

Larsen v O'Neill

2019 NY Slip Op 31176(U)

April 24, 2019

Supreme Court, New York County

Docket Number: 158668/2018

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

SANDRA LARSEN

INDEX NO. 158668/2018

- v -

MOT. DATE

JAMES O'NEILL

MOT. SEQ. NO. 001

The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This is an Article 78 proceeding brought by petitioner Sandra Larson, the widow of decedent Police Officer Erik Larsen, to annul the termination of the Board of Trustees of the Police Pension Fund that adopted the findings of the Medical Board that determined that decedent's cause of death was not related to his work at the World Trade Center (WTC).

The relevant facts are as follows. Decedent was a New York City police officer from 1994 until his untimely demise in 2016. On September 11, 2001 and for a period thereafter, Erik Larsen was a first responder the WTC where he participated in rescue, recovery and clean-up operations. The parties agree that decedent suffered from asthma that he developed due to his exposure at the WTC tragedy. In February 2016 petitioner requested benefits as the spouse of decedent under the provisions of the NYC Administrative Code 12-244 and Administrative Code 13-252.1(3) (WTC Death Benefit Law). Petitioner also filed an application on behalf of decedent for Accidental Disability Retirement in February 2016.

Medical Board Review - June 15, 2016

The Medical Board considered petitioner's application for WTC Death Designation on June 15, 2016. The Medical Board reviewed the following medical records: decedent's records from 2011 and 2012, an April 2013 EBT heart and body scan, which revealed a normal lung examination and a large hiatal hernia with intrathoracic stomach, September 2013 report from Dr. Diana Cherezova noting decedent's asthma was "well controlled", a January 20-14 chest x-ray which revealed no evidence of acute cardiopulmonary disease, a December 2014 echocardiogram and cardiac doppler study and an August 2015 report from nurse practitioner.

Dated: 4/24/19



HON. LYNN R. KOTLER, 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

Based on the Medical Board's review of the available medical evidence, the Board found that decedent was a 44-year-old male who died as a result of a respiratory condition related to bronchopneumonia. The Medical Board concluded that the WTC presumption applied. However, decedent died specifically due to the bronchopneumonia caused by infectious organism, unrelated to exposure secondary to the WTC tragedy. Therefore, the Board concluded that the medical evidence rebutted the WTC presumption, and recommended disapproval of petitioner's application for WTC death designation.

Medical Board Reconsideration – March 1, 2017

The Medical Board received new evidence from the Police Pension Fund in support of petitioner's application. The new evidence consisted of the following: a December 13, 2016 letter from Dr. Laura Crowley and Dr. Michael Crane, a November 19, 2015 report from Dr. Khawaja Siddique, a November 20, 2015 report from a physician's assistant, a December 27, 2015 report from Dr. Joseph Passanante, a December 28, 2015 report from Dr. Jonathan Weinstein and the finalized surgical pathology report dated February 25, 2016. Based on the newly submitted evidence, the Medical Board reached the following conclusions. The Board found that decedent had liver cirrhosis and delirium tremens and that decedent was diagnosed with influenza A infection and concomitant bronchopneumonia upon entering the hospital. The Board concluded that decedent died due to complications from influenza A and bronchopneumonia with liver cirrhosis as a contributing risk factor for his respiratory infection. The Board further concluded that decedent was not treated for acute asthma exacerbation. The Medical Board reaffirmed its earlier conclusion that the evidence rebutted the WTC Law presumption and again recommended disapproval of petitioner's request for Line of Duty WTC Death Designation.

Medical Board Reconsideration – November 15, 2017

In September 2017, the Police Pension Fund forwarded to the Medical Board new evidence in support of petitioner's application, to wit: a letter dated September 15, 2017 letter from Dr. Michael Crane. The Medical Board accepted the evidence and issued a new report and concluded that decedent died as a result of consequences of respiratory infection and contributed by liver disease as well as cardiomyopathy and delirium tremens, "as Dr. Crowley noted and quoted from the CDC that asthma patients are not more likely to get the flu"....and the "Medical Board notes that despite having influenza A and bacterial pneumonia, there is no evidence that [decedent's] asthma was exacerbated during hospitalization". The Medical Board reaffirmed its previous two decisions and recommended disapproval of petitioner's application Line of Duty WTC Death Designation.

