

SCANNED ON 10/18/2010
SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C.
Justice

PART _____

Index Number : 116931/2009
LAMARCHE, JAYNE
VS.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1
2

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

Answering Affidavits - Exhibits _____

Replying Affidavits Memos of Law - M1, M2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined
as per accompanying decision/order filed
10-7-10.

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

NYS SUPREME COURT RECEIVED
OCT 18 2010
MOTION SUPPORT OFFICE

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-7-10

M S Friedman
MARCY S. FRIEDMAN, 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

In the Matter of the Application of

JAYNE LAMARCHE,

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 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.

Index No.: 116931/09

DECISION/ORDER

FILED

OCT 15 2010

COUNTY CLERK'S OFFICE
NEW YORK

In this Article 78 proceeding, petitioner, a retired police officer, challenges a decision of respondent, The Board of Trustees of the Police Pension Fund, Article II (“Board of Trustees”), denying petitioner’s application for accident disability retirement (“ADR”) benefits and instead awarding ordinary disability retirement (“ODR”) benefits. Petitioner claims that she is entitled to ADR benefits based on a psychological disability resulting from or exacerbated by her participation in the rescue and recovery efforts following the attacks on the World Trade Center (“WTC”) on September 11, 2001.

Petitioner filed an application for ADR on July 30, 2007, complaining of psychological

001

issues “as a result of the World Trade Center Disaster.” (Ans., Ex. 1.) Pursuant to this application, the Medical Board Police Pension Fund, Article II (“Medical Board” or “Board”), interviewed and examined the petitioner on November 16, 2007, and recommended denial of petitioner’s application for ADR benefits and approval of the ODR application entered on petitioner’s behalf. (Ans., Ex. 2.) On April 9, 2008, the Board of Trustees remanded petitioner’s application to the Board, instructing the Board to consider new evidence. (Ans., Ex. 3.) The Medical Board again interviewed petitioner and reevaluated the case on July 11, 2008. The Board adhered to its original determination. (Ans., Ex. 4.)

On December 10, 2008 the Board of Trustees again reviewed petitioner’s case and again remanded the case to the Medical Board “as per Verbatim minutes” and to consider new evidence. (Ans., Ex. 5.) In the minutes, a Patrolman’s Benevolent Association Consultant argued that the Medical Board “has not identified any competent evidence to rebut the World Trade Center Presumption” and correctly noted that “[petitioner] need not prove that she has PTSD in order to receive ADR benefits.” (Id.) The Medical Board evaluated petitioner for a third time on January 30, 2009, finding again that “[t]he final diagnosis is Depression Disorder Not Otherwise Specific (by history).” (Ans. Ex. 6.) The Board recommended that the Board of Trustees disapprove petitioner’s application for ADR and approve the Police Commissioner’s application for ODR. (Id.) On July 8, 2009, the Board of Trustees denied petitioner’s request for a remand. (Ans., Ex. 7.) On August 12, 2009 the Board denied petitioner’s ADR application. (Id.) Petitioner requested that the application for ODR submitted on her behalf be withdrawn, and she remains on “service retirement” status. (Minutes of Board Meeting dated Aug. 12, 2009, and Letter to Petitioner dated Aug. 17, 2009 [Ans. Ex. 7]; Pet., ¶ 15.) Petitioner now seeks to annul this decision to deny ADR benefits.

A reviewing court may not set aside the determination of the Board of Trustees denying ADR, as a result of a tie vote, “unless ‘it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident.’” (Matter of Meyer v Board of Trustees of the New York City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139, 145 [1997], rearg denied 90 NY2d 936, quoting Matter of Canfora v Board of Trustees of the Police Pension Fund of the Police Dept. of the City of New York, Art. II, 60 NY2d 347, 352 [1983].) Moreover, “a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the ‘substantial’ threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require ‘some credible evidence.’” (Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756, 760 [1996] [internal citations omitted].) Where medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (Id. at 761; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1st Dept 1999], lv denied 95 NY2d 769 [2000].) The courts “cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board.” (Matter of Santoro v Board of Trustees of New York City Fire Dept. Art. 1-B Pension Fund, 217 AD2d 660 [2d Dept 1995].)

