

At an IAS Term, Part 43, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of October, 2005

P R E S E N T:

HON. SYLVIA O. HINDS-RADIX,
Justice.

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In the Matter of

WILLIAM RUSSELL,

Petitioner,

- against -

Index No. 9297/05

THE BOARD OF TRUSTEES OF THE NEW YORK
CITY FIRE DEPARTMENT, ARTICLE I-B PENSION
FUND, BY NICHOLAS SCOPETTA, CHAIRMAN, et ano.,

Respondents.

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The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3-4 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, petitioner William Russell seeks a judgment, pursuant to Article 78 of the CPLR, annulling a November 30, 2004 final determination of respondent the Board of Trustees of the New York City Fire Department, Article I-B

Pension Fund (Board of Trustees), which determination denied petitioner's application for service-incurred or accident disability retirement (ADR), and declaring said denial to be arbitrary, capricious and unlawful. Alternatively, petitioner seeks an order remanding the matter for respondents' further consideration and an administrative hearing on the factual and/or medical issues raised. Petitioner also moves for an order, pursuant to CPLR 2307 (a), directing certain discovery.

Respondents Board of Trustees, Nicholas Scopetta and City of New York oppose the petition on the grounds that the Board of Trustees' determination that petitioner was not entitled to ADR benefits was neither arbitrary nor capricious and that, in reaching such determination, the Board of Trustees did not act contrary to law and properly relied upon the credible findings and recommendation of the Pension Fund's 1-B Medical Board (Medical Board).

Factual Background

Petitioner was appointed to the uniformed force of the New York City Fire Department (FDNY) on October 15, 1995 and was, at all times relevant, a member of the FDNY Pension Fund.

On January 1, 2001, petitioner suffered line of duty second-degree burn injuries to his knees and shins, which injuries required petitioner's hospitalization at New York Presbyterian Hospital's (NYPH) Burn Center. Subsequent to his hospitalization,

petitioner underwent burn area excisions and skin graft operative procedures performed by Dr. Roger W. Yurt, a medical burn specialist.

Petitioner was discharged from hospital on January 13, 2000 and re-examined by Dr. Yurt on March 29, 2001. Dr. Yurt's March 29, 2001 report states that, following the operation, the skin in petitioner's shin area was "thinner and weaker than normal skin and will not tolerate injury including subsequent burns, as well as his normal skin" and, if subjected to other injury or burn, the "grafted site will proceed to a poor healing result than it has achieved currently." Dr. Yurt's medical recommendation was that petitioner not return to work as a firefighter.

On April 4, 2001, petitioner was examined by the FDNY's Bureau of Health Services' (BHS) Chief Medical Officer, Dr. Kerry Kelly, who noted in her report of the examination that petitioner was "recovering from burns but still having skin breakdown at areas of the burns due to skin irritation with pressure of pants [and] still has deep scars along both legs with area of skin breakdown locally."

On July 18, 2001, petitioner was again examined by Dr. Yurt. In his October 4, 2001 report of the July 18, 2001 examination, Dr. Yurt notes that, during said examination, petitioner complained of "a cold sensation and numbness to his lower right extremity." Dr. Yurt told petitioner to avoid temperature extremes and again recommended that petitioner not return to work as a firefighter.

Petitioner applied for ADR retirement and, on July 19, 2001, was examined by a three-person Medical Committee, composed of BHS physicians. The Medical Committee noted petitioner's subjective complaints of pain and coldness and his feeling that "the skin breaks down easily with any minor trauma or irritation." Based on its review of petitioner's medical records and the physical examination, which revealed "healed scars of the leg with evidence of grafting," the Medical Committee recommended that petitioner be placed on light duty.

On September 7, 2001, the Fire Commissioner applied for disability retirement benefits on petitioner's behalf by stamping the Medical Committee's July 19, 2001 report, and the matter was forwarded to the Medical Board for its consideration.*

In considering petitioner's application, the Medical Board looked at the Fire Commissioner's disability application; the Medical Committee's July 19, 2001 report; Dr. Yurt's January 7, 2000 operative report, and subsequent March 29 and October 4, 2001 examination reports; petitioner's hospital admission records; and petitioner's FDNY medical leave records.

On October 31, 2001, after reviewing the submissions, the Medical Board unanimously determined to refer petitioner to the Medical Board's impartial plastic surgeon, Dr. Gerald Ginsburg, "for his opinion if [petitioner] is disabled from full fire

* Whereas the Medical Committee is composed of physicians from the FDNY BHS, the Medical Board is composed of private physicians retained pursuant to statute to independently evaluate FDNY members' eligibility for ADR or ODR.

duty due to his bilateral skin grafting.” The Medical Board deferred its recommendation on petitioner’s disability application pending the outcome of Dr. Ginsburg’s evaluation.

Respondents contend, but submit no proof, that Dr. Ginsburg is a burn specialist as well as a plastic surgeon. The record reveals that, though apparently qualified in his medical fields, this may have been the first time Dr. Ginsburg acted as an impartial consultant to the Medical Board on a firefighter disability issue.

On November 20, 2001, Dr. Ginsburg took a medical history and conducted a physical examination of petitioner. His report of said examination notes petitioner’s complaints of pain in the burned areas; complaint of coldness in the right leg from the knee down; “belie[f] that the grafted areas are ‘paper thin’ and easily abraded;” and insistence that he could not return to regular firefighting duties, “as the quality of the grafted skin would not stand up to the abuse it would suffer.”

Dr. Ginsburg’s physical examination of petitioner revealed, *inter alia*, that the donor sites were well healed and almost invisible, there was “palpable subcutaneous tissue below the skin in the “burned, excised and grafted areas” of petitioner’s knees and shins; a comparison of the right and left legs revealed only minimally thinner skin in the grafted areas; and there was no tenderness, redness, breakdown or impending breakdown” of the grafted areas. Dr. Ginsburg photographed the grafted areas, and noted that the thinnest graft area still represented “a vigorous piece of skin with adequate subcutaneous tissue.”

Dr. Ginsburg's report opines that petitioner's knees would burn again if subjected to circumstances similar to those he encountered on January 1, 2000, that the grafted skin areas would burn and sunburn before the uninjured skin and would "lose their integrity before the injured skin if subjected to a stronger thermal insult," but that petitioner "can take the abuse of crawling on his knees as well as is needed in normal duty." As to petitioner's belief that his skin was "paper thin" and he would be re-injured if he returned to work and required to crawl on his knees through fire, Dr. Ginsburg noted that, while petitioner appeared to be "sincere" in these beliefs, "[n]o one's knees can take crawling through fire" and, although petitioner's "mind and spirit" might not be ready to return to full fire duty, his knees were.

Finally, Dr. Ginsburg, addressing the inconsistencies or differences in his and Dr. Yurt's medical opinion of petitioner's injuries, states in his report that, while he agreed with Dr. Yurt's statements concerning "injured skin not tolerating reinjury as well as uninjured skin," he disagreed as to "degree" and did "not think a significantly smaller thermal insult would harm [petitioner] than the degree of insult needed to harm him prior to his burn."

On January 9, 2002, upon reconsideration of petitioner's case, and after reviewing Dr. Ginsburg's November 20, 2001 report, the Medical Board unanimously opined that petitioner "is not disabled from full fire duty due to skin grafts of both knees" and recommended petitioner's disability retirement applications be denied. On January 25,

2002, petitioner's case was reviewed and discussed at length by the Board of Trustees. During said discussion it was noted that Dr. Yurt was the director of a burn center and a burn specialist, while Dr. Ginsburg was a plastic surgeon; that Dr. Yurt and the other burn specialist at his hospital see the majority of FDNY member injuries; that Dr. Yurt's experience at the burn center, his dealings with firefighters and knowledge of the extent of their burns and the effect in their firefighting duties, is extensive; that this may have been the first time Dr. Ginsburg was used by the Medical Board as an impartial medical consultant; and it was questionable whether Dr. Ginsburg "is able to appreciate the dangers of firefighting and what it entails [] to make a reasonable and reliable opinion as to [petitioner's] ability ... to crawl ... in the course of firefighting."

While further noting that the majority of burned, even grafted, firefighters return to full duty, members of the Board of Trustees questioned whether it was normal or proper practice to send a burn case to a plastic surgeon, whether the degree of petitioner's injuries (the depth of the burns and the amount of tissue grafted) rendered him disabled for full duty, and whether his firefighting gear could protect his skin regardless of the degree of his condition. Dr. Kelly noted her April 2001 examination of petitioner and his complaints during said examination of skin breakdown and irritation even while wearing protective firefighting bunker pants.

