

Matter of Urena v Kelly
2013 NY Slip Op 32282(U)
September 17, 2013
Sup Ct, NY County
Docket Number: 102404/2012
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 102404/2012
URENA, EVELYN
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to 3, were read on this motion to/for annul respondents' denial of benefits
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1
Answering Affidavits — Exhibits _____ No(s) 2-3
Replying Affidavits _____ No(s) _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ *and adjudged that:*
The court grants the petition to the extent set forth in the accompanying decision and otherwise denies the petition. C.P.L.R. §§ 7803(3) and (4), 7806.

FILED

SEP 26 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/17/13

Lucy Billings, J.S.C.

LUCY BILLINGS

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
-----x

In the Matter of the Application of
EVELYN URENA,

Index No. 102404/2012

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,
and BOARD OF TRUSTEES of the Police
Pension Fund, Article II,

Respondents
-----x

FILED

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NEW YORK

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner, a former New York City Police Detective, applied for accident disability retirement (ADR) February 13, 2009, based on post-traumatic stress disorder (PTSD) sustained from her work as a police officer evacuating persons from the World Trade Center during the terrorist attacks September 11, 2001, and cleaning up the site in the following days. On October 2, 2009, petitioner applied for ordinary disability retirement based on a diagnosis of multiple sclerosis (MS). On October 28, 2009, respondents' medical board recommended granting her ordinary disability retirement on the grounds that the medical evidence showed that her MS prevented her from performing full duty as a police officer. Respondent Board of Trustees of the Police

Pension Fund granted petitioner ordinary disability retirement on December 9, 2009, based on a diagnosis of MS.

On June 3, 2010, petitioner applied again for ADR due to PTSD. Adopting the findings of the medical board after several remands for consideration of new evidence, respondent Board of Trustees denied petitioner ADR benefits on December 14, 2011.

In this proceeding pursuant to C.P.L.R. Article 78, petitioner seeks to annul the determination denying her ADR as arbitrary or to require respondents to review her application once again. C.P.L.R. § 7803(3); N.Y.C. Admin. Code § 13-252.1. Petitioner also seeks respondents' production of specified documents, but nowhere indicates the grounds for this request.

II. APPLICABLE STANDARDS

In reviewing respondents' determination regarding disability, the court must defer to the medical board's 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); 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," the police officer is eligible for ADR. N.Y.C. Admin. Code § 13-252. See Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d 551 (1st Dep't 2013). Incapacity resulting from "a qualifying World Trade Center condition as defined in section two of the retirement and social security law" is presumptive evidence of an injury incurred as a "result of an accident" in the performance of service. N.Y.C. Admin. Code § 13-252.1(1)(a); Bitchatchi v. Board of Trustees of N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d 268, 276 (2012); Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d 551; McAuley v. Kelly, 103 A.D.3d 449, 451 (1st Dep't 2013); Dement v. Kelly, 97 A.D.3d 223, 225 (1st Dep't 2012). While PTSD and depression are qualifying conditions, N.Y. Retire. & Soc. Sec. Law § 2(36)(a), (b), and (d); Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d at 552, MS is not. See N.Y. Retire. & Soc. Sec. Law § 2(36)(c).

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 from performing 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. 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. Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 281; Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 N.Y.2d at 147; McAuley v. Kelly, 103 A.D.3d at 451; Cusick v. Kerik, 305 A.D.2d 247, 248 (1st Dep't 2003).

The presumption of an accidental disability from work in the line of duty at the World Trade Center site on or following September 11, 2001, provided by Administrative Code § 13-252.1(1)(a) shifts the burden of proof to respondents to show that the disabling condition did not arise from work at the World Trade Center site after the terrorist attacks. Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 276; Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d at 552; McAuley v. Kelly, 103 A.D.3d at 451. Credible medical evidence that the applicant's condition from work at the site on or following

September 11, 2001, did not cause her disability thus is required to rebut the presumption. N.Y.C. Admin. Code § 13-252.1; Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 281; McAuley v. Kelly, 103 A.D.3d at 451; Velez v. Kelly, 84 A.D.3d 693 (1st Dep't 2011); Claudio v. Kelly, 84 A.D.3d 667. Unlike applicants for ADR unrelated to the World Trade Center attacks, applicants under Administrative Code § 13-252.1 need not present any evidence of causation, so they may not be denied ADR solely due to a lack of evidence linking their disability to World Trade Center work. Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 281-82. See Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d at 552. Respondents' failure to rebut the presumption of causation leaves it intact and mandates an award of ADR. Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 283; McAuley v. Kelly, 103 A.D.3d at 451.

