

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

**PRESENT:** HON. ERIKA M. EDWARDS  
*Justice*

**PART** 11

Index Number : 101741/2019  
CAMILO, WILTON  
vs  
JAMES O'NEILL, AS THE POLICE  
Sequence Number : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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


Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/1/21

 J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

**PRESENT: HON. ERIKA EDWARDS**

**PART 11**

*Justice*

-----X

**INDEX NO. 101741/2019**

**WILTON CAMILO,**  
Petitioner,

**MOTION DATE 11/06/2019**

- v -

**MOTION SEQ. NO. 1**

**JAMES O'NEILL, 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, THE BOARD OF TRUSTEES of the Police Pension Fund, Article II, THE MEDICAL BOARD of the Police Pension Fund, Article II, by Dorothy Kunstadt, M.D., Lawrence Scharer, M.D., Lawrence Redutu, M.D. and ELI J. KLEINMAN, M.D., NYPD Supervising Chief Surgeon,**

**DECISION + ORDER ON  
MOTION**

Respondents.

-----X

The following papers, numbered 1

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

No(s)

Upon the foregoing documents, the court grants Petitioner Wilton Camilo's ("Petitioner")

Article 78 Petition in part to the extent that the court remands this matter to Respondent The Board of Trustees of the New York City Police Pension Fund, Article II ("PPF Board") for a new investigation and reconsideration of its determination to deny Petitioner accident disability retirement ("ADR") for line of duty injuries he suffered while working at the World Trade Center recovery site after September 11, 2001.

Petitioner brought this Article 78 proceeding against Respondent James O'Neill, 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, The Board of Trustees of the Police Pension Fund, Article II, The Medical Board of the Police Pension Fund, Article II, by Dorothy Kunstadt, M.D., Lawrence

Scharer, M.D., Lawrence Redutu, M.D., and Eli J. Kleinman, M.D., NYPD Supervising Chief Surgeon (collectively, "Respondents") seeking an order reviewing and annulling Respondents' denial of his accident disability retirement under the World Trade Center Disability Law, pursuant to the Administrative Code of the City of New York § 13-252.1 and determining it to be arbitrary, capricious, unreasonable and unlawful; an order directing Respondents to retire Petitioner with an accident disability retirement allowance retroactive to the date of his service retirement as a matter of law; or in the alternative, an order remanding Petitioner's matter for further review by Respondents. Petitioner also seeks an order, pursuant to CPLR 2307(a), directing Respondents to serve and file certain administrative records and minutes related to Petitioner's accident disability retirement application.

To date, Respondents have not opposed Petitioner's application.

In this case, Petitioner was appointed as a police officer with the NYPD on April 14, 1997 and he was a member of the Police Pension Fund. Petitioner was a member of the uniformed force until his retirement on April 21, 2017. After the September 11, 2001, terrorist attack on the World Trade Center ("WTC"), Petitioner participated in the rescue, recovery and clean-up operation for multiple dates at WTC designated sites. As a result of his participation, Petitioner asserts that he was exposed to a number of particulate matters including, but not limited to, smoke, jet fuel, asbestos, man-made vitreous fibers, polycyclic aromatic hydrocarbons (PAHS), dioxins, heavy metals, human remains and other contaminants.

On March 22, 2017, prior to his date of retirement for service, Petitioner filed an application to receive accident disability retirement benefits instead of ordinary disability retirement benefits. Petitioner alleged that as a result of his exposure to various toxins and debris at the WTC site, he was diagnosed with conditions including asthma, chronic obstructive

pulmonary disease (“COPD”), sinusitis and sleep apnea. Petitioner asserts that his various diagnoses prevented him from performing his full police duties.

On December 1, 2017, the Medical Board reviewed and declined Petitioner’s application for disability retirement. The Medical Board stated that although Petitioner had numerous diagnoses and symptoms, including asthma and sleep apnea, the etiology of those symptoms was unclear.

On April 11, 2018, Petitioner’s case was remanded to the Medical Board for further review based on new medical evidence. On August 10, 2018, after consideration of Petitioner’s additional medical documentation, the Medical Board reaffirmed its previous decision again and declined to approve Petitioner’s application for disability retirement. The Medical Board stated that there was no evidence of significant lung disease or sinus disease that would prevent Petitioner from performing his full duties as a New York City Police Officer.

On December 12, 2018, Petitioner’s case was remanded to the Medical Board for a second time for further review based on new medical evidence. On March 8, 2019, after consideration of Petitioner’s additional medical documentation, the Medical Board reaffirmed its previous decision and declined to approve Petitioner’s application for accident disability retirement. The Medical Board found that there was no new evidence provided and that Petitioner was able to work until 2017 with similar medical complaints. As such, the Medical Board reaffirmed its previous decision and denied Petitioner’s application for accident disability retirement under WTC.

On July 10, 2019, the Board of Trustees reviewed and finalized the findings of the Medical Board, which denied Petitioner’s application for accident disability retirement.

