At an IAS Term, Part 8 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 10th day of September, 2013

PRESENT:

HON. BERT A. BUNYAN,

Justice.

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IN THE MATTER OF THE APPLICATION OF ANTHONY SCIALO,

Petitioner,

FOR A JUDGMENT UNDER ARTICLE 78 OF THE CIVIL PRACTICE LAWS AND RULES

- against -

Index No. 22029/12

SALVATORE CASSANO, 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 ARTICLE1-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 5 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed Petition	1 - 2
Opposing Affidavits (Affirmations) Answer	3
Reply Affidavits (Affirmations) Reply Memorandum	4 - 5
Other Papers	

Upon the foregoing papers, petitioner Anthony Scialo (Scialo) moves:

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

   A ordering respondents to rescind the approval of the Fire Commissioner's application for ordinary disability retirement and permit petitioner to remain retired for service pending the outcome of this Article 78 proceeding; and

   B reviewing and annulling the action of the respondents herein in denying petitioner an accident disability retirement allowance (ADR) pursuant to the Administrative Code § 13-353 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and

   C directing and ordering the respondents to retire petitioner with an ADR allowance, retroactive to the date of his service retirement together with interest thereon.

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 Fire Pension Fund in connection with the petitioner's application herein;

   B copies of the minutes of each meeting of said fire Pension Fund Board of Trustees wherein petitioner's ADR application was considered, discussed or acted upon; and

   C copies of any and all medical records, reports or notes relating to petitioner which are on file with the Fire Pension Fund and/or the New York City Fire Department Bureau of Health Services including all pre-employment documentation.

This Article 78 proceeding results from a denial of petitioner's ADR application by the 1-B Medical Board of the New York City Fire Department Pension Fund, Subchapter 2 (the Medical Board). The Medical Board's decision was rendered after a second court ordered remand of petitioner's case in *Scialo v Cassano, et. al.,* Civil Index No. 1987/11 (Kings Sup. Ct. January 12, 2012) by Hon. Bert A. Bunyan. In its 2012 decision, this court

remanded the matter to the Medical Board for further review and findings with regard to petitioner's claimed line-of-duty right knee injuries. The court found that the Medical Board's "no disability" decision was not adequately explained in light of the following:

1. Dr. Basil Dalavagas' reports, created after each of the petitioner's May 11, 2006 and March 1, 2007 examinations, raised several questions precluding a finding that the Medical Board's denial was rationally based and supported by credible evidence; and
2. Having found the petitioner disabled, and having found a causal link between the petitioner's April 10, 2000 line of duty (LOD) knee injury and that disability, the Medical Board must explain its denial of petitioner's ADR application under the correct proximity standard as enumerated within section "II" of the court's decision.

BACKGROUND

The underlying facts of this matter follow, in abbreviated form, as taken from the court's two prior decisions. For a complete recitation of the underlying facts, please refer to *Scialo v Scopetta, et. al.,* Civil Index No. 20948/08 (Kings Sup. Ct. April 7, 2009) (*Scialo 1*) and, *Scialo v Cassano, et. al.,* Civil Index No. 1987/11 (Kings Sup. Ct. January 12, 2012) (*Scialo 2*). The facts relevant to the instant Article 78 proceeding are stated afterward in full.[1]

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[1] Page two of the verified petition, while numbered sequentially with the remainder of the pages, is from an unrelated action and is not pertinent to this matter. As the allegations of the petition clearly flow from page one to page three, this ministerial error shall be overlooked by the court.

"On May 7, 1983, petitioner was appointed to the uniformed force of the NYFD and served continuously as a member until his retirement. At all relevant times, petitioner was a member of the NYFD Pension Fund. Petitioner first injured his right knee on September 27, 1984 while working at a building that had collapsed. While stepping off of a portable ladder, petitioner slipped on debris from the collapse and twisted his right knee.

'Petitioner's second injury to his right knee occurred on April 10, 2000 while he was responding to a motor vehicle collision. As one of the vehicles abruptly lurched, petitioner dove out of the way, slipping on broken glass and spilled fluids. As he fell to the ground, he felt a sharp pain in his right knee. On April 14, 2000, an MRI of petitioner's right knee was taken by Sam Mayerfield, M.D., a radiologist. On May 4, 2000, as a result of the pain in his knee and the MRI findings of Dr. Mayerfield, petitioner was evaluated by Jo A. Hannafin, M.D. Dr. Hannafin confirmed that Scialo 'has a history and exam consistent with medial and lateral meniscal pathology and a questionable partial ACL...' Dr. Hannafin recommended an arthroscopy to repair the damage to petitioner's right knee. Dr. Hannafin performed the arthroscopic procedure on May 17, 2000. [Her] post-operative diagnosis was, '[a] complex medial meniscal tear, partial anterior cruciate ligament injury without instability and synovitis.' At the time of his surgical follow-up on October 4, 2000, Dr. Hannafin cleared Scialo for return to full duty.[2] This injury and subsequent surgery caused petitioner to lose 180 days of work, from April 11, 2000 until October 8, 2000.

'Petitioner subsequently injured his right knee a third time. . . on September 3, 2002 when a set of basement stairs he was climbing collapsed, causing him to fall into the basement of the premises. According to the petitioner's medical history, this incident resulted in his missing 46 days of work.[3]

'On April 14, 2004, petitioner submitted an application for ADR for injuries he allegedly sustained in the line of duty, including the injuries to his knee sustained in April of 2000. In response to petitioner's application and on his behalf, the Fire Commissioner submitted an application for non-service incurred disability retirement, also referred to as ordinary disability retirement (ODR). Petitioner also submitted an application for Service Retirement since

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[2] This fact was clearly stated in both *Scialo 1* and *Scialo 2*. Why this point needs stating a third time will become evident later in this decision.

[3] The instant petition alleges a fourth injury to the right knee occurring in a line of duty incident on February 23, 2004. As the report filed contained no reference to a knee injury, this line of duty incident is not discussed within this decision.

he had 20 years of service as a member of the FDNY. Petitioner retired on May 21, 2004, after 22 years of service, with a service pension.

'On May 17, 2004, just five days prior to his retirement, petitioner underwent another MRI of his right knee. Narendra Patel, M.D., a radiologist, concluded that petitioner exhibited: (1) status post partial meniscectomy of the posteromedial meniscus; (2) suspect partial incomplete tear of the femoral attachment of the anterior cruciate ligament with buckling of the posterior cruciate ligament; (3) a small intrasubstance tear of the posterolateral meniscus; (4) mild tendinitis of the infrapatellar tendon and (5) mild bone marrow edema of the posteromedial tibial condyle. On May 21, 2004, the same day he was retired by the FDNY, petitioner was examined by his treating physician, [Dr. Hannafin], the same doctor who performed the arthroscopic surgery on his knee. The purpose of this examination was for a follow-up evaluation and to determine the status of his right knee. According to Dr. Hannafin, after his surgery, '[petitioner] subsequently had a somewhat slow postoperative course with recurrence of an effusion within the knee.' Dr. Hannafin finished [her] report with the following impression, 'Mr. Scialo has a history and examination consistent with early posttraumatic arthrosis of the medial compartment of his knee. . . [t]he status of his knee, as documented on [the] current [5/17/2004] MRI, is directly related to the injury that he sustained in 2000 and the subsequent partial medial meniscectomy.'

'On June 14, 2004, petitioner was examined by the FDNY Medical Board Committee (the BHS Committee) which stated that petitioner should perform light duty and had a partial permanent disability. Specifically, quoting from respondents' answer, the BHS Committee found petitioner 'unfit for fire duty with a diagnosis of . . . status post right knee arthroscopy with medial meniscectomy and ACL tear.' As indicated by his stamped endorsement on the June 14, 2004 BHS Committee report, the Fire Commissioner submitted an application for ODR. Nearly two years later, on March 2, 2006, the Medical Board first reviewed Scialo's application for ADR. The Medical Board referred Scialo to its impartial orthopedic consultant, Dr. Basil Dalavagas, to determine if he had a disability of his right knee that would preclude full fire duty. Dr. Dalavagas examined petitioner on May 11, 2006. His report notes that a '[r]eview of the patient's X-Ray shows no significant degenerative changes in the knee. . .' and, '. . . in the MRI done in May/2004, there was evidence of S/P meniscectomy, partial, and there was evidence of partial ACL [anterior cruciate ligament] tear and questionable buckling of the PCL [posterior cruciate ligament].' Dr. Dalavagas also found right quadricep muscle atrophy that he felt could be corrected with intensive physical therapy. Despite these findings, Dr. Dalavagas found that the petitioner was 'not

permanently disabled for the performance of full fire duty.' On June 15, 2006, based upon Dalavagas' May 11, examination, the Medical Board denied petitioner's application for ADR.

'On October 3, 2006, in response to his being denied an ADR for his back and knee injuries, petitioner went to Dr. Hannafin for a reevaluation of his right knee. After his examination, Dr. Hannafin concluded that 'Mr. Scialo is continuing to have symptoms related to his knee. I have recommended to him that we repeat the MRI of his knee as his prior one has been almost two years. We would like to see whether he has had any further loss of articular cartilage in the medial compartment, or whether he is beginning to develop any subchondral edema from overload of the bone.' On October 6, 2006, Douglas Mintz, M.D. performed a third MRI of petitioner's right knee. After reviewing the film, Dr. Mintz reported the following impression, 'Magnetic resonance imaging of the right knee demonstrating medial meniscectomy, with focal full-thickness cartilage loss over the plateau and more diffuse grade III changes over the condyle posterior weight-bearing aspect. There is a chronic high-grade tear of the anterior cruciate ligament without acute translation.' Based upon this MRI, Dr. Hannafin made the following report on October 19, 2006, 'The MRI demonstrated significant progression of cartilage loss with grade III chrondral loss medial femoral condyle. There is no retear of the medial meniscus. There is also grade II - III changes of the tibial plateau. This has clearly progressed from the arthroscopy photos of 5/2000 which demonstrated no cartilage loss on the tibial plateau and only Grade I changes on the medial femoral condyle.'Dr. Hannafin also prescribed an 'unloader brace' for petitioner to wear on his knee to help alleviate some of his symptoms.

'On January 18, 2007, the Medical Board again considered Scialo's ADR application on remand from the Board of Trustees. After reviewing Dr. Hannafin's reports of October 3, 2006 and October 19, 2006, the Medical Board deferred making a decision until the MRI and Dr. Hannafin's reports could be referred back to its impartial orthopedic consultant, Dr. Basil Dalavagas, to determine if this would alter his previous opinion. The Medical Board also requested that Dr. Dalavagas re-interview and examine the petitioner.

'On March 1, 2007, less than 10 months after his first examination of the petitioner, Dr. Dalavagas re-evaluated Scialo. Dr. Dalavagas reported that, at the time of this examination, petitioner now has 'marked atrophy of the right quadriceps more than 3 cm.' Dr. Dalavagas reviewed the October 2006 MRI of petitioner's right knee and stated, '[t]here is significant Grade III degenerative changes with chrondral loss in the medial femoral condyle, softening of the articular cartilage in the medial tibial plateau and some

softening of the articular cartilage in the lateral tibia plateau.' Based on this examination, Dr. Basil Dalavagas stated, 'Patient is [status post] arthroscopic partial medial meniscectomy in the right knee, approximately more than 6 years ago with clinical and MRI evidence of significant degenerative changes mainly in the medial compartment, less in the lateral compartment, with marked right quadricep atrophy with significant functional deficit in the right knee.' Dr. Dalavagas concluded by stating that, 'I believe that now [firefighter] Anthony Scialo is permanently disabled for the performance of full fire duty.'

'On May 3, 2007, the Medical Board again reviewed petitioner's case. Based upon Dr. Dalavagas' March 1, 2007 report and the October 6, 2006 MRI report of petitioner's right knee, the Medical Board concluded, that while petitioner is now disabled, 'there is insufficient evidence available to us that he was disabled for full fire duty at the time of his retirement and therefore it is our opinion that our previous recommendation remains unchanged.'

'At its June 22, 2007 meeting, the Board of Trustees discussed petitioner's case . . [and] 'decided to table the issue until its next meeting. . .'

'The Board of Trustees reconvened on July 25, 2007. . .[Deputy] Commissioner Douglas White (DC White)[4] stated, 'I propose that we remand this to the 1B Board [Medical Board] with a copy of the discussion and the minutes that we've discussed in the last half hour, twenty minutes, with an instruction to clarify why they do not believe there was sufficient evidence that the member was disabled at the time of his retirement. . . [w]e're remanding with the minutes so the 1B Board can understand the views that have been expressed here with the instructions to clarify why they do not believe there was sufficient evidence that the member was disabled at the time of his retirement.' In response, Steven Cassidy (Cassidy), President of the Uniformed Firefighters Association of Greater New York, and First Vice Chair volunteered to create a summary of the issues in order to aid the Medical Board in understanding the Board of Trustees' questions. Instead of remanding the matter after this meeting, on the advice of Cassidy, the issue was held over one month until the Board of Trustees' next meeting so it could discuss the issues with petitioner's attorney.

'On September 5, 2007, the Board of Trustees again discussed petitioner's case. The debate covered the discrepancy between Dr. Dalavagas' two reports, the length of time it took this case to move through the system, and questions as to why the Medical Board would refer this case a second time to Dr. Dalavagas and then not take his recommendation that petitioner was

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[4] Douglas White's title has been corrected herein to reflect he was the Deputy Commissioner.

now disabled. While discussing what questions the Board of Trustees wanted answered on remand to the Medical Board, Carolyn Wolpert (Wolpert), of the Office of the Corporation Counsel, Law Department, made the following recommendation, 'You might ask the 1B [Medical Board] to explain their decision. There is a report from Dr. Dalavagas from 2006 that said he is not permanently disabled, and if there is more reasoning as to why they think he was not disabled in 2004 and they set that forth in the report, that might help explain the decision.' [DC White] then issued the following instruction, 'Remand it back to the 1B [Medical Board] with the instructions to look at the injuries of the member and the appropriate - - and the time line and details to determine whether or not there was a disability before retirement. I want them to look at this, the entire record, and explain to us in some detail how they reached that conclusion.' However, after an 'off the record' discussion called by Joey Koch, the Mayor's Representative, [DC White] stated as follows, 'I said to remand it, but I think we should table it to find out any more information about the case and if we can secure anything from the member that we don't have in the record. But my inclination is to remand it, not at this point, but we will table it until we can talk to the member to get additional information.'

'The Board of Trustees next met on October 31, 2007. After more debate on what issues it wanted clarified by the Medical Board, the Board of Trustees tabled the remand until its next meeting in November in order to 'frame these issues.'

'At its November 26, 2007 meeting, Cassidy again offered to draft a question for the Medical Board from Board of Trustees with regard to Scialo's file. To provide Cassidy time to prepare the question and forward same for the Commissioner's review, [DC White] tabled the matter until the next meeting in December.'

'The Board of Trustees met on December 17, 2007. In addition to the debate over the two Dr. Dalavagas diagnosis, the delay in getting the petitioner's file before the Medical Board, and the opinion of the Medical Board, that insufficient evidence of a disability existed at the time the petitioner retired, there was discussion regarding whether or not a framed question even need be prepared. Unable to come to any conclusion, the Board of Trustees tabled the remand of this file until its January 2008 meeting. According to the record, [DC White] tabled the issue so '[t]he administrative staff [can] look into the case to determine certain coding and be prepared at the next meeting to render a judgment as to the referral of the case back to the 1B Medical Board or not.'

'At this point, the court notes that the last time petitioner's file was before the Medical Board was on May 3, 2007. The Board of Trustees, while trying to determine precisely what it wanted the Medical Board to address, tabled the remand of petitioner's file at its June 22, July 25, September 5, October 31, November 26, and December 17, 2007 meetings. Including the fact that there appears to have been no August 2007 meeting, the Board of Trustees delayed remanding petitioner's ADR application a total of seven months.

'The Board of Trustees met again on January 30, 2008. With the decision to remand made, [DC White] stated, 'I think it should be remanded with the 1B Board [Medical Board] to take a look at the 5/11/2006 report of Dalavagas and the 2007 report, and reconcile the issue of the right knee injury, whether or not the right knee injury in 2000 - - that his disability was an aggravation of the 2000 injury, and get back to us.' After further discussion, [DC White] supplemented what was going to be remanded. He stated, as follows, '[s]o as an addendum to the referral back to the 1B Board [Medical Board] to take a look at the Dalavagas report from 2006 and 2007, additionally, we're going to forward the May 21, 2004 report of Dr. Hannafin with respect to the member to pay particular attention to the MRI and the impression-plan section of the report.'

'Despite these clear instructions, on February 7, 2008, Lei Tan (Tan), a member of the Board of Trustees, prepared the following remand memorandum from the Board of Trustees to the Medical Board. The memorandum reads, in its entirety, as follows, 'The Board of Trustees reviewed the case of the above noted member during the regular meeting on 01/30/08. At that time it was directed that the Subchapter 2 Medical Board should clarify whether the member's right knee disability was an aggravation from the 04/10/2000 injury. It was also directed that the following documents be forwarded to the Subchapter 2 Medical Board for review: 1) Dr. Jo A. Hannafin's report dated 05/21/04. Thank you for your cooperation in this matter.'

'There is no indication in the record why the remainder of [DC White]'s January 30, 2008 recommendations were not included in Tan's February 7th memorandum. Further, there is no explanation why any of [DC White]'s recommendations from any of the previous Board of Trustees' meetings, (i.e., remanding all of the minutes of the meetings), were not included in his recommendations from the January 30, 2008 meeting.

'Based upon the incomplete February 7, 2008 remand memorandum, on February 28, 2008, the Medical Board again reviewed Scialo's case, for the first time since May 3, 2007, nearly ten months prior thereto. In denying the

petitioner's ADR application, the Medical Board's report reads in its entirety, 'On 2/28/08, the 1-B Medical board again considered the case of Anthony Scialo. The case was last reviewed on 5/3/07, at which time the member was denied disability retirement.

'The 1-B Medical Board re-evaluated this case at the direction of the board of Trustees dated 2/7/08 and evaluated Dr. Jo A. Hannafin's report dated 5/21/04.

'After evaluating the report, it is the opinion of the 1-B Medical Board that the right knee disability of 2007 was not aggravated by the injury of 4/10/00, this is based on a policy that the aggravating injury must be proximate to the disability. Therefore, it is our opinion that our previous recommendation remains unchanged.'

'Based upon the foregoing, the court, in a written decision dated April 7, 2007, (*Scialo I*) remanded this matter back to the Medical Board for further review and findings with regard to petitioner's claimed line-of-duty right knee injuries and to include information not in its possession at the time the Board rendered its February 28, 2008 denial of ADR benefits to the petitioner. In addition, the court reasoned:

'The record bears out the conclusion that, on February 28, 2008, the Medical Board did not possess all of the relevant evidence [DC White] intended it to review as part of the remand. Additionally, there is a history of delays in this matter, including those delays by the Board of Trustees discussed above, that were not addressed by the Medical Board in its most recent denial, including consideration of the alleged 'policy' that the aggravating injury must be proximate to the disability. Moreover, the Medical Board's determination is conclusive only if it is supported by some credible evidence and is not irrational (*see Inguanta v Board of Trustees of New York City Fire Dept.*, 302 AD2d 527 [2003]). Here, the Medical Board's reference to a 'policy', without articulating a rational basis for said policy or providing any details of the policy, does not constitute the requisite 'credible evidence' because such credible evidence must be evidentiary in nature and not merely a conclusion of law (*see Meyer v Board of Trustees of the N.Y.C. Fire Dept., Art 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). The Medical Board's February 28, 2008 denial based upon causation is arbitrary and cannot be sustained in an Article 78 proceeding, such as the matter at bar (*see Drew v New York City Employees' Retirement Sys.*, 305 AD2d 408, 409 [2003]).'

'In response to the court's decision and order, the Board of Trustees remanded this matter to the Medical Board on May 29, 2009. The Medical Board deferred its determination at each of the July 19, 2009, September 17, 2009, May 6, 2010 and June 4, 2010 citing the 'complexity' of the matter. On

July 29, 2010, after apparently much debate, the Medical Board issued another denial of Scialo's ADR application.

'As a result of this denial, petitioner brought his second Article 78 proceeding seeking, among other things, an order annulling the July 29, 2010 denial of his ADR application and directing he be retired pursuant to his ADR application or, in the alternative, a second remand of this matter back to the Medical Board with instructions to apply the correct legal standard. Addressing the court's prior order, and opposing Scialo's petition, respondents alleged that:

> 'At the Board of Trustees' meeting on May 29, 2009, Board of Trustees Chair and Deputy Commissioner Douglas White clarified that his suggested inclusions of Board of Trustees' minutes for review by the 1-B Medical Board in prior remands were not instructions with which the Board of Trustees failed to comply, but rather recommendations that the Trustees discussed on and off the record and ultimately decided against implementing.'

Respondents further alleged that after reviewing the petitioner's entire medical file, there was ample credible evidence to support the Medical Board's denial. That since the petitioner was found 'not disabled' by Dr. Dalavagas in 2006, any delays prior to that examination would have no bearing on the 'denial' determination. Indeed, since he was found not disabled in May, 2006, there was insufficient evidence that he was disabled at the time of his service retirement on May 21, 2004.

'Respondents contended that pursuant to *Borenstein v New York City Employees' Ret. Sys.*,[5]

'there are two stages in the Medical Board's fact- finding process: (1) the 'threshold matter' of determining 'whether the applicant actually 'physically or mentally incapacitated for the performance of city-service;' and (2) the '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;' Because petitioner was found to be not disabled at the time of his retirement, the Board of Trustees did not reach the second step, and the issue of whether the disability was a natural and proximate result of an accidental injury received in city-service, is not an issue before this court.'

'In a written decision dated January 12, 2012, (*Scialo 2*) the court, as an initial matter, resolved a lingering question of whether Scialo was a 'member in city-service' at the time his application was addressed as follows:

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[5] 88 NY2d 756 (1996)

"[R]espondents have routinely stated the premise that since the petitioner retired for service prior to the resolution of his ADR application, that he was not a 'member in city-service' at the time his application was addressed, thus, the question before the Medical Board is whether the petitioner was disabled 'at the time of his retirement' (relying upon *Bansley v Safir*, 299 AD2d 185, 185 [2002]).[6] Respondents reassert this conclusion within their opposition to the instant Article 78. However, any fault for the fact that nearly two years elapsed between April 14, 2004 - the date the ADR application was submitted - and March 2, 2006 - the date the Medical Board first reviewed the ADR application - lays not with the petitioner. If the Medical Board wishes to justify a 'denial' by arguing that it had insufficient evidence that a member was disabled at the time of his retirement, then perhaps it would be prudent to act in a more timely fashion on a member's ADR application. As they have not done so here, such argument is unavailing and the petitioner will not be penalized for failing to be in city-service, or for an alleged dearth of evidence, resulting from the Medical Board's failure to act timely on his application.'

