

**Matter of Rosenthal v Kelly**

2010 NY Slip Op 33201(U)

September 9, 2010

Sup Ct, NY County

Docket Number: 104482/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~HON. JUDITH J. GISCHE~~  
~~HON. JUDITH J. GISCHE~~ Justice

PART 10

Index Number : 104482/2010  
ROSENTHAL, JILL  
vs.  
KELLY, RAYMOND  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause \_\_\_\_\_ Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Repeating Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**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: 11/9/10

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  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 10

In the Matter of the Application of  
JILL ROSENTHAL,

Petitioner,

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

-against-

RAYMOND W. 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, THE BOARD OF TRUSTEES of the Police  
Pension Fund, Article II, NEW YORK CITY POLICE  
DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

**Decision/Order**

Index No.: 104482/10  
Seq. No. : 001

Present:  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2019 (a), of the  
(these) motion(s):

**UNFILED JUDGMENT**  
This Judgment has been entered for the review of this  
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).

**Papers**

Pet's n/pet w/ exhs .....	1
Resps' verified answer w/ exhs .....	2

*Upon the foregoing papers, the decision and order of the court is as follows:*

Petitioner, Jill Rosenthal, is a former police officer with the New York City Police Department ("NYPD"). The respondents are Raymond Kelly, as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the New York City Police Pension Fund, Article II ("Board of Trustees"), Board of Trustees itself, the NYPD and the City of New York. In this Article 78 proceeding, petitioner seeks a judgment annulling the determination by the respondents denying petitioner's application for a line of duty

accident disability retirement pension ("ADR") made pursuant to AC § 13-252. The respondents oppose the petition.

Petitioner joined the NYPD on July 1, 2002. At that time, she passed all required physical and psychological tests and was deemed fit for full duty police work.

On March 15, 2005, while arresting a perpetrator who was resisting arrest, petitioner sustained certain injuries. According to petitioner's Line-of-Duty Injury Report completed the same day of the accident, "she received injuries to right hand and middle finger causing pain, bruising and swelling" for which petitioner was treated at St. Luke's Roosevelt Hospital. According to Police Officer Charles Van Vooren who witnessed the incident, the perpetrator "swung at [petitioner] and attempted to grabb (sic) her head, instead grabbed her side tearing her coat." On August 12, 2005, petitioner amended the injury report to include additional injuries to include: "neck and right shoulder, right elbow, right wrist, right hand and cut to middle finger." She claimed that she sustained these injuries as she hit the ground on her right side. Her request to amend the report was subsequently approved.

On January 24, 2007, after petitioner had been on either sick leave or restricted duty for an extended period as a result of her 3/15/05 injuries, the NYPD's Supervising Chief Surgeon received a memorandum recommending that the Medical Board review petitioner's case and determine whether she was incapacitated from performing police duties and should be retired.

On February 21, 2007, petitioner reported that she was again injured in a line of duty accident when she slipped and fell down the stairs of her command and again injured her right shoulder, right wrist, neck, lower back, right ankle, both knees and

buttocks. The 2/21/07 Report notes, however, that after both Sergeant Stephen Bertolini and Lieutenant W. Feliz of the 26<sup>th</sup> Precinct conducted a preliminary investigation, there was no evidence of a dangerous condition on the stairs (a wet sticky substance) or of petitioner's claimed injuries. Captain Lawrence Flood nonetheless approved the Line-of-Duty Injury Report because there was insufficient evidence to disprove petitioner's story.

On or about May 14, 2007, petitioner filed an application for ADR benefits. In her application, she alleges that she is disabled due to constant pain in her neck, back, right shoulder, right elbow, right hand, and right wrist. Therein, she claims that:

I have lost mobility and strength of my right arm and right hand. I have lost the ability to have a strong grip. I have lost mobility of my neck and back. As a result, I am unable to perform full police duty and request Accident Disability Retirement.

On July 6, 2007, petitioner was evaluated by the Medical Board. After reviewing all of the medical reports that petitioner submitted in support of her application and conducting an interview and physical examination of petitioner, the Medical Board unanimously recommended that the Board of Trustees deny both the ADR and ordinary disability retirement ("ODR") benefits applications<sup>1</sup>. The Medical Board noted that despite petitioner's complaints of pain and the subjective limitations that she displayed on physical examination, there were "no significant orthopedic findings precluding [petitioner] from performing the full duties of a New York City Police Officer." Petitioner's applications for ADR and ODR benefits was therefore denied.

