

Hanson v Shea

2022 NY Slip Op 30200(U)

January 24, 2022

Supreme Court, New York County

Docket Number: Index No. 152707-2021

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

Cathleen Hanson

INDEX NO. 152707-2021

- v -

MOT. DATE

Dermot Shea et al

MOT. SEQ. NO. 001

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

Petitioner is the widow and beneficiary of Michael Hanson, deceased, a former Detective of the New York City Police Department. Hanson was a first respondent to the 9/11 World Trade Center recovery effort and has since passed away. In this CPLR Article 78 proceeding, petitioner seeks an order annulling respondents' denial of petitioner's application for World Trade Center accidental death benefits ("AD benefits"). According to his death certificate, Hanson died on October 19, 2018 in Middle Hope, New York. His cause of death was listed as respiratory failure as a consequence of amyotrophic lateral sclerosis ("ALS").

Respondents are Dermot F. Shea, as Police Commissioner of the City of New York and 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 "Board of Trustees") and the Medical Board of the Police Pension Fund, Article II (the "Medical Board"). In challenging respondents' denial of her application for AD benefits, petitioner specifically challenges the recommendation of the Medical Board, as adopted by the Board of Trustees, which found that Hanson was not entitled to the WTC presumption because his cause of death is not a qualifying condition under RSSL § 2(36). Respondents oppose the petition. For the reasons that follow, the petition is granted.

When petitioner brought this proceeding, petitioner did not have all of the Medical Board's reports and Board of Trustee's minutes. Respondents have now provided said records, thus mooted petitioner's request for same. Petitioner contends that now that she has these documents, the record shows that the Medical Board never properly considered Hanson's "well-documented heavy metal poisoning as a factor in his untimely death, and never acknowledged his October 9, 2019, post-mortem toxicology report that clearly evinced heavy metal toxicity, let alone provide 'affirmative credible evidence' to support their denial on causal grounds, which is required under the controlling caselaw pertaining to the WTC Disability law."

Dated: 1/24/22

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

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

The toxicology report was performed by Michael E. Lamb, M.S.F.S, D-ABFT-FT, a Forensic Toxicologist for NMS Labs in Horsham, Pennsylvania. The samples studied by NMS Labs included Hanson's brain tissue and fluid. NMS Labs found that both samples tested positive for antimony, and the report explains:

1. Antimony - Fluid:

Pentavalent antimony compounds are used in medicine as parasiticides. Additionally, antimony has been used in the following industries: pigment; alloys; explosives; flame-retardants, etc.

2. Antimony - Brain Tissue:

Pentavalent antimony compounds are used in medicine as parasiticides. Additionally, antimony has been used in the following industries: pigment; alloys; explosives; flame-retardants, etc.

In its final report dated May 20, 2020, the Medical Board considered petitioner's "new evidence" in the form of a letter from Hanson's "family practitioner at Horizon Family Medical", Dr. Andrew Hirsh. In that letter, dated February 8, 2020, Dr. Hirsh wrote:

I had the privilege of caring for Mr. Michael Hanson as his primary care provider from 2011 until his death in 2018.

Mr. Hanson had complicated multisystem illnesses and progressive neurologic decline and diagnosed with an ALS-like illness which became progressively debilitating and incapacitating.

Mr. Hanson had extensive exposure post 9/11-World Trade Center collapse due to his resultant work at the site in the thick of the aftermath and debris of the collapse. His efforts were from what I recall extensive and exhaustive and his exposure to the resultant environment was real. By all accords he would be and is considered a hero for his leadership and dedication both prior and post 9/11.

It has always been my opinion that his deterioration and eventual death had some causality with his exposures on the 9/11 grounds. He had multiple respiratory, gastroenterologic, cardiac, and metabolic disorders, and I feel that his toxic exposures played a real impact on his global health deterioration and trigger of neurologic decline.

I feel that future studies and monitoring will confirm this relationship in others that have had similar exposure and I support a determination that his exposures where (sic) directly related to his decline and death.

I feel that his family should be adequately supported by current legislation afforded the victims of the 9/11-World Trade Center tragedy.

The Medical Board rejected Dr. Hirsh's opinion in its May 20, 2020 report, stating in pertinent part:

Retired Detective Hanson died on October 19, 2018. The retired detective had a known history of ALS for probably one year. An autopsy report from Columbia Presbyterian Medical Center dated January 24, 2019, stated the cause of death was ALS. The Medical Board notes ALS is not a listed condition under the WTC

is not a listed condition under the WTC Law (sic). Therefore, the Medical Board recommends disapproval of Line of Duty WTC Death Benefits.

As petitioner correctly points out, the Medical Board did not address the NMS Labs toxicology report. Further, petitioner points to a redacted 2015 Medical Board report regarding another officer where in the Medical Board stated that the officer's condition was idiopathic, which by definition is "one without a known root cause". That report provides in relevant part as follows:

The World Trade Center Law is presumptive and since there is no known cause for the sergeant's branchial neuropathy then it is possible that it was caused by his exposure to the toxins at the World Trade Center disaster. The Medical Board finds his condition to fall under the New Onset Diseases section of the World Trade Center Law. ...