'The court then listed the pertinent 'recommendations' while agreeing with DC White that further clarification from the Medical Board was warranted. Rather than Dr. Dalavagas explaining the contradictions in his diagnosis, the Medical Board chose to clarify same, by offering, in conclusory fashion, what it considered the 'most reasonable' explanation. In explaining why it was integral for Dr. Dalavagas to explain his own inconsistencies, the court stated:

'Dr. Dalavagas found petitioner 'not disabled' after his May 11, 2006 examination wherein he relied on a May, 2004 MRI (2 years old at that time), a current x-ray of the petitioner's knee, and his physical examination. In declaring the petitioner 'not disabled,' Dr. Dalavagas notes '[r]eview of patient's x-ray show *no significant degenerative changes in the knee. . .*' (*emphasis added*). Dr. Dalavagas does, however, note a 1" atrophy in the petitioner's right quadricep which he feels can be alleviated with intense physical therapy. Dr. Dalavagas found petitioner disabled after his March 1, 2007 examination wherein he relied, in large part, on an October 6, 2006 MRI and his physical examination. The October 6, 2006 MRI was performed at the petitioner's request because of continued pain with his right knee. This MRI, was performed a mere *4 months and 26 days* after the May 11, 2006

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[6] The citation to *Bansley* has been corrected from the moving papers in *Scialo 2*.

examination by Dr. Dalavagas. In declaring petitioner disabled, Dr. Dalavagas stated that 'r]eview of the MRI, which was done in October/06, shows . . *significant Grade III degenerative changes with chrondral loss in the medial femoral condyle, softening of the articular cartilage in the medial tibia plateau and some softening of the articular cartilage in the lateral tibia plateau*' *emphasis added*). Moreover, Dr. Dalavagas states that there is now 'marked atrophy of the right quadriceps more than 3 cm.'

'In light of these circumstances, several questions are raised, to wit:

(1) Having stated in May, 2006 that the petitioner's x-ray showed 'no significant degenerative changes in the knee' and faced with the October 6, 2006 MRI showing 'significant Grade III degenerative changes. . .' what possible degenerative changes could so quickly have occurred in the intervening 4 months and 26 days such that petitioner went from 'no significant degenerative changes' to 'significant Grade III degenerative changes' and causing Dr. Dalavagas to change his determination from 'not disabled' to 'disabled?' Would such a rapid degeneration not cause Dr. Dalavagas to reevaluate his May 2006 diagnosis wherein he used the outdated MRI?

(2) Does the observation of a 1" right quadricep muscle atrophy, just above the complained of right knee, not seem to evidence that the petitioner was favoring his left leg, over his right? Considering (a) the muscle atrophy, (b)an x-ray purporting to show no degenerative knee changes, (c) an MRI (and clinical evidence) of right ACL laxity and, (d) the knowledge that Dr. Dalavagas was using a two-year old MRI, why would Dr. Dalavagas not order a new MRI at the time of his May 11, 2006 examination in an effort to explain these inconsistencies prior to declaring that the petitioner was not disabled? In its July 29, 2007 denial, the Medical Board too acknowledged the fact that a new MRI in 2006 may have resulted in a determination of disability.

(3) The May 11, 2006 examination revealed a 1 inch atrophy in the petitioner's right quadricep muscle. The March 1, 2007 examination reveals a 'marked atrophy of the right quadriceps more than 3 cm.' While there is no explanation for why Dr. Dalavagas switched to the metric system in his follow-up examination, the court notes that 3 centimeters is approximately 1.2 inches. Why does an extra 2/10 of an inch of muscle atrophy

qualify as 'marked atrophy' such that it supports a determination of permanent disability?

'Further, the Medical Board misunderstood the applicable proximity standard. The decision reads, in pertinent part:

the court notes that the Medical Board conclusively states that the April 10, 2000 injury, a basis for the ADR application, was an LOD injury. Secondly, a reading of the plain language of the denial finds a causal link (allegedly 'partially') between the LOD injury of April 10, 2000 and Scialo's right knee disability. Finally, in response to the court's request for a rational, non-conclusory and evidentiary based explanation for its 'policy' the Medical board states, in conclusory fashion, '[t]he policy that a causative injury must be proximate to the time of disability is clearly stated in the Administrative Code.' In sum, it appears that while the Medical Board now concedes that the April 10, 2000 LOD injury contributed to the petitioner's disability, it bases its denial of the ADR application, in part, on the premise that, under the Administrative Code, the injury was not 'proximate in time' to the application.

