

Matter of Sheldon v Kelly
2013 NY Slip Op 33847(U)
Mar 11, 2013
Supreme Court, New York County
Docket Number: 101210/2013
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
ANNEMARIE SHELDON,
Petitioner,

INDEX NO. 101210/12

-against-

MOTION SEQ. NO. 001

For a Judgment Pursuant to the Provisions of Article 78
of the New York Civil Practice Law and Rules,

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

Respondents.

The following papers, numbered 1 to 6 were read on this motion by petitioner(s) for an order and judgement pursuant to CPLR Article 78 reversing, annulling and setting aside the decision of the Board of Trustees of the Police Pension Fund of the New York City Police Department.

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits (Memo) _____

3, 4, 5, 6

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

In this Article 78 proceeding, Annemarie Sheldon (petitioner), a retired New York City Police Officer and a first responder to the World Trade Center attack on September 11, 2001, seeks an order reversing, annulling and setting aside the determination of the Board of Trustees of the New York City Police Department Pension Fund (Board of Trustees) adopting the determination by the Medical Board of the New York City Police Department Pension Fund (Medical Board), denying petitioner's Accident Disability Retirement (ADR) claim pursuant to the Administrative Code §§ 13-252 and 13-252.1 (WTC Law). Petitioner seeks an order directing the respondents to retire her with an ADR pursuant to the WTC Law retroactive to the date of

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* 2]

her ordinary disability retirement (ODR), or in the alternative remanding the matter to respondents for further consideration.

The Medical Board concluded that there is no evidence of disability from GERD, no documentation of any immune derangement and no diagnosis of a pulmonary disability, and no credible medical evidence to support the finding that petitioner is not disabled from heavy metal poisoning. Additionally, the Medical Board noted that Fibromyalgia and CFS are not qualifying conditions under the WTC Law, and only those suffering from a qualifying disabling condition or impairment of health as defined by the applicable statute is entitled to the rebuttable presumption that the officer's disability was caused by his or her work at the WTC site.

Petitioner timely filed this action on February 9, 2012, seeking to reverse the respondents determination that: (1) her fibromyalgia and chronic fatigue syndrome (CFS) are neither work related nor caused by her alleged exposure during the World Trade Center rescue, recovery or clean-up operations and, (2) that she is not disabled from performing the duties of a New York City Police Officer, by GERD, immune derangement, pulmonary disability or heavy metal poisoning. Respondents are in opposition to petitioner's the Article 78 application, and for the reasons set forth below, the petition is denied.

When considering Article 78 petitions, courts may not weigh the evidence or substitute their own judgment for that of the board that made the decision (*see Matter of Borenstein v. New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Appleby v Herkommer*, 165 AD2d 727, 728 [1st Dept. 1990]). In an Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious (*see Matter of Borenstein*, 88 NY2d at 760; *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 351 [1983]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]; *Matter of Jeffererson v.*

Kelly, 51 AD3d 536, 537 [1st Dept 2008]). "Ordinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require some credible evidence" (*Matter of Borenstein*, 88 NY2d at 760) (internal citations omitted). Credible evidence has been generally defined as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered ... [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Matter of Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997] [internal citations omitted]).

Here, the Medical Board proffers that its credible evidence establishes, after its medical expert examination, that the petitioner does not qualify for a ADR pension. Petitioner's allegation that respondents' actions were arbitrary, capricious and an abuse of discretion are unfounded. As such, the Court holds that the respondents' decision must be upheld.

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

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs or disbursements to respondents; and it is further,

ORDERED that attorney for respondents shall serve a copy of this order with notice of entry upon the petitioner.

This constitutes the Decision and Order of the Court.

Dated: 2-25-11

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Paul Wooten
 PAUL WOOTEN J.S.C.

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