

Distinguished by Stavropoulos v. Bratton, | N.Y.A.D. 1 Dept., | March 9, 2017

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Sheldon v. Kelly
 Supreme Court, Appellate Division, First Department, New York. | February 17, 2015 | 126 A.D.3d 138 | 4 N.Y.S.3d 156 | 2015 N.Y. Slip Op. 01404 (Approx. 8 pages)

In re Annmarie **SHELDON**, Petitioner–Appellant,
 v.
 [Raymond **KELLY**, etc., et al., Respondents–Respondents.
 Feb. 17, 2015.

Synopsis

Background: New York City police officer brought Article 78 petition, seeking to annul determination of Board of Trustees of City Police Pension Fund, which denied her application for accidental disability retirement (ADR) benefits. The Supreme Court, New York County, Paul Wooten, J., dismissed petition.

Holdings: The Supreme Court, Appellate Division, Acosta, J., held that:
 1 fibromyalgia constituted qualifying World Trade Center condition, thereby entitling officer to ADR benefits, and
 2 Board failed to rebut presumption that officer's fibromyalgia was caused by hazards encountered at World Trade Center following September 11 terrorist attacks.

Reversed, petition granted, and matter remanded.

West Headnotes (4) Change View

1 Municipal Corporations Evidence
Public Employment Law enforcement personnel
 Fibromyalgia, as “new onset disease,” constituted a qualifying World Trade Center condition under Retirement and Social Security Law, and thus, police officer's fibromyalgia and chronic fatigue syndrome, developed in wake of her exposure to the World Trade Center while working at site as first responder and at security post, was presumed to have been incurred in performance and discharge of duty, as required to obtain accidental disability retirement (ADR) benefits. McKinney's Retirement and Social Security Law § 2(36)(c)(ii); New York City Administrative Code, § 13–252.1(1)(a).
 2 Cases that cite this headnote

2 Municipal Corporations Evidence
Public Employment Law enforcement personnel
 Board of Trustees of the New York City Police Pension Fund bears the burden of showing that petitioner's qualifying injury for accidental disability retirement (ADR) benefits was not incurred in the line of duty, and the Board's determination must be supported by credible evidence in the record. New York City Administrative Code, § 13–252.1.
 1 Case that cites this headnote

3 Municipal Corporations Disability pension or compensation
Public Employment Law enforcement personnel

SELECTED TOPICS

Municipal Corporations
 Officers, Agents, and Employees
 Accidental or Performance of Duty
 Disability Retirement Benefits
 Municipal Departments and Officers Thereof
 Retired Police Officer Pension Benefits
 01404 (Approx. 8 pages)

Secondary Sources

§ 382. Generally
 83A N.Y. Jur. 2d Pensions and Retirement Systems § 382
 ...Upon the accidental death of a member of the Subchapter 2 Police Pension Fund (PPF) before retirement, provided that evidence is submitted to the board of trustees proving that the member's death was t...

Relationship between fireman's or policeman's performance of official duties and his death, for purpose of recovery of benefits by survivors

27 A.L.R.2d 1004 (Originally published in 1953)
 ...Under most of the pension and benefit systems established for fire and police departments provision has been made for payments to widows, or other survivors, of those who are members of the department ...

§ 915. Benefits to police officers for death, injury, or illness in performance of duties

26 N.Y. Jur. 2d Counties, Etc. § 915
 ...Any member of a police force of any county, city of less than 1 million population, town, or village, or of any district, agency, board, body, or commission thereof, or various other specified persons ...

See More Secondary Sources

Briefs

JOINT APPENDIX, VOL. I

2004 WL 2899955
 Thomas Joe Miller-El, Petitioner, v. Doug Dretke, Director, Texas Department Of Criminal Justice, Correctional Institutions Division, Respondent.
 Supreme Court of the United States
 Sep. 02, 2004
 ...Before DAVIS, JONES and DeMOSS, Circuit Judges, DeMOSS, Circuit Judge: Petitioner brings this federal habeas corpus petition claiming, pursuant to Batson v. Kentucky, that the state trial court erred i...

Thomas Joe MILLER-EL, Petitioner, v. Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

2002 WL 32102969
 Thomas Joe MILLER-EL, Petitioner, v. Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.
 Supreme Court of the United States
 May 28, 2002

...It is often said that most cases are won or lost on Voir Dire agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance o...

Respondents-Appellants' Brief

second application, the Board addressed petitioner's history of heavy metal poisoning, stating that it was "unclear" due to the discrepancy between Dr. Cimmino's testing, which showed elevated levels of cadmium, and the Police Department tests, which indicated that petitioner's lead, cadmium and mercury levels were normal or less than the detectable range. It went on to note that although petitioner's fibromyalgia and chronic fatigue syndrome started soon after her WTC exposure, there was no relationship between heavy metal poisoning and fibromyalgia. Petitioner subsequently submitted several articles purporting to show a link between heavy metal poisoning and fibromyalgia. The Medical Board ultimately reaffirmed its position that petitioner was disabled by fibromyalgia and chronic fatigue syndrome and not a WTC-related condition. By letter dated October 13, 2011, the Board of Trustees denied petitioner's application for ADR.