'New York City Administrative Code § 13 - 353 reads as follows:

> 'Retirement; for accident disability. Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, . . . If such medical examination and investigation shows that such member 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 while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith'

'Despite respondents' contention that the Medical Board 'may have stated the principal in a legally inelegant manner,' the Medical Board actually misapprehended the code and misapplied the proximity test herein. As the section clearly sets forth, the test for proximity is whether the disability 'is a natural and proximate result of an accidental injury.' There is no requirement

> that the 'injury must be proximate to the time of disability.' Further, the Medical Board also clearly admits that the April 10, 2000 injury is 'arguably a partial cause of his right knee disability' thereby establishing the causal link required by the section. That respondents claim the injury is only a partial cause is irrelevant because the section only requires the injury to be 'a' natural and proximate cause, not 'the' natural and proximate cause. While the Medical Board's July 10, 2010 decision attempts to explain the proximity policy in the same conclusory fashion previously adjudicated insufficient, it has, in effect, made the petitioner's point in this matter.'
>
> 'As a result of the foregoing, the Medical Board's July 29, 2010 denial was deemed arbitrary, without a rationale basis and unsupported by credible evidence. The matter was again remanded with instructions to the Medical Board to explain its denial in light of the questions raised by the Dalavagas examinations and under the correct proximity standard, having found a causal link between Scialo's April 10, 2000 LOD knee injury and his disability.

In response to the court's mandate within *Scialo 2*, the Board of Trustees, at its March 28, 2012 meeting, again remanded Scialo's case to the Medical Board. The minutes of this meeting reflect that the Board of Trustees requested that the Medical Board "respond to the specific questions posed by the court." At its May 23, 2012 meeting, the Medical Board allegedly reviewed all previously considered material and rendered its report, again denying the petitioner's ADR application. At its July 31, 2012 meeting, the Board of Trustees voted twelve to twelve to adopt the Medical Board's recommendation. Pursuant to *City of New York v Schoeck*, 294 NY 559, (1945), a tie vote results in the automatic denial of an ADR retirement and the award of an ODR. According to the minutes from the Board of Trustees' July 31, 2012 meeting, those voting against the ADR application appear to have agreed with the following:

"MS. WOLPERT: Based on our review of the documents, especially the Medical Board's most recent report in which they specifically go over the court remand, I have to vote no.

'They're very specific that he has progressive degenerative arthritis of the right knee which is neither caused nor aggravated by an acute injury."

As a result of this most recent denial, the petitioner brings the instant Article 78 action, his third since 2008, seeking to, among other things, annul the determination of the Medical Board.

DISCUSSION

As an initial matter, the court notes that pursuant to counsel's affirmation (Exhibit "A" to the petitioner's reply memorandum) that branch of the instant Article 78 petition "ordering respondents to rescind the approval of the Fire Commissioner's application for ordinary disability retirement and permit petitioner to remain retired for service pending the outcome of this Article 78 proceeding" has been rendered moot. Subsequent to the petitioner filing the instant Article 78 action, the Fire Department Pension Fund (FPF) has corrected the petitioner's retirement status as sought herein. Accordingly, this branch need not be further addressed within this decision.

"The issue of whether a firefighter is disabled as a result of a service-related accident is determined by the Medical Board of the New York City Fire Department Pension Fund, Subchapter 2 (formerly Part 1-B) . . . Its determination that a firefighter is not disabled for duty is conclusive if it is supported by some credible evidence and is not irrational" (*see Kuczinski v Board of Trustees of New York City Fire Department, Article 1-B Pension Fund,*

8 AD3d 283, 284 [2004]; *see also Borenstein,* 88 NY2d at 756 ["In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious"]; *Drew*, 305 AD2d at 409 ["The Medical Board's determination is conclusive if it is supported by some credible evidence and is not irrational"]; *accord Inguanta,* 302 AD2d at 527).

"Credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered" (*see Meyer,* 90 NY2d at 147). "It must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*id.*). "An articulated, rational, and fact-based medical opinion" constitutes "credible evidence" (*id.* at 148). The Medical Board's "detailed and fact-based report," "explaining the basis for its conclusion" constitutes "credible evidence"(*id.* at 152).

As a result of the errors and inconsistencies below discussed, the court finds that the Medical Board's May 23, 2012 denial of the petitioner's ADR application is wholly arbitrary, without a rational basis and unsupported by any credible evidence. Accordingly, this matter shall again be remanded back to the Medical Board and said Board shall, in a manner consistent with the legal standards repeatedly cited within the court's decisions, set forth its reasoning and evidence supporting its denial of the petitioner's ADR benefits which as of yet remain unexplained.

The Medical Board's Inconsistent Positions Regarding Causation

In its July 29, 2010 denial, the Medical Board stated as follows:

> "After evaluating all of the above, we have attempted to answer the issues raised by Justice Bunyan. *It is noteworthy that on April 10, 2000, the applicant, Anthony Scialo injured his right knee in an on duty accident, was operated on and returned to full duty on October of 2000. This is arguably a partial cause of his right knee disability,* but the injury is not proximate to his application of June 14, 2004 . . . The policy that a causative injury must be proximate to the time of disability is clearly stated in the Administrative Code" (additional emphasis added).

In its May 23, 2012 denial, the subject of the instant Article 78 petition, the Medical Board has abandoned the above causal link and now proffers:

> "We note that following the injuries of 4/10/00, he returned to full duty until he had an additional minor injury to the right knee on 9/3/02, which required less than six weeks of recuperation time to returning to full duty. *There is no evidence of an additional work related injury prior to the MRI of 10/6/06, which shows changes consistent with the progression of degenerative joint disease consistent with the normal aging process.*
>
> *It is our unanimous opinion that the member has progressive degenerative arthritis of his right knee, which is not caused or aggravated by an acute injury*" (emphasis added).

As this court stated in *Scialo 1*:

> If there is a difference in medical opinion on petitioner's non-disability, such difference does not render the Medical Board's determination, nor the Board of Trustees' acceptance of that determination, arbitrary and capricious (*see Manza v Malcom*, 44 AD2d 794 [1974]), since it is solely within the Medical Board's province to resolve any conflict between medical opinions (*see Kuczinski,* 8 AD3d at 283; *Bartsch v Board of Trustees of New York City Fire Dept. Art. 1-B Pension Fund,* 142 AD2d 577 [1988]).