ADR is awarded where a “member in city-service” 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, provided that the disability was not the result of “wilful negligence on the part of such member.” (Administrative Code of the City of New York § 13-252.) Under this section, the applicant for ADR has the burden of establishing that a causal relationship exists between the service-related accident and the claimed disability. (See Matter

of Evans v City of New York, 145 AD2d 361 [1st Dept 1988].) However, following the terrorist attacks of September 11, 2001, the New York City Council enacted New York City Administrative Code § 13-252.1, also known as the World Trade Center Disability Law. Subsection 2 (a) of this law provides, in part, that “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.” Qualifying conditions include “post-traumatic stress disorder, anxiety, depression, or any combination of such conditions.” (Retirement and Social Security Law § 2 [36] [d].)

There is not an extensive body of case law analyzing what constitutes proof by competent evidence for purposes of rebutting the WTC causation presumption. (See Matter of Jefferson v Kelly, 14 Misc 3d 191,196 [Sup Ct New York County 2006], affd 51 AD3d 536 [1st Dept 2008].) Guidance is available, however, from treatment of the identically worded causal presumption in the so-called “heart bill.”(See id.; General Municipal Law § 207-k. See also Matter of Goldman v McGuire, 64 NY2d 1041 [1985] affg 101 AD2d 768 [1st Dept 1984] [requiring credible evidence to rebut the heart bill presumption].)

The standard of proof to rebut the presumption is the same as is required to support a “no causation” determination in a typical ADR application -- that is, there must be “some credible medical evidence in the record on which to base the determination.” (See Matter of Jefferson, 14 Misc 3d at 196-7, citing Matter of Goldman, 64 NY2d at 1041; Matter of Meyer, 90 NY2d at 145.) Furthermore, “fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees before petitioner’s claim to accident disability

retirement may properly be rejected' and that the medical board clearly state the reasons for its recommendations." (Matter of Kiess v Kelly, 75 AD3d 416, 417 [1st Dept 2010], quoting Matter of Kelly v Board of Trustees of Police Pension Fund, Art. II, 47 AD2d 892, 893 [1975], citing Matter of Sailer v McGuire, 114 AD2d 334 [1985].)

In the instant case, the Medical Board's diagnosis of depression and rejection of the diagnosis of PTSD is supported by credible evidence. In its first evaluation of petitioner, on November 16, 2007, the Board summarized reports from petitioner's treating psychologists, Renato Prati and Sandra Rainbow, and from Arthur Knour, PhD, Director of the Psychological Evaluation Section, and Dr. P.C. Wickremsinghe. (Ans., Ex. 2). The Board noted that Dr. Prati, who saw petitioner between 1996 and 2003, diagnosed her with "Adult Situational Reaction," due to "mild symptoms of anxiety and depression." The Board also noted Dr. Knour's observations that there was no psychological hold on petitioner's firearms and that she had returned to full duty in 2003. The Board referenced a letter from Dr. P.C. Wickremsinghe, dated March 13, 2007, stating that "the doctor noted that the officer was urged to look for a psychiatrist because she had not seen one in over a year" and that "she had a history of major depression." (November 16, 2007 Report at 3.) The Board considered Dr. Sandra Rainbow's letter, dated October 9, 2007, which gave a diagnosis of Post Traumatic Stress Disorder, and noted that "[petitioner] began treatment with Dr. Rainbow in 1995." (Id. at 2.) After conducting its own interview of petitioner, the Board found her to have "no psychotic behavior or symptoms." (Id. at 3.) It concluded that "[t]here was little evidence to support her feeling that she had post traumatic stress disorder" but that "there are significant objective findings precluding the officer from performing the full duties of a New York City Police Officer." (Id.) It concluded that the petitioner's diagnosis was "Major Depressive Disorder, Rule Out Monopolar Depressive

Disorder.” (Id.)

In its second evaluation, dated July, 11, 2008, the Board considered additional evidence from Dr. Rainbow, a treatment update through July 7, 2008. The Board noted that in this update Dr. Rainbow described petitioner as “continu[ing] to struggle with depression.” The Board found that Dr. Rainbow “offered as credibility for [petitioner’s] having PTSD, her subjective statements.” (Id. at 1-2.) The Board also interviewed petitioner and related that petitioner “stated that she has [sic] intermittent cycles of depression and anxiety from nine years prior to 9/11.” (Id.)