Following this discussion, and noting that "there is also a question underlying all of this as to who is the expert to evaluate these matters[,] [i]s it a plastic surgeon or is it

the doctors who treat members at the burn center or some other impartial consultant,” the Board of Trustees remanded the matter, along with their comments, to the Medical Board for review.

On March 27, 2002, upon remand of petitioner’s case from the Board of Trustees, and after reviewing Dr. Kelly’s April 4, 2001 report and the transcript of the Board of Trustees’ January 24, 2002 meeting, the Medical Board again unanimously recommended the denial of petitioner’s disability applications, finding “no new objective medical evidence to change [its] previous opinion.”

On April 11, 2002, petitioner was examined by Dr. Bruce Greenstein, a burn specialist with the Department of Plastic and Reconstructive Surgery at Jacobi Medical Center. Dr. Jacobi asserts in his report of that examination that there are “marked changes in texture and areas of excoriation around both knees” and opines that it “would be unwise for [petitioner] to resume his duties as a firefighter.”

On April 24, 2002, petitioner was examined by Dr. Harvey N. Himel, a physician at NYPH. In a letter of the same date, Dr. Himel asserts that petitioner has “a permanent loss of deep soft tissue at the site of his burns, particularly on his right knee and is unable to perform his usual work duties. Dr. Himel further noted that, “based on [his] experience treating other similarly burned firefighters,” petitioner’s knees were unable “to take the abuse of being a firefighter,” petitioner could not “perform his job reliably,” and his return to work would represent a danger to himself and his fellow firefighters.

On June 11, 2002, petitioner was examined by Dr. Jerome J. Finkelstein, a burn specialist. In his June 25, 2002 report of that examination, Dr. Finkelstein reported that the graft site was healed, but its "ability to withstand heat, or the stress of crawling is limited," and duties involving exposure to heat, crawling and wearing restrictive garments should be avoided, as they could compromise the skin's integrity. He opined that petitioner was unable to return to active duty.

On June 26, 2002, the Medical Board again reviewed petitioner's case, including the reports of Drs. Himel, Greenstein and Finkelstein, found no new objective medical evidence, and again recommended denial of petitioner's ADR application.

On July 19, 2002, the Board of Trustees again reviewed petitioner's case. During a lengthy discussion, Dr. Kelly read petitioner's BHS medical charts, noted that an MRI (Magnetic Resonance Image) of his left knee suggested degenerative changes to the knee, and noted further that petitioner was experiencing pain, skin breakdown and periodic opening of the graft and bleeding, even on light duty.

The Board of Trustees remanded the case, along with petitioner's BHS records, a copy of a July 10, 2002 letter written by petitioner's counsel, and the transcript of the Board of Trustees' June 26, 2002 meeting, back to the Medical Board for its consideration.

On November 27, 2002, on remand, the Medical Board reviewed the above submissions and deferred its recommendation pending review of the MRI of petitioner's

left knee by its impartial orthopedic consultant, Dr. Basil Delavagas.

Dr. Dalavagas examined petitioner's left knee on January 6, 2003 and, in his report of the examination, concluded that petitioner enjoyed a full range of motion in his left knee, with no effusion, instability, joint tenderness, and only mild tenderness in the anterior part of the medical joint line. Dr. Dalavagas found the MRI "essentially negative" and opined that petitioner was not permanently disabled (presumably, as to the knee only) for full fire duty.

On February 26, 2003, after reviewing Dr. Dalavagas' January 6, 2003 report, the Medical Board again recommended that petitioner's disability retirement applications be denied.

A February 27, 2003 letter from petitioner's supervisor, Lieutenant J. Harnett, to the FDNY, written at petitioner's request, states that petitioner, despite being off-duty and in obvious pain, reported to the World Trade Center site on September 12, 2001 to assist in the rescue and recovery efforts, and that such efforts on petitioner's behalf caused his bunker pants to become saturated in blood from his knee wounds.

On March 26, 2003, the Board of Trustees again reviewed petitioner's case and, this time, accepted the Medical Board's recommendation that petitioner's ADR application be denied.

On April 15, 2003, petitioner was reexamined by Dr. Ginsburg, who recorded the results of that examination in a May 9, 2003 report. Ginsburg reported that he "found

nothing different” from the earlier examination, and that petitioner’s damaged and grafted knees were “very well healed and only slightly less capable of sustaining thermal injury than before his burns.” Upon examination, he found that petitioner’s right knee, although containing less subcutaneous tissue than on a normal knee, had enough tissue to move freely and cover the bone. Nevertheless, upon “searching [his] soul” and noting the sharp disparity between his medical conclusions and those of petitioner’s other physicians, Dr. Ginsburg admitted that he might “be missing something or [did not] understand something” and recused himself from petitioner’s case.

On April 25, 2003, petitioner, during the course of his firefighting duties, suffered a breakdown of his skin grafts and lacerations to both knees caused by kneeling and the friction of his bunker pants against the knees.

On May 21, 2003, petitioner, during the course of his firefighting duties, sustained injury to the grafted skin areas and was transported to the emergency room at NYPH. He was examined and found to have full range of motion in both knees, with superficial scratches and abrasions over well-healed and intact skin grafts.

Thereafter, Dr. Kelly referred petitioner to Dr. Yurt for Dr. Yurt’s opinion as to whether petitioner was disabled for duty. Petitioner was reexamined by Dr. Yurt on June 2, 2003. In his report, dated June 20, 2003, Dr. Yurt asserts that petitioner’s skin grafts were fully matured, but with a decreased level of elasticity and a thin epidermal component. He opined that the grafts interfered with petitioner’s ability to crawl and

were subject to breakdown, and that petitioner was no longer able to perform his firefighting duties.

On June 4, 2003, petitioner was reexamined and reevaluated by the Medical Committee. The Medical Committee, noting petitioner's skin breakdowns following his return to duty, concurred with Dr. Yurt's June 2003 opinion that petitioner's performance of even minor activity in full bunker gear placed "his graft integrity at risk" and that petitioner was not capable of the performance of full duty. The Medical Committee recommended petitioner be placed on light duty.

On June 20, 2003, the Fire Commissioner applied for ODR disability retirement benefits on petitioner's behalf.

On August 21, 2003, petitioner went to the emergency room, stating that his grafts had opened during work and complaining of bleeding and pain in the area. He was examined and discharged with instructions.

On November 19, 2003, the Medical Board, after reviewing its own previous recommendations, the Medical Committee's June 2003 report, the emergency room and other reports from NYPH, dated May, June and August 2003, Dr. Yurt's May and June 2003 reports, Dr. Ginsburg's November 2001 and May 2003 reports, Dr. Himel and Dr. Greenstein's April 2002 reports, and petitioner's medical leave record and medical reports from April and May 2003, found insufficient evidence of a permanent disability

and recommended that petitioner's disability applications be denied.

On December 15, 2003, Captain Robert McNicholas, the Captain in charge of petitioner's ladder company, wrote to the Bronx Borough Commander concerning his observations, and those of the other firefighters in the ladder company, of petitioner. Captain McNicholas wrote that petitioner was "experiencing tremendous physical difficulty in the workplace," on September 12, 2001, was ordered to seek medical attention after another firefighter observed during a rest period that petitioner's bunker pants were saturated with blood from his knee wounds, and suffered other serious cuts or injuries to both knees during other firefighting operations caused "by the friction of his bunker pants against his knees in [] prolonged operation[s]." According to Captain McNicholas, petitioner's range of motion was greatly diminished following his leg burns, he had difficulty performing normal firefighting tasks and even the task of "donning his gear and responding is both time consuming and painful for him." Captain McNicholas concluded that a continuation of petitioner's firefighting duties would further compromise not only petitioner's health, but that of his fellow firefighters.

On December 22, 2003, the Board of Trustees reviewed petitioner's case and, after discussing the matter and noting that Dr. Ginsburg did not give a clear opinion as to whether petitioner could perform firefighting duties, remanded the matter back to the Medical Board "to consider sending petitioner to a burn specialist."

