

**SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS**

**In the Matter of the Application of  
JOSEPH K. DALY,**

**Index No.: 517282/2018**

*Petitioner,*

**-against-**

**DECISION/ORDER  
HON. KATHERINE A.  
LEVINE**

**DANIEL A. NIGRO, as the Fire Commissioner  
of the City of New York and as Chairman of  
the Board of Trustees of the New York City  
Fire Department Article 1-B Pension Fund and  
the BOARD OF TRUSTEES of the New York  
City Fire Department, Article 1-B Pension Fund,  
*Respondents.***

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

Papers	Numbered
Notice of Petition and Verified Petition with Accompanying Exhibits.....	1
Petitioner's Memorandum of Law in Support of Verified Petition.....	2
Verified Answer with Accompanying Exhibits.....	3
Respondent's Memorandum of Law.....	4

This case raises the issue of whether the presumption contained in Retirement and Social Security Law ("RSSL") 363(g)(2)(a) and section 13-353.1 of the N.Y.C. Administrative Code ("Code") (also known as the "World Trade Center presumption" or "WTC presumption"), automatically entitles a New York City firefighter who participated in the rescue, recovery and cleanup operation at the World Trade Center ("WTC") site on and after 9/11/2001, and was subsequently diagnosed with liver cancer, to an accidental disability retirement benefit ("ADR"). An ADR provides for a tax-free pension of three quarters of his salary. This would be an upgrade to the ordinary disability retirement ("ODR") that he is currently receiving; i.e., one half of his salary which pension is taxable.

Petitioner Joseph Daly ("petitioner" or "Daly") seeks an order annulling the April 25, 2018 determination of the respondent Board of Trustees ("Trustees") of the New York City Fire Pension Fund, Subchapter 2 ("Pension Fund"), which denied his application for an ADR benefit based on the findings of the Medical Board of the Pension Fund ("Medical Board") that he was not disabled due to liver cancer or psychological axis disorder. The Medical Board opined that

petitioner's disability was due to ascites<sup>1</sup> and abdominal distention, which were the result of alcoholic liver disease, and not due to liver cancer. It also determined that petitioner's psychological disease was due to petitioner's having "endured several life threatening medical conditions, most recently liver cancer with symptoms of ascites, that place him on the list for liver transplant," and that he was "aware that without the liver transplant, his prognosis is extremely poor." Alternatively, petitioner seeks an order remanding the matter to the Trustees for further consideration.

Petitioner served as a firefighter for the New York City Fire Department ("FDNY") from 1983 until 2005, and retired with an ordinary retirement benefit. Prior to his appointment, petitioner passed the physical and mental examinations that the FDNY administered, and was found to be physically and mentally fit to perform the full duties of a firefighter. The medical records attached to the petition reveal that in the year 2009, Daly was diagnosed with bladder cancer. In 2015, he filed a reclassification application, requesting that his ordinary retirement benefit be reclassified as an ADR pension pursuant to the WTC presumption, based on the fact that he had bladder cancer. The Medical Board recommended that Daly's WTC reclassification application be denied because no medical evidence was presented to document that his symptoms were related to bladder cancer and not to other urinary conditions. The Trustees accepted the Medical Board's recommendation and denied Daly's reclassification application, and he continued receiving an ODR benefit.<sup>2</sup>

In 2017, petitioner was diagnosed with liver cancer and received a liver transplant. He was also treated at the FDNY Counseling Service Unit for anxiety related to his liver cancer. Petitioner again applied for WTC reclassification, based on liver cancer and psychological axis disorder, and the Medical Board recommended denial of his reclassification. In support of his application, petitioner submitted the *White Paper on Minimum Latency & Types of Cancer*, prepared by Dr. John Howard, the Administrator of the WTC Health Program, which sets forth latency periods for cancers associated with exposure to WTC toxins, including a minimum latency of 12 years for liver cancer. The Trustees accepted the Medical Board's recommendation of denial, based on the latter's opinion that Daly's physical disability was due to "persistent ascites and abdominal distention, neither of which are a consequence of hepatocellular carcinoma or its treatment, but are the result of cirrhosis," and that Daly was not permanently disabled from psychological symptoms. The Trustees performed no independent analysis.

