

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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INDEX NO. 156281/2024

IN THE MATTER OF THE APPLICATION OF JACKSON
CHENG,

MOTION DATE 07/10/2024

Petitioner,

MOTION SEQ. NO. 001

- v -

EDWARD A CABAN, THE BOARD OF TRUSTEES OF THE
NEW YORK CITY POLICE PENSION FUND, ARTICLE II

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 24, 25, 26, 47, 48, 49, 50

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, this motion is decided as follows. This is a CPLR Article 78 proceeding arising from the denial of petitioner Jackson Cheng’s application for Accident Disability Retirement (“ADR”) benefits by respondent The Board of Trustees of the New York City Police Pension Fund, Article II (the “Board”) and Edward A. Caban as Police Commissioner of the City of New York and Chairman of the Board (collectively, “respondents”). Cheng petitions for an order pursuant to Article 78 annulling the denial of his ADR benefits and ordering respondents to grant ADR benefits, or in the alternative ordering a trial on the issue of verification. Respondents oppose, arguing that the court cannot find that Cheng was entitled to ADR benefits as a matter of law and that the Board determination must be upheld. For the reasons that follow, the petition is granted.

Facts

The relevant facts, which are based on the petition and the answer, are as follows. Cheng was a Captain in the New York Police Department (“NYPD”) that was appointed to the NYPD on January 20, 2004.

On October 14, 2021 Cheng left his home in a NYPD radio motor patrol vehicle (“RMP”) and was heading to his precinct, the 114th, to start his shift. While in route to the precinct, Cheng received a report of a grand larceny in progress through the NYPD’s Intergraph Computer Aided Dispatch system (“ICAD”) on his cell phone. Each ICAD report has an ID for the dispatch, Cheng was responding to ICAD#21101322128. Cheng used his cell phone to call into active duty via “outside wire” at approximately 9:45 p.m. His shift was scheduled to start at 11 p.m. that night. NYPD Sergeant Salisha Alirasul was the desk officer at that time and entered in the commend log at 2145 military time “Capt Cheng PFD via O/W”, where PFD means present for duty and O/W means outside wire.

At approximately 9:56 p.m., while heading to the crime scene to investigate, Cheng was involved in an accident as his RMP was struck by another vehicle on the Brooklyn-Queens Expressway. At the time Cheng was not wearing a body-worn camera (“BWC”) as he had not yet gone to the precinct. Cheng was brought to the New York-Presbyterian Hospital Emergency Room after sustaining an injury to his rotator cuff that required surgery. On October 15, 2021 a Line of Duty (“LOD”) injury report was filed, but did not mention that Cheng was responding to a ICAD report and that he reported in for duty. A treatment authorization form, provided to the court by Cheng, authorized treatment injury and identified it as a LOD injury.

On November 8, 2022, NYPD District Surgeon Brian Mignola submitted a Recommendation for Survey for Cheng with a diagnosis of shoulder derangement after surgery. Mignola noted “[r]ecommend that a survey be conducted in order to ascertain whether this

member is incapacitated for the performance of duty and ought to be retired.” The survey included both an ADR and ordinary disability retirement (“ODR”) benefits application.

On December 6, 2021, Cheng submitted an additional report stating, “I would like to make some changes to the statements in the occurrence of the line of duty incident with regards to ICAD 21101322128, a job in which I was responding to.” Respondents claim that Cheng’s LOD designation was denied, however, Cheng asserts that “the injury was approved, designated, and processed as a line-of-duty injury from the date that it occurred; the only thing that was denied was petitioner’s line-of-duty injury report amendment request”.

On March 3, 2023, the PPF Article II Medical Board (“Medical Board”) interviewed and examined Cheng in connection with the application. After reviewing Cheng’s medical history and conducting a physical examination, the Medical Board approved Cheng’s ADR application. In support of their recommendation to the Board, the Medical Board noted:

[I]t is the opinion of the [Medical Board] that retired Captain Jackson Cheng has significant orthopedic findings precluding him from performing the full duties of a New York City Police Officer. In light of this, the [Medical Board] recommends approval of the Police Commissioner's application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement. The final diagnosis is Residual Post Arthroscopic Surgery of the Right Shoulder. The competent causal factor is the line of duty injury of October 14, 2021.

On November 8, 2023, the Board considered the Medical Board’s recommendation for approval of ADR benefits. They found inconsistencies in his file as to whether Cheng was on duty at the time, noting that Cheng was not wearing a BWC and that he was not scheduled to start duty until 11 p.m. Additionally, the original statement made at the time of the injury did not include that he was responding to a larceny in progress, but an updated report filed 68 days later added this detail, though this update request was denied. Philip Dukes, a NYC Department of finance representative on the Board, stated “It seemed odd to us that someone would be called

for a larceny in progress when they are not on duty yet of a captain's level and that he would have to go there, but we would like a better explanation of why this was on duty.” Captain Ramirez, the Union representative, requested the determination be tabled until more evidence could be provided. Cheng was notified on December 13, 2023, that his case would be tabled until January 10, 2024.