On March 25, 2004, the Medical Board reviewed petitioner's case, including the

minutes of the Board of Trustees' December 22, 2003 meeting. The Medical Board, in once again recommending the denial of petitioner's disability applications, wrote: "It is the opinion of the 1-B Medical Board that Dr. Gerald Ginzburg (sic) is a Board Certified Plastic Surgeon, with expertise in burn cases, and as such we believe it is unnecessary to refer the member out for an additional evaluation. Therefore, it is our unanimous opinion that our previous recommendation remains unchanged."

On March 28, 2003, petitioner's counsel was allowed to address the Board of Trustees concerning petitioner's case and sought remand of the case to the Medical Board.

On April 5, 2004, petitioner was examined by Dr. Yurt. During said examination, Dr. Yurt noted a "blue/purplish area on [petitioner's right knee and erythema on the left knee from a recent abrasion." Dr. Yurt concluded in his report of that examination that the contusion and abrasion were incurred from normal daily activity and the "result of a fragile epidermis' secondary to petitioner's burn injury". He repeated his opinion that petitioner was unable to perform firefighting duties.

On April 8, 2004, petitioner was examined by Dr. Roger L. Simpson, a burn specialist. Dr. Simpson found no restrictions of motion, no hypertrophy of the burn wound, only mild hypersensitivity, and that no additional treatment for healing was required. He, however, further noted that petitioner's burn deformities were susceptible to heat tolerance and breakdown; "[f]orceful pressure on his knees continually in an

environment where heat is retained in those areas will lead to intermittent breakdown of those regions requiring time away from work for healing;" and "[r]epetitive breakdown would be expected with activities requiring pressure in that region." Dr. Simpson concluded that petitioner had a permanent partial disability to the grafted areas and that this "localized recurring problem will weigh significantly on his ability to continue forceful kneeling."

On April 22, 2004, the Board of Trustees remanded the case back to the Medical Board for consideration of Dr. Yurt's report of his April 4, 2004 examination of petitioner, and Dr. Simpson's report of his April 8, 2004 examination of petitioner.

On May 18, 2004, petitioner was examined by Dr. Geoffrey C. Gurtner, Director of Microsurgery at New York University Medical Center's Institute of Reconstructive Plastic Surgery. Dr. Gurtner's examination of petitioner revealed that petitioner had a full range of motion and his grafts were well healed and relatively stable, with some evidence of recent trauma and abrasions. Based upon his examination and "given the nature of [petitioner's] proposed employment as a fulltime firefighter," Dr. Gurtner noted that petitioner could not return to work "without significant issues." After noting further his concern that petitioner "would either re-burn these areas or repeatedly re-injure them which could eventually progress to more serious injury ... which would be limb threatening," Dr. Gurtner opined that petitioner could not return to active firefighting duties, but could return to a desk job.

On July 1, 2004, the Medical Board, after reviewing Dr. Yurt's April 2004 report, Dr. Simpson's April 2004 report, and Dr. Gurtner's May 2004 report, found insufficient evidence to warrant any change in their previous recommendation.

On September 10, 2004, the Board of Trustees remanded petitioner's case to the Medical Board for the Medical Board's review of a September 7, 2004 letter written by petitioner's counsel to the Board of Trustees on petitioner's behalf.

On October 14, 2004, the Medical Board, on remand of petitioner's case and having reviewed petitioner's counsel's September 7, 2004 letter, stated: "It is the opinion of the 1-B Medical Board that the qualifications and experience of our impartial burn specialist, Dr. Ginsberg, is adequate to advise us about our member's case ... we are satisfied that the member is capable of performing full fire duty. Therefore, our previous recommendation remains unchanged."

The Board of Trustees, during its regular meeting on November 30, 2004, again reviewed petitioner's applications for disability retirement and, this time, noting that, based upon the Medical Board's actions, they "had no other choice," denied petitioner's disability retirement applications. Petitioner was informed of the Board of Trustees' "final action" and determination by letter dated December 2, 2004.

The instant Article 78 proceeding ensued.

Petitioner contends that the November 30, 2004 determination denying his application for ADR retirement was arbitrary, capricious and contrary to law in that the

Medical Board and Board of Trustees failed to obtain independent expertise on the issue of petitioner's claimed disability by basing their conclusion on the opinion of a physician who recused himself from the matter; failed to properly evaluate petitioner's second disability application and, instead treated it as an extension of the first application; failed to seek the opinion of a burn specialist and improperly relied upon those of a plastic surgeon and orthopedist; and failed to explain in detail the analysis and evaluations leading to their conclusion of non-disability.

Analysis

The court, having thoroughly reviewed the record of this matter, finds more than sufficient cause for a setting aside of the at-issue determination, remand of the matter for respondents' further consideration and review, and referral of the issue of petitioner's claimed disability to an independent burn specialist.

To be eligible for ADR, a firefighter must demonstrate that he or she is physically or psychologically incapacitated for the performance of firefighting duties as a natural and proximate result of an accidental injury incurred while engaged in firefighting activities (New York City Administrative Code § 13-353).

In reviewing a determination of the Board of Trustees as to the existence of a disability, the standard is that the finding will be conclusive if rational and supported by some credible evidence (*see also Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760-761 [1996]; *see also Matter of Drayson v Board of*

Trustees of Police Pension Fund of the City of New York, 37 AD2d 378, 380 [1971]). “[C]redible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered” (*Matter of Meyer v Board of Trustees of the New York City Fire Department, Article 1-B Pension Fund*, 90 NY2d 139, 147 [1997]).

Here, there is no credible evidence in the record to support the Medical Board’s recommendation, which recommendation was clearly arbitrary and capricious, and the Board of Trustee’s determination is, thus, not rationally based.

Petitioner was sent out by the Medical Committee or self-referred to numerous physicians at the three major burn centers in the New York City area, all of whom are burn experts and all of whom concluded that petitioner had suffered a disabling physical injury which rendered him incapable of competently performing his full and normal firefighting duties, and concluded further that petitioner’s attempts at full firefighting duties would be at grave or extreme risk to himself and his fellow firefighters and, thus (given the nature of his work), to the public at large.

The Medical Board, however, solicited and then repeatedly based its recommendation of a finding of no disability, not upon the reports of the physicians and burn centers to whom its burned firefighters were routinely sent - - physicians who, because they constantly dealt with such firefighters, were acutely aware and knowledgeable of the work, equipment and physical requirements firefighters must

perform, use and possess - - but on the report of a plastic surgeon, Dr. Ginsberg. Despite respondents' protests, there has been absolutely no evidence or showing on the record that Dr. Ginsberg is a burn expert, or if a burn expert, has sufficient experience in or knowledge of the particular equipment, duties and physical stresses a firefighter deals with in the usual and even routine pursuit of that occupation.

Dr. Ginsberg's November 20, 2001 report concentrates largely on the issue of whether petitioner's skin grafts were well healed and could sustain another burn or sunburn, but fails to specifically and adequately address the pertinent and clearly controlling issue of whether the grafts were capable of sustaining petitioner in the course of his normal firefighting duties which include, *inter alia*, wearing bunker pants and crawling on his knees in buildings and structures during or subsequent to fire activity, or would break down under such conditions. The report was, in fact, deemed "insulting" by one or more members of the Board of Trustees.

Dr. Ginsberg's report does not support the proposition for which it was offered to the Medical Board - - that related to the ability of petitioner's grafted areas to withstand the physical excesses of his firefighting equipment and duties, as opposed to the ability of the grafts to withstand ordinary wear and tear encountered during civilian use - - and simply does not constitute credible evidence supporting the Medical Board's recommendation (*see Matter of Meyer*, 90 NY2d at 147). Nor is there any credible evidence on the record that does support the recommendation.

When a conflict in medical opinion exists on the issue of disability, the Medical Board may “make a rational decision to reject the opinion of one medical expert over another” (*Kavakos v McCall*, 251 AD2d 857, 858 [1998]) and the court, on review, can neither weigh the medical evidence nor “substitute [its] own judgment for that of the Medical Board” (*Matter of Borenstein*, 88 NY2d at 761). That, however, is not the situation presented herein.

Here, there was no true conflict of pertinent medical opinion, since there was no demonstration that the Medical Board’s expert, Dr. Ginsburg, was “able to appreciate the dangers of firefighting and what it entails [] to make a reasonable and reliable opinion as to [petitioner’s] ability ... to crawl ... in the course of firefighting” and could give a valid medical opinion as to petitioner. Dr. Ginsburg, moreover, specifically rejected the possibility that the medical diagnoses and findings of the other physicians, which differed drastically from his own, might have been based upon or the result of petitioner’s persuasiveness, rather than the medical evidence. Instead, Dr. Ginsberg openly and quite admirably acknowledged in his subsequent May 9, 2003 report, that he “must be missing” or did not “understand something” and, in essence, admitted that his medical opinion, for whatever reason, was quite possibly not credible as to this particular case, and on this particular issue.

Nevertheless, and although Dr. Ginsberg then completely recused himself from

petitioner's case, the Medical Board continued, even more than one year following the refusal, to assert his findings as a basis for its recommendation. Although Dr. Ginsberg questioned his own qualifications to render a medical opinion as to this firefighter, the Medical Board, when urged by several factors to refer the matter to an independent burn specialist for consult, simply asserted, without any proof, that Dr. Ginsberg was sufficiently qualified in this burn matter.

Here, the Medical Board did not simply resolve the conflict between its expert's medical findings and those of petitioner's other physicians (*see Matter of Borenstein*, 88 NY2d at 761; *Matter of Ramsey v City of New York*, 8 AD3d 392 [2004]; *accord Matter of Ackalitis v Murphy*, 5 AD3d 381 [2004]; *Matter of Drew v New York City Employees' Retirement System*, 305 AD2d 408, 409 [2003]). Instead, having taken an initial stance, the Medical Board stubbornly, arbitrarily and capriciously refused to be budged from that position by the credible medical and factual evidence, and the personal observations and pleas of others.

The court, on review of the record, noted with interest a particular section of colloquy that took place during the Board of Trustees' September 10, 2004 meeting, after petitioner's case had already several times been remanded by the Board of Trustees to the Medical Board for review and reconsideration of its recommendation. It is difficult, upon review of the record, to disagree that this matter was properly summed up by the following statement of a Board of Trustees member:

“[Dr. Ginsberg’s] review of [petitioner’s] burns were in terms of how they healed. Every burn expert that submitted documentation on this implied that the plastic surgeon didn’t know what the hell he was talking about. We should have sent [petitioner] to a burn specialist and we sent him to a plastic surgeon. We don’t care how his knee looks; we care how it functions. And it doesn’t function properly. He absolutely, based on every expert, can’t go back to fire duty. And yet the 1-B Board sent him to the wrong doctor and got their back up about this thing and there’s nowhere we can go. As far as I am concerned a mistake was made where we sent him, and the firefighter is suffering the results of that.”

It is apparent from the record that Dr. Ginsberg again, admirably, “searched [his] soul” and found his medical opinion possibly lacking, and that the Board of Trustees made every effort to reach a proper conclusion and only reluctantly and after several remands accepted the Medical Board’s recommendation. It is not as apparent from the record that the Medical Board acted as conscientiously, but it is clear that the Medical Board, at the very least, did not act rationally.

Under these circumstances, because the Medical Board’s resolution of the conflict in medical opinion or evidence was not credibly supported and its recommendation not factually grounded or based on credible medical evidence (*cf. Matter of Borenstein*, 88 NY2d at 760; *Matter of Kuczinski*, 8 AD3d at 284; *Matter of Canfora v Board of Trustees, Police Pension Fund of the Police Dept. of the City of New York*, 90 AD2d 751, 752 [1982]), the Board of Trustees was not bound by the Medical Board’s opinion (*see Russo v Board of Trustees of New York City Fire Dept.*, 143 AD2d 674 [1988]; *Matter of*

Schwarzrock v Board of Trustees of New York City Fire Dept., 238 AD2d 596, 597 [1997]; see also *Matter of Borenstein*, 88 NY2d at 760), and the matter must be remanded for appropriate action, which action will consist of a further review and reconsideration of petitioner's case by the Medical Board and shall include a reference by the Medical Board to an independent burn specialist other than (to the extent he may actually be a burn specialist), Dr. Ginsberg, who has already recused himself from petitioner's case.

Conclusion

Based upon all of the foregoing, petitioner's application is granted to the extent that this matter is hereby remanded to the FDNY Board of Trustees and Medical Board for referral to an independent burn specialist and reconsideration and review of respondent's determination in accordance with the herein decision and order.

The foregoing constitutes the decision and order of this court.

ENTER,

Sylvia O. Hinds-Radix
J.S.C.

MON. SYLVIA O. HINDS-RADIX JSC