

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND **PART 48**
Justice

Matter of JENNIFER CALISE,

INDEX NO. 116945/05

Petitioner,

MOTION DATE

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

MOTION SEQ. NO. 001

-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 et al.,

MOTION CAL. NO.

Respondents.

FILED
JUN 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: In this CPLR article 78 proceeding, petitioner, a retired New York City police officer, challenges the respondents' denial of her application for an accident disability retirement pension ("ADR"), finding that she is only entitled to an ordinary disability retirement pension ("ODR"). Petitioner argues that this determination was arbitrary and capricious and contrary to established law.

Background

Petitioner was appointed to the uniformed force of the New York City Police Department ("NYPD") on July 7, 1999. Prior to her appointment, petitioner underwent physical and mental examinations administered by the NYPD in order to demonstrate her fitness as a police officer.

On October 8, 2002, petitioner's NYPD partner committed suicide by shooting herself in the precinct bathroom. It was petitioner who discovered the body. Immediately following this incident and continuing to the present, petitioner has experienced severe psychological problems, including depression, excessive weight loss and suicidal thoughts. As a result, petitioner entered a Peer Psychological Association Program under which she was placed on sick leave while participating in a program of psychological counseling. In July, 2003, petitioner was removed from the program and returned to work on restricted duty while under the care and observation of the NYPD Psychological Evaluation Unit.

On April 19, 2004, Dr. Alice Steiner, an NYPD psychologist who had examined petitioner, wrote a memorandum in which she indicated that petitioner appeared to be suffering from post traumatic stress disorder as a result of the suicide of her partner. On April 20, 2004, the NYPD Supervising Chief Surgeon, in a memorandum addressed to the Police Commissioner, requested that the NYPD Medical Board evaluate petitioner for ADR and ODR retirement consideration. The memorandum noted that petitioner "has been in treatment involving both therapy and medication without any real improvement in her condition" and has a "poor prognosis." The memorandum concluded with a list of various diagnoses of petitioner's condition, including depressive disorder and anxiety. The Police Commissioner approved the request that

petitioner was examined by the Medical Board, which deferred making a final determination pending receipt of a report from petitioner's private treating psychiatrist, Dr. Zinoviy Benzar. Dr. Benzar's report was issued in early September, 2004. In the report, he concluded that petitioner was unable to perform the duties of a full time police officer and that her current diagnosis met the criteria for post traumatic stress disorder and major depressive disorder with anxiety.

On September 13, 2004, the Medical Board issued an opinion recommending that petitioner be given an ODR pension and that her application for an ADR pension be denied. The diagnosis was that of major depressive disorder. The Medical Board offered no explanation for its recommendation that petitioner was not entitled to an ADR pension. Although it referred to Dr. Benzar's report, the Board failed to discuss his diagnosis or address whether there was a causal connection between petitioner's disability and her partner's suicide.

The Police Pension Fund Board of Trustees is the body responsible for approving, modifying or rejecting the Medical Board's recommendations. After receiving the Medical Board's September 13, 2004 recommendation, the Board of Trustees remanded the matter to the Medical Board on two occasions, January 10, 2005 and May 2, 2005, for the consideration of new evidence. On both occasions, the Medical Board reaffirmed without any explanation its initial decision recommending that petitioner be given only an ODR pension. On August 10, 2005, the Board affirmed the Medical Board's determination. This article 78 proceeding then followed.

Discussion

Section 13-252 of the Administrative Code of the City of New York governs accident disability retirement for members of the NYPD pension fund. It provides that upon application by a member or by the Commissioner, the Medical Board shall certify to the Board of Trustees that the member is entitled to ADR if a medical examination and investigation by the Medical Board show that the member "is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member...."