Cheng submitted additional documents prior to the January 10, 2024, meeting, including NYPD captain duty schedules, overtime slips, and the October 14, 2021, command log entry made when he called in. Cheng also submitted two statements dated December 8, 2023, and January 9, 2024. In the first statement, Cheng indicated that from July 2021 to October 2021 he had been assigned eleven midnight duties (from 11 p.m. to 7 a.m.) and had reported to duty early for nine of them. The second statement contained further information regarding the night of the accident, explaining that while he was enroute to the 114th precinct he was notified on his work phone of the Grand Larceny of Auto in progress and called the precinct to report his PFD status. He did not submit an overtime slip for that night because he was unable to finish his shift due to the accident and did not meet the overtime requirements. Cheng also noted that his hours are entered by a payroll employee and not by him personally, and that he did not look at his LOD accident paperwork until December 6, 2021, when he was preparing for his NYPD District Surgeon appointment. It was at this time Cheng noticed the report did not reflect the job he was responding to a submitted a UF49 which detailed the Grand Larceny he was responding to.

At the January 10, 2024, meeting, the Police Union counsel explained that the original accident report did not contain information regarding the Grand Larceny but the amended one did, as Cheng was unable to amend the report while he was out of work following the injury. The

Board did not find this clarification sufficient, and Dukes stated “[b]ased on what we have, we do not feel that he has met his burden.”

On February 14, 2024, the Board again tabled Cheng’s case until March 13, 2024. Cheng submitted additional documentation including a statement from Alirasul who affirmed that she wrote the command entry log from the night of the accident stating that Cheng reported in for duty on an outside wire. Cheng also submitted an additional written statement detailing that on March 1, 2024, he asked Alirasul to submit a UF49 in regard to the command log entry. Alirasul confirmed the entry was in her handwriting but stated that she did not have an independent recollection of making the entry.

On March 13, 2024 the Board voted to deny Cheng’s ADR benefits in a 6/6 tie, which resulted in a denial. During the meeting, Ms. Zimberg stated the following:

The member provided no detail as to how he came to be called upon to respond while off-duty, where it occurred, or even what time he claimed to have received the communication. At the scene of the accident, the accident report was prepared by a Sergeant Estevez. Nowhere is it noted that the MOS told the sergeant that he was responding to a GLA... Sergeant noted the time of accident as 2205, which again was 55 minutes before the member was scheduled to present himself at his precinct at 2300 hours. The MOS, the member submitted an updated memo and Xerox of the page of the member's command log with an entry at 2145 hours on the 14th, 28 minutes before his collision, and one hour 15 minutes before he was scheduled to start working. The first part of the line is illegible and written in cursive writing. The second part is printed, possibly different pen, "CAPTAIN CHENG PFD via O/W". That entry did not provide evidence that the member was on duty at the time of the collision... Also there was no overtime submitted for the time of the accident.

Cheng retired on March 13, 2024 with ODR benefits as a result of the denial of ADR benefits. Cheng commenced this Article 78 proceeding on July 10, 2024.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law;

or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). “[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell*, 34 NY2d at 231; *see also Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Ferrelli v State of New York*, 226 AD3d 504, 504 [1st Dept 2024]). If the agency determination is supported by a rational basis, it must be upheld even if a different conclusion could have been reached by the court (*Matter of Ferrelli*, 226 AD3d at 504; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Where, as here, the Board has voted a six-to-six tie denying accident disability retirement benefits “the tie vote can be set aside on judicial review only if the courts conclude that the retiree is entitled to the greater benefits as a matter of law” (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). When considering an application for benefits, the Board “is not bound by the medical board’s determination that said disability resulted from a service related accident” and may decide whether the disability resulted from a line-of-duty accident (*id.* at 351).

Respondents argue that the petition must be denied as the decision by the Board was supported by credible evidence that Cheng was not on duty at the time of the accident, and that Cheng cannot prove as a matter of law that the accident occurred while he was on duty. Cheng

argues that the submitted evidence demonstrates that the accident occurred while he was on duty and that the Board's determination was contrary to the evidence before them.

Respondents cite *Matter of Torres v New York City Employees' Retirement Sys.*, which states that the issue is "whether at the time of the accident petitioner was performing city service" (160 AD2d 578, 579 [1st Dept 1990]). Respondents argue that the evidence on the record reflects that the incident occurred an hour before Cheng was to begin his shift that night and that he had not yet arrived at the precinct to report for duty and was therefore not performing city service. The court disagrees.