Petitioner thereafter submitted additional medical evidence and on December 12,

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<sup>1</sup> An ADR pension pays the recipient a 3/4 final salary tax-free, while an ODR pension is taxable, and pays a recipient with less than ten years of service like Ms. Rosenthal, a 1/3 final salary.

2007, the Board of Trustees voted to remand petitioner's applications back to the Medical Board for further review in light of the new evidence.

On January 1, 2008, while driving home with her husband, a Sergeant in the NYPD, the couple were "impacted by a drunk driver who had run a red light." Petitioner called 911 and pursued the suspect. The suspect fought petitioner whereby she sustained a lower back injury and aggravated her previous injuries.

On February 1, 2008, the Medical Board reviewed petitioner's ADR and ODR benefits applications. It concluded that:

[T]he officer continues to complain of right wrist pain as well as right elbow, shoulder and neck pain. Her physical examination today revealed a small dorsal wrist ganglion of the right wrist, but it is of insufficient size, and her deficits are of insufficient nature, as to preclude her from performing full duty. The wrist fracture and scaphoid fracture which she had sustained apparently was not visible on x-rays performed at either Long Island Jewish Medical Center and North Shore University Hospital after her encounter with the drunken driver. Her prior films have never been made available for review.

Again, petitioner's ADR and ODR benefits applications were denied.

Thereafter, petitioner submitted additional evidence in support of her application, and her case was remanded by the Board of Trustees to the Medical Board.

On December 5, 2008, petitioner's case was again evaluated by the Medical Board. In a unanimous decision, the Medical Board rescinded its previous decision and recommended approval of petitioner's ADR benefits application and denial of the ODR benefits application. The final diagnosis was somatization disorder related to multiple line-of-duty injuries. The competent causal factor was found to be the 3/15/05 line-of-duty injury. The Medical Board found that:

Based on the review of the history, the medical records, the new medical documentation submitted, the clinical findings, the symptomatology and the

physical examination, it is the unanimous opinion of [Medical Board] that the officer's subjective complaints of pain are overwhelming to the extent that they preclude her from performing her full duties of a New York City Police Officer. It appears that many symptoms are indeed related to her multiple injuries sustained in her line of duty injuries.

The Board of Trustees, however, remanding the case back to the Medical Board on February 11, 2009 "to clarify the record." The Board's concern was explained by Thaddeus McTigue as follows:

I would ask this case be remanded back to clarify the record, is the member disabled due to the multiple lines of duty or is the competent causal factor the March 15, '05 line of duty. If the officer's disability is related to the March 15<sup>th</sup> line of duty, does the diagnosis remain somatization or is there a different diagnosis?

On April 10, 2009, the Medical Board considered petitioner's case again. It reported as follows:

6. On interview today, the officer described the mechanism of the accident of March 15, 2005 and how this incident resulted in injuries of her right wrist and elbow and subsequently affected multiple other areas. She states that she continues to have significant pain in multiple body areas. She tries to avoid taking narcotic medications but manages to control her symptoms with Motrin and occasional Flexeril.

7. On examination today, the Article II Medical Board concentrated on the findings in the upper extremities. The examination revealed again marked voluntary guarding and resistance to any kind of evaluation of the elbow and wrists. However, there was no objective finding of abnormalities such as swelling, or limitation of motion. A minor dorsal wrist ganglion was again noted. Otherwise, the officer's examination was consistent with multiple somatic complaints with no evidence of objective physical injuries.

8. In summary, in answer to the question raised by the Pension Board, the article II Medical Board feels that the accident of March 15, 2005 did not result in any objective physical injury. However, it triggered a series of events aggravated by the subsequent injuries which resulted in the current condition of multiple subjective complaints of pain. For this reason, the Article II Medical Board feels that the accident of March 15, 2005 originated the condition that resulted in the somatization disorder and feels that indeed there are no objective physical findings supporting the officer's

application for physical disability but the somatization is of sufficient severity to preclude her from performing the full duty of a New York City Police Officer. Thereafter, the Article II Medical Board reaffirms its previous decision and recommends approval of the officer's own application for [ADR benefits]... The competent causal factor is the line of duty injury of March 15, 2005.

On June 10, 2009, petitioner's case was again considered by the Board of Trustees, at which time the following discussion of the case was held on the record:

POLICE OFFICER JILL ROSENTHAL, second called by the Comptroller.

Ms. Koch: Its actually the mayor's second call.

What we would like to remand this back to the Medical Board for, we have a definition published by the American Psychiatric Association and we are more than happy to give this also to the Medical Board as the definition of somatization disorc

We would like to know if PO ROSENTHAL'S somatization, psychological illness, is in line with the definition of the American Psychiatric Association in line with the diagnostic criteria from the ADA, if that's the correct acronym.

Thank you. That's it.

Ms. Debellis: That's a remand.

On September 18, 2009, petitioner's case was again considered by the Medical Board, which concluded as follows:

- 4. The Medical Board notes the minutes of the Police Pension Fund Articles I and II Executive Session, dated June 10, 2009. The Medical Board was asked if the diagnosis of Somatization was in line with the definition of the American Psychiatric Association and in line with the diagnostic criteria from the ADA. According to the American Psychiatric Association diagnostic criteria there needs to be (A) A history of many physical complaints beginning before or 30 years that occur over a period of several years and result in treatment being sought or significant impairment in social, occupational or other important areas of functioning. (B) Each of the criteria must have been met, with individual symptoms occurring at any time during the course of the disturbance - (1) Four pain symptoms (2) Two gastrointestinal symptoms (3) One sexual symptom (4) One pseudoneurological symptom. The officer does have four, and possibly



more pain symptoms in different parts of her body. The pain has been severe in her neck, right shoulder, back, right wrist. She has had severe gastrointestinal symptoms including bloating, intolerance of dairy products, nausea, vomiting and diarrhea. These symptoms occurred at times other than during her pregnancy. She has had sexual symptoms including long periods of sexual indifference due to what she called pain, irregular menses, excessive menstrual bleeding and vomiting during her pregnancy. She had a pseudoneurological symptom including a neurogenic bladder. She complained of light-headedness. There is an area of numbness in the pudendal area and around her sexual organ. Each symptom could not be explained by a known general medical condition. The Medical Board believes that these symptoms are not intentionally produced or feigned, as in fictitious disorder or malingering.

5. The Article II Medical Board finds that with reasonable medical certainty that the officer fits the criteria of the American Psychiatric Association of having a Somatization Disorder 300.81. In light of this, the Article II Medical Board reaffirms its previous decision and recommends approval of the officer's own application for [ADR benefits]...

On November 9, 2009, petitioner's case was again considered by the Board of Trustees, at which time the following discussion was held on the record:

Police Officer Alejandro: Okay, second call, Comptroller, POLICE OFFICER JILL ROSENTHAL.

Mr. McTigue: On the cases of PO ROSENTHAL, the Medical Board recommends approval of ADR.

It is the City's side position that we are not in a position to concur with that recommendation. And we will be voting no on this application.

The officer did sustain an injury on March 15 of '05 to a right hand during an altercation for a grand larceny situation.

Our issue with this case is that the diagnosis is somatization disorder.

The issue that we have is twofold. One, the board has a limited history of granting psychological disabilities.

Two, when they have granted those psychological disabilities, we look to see a nexus between the psychological disability and the physical injury.

And in this case it is very difficult for us to find the nexus between the

physical injury to the officer's hand and the complaints that she has vis-a-vis somatization disorder.

So based on that, we are voting no today.

Mr. McGrath: This member is represented by an attorney by the name of Linda Cronin who has submitted reports in the past.

My recollection of this case is that there were other physical illnesses for which this member claims are service-related.

At this time, I am going to seek to table this case for a month just to advise Attorney Cronin of the status of the case. So that if she wishes to make any arguments on behalf of this member, in response to the City side trustees in this case, she can do so at the next meeting.

Ms. Debellis: Okay, that's tabled.

