

Matter of Salerno v Kelly
2013 NY Slip Op 33384(U)
December 17, 2013
Supreme Court, New York County
Docket Number: 100213/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
SARA SALERNO,**

Petitioner,

INDEX NO. 100213/12

MOTION SEQ. NO. 001

**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, New York
City Police Department, and the CITY OF NEW YORK,
Respondents.**

FILED

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**COUNTY CLERK'S OFFICE
NEW YORK**

The following papers were read on this motion by petitioner for a judgment pursuant to Article 78.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

In this CPLR Article 78 proceeding, Sara Salerno (petitioner), a former New York City detective, seeks to: (1) review and annul the action of the respondents denying petitioner's accident disability retirement (ADR) allowance pursuant to the City of New York Administrative Code § 13-252.1 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; (2) directing respondents to retire petitioner with an ADR allowance pursuant to the World Trade Center (WTC) Disability Law, or in the alternative directing and ordering the respondents by way of remand to review petitioner's application for accident disability retirement allowance pursuant to the WTC Disability Law. Petitioner also seeks various NYPD records and Board of Trustees Police Pension Fund records pursuant to CPLR 2307(a). The respondents file in opposition to petitioner's application.

BACKGROUND

Petitioner became a member of the New York City Police Department (NYPD) on June 20, 1995, and served contiguously until her retirement for Ordinary Disability Retirement (ODR) on December 31, 2006. Prior to September 11, 2001, petitioner was on restricted duty as a result of a line of duty injury to her right knee and she was serving in the Internal Affairs Bureau (IAB), located at 315 Hudson Street, New York, New York. According to petitioner, on September 11, 2001, she was ordered by her supervisor to respond to the WTC disaster site, where she served various days with other IAB officers. She alleges that she participated in the clean up and rescue operations for multiple days, where she was exposed to various unhealthy and toxic WTC chemicals, metals and other materials. Petitioner was assigned a WTC Exposure Participation Number 12157, by the NYPD medical division. Her duties also included taking video and still pictures at the site.

On November 20, 2006, petitioner filed a WTC Notice of Participation Form indicating the dates that she worked at the WTC disaster site. On April 21, 2009, petitioner filed an ADR application pursuant to Administrative Code (Admin Code) Section 13-252, alleging that she was disabled from performing police duties due to the illness that she claimed to have developed as a result of participating in the rescue, recovery and clean up operations at the WTC Ground Zero site following the events of September 11, 2001.

Admin Code §13-252 governs ADR pensions for members of the NYPD Pension Fund. It provides that upon application by a member or by the NYPD Commissioner, the Police Pension Fund Medical Board (Medical Board) shall certify to the Police Pension Fund Board of Trustees (Board of Trustees) that the member is entitled to an ADR pension if a medical examination and investigation by the Medical Board show that the member is "physically or mentally incapacitated for the performance of city service as a natural and proximate result of an accidental injury received in such city-service while a member." Generally, it is the applicant

who bears the burden of proving to the Medical Board such incapacity and its causation (see *Matter of Evans v City of New York*, 145 AD2d 361 [1st Dept 1988]; *Matter of Archul v Bd. Of Trustees of N.Y. City Fire Dept., Art 1B Pension Fund*, 93 AD2d 716 [1st Dept 1983]). The fact that there may be a difference of opinion between the Medical Board and a petitioner's own physicians does not provide an "occasion for judicial interference" (*Matter of Muffoletto v New York City Employees' Retirement Sys.*, 198 AD2d 7 [1st Dept 1993]).

However, a different standard applies when the officer has retired due to a disabling condition that was allegedly caused by exposure during WTC rescue, recovery or clean-up operations. Sections 13-252.1 of the Administrative Code (Admin Code) of the City of New York (the WTC Law) amends the code to address cases involving WTC injuries. The WTC Law establishes a presumption that "any condition or impairment of health . . . caused by a qualifying World Trade Center condition" as defined in the Retirement and Social Security Law (RSSL), "shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident . . . unless the contrary be proved by competent evidence" (Admin Code § 13-252.1[1][a]). "Qualifying World Trade Center condition" is defined as, *inter alia*, "a Qualifying condition or impairment of health" (RSSL § 2[36][a]), which in turn is defined as, *inter alia*, a Qualifying physical condition or a Qualifying psychological condition, or both (RSSL § 2[36][b]). "Qualifying physical condition" is defined to include, "[n]ew onset diseases resulting from exposure as such diseases occur in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease and chronic psychological disease" (RSSL § 2[36][c][v]).

The Medical Board reviewed the applications for ADR and ODR for the first time on July 10, 2009, and recommended that petitioner's ADR application be granted. The Medical Board had diagnosed the petitioner with "Vocal Cord Problems Secondary to the WTC Exposure, (VCPS), thus, the only remaining issue on review is the physical evidence of causation.

