

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

Index No. : 11216/12
Motion Calendar No.
Motion Sequence No.

In the matter of the Application of

RAUL MUNIZ,

Petitioner(s),

For a Judgment pursuant to Article 78 of the Civil Practice
Law and Rules

-against-

SALVATORE J. CASSANO, as the Fire Commissioner of
the City of New York and as Chairman of the Board of
Trustees of the Fire Pension Fund and THE BOARD OF
TRUSTEES of the New York City Fire Pension Fund,
Article 1-B,

Respondent(s).

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Acting Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to :
petitioner's petition for judgment pursuant to Article 78 of the CPLR:

Papers	Numbered
Notice of Motion and Affidavits Annexed.(Petition.).....	<u>1-2</u>
Order to Show cause and Affidavits Annexed.....	<u> </u>
Answering Affidavits.....(Memorandum - Pet. and Resp).....	<u>3-4</u>
Replying Affidavits.....Pet. Reply Memorandum)..	<u>5</u>
Exhibits.....	<u> </u>
Other: _____	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Decision:

In this Article 78 proceeding, initiated by the petition filed on behalf of the petitioner, Raul Muniz ("Lt. Muniz") argues that the decision reached by the respondents denying Lt. Muniz an accident disability retirement allowance was arbitrary, capricious, unreasonable and unlawful.

The respondents, The Board of Trustees of the Fire Pension Fund (the "Trustees") and Salvatore J. Cassano, as the Fire Commissioner and as the Chairman of the Board of Trustees of the Fire Pension Fund ("Commissioner Cassano"), by letter dated February 23, 2012 had denied the application of petitioner Lt. Muniz for an accident disability retirement ("ADR") pursuant to sec. 13-353 and 13-354 of the Administrative Code of the City of New York. This Article 78 petition was filed on or about May 30, 2012.

Background

Petitioner Lt. Muniz is a retired Lieutenant of the New York City Fire Department. Lt. Muniz retired on or about March 28, 2004, after 23 years of employment as a New York City Firefighter.

Lt. Muniz allegedly suffered injuries to his back and to his shoulder during the course of his employment. Lt. Muniz also served in the rescue, recovery and cleanup operations at the World Trade Center site between September 11, 2001 and December 2001.

On February 22, 2004, Lt. Muniz filed for an ADR pension with the Board of Trustees alleging that he was disabled due to : 1) issues with his lungs; 2) cancer; 3) injury to his "right rotator cuff (shoulder injury)"; and 4) injury to his back.

On or about February 5, 2007, Lt. Muniz applied for an ADR pursuant to the WTC presumption law, alleging a disability due to asthma and fibrosis in his lungs. Prior to filing the ADR application, Lt. Muniz had filed a notice of participation in the WTC rescue, recovery or clean-up operations which is a condition for an ADR related to the WTC cleanup and rescue.

As required by New York State's two tier system for firefighter disability pensions, Lt. Muniz was first evaluated by the Medical Board Committee, comprised of FDNY physicians ("BHS Committee"). On or about February 20, 2004, the BHS diagnosed petitioner with clinical asthma; airway hyperactivity which was exacerbated by exposure to September 11 cleanup and rescue; and was found to be disabled and recommended for light duty. In a letter dated March 1, 2004, the BHS by the Chief Medical Officer Kerry J. Kelly, M.D. found that Lt. Muniz suffered "persistent clinical asthma with wheezing, chest tightness and cough, as well as documented to severe PFT reductions with bronchodilator response" and that Lt. Muniz was unfit for duty (see Letter of March 1, 2004 annexed to the Petition as Ex. "B"). The same medical committee later

found Lt. Muniz to be suffering from impingement syndrom and tendinopathy of the right shoulder and lumbar and lower thoracic disc disease with low back pain (see BHS letter dated May 17, 2004 annexed to the Petition as Ex. "C").

Following the BHS findings, the record indicates that the Fire Commissioner filed two applications for disability retirement on petitioner's behalf which annexed the findings of the Medical Board (see Exhibits "H" and "I" annexed to the Respondent's Answer).

The ADR application must then be reviewed by the FDPF Medical Board (the "1-B Medical Board") which is comprised of doctors who are not employed by the NY Fire Department and are specialists in their fields of practice. Lt. Muniz underwent a series of reviews by the 1-B Medical Board beginning in January 12, 2006. The record indicates that the 1-B Medical Board reviewed the medical reports assembled by the BHS Medical Committee. Lt. Muniz was directed to undergo pulmonary testing for his lungs at New York University Rusk medical facility. A second review by the 1-B Medical Board took place on June 22, 2006 and considered the pulmonary results. The Board deferred Lt. Muniz' case until further information could be obtained by the pulmonary function lab. A further deferral of the application was imposed by the 1-B Medical Board to allow for further examination by neurosurgical consultant, Dr. Richard Raynor, to address issues with Lt. Muniz' spine.

Dr. Raynor's exam resulted in a determination on or about February 6, 2007, that Lt. Muniz had a normal neurological examination and that "he was fit to perform full fire duty" (Report of Dr. Raynor annexed as Ex. "BB" to the Respondent's Answer).

Following the completion of the medical exams, the disability application would be reviewed by the 1-B Medical Board. The respondents claim that an attempt was made to notify Lt. Muniz of the review by the 1-B Medical Board by letter dated December 27, 2011. The review was scheduled to take place on January 24, 25, 26 and 27, 2012 and that Lt. Muniz was required to appear for medical examination. The Court notes that the letter states: "You are required to appear for medical examination by the Subchapter 2 Medical Board(s). Please bring a photo ID and all films with you" (see Ex. "CC" annexed to Respondent's Answer).

There is no dispute that the notices sent to Lt. Muniz were returned to the sender (respondents) and marked "Return to Sender, Not Deliverable as Addressed, Unable to Forward". Petitioner asserts that respondents were aware of Lt. Muniz's proper Portales, New Mexico address from his 2007 retirement application (see Ex. "AA" annexed to Respondent's Answer).

It appears from the record that petitioner's ADR application was put on hold while an investigation was conducted by the New York City Department of Investigation ("DOI"). Subsequent to Lt. Muniz's retirement, he became employed as a fire chief of the Portales, New Mexico Fire Department. The hold effectively suspended the review of petitioner's ADR application for approximately five (5) years.

The result of the DOI investigation is that no action was taken against Lt. Muniz and the nature of his employment in New Mexico was that of an administrative position, not involving physical fire fighting.

Once the hold was lifted, the ADR application process was to be considered by the 1-B Medical Board.

The determinations of the 1-B Medical Board were rendered in January, 2012 by specific letters which addressed each medical condition of Lt. Muniz separately. In letters dated January 24, 2012 (salivary gland); January 25, 2012 (right shoulder); January 26, 2012 (pulmonary function); and January 27, 2012 (lumbar and lower thoracic disease); the 1-B Medical Board addressed the medical complaints of Lt. Muniz and, based upon prior medical examinations and records (from 2004-2007) the 1-B Medical Board found Lt. Muniz was not permanently disabled and recommended that his ADR application be denied (see Ex. "J" annexed to the Petition).

Petitioner's attorney had attempted to hold a determination (of the Board of Trustees) in abeyance by sending a letter to the Board of Trustees on February 16, 2012 to allow for the participation of Lt. Muniz in this process and to introduce more recent medical evidence (see Letter of Jeffrey L. Goldberg dated February 16, 2012 annexed as Ex. "K" to the Petition).

On February 23, 2012 the Board of Trustees proceeded to adopt the findings of the 1-B Medical Board and declared Lt. Muniz eligible for full duty, and thereby rejected his ADR application (see Ex. "L" annexed to the Petition). The consequence of the decision is that Lt. Muniz would not receive the ADR pension which is a pension in an annual amount of 3/4 of the employee's last year's salary. The Article 78 Petition was filed on or about May 14, 2012.

Issues Presented

The overall issue in this proceeding is whether the Fire Department Pension Fund Medical Board (the "1-B Medical Board") properly reached a decision denying Lt. Muniz's accident disability retirement benefits ("ADR").

The petitioner alleges that the decision reached was invalid because petitioner was unreasonably precluded from offering medical evidence and a chance to appear for a medical examination at the 1-B Medical Board evaluation conducted in January, 2012.

The respondents argue that a physical examination of the petitioner is not required and that the determination reached by the Board of Trustees may not be disturbed provided it was supported by some credible evidence.

Discussion

The starting point of petitioner's objection is that the notice sent to petitioner was patently

defective, in that the address in New Mexico to which the notice was sent, was not petitioner's address. Respondents should have been aware of petitioner's address because the address was written on the petitioner's retirement application and, furthermore, petitioner was being investigated by the DOI who, presumably had the correct address for the petitioner.

The fact that petitioner was effectively denied a chance to appear for an examination is claimed to violate section 13-253 of the Administrative Code. The applicable Code section states that determinations are to be "based on a Medical Evaluation of a member in city service". The 1-B Medical Board conducted no medical examinations of petitioner and the Board itself was composed of an entirely different set of medical professionals who had examined Lt. Muniz years before. It is argued by petitioner that the determinations reached by the 1-B Medical Board, years after the medical evidence was obtained, were equivocal and uncertain. For example, the letter rejecting Lt. Muniz's application for ADR based on pulmonary function disability state as follows:

"... At least two pulmonary function studies show that Lt. Muniz had only difficulty performing the testing correctly during the pre-bronchodilator portion resulting in submaximal results. His post bronchodilator portion results were normal and with correct technique. They most likely represent his true pulmonary function." (Ex. "J" annexed to the Petition).

The use of the phrase "most likely represent" as well as other speculative terms contained in the 1-B Medical Board determinations are, in themselves equivocal and self-serving according to the petitioner. The petitioner also notes the earlier determinations reached by the BHS which found Lt. Muniz unfit for duty "due to asthma with wheezing and chest tightness and cough as well as severe PFT reductions with bronchiodilator response" (see Report of Chief Medical Examiner Ex. "A" annexed to the Petitioner) is directly opposite to the conclusions reached by the 1-B Medical Board. The petitioner makes a strong argument that the BHS conclusion appears to be objective clinical evidence of disability and that the 1-B Medical Board can not reach an opposite conclusion without conducting a physical examination of the petitioner.

Respondents argue that the reviewing court, in this Article 78 proceeding, may not disturb the Board of Trustees' conclusion, if the conclusion is supported by "any credible evidence of lack of causation before the Board of Trustees" (see Meyer v. Bd of TRS. of the New York City Fire Dept., 90 NY2d 139, 145 (1997); see also Canfora v. Board of Trustees, 90 AD2d 751 (1st Dept. 1982), aff'd 60 NY2d 351 (1983)).

Citing the same standard of "some credible evidence" set forth in Meyer, the petitioner challenges whether the 1-B Medical Board is in a position to render a decision based on credible evidence. The dated medical reports and examinations contained old information and it would be imperative to conduct a later medical examination of the petitioner in this case. As a result, the conclusion of the 1-B Medical Board only rises to the level of an "unsupported suspicion" (Meyer v. Board of TRS of the New York City Fire Dept., 90 NY2d at 147).

Conclusion

This Court is compelled to reject the conclusion that Lt. Muniz is fit for full duty as a New York City Firefighter. Taking the evidence as a whole, Lt. Muniz is clearly prejudiced by the sequence of events involving years of delay in reaching a determination of his ADR application. The initial conclusion of the BHS is unequivocal that his asthma and pulmonary function prevent him from full duty. There was delay in obtaining more tests from the NYU Rusk Center which turned into more delay to the application when the DOI investigated the circumstances of Lt. Muniz's employment in New Mexico. Such delay is assuredly unintentional and without deliberate prejudice to Lt. Muniz, however, it stretched for several years, and, when the application was reconsidered, the petitioner was unable to offer updated medical evidence or submit to a physical examination in January of 2012.

By the terms of the notice (that was never received by the petitioner) the clear understanding is that the subject applicant is expected to appear for an examination and have an opportunity to submit evidence. This was not available to Lt. Muniz.

As a whole, the facts underlying this particular case distinguish the case from others in which the Board of Trustees were permitted to rely on "some credible evidence" to support their decision. Here, the petitioner is being denied a fair opportunity to present evidence and the adverse conclusion appears to be an unsound decision based upon speculative reasoning.

Accordingly, the petitioner's request for a judgment pursuant to Article 78 of the CPLR is granted and the denial of the ADR application is found to be arbitrary and capricious.

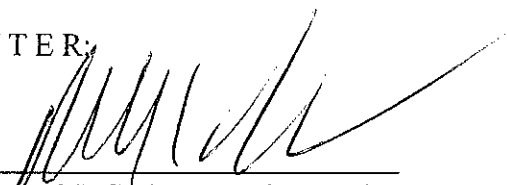
IT IS ORDERED that the respondents are directed to remand the petitioner's case for review by allowing participation of the petitioner in the 1-B Medical Board evaluation.

IT IS FURTHER ORDERED that the respondents are directed to make available to petitioner all documentation submitted to the FPF Board of Trustees in connection with petitioner's ADR application, including all minutes of Board Meetings, records, reports and notes in the possession of respondents which are relevant to the petitioner's ADR application.

This shall constitute the decision and order of this Court.

Dated: April 9, 2013

ENTER:

A handwritten signature in black ink, appearing to read 'Bernard J. Graham', written over a horizontal line.

Bernard J. Graham, Acting Justice
Supreme Court, Kings County