The above legal standard guides the courts of this state when, for instance, differences of opinion arise between the Fire Department's "independent" medical consultants and the petitioner's treating physicians. However, such guidance falters where, as here, the difference

of opinion lies not between the Fire Department and the petitioner, but rather, between the Medical Board in *Scialo 2* and the Medical Board in *Scialo 3,* the instant action.

As stated within the Medical Board's denials, each reviews all of the available information as well as any new information that may become available. How then, could two Medical Boards, reviewing substantially the same information, arrive at two completely incongruous conclusions regarding the same knee disability? The Medical Board in *Scialo 2* found that the petitioner's April 10, 2000 LOD knee injury "is arguably a partial cause of his right knee disability," while the Medical Board in the instant action alleges that the petitioner "has progressive degenerative arthritis of his right knee [consistent with the normal aging process], which is not caused or aggravated by an acute injury." The applicable legal standard requires the Medical Board to provide "[a]n articulated, rational, and fact-based medical opinion" that "explain[s] the basis for its conclusion" (*Meyer supra*). Should the Medical Board's report be so detailed, it is, by law, not arbitrary and the court has little option but to affirm same.

With this in mind, the court looks to the text of the Medical Board's May 23, 2012 denial for the detailed and fact based medical opinion that will explain why the petitioner's right knee disability is no longer caused, in part, by his April 10, 2000 LOD knee injury, but rather by "progressive degenerative arthritis of his right knee, which is not caused or aggravated by an acute injury." Unfortunately, the resolution of this paradox remains beyond the court's grasp as the Medical Board's May 23, 2012 denial does not *mention* the

inconsistency, much less provide any explanation for its existence. Missing, too, is any explanation why neither Ms. Wolpert, nor any of the other members of the Board of Trustees, requested clarification of this inconsistency prior to their July 31, 2012 vote. The Medical Board's inconsistent findings, detailed above, are prototypical of the "arbitrary or capricious" decisions discussed in *Borenstein*, therefore preventing the Medical Board's determination from being affirmed herein.

The Medical Board's Answer to the Court's Questions

As part of the court ordered remand of January 12, 2012, the Medical Board was asked to clarify three questions raised by the court's analysis of the diagnostic history in this action. At the risk of belaboring the point, the court must again recite the following section from *Scialo 2*, since respondents' recent denial compounds rather than resolves the issues presented:

> "Dr. Dalavagas found petitioner 'not disabled' after his May 11, 2006 examination wherein he relied on a May, 2004 MRI (2 years old at that time), a current x-ray of the petitioner's knee, and his physical examination. In declaring the petitioner 'not disabled,' Dr. Dalavagas notes '[r]eview of patient's x-ray show *no significant degenerative changes in the knee. . .*' (*emphasis added*). Dr. Dalavagas does, however, note a 1" atrophy in the petitioner's right quadricep which he feels can be alleviated with intense physical therapy. Dr. Dalavagas found petitioner disabled after his March 1, 2007 examination wherein he relied, in large part, on an October 6, 2006 MRI and his physical examination. The October 6, 2006 MRI was performed at the petitioner's request because of continued pain with his right knee. This MRI, was performed a mere *4 months and 26 days* after the May 11, 2006 examination by Dr. Dalavagas. In declaring petitioner disabled, Dr. Dalavagas stated that '[r]eview of the MRI, which was done in October/06, shows . . *significant Grade III degenerative changes with chrondral loss in the medial femoral condyle, softening of the articular cartilage in the medial tibia plateau*

and some softening of the articular cartilage in the lateral tibia plateau" (*emphasis added*). Moreover, Dr. Dalavagas states that there is now "marked atrophy of the right quadriceps more than 3 cm.'

'In light of these circumstances, several questions are raised, to wit:

(1) Having stated in May, 2006 that the petitioner's x-ray showed 'no significant degenerative changes in the knee' and faced with the October 6, 2006 MRI showing 'significant Grade III degenerative changes. . .' what possible degenerative changes could so quickly have occurred in the intervening 4 months and 26 days such that petitioner went from 'no significant degenerative changes' to 'significant Grade III degenerative changes' and causing Dr. Dalavagas to change his determination from 'not disabled' to 'disabled?' Would such a rapid degeneration not cause Dr. Dalavagas to reevaluate his May 2006 diagnosis wherein he used the outdated MRI?

(2) Does the observation of a 1" right quadricep muscle atrophy, just above the complained of right knee, not seem to evidence that the petitioner was favoring his left leg, over his right? Considering (a) the muscle atrophy, (b)an x-ray purporting to show no degenerative knee changes, (c) an MRI (and clinical evidence) of right ACL laxity and, (d) the knowledge that Dr. Dalavagas was using a two-year old MRI, why would Dr. Dalavagas not order a new MRI at the time of his May 11, 2006 examination in an effort to explain these inconsistencies prior to declaring that the petitioner was not disabled? In its July 29, 2007 denial, the Medical Board too acknowledged the fact that a new MRI in 2006 may have resulted in a determination of disability.

(3) The May 11, 2006 examination revealed a 1 inch atrophy in the petitioner's right quadricep muscle. The March 1, 2007 examination reveals a 'marked atrophy of the right quadriceps more than 3 cm.' While there is no explanation for why Dr. Dalavagas switched to the metric system in his follow-up examination, the court notes that 3 centimeters is approximately 1.2 inches. Why does an extra 2/10 of an inch of muscle atrophy qualify as 'marked atrophy' such that it supports a determination of permanent disability?"

Initially noted in *Scialo 2*, the Medical Board in the action at bar has again elected to address the court's questions itself, rather than forwarding same to the diagnosing doctor who is in the best position to explain his own reports. Unsurprisingly, the exercise yields similar results. The Medical Board offers the following conclusory and unsupported explanation, within its May 23, 2012 denial:

> "In Justice Bunyan's order dated 1/12/12, he queries the Subchapter 2 Medical Board regarding an X-ray of right knee which was dated in May, 2006 and compares it to an MRI dated 10/6/06. This X-ray was apparently taken and interpreted by Dr. Dalavagas. It should be noted that X-ray and MRI provide different information regarding boney and soft tissue findings. *X-rays are considered more accurate in determining arthritic changes*" (emphasis added).

As an aside, despite the long established standard, respondents include no evidentiary support for the "notation" that " [x]-ray and MRI provide different information regarding boney and soft tissue findings. X-rays are considered more accurate in determining arthritic changes"

That being said, the court seeks to restate the overarching issue as simply as possible, to wit, on May 11, 2006, Dr. Dalavagas examined Scialo, consulted a *then current x-ray* of Scialo's knee, and, finding no significant arthritis, clearly articulated that a "[r]eview of *patient's x-ray show no significant degenerative changes in the knee. . .*" (*emphasis added*) and found Scialo not disabled.

On March 1, 2007, Dr. Dalavagas again examined Scialo, consulted *an October 6, 2006 MRI* (*an MRI that was taken 5 months after the May 2006 x-ray*), now finding, as confirmed by the Medical Board's most recent denial, significant arthritis. Dalavagas

clearly articulated that a "[r]eview of *the MRI*, which was done in October/06, shows . . significant Grade III degenerative changes with chrondral loss in the medial femoral condyle, softening of the articular cartilage in the medial tibia plateau and some softening of the articular cartilage in the lateral tibia plateau," and he then found Scialo disabled.

Considering that the x-ray showed "no significant degenerative changes" and the MRI showed "significant Grade III degenerative changes" less than five months later, the court strains to understand why the Medical Board denied the petitioner's application, stating "[i]t should be noted that X-ray and MRI provide different information regarding boney and soft tissue findings. *X-rays are considered more accurate in determining arthritic changes*" (emphasis added). Having failed to adequately explain the contradiction between its opinion and the facts of this matter, upon what rational basis could the Medical Board conclude that "[i]t is our unanimous opinion that the member has progressive degenerative arthritis of his right knee, which is not caused or aggravated by an acute injury"? Rather than explaining how such dramatic changes could have manifested themselves within such a short time, as the court requested, the Medical Board's response only serves to further cloud the basis for its rejection and, as an unintended consequence, serves to independently support this court's third remanding despite the other issues discussed heretofore.

The Medical Board's Erroneous Quotation of Dr. Hannafin's May 21, 2004 Report

The Medical Board's May 23, 2012 denial includes a brief recital of the treatment Scialo has had over the years, relative to his right knee, including the following "purported" quote from Dr. Hannafin's May 21, 2004 report:

> "He was seen by Dr. Hannafin on 5/21/04 whose exam revealed that the member could fully squat and crawl without difficulty and, except for some tenderness on the posterior medial joint line, he could return to full activity."

A cursory review of Dr. Hannafin's May 21, 2004 report, as well as a review of the background facts stated in both *Scialo 1* and *Scialo 2*, reveals that the above quotation is erroneous. The correct text reads, in pertinent part:

> "*He was most previously seen for follow-up evaluation on October 4, 2000* at which point he was approximately six months status post arthroscopy. . . He could squat fully and could crawl without difficulty. At that point, he was returned to full and active duty as a firefighter" (emphasis added).

As the text shows, Dr. Hannafin was commenting on the petitioner's appearance when examined in October of 2000, not at the time of her examination in May, 2004. In fact, after her May 21, 2004 examination, she had the following impressions:

> "He can squat fully and resume a standing position but does have some mild posteromedial knee pain with a deep squat."
>
> "I have encouraged him not to run as a form of exercise but to do other types of cardiovascular training."
>
> "The status of his knee, as documented on current (5/2004) MRI is directly related to the injury he sustained in 2000 and the subsequent partial medial meniscectomy."

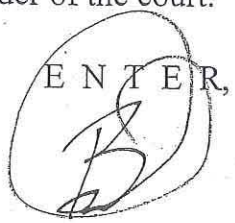
This clear misrepresentation of Dr. Hannafin's report is symptomatic of the respondents' focus, or lack thereof, throughout this action. Such clearly avoidable errors serve, not to

support the respondents' determination, but rather, to undermine the "rational basis" required to sustain the Medical Board's decisions. In fact, were Dr. Hannafin's reports diligently studied, respondents would have realized that her medical opinion - that the petitioner's April 10, 2000 LOD knee injury is a proximate cause of his knee disability - has remain unchanged since her May 21, 2004 examination.

CONCLUSION

As has been repeatedly stated since *Scialo 1*, the Medical Board's determination is conclusive only if it is supported by some credible evidence and is not irrational (*see Inguanta*, 302 AD2d at 527). As a result of the Medical Board's inconsistent theories of causation, the inconsistent, conclusory and, unsupported allegations regarding x-ray evidence versus MRI evidence and, the clear misquoting of Dr. Hannafin's report, the Medical Board's May 23, 2012 denial is arbitrary, without a rational basis, unsupported by credible evidence and cannot be sustained in the instant Article 78 proceeding (*see Drew*, 305 AD2d at 409). Accordingly, this matter is again remanded to the Medical Board for further review and findings with regard to petitioner's claimed line-of-duty right knee injuries. Such remand shall, in addition to the petitioner's complete medical file, include all documents, minutes and pleadings up to and including the May 23, 2012 denial. The court, having considered the respondents' remaining contentions, finds them to be without merit. All relief not expressly granted herein is denied.

The foregoing constitutes the decision and order of the court.



E N T E R,

J. S. C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT