

At an IAS Term, Part 88 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 26th day of June, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA

Justice.

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IN THE MATTER OF THE APPLICATION OF
HAKEEM WATKINS,

Petitioner,

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

- against -

Index No. 474/19

THE NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM,

Respondent.

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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 _____	<u>1-2</u>
Opposing Affidavits (Affirmations) _____	<u>3</u>
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memoranda of Law</u> _____	<u>4-6</u>

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.

Petitioner also seeks an order, pursuant to CPLR § 2307, directing the respondent herein to serve and file upon the date hereof:

a) all reports, recommendations, certificates and all other documents submitted to NYCERS in connection with petitioner's disability retirement application;

b) copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon the petitioner's retirement application; and

c) copies of any and all medical records, reports or notes relating to petitioner which are on file with NYCERS.

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 anything greater 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 petitioner'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 had been 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 so that it would be unsafe for him to return to his work as an EMT and that he was disabled on psychological grounds. He 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 Lattuga 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 symptomology with respect to the back and musculoskeletal system were 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., a psychiatrist, 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."¹

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 discusses 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

¹Malingering is defined as "a willful and deliberate feigning of symptoms of a disease or injury to gain some consciously desired end" (Mosby's Medical Dictionary, 1086, 9th ed 2013).

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. Solomon 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 or about March 9, 2016, petitioner commenced an action challenging the resolution adopted by the Board of Trustees which denied his application for performance of duty disability pursuant to RSSL § 607-b. By order dated April 6, 2017, Honorable Carl J. Landicino granted the petition and remanded the matter back to NYCERS. The court found that the Medical Board had failed to articulate a reasonable basis for its determination that petitioner was neither physically nor psychologically disabled from performing his job as an EMT.

In addition, on January 12, 2016, petitioner filed a second ADR application, pursuant to NYCERS' policy of allowing members to re-file for ADR within 60 days of a Board of Trustees' denial. Respondent referred petitioner to Dr. Kecia Ann Blissett for an independent psychiatric evaluation in relation to this application. Petitioner was interviewed and examined by Dr. Blissett on November 4, 2016, and she diagnosed petitioner with major depressive disorder and unspecified personality disorder. She noted that his "psychosis and reported psychological distressing symptoms are at this time at best vague and at times inconsistent . . ." Thus, she found that there was not sufficient evidence to substantiate that he was permanently psychiatrically disabled and that there was a reasonable chance of recovery. Dr. Blissett's report indicates that she reviewed a plethora of documents and reports from petitioner's other treating medical doctors and psychiatrists.

On January 24, 2017, petitioner appeared before the Medical Board in relation to his second ADR application. The Medical Board's report from this date indicates that it reviewed multiple medical reports from 2014 through 2016, including reports from several psychiatrists. Petitioner was interviewed and examined and the Medical Board concluded that it "could not determine the degree of impairment, if any, as the applicant could not be adequately examined, exhibiting pain out of proportion that would be expected from his documentary evidence." The Medical Board deferred its recommendation pending an examination by a NYCERS' consulting psychiatrist.

On April 17, 2017, the Medical Board again interviewed and examined petitioner in relation to his second ADR application. The Medical Board concluded that its examination revealed symptom magnification based upon his markedly strong reactions to even minor palpation or range of motion testing. The Medical Board further noted that "the gross magnification of physical and psychiatric symptomology in the setting of secondary gain (an EMT disability pension) makes the determination of the degree of psychiatric impairment questionable." The Medical Board recommended that his ADR application be denied finding that the documentary and clinical evidence failed to substantiate that he was disabled from performing the duties of an EMT.

