

Matter of Kelly v Kelly
2009 NY Slip Op 32596(U)
November 2, 2009
Supreme Court, New York County
Docket Number: 109540/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 5

Kelly, Kevin J.

INDEX NO. 109540/09

- v -

MOTION DATE _____

Kelly, Raymond

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

1, 2 Ex's A-V

Answering Affidavits — Exhibits _____

3, 4 Ex's 1-27

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

NOV 06 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/2/09

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 5

-----X
In the Matter of the Application of
KEVIN J. KELLY,

Index No.
109540/09

Petitioner,

DECISION
and ORDER

-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, NEW YORK CITY POLICE DEPARTMENT
and THE CITY OF NEW YORK,

Mot. Seq.
001

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Respondents.

-----X
HON. EILEEN A. RAKOWER:

Petitioner Kevin J. Kelly ("Petitioner"), a retired New York Police Department ("NYPD") sergeant, brings the instant Article 78 Petition seeking to annul the decision of Respondent Board of Trustees of the Police Pension Fund ("Board of Trustees") to deny Petitioner accidental disability retirement ("ADR"), instead awarding him ordinary disability retirement ("ODR") upon his separation from service with the NYPD.

Petitioner was appointed to the NYPD on July 15, 1986 and, pursuant to New York City Administrative Code ("NYC Admin. Code") §13-214, became a member of the New York City Police Pension Fund. Petitioner contends that he suffers from post-traumatic stress disorder ("PTSD") in connection with his service at the World Trade Center site ("WTC site") in the aftermath of the 9/11 attacks. Petitioner was not at the WTC site during the 9/11 attacks, but had witnessed the event from a window in his office, approximately one mile north of the site, and had responded to the WTC site in the following days to take photographs.

On May 3, 2006, Petitioner was referred for psychiatric evaluation by his superior officer, Lt. Otero. Petitioner was seen by Dr. Fiona A. Radcliffe of the NYPD's Psychiatric Evaluation Section ("PES"). Dr. Radcliffe recommended that Petitioner undergo an Inpatient Admission at New York Presbyterian Hospital. In the referral letter, Dr. Radcliffe notes that Petitioner appeared to be suffering from delusions. While Dr. Radcliffe noted that Petitioner was likely under investigation by the NYPD¹, and that some of what Petitioner presented in his interview with her appeared to be based in reality, Petitioner also exhibited delusional and irrational beliefs. Dr. Radcliffe noted, for instance, that Petitioner expressed the belief that he was drugged by his coworkers. Dr. Radcliffe observed that Petitioner believed that he was suspected by the NYPD of being involved in the 9/11 attacks because, according to Petitioner, on September 10, 2001, he reported observing a man of Arab descent on the roof of the building where he worked taking pictures (Dr. Radcliffe noted that this event might have been the product of Petitioner's delusions). Dr. Radcliffe reported that Petitioner also felt as though the NYPD has "gotten to his family," as evidenced by his three year old son's erratic behavior towards other children. Petitioner told Dr. Radcliffe that the NYPD's investigation of him and his family is all tied to 9/11.

That same day, Petitioner was admitted to New York Presbyterian, where he was hospitalized until May 15, 2006. There, Petitioner was interviewed by Dr. Susan A. Turner. Petitioner reported that he and his family had been followed for the past several months, and that "[e]veryone is in on it... everyone," referring to all of his coworkers at the NYPD and his neighbors. Petitioner further stated that he suspected that his wife was involved in the conspiracy against him. Just as in the interview with Dr. Radcliffe, Petitioner told Dr. Turner that he believes that he was drugged by his coworkers, and that everyone had suspected him of being a terrorist. During the interview, Petitioner indicated numerous times that he was unsure as to what is real, and what is "in [his] head." In her discharge report, Dr. Turner noted that Petitioner "presents with marked anxiety and paranoid delusions in the setting of extraordinary stressors."

¹The record indicates that Petitioner and other officers within the NYPD's Internal Affairs Bureau were falsely accused of wrongdoing by a coworker who was known to be disturbed. These accusations prompted a mandatory investigation of Petitioner, among others.

[* 4]

Petitioner was readmitted to New York Presbyterian on September 29, 2006 due to his suffering a mental relapse. He was subsequently discharged on October 10, 2006. During this visit, Dr. Turner noted that

On 9/11, the patient was not at the WTC site. His office was about ½ mile from the site. He visited the site 3-4 days later for taking pictures. His neighbor lost her husband in the event. Since then, he feels that his life is in danger. He avoids seeing TV with [9/11] content, but still often has flashback[s] of those pictures.

On January 24, 2007, Petitioner filed an ADR application alleging that he was disabled from performing police duties due to psychological troubles he developed as a result of participating in rescue, recovery, and clean-up operations at the WTC site. Petitioner stated that he has had difficulty eating and sleeping due to PTSD resulting from his work at the WTC site. On May 31, 2007, the NYPD Commissioner signed an ODR Examination Order directing the Medical Board to examine Petitioner and his medical record to ascertain whether Petitioner was precluded from performing his duties due to physical or mental disability.

The Medical Board first reviewed Petitioner's case on July 2, 2007. The Medical Board's review involved examination of Dr. Radcliffe's May 3, 2006 report; admission and discharge notes from Petitioner's hospitalizations in May and September of 2006; a comprehensive report from Dr. Radcliffe, dated April 23, 2007; and a letter dated May 14, 2007 from Dr. Elizabeth Mirabello, a psychiatrist. After reviewing this material and interviewing Petitioner, the Medical Board determined that Petitioner suffered from Bipolar Disorder with Psychotic Features, and that he was disabled from performing NYPD service; and recommended that the Board of Trustees disapprove Petitioner's ADR application and approve the ODR application filed on Petitioner's behalf.

On January 9, 2008, the Board of Trustees considered the Medical Board's July 2, 2007 determination and remanded Petitioner's case to the Medical Board for reconsideration based upon new evidence. Specifically, the purpose of the remand was for the Medical Board to address whether Petitioner's work at the WTC site had exacerbated a pre-existing psychological condition.

The Medical Board reconsidered Petitioner's case on July 28, 2008. Petitioner's new evidence comprised of a letter dated November 12, 2007 from Cecilia Dintino, a psychologist from Columbia Presbyterian Medical Center; and a November 14, 2007 report from Dr. Elizabeth Fitelson, a psychiatrist. Both opined that Petitioner suffered from PTSD "surrounding the events of" 9/11. In addition, the Medical Board considered the prior evidence and re-interviewed Petitioner. After reviewing all of the information, the Medical Board reaffirmed its previous decision granting ODR and denying ADR, diagnosing Petitioner with Bipolar Disorder with Psychotic Features.

On November 12, 2008, the Board of Trustees again remanded Petitioner's case to the Medical Board in order to address whether Petitioner's work at the WTC site caused his psychological disability.

The Medical Board reviewed Petitioner's case for a third time on January 5, 2009. After reviewing the record and interviewing Petitioner once more, the Medical Board found "that there is sufficient evidence based on contemporaneous notes during the acute hospitalization that would rebut the presumptive evidence of the World Trade Center Disability Law." Specifically, the Medical Board noted that

contemporaneous admission and discharge notes from New York Presbyterian Medical Center [gave] a history of a psychotic reaction, including paranoid delusions, disorganization, severe anxiety and sleep anxieties. There was serious loss of reality testing which occurred in the context of false accusations at work and an internal investigation at work. There was no mention of the September 11 disaster in these records.

Accordingly, the Medical Board reaffirmed its prior determinations, which diagnosed Petitioner with Bipolar Disorder with Psychotic Features.

On March 11, 2009, the Board of Trustees adopted the Medical Board's determination and denied Petitioner's application for ADR. On March 20, 2009, the Police Pension Fund sent Petitioner a letter informing him of the Board of Trustee's decision. The instant petition was commenced on July 7, 2009. Petitioner submits a verified Petition and a memorandum of law in support of the petition.

Respondents submit a verified answer and a memorandum of law in support of their answer.

In the instant petition, it is undisputed by the parties that Petitioner (1) is disabled; and (2) that Petitioner served at the WTC site in such a capacity as to entitle him to the benefit of NYC Admin. Code §13-252.1, which provides that any individual who participated in rescue and/or recovery operations at the World Trade Center on September 11, 2001 is entitled to a presumption that his or her disability was incurred in the course of such operations (“WTC presumption”). Accordingly, the only issue before the court is whether the Board of Trustees properly concluded that Petitioner’s service at the WTC site neither caused nor exacerbated his condition. The First Department has held that the WTC presumption is rebutted where there is “credible evidence” in the record to support the Medical Board’s determination that a retiree’s disability was not the natural and proximate result of his or her service at the WTC site (*Jefferson v. Kelly*, 51 A.D.3d 536, 537 [1st Dept. 2008]) (citations omitted).

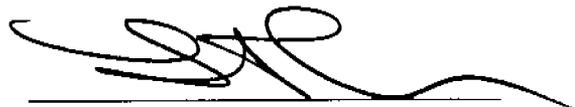
Here, the court finds that there existed credible evidence in the record to support the Medical Board’s determination that Petitioner’s disability was not the proximate result of his service at the WTC site. There was ample evidence in the record that Petitioner’s disability was unrelated to his service at the WTC site. Indeed, the notes from Petitioner’s interview with Dr. Radcliffe on May 3, 2006 and his 2006 hospitalization which commenced on that day make no reference to Petitioner’s work at the WTC site in the days following the 9/11 attacks. In addition, while the discharge notes from Petitioner’s October hospitalization note Petitioner’s stated fear since the 9/11 attacks and his avoidance of reminders of that event, they further state “r/o PTSD” (“rule out PTSD”) under “DISCHARGE DIAGNOSES”. Although Petitioner also submitted evidence that he was diagnosed with PTSD in connection with service at the WTC site, this presented at most a conflict of medical opinion, and the Board of Trustees is entitled to rely upon the Medical Board’s determination with respect to causation of Petitioner’s injuries (*see Casiano v. Brown*, 209 A.D.2d 182, 183 [1st Dept. 1994]).

Wherefore, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 2, 2009


EILEEN A. RAKOWER, J.S.C.

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