

**Matter of Henriquez v Kelly**

2012 NY Slip Op 31289(U)

May 11, 2012

Supreme Court, New York County

Docket Number: 112360/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of ELBA IIENRIQUEZ,*

INDEX NO. 4112360/11

Petitioner,

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

-against-

MOTION SEQ. NO. 001

RAYMOND KELLY, et al.,

Respondents.

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, 2

Answering Affidavits- Exhibits \_\_\_\_\_ 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.

Dated: 5/11/12

  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION

**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 141B).

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: 1AS PART 58

**UNFILED JUDGMENT**

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In the Matter of the Application of  
ELBA HENRIQUEZ,  
  
Petitioner,

~~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 141B).~~

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

-against-

Index No. 112360/11

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.

-----X

**DONNA M. MILLS, J.:**

In this Article 78 proceeding, petitioner Elba Henriquez 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.

Petitioner, a former New York City Police Officer, claims to have suffered injuries

to her back on November 23, 2005 when she allegedly caught her boot on a raised screw in the floor and fell to the ground during roll call at the Manhattan Traffic Task Force. Although the Medical Board of the New York Police Pension Fund, Article II (the "Medical Board") found petitioner disabled, the Board of Trustees denied petitioner's application for ADR. Upon reviewing all of the evidence in the administrative record, the Board of Trustees found that petitioner failed to meet her burden of establishing that her back disability was the natural and proximate result of the alleged November 23, 2005 incident; and that petitioner's back disability was the result of a sudden, unexpected, or out of the ordinary event.

Respondents now seek dismissal of the Verified Petition on the grounds that petitioner has failed to demonstrate that she was physically incapacitated for the performance of the duties of a police officer as the natural and proximate result of an accident not caused by her own negligence and sustained in the performance of her duties.

Respondents maintain, and it is undisputed, that it never received a Line of Duty ("LOD") incident report regarding petitioner until May 13, 2010, almost four and a half years after the alleged accident. Petitioner, however, maintains that a LOD injury report was prepared on the date of her accident, and placed in the Desk Officer's mailbox at Manhattan Traffic Task Force ("MTTF"), however petitioner contends that the Desk Officer was transferred out of MTTF shortly after petitioner's injury and the original completed LOD paperwork was misplaced after he left.

According to the May 13, 2010 LOD incident report and supporting documentation, on November 23, 2005, petitioner was performing a tour at the MTTF

and during roll call, as she stepped out from behind her desk, she caught her boot on a screw that was protruding from the floor and fell to the ground. Petitioner acknowledges that she refused medical attention at the scene of the incident. One of the supporting documents relied on by petitioner to establish that she did file her LOD incident report on the date of the incident, is a witness statement dated November 23, 2005 from P.O. Doreen Debattista, who claims to have witnessed the incident and supports petitioner's version of the incident in question.

By application dated October 18, 2010, petitioner filed for ADR. In the application, petitioner claimed that she suffered from a low spine injury, which caused constant pain to her back and left leg, and a loss of mobility. Petitioner alleged that her disability was the result of the line of duty incident that occurred on November 23, 2005. In response to petitioner's application, the Police Commissioner filed an application for ODR on behalf of petitioner.

On March 1, 2011, the Medical Board considered petitioner's application for ADR and the Police Commissioner's application for ODR by reviewing the available medical evidence and by examining and interviewing petitioner. After this review, the Medical Board concluded that petitioner suffered from a back disability and was unable to perform the full duties of a New York City Police Officer. The Medical Board found that the competent causal factor was the line of duty injury of November 23, 2005. Accordingly, the Medical Board recommended approval of petitioner's ADR application and denial of the Police Commissioner's ODR application.

During a Board of Trustees meeting on May 11, 2011, Ms. Rosemary Debellis, representative from the New York City Police Department and Chairperson for the

Board of Trustees, argued that petitioner's application for ADR should be denied because: (1) there was no causal link between the November 23, 2005 incident and petitioner's current condition; and (2) the act of tripping on a screw does not constitute an accident as defined in the relevant case law. The decision on petitioner's application was tabled until July 11, 2011 when the Board of Trustees voted six-to-six on whether to grant petitioner ADR. A six-to-six vote results in the awarding of an ODR pension (see City of New York v Schoeck, 294 NY 559 [1945]). Thereafter, petitioner retired on an ODR pension.

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.

In the case at bar, there was credible evidence before the Board of Trustees that petitioner's disability was not the result of a service-related accident. The Board of Trustees found that there were credibility issues surrounding the November 23, 2005 incident due to the lack of contemporaneous documentation, describing the nature of the incident or petitioner's alleged injuries, filed with the New York City Police Department (“NYPD”), at or around the time of the incident in 2005. Additionally, the NYPD Medical Division's computer database indicated that there were no computer entries indicating that the incident was ever reported in 2005 or that a line-of-duty number was assigned pursuant to NYPD protocol.

Further, petitioner's claim that the November 23, 2005 incident caused her back disability is unconvincing given that petitioner refused medical aid at the scene of the incident and that petitioner did not take any medical leave at or around the time of the incident. Moreover, petitioner's medical records suggest that a variety of other incidents could have caused petitioner's current back disability. Petitioner's medical records indicate that she was involved in an off-duty motor vehicle accident in May 2002, in which her back and neck were injured. In February 2006, petitioner was taken to the emergency room at Nyack Hospital after experiencing back pain while bending over at the waist to pick something out of her purse. It should also be noted that the February 2006 hospital records also indicate that petitioner told her doctor that "she was fine following a fall at work in December of 2005."

A report from Dr. Cruz-Banting (petitioner's neurologist), dated October 13, 2006, indicates that petitioner reported "falling at her home a week and a half earlier." Weiler Hospital records, dated May 4, 2009, indicate that petitioner reported experiencing back pain when opening a drawer. Similarly, a June 2, 2009 report from Dr. Adam L. Wollowick states that petitioner reported experiencing back pain when she bent over to close a drawer at home. Given these additional incidents that occurred from 2002 to 2009, it was reasonable and rational for the Board of Trustees to conclude that the November 2005 line of duty incident was not the natural and proximate cause of petitioner's back disability.

Additionally, even if this Court were to find that petitioner's back disability was causally related to the 2005 incident, I would still be required to deny this Article 78




petition because the November 23, 2005 incident was not an "accident" as required by Administrative Code § 13-252. Reviewing the record before this Court, I can not say as a matter of law that petitioner's disabling injury, allegedly sustained when she tripped on a screw that was sticking up from the floor 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]).

I also 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 Nicholas v. Safir, 297 AD2d 220 (1st Dep't 2002). Accordingly, it is hereby

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

Dated: 5/11/12

ENTER:  
  
J.S.C.

DONNA M. MILLS, J.S.C.

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