

Matter of Cameron v Shea
2020 NY Slip Op 31886(U)
June 17, 2020
Supreme Court, New York County
Docket Number: 151741/2020
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

In the Matter of the Application of
SEAN CAMERON,

Petitioner,

INDEX NO. 151741/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

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

- v -

DERMOT F. SHEA, as 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 and the MEDICAL BOARD of the Police
Pension Fund, Article II,

Respondents.

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

PAPERS NUMBERED

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

|

Answer – Affidavits – Exhibits _____

|

Replying Affidavits

|

|

Cross-Motion: Yes X No

Petitioner Sean Cameron (“Petitioner”), a retired New York Police Department (the “NYPD”) officer, brings the instant Article 78 Petition seeking the Court, to annul the decision of Respondents Dermot F. Shea, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees (hereinafter “Board of Trustees”) of the Police Pension Fund (the “PPF”) and the Medical Board of the PPF (the “Medical Board”) (collectively, “Respondents”) denying Petitioner reclassification/accidental disability retirement (“ADR”) under the World Trade Center (“WTC”) Disability Law pursuant to New York City (“NYC”) Administrative Code § 13-252.1; and directing Respondents to retire Petitioner with ADR under the World Trade Center Disability Law. Petitioner also seeks an Order directing Respondents to provide certain documents pursuant to CPLR 2307(a). Respondents oppose.

Background/Factual Allegations

Petitioner was appointed to the NYPD on April 15, 1997 and served continuously in the NYPD until his retirement on February 22, 2017. He was a member of the PPF and made contributions pursuant to NYC Administrative Code § 13-214. Petitioner contends that he “participated in rescue, recovery, and clean-up operations on September 11, 2001” until December 31, 2001. (Verified Petition at 6). Petitioner contends that as a result of his participation in the aforementioned operations, he “was exposed to WTC particulate matters, including smoke from the fires, jet fuels and combustibles, asbestos, silicates, man-made vitreous fibers, polycyclic aromatic hydrocarbons (PAHS), PCBs, dioxins, heavy metals, human remains, and additional unknown contaminants.” (*Id.*)

On or about January 18, 2018, Petitioner contends that he filed a WTC Notice of Participation form with PPF, stating that Petitioner worked on September 11, 2001 and for multiple days at WTC-designated sites for the required number of hours prescribed by Retirement and Social Security Law (“SSL”) § 2[36].

On January 30, 2018, Philip B. Paty, M.D. (“Dr. Paty”), Board-Certified Surgeon, in Colon and Rectal Surgery, at Memorial Hospital for Cancer and Allied Diseases New York, reviewed Petitioner’s history and treatment for stage 4 cancer of the colon with metastasis to the liver and lungs. (Verified Answer, Exhibit I). In the report Dr. Paty stated that Petitioner’s “diagnosis with advanced, metastatic colon cancer at such a young age is completely unexplained and causes us to presume some type of exposure to a carcinogen occurred earlier in his life.” (Verified Petition at 3). Dr. Paty also stated that “the 16 year time interval between 9/11 and the emergence of cancer is a credible time frame for the emergence of cancer.” (*Id.*)

On or about February 6, 2018, Petitioner contends that he submitted an application for Reclassification/ADR under the WTC Disability Law (Code § 13-252.1).

On February 27, 2018, Respondents contend that Petitioner submitted a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations (Verified Answer, Exhibit C). Petitioner stated that he worked the requisite number of hours at WTC-designated sites prescribed by Retirement and SSL § 2[36]. (*Id.*) On May 9, 2018, the PPF Medical Board (hereinafter “Medical Board”) interviewed Petitioner, reviewed Petitioner’s ADR application, and reviewed Petitioner’s relevant medical documents. The Medical Board then concluded that Petitioner was disabled as a result of colon cancer and recommended

“approval of the retired sergeant’s application for Accident Disability Retirement” and they “cannot rebut the World Trade Center presumption of causality.” (Verified Answer, Exhibit A).

Petitioner submitted three affidavits to the Board of Trustees attesting to his work at the WTC-designated site. (Verified Answer at 4-5). These statements were submitted by Danielle Wydra, Petitioner’s mother, retired NYPD Officer Ramon Salas, and Moises Feliz. The three notarized affidavits described instances when Petitioner had told the three individuals about his presence and work at WTC-designated sites both on September 11, 2001 and in the weeks after the terrorist attack. Petitioner also submitted an unsworn statement from retired NYPD Officer Brendan P. Nolan. Petitioner submitted his own notarized affidavit to the Board of Trustees on November 22, 2019.

Respondents contend that the Petitioner was unable to provide sufficient evidence to support the claim that he performed qualifying work for the requisite time. On February 12, 2020, the Board of Trustees denied Petitioner’s ADR application under the WTC Disability Law by a tie vote of 6/6. Thereafter, Petitioner commenced this Article 78 proceeding.

Parties’ Contentions

Petitioner contends that the denial of his WTC disability application by the Board of Trustees is arbitrary, capricious, unreasonable, unlawful and contrary to the provisions of the Constitution of the State of New York, statutes, laws, ordinances, rules and regulations applicable to these circumstances on two fronts. First, Petitioner argues that Respondents’ denial of Petitioner’s application does not follow any established procedures and thus must be annulled. Petitioner asserts that the PPF’s absence of rules specifying the validity, or lack thereof, of a WTC Disability application renders any denials of such applications to be subjective, arbitrary, and capricious. Petitioner continues, contending that such denials are especially subjective, arbitrary, and capricious in circumstances when, as here, the WTC Health Program has verified that the individual is entitled to victim compensation benefits.

Second, Petitioner contends that he is entitled to reclassification/ADR under the WTC Disability Law and Respondents’ denial of this application is contrary to competent evidence and thus must be annulled. Petitioner cites his time spent at WTC-designated sites both on September 11, 2001 and on subsequent days until December 31, 2001 as such competent evidence. He contends that his notarized

affidavit, the notarized affidavits of Danielle Wydra, Ramon Salas, and Moises Feliz, as well as the unsworn statement from Brendan Nolan, prove his attendance at WTC-designated sites. Petitioner further contends that his claim also rests on his diagnosis of stage 4 colon cancer with metastases to the liver and lungs. He argues that the Medical Board, upon reviewing Petitioner's medical records, found him disabled and stated that they "cannot rebut the World Trade Center presumption of causality." (Verified Answer, Exhibit A). Petitioner contends that his attendance at WTC-designated sites both on September 11, 2001 and on subsequent days until December 31, 2001, in combination with his diagnosis of stage 4 colon cancer with metastases to the liver and lungs, as approved by the Medical Board, proves that he is entitled to reclassification/ADR under the WTC Disability Law.

Respondents contend that their decision to deny Petitioner ADR was neither arbitrary nor capricious, but rather lawful and proper, as Petitioner was unable to prove that he is eligible for ADR. Respondents argue that for Petitioner to be eligible for ADR, NYC Administrative Code § 13-252.1 requires that Petitioner must establish that he worked within the first forty-eight hours at one of the qualifying sites or that he participated in WTC rescue, recovery, or cleanup operations for a minimum of forty hours between September 11, 2001 and September 12, 2002. Respondents contend that in order to overrule the Board of Trustees' ADR denial, it must be found as a matter of law that Petitioner is entitled to the presumption provided pursuant to the WTC Disability Law. Respondent contends that Petitioner failed to establish his eligibility and thus is not eligible for the WTC presumption entitling him to ADR. Respondents contend that the affidavits provided by Petitioner's mother and friends are conclusory in nature and lack supporting detail. Respondents also contend that although Petitioner describes the scene at the WTC on the morning of September 11, 2001, no evidence has been found to support his claims.

Respondents further contend that on 17 occasions over a period of 17 months, the Board of Trustees voted to table a vote on Petitioner's application so that Petitioner could submit additional documentation and to allow Respondents to continue to conduct their own efforts to verify that Petitioner had worked the requisite hours under the WTC Disability Law. Respondents contend that the Board of Trustees reviewed a wide variety of NYPD records including roll calls, command logs, the World Trade Center 9/11 Tracking System Report, and the records of the NYPD Medical Division's Occupational Health Unit. Respondents contend that due to their inability to corroborate Petitioner's statement of his WTC participation over a 17 month search, the Board of Trustees voted six-to-six to deny Petitioner's ADR application.

In reply, Petitioner contends that Respondents' "denial is based only upon the fact that there is no official documentation indicating that petitioner was assigned to the WTC within the first 48 hours of the attack." (Affirmation in Support of Verified Petition at 3.) Petitioner further contends that this logic is flawed, as WTC first responders, including Petitioner, were not all on official tours of duty that morning, thus expecting official documentation is invalid. Petitioner continues, contending that it was not Petitioner's duty to keep NYPD's records and, additionally, the presence of official written records amid the response to such an attack "is entirely beside the point of whether petitioner, in fact, responded to it, or whether there is any basis to doubt his properly sworn and uncontradicted affidavit." (Verified Petition, Exhibit F.) Petitioner contends that Respondents both have no reason to doubt Petitioner's affidavit and "offer no meaningful analysis of whether petitioner's affidavit is credible." (Affirmation in Support of Verified Petition at 4.) Petitioner refers to Detective James Zadroga ("Detective Zadroga"), the namesake of "The James Zadroga 9/11 Health and Compensation Act," whom, Petitioner contends, was not on an official tour and had just finished a midnight tour, when he arrived at WTC the morning of September 11, 2001. Petitioner contends that, unlike Petitioner, NYPD never challenged Detective Zadroga's work at WTC within 48 hours of the attack.

Legal Standard

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." *See* CPLR 7803[3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

“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.” *Brennan v Kelly*, 2012 N.Y. Slip Op. 31709[U] [Sup Ct, NY County 2012], *aff’d* 11 AD3d 407 [1st Dept 2013] (citation omitted). “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.* (citation omitted). “Therefore, as long as there was any credible evidence of lack of causation before the Board of Trustees ..., its determination must stand.” *Id.* (citation omitted). “Credible evidence is evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion.” *Stavropoulos v Bratton*, 148 AD3d 449, 452 [1st Dept 2017].

“Under the World Trade Center Disability Law, first responders who conducted WTC cleanup operations for the requisite number of hours at a qualifying WTC location and developed a qualifying condition later in life, all as defined in NY Retirement and SSL § 2 (36) are entitled to a statutory presumption of such WTC work having caused their ailments. (NYC Administrative Code § 13-252.1 [1] [a]). This includes either having served a total number of forty hours at a qualifying WTC location or having served any time at the primary WTC location within forty-eight hours of the first attack. (*Id.*)

The First Department in *Salerno v Kelly*, denied the Petition because petitioner’s statements and her two superior officers statements didn’t establish that petitioner performed the statutorily required “rescue, recovery or cleanup” work, nor identified a specific location within the statutorily defined area. *Salerno v Kelly*, 139 AD3d 516, 517 [1st Dept 2016]. Furthermore, “Respondents’ investigation revealed no contemporaneous records indicating that petitioner was present at the WTC site.” *Id.*

Discussion

Petitioner has failed to demonstrate that Respondents’ Decision was arbitrary and capricious. *Flacke*, 69 NY2d at 363. The Board of Trustees adjourned Petitioner’s application on 17 separate occasions over a period of 17 month, in an effort for the Board of Trustees to locate records verifying that Petitioner worked the requisite hours at a qualified WTC site. The Board of Trustees was unsuccessful in finding any documentation supporting Petitioner’s claim.

On February 12, 2020, after the Board of Trustees reviewed:

SERGEANT CAMERON's notice of participation in the World Trade Center Rescue/ Recovery or Clean-Up Operations, which was filed with the Police Pension Fund on February 27, 2018. On the notice of participation the sergeant stated that he was assigned to Ground Zero from September 11, 2001 through December 31, 2001.

The Transit District 20 roll calls and Transit District 20 command logs. Transit District 20 is located at 137-02 Queens Boulevard, Jamaica/ New York

The Transit District 3 command log. Transit District 3 is located at 145th and St. Nicholas Avenue subway station in Harlem, New York.

World Trade Center/911 Tracking System report indicating the dates and hours of overtime which were coded for payment relative to rescue, recovery or clean up regarding the 9/11 attacks. These entries are not location specific and therefore do not necessarily indicate the presence of the qualifying sites. NYPD time records report - leave integrity management system (LIMS report).

A careful inspection of all the available documents from September 11, 2001 through December 31, 2001 were reviewed and compared to SERGEANT CAMERON's notice of participation.

In addition, SERGEANT CAMERON's overtime records were cross-referenced with Transit District 20 roll calls. Transit District 20 command logs and District 3 command logs. (Verified Answer, Exhibit E at 93-94.)

The Board of Trustees determined that the documents failed to establish that Petitioner was present at a qualifying WTC site during the statutorily required time period. The Board of Trustees stated that:

No department documents have been located to corroborate this statement. In fact, department records show that SERGEANT CAMERON was present for duty

at Transit District 20 at 1430 hours located in Queens, New York and no other assignment was indicated assigning him to a qualifying location.

Furthermore, department records show that SEAN CAMERON was assigned to the 74th. Street Station and Queensboro Plaza Station on September 12th and 13th. Both locations are not qualifying locations in Queens, New York. (Verified Answer, Exhibit E at 102-103.)

The Board of Trustees also reviewed the documents submitted by Petitioner. In support of Petitioner's application that he worked the requisite hours at the WTC site, Petitioner submitted three affidavits to the Board of Trustees attesting to his work at the WTC-designated site. These statements were submitted by Petitioner's mother, and two retired NYPD Officers. Petitioner also submitted an unsworn statement from a retired NYPD Officer his own notarized affidavit. The Board of Trustees determined that the affirmations and statements assert in a conclusory manner that Petitioner performed qualifying work at the WTC sites and none of the statements are based on personal knowledge or observation. *See Stavropoulos*, 148 AD3d at 452.

Petitioner was not entitled to the presumption of the WTC Disability Law that his condition was incurred in the performance and discharge of duty by failing to demonstrate that he was present at the WTC site. Therefore, Petitioner fails to meet his burden of demonstrating that the Board of Trustee's determination should be disturbed by the Court.

Moreover, Petitioner's application pursuant to CPLR 2307(a) is moot, Respondents have annexed these documents to their Verified Answer.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Petition is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: June 17, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION