

101324/2017 UNFILED JUDGMENT filed 6/29/2018

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

**PRESENT: Hon. Nancy Bannon
Justice**

PART 42

In the Matter of

INDEX NO. 101324/17

DANIEL HERNANDEZ

MOTION DATE 12/11/17

- v -

MOTION SEQ. NO. 001

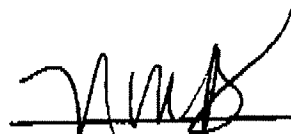
JAMES O'NEILL, as the Police Commissioner of the City of New York, and as Chalmán of the Board of Trustees of the Police Pension Fund, Article II, and THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND, ARTICLE II

The following papers were read on this proceeding pursuant to CPLR article in the nature of mandamus to compel

Notice of Petition/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). <u>1</u>
Notice of Cross Motion—Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). _____
Replying Affirmation — Affidavit(s) — Exhibits	No(s). _____

The petition is determined in accordance with the Decision, Order, and Judgment of this court, attached.

Dated: June 25, 2018



HON. NANCY M. BANNON

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
In the Matter of the Application of
DANIEL HERNANDEZ,

Petitioner,

Index No.: 101324/17

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

MOT SEQ. 001

-against -

DECISION, ORDER
& JUDGMENT

JAMES O'NEILL, as the Police Commissioner of the
City of New York, and as Chairman of the Board of
Trustees of the Police Pension Fund, Article II and
THE BOARD OF TRUSTEES of the New York City
Police Pension Fund, Article II,

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141B).**

HON. NANCY M. BANNON, JSC:

I. INTRODUCTION

In this CPLR Article 78 proceeding, the petitioner, Daniel Hernandez, a police officer,
petitions for relief in the nature of mandamus compelling the respondents to accept and process
his application for accident disability retirement benefits (ADR) based upon a line-of-duty
impairment.

II. BACKGROUND

The petitioner, who joined the police force in 2004, was involved in a shooting, at night,
on July 21, 2008. With his verified petition, petitioner submits a copy of an NYPD "Line-of-
Duty Injury Report" concerning the shooting incident, which states that:

"[w]hile attempting to affect a lawful arrest and acting in an official
capacity while on duty P.O. Hernandez was engaged in a foot pursuit and
did discharge his firearm to protect self. P.O. Hernandez, Daniel was
removed to Methodist Hospital due to possible hearing loss, shortness of

breath and muscle contraction. P.O. Hernandez Daniel was treated and released from the hospital."

Emergency room records from petitioner's hospital visit, at 12:17 a.m. on July 22, 2008, reflect the attending physician's clinical impression of headache and "Anxiety post officer involved shooting." Those records include a written notation of the word "Trauma," and demonstrate the hospital's evaluation of petitioner's complaints of headache and ringing in the ears. The petitioner was treated and discharged that day, with sleep medication, and was advised to seek an evaluation by an ear, nose, and throat specialist if he continued to experience ringing in his ears the next day. Other than asthma, which the petitioner reported had not troubled him since his mid-teens, the hospital records do not indicate that the petitioner suffered from medical problems of any nature prior to the shooting event.

The petitioner asserts that the medical division of the NYPD approved line-of-duty status for his injuries from the 2008 shooting incident, and supplies a reference number that he states was assigned by NYPD demonstrating this status. The petitioner also claims that, after years of suffering from the psychological after-effects of the shooting, he sought help from a social worker in early 2016, was diagnosed with major depressive disorder and post-traumatic stress disorder (PTSD), and was referred to a psychiatrist.

The petitioner submits medical records that reveal that, in 2016, he was seen by a social worker who diagnosed him with PTSD, general anxiety disorder and major depressive disorder. Within two weeks after being seen by the social worker, the petitioner was evaluated by a physician, whom the petitioner asserts is a psychiatrist, Dr. Marta Partyka. Dr. Partyka concurred with the social worker's assessment, and her treatment for petitioner included psychotropic

medication.

The petitioner asserts that, on June 6, 2017, his representative attempted to file an application for ADR benefits with the disability unit of the NYPD. The petitioner asserts that the commanding officer of that unit refused to accept the application because the Line-of-Duty Injury Report from the 2008 incident did not identify PTSD as one of the diagnoses.

The petitioner's submissions include a copy of his application for ADR benefits, which includes the records discussed above, as well as other documentation referable to the shooting event. In addition, the application provides a medication list of psychotropic medications prescribed, and the petitioner's statement that he is unable to perform full duty with a firearm as a result of the 2008 psychological trauma. In the petitioner's statement, he contends that the shooting incident has caused him to experience, among other things, nightmares, flashbacks, and anxiety over the years, but that he did not seek help earlier because he feared that doing so would result in negative career repercussions.

The respondents submit no opposition to this petition.

III. DISCUSSION

The petitioner asserts that the failure of the commanding officer of the disability unit to accept the petitioner's application for ADR benefits has deprived him of the right to be examined by the Medical Board of the New York City Police Pension Fund (the Medical Board) to assess whether or not he is fit to perform full police duties. He further asserts that the acceptance of the application for processing and consideration is a ministerial duty enjoined upon the commanding officer. Administrative Code of the City of New York (Ad. Code) § 13-252, entitled "Retirement; for accident disability," and referable to applications by police officers for ADR

benefits, provides that:

"Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or . . . member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith."

(emphasis added). As explained in a similar proceeding commenced in this court:

"The determination as to whether a retiring or retired police officer is entitled to ADR involves a two-step process. First, the Medical Board must determine whether or not the applicant is in fact physically or mentally incapacitated for the performance of City service. The Medical Board's determination on these issues is binding on the [New York City Police Pension Fund] Board of Trustees. If the Medical Board finds that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disabling condition was the natural and proximate result of an accidental injury. The second step involves the Board of Trustees. [T]he Board of Trustees, while bound by the Medical Board's determination of disability, is entitled to make its own determination regarding causation. In the exercise of sound discretion, the Board of Trustees may accept the Medical Board's opinion regarding causation or reject it and make a contrary finding"

Matter of Baudille v Kelly, 31 Misc 3d 1232(A), 2011 NY Slip Op 50927(U) (Sup Ct, NY County, May 19, 2011) (Stallman, J.), aff'd 95 AD3d 415 (1st Dept. 2012) (internal quotation

marks and citations omitted).

Ad. Code § 13-252 specifically states that the medical examination and investigation shall be made upon the member's submission of an application stating that, as a result of service on the police force, he or she is mentally incapacitated for performance, provided that the application includes the required details about the incident that the member contends resulted in the disability. In addition, the ADR application itself contains mandatory instructions to the NYPD medical division to supply to the Medical Board certain materials, including medical and line-of-duty reports, and states that the Medical Board must prepare a report of examination. Consequently, under Ad. Code § 13-252 and the NYPD's own procedures, the acceptance of an application for ADR benefits and the initiation of a medical investigation thereafter are ministerial acts enjoined upon the NYPD by law. See Matter of Mansfield v Epstein, 5 NY2d 70 (1958); Matter of Goldstick v Lambert, 161 AD2d 503 (1st Dept. 1990); Matter of Wilson v Quinn, 254 App Div 710 (2nd Dept. 1938), aff'd 277 NY 720 (1938); cf. Matter of Stephenson v. New York City Employees' Retirement Sys., 35 AD3d 484 (2nd Dept. 2006) (determination of whether to re-examine applicant for disability retirement benefits is not a ministerial act).

Hence, the petitioner was, and is, entitled to have the commanding officer accept his application for ADR benefits for processing and consideration, and have Medical Board conduct an investigation and examination concerning his claim. The failure to do so was contrary to the clear requirements of Ad. Code § 13-252. Although mandamus to compel is an extraordinary remedy, it is available, as here, "to enforce a clear legal right where a public [agency or] official has failed to perform a duty enjoined by law." New York Civ. Liberties Union v State of New York, 4 NY3d 175, 184 (2005).

The court expresses no opinion as to the merits of petitioner's claim for ADR benefits.

IV. CONCLUSION

In light of the foregoing, it is


ADJUDGED that the petition is granted, without opposition; and it is

ORDERED that, within 20 days after the petitioner's service on the respondents of a copy of this order with notice of entry in accordance herewith, the Medical Division of the Uniformed Disability Retirement Unit of the Police Department of the City of New York shall accept and process the petitioner's application for accident disability retirement benefits based upon a line-of-duty impairment, and the Medical Board of the New York City Police Pension Fund shall thereafter conduct the examination specified in Administrative Code of the City of New York § 13-252; and it is,

ORDERED that petitioner shall serve a copy of this order with notice of entry upon the respondents within 30 days of the date of this order.

Dated: June 25, 2018

ENTER:



J.S.C.

HON. NANCY M. BANNON

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