

At an IAS Term, Part 41 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 8<sup>th</sup> day of July, 2019.

P R E S E N T:

HON. LARRY D. MARTIN

Justice.

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IN THE MATTER OF THE APPLICATION OF  
JOHN CALTAGIRONE

Petitioner,

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

- against -

Index No. 602/18.

DANIEL A. NIGRO, AS THE FIRE COMMISSIONER OF THE CITY OF NEW YORK AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT ARTICLE 1-B PENSION FUND AND THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT, ARTICLE 1-B PENSION FUND,

Respondents.

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The following papers numbered 1 to 7 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 _____ Memoranda of Law _____	<u>4-7</u>

Upon the foregoing papers, petitioner John Caltagirone (petitioner) moves:

1. For a judgment pursuant to Article 78 of the CPLR:

A. reviewing and annulling the action of the respondents herein in denying petitioner reclassification/accident disability retirement pursuant to the New York City Administrative Code §13-353.1 (“World Trade Center [“WTC”] Disability Law”) and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and

- B. directing and ordering the respondents to grant petitioner's application for reclassification/accident disability retirement pursuant to the WTC Disability Law; or in the alternative
  - C. directing and ordering the respondents by way of remand to review petitioner's case based on the law and facts set forth in the Verified Petition; and
2. For an order pursuant to CPLR 2307(a) directing the respondents herein to serve and file upon the date hereof:
- A. all reports, recommendations, certificates and all other documents submitted to the Board of Trustees of the New York City Fire Department ("FDNY"), Article 1-B Pension Fund ("Board of Trustees"), in connection with the 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 retirement application of the petitioner; and
  - C. copies of any and all records, reports or notes relating to petitioner which are on file with the Article 1-B Fire Pension Fund, New York City Fire Department Bureau of Health Services and the FDNY WTC Health and Monitoring Program.

### ***Background and Procedural History***

On July 6, 1983, petitioner was appointed to the uniformed force of the FDNY and served continuously as a member until his retirement on September 11, 2003. Petitioner was a first responder to the World Trade Center Disaster on September 11, 2001, and participated in the rescue, recovery and clean-up operations at the site thereafter. On or about November 30, 2005, the FDNY received a WTC Notice of Participation from petitioner which was verified by the FDNY. Petitioner was later diagnosed with asthma, chronic bronchitis, sleep

apnea and acute reflux disease after being exposed to various particulate matters while working at the site. From 2012 to present, petitioner has undergone numerous Pulmonary Function Test (PFT) studies at the FDNY WTC Medical Monitoring Program, as well as under the care of pulmonologist Dr. Paul Schulster. He has had x-rays of his lungs performed and CT scans of his chest which revealed ground glass and nodules in his lungs. In 2014, petitioner underwent a sleep study and was diagnosed with mild-to-moderate obstructive sleep apnea. In 2016, Dr. Schulster diagnosed petitioner with reactive airway disease/asthma and pulmonary lung nodules. He opined that these pulmonary conditions precluded the performance of any work by petitioner, and that these conditions would be exacerbated by any exertion, temperature changes, fumes, chemicals, stress, as well as other precipitating factors. Also in 2016, petitioner underwent a CT scan of his sinus and treated with Dr. Kapil Saigal, an otolaryngologist, who diagnosed him with disturbances of smell and taste, deviated nasal septum, hypertrophy of nasal turbinates, chronic maxillary sinusitis and obstructive sleep apnea.

On April 19, 2017, petitioner applied for reclassification of his Service Retirement to Accident Disability Retirement under the WTC Disability Law, which provides that any condition caused by a WTC-listed qualifying condition under Retirement and Social Security Law (RSSL) § 2 (36) (c), which causes a uniformed FDNY member to become disabled from firefighting, shall be presumed to have been caused by the exposure to toxins at the WTC site. The application form contains six categories of qualifying conditions under the Law. Petitioner checked the box adjacent to the following three categories: 1) diseases of the upper respiratory tract and mucosae, adjacent to which he listed chronic rhino sinusitis, mucosal polyps and hypertrophy (both nasal cavities) and obstructive sleep apnea; 2) diseases of the lower respiratory tract, adjacent to which he listed asthma, obstructive airway disease,

multiple pulmonary nodules; and 3) diseases of the gastroesophageal tract, and he listed acute reflux disease adjacent thereto.

On June 20, 2017, the FDNY Pension Fund Subchapter II Medical Board (Medical Board) considered petitioner's application as it related to his acid reflux disease. The Medical Board found that, based upon its interview of petitioner and review of his medical records, he was not permanently disabled due to acute reflux disease. The Medical Board noted that petitioner had mild symptoms of heartburn, which were controlled with medication and dietary modifications.

On June 22, 2017, the Medical Board considered petitioner's application as it related to his pulmonary and upper respiratory conditions. Petitioner was examined, interviewed and all of his submitted medical records were reviewed. Upon examination, the Medical Board found that petitioner's chest was clear, there was no wheeze or sign of respiratory distress, and a limited Ear Nose and Throat exam was performed which showed moderate deviation of the nasal septum. The Medical Board determined that petitioner was not permanently disabled due to chronic rhino sinusitis, mucosal polyps or hypertrophy, asthma or obstructive airway disease, noting that all of these conditions were managed with medication. In addition, the Medical Board found that his mild sleep apnea was controlled with an oral appliance. Accordingly, the Medical Board recommended that the Board of Trustees deny petitioner's application for reclassification of his service retirement under the WTC Disability Law.

On August 18, 2017, petitioner was examined by his pulmonologist, Dr. Schulster, who performed a PFT and again diagnosed him with asthma. On October 2, 2017, the Board of Trustees remanded petitioner's pulmonary disability application to the Medical Board to consider Dr. Schulster's findings. On October 5, 2017, the Medical Board considered the

application pursuant to the remand and again denied it noting that the additional documents submitted did not demonstrate pulmonary disability as there was significant improvement in the Forced Vital Capacity (FVC)<sup>1</sup> and the Forced Expiratory Volume in the first second (FEV1)<sup>2</sup> after treatment with Albuterol.<sup>3</sup> On November 21, 2017, the Board of Trustees voted to adopt the Medical Board's recommendation to deny petitioner's application for pension reclassification.

Petitioner commenced the instant Article 78 proceeding challenging the Board of Trustees' determination. In support of the petition, petitioner argues that respondents failed to use the proper legal standard to determine whether he suffered a disabling respiratory impairment as a result of his work at the WTC site. Petitioner maintains that respondents either did not apply or misapplied the WTC Law, which enacts a presumption that respiratory impairments suffered by first responders at the WTC site were causally related to their service. Specifically, he argues that the Medical Board failed to take into account the full requirements of FDNY firefighting in determining that petitioner was not disabled due to his pulmonary condition. Moreover, petitioner contends that the denial of his application for ADR benefits was arbitrary, capricious and unreasonable. He argues that had he still been an active member of the FDNY, the Bureau of Health Services would have placed him on permanent light duty because of reactive airway disease, asthma, pulmonary lung nodules, sleep apnea and chronic bronchitis. Thus, petitioner maintains that the Medical Board's recommendation was contrary to the competent evidence establishing that his respiratory

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<sup>1</sup>Forced Vital Capacity is the amount of air that can be forcibly exhaled from the lungs after taking the deepest breath possible.

<sup>2</sup>Forced Expiratory Volume in the first second. The volume of air that can be forced out in one second after taking a deep breath, an important measure of pulmonary function.

<sup>3</sup>Albuterol is a bronchodilator (Stedman's Medical Dictionary 43 [28<sup>th</sup> ed 2006]).

conditions are disabling and, therefore, he is entitled to WTC disability retirement. Petitioner further notes that, pursuant to a Social Security Administration Notice, dated June 20, 2017, he was advised that he was found disabled due to a diagnosis of pulmonary chronic insufficiency and secondary diagnosis of asthma.

In opposition to the instant petition, respondents argue that the Board of Trustees' final determination denying petitioner's ADR application under the WTC Disability Law is supported by credible evidence and is therefore neither arbitrary nor capricious. Specifically, respondents contend that the determination that petitioner is not disabled from performing his work as a firefighter based upon his acid reflux disease was rational. In this regard, respondents note that petitioner acknowledged that he had "mild symptoms of heartburn" which he was able to control with the use of over-the-counter medication. Respondents contend that petitioner fails to set forth any argument or evidence that he is disabled from performing his firefighting duties due to this condition. Respondents also argue that the Medical Board's determination that petitioner's sinus and sleep apnea conditions were not disabling was rational. Respondents note that although petitioner suffered from a deviated septum, the Medical Board found that it was moderate and unremarkable. With regard to petitioner's sleep apnea, respondents found that the Medical Board's finding that he was not disabled from this condition as it was mild and controllable with an oral appliance was rational. Thus, respondents maintain that the Board of Trustees' adoption of the Medical Board's determination that petitioner was not disabled from performing his firefighting duties due to his sinus or sleep apnea conditions was rational and must be upheld.

Next, respondents note that the Medical Board reviewed petitioner's ADR application under the WTC Disability Law on two occasions, as it related to his pulmonary conditions which included asthma, obstructive airway disease, chronic rhino sinusitis, mucosal polyps

or hypertrophy. Respondents maintain that the Medical Board interviewed and examined petitioner and reviewed all of the medical documentation he submitted in relation to these conditions. The documents included multiple pulmonary function tests, Methacholine challenge tests, CT scans of petitioner's chest and thorax and Bronco challenge tests. Based upon this review, the Medical Board found that petitioner was not permanently disabled from performing firefighting duties due to his pulmonary conditions. The Medical Board found that although petitioner's treating pulmonologist determined that his pulmonary conditions precluded the performance of any work, he was "taking standard medication with persistent shortness of breath, but there was no evidence of disability with normal pulmonary function tests and a negative Methacholine challenge test."

Alternatively, respondents assert that even if this court grants the petition, this court may not award petitioner the relief he seeks (granting his application for ADR benefits pursuant to the WTC law). If the petition is granted, respondents contend, the remedy is limited to this court's finding that the Medical Board's determination was arbitrary and capricious and that the matter should be remanded to the Medical Board.

Finally, respondents claim that petitioner's document discovery requests are improper and based on a misunderstanding of applicable statutory provisions. In any event, respondents note that the answer interposed contains the entire administrative record rendering petitioner's discovery demands moot.

### *Discussion*

At the outset, the court notes that a disability determination by the Social Security Administration does not control the Medical Board's disability determination (*see Vargas v New York City Employees' Retirement System*, 95 AD 3d 1345 [2012]; *Matter of Stephenson v New York City Employees' Retirement Sys.*, 35 AD 3d 484, 485 [2006]; *Matter*

of *Knight v New York State & Local Employees' Retirement Sys.*, 266 AD 2d 774, 776 [1999]). Indeed, respondents were under no obligation even to consider such evidence (see *Matter of Knight*, 266 AD 2d at 776; *Matter of Achatz v New York State & Local Police & Fire Retirement Sys.*, 239 AD 2d 857, 858 [1997]). “[A]n administrative determination under one statute is not binding on another agency when the same question arises under another statute” (*Matter of Dickstein v State Tax Commn.*, 67 AD2d 1033, 1034 [1979]; *Matter of Pellittiere v New York State & Local Police & Fire Retirement System*, 121 AD3d 1143 [2014]; *Keller v Regan*, 212 AD2d 856, 858 [1995]).

The WTC Law, section 13-353.1 of the Administrative Code (“Accidental disability retirement; World Trade Center presumption”) states, in relevant part, as follows:

“1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence.

“(b) The New York City Fire Department Pension Fund (NYCFDPF) board of trustees is hereby authorized to promulgate rules and regulations to implement the provisions of this paragraph.

