

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6<sup>th</sup> day of April, 2017.

P R E S E N T:

HON. CARL J. LANDICINO,  
Justice.

-----X  
IN THE MATTER OF THE APPLICATION OF  
HAKEEM WATKINS,  
Petitioner,

COURTESY COPY

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

- against -

Index No. 2768/16

THE NEW YORK CITY EMPLOYEES' RETIREMENT  
SYSTEM,

Respondents.

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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-2 _____
Opposing Affidavits (Affirmations) _____	_____ 3 _____
Reply Affidavits (Affirmations) _____	_____ _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers <u>Memoranda of Law</u> _____	_____ 4-6 _____

Upon the foregoing papers, petitioner Hakeem Watkins, moves for a judgment, pursuant to Article 78:

- a) reviewing and annulling the action of respondent New York City Employees' Retirement System (NYCERS) in denying petitioner an EMT 3/4 performance of duty disability retirement pursuant to Retirement and Social Security Law § 607-b, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and
- b) directing and ordering NYCERS to retire petitioner with a disability retirement allowance and EMT 3/4 performance-of-duty disability retirement; or in the alternative
- c) remanding the matter to NYCERS for an appropriate review.

### ***Background And Procedural History***

Petitioner commenced his employment as an emergency medical technician (EMT) with the New York City Fire Department (FDNY) on October 9, 2012. On July 1, 2013, petitioner was loading a patient from an ambulance onto a loading bay at Brookdale Hospital. The loading bay was located several feet above the ambulance bed and petitioner strained his back in the process of lifting the stretcher. Petitioner was given emergency treatment at Brookdale Hospital immediately thereafter.

The record reveals that petitioner has been examined and treated by various doctors in the years following this accident. Petitioner was examined by Dr. Scott Skolkin on November 26, 2013 who found that petitioner could no longer perform the duties of an EMT including lifting stretchers and stair chairs as this would exacerbate his spinal condition and could result in a permanent spinal injury. On December 20, 2013, petitioner was examined by Dr. Matthew Wert who found that petitioner suffered from cervical neck and back pain and recommended chiropractic care, physical therapy and anti-inflammatory medication. On January 24, 2014, petitioner underwent an MRI of the lumbar spine which revealed: levoscoliosis, mild congenital lumbar spinal stenosis, L2/L3 disc bulge with facet arthrosis, L3/L4 moderate disc bulge with mild central canal stenosis, L4/L5 disc bulge with small central/left paramedian disc herniation, mild to moderate central canal and mild left lateral recess stenosis. There was also an MRI of his cervical spine performed that day which revealed: straightening and slight reversal of the normal cervical lordosis; congenital cervical spinal stenosis, C3/C4 small central disc protrusion with mild central canal stenosis, C4/C5 disc bulge with mild central canal stenosis, C5/C6 disc bulge with small central disc protrusion with mild central canal stenosis and mild right foraminal stenosis, C6/C7 disc bulge with mild central canal stenosis; C7/T1 disc bulge with mild central canal stenosis,

mild right foraminal stenosis, adenoidal hypertrophy with moderate narrowing of the nasopharynx.

On February 11, 2014, petitioner was examined by Dr. Steven Horowitz of Brooklyn Premier Orthopedic Group. Dr. Horowitz reviewed petitioner's MRI and recommended that he continue physical therapy and chiropractic care and continue taking anti-inflammatories. He told petitioner to remain on light duty and that he should not lift any more than ten pounds. Dr. Horowitz opined that petitioner's injuries, current disability and need for treatment, were directly related to the July 1, 2013 incident. On September 3, 2014 and October 1, 2014, Dr. Horowitz administered intralaminar epidural steroid injections to plaintiff's lumbar spine.

On November 18, 2014, Dr. Christine Crisafulli-Fitzpatrick, a neurologist, examined petitioner and recommended that he be treated by a spine surgeon for his back injury and a psychiatrist, as he was experiencing depression related to his injury. On November 24, 2014, petitioner met with Dr. Jonathan Levinson, a psychiatrist who examined him and diagnosed him with major depressive disorder; panic disorder with agoraphobia and pain disorder associated with a general medical condition. Dr. Levinson opined that the psychological symptoms petitioner experienced were causally related to the accident he had on the job on July 1, 2013.