At its May 11, 2017 meeting, the Board of Trustees remanded petitioner's first ADR application to the Medical Board based upon the directive in Justice Landicino's April 6, 2017 decision. It appears that the Medical Board referred petitioner for another psychological examination. He was examined by Dr. James Lynch, a psychiatrist, on November 1, 2017. Dr. Lynch found that petitioner is likely permanently disabled and unable to return to work as an EMT. However, Dr. Lynch stated that he could not say with any certainty what petitioner's psychiatric disability is, opining that it could be psychotic disorder,

schizoaffective disorder or major depression with psychotic features. He also stated that he also considered the diagnosis of malingering and that petitioner may be over emphasizing his symptoms.

On December 11, 2017, the Medical Board again considered petitioner's second ADR application, as well as his 2014 application, pursuant to judicial remand. With regard to the remand, the Medical Board states that it fulfilled the requirement to perform an additional orthopedic examination documenting range of motion testing. In this regard, the Medical Board points to its examination of petitioner on April 17, 2017, and notes that active range of motion is dependent on patient effort. The April 17, 2017 Medical Board report indicates that petitioner refused to perform certain maneuvers such as squatting and walking on his heels and toes. The Medical Board noted that he grimaced and groaned when he had to remove his shirt for the exam and complained that it was stinging when the doctor placed her fingers on his neck and lumbar areas to examine him. The Board further noted that petitioner had been sitting in a chair with his back leaning against the chair and his head against the wall during his interview and did not express any pain associated with this position. The Board points out that it made attempts at active range of motion testing on April 16, 2015 and on January 24, 2017 as well. The Medical Board's report states that "there were Waddell signs, which can be present with malingering, including pain response far out of proportion to objective findings (radiologic), substitute motion (performing the same range of motion testing which should elicit the same response, but in a different format) and the abnormal axial loading response, it is the opinion of the Medical Board that this does not represent a true picture of the applicant's range of motion."

The Medical Board further noted that "abnormal MRIs, especially disc bulges of the cervical and lumbar spine, are found frequently in asymptomatic individuals . . . [thus] in the

applicant, who at best has gross symptom magnification, these radiologic findings, without evidence of comprise of the neural elements do not correlate with nor in and of themselves substantiate his claim of inability to perform the job functions of an EMT . . . , including his duties, such as lifting stretchers and carrying heavy equipment.” In support of this contention, the Medical Board references two medical journal articles. The Medical Board also points to a report from Dr. Mikelis, an orthopedist that examined petitioner on April 11, 2017, a week before the Board’s own examination on April 17, 2017. In this regard, the Medical Board notes that petitioner reported the same level of pain for over a year and a half without change, despite a normal lumbar epidurogram showing no nerve root compression. The Board also notes that there is mention of L4-L5 instability but that there is no reference to the date of an x-ray or report related thereto. Finally, the Medical Board notes that petitioner appears to have tolerated that exam without mention of exhibiting the behavior he exhibited during the April 17, 2017 Medical Board examination.

Next, the Medical Board addressed petitioner’s claimed psychiatric disability, including whether there had been an aggravation or reactivation of a dormant condition. In this regard, the Board noted that petitioner had numerous evaluations by psychiatrists and psychologists and received a variety of psychiatric diagnoses. However, the Board contends that it had difficulty determining the degree of psychiatric impairment given the noted degree of symptom magnification and concerns raised regarding malingering. The Board points to Dr. Lynch’s determination that petitioner may be suffering from a version of schizophrenia and would be unable to continue his work as an EMT, but that there was no correlation between this diagnosis and his work place spine injury on July 1, 2013, and that no diagnoses offered are compatible with low back injury as a causation for psychiatric disability. In this regard, the Medical Board notes that there is no support in the literature for a claim that

schizophrenia or bipolar illness can be caused by, or permanently aggravated by, the lifting of a stretcher, referencing the AMA Guidelines to the Evaluation of Disease and Injury Causation. The Medical Board states that even if it were to find that petitioner was disabled as a result of a psychological illness, there is no causal nexus between his disability and the incident claimed. Thus, the Medical Board found that the documentary and clinical evidence failed to substantiate that petitioner was physically or psychologically disabled from performing the duties of an EMT and reaffirmed its recommendation to deny petitioner's ADR application.

On August 16, 2018, the Medical Board sent an addendum to the Board of Trustees in which it states that it was asked to reconsider petitioner's application based on an updated job description for Emergency Medical Specialist. The Medical Board once again 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 ADR application. On October 11, 2018, the Board of Trustees adopted the Medical Board's recommendation denying petitioner's September 18, 2014 and January 11, 2016 ADR applications. By notice of petition dated February 4, 2019, and amended verified petition dated October 7, 2019, petitioner commenced the instant action challenging the resolution adopted by the Board of Trustees which denied his applications for performance of duty disability pursuant to RSSL § 607-b.

Petitioner and Respondent's Contentions

Petitioner contends that the denial of his disability application was arbitrary, capricious, unreasonable and unlawful. Specifically, he argues that the Medical Board's psychological disability finding is contrary to the admonitions of the prior judicial remand and is not based on any credible evidence. In this regard he notes that respondent sent him

for two additional psychological consultations. He argues that Dr. Blissett issued a legally deficient finding as she opined that although he suffered from major depressive disorder and unspecified personality disorder, there was not sufficient evidence to indicate that he was permanently disabled and that he had a reasonable chance of recovery. He argues that this is conjecture and does not constitute credible evidence. Next, petitioner points out that Dr. Lynch found him to be permanently psychiatrically disabled with a version of schizophrenia. Thus, petitioner maintains that the Board's determination that he is psychologically fit is completely arbitrary, capricious and contrary to the evidence. Moreover, petitioner argues that the Board's psychological causation finding is contrary to the admonitions in Justice Landicino's remand and is not based on any credible evidence. Specifically, petitioner contends that the Medical Board failed to address whether there was aggravation of a preexisting condition or whether a latent condition may have developed as a result of his on the job back injury.

Finally, petitioner maintains that the Medical Board's physical disability finding is also contrary to the admonitions of the remand and is not based on credible evidence. In particular, petitioner asserts that the Medical Board failed to utilize a goniometer or any other medical device to perform its range of motion testing. Moreover, petitioner contends that respondent is accusing him of faking the severity of his injuries and is now contending that he exhibited Waddell's signs² throughout the course of his Medical Board examinations, but notes that this is mentioned for the first time in the Board's December 11, 2017 report.

² Waddell's signs were developed to identify psychogenic, or non-organic, manifestations of pain in patients that may have heightened emotional effects on their conditions. In order for these signs to be significantly correlated with disability, three of the five signs should be present...They have been also associated with detecting malingering in patients with complaints of lower back pain. (https://www.physio-pedia.com/Waddells_Sign).

In further support of his position, petitioner points to the court's holding in *Matter of Lidakis v New York City Empls. Retirement Sys.* (2016 NY Slip Op 32760(U) [Sup Ct, Kings County 2016]), in which the Medical Board initially found that the petitioner Lidakis, an EMT, was disabled due to a line of duty knee injury and that his application for ADR should be granted, with the stipulation that petitioner be reexamined in one year. The Board of Trustees approved the ADR application. Mr. Lidakis continued to be treated and his physician determined that he remained disabled and could not drive or partake in heavy lifting or any strenuous activity. After a year, the Medical Board reexamined Mr. Lidakis and determined that he was no longer disabled and recommended that his retirement benefits be discontinued and that he be rehired. The Board of Trustees agreed. Mr. Lidakis challenged the determination. With the safety of the public in mind and in light of the fact that Mr. Lidakis could not operate a vehicle in its standard condition and regularly took opioids for pain management, Justice Spodek held that the court could not allow petitioner to return to duty as an EMT. Similarly, petitioner herein urges this court to exercise its discretion in the public interest.

In opposition, respondent argues that its determination denying petitioner's application for disability retirement benefits is supported by credible evidence and is therefore neither arbitrary nor capricious. In this regard, respondent contends that petitioner's ADR applications were carefully reviewed and considered on six separate occasions. With regard to his alleged psychological disability, respondent points out that petitioner was interviewed and examined on multiple occasions including by psychiatrist/psychologists Drs. Reich, Sambursky and Lynch. Respondent argues that despite petitioner's claim that he suffers from bipolar disorder or schizophrenia, the medical records from Drs. Sambursky and Reich indicate he is exaggerating his symptoms and that this symptom exaggeration makes it

difficult to accurately assess the degree of his psychiatric problems and thus petitioner fails to satisfy his burden of demonstrating that he is disabled from performing the duties of an EMT for a year or longer. In addition, respondent points to Dr. Lynch's determination that he would also consider the diagnosis of malingering. With respect to causation, respondent points to Dr. Lynch's determination that there was no correlation between petitioner's psychological disability and the workplace spine injury he incurred on July 1, 2013. Moreover, respondent points to the Medical Board's reference to the AMA Guidelines to the Evaluation of Disease and Injury Causation in support of its contention that there is no causative relationship between petitioner's back injury and any psychological conditions he may exhibit.

Finally respondent argues that the credible medical evidence establishes that petitioner is not physically disabled in his back and neck. In support of this contention, respondent points to the Medical Board's own examinations of petitioner and a review of the extensive medical records. Respondent points out that petitioner consistently displayed symptom magnification and note that his pain level has remained unchanged despite a history of a normal lumbar epidurogram that showed no nerve root compression. In addition, respondent notes that, upon examination, his deep tendon reflexes were normal and that when his knee and hip flexion were tested in both the seated and supine positions, there were vast differences in range of motion despite the fact that there is no difference in performing these motions in either the seated or supine positions. The Medical Board further asserts that the fact that MRIs show some abnormalities in regard to disc bulges, without evidence of compromise of neural elements, there is no substantiation of his claimed inability to perform the functions of an EMT.

Respondent contends that the facts of the *Lidakis* case are distinguishable, pointing out that the Medical Board had initially found Mr. Lidakis to be physically disabled and that the court overturned its reversal because he could not fully perform EMT duties. Conversely, respondent contends that the petitioner herein has not been found to be either physically or psychologically disabled due to a line of duty injury but, rather, has been found to have exaggerated his symptoms. Respondent argues that the fact that some of petitioner's doctors may disagree with the Medical Board's findings, such dispute is not determinative, noting that a conflict in medical opinion remains solely within the Medical Board's province to resolve. Finally, respondent contends that as there has been no disability finding here, the issue of causation was never reached and never officially considered by the Medical Board, and, thus, any argument that petitioner's asserts regarding causation should not be considered by the court.

In reply, petitioner contends that respondent incorrectly asserts that his case is distinguishable from *Lidakis* because there has been no disability finding here. Petitioner contends that this is false because Dr. Lynch found him disabled but the Medical Board rejected this determination. In addition, petitioner argues respondent's contention that causation need not be addressed fails because of Dr. Lynch's disability determination.

The court notes that Medical Board, in its April 17, 2017 report, refers to an incident in which a Medical Board member observed petitioner as he walked on the public sidewalk after his examination had been completed and contended that he observed petitioner ambulating normally. In addition, petitioner refers to testimony that Dr. Bottner, a Medical Board member, gave before the Board of Trustees regarding the psychological disability of a petitioner, in a separate and unrelated disability pension application, arguing that it is relevant to the case of petitioner herein. The court finds no merit to either of these assertions

and that neither constitutes credible evidence to be considered by this court with regard to petitioner's applications (*see Matter of Quinn v Cassano*, 2010 NY Slip Op 51678[U] [noting that "it is well settled that judicial review of an administrative determination is limited to the record adduced before the agency"]; *Wolyniec v Board of Trustees of NY City Fire Dept, Article 1-B Pension Fund*, 232 AD2d 495, 496 [1996]; *Matter of Montalbano v Silva*, 204 AD2d 457, 458 [1994]; *Matter of Plaza Realty Investors v New York City Conciliation & Appeals Bd.*, 110 AD2d 704 [1985]).

Petitioner also notes that he is receiving Social Security disability as a result of his line of duty injuries. The court notes however that contrary to the petitioner's contention, the finding by the Social Security Administration that he is disabled is not binding on the Medical Board (*see Matter of Borenstein*, 88 NY2d at 759; *Matter of Drummond v New York City Employees' Retirement Sys.*, 98 AD3d 1116, 1118 [2012]; *Matter of Barden v New York City Employees' Retirement Sys.*, 291 AD2d 215, 216 [2002]; *Matter of Kalachman v Board of Trustees of NY City Fire Dept., Art. 1-B Pension Fund*, 224 AD2d 619, 620 [1996]).

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 respondent and to the question of whether its determination was arbitrary and capricious (*see 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 (*see 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 (*see Matter of Colton v Berman*, 21 NY2d 322 [1967]).

It is the responsibility of the Medical Board to determine whether a member applying for disability retirement benefits is disabled, and this determination is binding on the Board of Trustees (*see Matter of Russell v New York City Employees' Retirement Sys.*, 155 AD3d 1046, 1046 [2017]; *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]; *Matter of Drummond v New York City Employees' Retirement Sys.*, 98 AD3d 1116, 1117 [2012]). 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 (see *Matter of Borenstein*, 88 NY2d at 760; 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). 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 (see *Matter of Borenstein*, 88 NY2d at 760; see also *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 8 AD3d 283, 284 [2004]). It is "solely within the province of the Medical Board to resolve any conflicts in the medical evidence and medical reports presented to it" (*Matter of Schlesinger v New York City Employees' Retirement Sys.*, 101 AD3d 736, 737 [2012]; see *Matter of Borenstein*, 88 NY2d at 761; *Matter of Deering v Scopetta*, 71 AD3d 1141, 1141[2010]; *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 8 AD3d 283, 284 [2004]). A court may not substitute its own judgment for that of the Medical Board (see *Matter of Borenstein*, 88 NY2d at 761; see also *Matter of Campbell v. Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 47 AD3d 926, 928 [2008]; *Matter of Schwarzrock v Board of Trustees of N.Y. City Fire Dept., Art. I-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). “‘Substantial evidence’ in this context means ‘some credible evidence’” (*Matter of Gibbs v New York City Employees' Retirement Sys.*, 161 AD3d 980, 981 [2018] quoting *Matter of Borenstein*, 88 NY2d at 760; see *Matter of Hernandez v New York City Employees' Retirement Sys.*, 148 AD3d 706, 707 [2017]; *Matter of Jones v New York City Employees' Retirement Sys.*, 138 AD3d 852, 852 [2016]).

Physical Disability

Here, with regard to that portion of the determination that petitioner is not physically disabled from performing the work of an EMT, the court finds that the Medical Board’s determination was supported by credible evidence including the Medical Board’s own interviews and examinations of petitioner, as well as the medical records from petitioner’s treating physicians and those that conducted independent medical examinations (*see Matter of Gibbs v New York City Employees' Retirement Sys.*, 161 AD3d 980, 981 [2018]; *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, [1997]; *Matter of Borenstein.*, 88 NY2d at 761; *Matter of Hernandez v New York City Employees' Retirement Sys.*, 148 AD3d 706, [2017]; *Matter of Jones v New York City Employees' Retirement Sys.*, 138 AD3d at 852; *Matter of Schlesinger v New York City Employees' Retirement Sys.*, 101 AD3d 736, 737[2012]). Here, the Medical Board determined that there was no evidence of neural compromise, and thus any radiologic findings of disc bulges did not substantiate petitioner’s claim of inability to perform the duties of an EMT. In addition, the Medical Board determined that the symptoms and pain responses exhibited by petitioner were disproportionate to the objective medical findings. It is solely within the province of the Medical Board to resolve the conflicts between the determinations of petitioner’s treating physicians and the findings of the physicians retained to conduct independent medical examinations, as well as the examinations conducted by the

Medical Board. Accordingly, the court finds that this determination is rationally based and neither arbitrary nor capricious.

Psychological Disability

As noted above, 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]).

Here, the court 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 rational inasmuch as it not based upon the credible evidence presented to it. In this regard, the court notes that the record reveals that every single psychiatrist/psychologist that has examined petitioner during this process has diagnosed him with significant mental health issues ranging from depression, to psychosis to schizophrenia. Even the doctors that contend he could be a malingerer opine that he does indeed suffer from serious mental health impairment. Specifically, on or about November 24, 2014, psychiatrist, Dr. Jonathan Levinson examined petitioner and diagnosed him as suffering from major depressive disorder with psychotic features and panic disorder with agoraphobia. Petitioner was hospitalized following his first Medical Board appearance in December 2014 after expressing suicidal ideation. On January 29, 2015, Dr. Reich, a psychiatrist diagnosed petitioner with

schizoaffective disorder with psychosis with both manic and depressive features and antisocial personality disorder with paranoid aggressive disorder. Dr. Reich further opined that petitioner's "history suggests an early onset of emotional illness and his problems therefore was not caused by his injury but it might have reactivated an underlying psychotic process." Petitioner was examined by Dr. Daniel Kuhn on February 2, 2015 and March 2, 2015 and various tests were administered. Dr. Kuhn diagnosed petitioner as suffering from major depressive disorder with psychotic symptoms including auditory hallucinations. On May 20, 2015, Dr. Joel Sambursky, a psychologist examined petitioner and administered MMPI-2 testing at the request of respondent to determine the extent of his psychological pathology and to determine if there was symptom exaggeration. However, the test results were rendered invalid due to petitioner's exaggerated responses. Notwithstanding this, Dr. Sambursky diagnosed petitioner as suffering from major depressive disorder with psychotic symptoms.

Petitioner was again seen by Dr. Reich on June 25, 2015, who then opined that, despite his concern that petitioner was exhibiting signs of malingering, he is significantly depressed. A report from psychiatrist, Dr. Solomon Miskin from January 11, 2016, indicates that he diagnosed petitioner with major depressive disorder with psychotic features. On November 4, 2016, Dr. Kecia-Ann Blissett examined petitioner and rendered a diagnosis of major depressive disorder with unspecified personality disorder. Finally, on October 31, 2017, Dr. Lynch performed a comprehensive psychiatric assessment of petitioner and found that, although he could not render a clear diagnosis, petitioner could be afflicted with psychotic disorder, schizoaffective disorder or major depression with psychotic features, although there is the possibility of malingering. Dr. Lynch further opined that it is likely that petitioner had a risk of developing psychotic symptoms. Finally he determined that given

petitioner's presentation, poor response to treatment and prolonged use of anti-psychotics that he would never be able to resume working as an EMT.

The court notes that it is significant that the Medical Board, a three-person panel of medical professionals, refused to interview/examine petitioner without either a security guard or person from the law firm representing petitioner present. Based upon the foregoing, the court finds that the determination that petitioner is not psychologically disabled from performing the duties of an EMT is simply not supported by credible evidence in the record and completely disregards the determination made by each and every mental health professional that examined petitioner over a three year period. Although the Medical Board has determined that petitioner exhibits signs of malingering and notes that this is supported by several of the doctors that examined him, the Medical Board fails to address the fact all of those mental health professionals determined that petitioner did in fact suffer from mental illness but were merely concerned about the degree of it based upon their concerns of symptom exaggeration (*see Markowski v N.Y. City Empl. Ret. Sys.*, 2017 NYLJ LEXIS 576, *13-14; *Matter of D'Avolio v Nigro*, 2016 NY Slip Op 62495[U] [appeal withdrawn]; citing *Matter of Quinn v Cassano*, 2010 NY Slip Op 51678[U]).

In addition, the court notes that at least two of the psychiatrists that examined petitioner indicated that his current psychological condition may be the result of an exacerbation of a preexisting or latent condition, which the Medical Board attempts to discredit by pointing to a finding contained in the AMA Guidelines on the Evaluation of Disease and Injury Causation that schizophrenia or bipolar disease can not be caused by, or permanently aggravated by lifting a stretcher. However, this completely misconstrues petitioner's claim in this regard. Here, petitioner does not assert that lifting a stretcher caused the emergence or exacerbation of a dormant psychological condition but, rather, that

the debilitating injury he sustained, rendering him unable to continue working as an EMT, a job that he had long desired to perform, caused him to sink into a depressive state and triggered severe psychological trauma. “An accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury” (*Connelly v Board of Trustees of the N.Y. City Fire Dep't, Article 1-B Pension Fund*, 237 AD2d 602, 602 [1997]; see *Matter of Tobin v Steisel*, 64 NY2d 254, 259 [the Court of Appeals held that if a disability pension applicant’s accidental line-of-duty injury precipitated the development of a latent condition or aggravated a preexisting condition, resulting in disability, the applicant is entitled to a line-of-duty disability pension]; *Matter of Andrus v DiNapoli*, 114 AD3d 1078, 1079 [2014]; *Matter of Dement v Kelly*, 97 AD3d 223, 232 [2012]). Finally, the court notes that the Medical Board failed to address that portion of Justice Landicino’s decision, in which he found that the Medical Board did not discuss the fact that petitioner takes numerous medications related to the various psychological conditions he suffers from, including anti-psychotic drugs, 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 Lidakis*, 2016 NY Slip Op 32760[U]; *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]).

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Conclusion

Accordingly, it is

ORDERED that the branch of petitioner's motion for a judgment reviewing and annulling NYCERS' determination denying him a performance of duty disability retirement based upon his claimed physical disability and declaring respondent's action to be arbitrary, capricious, unreasonable and unlawful in that regard is denied; and it is further

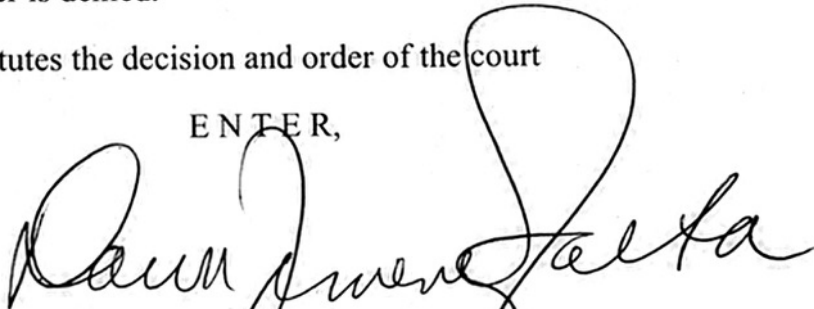
ORDERED that the branch of petitioner's motion for a judgment reviewing and annulling NYCERS' determination denying him a performance of duty disability retirement based upon his claimed psychological disability and declaring respondent's action to be arbitrary, capricious, unreasonable and unlawful is granted and the matter of petitioner's psychological disability is remanded back to the Medical Board for appropriate review before a new panel of doctors that have not been involved in any of the previous Medical Board examinations and review of petitioner's applications; and it is further

ORDERED that the branch of petitioner's motion for a judgment directing respondent to retire petitioner with a performance of duty retirement is denied without prejudice; and it is further

ORDERED that the branch of petitioner's motion for an order, pursuant to CPLR 2307 (a), directing NYCERS to serve and file documents submitted to it in connection with petitioner's disability retirement application, minutes of NYCERS' Board of Trustees' meetings where petitioner's retirement application was discussed and copies of medical records relating to this matter is denied.

The foregoing constitutes the decision and order of the court

ENTER,



J. S. C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court