

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of July 2021.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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In the Matter of the Application of
ROBERTO GONZALEZ,
Petitioner,
For a judgment under Article 78 of the Civil
Practice Law and Rules

--against--

Index No.: 526023/20

NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM,
Respondent.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-10
Opposing Affidavits (Affirmations) _____	13-40
Affidavits/ Affirmations in Reply _____	42-43
Other Papers: _____	_____

Upon the foregoing papers petitioner Roberto Gonzalez (petitioner) moves for a judgment pursuant to Article 78:

A. Reviewing and annulling the action of the respondents herein in denying petitioner a Performance-of-Duty Disability Retirement (3/4) from the New York City Employees' Retirement System (NYCERS)(respondent), pursuant to the Retirement and Social Security Law (RSSL) § 507-c and General Municipal Law (GML) § 207-o, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and

- B. Directing and ordering the respondents to retire petitioner with a disability retirement allowance under RSSL § 507-c and GML § 207-o, or, in the alternative,
- C. Remanding the matter to the respondents for an appropriate review by a newly composed Medical Board.

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 NYCERS Board of Trustees (the Board) by the New York City Department of Correction (DOC) Health Management Division in connection with any retirement of the petitioner herein;
- B. Copies of the minutes of each meeting of the Board wherein the Board considered, discussed, or acted upon any retirement application of the petitioner; and
- C. Copies of any and all medical records, reports or notes relating to petitioner which are on file with the NYCERS Pension Fund; the DOC Health Management Division; and the New York City Law Department Workers' Compensation Division; and
- D. Copies of any and all "job descriptions" reviewed by the Medical Board in their consideration of petitioner's subject applications.

Background

Petitioner was appointed as a Correction Officer with the DOC on June 29, 2006. Prior to his appointment with the DOC, he passed all physical and mental examinations administered by the DOC and was deemed physically and mentally fit to perform the essential duties of a Correction Officer. On December 23, 2011, petitioner suffered an inmate-related injury, when he was assaulted by an inmate who refused to be placed in handcuffs. Petitioner was punched in the face by the inmate and had to be assisted by two other officers in restraining the inmate. He sustained injuries to his jaw and right knee as a result of the incident.

In early 2016, petitioner began experiencing chest pain and shortness of breath. An echocardiogram, stress echocardiogram and nuclear stress test were performed. Petitioner was diagnosed with coronary artery disease and referred for cardiac catheterization. On February 10, 2016, the cardiac catheterization was performed and showed that his first diagonal coronary artery was 95% blocked. Petitioner underwent angioplasty of this artery and a stent was successfully placed.

Thereafter, petitioner filed two applications for Performance-of-Duty Disability Retirement (“POD”), which are at issue in this matter. The first application was filed on May 9, 2016, and was an application for POD under GML § 207-o (hereinafter, the “Heart Bill”), which provides that uniformed correction officers are entitled to POD disability retirement if they become disabled as a result of a condition of the heart. The Heart Bill is premised on the statutory presumption that the development of a heart condition is attributable to the continuous stress and sudden bursts of physical and mental strain routinely required in the line of duty, which results in a gradual and progressive degeneration of the heart.

On September 6, 2016, petitioner was interviewed and examined by the NYCERS' Medical Board in connection with his Heart Bill application. At that time, the Medical Board found that although petitioner had a qualifying heart condition, it did not find the condition to be disabling. The Medical Board issued a report concluding:

“Based on the medical records provided by this applicant, his medical history and examination, the Medical Board finds that although the applicant had one vessel coronary artery disease, it was successfully treated by angioplasty and stent and since his, left ventricular ejection fraction is preserved, the Medical

Board finds that the applicant is not suffering disabling heart disease. The Medical Board finds that the documentary and clinical evidence fail to substantiate that Roberto Gonzalez is disabled from performing the duties of Correction Officer with the Department of Correction. Therefore, the Medical Board recommends that Roberto Gonzalez' application for Disability Retirement under Section 207-o be denied."

On March 21, 2017, the Medical Board again reviewed petitioner's application under the Heart Bill. The Board interviewed and examined petitioner and reviewed updated medical evidence that had been submitted by petitioner. The Medical Board noted that petitioner stated that he suffered from shortness of breath and experiences chest pain while performing his duties as an instructor at the Corrections' Academy. The Medical Board issued a report again denying his application, stating as follows:

"The Medical Board finds that the clinical and documentary evidence fail to substantiate that Roberto Gonzalez is disabled from performing the duties of Correction Officer with the Department of Correction due to coronary artery disease. We note history of positive stress test with a single vessel disease that underwent stenting. We note some atypical chest symptoms with an abnormal lung examination today. We note that he has not undergone any further cardiac or pulmonary testing despite claims of worsening of his condition. The Medical Board is unable to ascribe his symptoms to the documented coronary artery disease. Therefore, the Medical Board recommends that Roberto Gonzalez' application for Disability Retirement under the provisions of Section 207-o be denied."

On September 5, 2017, petitioner filed a second application for POD, this time under RSSL § 507-c, which provides that uniformed correction officers who become disabled as a result of inmate-related injuries are entitled to POD disability retirement. His application was based on the injuries to his right knee that he suffered at the time of the December 23,

2011, inmate-related use-of-force incident. On January 29, 2018, the Medical Board interviewed and examined petitioner in connection with both of his POD applications, under the Heart Bill and RSSL § 507-c. The Medical Board denied the Heart Bill application on the same grounds as it previously had, and denied the RSSL § 507-c application on the ground that, although petitioner is disabled from a condition of the right knee, the disabling condition was not causally related to his inmate-related knee injury on December 23, 2011. At that time, the Medical Board reviewed petitioner's updated medical evidence, and stated as follows:

“The Medical Board finds Roberto Gonzalez not disabled from performing the duties of a Correction Officer due to cardiac condition. The Medical Board notes that the newly submitted documentation indicates that he underwent a nuclear stress test, which showed no ischemia. The Medical Board notes history of a stent placed previously for a single-vessel disease. The Medical Board finds his condition eligible under the Heart Law. However, the Medical Board does not find him disabled due to this condition. With regards to the right knee, the Medical Board finds that the documentation and the exam indicates that he is disabled due to osteoarthritis of the right knee condition, however, the Medical Board does not find causation with regards to the right knee to the incident of December 23, 2011, which was approximately six years prior. The Medical Board notes that the first MRI submitted is two years after the incident. The Medical Board also note an MRI from 2016 shows worsening of the condition and that he had returned to full duty in the meantime. Although he claims he has no other injury, there is bruising noted on the second MRI, which may indicate additional injury, which was not reported. There is no contemporaneous documentation linking to his disability to the injury of December 23, 2011. The Medical Board finds the incident of December 23, 2011 to be due to inmate contact and eligible under Section 507-c. However, The Medical Board cannot ascribe his disability due to this incident. Therefore, the Medical Board recommends that

Roberto Gonzalez' application for Disability Retirement under the provisions of Section 507-c and Section 207-o be denied.”

On September 13, 2018, the NYCERS Board of Trustees discussed petitioner's case and decided to remand it back to the Medical Board in order to reconsider the causal relationship between petitioner's December 23, 2011, inmate-related right-knee injury and his eventual disability from a condition of the right knee.

On September 18, 2018, the DOC applied, on petitioner's behalf, for Ordinary Disability Retirement (“ODR”), pursuant to RSSL § 507-a. This statute provides that if uniformed correction officers become disabled for any reason, regardless of whether their disability was incurred in the performance of duty, they become entitled to an ODR pension allowance, which is less than the POD disability pension allowance under either RSSL § 507-c or the Heart Bill.

On March 26, 2019, the Medical Board reviewed petitioner's two applications for POD disability retirement, as well as the DOC's application for ODR that was filed on petitioner's behalf. The Medical Board approved the application for ODR and denied petitioner's applications for POD. The Medical Board again found petitioner disabled due to a non-inmate-related degenerative condition of the right knee, the same knee he injured during the December 23, 2011, inmate altercation.

It appears that the Board of Trustees considered petitioner's applications at its meeting on September 13, 2018 and remanded the matter back to the Medical Board to consider whether petitioner's right-knee disability was causally related to his December 23, 2011, inmate injury and requested clarification as to the cause of his right-knee

disability. On July 15, 2019, the Medical Board reviewed petitioner's dual applications a final time as directed by the Board of Trustees. The Medical Board again denied both of petitioner's POD applications, stating:

“The Medical Board finds that the documentary and clinical evidence substantiate that Roberto Gonzalez is disabled from performing the duties of a Correction Officer with the Department of Correction. The Medical Board notes that the incident dated December 23, 2011 is consistent with inmate contact. The Medical Board notes that the incident dated December 23, 2011 is not the proximate cause of his disability. There is no contemporaneous documentation linking his right knee disability to the incident dated December 23, 2011. His right knee disability is causally related to Chronic Degenerative Joint Disease. Regarding his diagnosis of Coronary Artery Disease, the Medical Board finds that he had undergone successful single vessel coronary artery intervention with stenting and has been noted to have a normal SPECT. He reported atypical chest pain, which was nonischemic in nature by his description. In addition, we further note that he had no recent evaluation to determine a residual ischemic component of his chest pain. Therefore, the Medical Board recommends that Roberto Gonzalez's application for Disability Retirement under the provisions of Section 507-c, be denied and that his application under the provisions of Section 207-o, be denied.”

At a January 9, 2020 meeting, the Board of Trustees adopted the Medical Board's recommendation to deny petitioner's applications for POD disability retirement under RSSL § 507-c and GML Law § 207-o. This resulted in petitioner being retired with an ordinary disability retirement benefit. By letter dated January 10, 2020, NYCERS informed petitioner of the Board of Trustees' denial. By Notice of Petition and Verified Petition dated December 28, 2020, petitioner commenced the instant Article 78 proceeding seeking to annul the Board of Trustees January 9, 2020 determination, and seeking an

award of disability retirement under RSSL § 507-c or GML Law § 207-o, or that the matter be remanded for reconsideration. On or about March 24, 2021, respondents submitted a verified answer.

Petitioner argues that respondent's actions and determinations were arbitrary, capricious, unreasonable, unlawful and contrary to the provisions of the Constitution of the State of New York and all applicable statutes, laws, ordinances, rules and regulations and the Court of Appeals and Appellate Division rulings in that the Medical Board failed, neglected and refused to use the proper legal test of entitlement to a ¾ disability pension applicable in the circumstances, where a line-of-duty injury aggravates a preexisting condition, rendering the individual disabled. Petitioner further alleges that the Medical Board's determination was contrary to the competent evidence establishing that the petitioner is entitled to POD disability retirement.

In response, respondent argues that its' determination denying petitioner performance of duty disability retirement was neither arbitrary nor capricious, is supported by credible medical evidence and should be upheld. Specifically, respondent maintains that the Medical Board's determination that petitioner's right knee injury was not caused by a work-related incident is supported by credible evidence. In this regard, respondent points to the fact that Medical Board examined petitioner on January 29, 2018, and again on July 15, 2019, with respect to his right knee injury and determined that although petitioner was disabled as a result of osteoarthritis in the right knee, this condition was not causally related to the December 23, 2011 inmate related use-of-force incident. Respondent contends that the Medical Board's determination was based on the lack of

contemporaneous medical records linking petitioner's injury to the December 23, 2011 incident; the fact that petitioner had returned to full duty between the December 23, 2011 incident and the first time he sought treatment in 2013, and the fact that an April 23, 2016 MRI of petitioner's right knee indicated bruising of the right knee, which it determined could indicate an unreported, but intervening, injury to the right knee, and the fact that he failed to seek treatment for his injury for almost eighteen months following the incident. Thus, respondent argues that the Medical Board found that petitioner's right knee disability was causally related to chronic Degenerative Joint Disease rather than the inmate involved injury.

Respondent further asserts that the Medical Board's determination that petitioner's heart condition is not disabling is also supported by credible evidence and is neither arbitrary nor capricious. Specifically, respondent notes that the Medical Board examined petitioner on four separate occasions: September 6, 2016, March 21, 2017, January 29, 2018, and July 15, 2019, related to his heart condition and found that it had been successfully treated and was not disabling. Respondent asserts that the Medical Board's determination was based on the following factors: (1) that petitioner's one vessel coronary artery disease was successfully treated by angioplasty and stent, which preserved his left ventricular ejection fraction; (2) the fact that petitioner presented with a normal sinus rhythm, with no cardiac arrhythmia, and no clinical evidence of congestive heart failure on September 6, 2016; (3) that his symptoms on March 21, 2017—a slight wheeze and a slight systolic murmur of heart—could not be conclusively attributed to petitioner's one vessel coronary artery disease; (4) that a nuclear stress test following the coronary intervention

showed no ischemia of the heart; and (5) the fact that petitioner failed to provide new medical evidence on July 15, 2019, to substantiate his complaints of intermittent chest pain, which the Board deemed “nonischemic” based on petitioner’s description. Respondent notes that since petitioner was never found to be disabled, he was never entitled to the presumption of causation articulated in the Heart Bill.

In reply, petitioner maintains that respondent’s denial of his application for inmate-related disability under RSSL § 507-c was not based on credible evidence. In this regard, petitioner points out that when he was questioned by the NYCERS’ Board of Trustees’ chairperson at the September 13, 2018 meeting regarding the fact that the first medical record they had was from May 13, 2013, 18 months after the incident, he responded that he had gone to the hospital on the day of the incident and was thereafter placed on light duty, meaning that he worked an assignment that did not involve any inmate contact. Petitioner further stated that he used cold compresses to treat his pain and when the pain failed to resolve and, in fact, worsened, he sought further medical attention. In addition, petitioner points to the testimony of Dr Bottner, the Medical Board Chairperson, at the Board of Trustees January 9, 2020, meeting:

“MR. BOSLEY: I'd like to ask Dr. Bottner. I guess the board was determining that his disability is caused by arthritis? Is that correct? And that the injuries from the 23rd didn't cause the arthritis, or didn't have a causal relationship?

‘DR. BOTTNER: But the basis is really the lack of medical evidence linking any significant injury on December 23, 2011 to that arthritic process. So, in other words, the first record of complaints to the right knee was actually in 2013, May 13, 2013, Dr. Kaplan. So the board pointed that out, that it was a year and a half after the incident that the first medical record outside of that day that the person came in with a

complaint referring to the knee. And it appears he continued to work with that problem throughout.”

Accordingly, plaintiff argues that the Board of Trustees’ determination was not based upon credible evidence because Dr. Bottner incorrectly implied that petitioner continued to perform his usual duties following the December 2011 inmate incident to make it appear that his disability was not causally related to the inmate related injury, which is belied by the fact that he was placed on light duty as a result of his injuries. Moreover, petitioner notes that at the September 13, 2018 Trustees’ meeting, his attorney testified that when petitioner returned to full duty, it was as an instructor in the Corrections Academy and no longer involved inmate contact. Petitioner notes that it was during this time that his knee injury worsened.

Petitioner further argues that respondent’s denial of his application for disability retirement under the Heart Bill is also not based on credible evidence. Specifically, he contends that in making their determination that his heart condition is not disabling, the Medical Board failed to discuss any of the essential functions of petitioner’s job description. In this regard, he points out that the job description utilized by the DOC’s Health Management Division states that some of the physical activities performed by Correction Officers and the environmental conditions experienced are: standing for up to 8½ hours continuously; walking up several flights of stairs; using physical force to break up fights; when assigned a double tour, working 17 hours continuously; working outdoors in all kinds of weather; lifting heavy objects; moving heavy items; being exposed to fumes from disinfectants and sanitary supplies; wearing bullet-resistant or radiation protective vests;

being subjected to close contact with inmates; responding to smoke/fire conditions which may require wearing turn-out gear such as boots, gloves, coats and using a 25 lb. Scott Air pack (Self Contained Breathing Apparatus), when necessary.

Discussion

This court is limited by CPLR article 78 to a review of the record before respondent and to the question of whether its determination was arbitrary and capricious based upon that record (*see Matter of Gray v New York State Div. of Hous. & Community Renewal*, 177 AD3d 738, 740 [2d Dept 2019]; *Matter of 65-61 Saunders St. Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 154 AD3d 930, 931 [2d Dept 2017]). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.” (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]). If a rational basis exists for its determination, the decision of the administrative body must be sustained (*see Matter of Pell*, 34 NY2d at 230; *Matter of Clark v New York State Div. of Hous. & Community Renewal*, 193 AD3d 726, 727 [2d Dept 2021]; *Matter of Lucas v Board of Educ. of the E. Ramapo Cent. Sch. Dist.*, 188 AD3d 1065, 1067 [2d Dept 2020]). Stated simply, this court cannot substitute its judgment for that of the agency so long as the agency’s decision is rationally based on the record (*see Matter of Borenstein v New York City Employees’ Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Matter of Vastola v Board of Trustees of the N. Y. City Fire Dept., Art. 1-B Pension Fund*, 37 AD3d 478, 478 [2d Dept 2007]; *Matter of Santoro v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 217 AD2d 660, 660 [2d Dept 1995]).

The Court of Appeals in *Matter of Borenstein*, noted that the award of accidental disability retirement benefits to a NYCERS applicant is a two-step process as follows:

“The first step involves fact finding by the NYCERS Medical Board (*see also*, Administrative Code § 13-123 [a] [composition of Medical Board]). After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually “physically or mentally incapacitated for the performance of city-service.” (Administrative Code § 13-168 [a].) If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was “a natural and proximate result of an accidental injury received in such city-service” (*id.*).

“The second step in the process involves the NYCERS Board of Trustees (*see also*, Administrative Code § 13-103 [b] [composition of Board of Trustees]). If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant’s claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board’s recommendation regarding causation.”

Thus, it is the responsibility of the Medical Board to determine whether a member applying for disability retirement benefits is disabled, and this determination is binding on the Board of Trustees (*see Matter of Russell v New York City Employees' Retirement Sys.*, 155 AD3d 1046, 1046 [2d Dept 2017]; *Matter of Borenstein*, 88 NY2d at 760; *Matter of Drummond v New York City Employees' Retirement Sys.*, 98 AD3d 1116, 1117 [2d Dept 2012]). The “Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence” (*Borenstein*, at 761). ““Substantial evidence” in this context means “some credible evidence”” (*Matter of Gibbs v New York*

City Employees' Retirement Sys., 161 AD3d 980, 981 [2d Dept 2018] quoting *Matter of Borenstein*, 88 NY2d at 760; see *Matter of Hernandez v New York City Employees' Retirement Sys.*, 148 AD3d 706, 707 [2d Dept 2017]; *Matter of Jones v New York City Employees' Retirement Sys.*, 138 AD3d 852, 852 [2d Dept 2016]). “If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant's claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board's recommendation regarding causation” (*Matter of Borenstein*, 88 NY2d at 760).

Accordingly, in the context of a Medical Board determination, such finding will be sustained if there is some credible evidence that supports the Medical Board's determination (*Matter of Borenstein*, 88 NY2d at 760; see also *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 8 AD3d 283, 284 [2d Dept 2004]). It is “solely within the province of the Medical Board to resolve any conflicts in the medical evidence and medical reports presented to it” (*Matter of Schlesinger v New York City Employees*, 101 AD3d 736, 737 [2d Dept 2012]; see *Matter of Borenstein*, 88 NY2d at 761; *Matter of Deering v Scopetta*, 71 AD3d 1141, 1141 [2d Dept 2010]; *Matter of Kuczinski*, 8 AD3d at 284). A court may not substitute its own judgment for that of the Medical Board (*Matter of Borenstein*, 88 NY2d at 761; see also *Matter of Campbell v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 47 AD3d 926, 928 [2d Dept 2008]; *Matter of Schwarzrock v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 238 AD2d 596, 597 [2d Dept 1997], *lv denied* 91 NY2d 803 [1997]).

Performance-of-Duty Disability Retirement under GML § 207-o (the Heart Bill)

Here with regard to that portion of respondent's determination that petitioner's coronary artery disease, although a qualifying condition under the Heart Bill, was not disabling, the court notes that his treating physicians submitted documentation to the DOC Health Management Division, between 2017 and 2018 following the placement of a stent to open up a blocked coronary artery, indicating that based upon their examinations and treatment of petitioner's heart condition, he was unable to perform substantially all of the duties of a correction officer. Although the Medical Board during its March 21, 2017, review of petitioner's application noted "atypical chest symptoms with an abnormal lung examination today" it found that because petitioner had "not undergone any further cardiac or pulmonary testing despite claims of worsening of his condition. The Medical Board is unable to ascribe his symptoms to the documented coronary artery disease."

Based upon the foregoing, the court finds that the Medical Board's determination that petitioner's documented coronary artery disease was not disabling and thus, he could perform all the duties required of a correction officer is not rational. The Medical Board's own physical examination found that petitioner had a slight murmur, a slight wheeze, and decreased breath sounds. The Medical Board failed to explain how he was fully capable of performing the duties of a correction officer which can include standing for up to 8½ hours continuously; walking up several flights of stairs; using physical force to break up fights; working 17 hours continuously during a double tour; lifting heavy objects; moving heavy items; being exposed to fumes from disinfectants and sanitary supplies; responding to smoke/fire conditions which may require wearing turn-out gear such as boots, gloves,

coats and using a 25 lb. breathing apparatus (*see Cook v New York State Comptroller*, 135 AD3d 1117, 1118 [3rd Dept 2016] [finding that the dispositive inquiry for purposes of determining accidental disability retirement benefits is not whether the petitioner is capable of indefinitely performing the tasks assigned to him but rather whether he was capable of performing the full duties of his job in his occupation]; *see also Matter of Kiess v Kelly*, 75 AD3d 416, 417 [1st Dept 2010]; *Matter of Rodriguez v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501, 502 [2d Dept 2004]; *Matter of Guillo v New York City Employees' Retirement Sys.*, 39 Misc. 3d 1208(A)[2013]; *Matter of Louis v New York City Employees' Retirement Sys.*, 26 Misc. 3d 1236(A) [2010]; *Matter of Samadjopoulos*, 19 Misc. 3d 1123(A) [2008]).

Performance-of-Duty Disability Retirement under RSSL § 507-c

The court finds that respondents' determination that petitioner's right knee injury was not caused by a work-related incident is not supported by credible evidence. In this regard, the court notes that the Department of Corrections' December 23, 2011 Use of Force report, prepared following the inmate involved incident, indicates that petitioner sustained injuries to his left jaw and right knee as a result of this incident. The court notes that petitioner informed the Board of Trustees that following the incident he was placed on light duty as a result of his injuries, in contrast to Dr. Bottner's representation to the contrary. The medical records indicate that petitioner sought further medical treatment in 2013, when his knee injury failed to improve. At that time, an MRI revealed strained

ligaments as well as a right knee meniscal¹ tear which required surgical intervention and subsequent physical therapy. The record indicates that petitioner was unable to resume full duty working with inmates and was instead assigned to teach at the Corrections Academy following this incident. Although the Medical Board recognized that petitioner's knee injury is disabling, it determined that it was not caused by the inmate related incident occurring on December 23, 2011, finding that his right knee disability was causally related to Chronic Degenerative Joint Disease, in the form of osteoarthritis.²

Respondent contends that the Medical Board's determination was based on the lack of contemporaneous medical records linking petitioner's injury to the December 23, 2011 incident; the fact that petitioner had returned to full duty between the December 23, 2011 incident and the first time he sought treatment in 2013, and the fact that an April 23, 2016 MRI of petitioner's right knee indicated bruising of the right knee, which it determined could indicate an unreported, but intervening, injury to the right knee, and the fact that he failed to seek treatment for his injury for almost eighteen months following the incident. However, the court notes although Dr. Bottner testified that the first record of complaint with regard to a right knee injury was in 2013, there is DOC documentation corroborating

¹ A meniscus is cartilage that acts like a cushion between a person's shinbone and thighbone. Any activity that causes you to forcefully twist or rotate your knee, especially when putting your full weight on it, can lead to a torn meniscus (<https://www.mayoclinic.org/diseases-conditions/torn-meniscus/symptoms-causes/syc-20354818>).

² Osteoarthritis is a form of arthritis, which occurs when the protective cartilage on the ends of the bones wears down. Injuries, such as those that occur when playing sports or from an accident, can increase the risk of osteoarthritis. Even injuries that occurred many years ago and seemingly healed can increase your risk of osteoarthritis (<https://www.mayoclinic.org/diseases-conditions/osteoarthritis/symptoms-causes/syc-20351925>).

that petitioner injured his right knee during the inmate related incident of December 23, 2011 and there was discussion by the Board of Trustees when this matter was before them indicating that they had a record before them indicating that petitioner had gone to the emergency room following the incident. In addition, the record indicates that petitioner did not in fact return to full duty following the inmate related incident and that he was placed on light duty. Thereafter, petitioner began teaching at the Corrections Academy, where despite not having inmate contact his knee pain continued to worsen, forcing him to seek treatment which included surgery, physical therapy and resulted in the development of osteoarthritis in this knee. Further, the court finds that the alleged bruising that respondent contends “could” indicate an intervening injury does not constitute credible medical evidence demonstrating that his knee injury was not causally related to the December 23, 2011 incident.

“[C]redible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion” (*Meyer v Bd. of Trs. of the N.Y. City Fire Dep't*, 90 NY2d 139, 147 [1997] [internal citations omitted]). Here, there is nothing in the record indicating that petitioner had a knee problem prior to becoming a correction officer or that he had suffered right knee injuries which were not incurred in the course of his duty as a correction officer. Accordingly, the court finds that there is no objective medical evidence that the petitioner's disabling knee condition was the result of anything other than the line-of-duty injury he suffered (*see Mescall v Board of Trustees of N.Y. City Fire Dep't, Article 1-B Pension*

Fund, 204 AD2d 643, 644-645 [2d Dept 1994]; see also *Matter of Stack v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 235 AD2d 483, 483 [2d Dept 1997]; *Perrotta v Board of Trustees of the N.Y. Fire Dep't, Article 1-B Pension Fund*, 232 AD2d 493 494 [2d Dept 1996]). Thus, even crediting respondents' contention that osteoarthritis is a degenerative condition that occurs over time, said condition developed over the time period that petitioner was working as a correction officer and respondent has failed to demonstrate that it was not caused or exacerbated by the 2011 line-of-duty incident (see *Tobin v Steisel*, 64 NY2d 254, 259 [1985] [holding that "an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury"]; *Matter of Dement v Kelly*, 97 AD3d 223, 232 [1st Dept 2012]; *Hacker v Board of Trustees of N.Y. City Fire Dep't Article 1-B Pension Fund*, 228 AD2d 598,599 [2d Dept 1996). Thus, the court finds respondent's decision to deny petitioner's disability application based upon his right knee injury was arbitrary, capricious and not supported by credible evidence (see *Matter of Brady v City of New York*, 22 NY2d 601, 605-606 [1968] [remitting to trustees for new determination where it had relied upon incomplete investigation and conclusory report of the medical board]; *Occhipinti v McCall*, 305 AD2d 924, 925-926 [3d Dept 2003] [court found the evidence in the record was insufficient to support respondent's determination that petitioner's permanent disability was not the natural and proximate result of his prior work-related injuries]).

Conclusion

Based on the foregoing, it is hereby ORDERED as follows:

Petitioner's request for an Order annulling respondent's determination denying his application for POD disability retirement pursuant to RSSL § 507-c and GML § 207-o, dated January 10, 2020, is GRANTED; and

Petitioner's request for an award of a RSSL § 507-c and/or GML § 207-o POD disability retirement as a matter of law is DENIED; and

Petitioner's application for a RSSL § 507-c POD disability retirement is REMANDED to respondent to make an independent evaluation regarding whether petitioner's right knee disability is a natural and proximate result of his December 23, 2011 inmate-related incident; and

Petitioner's application for a GML § 207-o POD disability retirement is REMANDED to respondent to make an independent evaluation regarding whether petitioner's coronary artery disease is a disabling condition that prevents him from performing all of the duties of a Correction officer; and

Petitioner's request for an Order, pursuant to CPLR 2307(a), directing respondent to serve and file: A. all reports, recommendations, certificates and all other documents submitted to the NYCERS Board of Trustees (the Board) by the New York City Department of Correction (DOC) Health Management Division in connection with any retirement of the petitioner herein; B. copies of the minutes of each meeting of the Board wherein the Board considered, discussed, or acted upon any retirement application of the petitioner; and C. copies of any and all medical records, reports or notes relating to

petitioner which are on file with the NYCERS Pension Fund; the DOC Health Management Division; and the New York City Law Department Workers' Compensation Division; is DENIED, while that branch of his request seeking copies of any and all "job descriptions" reviewed by the Medical Board in their consideration of petitioner's subject applications is GRANTED and shall be provided to petitioner within 30 days of notice of entry of this order.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to read "J.S.C.", is written over the printed name "J. S. C." below.

J. S. C.