

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

PRESENT: Joan B. Lob
Justice

PART 6

Index Number : 114926/2010

MELENDEZ, JAMES

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 6/14/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ n this motion to/for _____

PAPERS NUMBERED

1-16

17-40

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ^{Petition} ~~motion~~

Petition
THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

SEP - 1 2011

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/25/11

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of
JAMES MELENDEZ,

Petitioner,

Index No. 114926/10

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

Decision, Order, and Judgment

-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, THE BOARD
OF TRUSTEES of the Police Pension Fund, ARTICLE II,
NEW YORK CITY POLICE DEPARTMENT and
THE CITY OF NEW YORK

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

This case returns to me under a new petition and index number in which petitioner, retired New York Police Department (“NYPD”) police officer James Melendez, asks me to annul respondents’ most recent determination to reaffirm its prior determination that petitioner is not entitled to a line of duty Accident Disability Retirement allowance (“ADR”). In a prior proceeding in 2009, I determined that there was no competent evidence to support the Medical Board’s diagnosis that petitioner suffers from a lifelong affliction of bipolar disorder and that it is this disorder—and not post traumatic stress disorder (“PTSD”) or major depressive disorder (“MDD”)—that causes petitioner to be disabled from performing his duties as a police officer. Respondents had previously determined that the Medical Board’s diagnosis that petitioner is bipolar was sufficient evidence to rebut the World Trade Center (“WTC”) presumption that petitioner’s psychiatric disability was

caused by his work at the WTC on September 11, 2001, and subsequent days thereafter.¹ See In re Melendez v. Kelly, 2009 N.Y. Slip Op. 32876U, 2009 N.Y. Misc. LEXIS 5595 (Sup. Ct. N.Y. Co. 2009) (Index No. 108266/09). In my prior decision under Index Number 108266/09, familiarity with which is presumed, I annulled the Medical Board's determination and ordered that the matter be remanded for further consideration. As I set forth in December 2009:

The fundamental flaw in the Medical Board's findings is the final determination that petitioner suffers from Bipolar Disorder. There is scant support for this diagnosis. The earliest evaluation of Mr. Melendez was performed after 9/11 and was done at Columbia Presbyterian Medical Center ("CPMC"). As part of the history from CPMC, in a record from September 10, 2005 (the earliest medical documentation included in the motion), it is noted that Mr. Melendez remembered taking Buspar for one day at age 14 for unclear reasons. His diagnosis upon admission to CPMC was "PTSD, MDD, without psychotic features, r/o initial depressive episode in bipolar illness." In a later evaluation dated October 5, 2005, petitioner reports a history of depression. His discharge diagnosis was MDD, single, without psychotic features, PTSD. The November 16, 2005 inpatient screening note from [New York State Psychiatric Institute] NYSPI states that petitioner's mother was the informant about his diagnosis of Bipolar Disorder when he was 14. His discharge diagnosis summary from NYSPI was recurrent MDD in partial remission, and PTSD. The police department's own evaluations are not to the contrary. There is only one reference to Bipolar Disorder in the police department's evaluations, and that is in Dr. Lamstein's February 17, 2006 notes regarding Mr. Melendez's description of his history, wherein she wrote: "[a]t age 14 he saw a psychiatrist once, was diagnosed with bipolar disorder and prescribed Buspar, but only took it once due to adverse side effects". But, her diagnostic

¹ Section 13-252.1(1)(a) of the Administrative Code of the City of New York, entitled "Accidental disability retirement; World Trade Center presumption," sets forth, in pertinent part, that an "impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours 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."

impression was MDD, PTSD, and alcohol abuse. There is no diagnostic impression of Bipolar Disorder. None of the additional sources, police or otherwise, make such a diagnosis, except for the Medical Board. There is no competent evidence that Mr. Melendez has Bipolar Disorder. At best, there is the undocumented diagnosis of petitioner at age 14 and no mention of manic behavior supported by a medical opinion relating the behavior to Bipolar Disorder. Yet, the Medical Board has repeatedly cited this condition, for which there is no competent evidence in the record, as their final diagnosis. The unfounded assertion by the Medical Board does not overcome the WTC presumption.

After I remanded the matter, in a determination dated April 12, 2010 (the “April 2010 Determination”) the Medical Board adhered to its prior diagnosis of bipolar disorder, which it attempted to bolster by cherry picking statements from the record that were previously determined by this court to be incompetent evidence of bipolar disorder and reiterating those statements as proof that petitioner is bipolar. The April 2010 Determination sets forth:

[t]he Medical Board notes that the officer’s recurrent history of emotional illness with treatment [*sic*] antidepressant medication at the age of 14, therapy at the age of 16, couples therapy in 1999 and apparent adequate work history until 2005, when following the separation from his wife and severe financial difficulties precipitated [*sic*] symptoms of alcohol abuse and suicidal behavior.

There is nothing in this statement competently supporting the Medical Board’s final diagnosis of bipolar disorder. Taking Buspar for one day at age 14 (for which the only proof is derived from hearsay from a layperson), receiving counseling, or having problems related to separation from a spouse or financial difficulties are not examples of behaviors or symptoms that support a diagnosis of bipolar disorder. Second, the Medical Board cites

reports submitted by Dr. Catherine Lamstein, a psychologist at the Psychological Evaluation Section (PES) which reported, “infrequent

manic episodes with elevated mood, racing thoughts, hyper-energy, feels invincible, goes on impulsive spending sprees of up to \$500.00 at a time, sleeps less and feels rested after only three hours of sleep and feels that his senses and memory were both sharper.”

The Medical Board uses this misquoted excerpt from Dr. Lamstein’s report to prove that its original diagnosis of bipolar disorder was correct. This excerpt comes from an evaluation that Dr. Lamstein performed in February 2006 after petitioner had recently finished four months of intensive in-patient treatment for MDD and PTSD at the New York State Psychiatric Institute. The excerpt does not do Dr. Lamstein’s report justice, and in particular with respect to the misquoted excerpt above, she actually sets forth that:

The officer has also reported an infrequent history of *what might be* manic episodes, during which he has a very elevated mood, racing thoughts, hyper-energy, feels invincible, goes on impulsive spending sprees of up to \$500 at a time, sleeps less and feels rested after only three hours of sleep, and feels that his senses and memory are both sharper.

(Emphasis added). More importantly, the conclusion of her lengthy, detailed evaluation is that petitioner suffers from MDD and PTSD, not bipolar disorder.

The two aforementioned sentences are the sole stated reasons behind the Medical Board’s determination to reaffirm its previous decision to recommend disapproval of ADR. The Medical Board concludes that “[t]he recurrent episodes of mood lability characterized by *significant* manic and hypo manic behavior alternating with depressive episodes would be consistent with a long standing diagnosis of Bipolar Disorder and offer sufficient competent evidence to rebut the presumption of the World Trade Center bill.” (Emphasis added). The Medical Board never mentions in its determination that since September 2005 there have been no competent evaluations

of petitioner by any of his psychiatric or psychological care providers that have resulted in a final diagnosis of bipolar disorder.

The medical board that has been reviewing petitioner's application for ADR appears to be operating under the impression that if it repeats its unsupported diagnosis of bipolar disorder enough times, and peppers in a few tidbits from the record that it states support its predetermined diagnosis, this is the "evidence" sufficient to rebut the WTC presumption. As the First Department recently stated, "[t]he existence of 'credible evidence' supporting the Medical Board's decision is a sufficient basis for a reviewing court to determine that the Board of Trustees correctly found that the Medical Board rebutted the World Trade Center presumption." In re Mandonado v. Kelly, ___ A.D.3d ___, 2011 N.Y. Slip Op. 6083 (1st Dep't July 28, 2011). However, no credible evidence supporting the Medical Board's determination has been shown here.

Even assuming, arguendo, the accuracy of the dubious determination that petitioner has been bipolar since he was fourteen—without any showing that this disorder affected his previously unremarkable employment with the NYPD for nearly fourteen years between 1992 and 2005—there is no competent evidence that this disorder is the reason why petitioner cannot work and is now currently disabled. There are, however, a number of evaluations in the record that was before the Medical Board wherein the evaluators determined that petitioner suffers from PTSD and MDD. The Medical Board has provided no insight or reasoning as to why its own diagnosis of petitioner as bipolar trumps the significant medical evidence that petitioner is incapacitated from working as a police officer as a result of PTSD and MDD. Nor has it addressed the issue of whether

or not a prior psychological condition could have been aggravated by the undeniably traumatic events of September 11, 2001, such as to amount to a disabling condition qualifying for ADR. It is arbitrary and capricious for the Medical Board to reassert its previously unsupported determination that petitioner is bipolar by reaching back and picking out small parts of petitioner's comprehensive medical records in an effort to demonstrate that there is sufficient competent evidence proving that it was right the first time. The entire record needs to be reevaluated by a fresh board. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the extent that the Medical Board's determination of April 12, 2010, be annulled, and that the matter be remanded for an evaluation of petitioner's whole record by a fresh medical board within thirty (30) days of the service of notice of entry of this decision, order, and judgment.

Dated: 8/25/11

ENTER:

J.S.C.
J.S.C.

FILED
SEP - 1 2011
COUNTY CLERK'S OFFICE
NEW YORK

Norman Goodman
CLERK

New York County Clerk's Index No. 114926/10

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

In the Matter of the Application of

JAMES MELENDEZ,

Petitioner,

For a Judgment under Article 78 of
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-against-

RAYMOND KELLY, as 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 New York City Police Pension
Fund, Article II,

Respondents.

ORDER

JEFFREY L. GOLDBERG, P.C.

Attorney for Petitioner
2001 Marcus Avenue
Lake Success, NY 11042
(516) 775-9400

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J. GOLDBERG