When applying for ADR benefits, firefighters must typically show that they are physically or mentally incapacitated for the performance of city-service and that their incapacity was the

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<sup>1</sup>Ascites is the accumulation of fluid in the peritoneal cavity (abdomen), and occurs in many conditions in addition to malignancy. 4 *Lawyers' Medical Encyclopedia* § 30.116 (2019)

<sup>2</sup>Whether petitioner was unfairly denied ADR benefits based on bladder cancer is not addressed herein because it is not before this court.

natural and proximate result of accidental injury received in such city-service, and not the result of their “willful negligence.” RSSL § 363(a)(1); NYCAC § 13-353. However, an exception applies in the case of firefighters who participated in WTC rescue, recovery or cleanup operations in one of the enumerated locations set forth in RSSL § 2(36)(f) during the requisite “qualifying period” as set forth in § 2(36)(g). RSSL § 363(g)(2)(a) provides that if subsequent to such firefighters’ retirement, the Pension Fund determines that they have “a qualifying World Trade Center condition,” as defined in RSSL § 2, it shall be presumed that such “disability” was incurred in the performance and discharge of duty as the natural and proximate result of an accident not caused by the their own willful negligence, unless the contrary is proven by competent evidence.”

The legislative intent behind this presumption was to benefit firefighters due to the “evidentiary difficulty in establishing that non-trauma conditions, such as cancer, could be traced to exposure to the toxins present at the WTC site in the aftermath of the destruction.” *Mtr. of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 N.Y.3d 268, 281 (2012). Therefore, firefighters “need not submit any evidence - credible or otherwise - of causation to obtain the enhanced benefits.” *Id.*; *Mtr. of Boyer v. New York City Employees' Retirement Sys.*, 41 Misc. 3d 987, 992 (Sup. Ct. Kings Co. 2013). Rather, the pension fund bears the initial burden of presenting affirmative evidence that a claimant’s qualifying condition was not caused by the hazards encountered at the WTC site. *Bitchatchi, supra*, 20 N.Y.3d at 282 (2012); *Mtr. of Sheldon v Kelly*, 126 A.D.3d 138, 142 (1st Dept. 2015). If the pension fund fails to present such evidence, causation is presumed and the applicant is entitled to ADR benefits even if he offers no medical proof. *Mtr. of Cardno v New York State & Local Retirement Sys.*, 105 A.D.3d 1173, 1174 (3d Dept. 2013). The applicability of the WTC presumption and any reclassification is predicated upon the Medical Board’s initial finding of disability. *Borenstein v. New York City Emples. Ret. Sys.*, 88 N.Y.2d 756, 760 (1996). While the Trustees must accept the Medical Board’s finding that the applicant is disabled, it must make its own independent evaluation as to the Medical Board’s recommendation regarding causation. *Meyer v. Bd. of Trs. of the N.Y. City Fire Dept.*, 90 N.Y.2d 139, 144 (1997); *Mtr. of Codd v New York Fire Dept. Pension Fund*, 2019 NY Slip Op 50136(U), 2019 N.Y. Misc. LEXIS 394, \*6 (Sup. Ct. Kings Co. 2019); *Mtr. of Boyd v New York City Employees' Retirement Sys.*, 60 Misc. 3d 608, 613 (Sup. Ct. Kings Co. 2018).

RSSL § 2(36) (a) defines “Qualifying WTC condition” as a “qualifying condition or impairment of health resulting in disability to a member who participated in WTC rescue, recovery or cleanup operations for a qualifying period,” provided that there was no evidence of the impairment that formed the basis for the disability in the physical examination for entry into public service or in the relevant medical records prior to September 11, 2001. It is undisputed that there was no evidence of cancer in petitioner’s physical examination administered by the FDNY prior to his commencement of work. There is also no dispute that petitioner participated in WTC “rescue, recovery or cleanup operations” in one of the enumerated locations set forth in RSSL § 2(36)(f) during the requisite “qualifying period” as set forth in § 2(36)(g), and that he is disabled from performing his duties.

A “qualifying condition or impairment of health” is defined as one of the “qualifying physical conditions” or “qualifying psychological conditions” listed in § 2(26)© and (d), or both.” RSSL § 2(36)(b). Qualifying physical conditions include “new onset diseases resulting from exposure as such diseases occur in the future including cancer.” RSSL § 2(26)©. Qualifying psychological conditions include “diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions,” or “new onset diseases resulting from exposure as such diseases occur in the future including chronic psychological disease.” Liver cancer is a qualifying physical condition because cancer is specifically enumerated in RSSL § 2(25)© as a “new onset disease resulting from exposure.”

While the Pension Fund does not dispute that Daly has a qualifying physical condition, it argues that it presented competent evidence to the court which disproves that petitioner’s disability was attributable to his WTC rescue, recovery and cleanup operations, and proves that it was caused by persistent ascites and abdominal distention due to alcoholic cirrhosis of the liver. This court finds that respondent failed to proffer competent evidence to rebut the presumption that petitioner’s qualifying physical condition was caused by the hazards he encountered at the WTC site.

Respondent’s unsubstantiated theory that petitioner’s disability is due to persistent ascites and abdominal distention, neither of which is a consequence of liver cancer or its treatment, is not sufficient to rebut the WTC presumption. *See, Mtr. of Fernandez v. Board of Trustees of N.Y. Fire Dept. Pension Fund, Subchapter 2*, 81 A.D.3d 950, 952 (2d Dept. 2011) (Medical Board’s postulation that the petitioner’s drowning did not “appear[ ]” to result from exposure to toxins at the World Trade Center site did not address evidence submitted by the petitioner regarding likelihood that his exposure to toxins at the site caused his heart condition, which, in turn, caused him to drown). The Medical Board’s recitation of petitioner’s medical history of cirrhosis of the liver, ascites and distended abdomen, as noted in several MRI reports, without further explanation, is also insufficient to rebut the presumption that his disability was caused by his work at the WTC site. *See, In re Carlock v. Bd. of Trs. of the N.Y. Fire Dep’t Pension Fund*, 2016 NY Slip Op 32943(U), 2016 N.Y. Misc. LEXIS 6126, \*8-9 (Sup. Ct. Kings Co. 2016) (Simply identifying reports and tests and stating their conclusions, without more, is not sufficient to rebut the WTC presumption; the Medical Board must explain why the evidence it discounts is not valid, and why the evidence it relies upon is more persuasive).

As this court noted in *Mtr. of Boyd v New York City Employees’ Retirement Sys.*, 60 Misc. 3d 608, 615 (2018), in evaluating causation, the Trustees may not pick and choose evidence in weighing causation to find that a disability resulted from work related injuries without explaining why it is more valid than probative and consistent evidence that it was in fact work related. *See also, Mtr. of Francese v Kelly*, 2010 NY Slip Op 31147(U), 2010 N.Y. Misc. LEXIS 2057 (Sup. Ct. NY Co. 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] (same); *Mtr. of Athanassiou v Kelly*, 2009 NY Slip Op 31651(U) (Sup Ct, NY County 2009) (same).

Here, the Trustees erred by accepting, without any independent review or explanation, the Medical Board's determination regarding causation, based on cherry picked evidence of cirrhosis of the liver. No explanation was provided as to why evidence of cirrhosis was more credible than incontrovertible reports that petitioner was diagnosed with liver cancer, and the *White Paper on Minimum Latency & Types of Cancer*, setting forth a minimum latency of 12 years for liver cancer associated with exposures to toxins at the WTC site.

The Trustees' decision to deny ADR benefits is reviewed under the arbitrary and capricious standard which, in the context of ADR benefit determinations, has been construed to require "some credible evidence." *Bitchatchi, supra*, 20 N.Y.3d at 281; *Mtr. of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 (1996). Credible evidence is that which proceeds from a credible source and "reasonably tends to support the proposition for which it is offered." *Bitchatchi, supra*, 20 N.Y.3d at 281. It must be "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion. *Id.*

This court finds that the Trustees' decision to deny petitioner ADR benefits lacked a rational basis and was arbitrary and capricious because the Trustees undiscerningly accepted the Medical Board's recommendation which was based on cherry picked evidence. This evidence was insufficient to rebut the presumption that petitioner's liver cancer, a superceding qualifying condition, was caused by his work in the rescue, recovery and cleanup operation at the WTC site. Accordingly, the Trustees' determination is annulled. Inasmuch as the petition is granted, the court will not address at this time whether petitioner's psychological condition rendered him disabled.

Respondent is directed to reclassify and upgrade petitioner's ODR benefit to an ADR benefit retroactive to April 25, 2019, the date upon which his application was denied. This constitutes the Decision and Order of the Court.

DATED: September 3, 2019

  
KATHERINE A. LEVINE  
Justice Supreme Court

APPEARANCES

**Attorney for Petitioner**  
Jeffrey L. Goldberg, Esq.  
6 Harbor Park Drive  
Port Washington, NY 11050

**Attorney for Respondents**  
Amy J. Weinblatt, Esq.  
NYC Law Department  
100 Church Street  
New York, NY 10007

HON. KATHERINE A. LEVINE  
JUSTICE SUPREME COURT