

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

PRESENT: Hon Joaw A Maddo
Justice

PART 11

Flynn, J

INDEX NO. 114619/06

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

Kelley, R

- v -

The following papers, numbered 1 to _____ were read on this ^{application} motion to/for Article 78 rule F

PAPERS NUMBERED

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 motion ^{application} is decided in accordance with the annexed memorandum Decision Order + Judgment.

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

UNFILED JUDGMENT
his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 118)

Dated: October 19, 2007

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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In the Matter of the Application of JOAN M.
FLYNN,

Index No. 114619/06.

Petitioner,

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

-against-

RAYMOND KELLY, as the Police Commissioner
Of the City of 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.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the County Clerk's Desk (Room
1127)

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JOAN MADDEN, J.:

Petitioner Joan Flynn, a retired New York City police sergeant, challenges the denial of her application for accident disability retirement benefits (ADR) on the basis of post traumatic stress disorder, by the Board of Trustees of the Police Pension Fund (Trustees), resulting in a reduced retirement benefit. Respondents oppose the petition, which is granted to the extent remanding the matter to the Medical Board for further hearings.

Background

Petitioner was appointed to the uniformed force of the New York City Police Department (NYPD) on February 3, 1984, and pursuant to Administrative Code of the City of NY § 13-214 was a member of the Pension Fund. Petitioner Flynn was promoted to the rank of sergeant,

passing all physical and mental exams without issue. On September 11, 2001, plaintiff was on duty and ordered to respond to the World Trade Center site, witnessing the collapse of the World Trade Center Towers. From September 11, 2001 until September 26, 2003, petitioner was assigned to oversee the Manhattan Morgue, a makeshift morgue at the World Trade Center site set up during the recovery efforts, as part of the Missing Persons Bureau (hereinafter “the Morgue”). Petitioner’s job included supervising the arrival and identification of bodies and body parts entering the Morgue and having face-to-face contact with the families of the victims who had come to the Morgue in search of their loved ones.

In August 2002, after petitioner began exhibiting symptoms of what would later be diagnosed as post traumatic stress disorder, petitioner’s lieutenant referred her to a psychiatrist at the Columbia Care Trauma Treatment Program (Trauma Treatment Program) (Respondent’s Exhibit 2, annexed to the Verified Answer). In her initial evaluation at the Trauma Treatment Program, petitioner reported “intense anxiety, panic attacks, irritability, disrupted sleep, nightmares, startle response, intense rage, uncontrollable crying, avoidant behavior, social withdrawal and periods of depersonalization” (*id*). In August 2002 she was diagnosed with post traumatic stress disorder by Dr. Lynn O’Brien, her psychiatrist with the Trauma Treatment Program, based upon the her reported symptoms of “extreme emotionality, crying, irritability, anxiety, poor sleep, poor concentration, losing track of time” (Respondent’s Ex 7). Dr. O’Brien prescribed Celexa for anxiety and depression, 40 mg, and Ambien as needed for sleep disturbances.

Petitioner also began seeing Robin Murray, a certified social worker at the Trauma Treatment Program for treatment of post traumatic stress disorder in individual weekly

psychotherapy sessions. On August 2003, as a result of experiencing increasing symptoms occurring a month before the anniversary of September 11th, including "inability to sleep, night awakenings, anxiety, grief, despair, panic... numbing, ... binge eating, significant weight gain" despite her current medications, petitioner was referred back to the Trauma Treatment Program to see psychiatrist Dr. Lynn Mirabello for an adjustment and re-evaluation of her medications (Respondent's Ex 6). Dr. Mirabello noted that despite her current dosages of anti-anxiety and anti depression medication, petitioner "is anxious, angry," "continues to avoid upsetting things that can trigger 9/11 memories, stays away from upsetting news in the newspapers, continues to have upsetting detailed memories of 9/11 related experiences, esp dealing with body parts of family members. At times paces, anxiety/agitation." As a result of the psychiatric evaluation, Dr. Mirabello continued petitioner on Ambien, increased the petitioner Flynn's dosage of Celexa, and added Atavain for anxiety in addition to recommending continued weekly psychotherapy and ongoing psychopharmacology management (Respondent's Ex. 7).