On December 7, 2009, petitioner's present attorney, Chet Lukaszewski, Esq., wrote a letter to the Pension Fund. Therein, he wrote in support of petitioner's application for ADR benefits. He argued that petitioner has demonstrated an orthopedic disability via objective evidence, e.g.:

- 8/23/05 MRI demonstrating herniations at the C5-6 and C3-4 levels;
- 2/24/06 EMG demonstrating cervical radiculopathy;
- 9/5/08 EMG demonstrating C5-6 chronic denervation;
- 10/24/08 MRI demonstrating disc herniations at L4-5

Attorney Lukaszewski also pointed to petitioner's 11/14/08 diagnosis of a neurogenic bladder caused by petitioner's lower back injuries in support of his contention that the Medical Board's finding that there was no physical disability was in error. Attorney Lukaszewski further argued that petitioner should be awarded ADR benefits based upon the Medical Board's diagnosis of Somatization Disorder.

On December 9, 2009, petitioner's case was again considered by the Board of Trustees, at which time, the following discussion was held on the record:

Mr. Grande: 8S/1A. The Medical Board reaffirms approval of accident disability, ordinary denied, for POLICE OFFICER JILL ROSENTHAL after examination on her own application for accident and at the direction of the Police Commissioner for ordinary.

Mr. McTigue: Second call.

Mr. Grand: Second call, PBA, second call Comptroller, POLICE OFFICER JILL ROSENTHAL.

Mr. McTigue: OFFICER ROSENTHAL, we discussed this case in detail last month.

Essentially the City side, in looking at this, had a number of issues. The first issue was the Medical Board has a limited history of brain and psychological disabilities.

Secondly, when we have granted those psychological disabilities, we looked for a nexus between the psychological disability and the first injuries that the officer may have sustained. In this case it's very difficult for us to find a nexus between the physical injury to the officer's hand and the complaint that she has regarding the final diagnosis of somatization disorder.

I would point out that the Medical Board finds multiple subjective complaints related to the neck, back, right shoulder, right elbow, right wrist, right hip, both shoulders have objective findings.

Without having a nexus that we can establish between the line of duty and the diagnosis, we are voting no.

Mr. McGrath: Before you do that, this member has retained Chet Lukaszewski as her attorney.

I believe the most recent times it has been before the pension board it has been the result of City side remands to make clarifications with regard to matters in this case. Mr. Lukaszewski has submitted a December 7, 2009 report dated December 7, 2009 seeking an upgrade.

Do the City side trustees have a copy of that?

Mr. McTigue: The City side reviewed the letter of December 7<sup>th</sup> from Attorney Lukaszewski and have evaluated that appropriately and our position remains the same.

Mr. Grande: So that would be a 6/6 of the accident, so move the ordinary?

Thereafter, petitioner was notified via mail of the decision of the Board of Trustees. She then commenced the instant proceeding.

### **Discussion**

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: [1] was made in violation of lawful procedure; [2] affected by an error of law; [2] or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law" (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 NY2d 222, 231 [1974] [emphasis removed]; see also Matter of Colton v. Berman, 21 NY2d 322, 329 [1967]).

Under NYC AC § 13-252, in order to receive an ADR pension, a police officer must show that he or she is "a member in city-service" who is "physically or mentally incapacitated for the performance of city-service as a natural and proximate result" of an accidental injury which occurred during such service. The ADR pension applicant has the burden of establishing that the disability is causally connected to a line-of-duty accident to the Medical Board of the New York City Police Pension Fund, Subchapter 2 ("Medical Board") and the Board of Trustees (see Matter of Evans v. City of New York, 145 AD2d 361 [1st Dept 1988]). Otherwise, once a police officer is certified by the Medical Board as physically or mentally incapacitated for the performance of police

duties, he or she may be retired by the Board of Trustees on an ODR pension pursuant to AC § 13-251.

It is not disputed that petitioner sustained injuries during the course of her employment as a police officer which began on March 15, 2005. It is also undisputed that petitioner is incapable of performing her duties as a police officer and therefore is eligible to receive, at least, an ODR pension. As here, where ADR benefits have been denied as a consequence of a tie vote, that denial can only be set aside on judicial review if the court can conclude that petitioner is entitled to the greater benefits, as a matter of law (Meyer v. Board of Trustees of the New York City Fire Dept., Article 1-B, 90 NY2d 139 [1997] citing Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City, 60 NY2d 347 [1983]).

Based upon the administrative record developed in this case, the court cannot, as a matter of law, evaluate whether petitioner's somatization disorder was causally related to the 3/13/05 service-related accident. The Board of Trustee's denial was made summarily, without any indication of what evidence, if any, the Board relied upon in reaching its conclusion (see *i.e.* Matter of Brady v City of New York, 22 NY2d 601, 605-606).

The court acknowledges that the Board of Trustees has no obligation to merely rubber-stamp the Medical Board's recommendations. Where, as here, the Medical Board reaches a different conclusion, the Board of Trustees should articulate what is the basis for their decision. Here, the Board has failed to articulate any rational basis for its denial of petitioner's application. The two reasons given by the Board for its denial of petitioner's application lacked rationality. The first reason is that the "Medical Board has

a limited history of brain and psychological disabilities." This explanation is unhelpful and of no moment because each application is fact specific, and a denial on this basis alone is arbitrary. The statute itself permits enhanced pensions based upon mental disabilities.

The Medical Board's objective medical opinion on the issue of causation was not addressed by the Board of Trustees, even to explain why the Medical Board came to a contrary conclusion. Nor did the Board of Trustees address the Medical Board's report dated September 18, 2009 detailing how petitioner's diagnosis fell within the American Psychiatric Association's diagnostic criteria for somatization disorder.

Moreover, the Board of Trustees stated on the record on two separate occasions that it was "difficult" to see a causal connection between the somatization disorder diagnosis and the injuries petitioner sustained to her hand on 3/15/05. However, the 3/15/05 Line-of-Duty Injury Report was amended to include injuries to petitioner's neck, right shoulder, right elbow and right wrist. That amendment was in fact approved by the NYPD. In light of the amendment, the Board of Trustees' narrow focus on the injuries to petitioner's hand, without any apparent consideration of petitioner's other injuries, was also irrational.

The Board of Trustee's denial was not based upon objective medical evidence that petitioner's injuries sustained on 3/15/05 are not causally connected to her diagnosis of somatization disorder (*cf.* Matter of Meyer v. Board of Trustees of the New York City Fire Dept., Article 1-B, 90 NY2d 139 [1997]; Matter of Canfora v Board of Trustees, supra; Matter of Christian v New York City Employees' Retirement Sys., 56 NY2d 841 [1982], *affg* 83 AD2d 507; Matter of Longo v City of New York, 79 NY2d 1011 [1992]). For these reasons, the matter must be remanded back to the Board of Trustees to

reconsider the issue of causation.

Petitioner also argues that it was irrational and arbitrary for the Medical Board to conclude that there was no evidence of objective physical injuries other than a minor dorsal wrist ganglion, in light of petitioner's medical records which revealed disc herniations at the C5-6 and C3-4 levels, cervical radiculopathy, chronic denervation at C5-6, disc herniations at L4-5 and neurogenic bladder dysfunction. The court, however, will not disturb the Medical Board's recommendation by "substitut[ing] [its] own judgment for that of the Medical Board" (Matter of Borenstein v. New York City Employees' Retirement System, 88 NY2d 756 [1996] citing Matter of Brady v City of New York, 22 NY2d 601 [1968]). Here, the record makes it clear that the Medical Board, a panel of medical doctors, considered all medical evidence submitted by respondent. In each of its reports submitted to the Board of Trustees, the Medical Board detailed what proof had been considered, specified the nature of respondent's complaints and outlined the results of its physical examinations of respondent. These determinations are based upon sufficient evidence and therefore should not be disturbed.

The court also rejects petitioner's request for a declaration that she is entitled to ADR benefits. Respondents are entitled to a further opportunity to review the record in this case and make a rational determination with respect to whether petitioner's somatization disorder was caused by her line-of-duty injuries, consistent with this court's order.

### **Conclusion**

It is hereby:

**ORDERED** that the determinations of the Respondents, 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, The Board of Trustees of the Police Pension Fund, Article II, the New York City Police Department and the City of New York, denying petitioner Jill Rosenthal accident disability retirement benefits are annulled as arbitrary, capricious and not in keeping with the law; and it is further

**ORDERED, DECLARED AND ADJUDGED** that the petition is granted to the extent that the matter is hereby remanded to the Board of Trustees of the Police Pension Fund, Article II, for re-hearing.

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision, order Judgment of the Court.

Dated: New York, New York  
November 9, 2010

SO ORDERED:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**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 1410)