Petitioner commenced the instant CPLR article 78 petition on January 31, 2012. In ****159** denying the petition, Supreme Court noted, among other things, that the Medical Board had concluded that fibromyalgia and chronic fatigue syndrome were not qualifying conditions under the WTC law. However, the court did not discuss the WTC presumption or analyze petitioner's claims pursuant to the presumption. It cited only one post 9/11 case (*Matter of Jefferson v. Kelly*, 51 A.D.3d 536, 537, 857 N.Y.S.2d 161 [1st Dept.2008]), in a string cite supporting the proposition ****141** that "the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious."

Administrative Code § 13–252.1 provides that "any condition or impairment of health ... caused by a qualifying World Trade Center condition" as defined in the Retirement and Social Security Law "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" (§ 13–252.1[1][a]; see *Matter of Samadjopoulos v. New York City Employees' Retirement Sys.*, 104 A.D.3d 551, 961 N.Y.S.2d 410 [1st Dept.2013]). "Qualifying World Trade Center condition" is defined to include, among other conditions, "[n]ew onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and *musculoskeletal disease*" (§ 2[36][c][v] [emphasis added]).

In determining whether a particular illness or condition is covered under the statute, the Medical Board should avoid employing narrow definitions. Thus, this Court rejected a narrow reading of the statute in *Matter of Dement v. Kelly*, 97 A.D.3d 223, 231–232, 947 N.Y.S.2d 72 (1st Dept.2012), finding that it

"would defeat the avowed purpose of the statute, i.e., to protect 9/11 workers as a result of their heroic efforts. Indeed, the full extent of the health challenges faced by these workers, arising from chronic, acute exposures to a toxic brew of substances at the site, may not be known for years. The statutory language 'an impairment of health caused by a qualifying [WTC] condition' must be interpreted in a manner consistent with the underlying purposes of the statute."

Consistent with the Legislature's intent, the statute refers to "diseases" in the most general terms to include, syndromes and disorders (see e.g. Retirement and Social Security Law § 2[36][c][ii] ["diseases of the lower respiratory tract, including but not limited to ... reactive airway dysfunction *syndrome*"] [emphasis added]; see also § 2[36][d][i] [diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions]).

Fibromyalgia is defined as "a syndrome that causes chronic, widespread musculoskeletal pain" (Lisa R. Sammaritano, M.D., ****142** *An In-Depth Overview of Fibromyalgia*, Hospital for Special Surgery, http://www.hss.edu/conditions_in-depth-overview-fibromyalgia.asp, September 8, 2003, reviewed and updated December 30, 2009; see also *Mosby's Dictionary of Medicine, Nursing & Health Professions*, 695 [9th ed. 2013] [Fibromyalgia is "a form of nonarticular¹ rheumatism characterized by musculoskeletal pain, spasms, stiffness, fatigue, and severe sleep disturbance"]). Therefore, under an expansive reading of ****160** the statute, fibromyalgia falls within the broad parameters of a musculoskeletal disease.

1 Here, the evidence shows that petitioner did not have fibromyalgia before September 11, 2001, and that she developed disabling fibromyalgia and chronic fatigue syndrome in the wake of her WTC exposure.

2 Because it was "caused by a qualifying [WTC] condition," petitioner's fibromyalgia is presumed to have been "incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by [her] own willful negligence, unless the

proof" (*Bitchatchi*, 20 N.Y.3d at 284, 958 N.Y.S.2d 680, 982 N.E.2d 600). Furthermore, as in *Samadjopoulos*, 104 A.D.3d at 552–553, 961 N.Y.S.2d 410, 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 (*Bitchatchi*, 20 N.Y.3d at 283, 958 N.Y.S.2d 680, 982 N.E.2d 600).

Accordingly, the order of the Supreme Court, New York County (Paul Wooten, J.), entered March 11, 2013, which denied the petition to annul the determination of respondent Board of Trustees of the New York City Police Pension Fund, Article II, dated October 13, 2011, denying petitioner's application for accidental disability retirement benefits under Administrative Code of City of N.Y. § 13–252.1, and dismissed the proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, the petition granted, the determination annulled, and the matter remanded to respondent Board of Trustees for further proceedings in accordance herewith.

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 11, 2013, reversed, on the law, without costs, the petition granted, the determination of ****162** respondent Board of Trustees of the New York City Police Department Pension Fund, Article II, annulled, ***145** and the matter remanded to respondent Board of Trustees for further proceedings consistent herewith.

All concur.

All Citations

126 A.D.3d 138, 4 N.Y.S.3d 156, 2015 N.Y. Slip Op. 01404

Footnotes

- 1 Nonarticular is defined as "affecting or involving soft tissues (as muscles and connective tissues) rather than joints" (Merriam–Webster on-line dictionary, www.merriam-webster.com).

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