Leaving her position on September 26, 2003, petitioner then used up vacation and sick leave and officially retired from the force on February 29, 2004, after 20 years of service. In November 2003, petitioner applied for a retired officer's carry pistol license and was granted such a license.

On January 7, 2004, petitioner submitted an application to the Article II Medical Board (Medical Board) for ADR, stating that she is unable to perform full police duty based upon symptoms of "nightmares, lack of concentration, panic attacks, depression, headaches, inability to sleep without medication." Petitioner maintained that her symptoms were caused by her work for two years at the Manhattan Morgue/World Trade Center Disaster. At the same time, the

Police Commissioner submitted an application to the Medical Board for ordinary disability benefits (ODR) (Respondent's Ex 1).

On January 27, 2004, petitioner received a letter from the NYPD License Division stating that her carry pistol license was suspended, and directing her to immediately surrender her firearms to the local precinct.

The Medical Board first considered petitioner's applications on May 17, 2004. That same date, the Medical Board examined her and recommended that the application for accident disability retirement and ordinary disability retirement be denied. In a written determination consisting of a few short paragraphs, the Medical Board noted that petitioner was treated for a total of four symptoms, namely, of "irritability, crying, poor sleep and poor concentration," and cited as stressors the death of a close friend in 2003 and her own planned retirement in 2004, dismissing the diagnosis of post-traumatic stress disorder as a result of her experiences at the World Trade Center and two year assignment at the Morgue, where she "perform[ed] mainly administrative duties." The Board further noted that petitioner told the Medical Board that she was "doing okay" and wrote that her "[a]ffect had good range...[m]ood was not depressed, and a modicum of humor was present...[m]ental status examination otherwise unremarkable." The Medical Board thus concluded that petitioner's mental condition would not prevent her from performing her full-duty police work (Respondent's Ex. 5).

On August 11, 2004, petitioner received a letter from the NYPD License Division revoking her carry license based on her "history of depression which casts doubt on her ability to safely possess a handgun." Petitioner filed an administrative appeal of the decision.

On November 5, 2004, Dr. Mirabello, petitioner's psychiatrist at the Trauma Treatment

Program wrote a letter (Respondent's Ex. 10) stating that petitioner suffers from "Post Traumatic Stress Disorder" as a result of the World Trade Center attacks, experiencing "severe symptoms", including

anxiety and depression, recurrent distressing recollections of experiences in the morgue and her related duties dealing with victims' families, avoidance of stimuli that might trigger flashbacks, sleep disturbance for which she takes medication, hypervigilance, easy startle, poor concentration, near anhedonia and social withdrawal. Ms Flynn is currently being prescribed Zoloft 150 mg daily for her mood and anxiety symptoms as well as Ambien 10 mg for sleep with a partial response.

Although Ms. Flynn's tendency is to put up a "strong front" and her presenting demeanor is often superficially bright, it is easily apparent in sessions with minimal questioning that she continues to be in significant distress and that her symptoms impact her functioning greatly. She has minimal social contacts and her ability to handle stress is greatly diminished.

(Ex B).

In a letter dated November 10, 2004, the Trustees remanded her case based on Dr. Mirabello's letter.

On January 26, 2005, after a hearing before the NYPD License Division, the hearing officer recommended that petitioner's carry pistol license be revoked noting that by petitioner's "own admission ...she suffers from depression and anxiety attacks and is under a doctor's care for her condition." The Director of the License Division accepted the hearing officer's recommendation and cancelled her carry license. Petitioner subsequently brought an Article 78 proceeding challenging the determination of the License Division, which was denied.

On April 25, 2005, petitioner was again examined by the Medical Board, wherein they unanimously disapproved of her application for ADR and the Police Commissioner's application for ODR filed on her behalf, discounting Dr. Mirabello's report as "similar to [her] previous

reports,” despite the lengthy discussion of added symptomology (Ex E).