[] The Article II Medical Board is unable to rebut the presumption based on the evidence provided, and therefore, it reaffirms its previous decision and recommends approval of the retired sergeant's own application for Accident Disability Retirement pursuant to Chapter 93 of the Laws of 2005 (World Trade Center Disability Law).

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 or 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. "[T]he 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]).

Petitioner's application for benefits is made pursuant to New York City Administrative Code § 13-252.1, the World Trade Center Disability Law, which provides:

Accidental disability retirement; World Trade Center presumption. 1.(a) 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 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.

Section 2 of the RSSL, referenced in Administrative Code § 13-252.1, defines the scope of qualifying WTC conditions and impairments. The relevant provision, RSSL § 2(36), is as follows:

Section 2. Definitions. The following words and phrases as used in this article shall have the following meanings unless a different meaning is plainly required by the context:

...

36. (a) "Qualifying World Trade Center condition" shall

mean a qualifying condition or impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery, or cleanup operations for a qualifying period, as those terms are defined below ...

(b) “Qualifying condition or impairment of health” shall mean a qualifying physical condition, or a qualifying psychological condition, or both . . .

(c) “Qualifying physical condition” shall mean one or more of the following: (i) diseases of the upper respiratory tract and mucosae, including conditions such as rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, and upper airway hyper-reactivity, or a combination of such conditions; (ii) diseases of the lower respiratory tract, including but not limited to tracheo-bronchitis, bronchitis, chronic obstructive pulmonary disease, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic; (iii) diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure; (iv) diseases of the skin such as conjunctivitis, contact dermatitis or burns, either acute or chronic in nature, infectious, irritant, allergic, idiopathic or non-specific reactive in nature, caused by exposure or aggravated by exposure; or (v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease.

The presumption afforded under Admin Code § 13-252.1 has been explained by the Court of Appeals as follows: “petitioner carried no burden to offer any evidence of causation. Simply put, the Board could not rely on petitioner’s deficiencies to fill its own gap in proof. Because the record contains no affirmative credible evidence to rebut the presumption, we reverse and hold that petitioner is entitled to ADR benefits.” *Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268 (2012).

The court agrees with petitioner that respondents’ determination is irrational and arbitrary. Contrary to respondents’ counsel’s contention, the Medical Board did not consider all of the medical evidence provided by petitioner. The Medical Board did not address the toxicology report which showed that Hanson’s brain tissue and brain fluid tested positive for antimony.

Nor did the Medical Board state what caused Hanson’s ALS. *Matter of Sheldon v Kelly*, (126 AD3d 138 [1st Dept 2015]), a case cited by petitioner and not even addressed by respondents, is on point. In that case, the respondents also failed to rebut the presumption that a first responder to the WTC disaster was entitled to. The *Sheldon* court wrote: “respondents ‘do not even purport to offer an alternative cause for petitioner’s debilitating conditions.’ Indeed, the record contains no proof whatsoever that petitioner’s disabling conditions were attributable to any other cause. Petitioner is therefore entitled to ADR benefits as a matter of law (126 AD3d at 144 [internal citations omitted]). As in *Sheldon*, the Medical Board here did not even state what caused Hanson’s ALS, let alone rule out that his exposures as a result of his heroic acts in response to the World Trade Center disaster could have caused the disease. Thus, the Medical Board’s final report was irrational.

The Medical Board’s final report was also arbitrary, since the Medical Board seemingly applied a different standard in connection with petitioner’s application as compared to another officer’s accident disability retirement application. The Medical Board conceded in its 2015 report for another officer that when there is no known cause for a condition, it is possible that the condition was caused by exposure to toxins at the World Trade Center disaster. However, petitioner was put to a different burden of proof and the Medical Board seemingly required petitioner to prove that ALS was caused by Hanson’s response to the WTC disaster. These differing burdens of proof and the Medical Board’s application of dif-

fering standards with respect to two different benefits applications, without any explanation, render the Medical Board's decision arbitrary.

In light of these findings, the court must annul respondents' denial of petitioner's application for AD benefits. Further, the court finds that petitioner is entitled to an order directing respondents to grant petitioner AD benefits as a matter of law. There is no dispute that Hanson was a first responder to the World Trade Center disaster and as a result, was exposed to various toxins. Petitioner submitted evidence to respondents in the form of a toxicology report showing the presence of antimony compounds in Hanson's brain tissue and fluid and Dr. Hirsh's opinion that Hanson's "toxic exposures [on 9/11] played a real impact on his global health deterioration and trigger of neurologic decline." New onset diseases resulting from, *inter alia*, heavy metal poisoning, is a qualifying World Trade Center condition under RSSL § 2(36) which entitles petitioner to the presumption under Administrative Code § 13-252.1. Since respondent wholly failed to rebut the presumption, petitioner's AD benefits application must be granted.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED the petition is granted to the following extent:

[1] the respondents' determination which denied the application for World Trade Center accidental death benefits by petitioner Cathleen Hanson, as widow and beneficiary of Michael Hanson, deceased, is annulled; and

[2] upon annulment, the application for World Trade Center accidental death benefits by petitioner Cathleen Hanson, as widow and beneficiary of Michael Hanson, deceased, is granted.

And it is further **ORDERED** that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/24/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.