medical Board's reports which found that Petitioner's colitis was not proximately caused by his exposure at the World Trade Center, the court finds that the Medical Board's conclusion did not constitute "credible evidence" and was therefore insufficient to rebut the WTC Law's presumption of causation.

The record demonstrates that the Medical Board reviewed Petitioner's medical records, conducted its own physical examination, interviewed Petitioner, and considered letters from his doctors. Though reviewing courts must treat decisions of the Medical Board with deference in Article 78 proceedings, see Belmonte v. Snashall, 2 N.Y.3d 560, 565, 780 N.Y.S.2d 541, 544

(2004), the Board must do more than simply state that there was no apparent causal connection and it also must address and refute the positive evidence that petitioner submitted. Moreover, as the Court of Appeals recently clarified, in the context of the WTC Law “a pension fund cannot deny ADR benefits by relying solely on the absence of evidence tying the disability to the exposure.” Bitchatchi, No. 08-566, slip. op. at 13 (N.Y. Dec. 13, 2012). In this case, the Medical Board reviewed the medical records and conducted interviews but did not support its finding of lack of causation or provide the data upon which it relied in reaching its conclusions. Because of the lack of affirmative evidence as well as because of its failure to analyze whether colitis can constitute a qualifying condition, Respondents must reconsider Petitioner’s application.

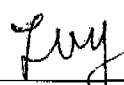
Conclusion

Based on the foregoing, it is

ORDERED and **ADJUDGED** that the application by Petitioner for a judgment pursuant to Article 78 of the CPLR, reviewing and annulling the decision of Respondents denying Petitioner Accident Disability Retirement pursuant to the WTC Law and ordering Respondents to review his application again, is granted.

Dated: Jan. 11, 2013

ENTER:



 Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.