

Matter of Colon v Kelly
2011 NY Slip Op 32602(U)
October 4, 2011
Supreme Court, New York County
Docket Number: 105994/2011
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 105994/2011
COLON, LISA
VS
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 7/20/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-35
36-59

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM 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).

Dated: 10/4/11

[Signature]
JOAN B. LOBIS
J.S.C.

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
NEW YORK COUNTY**

-----X

In the Matter of the Application of

LISA COLON, as WIDOW of DECEDENT
WILLIAM TITUS,

Index No. 105994/11

Decision, Order, and Judgment

Petitioner,

- 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, Kevin
Holloran, as Executive Director of the New York City
Police Pension Fund, THE BOARD OF TRUSTEES of
the Police Pension Fund, Article II and THE CITY OF
NEW YORK,

Respondents.

UNFILED JUDGMENT

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For a Judgment pursuant to Article 78, CPLR, to review^{141B}
and annul the determination made by respondents denying
petitioner a pension payable under the provisions of the
Administrative Code § 13-244, the General Municipal
Law 208-f, as applicable to NYC Administrative Code §
13-252.1(3) (The World Trade Center Death Benefit,
Chapter 445 of the Laws of 2006), and an Accidental
Death Benefit pursuant to NYC Administrative Code §
13-244, and for a further order directing payment of such
pension retroactive to the day after the date of decedent's
death, and for such other appropriate relief.

-----X

JOAN B. LOBIS, J.S.C.:

Petitioner Lisa Colon, as the widow and beneficiary of Detective William Titus,
brings this proceeding under Article 78 of the C.P.L.R. seeking an order annulling the decision of
respondent The Board of Trustees of the Police Pension Fund (the "PPF"), which denied petitioner
an accidental death benefit ("ADB") or, in the alternative, ordering a new hearing on the issue of her
entitlement to ADB. In addition, petitioner seeks an order compelling respondents' production of

certain records; however, that branch of the petition is moot based on the documents annexed to respondents' papers. Respondents oppose the petition.

This is petitioner's second petition to the undersigned for this relief. By decision and order dated May 15, 2010, the court granted the first petition to the extent of remanding her application for ADB to the New York Police Department's ("NYPD") Medical Board to set forth a non-conclusory, scientific basis for its denial of ADB (the "May Decision"). See In re Colon v. Kelly, 2010 N.Y. Slip Op. 31211(U) (Sup. Ct. N.Y. Co. 2010) (filed under Index Number 117992/09).

A brief recitation of facts is warranted. Titus, petitioner's spouse, was a detective with the NYPD. After September 11, 2001, Titus performed rescue, recovery, and clean-up operations at Ground Zero for over forty hours. In May 2002, he was diagnosed with esophageal cancer after his physician discovered a 4 cm mass at his gastroesophageal junction. Titus succumbed to the cancer on August 24, 2003.

The Medical Board denied petitioner's first application for ADB setting forth that the size of the tumor at the time it was biopsied and the length of time prior to the cancer diagnosis that Titus was symptomatic led them to conclude that the cancer was not caused nor aggravated by exposure to airborne toxins at Ground Zero. After I remanded the application for further consideration, the Medical Board again denied the ADB request. The Medical Board reiterated its conclusion that, based on the size of the tumor, Titus' cancer predated his work at Ground Zero. The

Medical Board, without referencing any scientific studies, also asserted that asbestos is not known to exacerbate esophageal cancer. The Medical Board did not mention the possible cancerous effects of any other substance.

“In an article 78 proceeding challenging the disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious.” In re Borenstein v. N.Y.C. Emples. Ret. Sys., 88 N.Y.2d 756, 760 (1996) (citations omitted). ADB is available to a surviving spouse of a deceased police officer when evidence demonstrates that the death was caused by an accident, which occurred in the line of duty, and that the death was not the result of willful negligence on the part of the applicant. Administrative Code of City of New York (“Administrative Code”) § 13-244. If the applicant for ADB claims that the officer died due to his or her efforts during the WTC rescue, recovery, and clean-up operations, Section 13-252.1 of the Administrative Code allows for what is commonly known as the “WTC presumption.” The presumption states, in pertinent part, that any member of the NYPD who participated in the WTC rescue, recovery, or clean-up operations and who later “dies from a qualifying World Trade Center condition. . . unless the contrary be proven by competent evidence . . . shall be deemed to have died as a natural and proximate result of an accident sustained in the performance of duty and not as a result of willful negligence on his or her part.” Administrative Code § 13-252.1(3). Respondents have the burden of proffering “credible evidence” to rebut the WTC presumption. In re Bitchatchi v. Bd. of Trs., 86 A.D.3d 427 (1st Dep’t 2011). Courts have annulled determinations of the Medical Board that were “premised only on a summary conclusion of no causation and lacked any factual basis.” In re Meyer v. Bd. of Trs., 90 N.Y.2d 139, 147 (1997) (citations omitted). Indeed, the

Medical Board cannot merely assert “that the size of the tumor meant it began growing before September 11, 2011” without the support of credible evidence. Bitchatchi, 86 A.D.3d at 427-28. Nor can the Medical Board rely on “mere conjecture or unsupported suspicion.” Meyer, 90 N.Y.2d at 147 (citations omitted).

Petitioner argues that respondents’ decision to deny ADB was not based on any competent or credible evidence. Petitioner further asserts that respondents both failed to address evidence that supports her claim that Titus’ cancer was caused by his operations at Ground Zero and failed to address the holdings in the May Decision. Petitioner contends that respondents’ conclusory decision to deny her ADB cannot stand.

Respondents answer and assert that the Medical Board’s determination was based on credible evidence that demonstrated that Titus’ esophageal cancer was neither caused nor exacerbated by his work at Ground Zero. Respondents maintain that the Medical Board relied on its own expertise to conclude that cancer grows over a period of years and not months, therefore exposure at Ground Zero, if any, during September 2001 would not cause cancer in May 2002. Respondents further maintain that the Medical Board properly relied on its own expertise in opining that asbestos does not exacerbate esophageal cancer and that none of Mr. Titus’ physicians suggested the opposite.

Here, once again, the Medical Board failed to set forth any evidence to support its conclusions about tumor growth; failed to cite any scientific support for its conclusions about

asbestos; failed to discuss the possibility that Mr. Titus may have been exposed to other cancer-causing substances; and failed to address the possibility of exacerbation of the cancer cells in Mr. Titus' esophagus. Not only did the Medical Board fail to address any of the court's concerns raised in the May Decision, it disregarded a memorandum from the City of New York Law Department (that followed the May Decision) that specifically asked that the PPF require the Medical Board, if it concludes that petitioner is not entitled to ADB, to "discuss its medical conclusion in detail, including specific references to the medical evidence that supports its conclusion . . . [and] [s]pecifically discuss the 'science' and/or theory of cancer growth." The legislative mandate that created the WTC presumption cannot be so blatantly ignored. Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the decision by the PPF to deny petitioner ADB is annulled; and it is further

ORDERED that this matter is remanded to a fresh Medical Board for a new determination consistent with this decision, order, and judgment.

Dated: October 4, 2011

ENTER:

UNFILED JUDGMENT

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JOAN B. LOBIS, J.S.C.