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SCANNED ON 4/9/2012

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

PRESENT : DONNA M. MILLS **PART** 58

Justice

JEAN LANG,

Petitioner,

-v-

RAYMOND KELLY, as the Police Commissioner of the City of New York, et al.,

Respondents.

INDEX NO. 112008/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 6
Answering Affidavits– Exhibits	2, 3, 4
Replying Affidavits	5

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED

APR 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/3/12 _____ J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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In the Matter of the Application of
JEAN LANG,

Petitioner,

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

-against-

Index No. 112008/11

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.

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DONNA M. MILLS, J.:

In this Article 78 proceeding, petitioner Jean Lang seeks a judgment annulling the determination of respondents 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, the Board of Trustees of the Police Pension Fund, Article II ("the Board of Trustees"), the New York City Police Department and the City of New York (collectively "respondents") which denied her accident disability retirement, ("ADR") application pursuant to § 13-252 of the Administrative Code of the City of New York ("Administrative Code"), and instead awarded her ordinary disability retirement ("ODR") benefits pursuant to Administrative Code § 13-251. Petitioner also asks the Court to direct the Board of Trustees to grant her ADR benefits outright or for another reconsideration of her application.

On May 13, 2011, Justice Jane Solomon of the New York State Supreme Court,

County of New York, granted petitioner a remand of her ADR application, holding that the Board of Trustees did not rely on the commonsense definition of accident as set forth by the Court of Appeals. In accordance with the Court's directions, the Board of Trustees again considered petitioner's case and set forth a detailed record regarding the basis for its determination to again deny petitioner's ADR application. Petitioner now challenges this new determination.

It is undisputed that petitioner suffered injuries on March 15, 2008, when she tripped on wires while exiting the female supervisor's locker room/bathroom in response to a radio call. Although the Medical Board found petitioner disabled, the Board of Trustees was not convinced that petitioner's injuries were caused by an accident as defined by relevant statutes and case law. Specifically, the Board of Trustees, both in the initial Article 78 proceeding and upon reconsideration, was unable to conclude that petitioner was unfamiliar with the condition of the area where she had her incident; therefore, they found that petitioner did not establish as a matter of law that her injury was the result of a sudden unexpected circumstance. As a result, on June 9, 2010, petitioner was retired on ODR pursuant to a six to six vote of the Board of Trustees.

At the time of injury, both petitioner and petitioner's supervisor described the wires as "exposed". However, over two years after the date of injury, petitioner submitted a written statement, dated April 9, 2010, to the Board of Trustees, that stated:

> The undersigned was assigned to the 75th Pct. in February 2005. In December 2007 through January 2008 the command was equipped with

> new computers. One was placed in the female supervisors locker room. Wires from the computers, along with others were placed crossing the doorway from the locker room to the bathroom and were secured to the floor with duct tape causing no hazard. On the day of my injury the tape had been removed and the wires were left raised from the floor causing myself to trip over them.

The Board of Trustees attempted to acquire additional information concerning the circumstances of petitioner's injury in order to ascertain whether petitioner was aware of the exposed wiring, and to corroborate the facts set forth in her April 9, 2010 statement, which they claim differed from the information provided in the line-of-duty injury report, with respect to the wires being taped down.

Respondents contend that after accepting a written statement from the petitioner, reviewing a work order summary provided by the Sergeant's Benevolent Association, and reviewing the Medical Board's report, the Board of Trustees could not conclusively determine whether petitioner was unfamiliar with the conditions where the incident took place. Additionally, respondents argue that upon reconsideration and after reviewing two letters written by Jeffrey Goldberg on petitioner's behalf, the Board could not conclude that her injuries were a result of a "sudden, unexpected circumstance." Rather, respondents' maintain that petitioner was aware that the wires had been running across the doorway from the locker room to the bathroom for many months prior to her injury.

The qualifications for ADR and ODR for police officers are set forth in New York City Administrative Code § 13–252 and 13–251, respectively. The statutory scheme

entitles a police officer to ADR if she 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 ... and that such disability was not the result of willful negligence...." Code § 13–252. For an officer to become entitled to ADR, the Trustees must determine not only that she was unfit for duty and was injured in a line-of-duty accident, but also that such accident proximately caused the disability. Drayson v. Board, 37 A.D.2d 378, 380 (1st Dept.1971). Although the Trustees make this determination, they rely on the Medical Board's recommendations to determine all medical issues.

In the usual Article 78 proceeding, the review of the Board's decision is limited to whether their decision was supported by "some credible evidence" and was not arbitrary and capricious. Drayson, supra at 380. See also Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756, 760 (1996) This standard is set as courts cannot "weigh the medical evidence or substitute their own judgment for that of the Medical Board." Borenstein, supra at 761 (citing Brady v. City of New York, 22 N.Y.2d 601; Appleby v. Herkommer, 165 A.D.2d 727 (1st Dept.1990)). Ordinarily, the decision of the Trustees as to the cause of an officer's disability "will not be disturbed unless its factual findings are not supported by substantial evidence or its final determination and ruling is arbitrary and capricious." Canfora, supra at 351. However, where, as in this case, the Trustees deny ADR but grant ODR pursuant to a 6–6 tie vote, the standard of judicial review must be different as the Trustees have made no findings. Denial of ADR in consequence of a tie vote "can only be set aside if the courts conclude that the retiree is entitled to [ADR] as a matter of law." Meyer v. Board of

Trustees, 90 N.Y.2d 139, 145 (1997). Thus, the Court may not set aside the denial of ADR unless the Court can conclude as a matter of law that disability was the natural and proximate result of a service-related accident . No such conclusion can be drawn here.

This Court finds that the Board was entitled to credit contemporaneous accounts that did not mention that the wires that caused petitioner's fall were previously taped to the floor and to discredit the subsequent 2010 statement that did (see Matter of Gray v Kerik, 15 AD3d 275 [2005]). Reviewing the record before this Court, I can not say as a matter of law that petitioner's disabling injury, sustained when she tripped over computer wiring in the locker room/bathroom where she was very familiar with the location, was the result of an accident and not her own misstep (see Matter of Starnella v Bratton, 92 NY2d 836, 839 [1998]). There is no contemporaneous evidence corroborating the claims made in petitioner's 2010 statement that the wires were previously taped to the floor.

Therefore I find that it was neither irrational nor an error of law for the respondents to deny ADR on the grounds that petitioner's fall was not an accident. The risk of tripping in the instant action cannot be considered sudden, unexpected, and out of ordinary, and it cannot be said that petitioner is entitled to ADR as a matter of law. See In re Mejia v. Kerik, 301 A.D.2d 385 (1st Dep't 2003). Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 4/3/12

ENTER:

J.S.C.