On October 12, 2005, the Trustees reviewed petitioner’s case, and remanded it once again to the Medical Board due to the submission of “new evidence,” namely, the NYPD License Division’s January 26, 2005 decision to cancel petitioner Flynn’s carry license based upon their determination that she “suffers from depression and anxiety attacks, and is under a doctor’s care for the condition” (Ex C) and the denial of her Article 78 petition seeking to vacate the determination (Ex F).

In 2005, the pension law was amended to provide that participation by police officers in the World Trade Center rescue, recovery, or clean up efforts for a minimum of 40 hours is presumptive evidence that any physically or emotionally illness was incurred in the performance of their duties as police officers (“the WTC bill”). See Administrative Code of the City of New York § 13-252.1 et seq. To be entitled to the presumption under the WTC bill, an officer must submit a form supplied by the retirement systems indicating that dates and location of service, and on February 24, 2006, petitioner filed such a form known as a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations (Ex G).

On March 20, 2006, petitioner’s case was again reviewed by the Medical Board. Petitioner did not appear before the Board, which disapproved her application, determining that there were no “significant objective findings precluding the sergeant from performing the full duties of a New York City Police Officer” (Ex H).

On June 14, 2006, the Trustees reviewed petitioner’s application and adopted the recommendation of the Medical Board (Respondent’s Ex 20).

Petitioner then commenced this Article 78 proceeding challenging the denial of her

application for ADR benefits. In the application, petitioner seeks an order annulling respondents' denials of ADR and directing respondent to retire her with a line of duty disability retirement allowance. Alternatively, petitioner seeks an order directing that a hearing be held regarding the factual issues herein or directing that the Board of Trustees permit petitioner to present testimony. Petitioner also seeks an order pursuant to CPLR 2307 directing respondents to file certain records relating to their determination regarding petitioner.

In support of her application, petitioner argues that the Medical Board's denials were deficient as a matter of law as they contained no discussion with respect to how the Medical Board arrived at a conclusion directly contrary to the medical evidence provided by her doctors. In addition, petitioner asserts that as her disability was the result of her participation in the recovery effort after September 11th, under the WTC bill she is afforded the presumption that her disability was caused by her performance of her duties as a police officer. Petitioner further argues the determination of the NYPD License Division that she was not she was not mentally fit to carry a gun renders the Trustees' decision irrational.¹

Respondents oppose the application, asserting that their determination is supported by ample credible evidence in the record. Specifically, respondents argue that not only did the Medical Board examine the petitioner several times, but each decision discussed all of the objective medical evidence considered in reaching the decision. In addition, respondents argue that as they found that petitioner was not disabled, the presumption under the WTC bill that any disability was caused by performance of her duties as a police officer is irrelevant.

¹Petitioner submits additional medical evidence in reply to support her position. As this evidence was not a part of the administrative record, the court cannot consider it. 72A Realty Assocs. v Environmental Review Board, 275 AD2d 284, 286 (1st Dept 2000)

Discussion

In an Article 78 proceeding challenging a disability determination, the Medical Board's determination will be sustained unless it lacks a rational basis, or is arbitrary or capricious. See Matter of Borenstein v. New York City Employees' Retirement System, 88 NY2d 756, 760 (1996); Matter of Canfora v. Board of Trustees of Police Pension Fund of Police Department of City of New York, 60 NY2d 347, 351 (1983). Ordinarily, the Medical Board's disability determination will not be disturbed if it is supported by substantial evidence, which in the context of disability cases, has been construed "to require some credible evidence." Matter of Borenstein v. New York City Employees' Retirement System, *supra* at 760; Matter of Rubiano v. New York City Employees' Retirement System, 268 AD2d 261 (1st Dept 2000). Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered... [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion." Matter of Meyer v. Board of Trustees of the New York City Fire Department, 90 NY2d 139, 146-147 (1997).

Once the Medical Board certifies that an applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny the application. See Matter of Borenstein v. New York City Employees' Retirement System, *supra* at 760. Where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve any conflicts. Id. However, determinations of the Medical Board and the Board of Trustees have been annulled and the matter remanded for further review where the medical issues presented by the petitioner were not adequately addressed or when the medical evidence did not sustain the determination. See Matter of Rodriguez v. Board of Trustees of New York City Fire Department, 3 AD3d 501

(2nd Dept 2004).

