

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

PRESENT: HON. NICHOLAS W. MOYNE PART 52

Justice

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LOURDES NIEVES,

Plaintiff,

INDEX NO. 155150/2022

MOTION DATE 08/03/2022

MOTION SEQ. NO. 001

- v -

KEECHANT SEWELL, THE BOARD OF TRUSTEES OF
THE POLICE PENSION FUND, ARTICLE II, THE MEDICAL
BOARD OF THE POLICE PENSION FUND, ARTICLE II, ELI
J. KLEINMAN

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

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

Upon the foregoing documents, it is

As discussed in more detail on the record, the petition is granted in part.

Petitioner Lourdes Nieves commenced this Article 78 proceeding seeking to annul the determination by The Board of Trustees of the Police Pension Fund, Article II, denying her application for reclassification for Accidental Disability Retirement (“ADR”) allowance pursuant to Administrative Code 13-252.1, known as the World Trade Center Disability Law (“WTC Disability Law”). Specifically, petitioner is challenging the disability determination made by the Medical Board Police Pension Fund, Article II (“Medical Board” or “Board”) in denying her application. Petitioner argues, *inter alia*, that the Board failed to properly consider her diagnosis of fibromyalgia despite it being judicially recognized as a new onset disease (*Sheldon v Kelly*, 126 AD3d 138, 142 [1st Dept 2015]).

In an Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks rational basis or is arbitrary and capricious (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). Ordinarily, a disability determination will not be disturbed if it is supported by substantial evidence, which in disability cases, is construed to require "some credible evidence" (*Id.*). Credible evidence is evidence that proceeds from a credible source; it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or supported suspicion (*Matter of Meyer v Bd. of Trustees of the New York City Fire Dept., Art. 1-B Pension Fund by Safir*, 90 NY2d 139, 147 [1997]).

Notwithstanding the above, Courts have annulled determinations and remanded them for further review when the Board has not adequately addressed medical issues or when the Board fails to clearly state the reasons for its recommendations (*Kiess v Kelly*, 75 AD3d 416, 417 [1st Dept 2010]). In this case, the Board's determination warrants further review as to the issue of petitioner's condition of fibromyalgia. Based on a review of the record, the Court finds that the Medical Board failed to adequately address the medical evidence regarding petitioner's fibromyalgia and/or the associated chronic pain, and failed to provide an explanation or credible evidence supporting its conclusion that the condition was not disabling.

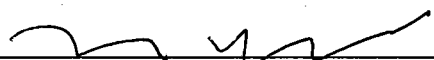
For the reasons set forth herein and, on the record, it is hereby;

ADJUDGED and ORDERED that the petition is granted to the limited extent of remanding the matter to the Medical Board for reconsideration only on the issue of petitioner's fibromyalgia/chronic pain.

The remainder of the petition is denied and dismissed.

8/4/2023

DATE


NICHOLAS W. MOYNE, 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