

Matter of Rosenthal v Kelly

2012 NY Slip Op 33053(U)

November 20, 2012

Supreme Court, New York County

Docket Number: 104845/11

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART 46

JILL ROSENTHAL

INDEX NO. 104845/11

-v-
RAYMOND KELLY, et al.

MOTION DATE _____

MOTION SEQ. NO. 01

The following papers, numbered 1 to 2, were read on this ^{petition} motion to/for know respondent's determination
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). _____

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

*The court grants the petition pursuant to the accompanying decision.
C.P.L.R. § 7803(3) and (4).*

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

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).

Dated: 11/20/12

Lucy Billing, J.S.C.

LUCY BILLING

- 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 46

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In the Matter of the Application of
JILL ROSENTHAL,

Index No. 104845/2011

Petitioner

DECISION AND ORDER

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

- against -

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,
BOARD OF TRUSTEES of the Police
Pension Fund, Article II, NEW YORK
CITY POLICE DEPARTMENT, and CITY OF
NEW YORK,

Respondents

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner, a former New York City Police Officer,
challenges the Police Pension Fund's denial of disability
benefits for disabling somatization symptoms stemming from an
injury in service in 2005. She injured her right hand, wrist,
and shoulder and her neck March 15, 2005, while arresting a
suspect; injured them again February 21, 2007, falling down
stairs; and aggravated those injuries January 1, 2008, in an off-
duty motor vehicle collision. Petitioner applied for accident
disability retirement (ADR) May 14, 2007. Respondent Kelly
applied for petitioner's ordinary disability retirement.

Respondents' medical board considered surgical reports and

treatment notes from petitioner's treating physician and physical therapist and reports from respondents' examining physician. The medical board examined petitioner July 6, 2007, and February 1, 2008, and disapproved disability based on the lack of findings regarding an orthopedic impairment.

The medical board reviewed petitioner's application again December 5, 2008, after a remand from the Board of Trustees. Citing petitioner's ongoing pain, the medical board concluded that petitioner suffered from a psychological somatization disorder related to multiple line of duty injuries beginning March 15, 2005, and could no longer perform a police officer's duties. The medical board unanimously recommended approval of ADR and disapproval of ordinary disability retirement. The Board of Trustees remanded petitioner's application again to the medical board to clarify whether the March 2005 injury caused physical disability. On April 10, 2009, the medical board found that the injuries March 15, 2005, did not cause physical disability, but triggered the pain symptoms that petitioner's subsequent injuries repeatedly aggravated, resulting in the somatization disorder, and recommended approval of ADR. On September 18, 2009, upon a remand for consideration of new evidence, the medical board found with reasonable medical certainty that petitioner met the American Psychiatric Association's criteria for somatization disorder. At proceedings December 9, 2009, the Board of Trustees found no nexus between the injuries petitioner first sustained and the somatization

disorder, found her symptoms entirely subjective, and denied ADR by a 6-6 vote.

Petitioner commenced a prior proceeding in this court pursuant to C.P.L.R. Article 78, in which the court (Gische, J.) found the Board of Trustees' denial of ADR based on the lack of a causal relation between the line of duty injury and somatization disorder irrational. The court annulled respondents' determination as arbitrary and contrary to law and remanded the proceeding to respondents.

On February 9, 2011, the Board of Trustees acknowledged that petitioner's somatization was disabling, but determined that petitioner's delay in treatment for her March 2005 injuries until August 2005 and amendment of her line of duty injury report to include neck, elbow, and wrist injuries demonstrated that the March 2005 right hand injury did not cause her somatization disorder. The Board of Trustees also cited petitioner's 21 days of medical leave, eight before March 15, 2005, and 14 unrelated to line of duty injuries, which could have caused her somatic complaints. Upon another 6-6 vote, the Board of Trustees again granted ordinary disability retirement and denied ADR. In this second proceeding pursuant to C.P.L.R. Article 78, petitioner seeks to annul respondents' last determination, February 9, 2011, denying her ADR, as arbitrary and require respondents to grant her ADR or, alternatively, review her application again or grant her a hearing. C.P.L.R. § 7803(3); N.Y.C. Admin. Code § 13-252.

II. APPLICABLE STANDARDS

In reviewing respondents' determination regarding disability, the court must defer to respondents' determination of causation and uphold it if rationally based and not arbitrary, an abuse of discretion, or contrary to law. Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d 756, 760 (1996); Maldonado v. Kelly, 86 A.D.3d 518, 519 (1st Dep't 2011); Claudio v. Kelly, 84 A.D.3d 667 (1st Dep't 2011); Jefferson v. Kelly, 51 A.D.3d 536 (1st Dep't 2008). See Linden Airport Mgt. Corp. v. New York City Economic Dev. Corp., 71 A.D.3d 501, 502 (1st Dep't 2010); Valentin v. New York City Police Pension Fund, 16 A.D.3d 145 (1st Dep't 2005); City of New York v. O'Connor, 9 A.D.3d 328 (1st Dep't 2004). Physical or mental incapacity to perform city service qualifies a police officer for ordinary disability retirement. N.Y.C. Admin. Code § 13-251. If that incapacity is "a natural and proximate result of an accidental injury received in such city-service while a member," the police officer is eligible for ADR. N.Y.C. Admin. Code § 13-252. See Dement v. Kelly, 97 A.D.3d 223, 229 (1st Dep't 2012).

The medical board's medical examination must establish disability. N.Y.C. Admin. Code §§ 13-251, 13-252. Thus the medical board's fact finding process requires (1) determining whether the applicant is physically or mentally incapable of performing city work and (2) whether an "accidental" injury while in service proximately caused the applicant's disability to perform that work. Meyer v. Board of Trustees of N.Y. City Fire

Dept., Art. 1-B Pension Fund, 90 N.Y.2d 139, 144 (1997); Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 760. The medical board's determination must be supported by substantial evidence, which must be credible, relevant evidence reasonably adequate to support a fact or conclusion. Jennings v. New York State Off. of Mental Health, 90 N.Y.2d 227, 239 (1997); Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d at 760. See McCabe v. Hevesi, 38 A.D.3d 1035, 1036 (3d Dep't 2007). Credible evidence is evidence from a reliable source, which must reasonably tend to support the fact or conclusion for which the evidence is offered, as long as it is neither conjecture nor simply a conclusion itself. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 147; Cusick v. Kerik, 305 A.D.2d 247, 248 (1st Dep't 2003).

III. RESPONDENTS' IRRATIONAL AND UNLAWFUL BASIS FOR DENYING PETITIONER ADR

All evidence of petitioner's disability from somatization due to her injuries March 15, 2005, derives from respondents' medical board, which on September 18, 2009, found that petitioner met the criteria for a somatization disorder. Specifically, she exhibited a history of physical complaints beginning at 30 years of age, extending over several years, and resulting in treatment or in impairment of social, occupational, or other important functioning, and four pain symptoms: two gastrointestinal symptoms, one sexual symptom, and one pseudoneurological symptom. The medical board found petitioner experienced pain in her back,

neck, right shoulder, and right wrist; severe gastrointestinal symptoms of bloating, intolerance of dairy foods, nausea, vomiting, and diarrhea; long term sexual indifference; and a neurogenic bladder. None of these symptoms was attributable to a physical abnormality. The medical board's conclusions after examining petitioner constitute credible evidence. Keiss v. Kelly, 75 A.D.3d 416, 417 (1st Dep't 2010); Khurana v. Kelly, 73 A.D.3d 497 (1st Dep't 2010); Goffred v. Kelly, 13 A.D.3d 72 (1st Dep't 2004).

While the Board of Trustees found petitioner's March 2005 right hand injury was treated, allowing her to return to work, that treatment and return to work are consistent with a somatization disorder, particularly when considered with petitioner's numerous subsequent absences for several days to a week and the symptoms' spread to her right arm and her neck. Since somatization is based on the cumulative effect of injuries, actual or perceived, to the point of becoming disabling, the gap between petitioner's March 2005 injury and her treatment in August 2005 is not a rational basis for concluding that the somatization disorder did not arise from her March 2005 injury. Petitioner's perception of her injuries as physical, instead of psychological, and her consequent failure to seek psychiatric care reasonably explain the lack of an earlier diagnosis of somatization. Instead, petitioner believed she was suffering from a disabling orthopedic impairment and therefore sought treatment for an orthopedic condition, which was not in fact disabling.

The absence of any medical history of the disabling somatization before March 15, 2005, moreover, is a relevant, albeit not dispositive, factor in determining causation. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 146; Tobin v. Steisel, 64 N.Y.2d 254, 257, 259 (1985). Petitioner's amendment of her disability retirement application to include additional injuries is likewise consistent with a somatization disorder.

In short, the Board of Trustees denied ADR to petitioner based on a mere conclusion as to lack of causation. Therefore the denial is unsupported by credible evidence, Macri v. Kelly, 92 A.D.3d 53, 61 (1st Dep't 2011); fails to set forth any reasons for the conclusion, see Goodacre v. Kelly, 96 A.D.3d 625, 626 (1st Dep't 2012); Keiss v. Kelly, 75 A.D.3d at 417; and lacks a rational basis. Dement v. Kelly, 97 A.D.3d at 230. See Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 147; Agnelli v. Kelly, 96 A.D.3d 471, 472 (1st Dep't 2012). Nor is the Board of Trustees' sheer speculation, that petitioner's medical leave could have caused her somatization disorder, a basis to reject her application for ADR. Baranowski v. Kelly, 95 A.D.3d 746 (1st Dep't 2012); Cusick v. Kerik, 305 A.D.2d at 253. See Maldonado v. Kelly, 86 A.D.3d at 519. The medical leave equally could be viewed as supporting petitioner's somatization.

IV. DISPOSITION

The Board of Trustees adopt their determinations by a simple majority of votes. N.Y.C. Admin. Code § 216(b); Caruso v. New York City Police Dept. Pension Funds, Arts. 1 & 2, 72 N.Y.2d 568, 573 (1988). A tie vote on ADR claims constitutes a denial of the ADR claim and therefore a determination of only ordinary disability retirement. Caruso v. New York City Police Dept. Pension Funds, Arts. 1 & 2, 72 N.Y.2d at 573; Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 60 N.Y.2d 347, 351-52 (1983); Kenney v. New York City Tr. Auth., 275 A.D.2d 639, 640 (1st Dep't 2000). Since a denial of ADR by a deadlocked vote does not produce any more of a factual determination to be reviewed than a majority vote that simply accepts the medical board's finding, the deadlock does not provide a ground for the court to act as the tiebreaker and reverse the ADR denial. Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 144-45; Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 60 N.Y.2d at 352; Maldonado v. Kelly, 86 A.D.3d at 518 n.2.

The court may, however, reverse respondents' denial of ADR if the evidence demonstrates that petitioner's injury on duty caused her disability as a matter of law. Dement v. Kelly, 97 A.D.3d at 232. See Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 145; Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of

N.Y., Art. II, 60 N.Y.2d at 352; Agnelli v. Kelly, 96 A.D.3d at 472. Although there is evidence in the record that does not address petitioner's somatization disorder, no evidence contradicts the somatization diagnosis or that it arose from her injury March 15, 2005.

On this record, the credible evidence establishes that petitioner's line of duty injuries March 15, 2005, caused her diagnosed somatization disorder, which disables her from performing police work, and that respondents' denial of her application for accident disability retirement is not supported by a rational basis or credible evidence. C.P.L.R. § 7803(3) and (4). Therefore the court remands this proceeding to respondents to award petitioner accident disability retirement. C.P.L.R. § 7806; Dement v. Kelly, 97 A.D.3d at 232-33; Baranowski v. Kelly, 95 A.D.3d 746; Cusick v. Kerik, 305 A.D.2d at 247, 253. This decision constitutes the court's order and judgment granting the petition.

DATED: November 20, 2012



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.