

**Supreme Court of the State of New York
County of Kings**

Index Number 3007/2017
Seq# 001

Part 91

DECISION/ORDER

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

SCOTT M. GAFFNEY,

Petitioner,

against

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,

For the Judgment Pursuant to Article 78, CPLR, to review and annul the determination made by respondents to retire petitioner without providing for a pension for said petitioner at not less than three quarters of his salary as of the date of his service retirement as required by law, and for a further order directing the respondents to review petitioner's case and for such other appropriate relief.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	2
Answering Affidavits.....	3
Replying Affidavits.....	
Exhibits.....	
Other	

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Upon review of the foregoing documents, petitioner's application, pursuant to Article 78 of the CPLR, to nullify a decision by respondent, Board of Trustees, which upheld respondent Medical Board's initial determination that petitioner's chronic sinusitis is not of such a severity to preclude the work of a firefighter, is decided as follows:

On November 9, 2017, petitioner, Scott M. Gaffney, commenced this action to recover benefits he claims are owed to him by respondents. It is undisputed that petitioner is a former firefighter with the New York City Fire Department (hereinafter "FDNY"). It is also undisputed that petitioner responded to the World Trade Center (hereinafter "WTC") attack. Specifically, he

was acknowledged as a WTC responder through a member notice of participation form, verified on June 1, 2007, by FDNY's Bureau of Payroll and Pension services¹.

Pursuant to CPLR § 7803(3), the question raised in an Article 78 proceeding is "whether a determination was made in violation of lawful procedures, affected by an error of law or was arbitrary and capricious or an abuse of discretion." The function of the court, in an Article 78 proceeding, is to determine whether the action of an administrative agency had a rational basis or was arbitrary and capricious (*Pell v Board of Educ. Of Union School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Peckham v Calogero*, 12 NY3d 424, 431 [2009]). 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 (*Ador Realty, LLC v Division Housing and Community Renewal*, 25 AD3d 128, 139-140 [2d Dept 2005]).

Petitioner is entitled to accident disability retirement, pursuant NYC Administrative Code § 13-353.1 (hereinafter WTC disability law), if he can establish that he worked the requisite number of hours at the WTC and was diagnosed with a qualifying WTC condition (*In the Matter of Muniz v Nigro*, Kings County Civ. Index No. 6077/16 [NYLJ 1202796849481]). If petitioner can establish these two facts, there is a rebuttable presumption that the disabling condition was incurred in the line of duty (*Id*). However, petitioner will not be entitled to accident disability

¹ In support of his petition, Mr. Gaffney attached a copy of the notice of participation form. Petitioner filed the notice of participation form dated November 28, 2005 and notarized on December 5, 2005, as set forth in the Retirement and Social Security Law § 2(36)(a). By notation dated June 1, 2007, the FDNY Bureau of Uniform Payroll and Pension services, verified that petitioner worked the requisite hours during the WTC rescue at the WTC site.

retirement, if the Board of Trustees, based on credible evidence, is able to establish that petitioner's condition was not caused by his work at the WTC site. (See NYC Administrative Code § 13-353.1, *Maldonado v Kelly*, 86 AD3d 516, 516 [1d Dept 2011]).

The Board of Trustees' denial of petitioner's accident disability application is reviewed under an arbitrary and capricious standard which, in the context of disability determinations, has been construed to mean some credible evidence (*Borenstein v N.Y. City Employees' Ret. Sys.* 88 NY2d 756, 760 [1996]). Credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered and further that it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1 -B Pension Fund*, 90 NY2d 139, 147 [1997]). When applying this standard courts have found an absence of required credible evidence when the denial was premised by a summary conclusion of no causation and no factual basis was articulated (*Meyer* at 147). On the other hand, courts have upheld board determinations where they are supported by objective medical evidence or a rational, and fact-based medical explanation (*Meyer* at 147).

On April 20, 2016, following his retirement, petitioner filed a reclassification accident disability retirement (hereinafter ADR) application, pursuant to WTC disability law, based on his chronic sinusitis condition. On two separate occasions, September 15, 2016 and June 15, 2017, the Medical Board determined that petitioner is not permanently disabled because his symptoms are not of such a severity that they would preclude the work of a firefighter. The Board of Trustees' July 26, 2017 resolution, adopted the Medical Board's June 15, 2017 determination and denied petitioner's April 20, 2016 ADR application under the WTC disability law. Petitioner

objects to Medical Board's June 15, 2017. He argues that he is entitled to accident disability retirement because, as a result of his participation in WTC rescue, recovery, and clean up operations he was diagnosed with and suffers from chronic sinusitis. In opposition, respondents argue that the Medical Board carefully reviewed all the available documentation and reached a conclusion based on objective and credible evidence, which the Board of Trustees relied upon.

The Medical Board's determinations do not contain the required credible evidence that the Board of Trustees could have relied on because the denial was premised by a summary conclusion and no factual basis was articulated (*Meyer* at 147). Specifically, the Medical Board failed to address evidence, within the administrative record, of petitioner's job requirements and medical leave. In fact, the Medical Board never defined the work of a firefighter, although they determined that petitioner's chronic sinusitis is not of such a severity to preclude that work. In addition, the Medical Board never addresses why chronic sinusitis does not preclude the work of a firefighter. At best, the Medical Board's determinations are nothing more than conclusory statements providing no credible evidence that petitioner's symptoms are not sufficiently severe.

Moreover, the explanation provided by the Medical Board is insufficient because it fails to address evidence of petitioner's prior medical leave. Specifically, petitioner submits copies of FDNY's Bureau of Health and Services (hereinafter BHS) examination reports from August 7, 2015 through August 24, 2015 and from September 22, 2015 through September 28, 2015. On August 8, 2015 petitioner was evaluated at BHS, with complaints of sinus pain, and placed on medical leave due to chronic sinusitis. Petitioner remained on medical leave through August 24, 2015. On September 22, 2015, petitioner reported sick, again, due to his sinus condition and was placed medical leave through September 28, 2015.

On September 28, 2015, Dr. Rotkowitz, a BHS employee, authorized endoscopic surgery for petitioner's chronic sinusitis to be done by Dr. Shohet. On October 2, 2015, petitioner underwent endoscopic sinus surgery performed by Dr. Shohet. In Dr. Shohet's October 2, 2015 operative report, the post operative diagnoses consisted of chronic sinusitis, nasal airway obstruction and nasal valve collapse. Petitioner was seen by Dr. Shohet on a regular basis, including from his first post-operative visit on October 8, 2015 through June 14, 2017. As a result of his chronic sinus condition, petitioner was on medical leave from September 30, 2015 until October 21, 2015, the date of his retirement. Thus, based on BHS's own evaluation, petitioner's condition clearly precluded the work of a firefighter.

Furthermore, the Medical Board completely disregarded Dr. Shohet's June 14, 2017 letter addressed to Dr. Rotkowitz. In Dr. Shohet's letter, he provided an assessment and impression. Specifically, he discussed that petitioner was to strictly avoid precipitants of sinus irritation including smoke. He also explicitly stated that petitioner was still precluded from fighting fires. Dr. Shohet's June 14, 2017 assessment directly contradicts the Medical Board's June 15, 2017 negative determination. According to the FDNY's official requirements and New York City's notice of examination for employment as a firefighter, the work of a firefighter includes the ability to extinguish fires, climb stairs, ladders and fire escapes; using forcible entry tools such as, axes, sledge hammers, power saws and hydraulic tools; searching for victims in smoke filled environments; carrying or dragging victims from dangerous locations, and locating hidden fire by feel and smell. The Board of Trustees' July 26, 2017 resolution, adopting the Medical Board's June 15, 2017, determination was not rational, not reasonable and not based on credible evidence because respondents blatantly ignored the credible and pertinent evidence that the physical

requirements of FDNY firefighters include exposure to smoke, which Dr. Shohet's June 14, 2017 assessment of petitioner specifically prohibited.

Although the Board of Trustees' determination is entitled to considerable deference (*See Borenstein* 88 NY2d at 760), the respondents, in this case, were unable, based on credible evidence, to establish that petitioner's condition was not caused by his work at the WTC site (*See NYC Administrative Code § 13-353.1; Maldonado v Kelly*, 86 AD3d 516, 519 [1d Dept 2011]). The Court of Appeals has held that the Medical Board's opinions must be rational and articulated for them to be entitled to Judicial deference (*Meyer v Board*, 90 NY2d 139 [1997]). In this context, the court finds the Medical Board's determination in this matter to be completely devoid of any articulated basis for concluding that chronic sinusitis is not a disabling or incapacitating condition for firefighters. The Medical Board's written determination has no description of the performance requirements for firefighting, no description of the characteristics of sinusitis and no assessment of any risk that the diagnosed condition will threaten the safety of any person during the anticipated course of firefighting activity.

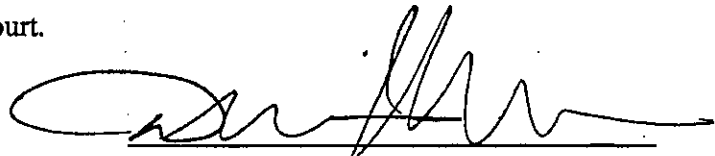
Moreover, patently missing from the Medical Board's reports is any explanation of how petitioner's physical condition would permit him to perform the duties of a firefighter (see *Guillo v N.Y. City Employees' Ret. Sys.*, 39 Misc 3d 1208[A], NY Slip Op 50539[U], *4-5 [Sup Ct, Kings County 2013] [reasoning that the Medical Board failed "to articulate in its determination how the petitioner can perform the physical duties of a commercial bus operator given the limitations to the range of motion of his back and neck"]. Indeed, the Medical Board's determination does not describe the duties of a firefighter or identify any medical findings that show petitioner can perform such duties. Consequently, the reasons for concluding that petitioner

is not disabled from performing his duties as a firefighter due to his chronic sinusitis are not supported by credible evidence or clearly stated in the Medical Board's reports.

For the reasons stated above, this court finds that the Medical Board's conclusion that petitioner was not disabled from performing the duties of a firefighter lacked a rational basis, and the Medical Board's determination was not set forth in such a manner as to permit adequate judicial review (*Fernandez v Bd. of Trustees of N.Y. Fire Dept Pension Fund*, 81 AD3d 950, 952 [2d Dept, 2011]) . Accordingly, respondent's findings and determination that petitioner is not disabled are hereby vacated, and the matter is remanded to the Medical Board for further consideration consistent with this Decision and Order.

This constitutes the order of the court.

January 3, 2019
DATE



DEVIN P. COHEN
Justice of the Supreme Court

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