

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**In the Matter of the Application of
MILLY CENATIEMPO,**

Petitioner,

**INDEX NO. 153818/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.**

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

Decision and Order

- against-

**DERMOT F. SHEA, as the Police Commissioner of
the City of New York, and as Chairman of the Board
of Trustees of the Police Pension Fund, Article II
and THE BOARD OF TRUSTEES of the New York
City Police Pension Fund, Article II,**

Respondents.

The following papers, numbered 1 to _____ were read on this motion for/to

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- Answer — Affidavits — Exhibits _____
- Replying Affidavits

PAPERS NUMBERED

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■

Cross-Motion: Yes X No

On October 27, 2021, the Court heard oral argument via TEAMS. For the reasons stated on the record,

Wherefore, it is hereby

ORDERED that the Petition is granted to the extent that the action is remanded back for reconsideration by the medical board as stated on the record.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: October 27, 2021



EILEEN A. RAKOWER, J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK : CIVIL TERM : PART 6

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6 For a Judgment under Article 78 of
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-against-

8 DERMOT F. SHEA, as the Police Commissioner
9 of the City of New York, and as Chairman
10 of the Board of Trustees of the Police Pension
11 Fund, Article II, and THE BOARD OF TRUSTEES
12 of the Police Pension Fund, Article II,

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Respondents.

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Via Online Teams Meeting
October 27, 2021

13

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B E F O R E:

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THE HONORABLE EILEEN RAKOWER, Supreme Court Justice

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A P P E A R A N C E S:

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Stefanie Johnson, RMR, CRR
Senior Court Reporter

1 THE COURT: This petitioner seeks review of the
2 denial of her application for accidental disability
3 retirement. I'll hear from the petitioner, please.

4 MR. McENANEY: Your Honor, in this case we are
5 contending that the medical board fully analyzed and
6 consider all of this officer's prior line of duty injuries
7 when concluding that her disability was not the result of
8 line of duty injuries.

9 The medical board essentially stated that because
10 -- one of the reasons cited by her spine surgeon for her
11 fusion surgery was an extruded disk portion at her L5-S1
12 area and because this extruded component did not show up in
13 an August 2017 MRI, but did show up months later in a
14 November 2017 MRI, that it could not have been the cause for
15 her surgery. That this was not caused by her line of duty
16 motor vehicle accident in 2016 because essentially it would
17 have shown up in the prior MRI if that was the case.

18 What the medical board doesn't discuss is any of
19 her prior line of duty injuries, why this 2015 accident
20 could not have exacerbated the conditions caused by these
21 injuries, all of which were to the L5-S1 area. She had
22 extensive treatment for these back issues that she had,
23 which originated and which were authorized by the chief
24 surgeon of the NYPD as having come from her 2012 injury that
25 she sustained while restraining an EDP, which is an

1 emotionally disturbed person.

2 In 2013, and this is what's odd about this medical
3 board saying, Well, there's no prior evidence of an extruded
4 disk fragment. If you go to my Exhibit A, page 235, this is
5 the September 10, 2013, report by the medical board, they
6 acknowledge an L5-S1 paracentral extrusion of a portion of
7 disk at the L5-S1 level compressing the S1 nerve. They know
8 that this extruded disk fragment was there in 2013, yet, in
9 their last medical board report they say, Whoa, it's not
10 showing up in this one MRI report from an ER radiology
11 department, which are notorious for having low strength
12 outdated MRI machines. The Zwanger-Pesiri MRI shows it just
13 a few months later. And, again, it was in evidence in 2013.
14 Medical board ignores this completely. Having ignored it in
15 this way they have violated *Tobin v. Steisel* under the Court
16 of Appeals which requires that they consider all prior line
17 of duty injuries and whether the last injury could have been
18 the proximate cause of disability because it exacerbated
19 these preexisting conditions. They clearly were preexisting
20 here.

21 We're talking about six line of duty injuries that
22 are mentioned in their 2013 medical board report but are not
23 discussed at all in this latest report which denies her
24 application. On that ground, your Honor, we think that this
25 requires a remand, at a minimum, and that it could be

1 decided as a matter of law.

2 In addition, your Honor, a final point. The city
3 has not contested, and it must be deemed admitted as a
4 result, that the NYPD's own chief surgeon authorized her
5 fusion surgery on the basis of her 2012 line of duty injury.
6 This is the NYPD's own surgeon saying this surgery is
7 required because of that line of duty injury.

8 Final point. Nowhere in the medical board's
9 discussion in the final medical board report do they talk
10 about the preexistence of something called
11 spondylolisthesis, that is what's known as a fracture of the
12 pars interarticularis which is part of your vertebrae at the
13 L5-S1 level. When you fracture this -- the pars
14 interarticularis are what root the spine together so that
15 one section doesn't slide forward under the section below
16 it.

