

Matter of Titza v Kelly
2012 NY Slip Op 32627(U)
October 12, 2012
Supreme Court, New York County
Docket Number: 111177/2011
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 111177/2011
TITZA, ROBERT
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78 CAL: # 87

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>12</u>
Answering Affidavits — Exhibits _____	No(s). <u>34</u>
Replying Affidavits _____	No(s). <u>5</u>

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ~~ORDER~~ JUDGMENT.**

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).

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

Dated: 10/12/12
OCT 12 2012

Barbara Jaffe, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of:
ROBERT TITZA,

Petitioner,

For a Judgment pursuant to 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 New York City Police Pension Fund,
Article II, and THE BOARD OF TRUSTEES of the
Police Pension Fund, Article II,

Respondents.

-----X
BARBARA JAFFE, JSC:

For petitioner:

Jeffrey L. Goldberg, Esq.
Jeffrey L. Goldberg & Associates, P.C.
2001 Marcus Avenue
Lake Success, NY 11042
516-775-9400

For respondents:

Amy J. Weinblatt, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-676-6051

Index No. 111177/11

Argued: 6/19/12
Motion Seq. No.: 001
Motion Cal. No.: 87

DECISION & JUDGMENT

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).

By notice of petition dated September 29, 2011, petitioner, a retired New York City Police Officer, moves pursuant to: (1) CPLR 7803 for an order annulling respondent Board of Trustees of the New York City Police Pension Fund's (Board of Trustees) denial of his application for accident disability retirement (ADR) benefits pursuant to the Heart/Stroke Bill, General Municipal Law (GML) § 207-k, and directing the Board of Trustees to award him ADR benefits retroactive to the date of the denial, or in the alternative, remanding the matter to the Board of Trustees for further review; and (2) pursuant to CPLR 2307(a) for an order directing the Board of Trustees to serve and file certain documents it reviewed in considering petitioner's

application. Respondents oppose.

I. PERTINENT FACTS

On July 7, 1999, petitioner joined the New York City Police Department and became a member of the Police Pension Fund. (Ver. Ans., Exh. 1).

On April 18, 2007, after having worked 14 of the last 24 hours, petitioner, then 32 years old, suffered multiple strokes. (Ver. Pet., Exh. A). The same day, an application for ADR benefits was submitted on his behalf. (Ver. Ans., Exh. 3).

On March 10, 2010, after reviewing extensive medical evidence, the New York City Police Pension Fund Medical Board (Medical Board) determined that petitioner was disabled as the result of multiple embolic strokes but ineligible for ADR for the following reasons:

The studies of the arteries to the brain revealed no evidence of atherosclerotic disease (blockages) of the main vessels. Therefore, there are no atherosclerotic lesions to precipitate thrombosis or emboli as etiology as the cause of the strokes. Additionally, there is no evidence of hypertension as the etiology of the strokes based on the distributions of the infarctions (strokes) and history. Since the strokes are not related to what has been previously defined under the Heart Bill as stress related[,] namely atherosclerotic and hypertension, the Medical Board finds this competent evidence to rebut the presumption of the Stroke Bill. Additionally, the Medical Board is unaware of any literature relating occupationally related stress to embolic phenomenon in stroke

(Ver. Ans., Exh. 6).

On July 21, 2010, after reviewing new medical evidence, the Medical Board upheld its previous determination, noting that the new evidence revealed neither atherosclerosis nor hypertension. (*Id.*, Exh. 9). Thereafter, it reviewed additional new evidence, including a letter from petitioner's counsel emphasizing his young age and the number of hours he worked before his strokes occurred, and on February 23, 2011 again affirmed its initial determination. (*Id.*, Exh. 12).

On June 8, 2011, the Board of Trustees denied petitioner's application based on a tie vote. (*Id.*, Exh. 14).

II. ARTICLE 78 PROCEEDING

The determination of an ADR application requires two considerations. (*Matter of Borenstein v New York City Empls. Ret. Sys.*, 88 NY2d 756, 760 [1996]). First, the Medical Board decides whether the applicant is disabled and if so, whether the disability resulted from a service-related accident, certifying its determination to the Board of Trustees. (*Id.*). Second, the Board of Trustees makes its own determination of causation. (*Id.*).

Generally, the Board of Trustees' determinations as to ADR benefits eligibility, like most administrative determinations, are reviewed according to the arbitrary and capricious or substantial evidence standards. (*Matter of Canfora v Bd. of Trustees of the Police Pension Fund of the Police Dept. of the City of New York, Art. II*, 60 NY2d 347, 351 [1983]; *Matter of Macri v Kelly*, 92 AD3d 53, 59 [1st Dept 2011]). However, where the Board of Trustees denies an application for ADR benefits on the basis of a tie vote, the standard of review "is necessarily different. In such circumstances, the reviewing court may not set aside [its] denial of [ADR benefits] . . . 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." (*Id.*). Therefore, "as long as there was any credible evidence of lack of causation before the Board of Trustees . . . , its determination must stand." (*Matter of Macri*, 92 AD3d at 59).

The Heart/Stroke Bill provides that if a police officer is disabled as a result of a heart condition or stroke, and if the condition or stroke had not been discovered during his or her physical examination preceding his entry to the force, it is presumed to have resulted from the

discharge of his or her police duties. (GML § 207-k). This presumption may be rebutted by a finding that, absent any evidence of hypertension, coronary artery disease, or other stress-related syndrome, the condition or stroke did not result from job-related stress and is of unknown origin. (*In re Hogg v Kelly*, 93 AD3d 507 [1st Dept 2012]; *Stegmuller v Brown*, 216 AD2d 23 [1st Dept 1995]; *Goldman v McGuire*, 101 AD2d 768 [1st Dept 1984], *affd* 64 NY2d 1041 [1985]).

Here, absent any evidence reflecting that petitioner suffered from atherosclerosis, hypertension, or any other stress-related heart condition, it may not be determined, as a matter of law, that his strokes resulted from job-related stress. Therefore, the Board of Trustees' determination must stand. (*See Hogg*, 93 AD3d 507 [where Heart/Stroke Bill presumption rebutted by physician's opinion that petitioner's stroke was caused by congenital condition, court noted that second physician's opinion that stroke was of unknown origin would be sufficient by itself to rebut presumption]; *Matter of DeMonico v Kelly*, 49 AD3d 265 [1st Dept 2008] [objective evidence that petitioner's cardiomyopathy was of unknown origin "and that, while he had high blood pressure since 2003, it was unlikely that his was the cause of the cardiomyopathy" rebutted presumption]; *Matter of Walsh v Bd. of Trustees of the N.Y. City Police Dept.*, 37 AD3d 370 [1st Dept 2007] [presumption rebutted where medical evidence demonstrated "that petitioner's dilated cardiomyopathy was not accompanied by stress-related coronary artery disease or hypertension, and the conclusion of various doctors that petitioner's disabling condition was of unknown origin"]; *Matter of Hutnik v Kelly*, 37 AD3d 346 [1st Dept 2007] [presumption rebutted by objective medical evidence that petitioner did not suffer from hypertension and absence of evidence of "any other possible cause for the condition"]).

Petitioner's age and the number of hours he worked before the strokes provide no basis for

vacating the determination, as the Medical Board considered his counsel's letter addressing these circumstances in making its determination, and the limited scope of my authority precludes me from weighing the evidence.

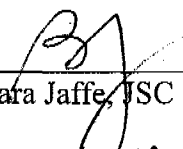
III. CPLR 2307(a) MOTION

As respondents annexed these documents to their answer (Ver. Ans., Exhs. 15-52), this portion of petitioner's application is moot.

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: October 12, 2012
New York, New York

OCT 12 2012

UNFILED JUDGMENT

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