In an Article 78 proceeding, courts are required to grant a governmental agency broad discretion and the scope of judicial review is limited to whether the agency's determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion (CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). A determination subject to review under Article 78 exists when, first, the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

A police officer must show that he or she is "a member in city-service" who is "physically or mentally incapacitated for the performance of city-service...", when applying for ADR (*see* Administrative Code § 13-252). The applicant has the burden of proving incapacitation (*Califano v DiNapoli*, 147 AD3d 1177, 47 N.Y.S.3d 484 [2017]). If certain conditions are met, police officers (or retirees) may also apply for ADR benefits under the WTC Disability Law for any condition or impairment of health that is caused by a qualifying WTC condition, as defined in Section 2 of the New York Retirement and Social Security Law ("RSSL"). RSSL § 2(36) defines "Qualifying [WTC] condition as "a qualifying condition or impairment of health resulting in disability..." and defines "qualifying condition or impairment of health" as one of the listed physical and psychological conditions.

Pursuant to the Administrative Code § 13-252.1(1)(a), a condition or impairment that is caused by a qualifying World Trade Center condition is, "presumptive evidence that it was incurred in the performance and discharge of duty," unless there is competent evidence to the

contrary. The WTC Disability Law shifts some of the burden of proof onto the Medical Board to rebut this presumption with credible evidence (Administrative Code § 13-252.1(1)(a); *Mulet v Kelly*, 49 AD3d 336, [1st Dept. 2008]; *Jefferson v Kelly*, 51 AD3d 536 [1st Dept 2008]).

Credible evidence is defined as coming from a credible source and being, "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Meyer v Bd. Of Trs. NYC Fire Dep't Article 1-B Pension Fund*, 90 NY2d 139 [1997]).

As long as "some credible evidence" supports the Medical Board's disability determination, that determination cannot be disturbed by the courts. "Credible evidence" is defined as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered. . . which must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion (*id.* at 145-147). The Medical Board's expert opinion constitutes credible evidence when it is based on objective medical evidence, or where the Medical Board clearly articulates a rational fact-based medical explanation (*id.* at 145-146). Additionally, the resolution of conflicts between the medical conclusions of the Medical Board and an applicant's treating physicians is exclusive to the Medical Board (*Russell v NYC Emps. Ret. Sys.*, 155 AD3d 1046 [2017]).

The Medical Board is required to consider all relevant medical evidence before rejecting the petitioner's claim and must clearly state the reasons for its recommendations. An unsubstantiated conclusion and failure to include uncontradicted evidence submitted by the petitioner concerning a psychological condition is not a basis to determine the condition (*Keiss v Kelly*, 75 AD3d 416 [1st Dept. 2010]; *Flynn v Kelly*, 851 NY2d 69 [2007]).

The threshold question of whether an applicant has the injury claimed and whether the injury incapacitates the applicant from the performance of duty is solely for the Medical Board

(*Borenstein v NYC Emps Ret. Sys.*, 88 NY2d 756, 760 [1996]). The applicability of the WTC Disability Law and any reclassification is predicated on the initial finding of disability. In this matter, the Medical Board found that the Petitioner did not prove that he was incapacitated and was not disabled.

The Court of Appeals has held that the Medical Board's opinions must be rational and articulated for them to be entitled to judicial deference (*see Meyer*, 90 NY2d 139, 146-147). In this context, the court finds the Medical Board's determination in this matter to be devoid of an articulated basis for concluding that Petitioner's various diagnoses, including asthma, COPD, sinusitis, and sleep apnea (which required special accommodations on the job) as not disabling or incapacitating conditions for a police officer. The Medical Board's written determinations are bare bones with no assessment of Petitioner's conditions or risk that his diagnosed conditions pose a threat to his employment as a police officer.

Moreover, missing from the Medical Board's reports is any explanation of how Petitioner's physical condition would permit him to perform the duties as a police officer without accommodations (*see 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] [the Medical Board failed "to articulate in its determination how the petitioner can perform the physical duties of a commercial bus operator given the limitations to the range of motion of his back and neck"]]).

Here, the Medical Board's determination does not detail the job responsibilities of a police officer or identify any medical findings that show Petitioner could perform such duties. Consequently, the reasons for concluding that Petitioner is not disabled from performing his duties as a police officer due to his chronic sinusitis are not supported by credible evidence or clearly stated in the Medical Board's reports.

For the reasons stated above, this court finds that the Medical Board's conclusion that Petitioner was not disabled or impaired from performing the duties of a police officer lacked a rational basis and the Medical Board's determination was not set forth in such a manner as to permit adequate judicial review (*Fernandez v Bd. of Trustees of N.Y. Fire Dept Pension Fund*, 81 AD3d 950, 952 [2d Dept 2011]). Accordingly, Respondents' findings and determination that Petitioner was not disabled or impaired are hereby vacated, and the matter is remanded to the Medical Board for further consideration consistent with this decision and order.

As such, it is hereby

ORDERED AND ADJUDGED that the court grants in part Petitioner Wilton Camilo's Article 78 to the extent that the July 10, 2019 decision the Board of Trustees of the Police Pension Fund denying Petitioner's application for accident disability retirement is annulled; and it is further

ORDERED that the court remands this matter to Respondent The Board of Trustees of the New York City Police Pension Fund, Article II for reconsideration of its determination to deny Petitioner's accident disability retirement for injuries he sustained as a result of working at the World Trade Center recovery site after September 11, 2001; and it is further

ORDERED that to the extent not already provided, Respondents are to provide Petitioner Wilton Camilo with all reports, recommendations, certificates, medical records or notes, and all other documents submitted to the Article II Pension Board of Trustees in connection with the retirement of Petitioner that was not included in the petition and answer; and it is further



ORDERED that this constitutes the decision and order of the court.

  
ERIKA EDWARDS, J.S.C.

11/1/2021  
DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).