On September 18, 2014, petitioner filed an application, pursuant to Retirement and Social Security Law § 607-b, for an EMT 3/4 performance-of-duty disability retirement. His application was based upon his physical and emotional symptoms stemming from his July 1, 2013 accident. In support of his application, he submitted medical reports from various treating physicians including Drs. Lattuga, Crisafulli- Fitzpatrick and Levinson. On December 4, 2014, petitioner was interviewed and examined by the NYCERS Medical

Board. During the examination, petitioner indicated that he was disabled due to his neck and back pain as well as medical problems related to his fingers and ankles. During his interview with the Medical Board, petitioner stated that he was depressed, feeling suicidal and homicidal and indicated that he was thinking of hurting himself and had a plan to do so. At that point, NYCERS terminated the examination and security was alerted. The Medical Board deferred its recommendation pending evaluation and stabilization by a psychiatrist. That evening, petitioner was admitted to the psychiatric unit of New York Methodist Hospital for observation based upon his suicidal and homicidal thoughts. He was discharged on December 12, 2014 and was prescribed several medications including Lyrica, Ambien, Abilify, Zoloft and Zyprexa.

Petitioner was seen by Dr. Crisafulli-Fitzpatrick on December 16, 2014, who recommended that he continue taking his medications and follow up with a psychiatrist and pain management specialist. On January 29, 2015, Dr. Robert Reich, NYCERS' outside consulting psychiatrist, interviewed petitioner to determine whether his psychiatric impairment prevented him from performing his duties as an EMT. Dr. Reich reported that petitioner presented with severe rage, self-mutilation, auditory and command hallucinations and suicidal and homicidal ruminations. Dr. Reich opined that despite his feeling that some of petitioner's symptoms were exaggerated, they were sufficiently severe to suggest significant psychological impairment resulting in disability in that it would be unsafe for him to return to his work as an EMT and that he was disabled on psychological grounds. Dr. Reich noted that petitioner's history suggested an early onset of emotional illness and thus his problem was not caused by his injury but it might have reactivated an underlying psychotic process.

On February 9 and March 2, 2015, petitioner was evaluated by Dr. Daniel Kuhn, a psychiatrist. Dr. Kuhn diagnosed major depressive disorder, severe with psychotic symptoms secondary to chronic disability and chronic pain syndrome, and auditory hallucinations. He found that petitioner developed a severe psychiatric disability subsequent to his job-related injury on July 1, 2013, and that he was totally disabled at that time. On March 9, 2015, petitioner was seen for a follow up visit at the office of Dr. Sebastian Latugga and was examined by Dr. Demetrios Mikelis, an orthopedist, who diagnosed him with herniated cervical and lumbar intervertebral discs. The examination revealed restricted range of motion in several areas, and Dr. Mikelis opined that based upon his examination, petitioner remained totally disabled.

On April 16, 2015, petitioner was interviewed and examined by the Medical Board which again deferred his case stating that petitioner's manifestations and reported symptomatology with respect to the back and musculoskeletal system are not proportional with, or explainable by, identifiable organic pathology. The Board further found that there were questions regarding the significance of his psychiatric complaints and presentations and deferred recommendations pending evaluation by NYCERS' consultant psychologist, including results of MMPI testing.

On May 20, 2015, petitioner was interviewed and tested by Dr. Joel Sambursky, Ph.D., on behalf of NYCERS. Dr. Sambursky administered the MMPI-2 test and found that petitioner was suffering from major depressive disorder with psychotic symptoms. However, he noted that there was an exaggeration of symptoms so it was difficult to accurately assess the degree of his psychiatric problems. On June 25, 2015, consulting psychiatrist, Dr. Reich, reviewed petitioner's submissions at the request of NYCERS. Dr. Reich then rendered a report which referenced Dr. Sambursky's findings and discussed Dr. Reich's interview with

petitioner of January 29, 2015. In his report, Dr. Reich concluded that “while Mr. Watkins is depressed because of his job loss his psychological symptoms suggest significant malingering.” Dr. Reich suggested that the reason that petitioner could not function at his job was due to his morbid obesity.