On May 9, 208, the Board of Trustees voted to disapprove petitioner's application. This Article 78 ensued.

Petitioner argues that she is entitled to Line of Duty WTC Death Designation pursuant to NYC Administrative Code 13 section 244. She contends that while she has no burden, she has provided abundant literature establishing that decedent's asthma put him at risk for the type of respiratory infection that took his life. Petitioner further claims that respondent must affirmatively disprove the statutory presumption which they have not done and that "decedent's doctors have provided abundant literature establishing that his asthma put him at an increased risk for the type of respiratory infection that eventually took his life".

Respondent contend that in its three reports dated June 15, 2016, March 1, 2017 and November 15, 2017, the Medical Board's determination that decedent's death was unrelated to his WTC exposure was "reasonable and rational and in accordance with the law". Respondent argues that the competent medical evidence submitted is not only credible, but it also affirmatively refutes the WTC causation presumption. Respondent further argues in rebuttal that decedent's chronic alcohol use compromised his health. Finally, respondent argues that to the extent that Drs. Crane and Crowley opinion that dece-

dent's asthma could have contributed to the aggravation of decedent's fat condition that the disagreement is a difference of opinion and that the Medical Board determination was not arbitrary and capricious.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary, capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[The proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

Under the WTC presumption, the pension fund bears the initial burden of proving that a claimant's qualifying condition was not caused by the hazards encountered at the WTC site:

"Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the [2] 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 be proved by competent evidence" (Administrative Code of City of NY § 13-252.1 [1] [a] [emphasis added]).

A decision by the Board of Trustees that a disability was not caused by a service-related accident will be upheld provided it is supported by "credible evidence" in the record (see *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147, 659 NYS2d 215 [1997]; *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761, 650 NYS2d 614 [1996]). Credible evidence "is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered" (*Meyer*, 90 NY2d at 147). Furthermore, "it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*id.*).

Here, although decedent suffered from asthma as a result of his WTC exposure, his untimely death was unrelated to that exposure. The Medical Board conducted three reviews on June 15, 2016, March 1, 2017 and November 15, 2017. The Medical Board reasonably concluded that the respiratory condition related to the bronchopneumonia was exacerbated by his cirrhotic and chronic alcohol use. The Board's conclusion showed that decedent's asthma was controlled by medications over the years and did not exacerbate his condition that took his life. In the June 2016 Medical Report decedent's history of asthma was under control with medication. The Board included, based on the surgical pathology report, that decedent's death resulted from complications arising from bronchopneumonia. Moreover, the Medical Board found based on decedent's medical records from 2011 through August 2015 that there was normal lung exam, that decedent's asthma was well controlled as per Dr. Cherezova and that decedent did not report any heart or lung complaints. Decedent was diagnosed with influenza A in December 2015. The Medical Board indicated from the hospital record that decedent's "microscopic examination revealed denuded tracheal mucosa with acute inflammation and the lungs showed vascular congestion, interalveolar neutrophils, dilated alveolar spaces consistent with acute bronchopneumonia" unrelated to the asthma. Based on the Medical Board's conclusion that decedent died from pneumonia and not asthma was reasonable considering all the credible evidence. Petitioner's argument that decedent's doctors referred to "abundant literature to support its application and that it was unrefuted by the Medical Board" is unpersuasive. The Court cannot substitute its judgement for the Medical Board. Based on the foregoing, the Board rationally concluded that decedent's death was unrelated to his asthma.

Accordingly, the petition is denied, and the matter dismissed

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 4/24/19



HON. LYNN R. KOTLER, J.S.C.