Petitioner subsequently produced evidence from her supervisor and other officers, including overtime payroll records, of her participation at the WTC site on the days she indicated in support of her claim and statutory presumption under the WTC Disability Law. At its April 14, 2010, meeting the Board of Trustees denied petitioner's ADR application concluding that her overtime payroll records and testimony of other officers was not sufficient to place her at the WTC disaster site at the time and dates indicated.

On July 29, 2010, petitioner filed an Article 78 petition seeking to reverse the decision of the Board of Trustees. In that proceeding, petitioner introduced additional evidence of her participation at the WTC Ground Zero disaster site over the objection of the respondent. In a Decision and Order dated March 21, 2011, Justice Alice Schlesinger denied the Article 78 petition, but remanded the case back to the Board of Trustees for reconsideration with the "new" evidence. The Court wrote:

However, having said the above, it certainly may be the case that Ms. Salerno did in fact work at or near the WTC in the days after the attack on September 11, 2001. Further, it certainly may be the case that her medical disability, which has been established, was a result of her work there. So I urge the parties to revisit this controversy by Ms. Salerno, in the first place, asking the Board to hear her case again and providing it with additional evidence. Then I believe the Board should approach such an appeal in an open and fair manner. What is **so** problematic here is the inability of the Department to come up with all the records that must have once existed, although probably lost in the chaotic period that followed the attack, which show the assignments of their members. Here in its answer, respondents do indicate that they have provided all the records regarding Ms. Salerno that they could find. But I emphasize, though the petitioner has failed to meet her burden this time, the Board while not lessening its obligation to follow the mandates of the law, should give Ms. Salerno every opportunity to show that she actually worked at or near the site on the requisite days.

On March 24, 2011 petitioner submitted a new ADR application and on April 29, 2011, the Medical Board reaffirmed their approval of the ADR application. Petitioner, thereafter, introduced additional evidence of her participation at the WTC disaster site that was not presented to the Board in the first ADR proceeding. This included, *inter alia* time stamped

photographs that she allegedly took at the WTC on days that she worked there. Nonetheless, on September 14, 2011, the Board of Trustees once again voted to deny petitioner's ADR application, concluding the additional evidence failed to verify or establish her physical participation at the WTC disaster site.

DISCUSSION

It is well settled that in an Article 78 proceeding challenging a disability determination by the Medical Board, the determination should be sustained if it is based on "some credible evidence" (see *Matter of Borenstein v New York City Employees' Ret. Sys.*, 88 NY2d 756, 760-61 [1996]). Where the Medical Board issues a report detailing the medical proof considered, including the results of any tests and/or physical examinations of the applicant, its determination should be respected and the court should not substitute its own judgment for that of the Board unless the determination is clearly irrational (*id.* at 761). In order to rebut the presumption of the WTC Law, 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" (*Jefferson v Kelly*, 14 Misc3d 191, 196-197 [Sup Ct NY County 2006], *aff'd* 51 AD3d 536 [1st Dept 2008]; see also *Matter of Mulet v Kelly*, 49 AD3d 336, 336 [1st Dept 2008]; *Matter of Picciurro v Bd. of Trustees*, 46 AD3d 346, 348 [1st Dept 2007]). Here the Medical Board found, *inter alia*, that even assuming, *arguendo*, that the WTC Law presumption applied, there was sufficient evidence to rebut the presumption and determine that petitioner's VCPS was not caused by WTC exposure. Respondents argue that this determination was supported by credible medical evidence in the record, is neither arbitrary nor capricious and therefore should be upheld.

Here the Medical Board's conclusion that petitioner suffers from VCPS is supported by credible medical evidence. However, the determination by the Board of Trustees that the petitioner's VCPS was not caused by her work at the WTC, because it could not be verified that petitioner actually participated at the WTC site, was based upon their review of credible and

physical evidence sufficient to rebut the presumption of the WTC Law. The Court finds that the Board of Trustee's determination was not arbitrary or capricious since it was based on the evidence before them where, again, there was no convincing proof establishing that petitioner worked at the WTC site, and the burden here rests on the petitioner to prove that she qualified. Accordingly, the determination should be upheld and the petition dismissed.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied; and it is further,

ORDERED that petitioner's request for various NYPD records and Board of Trustees Police Pension Fund records to CPLR pursuant to 2307(a) is denied as moot; it is further,

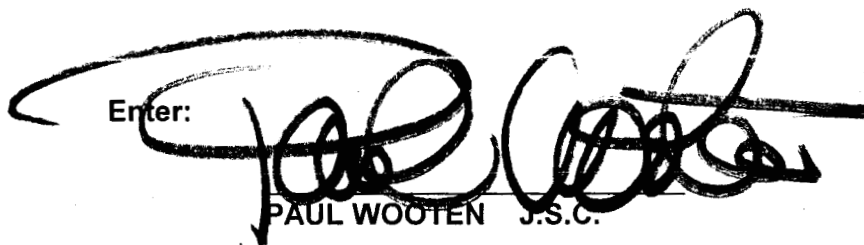
ORDERED that the respondents shall serve a copy of this Order, with Notice of Entry, upon petitioner and the Clerk of the Court who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated:

12/17/13

Enter:


PAUL WOOTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE

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