On July 2, 2015, the Medical Board reviewed petitioner’s application but did not require petitioner to be present. On this date the Medical Board issued a report in which it referenced the minutes of its December 4, 2014 and April 16, 2015 meetings regarding plaintiff’s application. In its report the Board references the reports of Drs. Sambursky and Reich which found that petitioner suffered from depression and exhibited psychotic symptoms which were determined to be exaggerated and suggestive of malingering. Thus, the Medical Board concluded that the documentary and clinical evidence failed to substantiate that petitioner was disabled from performing the duties of an EMT and recommended denial of his application.

On September 29, 2015, petitioner submitted five additional medical reports to the Medical Board, including a June 19, 2015 report from the FDNY Bureau of Health Services in which petitioner was found disabled as an EMT due to his spinal issues. He also submitted two reports from Dr. Lattuga in which spinal fusion surgery was recommended. In addition, he submitted reports from independent medical examinations conducted by orthopedic surgeon Dr. William Walsh and psychiatrist Dr. Solomin Miskin. On October 19, 2015, petitioner was terminated from his position as an EMT due to the fact that he had been medically unable to work for more than one year.

On November 12, 2015, the NYCERS Board of Trustees adopted the Medical Board’s recommendation and denied petitioner’s application. On February 12, 2016, petitioner was awarded Social Security disability benefits.

On or about March 9, 2016, petitioner commenced the instant action challenging the resolution adopted by the Board of Trustees which denied his application for performance of duty disability pursuant to RSSL § 607-b. Petitioner contends that the denial of his disability application was arbitrary, capricious, unreasonable and unlawful. He argues that the Medical Board failed to consider objective medical evidence of his physical disability including an MRI which found several bulging discs and herniation in his lower back. He contends that the Medical Board only physically examined him once despite reviewing his application on three separate occasions and failed to report any range of motion testing for the lumbar spine at that examination. Thus, he contends that the Medical Board's finding that his "manifestations and reported symptomatology with respect to the back and musculoskeletal system are not proportional with or explainable by identifiable organic pathology" is not based upon credible evidence. Petitioner further maintains that NYCERS fails to articulate any rational basis for rejecting the evidence he submitted related to his physical and psychological disabilities. In addition, he argues that he submitted new evidence prior to the finalization of this case which the Medical Board failed to address, including the report from the FDNY Bureau of Health which found petitioner to be permanently disabled from his job as an EMT due to his disc bulges and herniation. Finally, petitioner argues that the Medical Board's determination that he was not psychologically disabled from performing his EMT duties is not based upon credible evidence.

#### ***Discussion***

"Retirement and Social Security Law article 15 provides a comprehensive scheme of retirement benefits through which city employees may receive a pension upon retirement from service, after meeting specified age and length-of-service requirements" (*Matter of Roberts v Murphy*, 2 NY3d 641, 644 [2004], citing Retirement and Social Security Law §§ 600-604-h). In particular, "Retirement and Social Security Law § 605 . . . governs

emergency medical technicians' retirement for ordinary disabilities” otherwise known as ODR benefits (*Matter of Aitola v New York City Employees' Retirement Sys.*, 25 AD3d 604, 605 [2006]), while “Retirement and Social Security Law § 607-b . . . governs emergency medical technicians' retirement under a disability received in the line of duty,” namely ADR benefits (*id.*). Section 607-b specifically provides that an EMT who “ becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties shall be paid a performance of duty disability retirement allowance equal to three-quarters of final average salary, subject to section 13-176 of the administrative code of the city of New York . . . ”

This court is limited by CPLR Article 78 to a review of the record before respondents and to the question of whether its determination was arbitrary and capricious (*Matter of Windsor Place Corp. v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 161 AD2d 279, 280 [1990]; *Matter of Mazel Real Estate. v Mirabal*, 138 AD2d 600 [1988]; *Matter of Bambeck v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 129 AD2d 51, 55 [1987], *lv denied* 70 NY2d 615 [1987]; *Villas of Forest Hills v Lumberger*, 128 AD2d 701, 703 [1987]). If a rational basis exists for its determination, the decision of the administrative body must be sustained (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]; *Matter of Tener v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 159 AD2d 270 [1990]). Stated simply, this court cannot substitute its judgment for that of the agency so long as the agency’s decision is rationally based in the record (*Matter of Colton v Berman*, 21 NY2d 322 [1967]).