Under this standard, the court concludes that the record reveals that Medical Board failed to adequately address the medical evidence concerning petitioner's symptoms of post traumatic stress disorder documented by petitioner's mental health professionals, including her increasing inability to function as an officer, and her reliance on medications in order to sleep.

While respondents correctly points out that any issues concerning conflicting medical evidence are to be resolved solely by the Medical Board (Matter of Demarco v New York City Employees' Retirement Sys, 211 AD2d 594 (1st Dept 1995); Matter of Cassidy v Ward, 169 AD2d 482 (1st Dept 1991)), it is nonetheless incumbent on the Board to at least evaluate the evidence submitted by the petitioner. See McAdams v. Kelly, 2007 WL 2965402 (Sup Ct NY Co. Oct. 2, 2007), 2007 NY Slip Op. 51938 (U) (holding that the Medical Board's summary denial of petitioner's application for ADR benefits based on his post traumatic stress disorder resulting from his assignment at the World Trade Center site was arbitrary and capricious).

Significantly, except for the Medical Board's unsubstantiated conclusion that petitioner was not depressed based on her demeanor during one of her interviews, the evidence submitted by petitioner regarding her condition was uncontradicted. Belnavis v. Board of Trustees of the New York City Fire Dept, 84 AD2d 244, 248 (1st Dept) appeal dismissed, 56 NY2d 645 (1982)(observations of board that petitioner was "anxious and tense beyond what is ordinary in interviews" was insufficient basis for determining that petitioner's medical condition and that Medical Board "could not disregard the only competent medical evidence before it" consisting of reports from a psychologist and psychiatrist). Moreover, the Medical Board never reconsidered its conclusion based on petitioner's demeanor in light of the subsequent letter from petitioner's

doctor that petitioner's "tendency is to put up a 'strong front'" and that "her presenting demeanor is often superficially bright, it is easily apparent in sessions with minimal questioning that she continues to be in significant distress and that her symptoms impact her functioning greatly."

Furthermore, while the Medical Board is not bound by the determination of the NYPD License Division's finding that petitioner was not mentally competent to carry a pistol, the record provides no apparent basis for the Medical Board's decision to disregard this determination, which would presumably prevent petitioner from resuming her full duties as a police officer.

Additionally, nothing in the record suggest that the Medical Board took into account the performance requirements or psychological condition of a sergeant in charge of the Morgue who participated at Ground Zero, or that the Medical Board gave any consideration to whether petitioner suffered from a disability in light of her duties at the Morgue which the Board dismissively characterized as "administrative."

Finally, as the Medical Board did not find petitioner "physically or mentally incapacitated for the performance of city-service," it was not required to determine whether the condition was "a proximate and natural result of an accidental injury received in such city service." Matter of Meyer v. Board of Trustees of the New York City Fire Department, 90 NY2d at 144. The court notes, however, that it appears from the record that if petitioner were found to be disabled, that the presumption under the WTC bill that such condition or impairment of health² "was incurred in the performance or discharge of duty and [was] the natural and proximate result of an

²Under the WTC bill, a qualifying condition or impairment of health includes "[d]iseases of the psychological axis, including posttraumatic stress disorder, anxiety, depression or any combination of such conditions." Administrative Code § 13-252.1 (c)(iv).

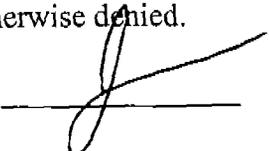
accident,” (See, Administrative Code § 13-252.1), would apply under the circumstances here.

In view of the above, it is

ORDERED and ADJUDGED that petitioner’s application is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of petitioner’s application for Accident Disability Retirement and disapproval of the Police Commissioner’s application for Ordinary Disability Retirement, and it is further

ORDERED and ADJUDGED that the petitioner is granted to the extent of directing that the Medical Board conduct an additional hearing before issuing an expanded determination on the subject application and, upon issuance of an expanded determination, shall present the expanded determination to the Board of Trustees, and is otherwise denied.

Dated: October 19th 2007


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)