In the final evaluation of petitioner, memorialized in its report of January 30, 2009, the Board again summarized earlier reports from petitioner’s treating psychologists and noted her history of depression. It also considered an update from Dr. Rainbow, regarding petitioner’s treatment through January 27, 2009, which stated that petitioner continued to be seen for PTSD and that “the officer continues to be stuck in a cycle of brief improvements followed by easily triggered regressions.” (Id. at 1-2.) After making its own mental status evaluation, the Board found that “[f]rom a medical point of view, she did not manifest any PTSD symptoms.” (Id. at 3.)

Resolution of the conflict in medical opinion as to petitioner’s diagnosis was squarely within the province of the Medical Board. (See Matter of Borenstein, 88 NY2d at 761.) Nor is there any basis in the record for the court to find as a matter of law that petitioner suffers from post-traumatic stress disorder, or that such disorder was caused by her experiences after September 11, 2001.

The court finds, however, that the Board did not apply the correct standard of causation in determining petitioner’s ADR application. It is well settled that “[t]he causation rule . . . is that

an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury.” (Matter of Tobin v Steisel, 64 NY2d 254, 259 [1985].) A case will therefore be remanded where the Medical Board concludes that a petitioner’s injury “stemmed from a long-present” psychological issue but “neglects to consider the causation rule” articulated in Tobin. (See Matter of Petrella v Board of Trustees of Police Pension Fund, 141 AD2d 361, 363 [1st Dept 1988].)

Here, the Board noted the applicability of the World Trade Center presumption in its final report, and made the finding that petitioner’s “history of continuing psychiatric disease rebuts the presumption of the World Trade Center Bill.” (Jan. 30, 2009 Report at 3.) While it was within the Board’s power to weigh the medical evidence, the Board failed to address and to make specific findings as to whether petitioner’s depression was aggravated by her work on and after 9/11. The court notes that the Board did make a finding that petitioner had a vulnerability to stress both before and after 9/11. (See Jan. 30, 2009 Report at 3.) However, that finding was insufficient to show that petitioner’s vulnerability was not exacerbated by her work as a first responder. Contrary to respondents’ further contention, the fact that petitioner returned temporarily to full duty status is not conclusive as to whether her depression was exacerbated by her 9/11 work.

The court has considered respondents’ remaining contentions and finds them to be without merit. As the Board applied an incorrect standard of causation, it has not met its burden of rebutting the presumption under the World Trade Center law. The matter will accordingly be remanded for reconsideration by the Board under the Tobin causation standard and, if the Board finds that petitioner’s condition was not exacerbated or aggravated by her 9/11 work and/or that the presumption under the World Trade Center law is rebutted, for a fuller explication of the

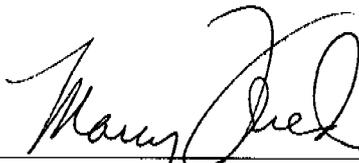
bases for such findings. (See Matter of Kiess, 75 AD3d at 416.)

It is accordingly hereby ORDERED and ADJUDGED that the petition is granted to the extent of remanding the matter to Medical Board Police Pension Fund, Article II for reconsideration pursuant to the terms of this decision; and it is further

ORDERED that in the event petitioner seeks to challenge the decision after remand of the Medical Board or Board of Trustees of the Police Pension Fund, it shall bring a new Article 78 proceeding.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
October 7, 2010



MARCY FRIEDMAN, J.S.C.

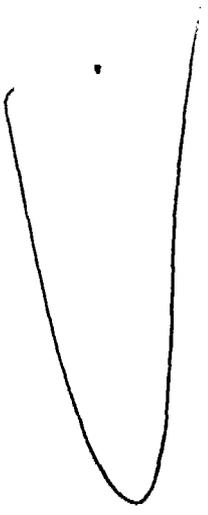


Clerk of the Court

FILED
OCT 15 2010
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New York County Clerk's Index No. 116931/09

<p>SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK</p> <p>In the Matter of the Application of</p> <p>JAYNE LAMARCHE,</p> <p style="text-align: center;">Petitioner,</p> <p>For a Judgment under Article 78 of The Civil Practice Law and Rules</p> <p style="text-align: center;">-against-</p> <p>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, THE BOARD OF TRUSTEES of the New York City Police Pension Fund, Article II and THE CITY OF NEW YORK,</p> <p style="text-align: center;">Respondents.</p>
<p>DECISION, ORDER & JUDGMENT</p>
<p>JEFFREY L. GOLDBERG, P.C. Attorney for Petitioner 2001 Marcus Avenue Lake Success, NY 11042 (516) 775-9400</p>



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AT 4:10 P M
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