Thus, in an Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary and capricious (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]; *see also Matter of Canora v Board of Trustees of Police Pension Fund of Police*



*Dept. of City of N.Y., Art. II*, 60 NY2d 347, 351 [1983]; *Matter of Pell*, 34 NY2d at 230-231). If the Medical Board's determination is reasonably based in the record, it will not be considered to lack a rational basis or to be arbitrary or capricious (*Matter of Borenstein*, 88 NY2d at 760). In the context of a Medical Board determination, such finding will be sustained if there is some credible evidence that supports the Medical Board's determination (*id.*; see also *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 8 AD3d 283, 284 [2004]). If the evidence reviewed by the Medical Board is subject to conflicting interpretations, the Medical Board alone has the authority to resolve the conflict (*Matter of Borenstein*, 88 NY2d at 761; *Matter of Mininni v New York City Employees' Retirement Sys.*, 279 AD2d 428, 429 [2001], *lv denied* 96 NY2d 722 [2001]; *Matter of Martucci v New York City Employees' Retirement Sys.*, 248 AD2d 240 [1998]). A court may not substitute its own judgment for that of the Medical Board (*Matter of Borenstein*, 88 NY2d at 761; see also *Matter of Schwarzrock v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 238 AD2d 596, 597 [1997], *lv denied* 91 NY2d 803 [1997]).

"After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service'" (*Borenstein*, 88 NY2d at 760, quoting Administrative Code § 13-168 [a]). "If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was 'a natural and proximate result of an accidental injury received in such city-service'" (*id.*). The "Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence" (*id.* at 761), which in disability cases has been construed to require "some credible evidence" (*id.*). With respect to this standard, the required quantum of

credible evidence has been found lacking when the denial "was premised only on a summary conclusion of no causation and lacked any factual basis" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997], citing *Matter of Brady v City of New York*, 22 NY2d 601, 605-606 [1968]; *Matter of Bennett v Board of Trustees of Police Pension Fund of City of N.Y.*, 20 AD2d 522, 522-523 [1963], *affd* 16 NY2d 562).

Specifically, "determinations of the Medical Board and the Board of Trustees have been remanded where the medical evidence did not sustain the determination, the record did not reveal a rational evaluation of the medical evidence, or where the basis of a determination was not adequately articulated" (*Matter of Quinn v Cassano*, 29 Misc 3d 1203 [A], 2010 NY Slip Op 51678[U] [Sup Ct, Kings County 2013], \* 13-14, citing *Matter of Stack v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 AD3d 562 [2007]; *Matter of Rodriguez v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501 [2004]; *Matter of McAdams v Kelly*, 17 Misc 3d 1112[A], 2007 NY Slip Op 51938[U] [Sup Ct, NY County 2007]; *Matter of Weller v Kelly*, index No. 109357/06, 2010 N Y Misc LEXIS 2768, 2010 NY Slip Op 31581[U] [Sup Ct, NY County 2010]; *Matter of Brady v Board of Trustees NY City Police Pension Fund*, index No. 116273/07, 2008 N Y Misc LEXIS 9426, 2008 NY Slip Op 32529[U] [Sup Ct, NY County 2008]; *see also Matter of Dement v Kelly*, 97 AD3d 223 [2012]).

Conversely, courts have upheld determinations which are supported by a rational, fact-based medical opinion" (*Meyer*, 90 NY2d at 147-148, citing *Matter of Christian v New York City Employees' Retirement Sys.*, 56 NY2d 841, 843 [1982], *affg* 83 AD2d 507 [1981]; *Matter of Simmons v Herkommer*, 98 AD2d 651, 651-652 [1983], *affd* 62 NY2d 711 [1984]; *see also Cammarota v Teachers' Retirement Sys.*, 205 AD2d 412 [1994]). Moreover, "[a]lthough the Board of Trustees is entitled to rely on the report and recommendation of the

Medical Board, the proceedings should disclose the reason for the denial, and the determination must be set forth in such manner as to permit adequate judicial review" (*Matter of Fernandez v Board of Trustees of N.Y. Fire Dept. Pension Fund, Subchapter 2*, 81 AD3d 950, 952 [2011]; *see also Paccio v Kelly*, 97 AD3d 415 [2012]).

While the Medical Board is entitled to resolve conflicts in the medical evidence and rely on its own physical examinations of the applicant (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Matter of Goffred v Kelly*, 13 AD3d 72 [2004]), "fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees before petitioner's claim to accident disability retirement may properly be rejected" (*Matter of Kelly v Board of Trustees of Police Pension Fund, Art. II*, 47 AD2d 892, 893 [1975]), and that the Medical Board clearly state the reasons for its recommendations (*see Matter of Kiess v Kelly*, 75 AD3d 416 [2010]; *Matter of Sailer v McGuire*, 114 AD2d 334, 335 [1985]). Based upon the record, it is unclear whether the Medical Board actually considered all of the medical evidence especially those reports that petitioner submitted after the Medical Board rendered its July 2, 2015 report and recommendation. These reports included a report from the FDNY Bureau of Health Services which found petitioner unfit for full EMS duty due to his multiple level disc bulges, stenosis and disc herniation.

In addition, it appears that the Medical Board performed one physical examination of petitioner but does not document any range of motion testing performed related to his lumbar spine, which his MRI revealed had several disc bulges with disc herniation. However, the Medical Board opines that his symptoms are not proportional with the identifiable organic pathology. Although the Medical Board is entitled to resolve conflicting medical evidence, here the Medical Board fails to explain why it is discounting the clinical evidence submitted from petitioner's doctors regarding the disabling nature of his disc bulges and herniations.

Accordingly, the Medical Board has failed to articulate a credible basis for its determination that petitioner is not physically disabled from performing his job as an EMT.

The court further finds that the Medical Board's determination that petitioner's psychological conditions do not render him disabled from performing his duties as an EMT is not based upon the credible evidence presented to it. The Board's own psychiatrist, Dr. Reich, following his January 29, 2015 examination of petitioner found that, although there was some exaggeration of symptoms, petitioner was disabled from performing his EMT duties on psychological grounds due to his severe rage, hallucinations, suicidal and homicidal threats. This caused the Medical Board to send petitioner for further psychological testing with Dr. Sambursky, who also found that petitioner was depressed and exhibited psychotic symptoms but could not assess the degree of his psychiatric problems due to his exaggeration of symptoms. It appears that this prompted the Medical Board to direct Dr. Reich to review Dr. Sambursky's report, and then without again interviewing or examining petitioner, Dr. Reich determined that petitioner was now neither psychologically nor physically disabled from performing the job of an EMT. Instead, Dr. Reich concluded that "perhaps" the reason petitioner could not perform his duties as an EMT was the fact that he was morbidly obese.

Moreover, in the instant case, the Medical Board indicates that it examined petitioner, however, it fails to articulate in its determination how the petitioner can perform the physical duties required of an emergency medical technician given the MRI findings regarding severe disc bulges and herniations (*see Matter of Guillo v New York City Employees' Retirement Sys.*, 39 Misc 3d 1208[A], 2013 NY Slip Op 50539 [Sup Ct, Kings County 2013], \*5; *Matter of Louis v New York City Employees' Retirement Sys.*, 26 Misc 3d 1236[A], 2010 NY Slip Op 50426[U][Sup Ct, Kings County 2010], \*6; *Matter of Samadjopoulos v New York City Employees' Ret. Sys.*, 19 Misc 3d 1123[A], 2008 NY Slip Op 50828 [Sup Ct, NY County 2008], \*4-5). In addition, missing from the Medical Board's determination is any discussion regarding the fact that petitioner takes numerous medications to address the various

psychological conditions he suffers from, including depression and psychotic symptoms, and the effects these medications and petitioner's psychological conditions could impose upon the safety of the patients utilizing the City's emergency medical services (*see Matter of Quinn* 2010 NY Slip Op 51678[U], \*7-10; *Tesoriero v Board of Trustees*, 17 Misc 3d 497, 503 [Sup Ct, Kings County 2007]; *Matter of Marley v Board of Trustees of New York Fire Dept., Art. 1-B Pension Fund*, 15 Misc 3d 1068 [Sup Ct, Kings County [2007]]).

As such, the court finds that the Medical Board's final determination is not in "such form as to permit adequate judicial review" (*Perkins v Board of Trustees of the New York Fire Department Article 1-B Pension Fund*, 59 AD2d 696, 697 [1997]). An agency's failure "to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review" (*Montauk Improvement, Inc. v Proccacino*, 41 NY2d 913, 914 [1977]; *Matter of Samadjopoulos*, 2008 NY Slip Op 50828[U], \*5).

Further, the court finds that the Medical Board's determination that petitioner could perform all of his duties required of an emergency medical technician is not rational. The Medical Board's own physical examination found that petitioner had significant deficits in the range of motion of his upper back and hip area, although it determined this was not proportional with or explainable by any organic pathology, despite an MRI report which revealed several disc bulges and herniation of his back. The Medical Board failed to explain how he was fully capable of performing emergency medical technician duties which include, at a minimum, lifting patients on stretchers into and out of ambulances (*see Matter of Kiess v Kelly*, 75 AD3d 416, 417 [2010]; *Matter of Rodriguez v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501, 502 [2004]; *Matter of Louis*, 2010 NY Slip Op 50426, \*4-6 ; *Matter of Samadjopoulos*, 2008 NY Slop Op 50828, \*4-5). Further, Dr. Sambursky, who examined petitioner on behalf of NYCERS diagnosed him with major

depressive disorder with psychotic symptoms. The Board fails to address how petitioner can safely perform the duties of an EMT with such conditions.

The Medical Board's statement that "the documentary and clinical evidence fail to substantiate Hakeem A. Watkins is disabled from performing the duties of Emergency Medical technician with the Fire Department of the City of New York" is puzzling in light of the record, which includes the report of Dr. Reich who examined petitioner at NYCERS' behest and initially concluded that petitioner's symptoms of "rage, hallucinations, suicidal and homicidal threats and his deteriorating course suggest significant psychological impairment resulting in disability so that it would be unsafe to return him to work and therefore he is disabled on psychological grounds." The Medical Board fails to address why it rejected this finding, as well as the finding of petitioner's own psychologist, Dr. Levinson, who found him psychologically disabled (*Matter of O'Brien v Kelly*, 126 AD3d 437, 438 [2015]; see *Matter of Baranowski v Kelly*, 95 AD3d 746 [2012]; see also *Matter of Kiess v Kelly*, 75 AD3d 416, 417 [2010]).

As the Medical Board found that petitioner was neither physically nor psychologically disabled from performing the duties of an EMT the Board never reached the issue of causation. However, petitioner and respondent both address this issue in their papers. Petitioner contends that he is disabled from performing his duties as an EMT and that his psychological disability was a result of his on-the-job accident. He contends that he passed a psychiatric screening prior to becoming an EMT which indicates that he did not have a prior psychological condition. Conversely, he points to Dr. Reich's finding that his injury may have reactivated an underlying psychotic condition. Respondent contends that petitioner's alleged psychological disability was not the natural and proximate result of an injury sustained during the course of his duty as an EMT. Respondent contends that any alleged psychiatric problems are remote in time and unrelated to his July 1, 2013 accident.

However the court notes that it is well settled that "when a preexisting dormant disease is aggravated by an accident, thereby causing a disability that did not previously exist, the accident is responsible for the ensuing disability" (*Matter of Covelli v DiNapoli*, 104 AD3d at 1003, quoting *Matter of Britt v DiNapoli*, 91 AD3d 1102, 1103 2012]; accord *Matter of Tobin v Steisel*, 64 NY2d 254, 259 [1985]; *Matter of Andrus v DiNapoli*, 114 AD3d 1078, 1079-1080 [2014]; *Matter of Dement v Kelly*, 97 AD3d at 232; *Matter of Sanchez v New York State & Local Police & Fire Retirement Sys.*, 208 AD2d 1027, 1028 [1994]).

In view of the foregoing, the court finds the determination that petitioner was not disabled is conclusory and not supported by credible evidence. Accordingly, it is


ORDERED, that the petition is granted in that the determination of the Board of Trustees, dated November 13, 2015, is annulled and the matter is remanded for new medical findings and reports by the Medical Board including, but not limited to, a complete physical and psychological examination of petitioner and a new determination by the Board of Trustees regarding disability and causation consistent with this decision and order.

This constitutes the decision and order of the court.

Date: April 6, 2017

ENTER:

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Carl J. Landicino  
J.S.C.