17 The surgeon specifically states that one of the
18 things he was going in to correct and repair was the
19 spondylolisthesis, which is always traumatic, it's never
20 degenerative, otherwise it would be called something else.
21 Spondylolisthesis is always a traumatic injury. That is
22 mentioned by the medical board in 2013 as well where it says
23 the impression was spondylolisthesis. No mention of it now
24 or how this spondylolisthesis could not have been attributed
25 to the 2012 injury. The operating surgeon says right in his

1 report, "The patient has spondylolisthesis at the L4-5
2 level." Following out to the L3-4 facet joint and into the
3 pars interarticularis that's where the spondylolisthesis occurs,
4 that he had to follow the cutout to the L3-4 facet joint
5 bilaterally. He's talking about here measures to expose and
6 later to correct the spondylolisthesis. We packed autograft
7 bone and allograft bone product across the decorticated
8 surfaces.

9 Without an analysis of these prior conditions,
10 which are clearly being repaired now, the medical board has
11 failed to support its denial with credible evidence. This
12 is pure speculation at this point that there is no
13 connection between the two. Without a detailed description
14 of these prior line of duty injuries specifically stating
15 why these could not have been exacerbated by the 2015
16 injury, the medical board has failed to support its decision
17 with credible evidence.

18 MS. SCHONFELD: As an initial matter, petitioner's
19 attorney fails to advise the Court that petitioner did file
20 a prior ADR application on June 25, 2013, to which the
21 medical board reviewed her application three times: In
22 September 2013, February 2014, and July 2014. The medical
23 board determined at that time that petitioner was not
24 disabled. Petitioner conveniently fails to leave that out
25 of his argument.

1 Additionally, plaintiff returned to work after
2 those alleged prior five LOD injuries. To the point for
3 this LOD injury, the August 11, 2015, injury, which is the
4 subject of this Article 78, there's a paucity of evidence --
5 the medical board credibly found that there was a paucity of
6 evidence supporting the fact that this LOD injury caused her
7 disability.

8 As plaintiff's attorney stated, there was an MRI
9 done in August of 2017 which showed no herniated or
10 protruding disk or extruded disk. And only at the
11 petitioner's November 8th MRI of 2017 did an extruded disk
12 appear on the MRI. Accordingly, as there was nothing to
13 show disability from the August 2017 MRI and it only showed
14 November 2017, it is clear that the LOD injury from August
15 2015 did not cause her disability.

16 I just would really like to stress that petitioner
17 filed her prior Article 78, the medical board found her not
18 disabled at that time, and that was after reviewing the LOD
19 injuries that petitioner's attorney speaks of from 2012. So
20 she was not found disabled at that time, she returned to
21 work, and from my understanding of the record she was not on
22 any restrictive duty at the NYPD and, therefore, showed that
23 at that time she was not disabled from her performance of
24 duties as a police officer.

25 THE COURT: So as I understood it, she had

1 conservative therapy, she didn't want to have surgery back
2 then, she explored conservative avenues to relieve her pain
3 and was able to return to duty full time.

4 What counsel is raising is the possibility that she
5 had a traumatic injury which she was able to manage, return
6 to work, but was then exacerbated by a later line of duty
7 injury. And, therefore, while it wasn't the cause of her
8 current injury that rendered her disabled, it was the
9 exacerbation of that original injury which rendered her
10 disabled. Here, of course, we're talking about a previous
11 line of duty injury, so still eligible for ADR. Do you have
12 a response to that?

13 MS. SCHONFELD: I would just like to point to the
14 medical evidence that the medical board cited, those two MRI
15 reports. In the August 2017 report, there was no indication
16 of extruding disk or disabling conditions and then not until
17 November 8, 2017, did that show up on any MRI scan. I don't
18 know how credible the petitioner's statement is that that
19 initial MRI was done at a place that doesn't do
20 comprehensive MRIs.

21 THE COURT: But nevertheless intra-operatively they
22 found a traumatic injury. So it's irrelevant what showed up
23 on an MRI if intra-operatively they discover this fracture.

24 MR. McENANEY: As I said before and counsel is not
25 really addressing this point, the medical board previously

1 acknowledged an extrusion at the L5-S1 level from a prior
2 MRI and should have come to the conclusion that this one MRI
3 simply did not pick it up. These busy radiologist sometimes
4 miss things, that's why you get second opinions, that's why
5 you call it an impression because you're interpreting these
6 ghostlike images in black and whites.

7 THE COURT: Maybe I misunderstood. I thought we
8 got beyond the bulge and went to the fracture.

9 MR. McENANEY: We have both. We have the pars
10 interarticularis but counsel just recently reiterated the
11 same arguments that it didn't show that the disk fragment
12 extrusion, the extruded fragment was not noted on the August
13 2017 MRI and only showed up in the November 2017 MRI, that's
14 not true. It was in evidence in prior MRIs acknowledged by
15 the medical board. They know there was an extruded disk
16 fragment. They just ignore all those prior line of duty
17 injuries so they could focus just on 2015, just on the MRI
18 reports from 2017 related to that 2015 accident, and act as
19 if the first time an extrusion was ever mentioned was in
20 November just before she got her operation done. That's not
21 true.

22 MS. SCHONFELD: Your Honor, all I will say is that
23 the medical board relied on the evidence from those two MRI
24 reports to come to its conclusion that although petitioner
25 was disabled, the line of duty injury was not the cause.