It is well settled that the Board of Trustees is entitled to rely on the Medical Board's recommendations as to causation, even in the face of conflicting evidence, and that its decision as to whether a police officer's disability is the result of an "accidental injury" should not be disturbed unless its factual findings are not supported by substantial evidence or unless its final determination is arbitrary and capricious. See *Matter of Canfora v. Board of Trustees*, 60 NY2d 347, 351 (1983); *Matter of Hipple v. Ward*, 146 AD2d 201, 207 (1st Dept. 1989). See also *Matter of Meyer v. Board of Trustees of the New York City Fire Dep't*, 90 NY2d 139 (1997); *Matter of Borenstein v. New York City Employees' Retirement System*, 88 NY2d 756, 760-61 (1996).

Here, petitioner argues that the decision to deny her application for ADR was arbitrary and capricious because the Medical Board ignored or failed to adequately address the findings of Drs. Steiner and Belzar that she suffered from post traumatic stress disorder, as well as major depression, and that this disability and the suicide of her partner are causally connected. Petitioner also argues that her discovery of the suicide constitutes an "accidental injury" within the meaning of section 13-252 of the Administrative Code and that she is therefore entitled to ADR since her disability was a natural and proximate result of this event.

In opposition, the respondents contend that the determination by the Medical Board had a rational basis and therefore must be confirmed. Respondents maintain that petitioner's records and the reports submitted by the examining psychiatrists support a conclusion that her disability was not caused by post traumatic stress disorder but is, rather, a major depressive disorder caused either by life issues unrelated to

the suicide of her partner or by petitioner's subsequent difficulties in coming to terms with the blame directed at her from co-workers, her partner's family and others for not preventing the suicide. Respondents also claim that the suicide of petitioner's partner and her subsequent discovery of the body do not meet the statutory definition of an "accidental injury" for which ADR may be awarded pursuant to section 13-252 of the Administrative Code.

As a threshold matter, the court finds that the Medical Board and the Board of Trustees failed to adequately address the issues of whether petitioner's disability was caused by the discovery of the suicide of her partner and whether the discovery constituted an accidental injury received in city service. In its determination, the Medical Board neither cited any medical evidence nor made a specific finding with respect to any causal connection between petitioner's disability and the discovery of her partner's suicide. The Medical Board also failed to address the issue of whether the discovery of the suicide constituted an "accidental injury" within the meaning of the Administrative Code. Although the term "accidental injury" is not defined in the statute, courts have routinely held that it includes incidents which are "sudden fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." *Matter of Baird v. Kelly*, 25 AD3d 311, 312 (1st Dept. 2006) (quoting *Matter of Lichtenstein v. Bd. of Trustees of Police Pension Fund of Police Dept. of City of NY, Art. II*, 57 NY2d 1010, 1012 (1982)). Although it appears that the incident in the precinct house could constitute a sudden and out of the ordinary injurious incident, the court need not reach this issue in light of the failure of the Medical Board to provide any explanation for its determination. See *Sailer v. McGuire*, 114 AD2d 334, 335 (1st Dept. 1985); *Matter of Curran v. McGuire*, 87 AD2d 223, 226-27 (1st Dept. 1982). Moreover, although the Board of Trustees must defer to the Medical Board with regard to medical judgments such as whether the employee is mentally or physically incapacitated to perform her city job, it is nevertheless obligated to make its own evaluation as to whether the event that gave rise to the disability was an accidental injury which occurred in the line of duty. See *Matter of Borenstein v. New York City Employees' Retirement System*, 88 NY2d 756, 760 (1996); *Pamlayne v. McGuire*, 111 AD2d 721, 723 (1st Dept. 1985); *Matter of Curran v. McGuire*, 87 AD2d at 226-27. In affirming the Medical's Board's determination, the Board of Trustees failed to discharge this obligation.

Accordingly, the petition is granted to the extent that the determination denying petitioner's application for accident disability retirement is hereby annulled and the matter is remanded to the Medical Board and the Board of Trustees for reconsideration and further proceedings not inconsistent with this decision.

The Clerk Shall Enter Judgment Herein

Dated: 6/19/06

Check one: FINAL DISPOSITION

MGT

MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

FILED
JUN 30 2006
NEW YORK
COUNTY CLERKS OFFICE