III. PETITIONER'S ACCIDENT DISABILITY RETIREMENT CLAIM

Petitioner claims entitlement to ADR based on PTSD and depression caused by her rescue and recovery work after the terrorist attacks. She maintains that respondents' denial of ADR failed to apply the required standards in evaluating the cause of her disability, reaching a conclusion contrary to the evidence.

A. The Basis for Petitioner's ADR Claim

Petitioner was present during the attack on the World Trade Center on September 11, 2001, and then worked on clean-up in lower Manhattan in the following days. The World Trade Center (WTC) Medical Monitoring and Treatment Program Health Center began treating petitioner in January 2009. On April 2, 2009, Alessandra Herbosch Psy. D., a psychologist with respondents' Psychological Evaluation Section, requested that respondents remove petitioner's firearms based on her psychological evaluation. In a letter dated May 29, 2009, Seema Quraishi M.D., of the WTC Medical Monitoring and Treatment Program, found that petitioner exhibited a depressed and irritable mood, insomnia, fatigue, low energy, poor concentration, disinterest in activities, and social withdrawal. Petitioner suffered panic attacks, triggered by reminders of September 11, 2001, crowds, and subways, which caused palpitations, shortness of breath, sweating, and nausea. Petitioner also experienced flashbacks of September 11, 2001. Dr. Quraishi diagnosed petitioner with PTSD and depression. While Dr. Quraishi found that petitioner's MS renewed her psychological stress, the doctor concluded that the PTSD and depression alone disabled petitioner from working.

Alicia Hurtado M.D. of the Treatment Program also treated petitioner for PTSD and depression. In a letter dated July 24, 2009, Dr. Hurtado found that petitioner exhibited symptoms consistent with PTSD and depression, including severe anxiety with flashbacks, irritability, insomnia, fatigue, decreased

energy, cognitive difficulties, disinterest in activities, and isolation. Dr. Hurtado also found that petitioner's MS retriggered her psychological stress. Petitioner visited the Treatment Program for weekly psychotherapy and monthly psychopharmacology. In a letter dated January 11, 2010, Dr. Hurtado reported that petitioner remained symptomatic for PTSD and depression, which Dr. Hurtado attributed to September 11, 2001, and concluded that petitioner's condition prevented petitioner from working and that treatment of her psychiatric conditions was more difficult in the context of her MS.

In a report dated May 20, 2010, Dr. Hurtado evaluated petitioner's functioning in connection with her application for Social Security disability benefits. Dr. Hurtado evaluated petitioner's functioning in a work environment as, at minimum, severely limited due to her psychiatric conditions, but her MS increased her risk for emotional instability. In a decision dated October 26, 2010, the Social Security Administration found petitioner disabled from PTSD and depression as of December 21, 2009.

In a letter dated June 9, 2011, Dr. Hurtado, based on review of Dr. Quraishi's initial evaluation March 25, 2009, explained that petitioner did not seek treatment for her psychological symptoms because she experienced difficulty discussing September 11, 2001, and did not know about the WTC Medical Monitoring and Treatment Program. Such avoidance was common among patients suffering from PTSD. Petitioner reported to Dr. Quraishi,

however, that since September 11, 2001, petitioner had experienced flashbacks and related psychological symptoms. Dr. Hurtado did not indicate that any of petitioner's psychological symptoms or failure to seek treatment for them was in any way associated with her MS.

B. Respondents' Rebuttal Evidence

Given petitioner's evidence, respondents bore the burden to rebut the presumption that her service in recovery operations on and after September 11, 2001, caused her disabling conditions. The presumption prevails "unless the contrary be proved by competent evidence." N.Y.C. Admin. Code § 13-252.1(1)(a). As set forth above, the evidence sufficient to rebut the presumption need only be relevant, credible evidence supporting the medical board's contrary conclusions. The medical board need only demonstrate this requisite support for the board's own conclusions and need not demonstrate that the conclusions by petitioner's treatment providers are unsupported or unscientific. Claudio v. Kelly, 84 A.D.3d 667; Kelly v. Kelly, 82 A.D.3d 544 (1st Dep't 2011); Jefferson v. Kelly, 51 A.D.3d at 537.

The medical board re-evaluated petitioner's psychiatric disability claim several times based on remands by respondent Board of Trustees for consideration of new evidence. The medical board rejected the various diagnoses of PTSD and depression because her psychiatric conditions were not well documented and her treating psychiatrists failed to consider the impact of her MS on those conditions.

In its review February 14, 2011, the medical board noted a report dated January 7, 2011, by Dr. Herbosch, who examined petitioner eight times in 2009 regarding her psychological conditions. Petitioner reported to Dr. Herbosch not only worsening MS symptoms, but also increased anxiety and depression and petitioner's treatment at the WTC Medical Monitoring and Treatment Program that had begun in January 2009. Petitioner attributed her absences from work to relapses of MS and the cognitive side effects of her MS medication. Nevertheless, she also reported irritability, difficulties sleeping, poor concentration and memory, isolation, depression, flashbacks related to September 11, 2001, and anxiety attacks when she observed persons running, heard sirens, and observed or smelled meat. On September 29, 2009, petitioner attributed her inability to continue working to both her psychological and her physical symptoms. Dr. Herbosch diagnosed petitioner with a mood and anxiety disorder.

The medical board also considered an endorsement January 7, 2011, by Arthur Knour Ph.D., the Director of respondents' Psychological Evaluation Section, who never examined petitioner, but simply summarized his Section's examinations of her and offered the opinion that vertigo, emotional lability, attention loss, lack of judgment, and apathy are emotional symptoms of MS. Therefore it was difficult to determine whether MS, PTSD, depression, or a combination of them caused petitioner's psychological symptoms. Dr. Knour also noted petitioner's delay

in obtaining treatment for several years after September 11, 2001. Dr. Knour agreed that petitioner was psychologically disabled from working, but rested on the possibility that her MS caused many of her psychological symptoms and the history that, until her treating physicians examined her well after September 11, 2001, her symptoms unrelated to MS and related to PTSD were only according to her own account. On this basis the medical board found that the MS diagnosis rebutted the presumption.

This evidence, however, which acknowledges petitioner's disability from her psychiatric conditions, does not rebut the presumption under Administrative Code § 13-252.1. Although respondents claim MS caused petitioner's psychiatric symptoms, Dr. Knour did not attribute all the symptoms petitioner reported to her treating psychiatrists to MS. Thus respondents' rebuttal, that petitioner's psychiatric conditions are unrelated to her service September 11, 2001, fails to address her many psychiatric conditions that are attributed only to her service at the WTC site. Dement v. Kelly, 97 A.D.3d at 231. The medical board may not ignore this medical evidence. Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d at 553.

Respondents address petitioner's symptoms of PTSD and depression, such as her flashbacks, anxiety attacks, irritability, insomnia, fatigue, poor memory, social withdrawal, and isolation, only by pointing out her delay in seeking treatment for them. The medical board's finding that petitioner's treating psychiatrists failed to address the impact

of MS on her psychiatric condition is unsupported by the evidence. As recited above, both Dr. Quraishi and Dr. Hurtado reported that MS renewed or retriggered petitioner's psychological stress, indicating that her psychological symptoms predated her MS.

Even absent those reports, petitioner bore no burden to present such evidence. Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 284. Respondents may not deny petitioner ADR benefits based on a lack of evidence to satisfy respondents' burden. Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 281-82; Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d at 552; McAuley v. Kelly, 103 A.D.3d at 451. Respondents present no evidence that petitioner suffered her psychiatric disorders before September 11, 2001, or that another trauma caused them. Samadjopoulos v. New York City Employees' Retirement Sys., 104 A.D.3d at 552; McAuley v. Kelly, 103 A.D.3d at 452. See Claudio v. Kelly, 84 A.D.3d at 667; Kelly v. Kelly, 82 A.D.3d 544.

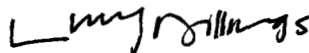
IV. CONCLUSION

The unrebutted presumption under Administrative Code § 13-252.1 mandates the conclusion that respondents' denial December 14, 2011, of petitioner's application for accident disability retirement violated lawful procedure, lacked a rational basis premised on relevant evidence, and therefore was arbitrary. C.P.L.R. § 7803(3) and (4). Consequently, the court remands this

proceeding to respondents to award accident disability retirement and recompute petitioner's benefit levels. C.P.L.R. § 7806; Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d at 283; McAuley v. Kelly, 103 A.D.3d at 453; Dement v. Kelly, 97 A.D.3d at 232.

Since petitioner has not explained her reason or purpose in requesting that respondents produce documents, the court denies this request as unsupported. If her request is not academic in light of this disposition, because she needs those documents in the further administrative proceedings, she may present her request to respondents in conjunction with the remand and recomputation. This decision constitutes the court's order and judgment granting the petition to the extent set forth and otherwise denying the petition and dismissing this proceeding.

DATED: September 17, 2013



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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