

<b>Matter of Finck v Kelly</b>
2012 NY Slip Op 30135(U)
January 19, 2012
Supreme Court, New York County
Docket Number: 105230/11
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROL E. HUFF**

PART 32

Index Number : 105230/2011  
**FINCK, MICHAEL**  
vs.  
**KELLY, RAYMOND**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

JAN 20 2012

Upon the foregoing papers, it is ordered that this ~~motion~~

NEW YORK  
COUNTY CLERK'S OFFICE

motion is decided in accordance

with accompanying memorandum decision

Dated: JAN 19 2012

  
**CAROL E. HUFF**

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  
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of : Index No. 105230/11  
MICHAEL FINCK,

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 a Chairman of the Board of  
Trustees of the Police Pension Fund, Article II and :  
THE BOARD OF TRUSTEES of the Police Pension Fund,  
Article II, NEW YORK CITY POLICE DEPARTMENT, :

Respondents. :

-----X

**FILED**

**JAN 20 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner, a former uniformed New York City Police officer, seeks to annul the determination of respondent Board of Trustees of the Police Pension Fund (the Board of Trustees), dated January 12, 2011. The Board by a six-to-six vote upheld the determination of nonparty Medical Board of the New York City Police Pension Fund (Medical Board) that petitioner qualified for ordinary disability retirement benefits (ODR), but not accident disability retirement benefits (ADR).

Petitioner was a first responder to the World Trade Center disaster and for days thereafter was assigned to rescue, recovery and clean-up operations. The Medical Board characterized the experiences he described to them as "horrific."

On October 9, 2009, petitioner applied for ADR under the World Trade Center Disability

Law, Administrative Code of the City of New York § 13-252.1 (“Accidental disability retirement; World Trade Center presumption”). Section 13-252.1(1)(a) provides:

if any condition or impairment of health is caused by a qualifying World Trade Center condition . . . , 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.

The key issue in this case is whether plaintiff's psychological disabilities were “caused” by his World Trade Center experiences. Applying the rule in Tobin v Steisel, 64 NY2d 254, 259 (1985) to the World Trade Center Bill, “any condition or impairment of health” that “produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury.”

In support of his application on the first review by the Medical Board, petitioner submitted the following:

– A June 2, 2009, report from therapist Ernest Leucci, M.A., LCSWR, regarding treatment of petitioner initiated January 13, 2009, in which Leucci stated that petitioner's condition, severe Post Traumatic Stress Disorder (PTSD) with paranoid delusion “relates directly to a globalization of danger assimilated during his protracted duty during and after the attack on the World Trade Center.” Petition, Ex. A.

– A July 18, 2009, report from psychiatrist Dr. Louis K. Teitelbaum, M.D., which concluded: “I believe that [petitioner] should be offered permanent and complete 100% disability from his job as a police officer. Due to his relationship to the 9/11 events I believe he should access special benefits that are available to 9/11 surviving police officers.” Petition, Ex. B.

– An October 13, 2009, memorandum from psychologist Alessandra Herbosch, Psy.D.,

NYPD Psychological Evaluation Section Level I, detailing her interview with petitioner in which she reports psychological symptoms beginning shortly after 9/11 and recommending that he not return to police work. Petition, Ex. D.

– A November 28, 2009, report from Mr. Leucci to the Medical Board, stating, “[Petitioner] has diagnoses of [PTSD], Major Recurrent Depression, which is now moderate to severe in specifier, Anxiety Disorder, and he experiences delusions with a paranoid theme. These diagnoses onset within six months (four weeks) [sic] of his intensive and uninterrupted exposure during and subsequent to the attack . . . at the World Trade Center. . . .” Petition, Ex. E.

On December 14, 2009, the Medical Board interviewed petitioner for five minutes. On that date it denied his application for an ADR in nine cursory paragraphs, rejecting a causal connection between petitioner’s World Trade Center experiences and his disabilities. Noting that he had had a good attendance record and had assisted in dangerous operations since 9/11, the Medical Board found simply: “The absence of significant objective symptoms, disorder or disability following the World Trade Center disaster, the recent onset of a psychiatric disorder and the lack of stigmata associated with a [PTSD], would provide competent evidence to rebut the provisions of the World Trade Center Bill.”

On February 25, 2010, the Board of Trustees remanded petitioner’s application to the Medical Board for consideration of new evidence, including:

– A January 14, 2010, letter from therapist Eliza M. Marcus, M.Ed., LMHC, in which she states, “Prior to September 11, 2001, [petitioner] was in good health with no previous psychological history. After September 11, 2001, he began to experience symptoms of [PTSD],

Anxiety, Panic and Suicidal Ideation with a plan.” Petition, Ex. G.

– A February 23, 2010, report from Dr. Teitelbaum in which he disputes the Medical Board’s previous findings, stating, “The board asserts the illness is of recent origin. The report of the patient is that the symptoms began at the time of the 9/11 events and grew in severity over years to the level where they became overwhelming.” Petition, Ex. H.

On March 29, 2010, the Medical Board interviewed petitioner for several minutes, and reaffirmed its prior decision in seven cursory paragraphs.

On June 9, 2010, the Board of Trustees remanded petitioner’s application again for consideration of new evidence, including:

– A May 28, 2010, letter from Mr. Leucci to the Medical Board stating that petitioner’s condition had not improved, and reiterating his opinion that petitioner’s disabilities arose out of the World Trade Center disaster. Petition, Ex. K.

– A May 31, 2010, report from psychiatrist Dr. Frank Dowling, M.D., who has treated police officers for psychological conditions related to the World Trade Center disaster, in which he stated: “In my medical opinion, within a reasonable degree of medical certainty, the diagnoses [for petitioner] are causally related to his work at Ground Zero and the vicinity during the WTC rescue and recovery operations.” Petition, Ex. L.

After another brief interview with petitioner, on August 9, 2010, the Medical Board again denied his application in seven cursory paragraphs.

On January 12, 2011, the Board of Trustees deadlocked six to six on whether to grant the ADR. The tie vote resulted in an award of ODR pursuant to City of New York v Schoek, 294 NY 559 (1945).

The Board of Trustee's determination denying petitioner's application for an ADR will be upheld unless it is shown that the determination "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974).

The Police Pension Fund instructions to the Medical Board included in ADR applications requires it to provide in its determination (emphasis in the original):

[A s]tatement as to whether member is physically or mentally incapacitated for the performance of full police duty as a natural proximate result of an accidental injury or injuries received in such city service. *If the Medical Board disagrees with a report submitted by another physician, the Medical Board should briefly explain why it does not accept the outside physician's conclusion.*

Police Pension Fund Instructions for the Medical Division upon Receipt of Application for Accident Disability, ¶ 5, Petition, Ex. J.

The determination was plainly taken without regard to the facts and ignored Police Pension Fund procedure with respect to explaining disagreement with outside reports. Without attempting any meaningful inquiry or explanation in three opportunities, the Medical Board denied petitioner's application, disregarding the reports of five mental health professionals and offering no contrary professional evidence in support of its decisions. It failed to articulate why it found no causation pursuant to the rule in Tobin v. Steisel.

This is not the first time the Medical Board has failed recently to adequately address an application for ADR benefits for psychological disability pursuant to the World Trade Center Bill, resulting in granting the Article 78 petition and remand. See Kringdon v Kelly (Sup Ct, NY

County, October 30, 2006, Gische, J., index No. 101941/06); Loud v Kelly (Sup Ct, NY County, January 12, 2010, Madden, J., index No. 101609/09); Lamarche v Kelly (Sup Ct, NY County, October 7, 2010, Friedman, J., index No. 116931/09); and Melendez v Kelly (Sup Ct, NY County, August 25, 2011, Lobis, J., index No. 114926/10) (remanding the same case for a second time, requiring that a different medical board review the application).

In Petrella v Board of Trustees of Police Pension Fund, 141 AD2d 361 (1<sup>st</sup> Dept 1988), the remedy for Medical Board's failure to consider the Tobin causation rule was remand.

Accordingly, it is

ADJUDGED that the petition is granted and the matter is remanded to the Medical Board and the Board of Trustees for reconsideration in light of this decision; and it is further

ORDERED that the Medical Board, if it rejects petitioner's application again, discuss in its determination in substantive detail the reasons for its rejection of the reports, evaluations and letters of the mental health professionals filed on petitioner's behalf.

Dated: JAN 19 2012

**FILED**

JAN 20 2012

NEW YORK  
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*CH*  
**CAROLE E. HUFF**  
J.S.C.