“2. (a) Notwithstanding the provisions of this chapter or of any general, special or local law, charter, administrative code or rule or regulation to the contrary, if a member who participated in World Trade Center rescue, recovery or cleanup operations as defined in section two of the retirement and social security law, and subsequently retired on a service retirement, an ordinary disability retirement, an accidental disability retirement, or a performance of duty disability retirement and subsequent to such retirement is determined by the head of the retirement system to have a qualifying World Trade Center condition, as defined in section two of the retirement and social security law, upon such determination by the NYCFDPF board of trustees, it shall be presumed that such disability was incurred in the performance



and discharge of duty as the natural and proximate result of an accident not caused by such member's own willful negligence, and that the member would have been physically or mentally incapacitated for the performance and discharge of duty of the position from which he or she retired had the condition been known and fully developed at the time of the member's retirement, unless the contrary is proven by competent evidence.”

“A firefighter is entitled to accidental disability retirement when a medical examination and investigation shows that he or she is ‘physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service’” (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144 [1997], quoting § 13-353 of the Administrative Code of City of New York [Administrative Code]). Generally, the burden rests with the applicant to demonstrate that he or she is disabled from firefighting service and is entitled to a disability retirement (*see Matter of Nemecek v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 99 AD2d 954, 955 [1984]), and that a causal relationship exists between the service-related accident and the claimed disability (*see Matter of Gaudio v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 40 AD3d 638, 639 [2007]; *Matter of Wesarg v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 246 AD2d 601, 601 [1998]; *Matter of Causarano v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 178 AD2d 474, 474 [1991]). However, the WTC Disability Law (Administrative Code § 13-353.1) creates a presumption which specifically applies to firefighters who participated in operations at the World Trade Center site after September 11, 2001 and who suffered impairments to their health as a consequence of that work. Asthma is a qualifying physical condition (*see RSSL* § 2 [36] [c]; *Matter of Samadjopoulos v New York City Employees' Retirement Sys.*, 104 AD3d 551, 552 [2013]).

If a petitioner suffers from a qualifying World Trade Center condition, there is a presumption that such condition was incurred in the performance and discharge of duty. Petitioner must show that he worked at the WTC site either within the first 48 hours after the WTC attacks, or that he worked a minimum of 40 hours at one of the qualifying WTC sites between September 11, 2001 and September 12, 2002. If the petitioner can establish those two facts, there is a rebuttable presumption that the disabling condition was incurred in the line of duty. The Medical Board then determines if the firefighter is disabled and, if so, whether the disability is itself a qualifying WTC condition or caused by one.

“The issue of whether a firefighter is disabled is determined by the Medical Board of the New York City Fire Department, Article 1-B Pension Fund (hereinafter the Medical Board), and its ‘determination . . . is conclusive if it is supported by some credible evidence and is not irrational’” (*Matter of Sorenson v Cassano*, 117 AD3d 1069, 1069-1070 [2014] quoting *Matter of Martirano v Cassano*, 96 AD3d 851, 851[2012]; *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 8 AD3d 283, 284 [2004]; *Matter of Rodriguez v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501, 501 [2004]). Credible evidence “must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion” (*Meyer*, 90 NY2d at 147). Thus, an articulated, rational, and fact-based medical opinion constitutes credible evidence entitled to judicial deference (*see id.* at 152).

Here, petitioner has established that he worked the requisite number of hours at the site and that he suffers from qualifying conditions. Respondents acknowledge that petitioner has mild sleep apnea, a deviated septum and asthma, but do not find that he is disabled by these conditions. The Medical Board examined petitioner on June 22, 2017 and found that his chest was clear without wheeze or distress and that he had a moderate deviation of the

nasal septum. In addition, on October 5, 2017, pursuant to a remand, the Medical Board reviewed petitioner's pulmonary function study report, dated August 18, 2017, which the Board determined was not diagnostic of restrictive airway disease and noted that, although it showed a baseline restrictive pattern, there was significant improvement after petitioner received the medication, Albuterol. The Medical Board determined that there was no respiratory obstructive pattern and that petitioner was not disabled as a result of this condition.

