

At an IAS Term, Part 92 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 11th day of January, 2024.

P R E S E N T:

HON. KATHERINE LEVINE,

Justice.

-----X

In the Matter of the Application of
ROBERT McCracken,

Petitioner,

-against-

DECISION/ORDER

Index No.: 508590/21

MELANIE WHINNERY, AS THE EXECUTIVE
DIRECTOR OF THE NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM, THE BOARD OF
TRUSTEES OF THE NEW YORK CITY
EMPLOYEES' RETIREMENT SYSTEM, THE
MEDICAL BOARD OF THE NEW YORK CITY
EMPLOYEES' RETIREMENT SYSTEM AND
THE NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM,

Respondents.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-17,24-26
Opposing Affidavits (Affirmations) _____	_____ 27- 80
Affidavits/ Affirmations in Reply _____	_____ 81-82
Other Papers: _____	_____

Upon the foregoing papers, petitioner Robert McCracken (“petitioner” or “McCracken”) moves for a judgment, pursuant to Article 78 of the Civil Practice Law and Rules (CPLR):

- (1) reviewing and annulling the action of respondents the New York City Employees’ Retirement System (NYCERS), the Board of Trustees of NYCERS (Board of Trustees), the Medical Board of NYCERS (Medical Board), and Melanie Whinnery as the Executive Director of NYCERS (collectively “Whinnery” respondents) in denying petitioner a performance of duty disability retirement pursuant to the World Trade Center (WTC) Disability Law, Administrative Code § 13-168 and New York Retirement and Social Security Law (RSSL) § 2 (36) (c) (i) (ii) (iii) (v) for his WTC qualifying conditions, and declaring said action to be arbitrary, capricious, unreasonable and unlawful;
- (2) directing and ordering the respondents to retire petitioner with WTC Disability Retirement allowance under the WTC Disability Law based on the overwhelming documentation submitted to NYCERS; and
- (3) ordering respondents to pay for costs and reasonable attorneys’ fees.

Petitioner further seeks an order pursuant to CPLR 2307 (a) directing respondents to serve and file upon the date hereof:

A. all reports, recommendations, certificates and all other documents submitted to or reviewed by the NYCERS Medical Board and Board of Trustees in connection with petitioner’s performance-of-duty disability retirement application herein, including, but not limited to, any job description documents referenced or relied upon in determining whether petitioner is disabled from the performance of the essential functions of his former title;

B. copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon petitioner’s accident disability retirement application;

C. copies of any and all medical records, reports or notes relating to petitioner which are on file with the Pension Fund

and/or the FDNY Bureau of Health Services, including authorizations for treatment and sick history reports; and

D. a copy of the Rules governing NYCERS disability retirement procedure.

Background and Procedural History

Petitioner was appointed as a paramedic/EMT with the New York City Health and Hospitals Corporation Emergency Medical Services (EMS) on October 26, 1973. On March 17, 1996, EMS was merged with the New York City Fire Department (FDNY), and petitioner continued to serve with the FDNY as the Chief of Department until retiring on February 28, 2005. On September 11, 2001, petitioner suffered from smoke inhalation and injured his back and hip while performing rescue and recovery operations at the World Trade Center (WTC) following the terrorist attack. He continued working at the site assisting in recovery and cleanup operations for several months thereafter. Since 2001, petitioner has been treated by the FDNY's Bureau of Health Services (BHS) for the injuries he sustained and several conditions he developed following his work at the WTC site. In 2004, the BHS Medical Board Committee¹ found that he was disabled from performing his duties due to herniated disc L3-L4 with radiculopathy and left hip arthrosis with joint effusion, injuries he sustained working at the WTC site. As stated above, petitioner retired on February 28, 2005.

Subsequently, Governor Pataki signed the WTC Disability Law in 2005, which provided that an emergency responder is entitled to WTC Disability benefits if he

¹ The BHS Medical Board determines the fitness for duty of FDNY members based upon the requirements of the members job title.

completed at least 40 hours or was present within the first 48 hours after the first plane hit the towers at the WTC site, and suffers from a “qualifying condition or impairment of health.” RSSL §2 (36) (c) (i) (ii) (iii) (v) delineates the WTC-related qualifying conditions under the WTC Disability Law.² Pursuant to Administrative Code §13-168 (b) (5)³ any condition or impairment of health caused by a qualifying WTC qualifying condition is presumed to have been incurred in the performance and discharge of duty and the natural and proximate result of an accident.

On March 21, 2006, petitioner submitted a Notice of Participation in WTC Rescue Recovery or Clean-Up Operations with NYCERS, stating that he worked at the WTC on multiple days between September 11, 2001 and May 2002. The WTC Health Program certified him for the following WTC-related qualifying conditions: asthma and chronic respiratory disorder-fumes/vapors [obstructive airway disease]; chronic rhinosinusitis

² The qualifying conditions include: (i) diseases of the upper respiratory tract and mucosae, including conditions such as rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, and upper airway hyper-reactivity, or a combination of such conditions; (ii) diseases of the lower respiratory tract, including but not limited to tracheo-bronchitis, bronchitis, chronic obstructive pulmonary disease, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic; (iii) diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure; ...or (v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease.

³ NYC Administrative Code § 13-168 provides that “[n]otwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence.”

[upper respiratory disease]; gastroesophageal reflux disease (GERD); medically associated to rhinosinusitis and medically associated to GERD [obstructive sleep apnea]; medically associated to GERD [Barrett's Esophagus]; and acute traumatic injury [displaced intervertebral disc in back].

On May 19, 2006, petitioner filed an accident disability retirement application under the WTC disability provision in Administrative Code § 13-168 (b) (5). In support of his application, petitioner listed a herniated disc at L3-L4, L4-L5, and L5-S1 with radiculopathy; asthma; chronic sinusitis; GERD; and nodules in the lungs as the disabling conditions. After examining and interviewing petitioner and considering the medical documentation he submitted, the Medical Board found that the documentary and clinical evidence failed to substantiate that petitioner was disabled from performing the duties as an EMS Chief, and recommended that his application be denied. The Board of Trustees adopted the Medical Board's recommendation on September 14, 2006.

On June 15, 2006, petitioner was awarded Social Security Disability benefits, effective from October 9, 2003. The administrative law judge found petitioner disabled from performing any gainful employment with the following impairments: herniated disc at L3-L4 with radiculopathy; left hip arthrosis with joint effusion; asthma with borderline hyperreactivity; gastroesophageal reflux disorder; and chronic sinusitis.

On November 20, 2007, petitioner filed a second application for disability retirement citing the same conditions he cited in his 2006 application. The Medical Board reviewed the documentation submitted from petitioner's treating physicians including his orthopedist, gastroenterologist, pulmonologist and physical therapy records.

Petitioner was interviewed and examined by the Medical Board. On November 20, 2008, the Medical Board recommended denial of petitioner's application finding that the documentary and clinical evidence failed to substantiate that he was disabled from performing the duties of an EMS Chief. On May 14, 2009, the Board of Trustees adopted the Medical Board's recommendation and denied petitioner's application.

On July 9, 2009, petitioner filed a third WTC accident disability retirement application but was informed by NYCERS, by letter dated August 18, 2009, that he could not re-apply for reclassification of his pension because more than 12 months had elapsed from the date of the Medical Board's recommendation of denial on November 20, 2008.

Approximately 10 years later, on March 14, 2019, petitioner filed his fourth WTC accident disability retirement application listing the disabling conditions as: "herniated lumbar disc herniations with radiculopathy, asthma, obstructive sleep apnea, sinusitis, GERD, Barrett's Esophagus, [and] lung nodules." He also stated that he suffers from weakness, difficulty walking, difficulty breathing and fatigue. On June 4, 2019, the Medical Board reviewed petitioner's submissions including the medical reports he submitted from his treating physicians including a gastroenterologist, orthopedist, and pulmonologist. The Medical Board stated that it reviewed x-rays, CAT scans and MRIs of petitioner's back as well as IME reports, all of which covered the time period from 2001 to through 2018. The Medical Board interviewed and examined petitioner and once again determined that he was not disabled as a result of any of the WTC qualifying conditions he suffered from. Subsequently the Medical Board was asked to reconsider the application based upon additional documentation.

On September 18, 2020, the Medical Board issued a report stating that it had reviewed the updated documentation submitted by petitioner from several of his medical providers and the description of the duties and responsibilities of an EMS Paramedic including for EMS Lieutenants, Captains and Chiefs. The Medical Board concluded that the new documentation submitted failed to demonstrate objective evidence of permanent disability and again recommended that petitioner's application for Accident Disability Retirement pursuant to the World Trade Center Law be denied.

On December 9, 2020, by letter to NYCERS Executive Director Melanie Whinnery, petitioner's counsel requested that the Board of Trustees consider all of the evidence in petitioner's NYCERS file before making its determination with regard to his application. Specifically, petitioner stated that he disagreed with the Medical Board's determination that his multiple WTC-related conditions would not prevent him from performing all of the essential tasks of an EMS Chief. In this regard, he noted that the Medical Board acknowledged that petitioner suffers from these qualifying conditions but failed to actually discuss what his job duties entailed and explain how he is capable of performing such duties. However, on December 10, 2020, the Board of Trustees adopted the Medical Board's recommendation to deny petitioner's WTC Disability Retirement application and informed petitioner of his right to commence the instant proceeding.

By Notice of Petition and Verified Petition dated April 12, 2021, petitioner commenced the instant Article 78 proceeding seeking to annul the Board of Trustees' determination dated December 10, 2020, and for an award of disability retirement under the WTC Disability Law on the grounds that the determination of the Board of Trustees

to adopt the Medical Board's recommendation to deny him these benefits without discussion was arbitrary and capricious. On or about September 8, 2021, respondents submitted a verified answer.

In support of his petition, petitioner argues that he is entitled to a WTC Disability Retirement benefit based upon the injuries and conditions he sustained as a result of the time he spent working at the WTC site as he met his burden of establishing that he was at the WTC site on September 11, 2001, and for the requisite time thereafter, and that he suffers from several WTC qualifying conditions that have rendered him disabled from performing all of the job duties of an EMS Chief.

Petitioner further asserts that the Trustees' reliance on the Medical Board's conclusion that he can perform all of the essential tasks as set forth in the job description for a Supervising Medical Service Specialist-Chief is irrational and misplaced. Petitioner notes that the Medical Board merely stated that it had reviewed the job description but failed to articulate how he could perform the extensive job requirements, which include carrying heavy objects and exposure to toxic materials, given that he was found disabled from performing full duty by the FDNY BHS Medical Committee in 2004, based upon conditions, that were subsequently deemed to be qualifying conditions under the WTC disability retirement statute. He further notes that the SSA determined in 2006 that he was fully disabled, "based upon evidence of herniated disc at L3-L4 with radiculopathy; left hip arthrosis with joint effusion; asthma with borderline hyperreactivity; gastroesophageal reflux disorder; and chronic sinusitis" (NYSCEF Doc No. 9).

In further support of his petition, he points to several cases in which the courts have found that the Medical Board's determination of no disability was arbitrary and capricious and for the proposition that this court can grant him ADR WTC disability as a matter of law. In *Mtr. of Samadjopoulos v NYCERS* (104 AD3d 551, 553 [1st Dep't, 2013]), the court overruled the Medical Board and found that the petitioner was entitled to ADR benefits as a matter of law pursuant to the WTC presumption. The *Samadjopoulos* court held that "respondents' assertion that petitioner is not 'disabled' is itself irrational and arbitrary. Respondents admit that petitioner suffers from several qualifying conditions, yet state-without any medical evidence to rebut the conclusion that the conditions are disabling-that no disability exists." See also, *Mtr. of Lidakis v NYCERS* (2016 NY Slip Op 32760 [U] [Sup Ct, Kings County 2016]), which involved an FDNY EMT seeking non WTC related ADR. The court held that placing petitioner, whose duty was to render aid to those in need back into the line of duty when he suffered from knee conditions, would endanger those vulnerable and sick people needing the services of an EMT. *Mtr. of Muniz v Nigro* (NYLJ, 1202796849481, *1 [Sup. Ct. Kings County 2017]), (court remanded back to the Medical Board that portion of petitioner's application seeking ADR based upon his WTC qualifying condition of asthma. The *Muniz* court noted that "the Medical Board's report does not reference the performance requirements for firefighting, there is no description of the characteristics of asthma and no assessment of any risk that the diagnosed condition would threaten the safety of any person during the anticipated course of firefighting activity, including petitioner who could be exposed to noxious fumes and toxins that could exacerbate his asthma." Thus,

petitioner argues that respondents' determination that he is not disabled as the result of the WTC qualifying conditions he suffers from is arbitrary, capricious and irrational as the record here indicates that he suffers from several disabling conditions which render him unable to perform the full duties required of an EMS Chief.

In opposition, respondents contend that the determination denying petitioner's application for accident disability retirement pursuant to the WTC statute is supported by credible evidence and is thus neither arbitrary nor capricious. While respondents acknowledge that petitioner has documented diagnoses of sinusitis, asthma, GERD, Barrett's esophagus, obstructive sleep apnea and disc herniation with radiculopathy, all of which are conditions covered under RSSL § 2 (36), petitioner has not demonstrated that these conditions have resulted in disability. Moreover, respondents assert that the Medical Board's determination was supported by ample evidence as it thoroughly reviewed and referenced all of the documentation submitted by petitioner and relied on its interviews and examinations of petitioner, including in relation to his earlier applications.

Specifically, with regard to petitioner's herniated lumbar disc with radiculopathy diagnosis, respondents state that the Medical Board reviewed and referenced all of petitioner's medical documentation with respect to this injury, which he claims he suffered as a consequence of debris falling on him at the WTC site. Respondents maintain that the Medical Board reviewed various MRIs, including one from September 3, 2019, which demonstrated "a left foraminal L2-3, L3-4, and L4-5 disc herniation resulting in mild to moderate left foraminal stenosis with mass effect upon exiting nerve

roots . . . and straightening of the normal lumbar lordosis, which may be due to muscle spasm, and mild L4-5 and L5-S1 facet arthrosis” (NYSCEF Doc No.75). Respondents maintain that these findings are not indicative of a permanent disability. Additionally, respondents state that they reviewed orthopedic records from four separate doctors, various physical therapy notes and evaluations from the FDNY BHS between 2001 through 2018. Finally, they point to the Medical Board’s own physical examination of petitioner on June 4, 2019, which found that he had “rather functional range of motion of the lumbar spine without objective evidence of disability on examination” (NYSCEF Doc No. 67). Accordingly, respondents maintain that the determination to deny petitioner’s WTC disability retirement application based upon this injury was based on credible evidence.

With regard to petitioner’s asthma diagnosis, respondents point to the Medical Board’s examination of petitioner on June 4, 2019, which revealed normal breath sounds with no wheezes or rales. They further state that a review of the pulmonary function studies submitted by petitioner do not show any significant degree of impairment and are normal or borderline normal. Thus, respondents argue that the Medical Board appropriately found that petitioner was not disabled from performing his duties due to his asthma diagnosis.

Turning to petitioner’s diagnosis of obstructive sleep apnea, respondents contend that the Medical Board appropriately determined that this was not a disabling condition as he had not reached maximum medical improvement. They point to the fact that the medical records submitted indicate that petitioner’s sleep apnea has actually improved

through the years and that he is awaiting a new treatment with an oral appliance as he has been unable to tolerate the CPAP apparatus.

With regard to petitioner's sinusitis diagnosis, respondents point out that the Medical Board reviewed medical documentation regarding this condition spanning from 2004 through 2019 and found that none of these records establish that he has severe sinus disease. The Medical Board noted that petitioner treats this condition with the use of medication, sinus rinses and the use of a nebulizer as needed. Accordingly, respondents contend that the Medical Board appropriately determined that petitioner's symptoms of sinusitis did not permanently disable him from performing his duties.

Respondents note that the Medical Board reviewed petitioner's submissions related to his GERD diagnosis and determined that based upon the documentation submitted and petitioner's own statements during his interview on June 4, 2019, his GERD was diet related and triggered by the consumption of certain foods. Thus, respondents argue that the Medical Board aptly found that petitioner's GERD was not disabling to the performance of petitioner's duties. Next, respondents point out that the Medical Board reviewed all of the documentation submitted in relation to petitioner's Barrett's esophagus diagnosis, including endoscopy films and reports from 2008 through 2019. Similar to his GERD symptoms, the documentation revealed that his symptoms were episodic and triggered by certain foods. As such, respondents argue that the Medical Board properly found that petitioner's Barrett's esophagus did not permanently disable him from performing his job duties.

Additionally, with regard to petitioner's diagnosed lung nodules resulting from his WTC exposure, respondents point out that the Medical Board reviewed documentation from 2006 through 2019, including several CAT scans, all of which showed stable unchanged lung nodules with no evidence of bronchiectasis or pulmonary fibrosis. They further note that the Medical Board's examination of petitioner's lung function revealed good air entry with normal breathing sounds and no wheezes or rales. Respondents assert that the Medical Board correctly determined that petitioner's lung nodules did not permanently disable him from performing his job duties.

Finally, respondents argue that if the court finds the Medical Board's determination lacking, the only option is to remand the matter back to the Medical Board for further review. They further note that they are not bound by any determinations of disability rendered by the Social Security Administration. Additionally, respondents distinguish the cases cited by petitioner stating that the *Samadjopoulos* case involved the issue of causation and not the issue of disability. Next, respondents note that here the Medical Board specifically referred to petitioner's medical records in contrast to what occurred in *Mtr. of D'Avolio*.

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 Mtr. of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Mtr. of Boyd v New York City Employees' Retirement*

Sys., 202 AD3d 1082, 1083 [2d Dept 2022]; *Mtr. of Gray v New York State Div. of Hous. & Community Renewal*, 177 AD3d 738,740 [2d Dept 2019]). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*see Mtr. 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 (*Mtr. of Pell, supra* 34 NY2d at 230; *Mtr. of Clark v New York State Div. of Hous. & Community Renewal*, 193 AD3d 726, 727 [2d Dept 2021]; *Mtr. of Lucas v Board of Educ. of the E. Ramapo Cent. Sch. Dist.*, 188 AD3d 1065, 1067 [2d Dept 2020]). A court cannot substitute its judgment for that of the agency so long as the agency’s decision is rationally based on the record (*see Mtr. of Borenstein, supra* 88 NY2d at 761; *Mtr. of Clarke v Board of Trustees of N. Y. City Fire Dept., Art. 1-B Pension Fund*, 46 AD3d 559, 560 [2d Dept 2007]; *Mtr. 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]; *Mtr. 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 “Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence” (*Borenstein*, at 761). “Substantial evidence has been construed in disability cases, as requiring some credible evidence” (*Mtr. of Singleton v New York City Employees' Retirement Sys.*, 208 AD3d 882, 883 [2d Dept 2022]; *see Mtr. of Borenstein*, 88 NY2d at 760; *Mtr. of Boyd*, 202 AD3d at 1083; *Mtr. of Gibbs v New York City Employees' Retirement Sys.*, 161 AD3d 980, 981 [2d Dept 2018]; *Mtr. of Hernandez v New York City Employees' Retirement Sys.*, 148 AD3d 706, 707 [2d Dept 2017]). “Credible evidence has been described as evidence that proceeds

from a credible source, which reasonably tends to support the proposition for which it is offered” (*Id.*; see *Mtr. of Sorenson v Cassano*, 117 AD3d 1069, 1070 [2d Dept 2014]).

It is within the sole province of the Medical Board to resolve conflicting medical evidence and it is “entitled to credit the analysis of its own doctors over that of the petitioner's doctor” (*Mtr. of Maxwell v New York City Employees' Retirement Sys.*, 210 AD3d 1095, 1096 [2d Dept 2022]; see *Mtr. of Boyd*, *supra* 202 AD3d at 1083; *Mtr. of Bradley v New York City Employees' Retirement Sys.*, 193 AD3d 847, 849 [2d Dept 2021]; *Mtr. of Servedio v Lee*, 188 AD3d 891, 893 [2d Dept 2020]; *Mtr. of Giuliano v New York Fire Dept. Pension Fund*, 185 AD3d 812, 815 [2d Dept 2020]).

The court notes that the instant case differs from other WTC disability pension cases which typically involve the Medical Board's refusal to find an injury, condition or disease to be causally related to the petitioner's time spent working at the WTC site. Here, the Medical Board does not dispute that petitioner suffers from several WTC qualifying conditions as a result of his work at the WTC site, but conclude that petitioner is not disabled from performing his job-related duties as a result of any of the WTC qualifying conditions at issue.

Initially, the court notes that although petitioner has been retired since 2005, the WTC Disability Statute provides for retirement benefits for members who become disabled from such conditions at any point, irrespective of whether they are still on the job or after they have already retired (*see* NYC Administrative Code §13-168 (a)). Here, the record indicates that in 2004, the BHS Medical Board, which is responsible for assessing and determining the fitness for duty of its members based upon the

requirements of each members' job title, determined that petitioner was disabled and thus unfit for duty as an EMS Chief. Specifically, the BHS Medical Board found that petitioner suffered from an orthopedic disability related to the several disc herniations with radicular dysfunction that he had sustained as a result of being struck by debris while working at the WTC site. Upon physical examination of petitioner, the BHS Medical Board found limited forward flexion, leg weakness and a decrease in the strength of his left foot (NYSCEF Doc No. 42). This determination prompted petitioner to file for retirement as he could no longer perform all of the duties required of an EMS Chief, and the record indicates that there was no light duty assignment available for this position. The record further includes a report from Dr. Mitchell Goldstein, an orthopedist who performed an independent medical examination of petitioner on August 17, 2004, and reviewed several MRI scans and reports, CAT scans and electrophysiologic testing and the medical records of several of petitioner's treating physicians. Upon examination, Dr. Goldstein found limitations in petitioner's spine/back flexion and straight leg raising and an inability to squat. Specifically, Dr. Goldstein found that petitioner had "a permanent partial disability that is marked in nature" (NYSCEF Doc No. 46).

Subsequent to petitioner's retirement, as mentioned above, the WTC Disability Law was enacted to allow any public employee injured as a result of working at the WTC site to apply for an accidental disability retirement if the injury they sustained rendered them unable to perform their job, even if they had already retired. Thus, petitioner has filed several applications seeking that his retirement be reclassified to reflect the fact that

the conditions which caused him to retire were incurred as a result of his participation in the WTC rescue, recovery and cleanup effort.

The Medical Board, in its report and recommendation to the Board of Trustees regarding petitioner's 2019 application, summarizes the various reports/records it has reviewed supporting the determination that petitioner is not permanently disabled by any of the WTC qualifying conditions he suffers from. However, glaringly absent from the Medical Board's report is any articulation of its determination that petitioner is not disabled from performing all of the duties of an EMS Chief due to the well documented disabling orthopedic injury sustained when he was struck by debris while working at the WTC site (*see Abramowitz v New York City Employees' Retirement Sys.*, NYLJ LEXIS 689 [Sup Ct, Kings County 2019] [court held that it was irrational for the Medical Board to determine that petitioner was not disabled from performing his duties as an EMT where the FDNY retired him due to his WTC qualifying conditions]; *Gaffney v Nigro*, NYLJ LEXIS 327, *10 [Sup Ct, Kings County 2019] [court held that Medical Board failed to address why petitioner's chronic sinusitis did not preclude him from performing the work of a firefighter]; *Mtr. of Lidakis*, 2016 NY Slip Op 32760 [U] [court held that it could not in "good conscience, allow the public of New York City to be put in harm's way by allowing Petitioner, who is unable to fully perform the duties required of him because of the conditions he suffers from in both knees, to be placed back as an FDNY EMT"]; *Mtr. of Guillo v New York City Employees' Retirement Sys.*, 39 Misc 3d 1208(A) [2013][court held that Medical Board failed to articulate in its determination how the petitioner could perform the physical duties of a commercial bus operator given the

limitations to the range of motion of his back and neck that its own physical examination revealed]; *Mtr. of Quinn v Cassano*, 29 Misc 3d 1203 [A] [2010] [court held that Medical Board's determination that firefighter with mild intermittent asthma was not disabled from performing the duties of a firefighter, and failure to assess "any risk that mild intermittent asthma,[] may pose to the safety of the petitioner and his colleagues while performing his duties as a firefighter" was not credible]). Specifically, the Medical Board failed to explain how petitioner was fully capable of performing all of the duties of an EMS Chief which include, but are not limited to: "carrying and utilizing heavy equipment including such devices as stair chair or ambulance stretcher and carrying patients on ambulance stretchers. The EMT must be able to climb at least 6 flights of stairs . . . carrying his/her medical equipment The average total weight for the equipment that an EMT is required to carry to the patient is approximately 40 lbs" (NYSCEF Doc No. 3). Importantly, EMT's have to lift and transport patients of varying weights in addition to this equipment. Based upon the foregoing, the court finds that the Medical Board's determination that petitioner was not disabled from performing all of the duties of an EMS Chief is not rational (*see Mtr. of Stack v Board of Trustees*, 38 AD3d 562, 563 [2d Dept 2007]).

Moreover, respondents fail to address the determinations in the record from the FDNY's BHS finding petitioner disabled as far back as 2004. Courts have consistently held that "the Medical Board cannot cherry pick the evidence it chooses to rely on" (*Mtr. of Smiley v Whinnery*, 2021 NY Slip Op 32640 [U] [Sup Ct, Kings County 2021]; *see Daly v Nigro*, 65 Misc 3d 1206 [A], 2019 NY Slip Op 51525[U] [Sup Ct, Kings County

2019]; *Mtr. of Francese v Kelly*, 2010 NY Slip Op 31147 [U] [Sup. Ct. NY County 2010] [Medical Board may not “cherry pick” portions of reports it received or disregard information that does not support its position without including them or discussing them]; *Mtr. of Loud v Kelly*, 2010 NY Slip Op 30116 [U] [Sup Ct, NY County 2010]; *Mtr. of Athanassiou v Kelly*, 2009 NY Slip Op 31651 [U] [Sup Ct, NY County 2009]).

Based upon the foregoing, the court finds that the Board of Trustees erred by accepting, without any independent review or explanation,⁴ the Medical Board's determination, based on cherry picked evidence, that petitioner is not disabled from performing the duties of an EMS Chief as a result of his WTC qualifying orthopedic injury.⁵ Thus, respondents' determination lacked a rational basis and was arbitrary and capricious. Accordingly said determination is annulled. Respondents are directed to reclassify and upgrade petitioner's retirement benefit to an ADR benefit retroactive to December 10, 2020, the date upon which his application was denied.

The relief requested by the petitioner directing respondents to serve and file all reports, recommendations and all other documents submitted to NYCERS, etc., is deemed moot, inasmuch as any and all records appear to have been annexed to the respondents' answer and served upon petitioner's attorney who has not, in reply, stated otherwise.

⁴ It does not appear that the Board of Trustees discussed the details of petitioner's application and injuries prior to voting to accept the Medical Board's recommendation. However, this is unclear inasmuch as the documentation submitted from respondents purporting to contain the minutes of the Board of Trustees meeting is almost completely redacted with the exception of the names of the attendees and who they were representing.

⁵ The court notes that it does not find that petitioner has demonstrated, at this juncture, that any of the other WTC qualifying conditions he suffers from are disabling.

Conclusion

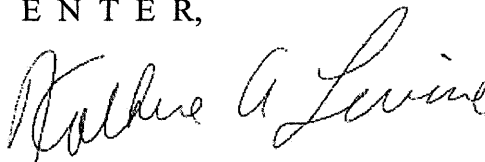
Based on the foregoing, it is hereby

ORDERED that petitioner's request for an order annulling respondents' determination denying his application for a WTC disability retirement, is **GRANTED**; and it is further

ORDERED and **ADJUDGED** that petitioner's request to annul respondents' determination, and for an award of a WTC disability retirement, as a matter of law, is **GRANTED**; and the remainder of the relief sought by petitioner is **DENIED**.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT

APPEARANCES

Attorneys for Petitioner
Jeffrey L. Goldberg
Goldberg & McEnaney, LLC
14 Vanderverter Ave, Ste 129
Port Washington, NY 11050

Attorneys for Respondent
New York City Law Department
100 Church Street
New York, NY 10007