

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 44

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In the Matter of the Application of

THOMAS DeROSA

Petitioner,  
-against-

Index no.: 107957/2006  
Motion seq.: 001  
Motion date: 08/18/06

**DECISION AND ORDER**

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

Respondents.  
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**PRESENT: KAREN S. SMITH, J.S.C.:**

This petition, pursuant to CPLR Article 78, is granted to the extent that the determination of the respondents, denying the petitioner's application to retire from the New York City Police Department on an accident disability pension (and the police commissioner's application for an ordinary disability retirement pension made on behalf of the petitioner<sup>1</sup>), is remanded to the Board of Trustees of the Police Pension Fund for further consideration as set forth herein.

Petitioner (hereafter referred to as "DeRosa") brought this proceeding to review the

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<sup>1</sup> It appears that, whenever a member of the New York City Police Force submits an application for an Accident Disability Retirement pension, the New York City Police Commissioner also, automatically, submits a simultaneous application for an Ordinary Disability Retirement pension on behalf of the applicant.

determination of the Board of Trustees of the New York City Police Pension Fund (hereafter referred to as the "Board"), which denied DeRosa an accident disability retirement pension and an ordinary disability retirement pension. DeRosa seeks an order vacating the determination and directing that the Board award DeRosa an accident disability pension or, in the alternative, directing the Board to hold a factual hearing and allow DeRosa to present evidence at the hearing.

DeRosa is a New York City Police Detective. DeRosa was one of the first responders to the September 11, 2001 World Trade Center Disaster. Thereafter, he spent months working at the Staten Island Landfill operation searching for remains of victims of the disaster. DeRosa contends that he is qualified for and should receive an accident disability retirement pension because he suffers from Post Traumatic Stress Disorder to such a degree that it is unsafe, inappropriate for him to perform his duties and that he is unable to perform his duties as a New York City Police Detective. More specifically, he is susceptible to panic attacks, flashbacks, nightmares, restlessness and irritability. According to DeRosa, his panic attacks and flashbacks can occur both spontaneously and be brought about by associative triggers such as the sound of a low flying airplane, a passing railroad train or numerous other triggers. DeRosa points out that these attacks can be so severe that, during the course of an attack, he may not be cognizant of his current surroundings and this circumstance poses a danger to DeRosa, his fellow police officers and the general public.

Based upon two separate applications by DeRosa for Accident Disability Retirement, DeRosa was twice evaluated by the Medical Board of the Police Pension Fund (hereafter referred to as the "Medical Board"). On each occasion the Medical Board found that DeRosa was not

disabled and recommended that the Board disapprove DeRosa's application. The Board accepted the recommendation of the Medical Board and determined that DeRosa is not disabled. Therefore, the Board concluded that DeRosa is not entitled to either Accident Disability Retirement or Ordinary Disability Retirement but should, instead, continue in active duty in the New York City Police Department.

DeRosa brought the instant proceeding to review the Board's determination, arguing that the determination is arbitrary and capricious, unreasonable and contrary to the competent evidence in the record before the Board. The Respondents argue that the Board is bound by the recommendation of the Medical Board, that DeRosa has not met his burden of establishing that he is disabled, and that there is ample, credible evidence to support the Medical Board's finding that DeRosa is not disabled.

The proper standard of review in a matter such the one currently before the court is; whether the administrative determination is arbitrary and capricious. An administrative determination is considered arbitrary and capricious if it is without sound basis in reason or was generally made without regard to the facts (See *Pell v Board of Education*, 34 NY2d 222 [1974]). The court's review is limited to determining whether the facts presented to the Board can support the conclusion it reached and, if they do, the court is not at liberty to usurp the Board's function by disturbing the Board's determination even if the court disagrees with that determination.

"[B]ecause of the severe limitations on the availability of judicial review of determinations made by bodies such as the pension board ... such bodies must make a careful and painstaking assessment of all the available evidence and should defer final determinations until they are satisfied that all the evidence has been fully and fairly considered" (*Brady v City of New*

*York*, 22 NY2d 601 [1968]). The fact that the Board is obligated to rely upon the recommendations of the Medical Board on issues concerning an applicant's medical disabilities does not relieve the Board of its responsibility to determine that the Medical Board's recommendation is supported by appropriate facts and evidence.

In the instant matter, it cannot be said that the Board's determination was made with due regard for the facts. The Medical Board twice reviewed DeRosa's application. Both of its recommendations to the Board contain substantial information, consisting of reports and testimony from DeRosa's treating physicians as well as the reports of police department evaluators, all of which indicates that DeRosa is psychologically disabled and unfit for police duty. On the other hand, the Medical Board's recommendations contain absolutely no indication that any evidence exists to support the Medical Board's conclusion that DeRosa is not disabled. Without any record of the purportedly contrary evidence allegedly considered by the Medical Board, neither the Board (nor the court) has any basis upon which to conclude that the Medical Board has relied upon facts, evidence and its expertise to resolve a medical controversy as opposed to arbitrarily and capriciously recommending the denial of the applications for disability retirement notwithstanding the overwhelming evidence of DeRosa's psychological disability to perform his duties. Thus, the instant matter must be remanded to the Board with the instruction that it undertake appropriate proceedings to determine if the Medical Board's recommendation is founded upon appropriate facts and evidence. Unless the Medical Board is able to issue a recommendation based upon the existing facts and evidence, further proceedings before the Medical Board may be necessary. In any event, the Board will not be able to make a proper determination on DeRosa's application until the Board has sufficient information before it to

assure itself that the Medical Board has fully and fairly considered all the evidence before it.

DeRosa's request that the court direct a fact finding hearing (at which he may present evidence) must be denied. The nature of the proceedings before the Board is a matter within the Board's discretion based upon the administrative rules governing the Board's activities. None of the parties to the instant proceeding has cited any rules or procedures governing the conduct of the Board's activities or argued that the Board has violated any such rules or procedures. Therefore, it is not appropriate for the court to interfere in the Board's administrative process in the context of the instant petition. Accordingly, it is;

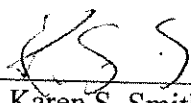
ORDERED that the instant petition is granted to the extent that the determination of the Board denying DeRosa an accident disability retirement pension and an ordinary disability retirement pension is vacated, and it is further;

ORDERED that this matter is remanded to the Board for further proceedings to determine if the Medical Board's recommendation is based upon facts and evidence before it and appropriate action by the Board once it has determined all of the necessary facts.

The foregoing constitutes the decision, order and judgment of this court.

Dated: October 17, 2006.

ENTER:

  
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Hon. Karen S. Smith, J.S.C.

**MAILED JUDGMENT**  
This judgment must be filed with the County Clerk and notice of filing must be given to the parties (see Rule 41B).  
To obtain entry of this judgment, you must appear in person at the County Clerk's Office (see Rule 41B).