Respondents refer to several cases where the denial of ADR benefits were affirmed, however these cases are not factually analogous to the case at hand. In each of the cases provided, it was clear the accident occurred to the officer prior to starting or after finishing their tour of duty (*see Matter of Alessio v New York City Employees' Retirement Sys.*, 67 NY2d 978 [1986] [petitioner falling outside the precinct while on his way to report for duty was not considered city service]; *Matter of Rubenstein v Metropolitan Transp. Auth.*, 145 AD3d 453, 454 [1st Dept 2016] [petitioner was not "in service" when injured in the parking lot 30 minutes before his tour of duty began]; *Torres*, 160 A.D.2d at 579 [corrections officer was injured after her tour of duty ended and was heading home]; *Matter of Cantello v Regan*, 154 AD2d 867, 868 [3d Dept 1989] [injury sustained by the petitioner in the parking lot was sustained prior to the commencement of his duties]). This is not a case of an officer who slipped in a parking lot before or after work, but one who called into the precinct to report he was responding to an active crime and was on his way to investigate.

While it is true that Cheng had not yet reported into the precinct physically, he had called in and reported for active duty to pursue an active crime after receiving an alert via the ICAD

system on his cell phone. While some of the entry is illegible, there is a clear and legible entry in the command log that Cheng called in via outside wire to report for duty that was verified by the Sergeant who recorded the entry. The fact that there is some portion of the entry that is illegible and written in a different color pen is in no way dispositive of his active-duty status.

Cheng was able to identify the crime he was responding to by its ICAD ID number and attempted to file an amended report when he returned from his sick leave and realized the original entry did not reflect the crime he was enroute to investigate. Duke's statement that it seemed odd that a captain would be responding to a crime in progress seems based on nothing but conjecture alone. Cheng provided evidence that he often reported for duty early, having done so for nine of his prior eleven midnight shifts. Respondents argue that his habit of beginning work before the scheduled start "at best, [] may support the claim that it was plausible for Petitioner to be on duty an hour before the beginning of his shift – not that he actually was on the night in question", seemingly ignoring the command log and Cheng's testimony while viewing this evidence in isolation. The Board also raised an issue that Cheng did not report overtime that night despite only being on duty for 11 minutes that night before the accident occurred. Cheng would only qualify for overtime if he reported in early and worked for the remainder of his assigned shift.

Respondents argue that even if Cheng had validly reported present for duty, that "even while on the clock, employees are not 'in service' for disability retirement purposes if they are not 'performing work duties' at the time of the injury (*Matter of Welch v Hevesi*, 32 AD3d 564 [3d Dept 2006]). It is undisputed that even while on duty, an officer is not in service when engaged in personal activities (*id.*; see also *Matter of Dreher v DiNapoli*, 121 AD3d 1145, 1145-46 [3d Dept 2014] [ADR benefits were denied where petitioner was injured while making a

detour while on duty to get coffee). In *Matter of Welch*, the petitioner was a corrections officer who was on duty, but was walking to her car in the parking lot to retrieve her cell phone for another corrections officer to make a phone call and therefore was not in service when injured (32 AD3d at 564). This case is factually distinguishable, as Cheng was not conducting personal activities on a frolic or detour but driving in his capacity as a police captain to investigate a crime.

Respondents argue that Cheng was “not performing any job duties at the time of the collision but instead was simply travelling to a work location to start duty”. They argue further that this court should defer to the Board’s “reasonable conclusion” that Cheng did not suffer a service-related accident based off the First Department decision in *Matter of Marchisotto v Kelly* (58 AD3d 555, 556 [1st Dept 2009]). In *Matter of Marchisotto*, the officer was injured while attempting to unclog a toilet, which the Board had determined did not constitute “the regular duties of a police officer”. Driving to the scene of a crime would be considered a part of the regular duties of a police officer to any reasonable mind. Had Cheng been enroute from the precinct rather than from his home, there would be no doubt that he was performing his job duties by driving to the scene of the crime. Where he originated from does not change the change the fact that he was actively responding to a crime and driving directly there, not on his way to a coffee shop or otherwise engaged in personal matters. Therefore, it is clear that Cheng is entitled to ADR benefits as a matter of law.

For the reasons above, the petition is granted.

Conclusion

Based on the foregoing, it is hereby

ADJUDGED and ORDERED that the petition is granted; and it is further

ADJUDGED and ORDERED that the March 13, 2024 decision denying Jackson Cheng Accident Disability Retirement benefits is annulled; and it is further

ADJUDGED and ORDERED that respondents shall grant petitioner Jackson Cheng Accident Disability Retirement benefits.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.



1/24/2025

DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE