

At an IAS Term, Part 88 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 June 24, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,

Justice.

-----X

**In the Matter of the Application of  
ABIGAIL HODGE,**

*Petitioner,*

**Index No.: 1799/2019**

**For a Judgment under Article 78 of the  
Civil Practice Law and Rules,**

- against -

**DECISION AND ORDER**

**NEW YORK CITY EMPLOYEES' RETIREMENT  
SYSTEM.**

*Respondent.*

-----X

Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Petitioner Abigail Hodge's ("Petitioner" or "Hodge") Notice of Petition with Exhibits, dated May 3, 2019 for a Judgment pursuant to *CPLR Article 78*:

a) For an Order, to Review and Annul the Action of the Respondent New York City Employees' Retirement System ("NYCERS") in its Denial of Petitioner's Performance of Duty Disability Retirement pursuant to *Retirement and Social Security Law Section 507-c ("RSSL Section 507-c")* and to Declare Said Action to be Arbitrary, Capricious, Unreasonable and Unlawful;

b) to Direct and Order Respondent NYCERS to Retire Petitioner with a Performance of Duty Disability Retirement Allowance pursuant to *RSSL Section 507-c* Retroactive to her Retirement,  
or, in the Alternative;

c) to Remand the Matter to Respondent NYCERS for an Appropriate Review, and;

d) for an Order, pursuant to *CPLR Section 2307(a)*, Directing Respondent NYCERS to Serve and File:

I) All Reports, Recommendations, Certificates and All Other Documents Submitted to the NYCERS Board of Trustees by the Department of Correction Health Management Division Regarding Any Retirement Application of Petitioner;

ii) Copies of the Minutes of Each Meeting of the Board of Trustees in its Consideration, Discussion or Actions Relating to Any of Petitioner's Retirement Applications; and

iii) Copies of Any and All Medical Records, Reports or Notes on File with the NYCERS Pension Fund and/or the Department of Correction Health Management Division Regarding Petitioner;

e) for Such Other Just and Proper Relief as Deemed by the Court;

2) Petitioner's Memorandum of Law, dated October 23, 2019;

- 3) Respondent New York City Employees' Retirement System ("NYCERS") Verified Answer with Administrative Record Volume I and II, dated November 7, 2019;
- 4) Respondent NYCERS Memorandum of Law, dated November 7, 2019;
- 5) Petitioner Hodge's Reply Memorandum of Law, dated November 18, 2019, all of which submitted November 27, 2019.

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	Petitioner 1 [Exh. A-I]
Notice of Cross-Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits.....	
Verified Answer.....	Respondent 3 [Exh. Vol. I & II]
Replying Affidavit.....	
Supplemental Affidavits.....	
Exhibits.....	
Other [Memoranda of Law] .....	Petitioner 2 Respondent 4 Petitioner 5

Upon the foregoing cited papers, the Decision/Order on Petitioner Abigail Hodge's ("Hodge") Petition for a Judgment pursuant to *CPLR Article 78* regarding Respondent NYCERS' denial of Petitioner's Performance of Duty Disability Retirement from the New York City Employees' Retirement System pursuant to *RSSL Section 507-c* is as follows: This Court grants Petitioner's request only to the extent of remanding the matter to Respondent NYCERS for an appropriate review to reconsider her *RSSL Section 507-c* Performance of Duty Disability Retirement because this Court finds Respondent's actions and determinations are arbitrary, capricious, unreasonable and unlawful. Respondent NYCERS' prior decisions regarding her June 7, 2011; July 19, 2013; June 9, 2014; and November 9, 2017 applications, denying Petitioner's request for a *RSSL Section 507-c* Performance of Duty Disability Retirement are annulled. The matter is remanded, and Respondent NYCERS is to reconsider her application for a *RSSL Section 507-c* Performance of Duty Disability Retirement application in a fair and lawful manner by not disregarding this Court's rulings. This Court denies Petitioner's request for an order pursuant to *CPLR Section 2307(a)*, directing Respondent NYCERS to serve and file all reports, recommendations, certificates and all other documents submitted to the NYCERS Board of Trustees by the Department of Correction Health Management Division regarding any retirement application of Petitioner; copies of the minutes of each meeting of the Board of Trustees in consideration, discussion or actions relating to any of Petitioner's retirement applications; and copies of any and all medical records, reports or notes on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division regarding Petitioner [Petitioner 1, Exhs. A-I; Petitioner 2; Respondent 3, Exhs. Vol. I & II; Respondent 4; Petitioner 5].

### BACKGROUND AND PROCEDURAL HISTORY

Petitioner Abigail Hodge ("Petitioner" or "Hodge") was appointed as a Corrections Officer with the New York City Department of Correction ("DOC") on January 6, 1996, becoming a member of Respondent NYCERS pursuant to *New York City Administrative Code Section 13-104*. A full duty Correction Officer is required to supervise and subdue violent inmates. Petitioner became injured in no fewer than four (4) service connected injuries on July 30, 2008; October 17, 2008; December 1, 2009; September 3, 2010; and August 14, 2012 pursuant

to her work duties during her career. Those areas of injury include her knees, hip, foot, ankles, shoulders, elbow, arm, wrist, hand, lower back, chest and neck. Her last day of work was May 7, 2013.

First Incident-July 30, 2008 (right knee, elbow and ankle):

She was restraining a violent inmate at the mini-clinic on July 30, 2008 when she placed leg irons on him. Because of the inmate's brutal, resistant force, she hit the floor, injuring her right knee, ankle and elbow. As a result, she suffered a bruised right knee, elbow, and twisted ankle. When Dr. Charles Kaplan ("Kaplan") saw her that same day, he recommended that she not return to work until Monday, August 4. He further advised her to rest. He recommended that she use ice and elevate the injured areas. He prescribed Ultram 200 mg.

Second Incident-October 17, 2008 (left knee, lower back, right knee and left shoulder):

Approximately three (3) months later on October 17, 2008, after an inmate exited his cell, he punched another officer in the face. Petitioner came to the rescue of her fellow officer, placing the inmate in a control hold. However, the inmate "bucked back", causing her to fall, hitting the stairs. She continued to fight on the ground. As a result of this violent encounter, she sustained injuries to her left knee, lower back, right knee and left shoulder. Following its evaluation of her, Prison Health Services referred her to the hospital. When she visited Mount Sinai Hospital in Queens, she had X-rays of her knee. However, it indicated that there was no fracture.

Third Incident-December 1, 2009 (right arm, right ankle, right foot and lower back):

A little over a year later, Petitioner was bitten on the arm by an inmate on December 1, 2009 as she was pushed into the wall. As a result, she suffered injuries to her right arm, right ankle, right foot and lower back.

Fourth Incident-September 3, 2010 (neck, back, left hip, left wrist/hand, left shoulder, left elbow and chest):

Approximately nine (9) months later, Petitioner was assaulted by an inmate on September 3, 2010 when she was placing leg irons on him. The inmate kicked her into a wall, resulting in her striking the left side of her body, including her left shoulder. Because of this violent assault, she suffered injuries to her neck, back, left hip, left wrist/hand, left shoulder, left elbow and bruising to her chest.

Fifth Incident-August 14, 2012 (right knee, right shoulder and right wrist):

Approximately two (2) years later, while on duty on August 14, 2012, Petitioner was escorting an inmate to an area when the inmate slipped on an unknown substance. As she attempted to catch him, she fell. As a result, she injured her right knee, right shoulder and right wrist.

Petitioner's June 7, 2011 NYCERS Disability Retirement Application:

Based upon the inmate related injuries from her work, Petitioner applied for disability retirement from Respondent NYCERS on June 7, 2011. She stated that her disabling conditions involved both shoulders, both knees, right ankle, right arm and lower back due to the incidents on July 30, 2008; October 17, 2008; and December 1, 2009. DOC submitted an application for Disability Retirement for Petitioner on February 6, 2012. Petitioner appeared before the Medical Board on April 16, 2012 for an examination. Following its review of medical reports, its interview and its examination of her, the Medical Board opined that it did not have sufficient evidence to conduct a proper evaluation of Petitioner. It claimed that the information was lacking regarding the diagnosis and treatment of the right shoulder. Respondent NYCERS alerted Petitioner by letter, dated April 23, 2012 that its recommendation on the June 2011 and DOC February 2012 applications was deferred pending an examination of her in August 2012 and the submission of additional medical evidence. However, because of her failure to appear before Respondent NYCERS Medical Board on September 6, 2012, NYCERS sent a letter, dated December 26, 2012, informing Petitioner that it had suspended the June 2011 application. Although the Medical Board attempted to resume consideration of the 2011 and DOC 2012 applications on March 7, 2013, the case was closed

because it claimed that there was no additional documentation to consider.

#### Petitioner's Left Shoulder Surgery on May 7, 2013:

Board Certified Orthopedic Surgeon David R. Capiola ("Capiola"), M.D. performed left shoulder surgery on Petitioner on May 7, 2013, Petitioner's last day of work. Orthopedic Surgeon Capiola's post operative diagnosis was left shoulder loose body, extensive chondromalacia, synovitis, labral tearing, partial rotator cuff tearing and impingement.

#### Petitioner's July 19, 2013 NYCERS Disability Retirement Application:

Petitioner applied again to NYCERS on July 19, 2013 for disability retirement pursuant to *RSSL Section 507-c*. She indicated on her application that the disabling condition was attributed to both knees, her left shoulder and back which symptoms commenced in October 2008. Petitioner appeared before the Medical Board on January 16, 2014. After its review of the medical records, its interview and its examination of her, the Medical Board recommended denial of Petitioner's application for disability retirement. Its basis for the denial was because of an alleged inconsistency between her demonstrated range of motion during its examination compared to a significantly better range of motion by her own physicians on September 13, 2013, five months previously. The Medical Board claimed that it did not find documentary evidence to substantiate any disability to the left knee. It professed an inability to fully assess the condition of the left shoulder. Thereafter, the Board of Trustees adopted a resolution on April 10, 2014, denying Petitioner's application, alerting her about its determination by letter dated April 11, 2014.

#### Petitioner's June 9, 2014 NYCERS Disability Retirement Application:

Petitioner again applied for *RSSL Section 507-c* disability retirement on June 9, 2014. She indicated that her disabling condition was due to injuries in both knees, her left shoulder and back from the October 17, 2008 incident. She appeared before the Medical Board on October 30, 2014. After its review of medical records, its interview and its examination of her, the Medical Board again claimed inconsistencies in Petitioner's demonstrated disability. Consequently, the Medical Board recommended denial of Petitioner's application. Its basis for denial was because of the alleged "paucity" of documentation supporting her claim of continuous treatment of the left shoulder from 2008 to 2013. It claimed an inability to assess her impairment due to voluntary restrictions and motion which were marked with inconsistencies between passive and active movement of the extremities. Thereafter, the Board of Trustees directed its recommendation for further consideration to the Medical Board on May 7, 2015 based upon recently submitted medical evidence. Petitioner again appeared before the Medical Board on November 16, 2015. After its review of the medical reports, its interview and its examination, the Medical Board found Petitioner to be disabled due to her left shoulder injury. However, because of an alleged lack of contemporaneous medical records regarding her claimed line of duty left shoulder injury on September 3, 2010, it denied her application based upon her failure to establish causality. Thereafter, the Board of Trustees referred the matter for further consideration to the Medical Board on September 8, 2016 based upon medical evidence submitted subsequent to her November 16, 2015 Medical Board appearance. After the Medical Board reviewed medical records, interviewed and examined Petitioner on March 13, 2017, it claimed inconsistencies in Petitioner's demonstrated mobility. Because of these alleged inconsistencies, the Medical Board found that the clinical and documentary evidence failed to substantiate that she was disabled. Thereafter, the Board of Trustees adopted a resolution on September 14, 2017, denying her June 9, 2014 application for disability retirement.

#### Petitioner's Repeat Left Shoulder Surgery on February 17, 2015:

After Petitioner appeared for her October 30, 2014 Medical Board examination but before her November 16, 2015 appearance, Board Certified Orthopedic Surgeon Thomas A. Scilaris ("Scilaris"), M.D. performed repeat surgery on Petitioner's left shoulder on February 17, 2015. Orthopedic Surgeon. Scilaris' post operative diagnosis

was left shoulder adhesive capsulitis; high grade biceps labral tear; full thickness supraspinatus rotator cuff tear; and adhesive capsulitis.

Petitioner's November 9, 2017 NYCERS Disability Retirement Application:

Petitioner persisted in her quest by filing another application for disability retirement, dated November 9, 2017, citing the dates of October 17, 2008 and September 3, 2010 for her injuries to the left shoulder, both knees, back, both wrists and both elbows. After its review of the medical records, examination and interview of Petitioner on June 11, 2018, the Medical Board claimed once again that there were inconsistencies in her demonstrated mobility. Because it also determined that it could not fully examine her because of her recent bunion surgery, it deferred the remainder of her examination. After its review of the medical records, examination and interview of Petitioner on November 1, 2018, the Medical Board repeated its claim that it found inconsistencies in her demonstrated range of motion during its examination. It found that the documentary and clinical evidence allegedly failed to substantiate that she was disabled. Consequently, it recommended denial of her application. Thereafter, the Board of Trustees adopted a resolution on January 11, 2019, denying her November 9, 2017 application.

Petitioner commenced the instant proceeding by Notice of Petition, dated May 3, 2019 for a judgment pursuant to *CPLR Article 78* to review and annul Respondent NYCERS' denial of Petitioner's Performance of Duty Disability Retirement from the New York City Department of Corrections pursuant to *RSSL Section 507-c* because its actions are arbitrary, capricious, unreasonable and unlawful; to direct and order Respondent NYCERS to retire Petitioner with a disability retirement allowance pursuant to *RSSL Section 507-c*; or in the alternative, to remand the matter to Respondent NYCERS for an appropriate review. Petitioner also seeks an order, pursuant to *CPLR Section 2307(a)* for Respondent NYCERS to serve and file all reports, recommendations, certificates and all other documents submitted to NYCERS Board of Trustees by the Department of Correction Health Management Division regarding any retirement of Petitioner; copies of the minutes of each meeting of Board of Trustees when it considered, discussed or acted upon any retirement application of Petitioner; copies of any and all medical records, reports or notes relating to Petitioner which are on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division; and for such other further relief as this Court may deem just and proper.

Petitioner's attorney filed Petitioner's Memorandum of Law, dated October 23, 2019.

Respondent NYCERS filed its Verified Answer and its Memorandum of Law, dated November 7, 2019.

Petitioner's attorney filed his Reply Memorandum of Law, dated November 18, 2019.

#### COURT RULINGS

This Court's function in a *CPLR Article 78* proceeding is to determine whether the action of an administrative agency had a rational basis or was arbitrary and capricious. See *Matter of Borenstein v. New York City Employees' Retirement System*, 88 NY2d 716 (1996); *Pell v. Board of Education*, 34 NY2d 222, 356 NYS2d 833, 313 NE2d 321 (1974). "Arbitrary action is without sound basis in reason and is generally taken without regard to the fact." See *Pell v. Board of Education* at 231, 356 NYS2d 833, 313 NE2d 321. Administrative agencies must act "lawfully with regard to the essential evidence and in a nonarbitrary fashion." See *VR Equities v. New York City Conciliation & Appeals Board*, 118 AD2d 459, 461 (1<sup>st</sup> Dept., 1986). "Moreover, when an administrative agency has not observed its own standards or has violated procedure by denying an applicant his or her statutory rights,

its determination cannot be sustained.” See *CPLR Section 7803[3]; In the Matter of Lidakis v. New York City Employees Retirement System*, 27 Misc.3d 1150, Kings County (2010).

A rational basis exists where the determination is “[supported] by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination.” See *Ador Realty, LLC v. Division of Housing and Community Renewal*, 25 AD3d 128, 139-140, 802 NYS2d 190 (2<sup>nd</sup> Dept., 2005), quoting *Pell v. Board of Education* at 231, 356 NYS2d 833, 313 NE2d 321. See *Consolation Nursing Home, Inc., v. Commissioner of New York State Dept. Of Health*, 85 NY2d 326, 331, 624 NYS2d 563, 648 NE2d 1326 (1995); *300 Gramatan Ave. Associates v. State Div. Of Human Rights*, 45 NY2d 176, 180, 408 NYS2d 54, 379 NE2d 603 (1971); *Sewell v. City of New York*, 182 AD2d 469, 583 NYS2d 255 (1<sup>st</sup> Dept., 1992), lv. denied 80 NY2d 756, 588 NYS2d 824, 602 NE2d 232 (1992). If the reviewing court finds that the agency determination has a rational basis, supported by substantial evidence, such determination must be sustained, and the reviewing court is prohibited from substituting its own judgment for that of the agency. See *Navaretta v. Town of Oyster Bay*, 72 AD3d 823, 898 NYS2d 237 (2<sup>nd</sup> Dept., 2010); *Halperin v. City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 (2<sup>nd</sup> Dept., 2005); *Dawson v. Zoning Board of Appeals of Town of Southold*, 12 AD3d 444, 785 NYS2d 84 (2<sup>nd</sup> Dept., 2004); *Morley v. Arricale*, 66 NY2d 665, 495 NYS2d 966, 486 NE2d 824 (1985); *Purdy v. Kreisberg*, 47 NY2d 354, 418 NYS2d 329, 391 NE2d 1307; *Pell v. Board of Education*, at 230-232, 356 NYS2d 833, 313 NE2d 321; *Procaccino v. Stewart*, 25 NY2d 301 (1969).

As the Court of Appeals succinctly summarized, “[B]ecause of the severe limitations on the availability of judicial review of determinations made by bodies such as the pension board that such bodies must make a careful and painstaking assessment of all the available evidence and should defer final determination until they are satisfied that all the evidence has been fully and fairly considered.” See *Brady v. City of New York*, 22 NY2d 601 (1968), quoting *Matter of Kilgus v. Board of Estimate of City of New York*, 308 NY 620, 626-627, 127 NE2d 705; *Matter of Watson v. McGoldrick*, 286 NY 47, 55, 35 NE2d 645.

While the Board of Trustees has the ultimate authority to make decisions with respect to entitlement to a pension, it must rely upon “credible evidence”. See *Matter of Borenstein v. NYCERS, supra*. The Court of Appeals has characterized “credible evidence” as evidentiary in nature and not merely a conclusion of law nor mere conjecture or unsupported suspicion. See *Matter of Meyer v. Board of Trustees*, 90 NY2d 139 (1997)..

When an agency has not observed its own standards or has violated lawful procedure in its denial of an applicant’s statutory rights, its determination cannot be sustained. See *CPLR Section 7803(3); Pell v. Bd. of Ed., supra*. Consequently, this Court finds that Respondent NYCERS acted in an arbitrary, capricious and unlawful manner in its denial of Petitioner’s disability application since it failed to adhere to the governing law or to adequately conduct the type of required thorough, independent investigation. It wilfully ignored evidence of medical treatment, causation and disability by refusing to adhere to the proper legal standards.

*New York State Constitution Article 5, Section 7* guarantees that membership in any pension or retirement system of the state or of a civil division shall be a contractual relationship, the benefits of which shall not be diminished or impaired. As the Court of Appeals found in *Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. Regan*, 71 NY2d 653 (1988), the *New York State Constitution, Article 5, Section 7* provides valued safeguards for public employees against the diminishment or impairment of pension rights which are fixed and determined by the laws and conditions in existence at the time membership in the pension system commences. *New York Constitution, Article 5, Section 7* provides that upon attainment of membership in a retirement system, a contractual relationship arises, the benefits of which cannot be diminished or impaired. See *Day v. Mruk*, 307 NY 349, 121 NE2d 362 (1954); *Birnbaum v. New York State Teachers Retirement System*, 5 NY2d 1, 176 NYS2d

984 (1958). Since membership in the Pension Fund and entitlement to the accrued benefits are not a mere gratuity, they reflect the substantial contributions to the Fund by the member. See *New York City Administrative Code Section 13-203*; *O'Marah v. Levitt*, 35 NY2d 595 (1974).

Although a difference in medical opinion does not render a Medical Board's determination to be arbitrary and capricious, the key facts, evidence and circumstances when viewed as a whole in this instance make the Medical Board's medical conclusions legally deficient. See *Matter of Cook v. New York State Comptroller*, 135 AD3d 1117 (3<sup>rd</sup> Dept., 2016); *Matter of Stack v. Board of Trustees*, 38 AD3d 562 (2<sup>nd</sup> Dept., 2007); *Agnelli v. Kelly*, 96 AD3d 471 (1<sup>st</sup> Dept., 2012); *Matter of Gaudio v. Board of Trustees*, 40 AD3d 638 (2<sup>nd</sup> Dept., 2007), lv. to appeal denied, 9 NY3d 815 (December 13, 2007); *Matter of Rodriguez v. Board of Trustees*, 3 AD3d 501 (2<sup>nd</sup> Dept., 2004).

The Court of Appeals has clearly enunciated in *Matter of Tobin v. Steisel*, 64 NY2d 254 (1985) that causation requires that an injury be a "natural and proximate cause" but not its "direct" cause. Thus, for the purposes of accidental disability retirement benefits, 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 and satisfies the test. See also *Occhipinti v. McCall*, 305 AD2d 924 (3<sup>rd</sup> Dept., 2003).

As the Appellate Division ruled in *Cook v. New York State Comptroller*, 135 AD3d 117 (3<sup>rd</sup> Dept., 2016), 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.

Petitioner's line of duty accidents initially occurred on July 30, 2008 when she injured her right knee, elbow and ankle. Three months later, she injured her left knee, lower back, right shoulder and left shoulder on October 17, 2008. About a year later, she injured her right arm, right ankle, right foot and lower back on December 1, 2009. Nine months later, she injured her neck, back, left hip, left wrist/hand, left shoulder, left elbow and chest on September 3, 2010. Two years later, she injured her right knee, right shoulder and right wrist on August 14, 2012.

Although Respondent NYCERS initially determined that Petitioner was disabled due to left shoulder injury pursuant to her June 9, 2014 disability application, it reversed itself, finding that the documentary and clinical evidence failed to substantiate that she was disabled pursuant to her November 9, 2017 application. However, this Court finds that it failed to demonstrate that it conducted the balancing test required in the assessment of the relative weight and validity of conflicting medical evidence regarding causation. While the Medical Board is indeed entitled to resolve conflicts in medical evidence and rely upon its own physical examination of the applicant, this Court finds that fairness demands that all available medical evidence be considered by the Medical Board and the Board of Trustees prior to its proper rejection of an applicant's claim to accident disability retirement. See *Borenstein v. NYCERS*, 88 NY2d 756 (1996); *Matter of Kiess v. Kelly*, 75 ad3d 416 (1<sup>st</sup> Dept., 2010). Moreover, the Medical Board must clearly state the reasons for its recommendations in the form of an articulated, rational and fact-based medical opinion. See *Meyer v. Bd. of Trustees of the New York City Fire Dept., Article 1-B Pension Fund by Safir*, 90 NY2d 139 (1997); *Montauk Improvement, Inc., v. Proccacino*, 41 NY2d 913, 363 NE2d 344 (1977); *Matter of Samadjopoulos v. NYCERS*, 104 AD3d 551, 961 NYS2d 410 (1<sup>st</sup> Dept., 2013); *Agnelli v. Kelly*, 96 AD3d 471 (1<sup>st</sup> Dept., 2012).

Respondent NYCERS contends in its denials that information was lacking pertaining to the diagnosis and treatment of her right shoulder. It claims that there were alleged inconsistencies between her demonstrated range of motion during her examinations compared to significantly better previous range of motion by her own

physicians. It postures that there was no documentary evidence to substantiate any disability of the left knee. It professes an inability to fully assess the condition of her left shoulder because there are no contemporaneous medical records regarding her left shoulder injury on September 3, 2010. Consequently, it finds a "paucity" of documentary evidence supporting her claim of continuous treatment of her left shoulder from 2008 to 2013. Thus, it determined that there was no documentary and clinical evidence to substantiate that she was disabled from any of her injuries pursuant to her requests for disability retirement pursuant to *RSSL Section 507-c*.

However, this Court notes that the following acknowledged documents were chronicled as given to the Medical Board during its review of Petitioner's several applications:

Left shoulder:

Medical notes from Christopher Kyriakides, M.D., dated October 23, 2008 through June 23, 2011, addressing Petitioner's injuries from October 17, 2008 and December 8, 2009, listing scheduled loss of use of 37.5% to left shoulder; subsequent note, stating injuries are causally related to work related accident of September 3, 2010;

MRI's of left shoulder:

MRI of left shoulder, dated October 24, 2012, revealing partial rotator cuff tendon tear involving the suprapinatus and infraspinatus tendons with fluid distending the capsule on the subacromial-subdeltoid bursa;

MRI of left shoulder, dated April 25, 2014, indicating diffuse high grade partial tear of the supraspinatus tendon between the musculotendinous junction and the insertion; diffuse anterior labral tear, superior labral (SLAP) tear and fraying of the posterior labrum; osteochondral defect at the posterior medial margin of the humeral head most likely due to trauma achieved with clinically excellent position of defect; capsular laxity, articular surface erosions with the inferior half of the glenoid; mild acromioclavicular joint arthropathy with mild lateral acromial downslope, mild joint effusion and severe long biceps tenosynovitis;

MRI of left shoulder, dated September 8, 2017, indicating synovial fluid in the glenohumeral joint, narrowing of the glenohumeral joint, glenoid spurring and inferiorly as well as anteriorly; bipital groove exhibits findings suggest prior tear versus marked atrophy;

Operative Report of left shoulder:

Operative report of left shoulder surgery on May 7, 2013, revealing left shoulder arthroscopy, extensive chondroplasty, excision of large loose body in anterior glenoid, labral debridement, rotator cuff debridement, subacromial decompression, extensive chondroplasty and synovectomy;

Medical Notes from Physiatrist Charles Kaplan, M.D., dated September 29, 2014, indicating that an MRI of left shoulder revealed rotator cuff tear and observing that left shoulder surgery was performed in May 2013; there are comments about the progression of a rotator cuff tear and tendinosis compared to a previous MRI of left shoulder;

Medical Notes from Orthopedist Thomas Sciliaris, M.D., dated May 9, 2014 regarding Petitioner's complaints about her left knee and left shoulder pain. While previous arthroscopic surgery helped, it did not resolve pain in the left shoulder. He documents limitations in the shoulder's range of motion. His impression was tear to the rotator cuff which has progressed to near full thickness tear. He recommends arthroscopic surgery;

Medical Notes from Orthopedic Dr. Cappiola, dated July 24, 2014, noting limitations in Petitioner's range of motion in her left shoulder and left knee;



Operative Report of left shoulder:

Operative Report of left shoulder from Thomas Scilaris, M.D., dated February 17, 2015 regarding left shoulder arthroscopy with rotator cuff tear with follow up notes, dated March 16 to June 22, 2015 showing range of motion limitations for her left shoulder;

Medical Notes from Dr. Scilaris, dated September 19, 2013 regarding follow up for left knee and left shoulder after surgery and a cortisone injection to left shoulder;

Medical Notes from C4.2 form from Thomas Scilaris, M.D., dated June 25, 2013 referencing date of injury of October 17, 2008 with diagnosis of rotator cuff sprain, superior glenoid labrum, LES loose body joint shoulder region;

Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as injuries to her lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Right shoulder:

C4 form signed by Dwiref Mehta, M.D., dated February 27, 2013 for date of injury of August 14, 2012 for diagnoses of internal derangement of right shoulder, wrist/hand, right internal derangement knee/changes and a C4 from Barry Katzman, M.D., dated July 11, 2013 for date of injury August 14, 2012, noting diagnosis of rotator cuff syndrome; medical report by Barry M. Katzman, M.D., dated July 1, 2013 for date of injury of August 14, 2012;

Right elbow:

Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as her injuries to lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Right elbow MRI, dated November 30, 2008, depicting metal artifact in the proximal ulna and partial tears of the radial and ulnar collateral ligaments; right elbow MRI, dated March 15, 2009, revealing similar findings to the MRI, dated November 30, 2008;

Left elbow:

MRI of left elbow, dated December 2, 2014, indicating partial tear of the medial collateral ligament; Electrodiagnostic report of upper extremities, dated January 7, 2015, showing mild right median neuropathy at wrist, bilateral ulnar neuropathy at the elbows;

Right wrist:

Medical Report by Barry M. Katzman, M.D., dated July 1, 2013 for date of injury of August 14, 2012; Electrodiagnostic report of upper extremities, dated January 7, 2015, showing mild right median neuropathy at wrist, bilateral ulnar neuropathy at the elbows; Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as injuries

to her lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Right hand:

Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as injuries to her lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Left knee:

MRI of left knee, dated November 23, 2008, revealing tear of the lateral meniscus and MRI of left knee, dated July 7, 2015, indicating linear meniscal tear posterior horn medial meniscus; left knee MRI, dated January 9, 2012, showing chondromalacia of the patella;

Medical Operative Note, dated July 19, 2011, describing arthroscopic surgery of left knee, showing tear of medial meniscus and tear of lateral meniscus;

Medical Notes from Christopher Kyriakides, M.D., dated October 23, 2008 through June 23, 2011, addressing Petitioner's injuries from October 17, 2008 and December 8, 2009, listing scheduled loss of use of 40% to left knee . Subsequent note, stating Injuries are causally related to work related accident of September 3, 2010;

Medical Notes from Dr. Sciliaris, dated September 19, 2013 regarding follow up for left knee and left shoulder after surgery and a cortisone injection to left shoulder;

Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as injuries to her lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Operative Note, dated July 19, 2011, describing arthroscopic surgery of the left knee with findings of synovitis, chondromalacia of the patella, tear of the medial meniscus, tear of the lateral meniscus and intact ACL;

Right knee:

MRI of right knee, dated November 23, 2008, showing a partial tear of the ACL and metallic artifact over the patella and MRI of right knee, dated July 20, 2013, revealing partial tear of anterior cruciate ligament, suprapatellar and intra articular joint fluid substance, subcutaneous swelling and edema in the anterior aspect of knee; right knee MRI, dated March 21, 2009, showing small popliteal cyst;

Medical Report by Barry M. Katzman, M.D., dated July 1, 2013 for date of injury of August 14, 2012;

Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as injuries to her lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Cervical and lumbar spines:

MRI of cervical spine, dated January 18, 2013; MRI of lumbar spine, dated January 18, 2013;

Operative Reports by David Adin, M.D. regarding epidural steroid injections to lumbar and cervical areas, dated April 10, 2013 and June 12, 2013 as well as medial branch blocs of bilateral L3 through L5 dorsal primary rami

and bilateral C3 through C5 dorsal primary rami on July 17, 2013 and August 14, 2013;

Operative Surgical Report, dated November 30, 2016 by Surgeon David Adin, D.O. for medial branch block of bilateral L3 to L5 dorsal primary rami;

Medical Notes from New York Orthopedic Surgery and Rehab regarding injuries to the right elbow, wrist, hand and right knee from the July 30, 2008 incident as well as injuries to her lumbosacral spine, left shoulder and left knee from her October 17, 2008 incident;

Progress Notes from Stanley Leibowitz, M.D., Thomas Scilaris, M.D., and David Capiola, M.D. for visits May 10, 2013 through September 19, 2013; note regarding treatment, dated September 30, 2011, mentioning the injection of Marcaine, lidocaine and Kenalog.

Thus, there is no “paucity” of evidence to substantiate Petitioner’s applications for disability. In fact, credible evidence shows that Petitioner’s disability was related to a verified line of duty injuries. See *RSSL Section 507-c; Pell v. Bd. of Educ.*, 34 NY2d 222 (1974); *Tobin v. Steisel*, 64 NY2d 254 (1985); *Nastasuk v. Board of Trustees of New York Fire Dept. Article 1-B Pension Fund*, 289 AD2d 335, 734 NYS2d 571 (2<sup>nd</sup> Dept., 2001); *Matter of Meyer v. Board of Trustees, supra*; *Matter of Nicolosi v. Board of Trustees*, 198 AD2d 282, 603 NYS2d 532 (2<sup>nd</sup> Dept., 1993); *Matter of Jones v. Board of Trustees*, 123 AD2d 628 (2<sup>nd</sup> Dept., 1986); *Matter of McCambridge v. McGuire*, 62 NY2d 563, 468 NE2d 9, 479 NYS2d 171 (1984); *Matter of Canfora v. Board of Trustees, supra*; *Matter of Bridgewood v. The Board of Trustees of NY City Fire Dept., Art. 1-B Pension Fund*, 204 AD2d 629, 612 NYS2d 621 (2<sup>nd</sup> Dept., 1994); *Matter of Rodriguez v. Bd. of Trustees of NYC Fire Dept.*, 3 AD3d 501 (2<sup>nd</sup> Dept., 2004); *Cusick v. Kerik*, 305 AD2d 247 (1<sup>st</sup> Dept., 2003); *Matter of Borenstein v. New York City Employees’ Ret. Sys., supra*; *Matter of Costello v. Board of Trustees*, 63 AD2d 894 (1<sup>st</sup> Dept., 1978); *Matter of Calzerano v. Board of Trustees of NYC Police Pension Fund Art. II, supra*.

Although the Medical Board’s determination about an applicant’s disability is binding on the Board of Trustees, the Medical Board failed to advance credible evidence in support of its lack of causation finding. It did not repudiate any of Petitioner’s supporting medical evidence. Moreover, Respondent NYCERS failed to challenge any of Petitioner’s medical evidence which causally connected Petitioner’s disabling conditions to her previous inmate-related injuries. Thus, it failed to consider the “credible evidence”. See *Borenstein v. New York City Employees’ Ret. Sys.*, 88 NY2d 756 (1996); *Zamelsky v. New York City Employees’ Ret. Sys.*, 55 AD3d 844 (2<sup>nd</sup> Dept., 2008); *Meyer v. Bd. of Trs. Of the New York City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 (1997); *Suppan v. New York City Employees’ Ret. Sys.*, 37 AD3d 474 (2<sup>nd</sup> Dept., 2007); *Canfora v. Bd. of Trustees*, 60 NY2d 347 (1983); *Kuczinski v. Board of Trs. Of the New York City Fire Dept., Article 1-B Pension Fund*, 8 AD3d 283 (2<sup>nd</sup> Dept., 2004); *Inguanta v. Board of Trs. Of the New York City Fire Dept., Article 1-B Pension Fund*, 302 AD2d 527 (2<sup>nd</sup> Dept., 2003); *Manza v. Malcolm*, 44 AD2d 794 (1<sup>st</sup> Dept., 1974); *Califano v. DiNapoli*, 147 AD3d 1177 (3<sup>rd</sup> Dept., 2017); *Nemecek v. Bd. of Trus. Of the NYC Fire Dept., Article 1-B Pension Fund*, 99 AD2d 954 (1<sup>st</sup> Dept., 1984); *Christian v. NYC Emps. Ret. Sys., supra*; *Belton v. Herkommer*, 84 AD2d 713 (1<sup>st</sup> Dept., 1981); *Muffoletto v. NYC Emps. Ret. Sys.*, 603 NYS2d 144 (1<sup>st</sup> Dept., 1993); *Cassidy v. Ward*, 169 AD2d 482 (1<sup>st</sup> Dept., 1991); *Bervers v. NYC Employees Ret. Sys.*, 179 AD2d 489 (1<sup>st</sup> Dept., 1992); *Baudille v. Kelly*, 95 AD3d 415 (1<sup>st</sup> Dept., 2012); *Calzerano v. Bd. of Trs. Of the NYC Police Pension Fund*, 245 AD2d 84 (1<sup>st</sup> Dept., 1997); *Duggan v. Ward*, 160 AD2d 532 (1<sup>st</sup> Dept., 1990); *Matter of Tobin v. Steisel, supra*; *Matter of McCambridge v. McGuire, supra*; *Baranowski v. Kelly*, 95 AD3d 746, 945 NYS2d 664 (1<sup>st</sup> Dept., 2012); *Matter of Gaudio v. Board*, 40 AD3d 638 (2<sup>nd</sup> Dept., 2007), lv. to appeal denied 9 NY3d 815 (December 13, 2007); *Matter of Mescall v. Board*, 204 AD2d 643 (2<sup>nd</sup> Dept., 1994); *CPLR Section 7803(3); Pell v. Bd. of Ed., supra; Matter of Borenstein v.*

*NYCERS, supra; Matter of Meyer v. Board of Trustees, supra*

The Medical Board selectively predicated its denials upon Petitioner's decreased range of motion from that noted previously in her treating doctors' reports. It is also based upon its alleged observations of Petitioner's ability to get off the examination table without assistance and to tie the back of her examination gown. Thus, it failed to adequately conduct the required type of thorough, independent investigation which is warranted. See *Matter of Borenstein v. New York City Employees' Ret. Sys., supra; Matter of Meyer v. Board of Trustees, supra; Roddy v. Valentine*, 268 NY 228, 197 NE 260; *New York Constitution Article IV., Section 7; Day v. Mruk*, 307 NY 349, 121 NE2d 362 (1954); *Birnbaum v. New York State Teachers Retirement System*, 5 NY2d 1, 176 NYS2d 984 (1958); *New York City Administrative Code Section 13-203; O'Marah v. Levitt*, 35 NY2d 595 (1974); *Pell v. Bd. Of Ed., supra; Matter of Kiess v. Kelly*, 75 AD3d 416 (1<sup>st</sup> Dept., 2010); *Meyer v. Bd. of Trustees of the NYC Fire Dept., Article 1-B Fund by Safir*, 90 NY2d 139, 681 NE2d 382 (1997); *Montauk Improvement, Inc., v. Proccacino*, 41 NY2d 913, 363 NE2d 344 (1977); *Matter of Samadjopoulos v. NYCERS*, 104 AD3d 551, 961 NYS2d 410 (1<sup>st</sup> Dept., 2013); *Matter of Mescall v. Board, supra; Matter of Gaudioso v. Board, supra; Matter of Canfora v. Board of Trustees, supra*.

This Court denies Petitioner's request for an Order, pursuant to *CPLR 2307(a)*, directing Respondent NYCERS to serve and file: i) all reports, recommendations, certificates and all other documents submitted to the NYCERS Board of Trustees by the Department of Correction Health Management Division regarding any retirement application of Petitioner; ii) copies of the minutes of each meeting of the Board of Trustees in its consideration, discussion or actions relating to any of Petitioner's retirement applications; and iii) copies of any and all medical records, reports or notes on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division regarding Petitioner. The motion papers are replete with all necessary documents regarding Petitioner's retirement applications.

As the Appellate Division found in *Day v. Board of Trustees of New York City Fire Department Article 1-B Pension Fund*, 74 AD2d 507 (1<sup>st</sup> Dept., 1980) when it is in the interest of making sure that no injustice has been done and that no relevant evidence has been overlooked, a court can remand an improperly denied application to NYCERS for a proper consideration with strict handling instructions. Accordingly, this Court is hereby remanding the matter for reconsideration of Petitioner Hodge's *RSSL Section 507-c* Performance of Duty Retirement because it did not properly follow its own procedures. This Court instructs NYCERS to immediately schedule the matter for a determination within thirty (30) days of the Notice of Entry of this Decision/Order whether in person, or virtually or by telecommunications. NYCERS is to make an independent evaluation of Petitioner's disability in its determination of whether the July 30, 2008; October 17, 2008; December 1, 2009; September 3, 2010; and August 14, 2012 inmate-related assaults and/or altercations were the "natural and proximate cause" of her injuries in question. Moreover, this Court urges NYCERS to expeditiously reach a fair and lawful decision, considering all facts and circumstances. When NYCERS releases its determination, it is instructed to simultaneously provide Petitioner with a copy of the full transcript of the meeting so Petitioner may see the complete reasons for its decision. See *Agnelli v. Kelly, supra; Rodriguez v. Board of Trustees, supra; Occhipinti v. McCall, supra; Tobin v. Steisel, supra; Canfora v. Board of Trustees, supra; Meyer v. Board of Trustees, supra; Matter of Bridgewood v. Board of Trustees, supra*.

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

Petitioner Hodge's request for an Order to annul Respondent NYCERS' decisions relating to her *RSSL Section 507-c* Applications for Performance of Duty Disability Retirement, dated June 7, 2011; July 19, 2013; June 9, 2014; and November 9, 2017, denying Petitioner's requests for a *RSSL Section 507-c* Performance of Duty

Disability Retirement is GRANTED; and NYCERS' decisions are ANNULLED because they are ARBITRARY, CAPRICIOUS, UNREASONABLE and UNLAWFUL.

Petitioner Hodge's request for an award of a *RSSL Section 507-c* Performance of Duty Disability Retirement Pension as a matter of law is DENIED.

Petitioner Hodge's application for a *RSSL Section 507-c* Performance of Duty Disability Retirement is REMANDED to Respondent NYCERS with the following INSTRUCTIONS:

Petitioner's Hodge's application for a *RSSL Section 507-c* Performance of Duty Disability Retirement is to be SCHEDULED within thirty (30) days of the Notice of Entry of this Court's Decision/Order whether in person or virtually or by telecommunications;

Respondent NYCERS is to make an INDEPENDENT EVALUATION of Petitioner's disability in its determination of whether it was a natural and proximate result of her injuries received in the July 30, 2008; October 17, 2008; December 1, 2009; September 3, 2010; and August 14, 2012 inmate-related incidents;

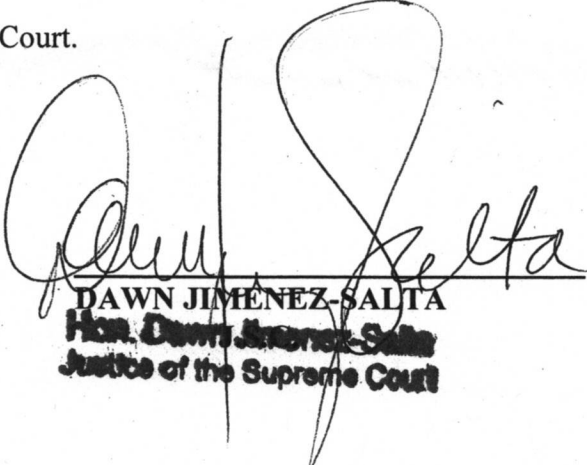
Respondent NYCERS is to EXPEDITIOUSLY reach a FAIR and LAWFUL decision, considering ALL THE FACTS and CIRCUMSTANCES and it is NOT TO DISREGARD the rulings in this Decision/Order;

When Respondent NYCERS releases its determination, it is to SIMULTANEOUSLY provide Petitioner Hodge with a COPY of the FULL TRANSCRIPT of the meeting WITH A COMPLETE EXPLANATION OF THE REASONS for its DECISION;

Petitioner Hodge's request for an Order, pursuant to *CPLR 2307(a)*, directing Respondent NYCERS to serve and file: I) all reports, recommendations, certificates and all other documents submitted to the NYCERS Board of Trustees by the Department of Correction Health Management Division regarding any retirement application of Petitioner; ii) copies of the minutes of each meeting of the Board of Trustees in its consideration, discussion or actions relating to any of Petitioner's retirement applications; and iii) copies of any and all medical records, reports or notes on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division regarding Petitioner is DENIED.

This constitutes the Decision and Order of the Court.

DATE: June 24, 2020  
In the Matter of Abigail Hodge v.  
New York City Employees' Retirement  
System  
(#1799/2019)



**DAWN JIMÉNEZ-SALTA**  
**Hon. Dawn Jimenez-Salta**  
**Justice of the Supreme Court**