

Matter of Cruz v Kelly
2013 NY Slip Op 31458(U)
July 3, 2013
Supreme Court, New York County
Docket Number: 104497/2013
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART 16

Index Number : 104497/2012
CRUZ, SYLVIA
vs.
KELLY, RAYMOND W.
SEQUENCE NUMBER : 001
ARTICLE 78

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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ Article 78 petition is granted to the extent provided in the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

THIS JUDGMENT IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 3, 2013

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

- 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: IAS PART 16

-----X
In the Matter of the Application of
SYLVIA CRUZ,

Petitioner,

Index No. 104497/2013
Motion Seq. 001

-against-

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 and THE CITY OF NEW YORK,

Respondents,

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141B).

For a Judgment pursuant to Article 78, CPLR, to review
and annul the determination made by respondents denying
petitioner a pension of three quarters of petitioner's salary
as required by Administrative Code 13-252, and for a
further order directing payment of such pension retroactive
to the date of petitioner's retirement, and for such other
appropriate relief.

-----X
SCHLESINGER, J.:

When one reviews the long history of this case, one sees that up until now the
attempts by Police Officer Sylvia Cruz to obtain Accident Disability Retirement benefits,
in place of Ordinary Disability Retirement, based on her alleged presence at the World
Trade Center site on September 11 and 12, 2001 and at the Fresh Kills landfill through
June of 2002, have been frustrated — despite a Supreme Court remand by Justice Lucy
Billings on January 30, 2012. Based on this history, this Court is forced to conclude one
of two things: either the Medical Board and the Pension Board truly do not understand the
meaning of §13-252.1(1)(a) of the Administrative Code of the City of New York and how
its presumption in favor of an affected Police Office works, or they do understand the law

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but choose to ignore its mandates, arguably with hopes of eventually wearing the injured officer down.¹ Realizing that the above statement may be strong, let me explain.

In the course of Justice Billings' decision (Index No. 108869/10, Exh B to Petition), the Court discusses the facts supporting the application by Officer Cruz for Accident Disability Retirement (ADR). Officer Cruz did appear to have had the WTC work experience; she was assigned to the WTC site itself on September 11 and 12, 2001, and then was assigned to the Fresh Kills landfill site in Staten Island until June of 2002. She also appeared to have suffered from symptoms of irritability, anxiety, hypervigilance, insomnia, and fatigue.

Some time thereafter, on September 18, 2006, the WTC Mental Health Program at Mt. Sinai Hospital screened Officer Cruz, and Dr. David Schwam of that program then

¹ In 2005, legislation was enacted that gave responders to the September 11th WTC tragedy a boost up in the event they believed they had suffered injuries from their work there. If they qualified by having been at a designated WTC site for the requisite time and suffered from a disease or condition specified in the legislation such as Post-Traumatic Stress Disorder, then they were entitled to a presumption going to the element of causation. In other words, they would be presumed to be a WTC responder entitled to Accident Disability Retirement (ADR), but this presumption could be rebutted by credible evidence showing otherwise; that is, the burden would shift, as it did here, to the Medical Board to prove with competent or credible evidence that there was another cause for the officer's disability unrelated to the WTC events. See *Matter of Bitchatchi v. Board of Trustees of the N.Y. City Police Dept.*, 20 NY3d 268 (2012). In 2006, in an effort to alert first responders to the new law, the State created the World Trade Center Health Monitoring and Treatment Program. These health care providers were urged to reach out to officers and others to advise them of the change in law and to urge those who were suffering to come forward to be screened. This was a proactive program, one consistent with the aim of the law to recognize first responders who had risked their own lives and health with valiant attempts at WTC rescue and recovery. Those who qualified and found themselves disabled as a result would get the benefit of a more generous ADR pension, in lieu of Ordinary Disability Retirement (ODR).

began treating her for Post-Traumatic Stress Disorder (PTSD). On October 26, 2006, this doctor found that the Officer's WTC work caused her anxiety and other stresses, and he prescribed medication and psychotherapy. Justice Billings pointed out that in a treatment note dated March 9, 2007, Dr. Schwam reported that Officer Cruz had PTSD symptoms of social withdrawal and emotional numbing, as well as persistent anxiety, improved with medication.

Further, in a letter dated September 10, 2008, a second psychiatrist with this program, Dr. Faith Ozbay, discussed treating Officer Cruz for chronic PTSD. The symptoms the Officer exhibited were panic attacks and claustrophobia. Supreme Court also referenced two other letters by Dr. Ozbay in October 2008 and January 2009, which noted that the Officer was experiencing nightmares and diminished attention, as well as the symptoms discussed earlier of irritability, anxiety, hypervigilance and the like, from which she had suffered since 2002. Dr. Ozbay also wrote that Officer Cruz had failed to seek treatment because of a perceived stigma in the Police Department attached to mental health problems.

Additionally, Ali Khadivi, Ph.D. examined and performed psychological tests on Officer Cruz on July 11, 2009. These showed that the Officer suffered from "anxiety and PTSD, but not a personality disorder" (p. 6 of Justice Billings' decision). This professional also determined that Officer Cruz exhibited PTSD symptoms in 2001. He agreed with Dr. Ozbay and confirmed that petitioner had not sought treatment because of the associated stigma and fear of its negative consequences on the job. Both Dr. Ozbay and Dr. Khadivi concluded that Officer Cruz's recorded symptoms prevented her from performing police work.

After relating the above facts, Justice Billings appropriately found that pursuant to the law, Officer Cruz's evidence was such that now "respondents have the burden to rebut the presumption that her service in recovery operations on or after September 11, 2001, caused her disabling conditions." The court then found that this had not been done by respondents, at least not done adequately. Justice Billings stated that respondents merely relied on the lack of evidence of any treatment after the Officer's September 11, 2001 service until June 2006 when she went for screening to the WTC Mental Health Program at her union's urging of all its members (pp. 7-8).

Justice Billings then noted that on July 2, 2007 Officer Cruz was hospitalized after she suffered a panic attack at work. That is when the psychologist Catherine Lamstein, Psy.D., entered the picture. She worked for the Police Department's Psychological Evaluation Section. She examined Officer Cruz, who then reported anxiety attacks caused by traveling over bridges and into Manhattan, social withdrawal, and insomnia. Cruz further reported experiencing olfactory hallucinations of burning flesh and nightmares about finding body parts. Supreme Court then referenced Dr. Lamstein's six-page report of August 13, 2008 wherein this psychologist concluded that the officer suffered from AXIS I:300.02 of the DSM-IV "Generalized Anxiety Disorder".

Justice Billings summarized Dr. Lamstein's findings and her diagnosis. The court pointed out that Dr. Lamstein had identified concerns about other causes of Cruz's stress and named them — a small pituitary tumor, possible infertility, being disciplined at work, and caring for an ill parent. However, none of these stresses found a predicate in trauma, which is a prerequisite for a diagnosis of PTSD (Post-Traumatic Stress Disorder). Justice Billings pointed out that Dr. Lamstein clearly had a negative impression of Cruz, finding

that petitioner underperformed as a worker, exaggerated, and was not completely truthful (p. 8 of decision).

Justice Billings further found that the respondents' denial of ADR was based solely on this Lamstein report, as confirmed by the Police Department's Chief Surgeon Dr. Eli Kleinman on August 18, 2008. The Medical Board in its October 19, 2009 recommendation of denial relied "on the lack of documented symptoms or treatments before 2006 and her work difficulties and health concerns causing anxiety, to rebut the World Trade Center presumption" (p. 11). However, the diagnosis given to petitioner was something never referenced before by any of the treaters at the WTC program at Mt. Sinai Hospital; i.e., "personality disorder"

Justice Billings then stated: "This respondent's diagnosis [of personality disorder] is not supported by credible evidence" (p. 12). The court pointed out that Officer Cruz's own physicians had uniformly found that petitioner had exhibited symptoms of PTSD during and after the period when she worked at the World Trade Center site and the Staten Island landfill. She further pointed out that Drs. Khadivi and Ozbay had also explained that the Officer's failure to seek treatment was due to the perceived stigma attached to seeking help and her fear of removal from duty.

However, the court continued: the "medical board never addressed these findings [supporting the Officer's claims], even though the lack of symptoms and treatment were a basis for respondents' denial of ADR" (p. 12). Thus, Justice Billings remanded the proceeding for a reevaluation of the Board's decision in light of the findings of Officer Cruz' treating physicians that the Officer suffered from PTSD. While the Medical Board alluded to these findings in its decision, it never made a sincere attempt to deal with them. Nor did the Board succeed in showing that the findings by these physicians that Cruz was in fact

suffering from PTSD, a qualifying injury pursuant to the WTC law, had been rebutted with credible evidence. That was the status when Justice Billings issued her decision on January 30, 2012. The Trustees, confronted with these findings, remanded the case to the Medical Board for reconsideration on March 14, 2012 (Exh C).²

Two months later, on May 21, 2012, the Medical Board reconsidered its earlier recommendation and came to precisely the same result (Exh D). In the course of its three and one-half page report, the Board first referred to the earlier remands by the Trustees and then to the Supreme Court's decision. The Board appeared to understand that it was obliged to adequately address the findings of Drs. Schwam, Khadivi and Ozbay, petitioner's treating physicians at Mt. Sinai. Also, the Board acknowledged that there was no credible evidence supporting its own diagnosis of Personality Disorder, as no one else had ever mentioned it, much less found it.

On page two, they then reviewed some of the tests given at Mt. Sinai and the conclusions reached, adding, "Neither Dr. Ozbay or Dr. Khadivi explained why Police Officer Cruz did not avail herself of the services of POPPA which offered her complete confidentiality." This comment was made in response to the stigma the doctors noted that Officer Cruz had felt. The remainder of the history section of the report was a summary of some of the events and findings described in the Lamstein report for the Department's Psychological Evaluation Section.

² The Medical Board did seem to get a cue as to the denial of the application that at least some members of the Pension Board apparently wanted. The minutes show that the Chairperson made a few comments at the end of the meeting, pointing out three quotes from Justice Billings' decision which suggested that rebuttal did not have to be very strong or significant; e.g., It "need only be relevant, credible evidence supporting the Medical Board's conclusions..."

Finally, in conclusion in paragraph 13, the Board virtually copied, word for word, the findings in paragraph 10, the final paragraph by Dr. Lamstein in her August 13, 2008 report, the same report they had quoted in the preceding page. When I say "word for word", I am not exaggerating. The beginning, "Police Officer's Cruz's initial screening at the Mount Sinai Program in 2006," compares almost exactly with Lamstein's beginning "Her initial screening at the Mount Sinai Program in the fall of 2006." What is more, the content that follows uses words virtually identical to those used by Dr. Lamstein. And finally, the Board "agrees" that nothing substantiates its earlier diagnosis of Personality Disorder, although they point to evidence showing various "personality aberrations." It is so apparent at this point that neither the Board, nor psychologist Lamstein, regarded Officer Cruz favorably.

But of course, the Officer's "personality aberrations" are irrelevant, as was the Medical Board's final recommendation, which not surprisingly reaffirmed its earlier recommendation. As to the Trustees? They cite to the same identically worded paragraph and state "So we think the Medical Board did a good job of rebutting the presumption." (Exh F, pp 98-99).

But it is apparent to this Court that the Medical Board did no such thing. The Trustees should have known better. There was nothing new in the Medical Board's final report, except for their grudging acknowledgment that Officer Cruz did not, in fact, suffer from a Personality Disorder. Justice Billings had remanded the matter so that there could be a sincere attempt to reconcile, if possible, the opinions of Dr. Lamstein on which they relied with those of the Officer's physicians, who all found that she suffered from PTSD and heavily medicated her for it. None of that was done, probably because such a

reconciliation was not possible. Rather, all the Board did was review again the Lamstein report, which they had earlier exclusively relied on, and this time shamelessly copied its conclusion. But the Lamstein conclusion had nothing to do with a trauma suffered by Ms. Cruz, which was responsible for certain disabling symptoms and the PTSD.

What the Board and the Trustees did originally and continued to do on remand was to violate both the letter and the spirit of the WTC law. Here, assuming Officer Cruz had the requisite time at WTC sites, because of her diagnosis by Mt. Sinai doctors that she suffered from PTSD, she was entitled to the law's presumption (as found by Justice Billings). And for that presumption to be rebutted, there had to be a reasonable and rational attempt to attribute the Officer's obvious PTSD symptoms to some other plausible origin. The Court of Appeals emphatically explained this requirement in its recent decision in *Matter of Bitchatchi v. Board of Trustees of the N.Y. City Police Dept.*, 20 NY3d 268, 281-82 (2012), and the rationale applies equally to PTSD:

The legislature created the WTC presumption to benefit first responders because of the evidentiary difficulty in establishing that non-trauma conditions, such as cancer, could be traced to exposure to the toxins present at the WTC site in the aftermath of the destruction. Hence, unlike ordinary ADR claimants, first responders need not submit any evidence — credible or otherwise — of causation to obtain the enhanced benefits. Nevertheless, the legislature did not create a per se rule mandating ADR benefits for all eligible responders. Rather, it provided that a pension fund could rebut the presumption by competent evidence.” **Under this carefully calibrated framework, we believe that the competent evidence contemplated by the WTC presumption may be equated with the well-established credible evidence standard, provided that the pension fund bears the burden of coming forward with affirmative evidence to disprove causation. ... In other words, unlike the typical application for disability benefits, a pension fund cannot deny ADR benefits by relying solely on the absence of evidence tying the disability to the exposure.**

The Medical Board and the Trustees in this case never succeeded in coming forward with evidence to rebut the presumption in favor of Officer Cruz. In fact, they never even tried. Instead, Lamstein referred to a growth in the Officer's pituitary gland, her parents' alcohol and other problems, and her fear of infertility, perhaps hoping that some mention of these alternative issues could suffice. But since those issues did not involve a trauma sufficient to cause the PTSD with which Officer Cruz had been diagnosed, evidence of those problems, like the delay in seeking treatment, did not constitute "affirmative evidence to disprove causation" as required by the *Bitchatchi* court.

What Dr. Lamstein and the Medical Board failed to consider — or chose not to consider — was that the Officer's PTSD was diagnosed and treated because of very real symptoms that she displayed, such as nightmares and panic attacks and olfactory hallucinations of dead body parts. These were symptoms known to be connected to the WTC tragedy and associated with a diagnosis of PTSD. To rebut that presumption, if it could be rebutted, the Board had to show a psychological cause for the symptoms that Officer Cruz had, unrelated to the events of September 11. In addition, the Board had to reconcile its findings with the findings of the Officer's own physicians. But instead, they just ignored these symptoms.

Dr. Lamstein simply chose episodes in petitioner's work history to her disadvantage, brought up her parents' history, quoted some of Cruz's complaints, and then decided that she had an Anxiety Disorder. These issues were simply irrelevant to the clear PTSD symptoms with which Officer Cruz had been diagnosed. The conclusions of Lamstein and the Board were the furthest thing from "doing a good job in rebutting the presumption." Neither Board here saw the obvious, or if they did see it, accepted it; i.e., that the WTC

tragedy was the cause of the PTSD affliction suffered by Officer Cruz, as confirmed by her doctors.

But this Court does see the obvious. In fact, I am now making a finding that as a matter of law, the presumption here of PTSD as a result of WTC work has not been rebutted. *See Matter of Canfora v. Board of Trustees*, 60 NY2d 347 (1983). Nothing would be served by a further remand, as it is clear that the Board is bereft of rational evidence to rebut the WTC presumption. However, since I do not believe the Pension Fund has verified the requisite amount of petitioner's WTC work pursuant to Administrative Code §13-252.1, I am remanding the matter solely for that purpose. Assuming that the work is verified, then petitioner shall be approved for ADR.

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent of annulling respondents' October 12, 2012 determination denying petitioner's application for ADR benefits; and it is further

ORDERED that the matter is remanded for confirmation of petitioner's WTC work and, assuming such confirmation, for an award of ADR benefits consistent with the terms of this decision.

DATED: July 3, 2013

JUL 03 2013


 J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT

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