The Medical Board's report does not reference the performance requirements for firefighting, there is no description of the characteristics of asthma, and no assessment of any risk that the diagnosed condition would pose to the safety of any person during the anticipated course of firefighting activity, including petitioner, who could be exposed to noxious fumes and toxins that could exacerbate his asthma. Nor does it address petitioner's treating pulmonologist's findings that his pulmonary conditions precluded the performance of any work by petitioner and that these conditions would be exacerbated by any exertion, temperature changes, fumes, chemicals, stress, as well as other precipitating factors. Dr. Schulster specifically opined that petitioner was not capable of standing on his feet for much of the day, nor could he lift more than a few pound on a sustained basis, or work near dust or caustic chemicals. "According to the FDNY's official requirements and New York City's notice of examination for employment as a firefighter, the work of a firefighter includes the ability to extinguish fires, climb stairs, ladders and fire escapes; using forcible entry tools such as, axes, sledge hammers, power saws and hydraulic tools; searching for victims in smoke filled environments; carrying or dragging victims from dangerous locations, and locating hidden fire by feel and smell" (*Gaffney v Nigro*, 2019 NYLJ LEXIS 327, \*8 [Sup Ct, Kings County 2019]).

Minimally, the court finds that the Medical Board's determination is not in such form as to allow adequate judicial review in order to determine whether the Board's determination was arbitrary or capricious (*see Muniz v Nigro*, 2017 NYLJ LEXIS 2478 \*15 [Sup Ct, Kings County 2017]; *see also Matter of Stack v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 AD3d 562, 563 [2007]; *Gaffney v Nigro*, 2019 NYLJ LEXIS 327 \*9 [Sup Ct, Kings County 2019]; *Matter of Guillo v N.Y. City Employees' Ret. Sys.*, 39 Misc 3d 1208[A], NY Slip Op 50539[U], \*4-5 [Sup Ct, Kings County 2013]; *Matter of Quinn v Cassano*, 29 Misc 3d 1203[A], 2010 NY Slip Op 51678 [U] [Sup Ct, Kings County 2010]; *Matter of Tesoriero v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 17 Misc 3d 497 [Sup Ct, Kings County 2007]; *Marley v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 15 Misc 3d 1068, 1074-1075 [Sup Ct, Kings County 2007]). 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" (*Matter of Montauk Improvement v Proccacino*, 41 NY2d 913, 914 [1977]; *Matter of Samadjopoulos v N.Y. City Employees' Ret. Sys.*, 19 Misc 3d 1123[A] [Sup Ct, NY County 2008]). Consequently, the court finds that the reasons for concluding that petitioner is not disabled from performing his duties as a firefighter due to his asthma are not supported by credible evidence, or clearly stated in the Medical Board's reports (*see Gaffney v Nigro*, 2019 NYLJ LEXIS 327, \*10)[Sup Ct, Kings County 2019]; *Matter of Tesoriero v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 17 Misc 3d 497 [Sup Ct, Kings County 2007]).

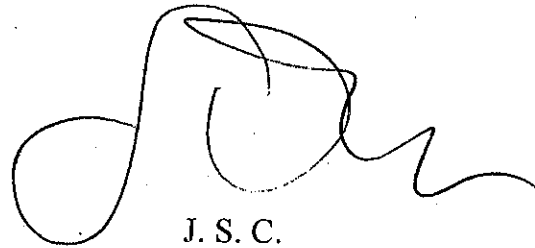
Accordingly, the court finds that the matter should be remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees (*see Samadjopoulos*, 104 AD3d at 553 [holding that determination was arbitrary and

capricious where respondents admitted that a petitioner suffered from several qualifying conditions but failed to point to any medical evidence to rebut the conclusion that the conditions were disabling]; *Matter of Kiess v Kelly*, 75 AD3d 416, 417 [2010]; *Matter of Stack v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 AD3d 562, 563 [2007]; *Matter of Rodriguez v Board of Trustees of N.Y. Fire Dept., Art. 1-B. Pension Fund*, 3 AD3d 501 [2004]). Thus, the petition is granted to the extent of annulling the determination of the Board of Trustees denying petitioner's application for WTC disability retirement benefits, and remanding the matter for further consideration in light of all of the proffered medical evidence.

All other relief is denied as respondents have submitted all requested documents in support of their verified answer.

The foregoing constitutes the decision and order of the court

E N T E R,

A handwritten signature in black ink, appearing to read "L. D. Martin", written in a cursive style.

J. S. C.

**HON. LARRY D. MARTIN**  
**Justice of the Supreme Court**