

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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DAVID LOPEZ,

Petitioner,

- v -

EDWARD A CABAN, THE BOARD OF TRUSTEES OF THE
NEW YORK CITY POLICE PENSION FUND, ARTICLE II

Respondent.

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INDEX NO. 153370/2024

MOTION DATE 04/11/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Upon the foregoing documents, this motion is decided as follows. This is a CPLR Article 78 proceeding arising from the denial of petitioner David Lopez' application for Accident Disability Retirement ("ADR") benefits by respondent The Board of Trustees of the New York City Police Pension Fund, Article II (the "Board") and Edward A. Caban as Police Commissioner of the City of New York and Chairman of the Board (collectively, "respondents"). Lopez petitions for an order pursuant to Article 78 annulling the denial of his ADR benefits and ordering respondents to grant ADR benefits, or in the alternative ordering a trial on the issue of verification. Respondents oppose, arguing that the court cannot find that Lopez was entitled to ADR benefits as a matter of law and that the Board determination must be upheld. For the reasons that follow, the petition is granted.

Facts

The relevant facts, which are based on the petition and the answer, are largely undisputed. David Lopez was a detective of the New York Police Department ("NYPD") that

was appointed to the NYPD on June 20, 1992. Lopez participated in the response operations conducted at World Trade Center (“WTC”) sites following the September 11, 2001 terrorist attack. As a result of his participation in the operations, Lopez was exposed to various particulate matters that contributed to him developing WTC related health issues that were certified for treatment by the WTC Health Program, including Obstructive Sleep Airway Disease, Obstructive Sleep Apnea, Gastroesophageal Reflux Disease and Chronic Obstructive Pulmonary Disease.

On June 21, 2019, Lopez filed an application for ADR under the WTC Disability Law alleging that he was unable to performing his full police duties due to illnesses he developed from the exposure to the toxins and inhaled debris while assigned to the WTC response efforts after the September 11, 2001 attack. Lopez’ application was reviewed several times, including on October 2, 2019, June 17, 2020, November 11, 2020 and finally on August 24, 2022. On August 24, 2022, the Medical Board of the Police Pension Fund Article II approved Lopez’ WTC Disability Law application, finding he was disabled due to Intractable Obstructive Sleep Apnea and Chronic Obstructive Pulmonary Disease.

The Board received the medical board’s recommendation for ADR on January 31, 2023. Originally scheduled for consideration on April 12, 2023, Lopez’ application was delayed eight times until it was finally heard on December 13, 2023. The reason for delay was to allow Lopez time to find and provide documentation to verify the facts alleged in his ADR application and for the Board to conduct a search of their records and verify Lopez’ claims.

In order to qualify for ADR under the under Administrative Code § 13- 252.1, the individual must show (1) they are disabled from the performance of police duty by a documented and qualifying physical condition and (2) establish either that they were present at a qualifying

site during the first 48 hours or participated in WTC rescue, recovery, or cleanup operations for a minimum of 40 hours between September 11, 2001 and September 12, 2002.

Lopez provided a number of documents to verify his presence at the site on the morning of September 12, 2001, including a personal affidavit stating he was there that morning, affidavits from three other officers stating they worked with Lopez on site on September 12, 2001, and Lopez' entries from his NYPD logbook. Accompanying the affidavits were several color photographs showing Lopez, both alone and with his fellow officers, amongst the rubble of Ground Zero, purported to be taken on the morning of September 12, 2001. The affidavits, provided by retired Sergeant Michael Acevedo, retired Sergeant Miguel Torres, and retired police officer Thomas Noguera, all stated that they worked with Lopez performing search, rescue, recovery and cleanup on the morning of September 12 and throughout the rest of the day. Lopez' handwritten logbook entry for September 11, 2001 contains the notes "Level 4 Mobilization" and "World Trade Towers Building Destroyed: Terrorist Act".

On December 13, 2023, the Board denied ADR benefits to Lopez in a six-to-six vote. They did not dispute that he was disabled on police duty from a qualifying physical condition, but determined the evidence did not prove Lopez was at a qualifying site within the first 48 hours and could only prove he was assigned to 27 hours and 15 minutes of work at a qualifying site, short of the required 40 hours.

The Board came to this conclusion after reviewing the evidence provided by Lopez, as well as from their own research. They reviewed Lopez police activity log and were only able to verify that Lopez was on site on October 8, 2001 for 13 hours and December 9, 2001 for 14 hours and 15 minutes, compromising the 27 hours and 15 minutes of qualified site time. Lopez' claim that he was on site on September 12, 2001 could not be corroborated. The Board reviewed

petitioner's assignments in the NYPD records and noted that on September 11, 2001 he was assigned to "Transit District 11 Mobile Response Auto" and on September 12 "TD 11 Train Patrol" both of which are located in the Bronx, a non-qualifying location.

The Board considered the evidence submitted by Lopez to support his presence at Ground Zero on September 12, 2001, including a Facebook post by retired Sergeant Michael Acevedo from September 11, 2016 reflecting on his response to the terror attacks at the WTC building on September 12, 2001 with Lopez, along with the supporting statements and photos provided. The Board stated in their review that they could not corroborate the Facebook post. They also determined the statements did not provide conclusive evidence of his location, as the photos offered were not date and time stamped, that the assignment records do not indicate any post changes on September 12 to the WTC site, and they were unable to verify the type of "rescue and recovery" Lopez was observed performing from the evidence.

The Police Pension Fund notified Lopez of the Board decision in a letter dated December 14, 2023. Lopez commenced this Article 78 proceeding on April 10, 2024.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell*, 34 NY2d at 231; *see also Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Ferrelli v State of New York*, 226 AD3d 504, 504 [1st Dept 2024]). If the agency determination is supported by a rational basis, it must be upheld even if a different conclusion could have been reached by the court (*Matter of Ferrelli*, 226 AD3d at 504; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Where, as here, the board of trustees has voted a six-to-six tie denying accident disability retirement benefits “the tie vote can be set aside on judicial review only if the courts conclude that the retiree is entitled to the greater benefits as a matter of law” (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]).

Respondents argue that the decision must stand, as Lopez is not entitled to ADR benefits as a matter of law and the Board is entitled to discount the affidavits and photos when they are contradicted by NYPD records (*see Matter of Cameron v Shea*, 220 AD3d 564, 565 [1st Dept 2023], *lv denied*, 41 NY3d 907 [2024]; *Matter of Salerno v Kelly*, 139 AD3d 516, 517 [1st Dept 2016]). Lopez argues that the evidence presented exceeds those of previous cases and that the photographs and affidavits together provide “overwhelming proof of his presence for a qualifying period [at] Ground Zero”.

Respondents cited *Matter of Cameron v Shea*, where petitioner provided affidavits affirming their presence at the WTC, however the first department ruled that the Board was allowed to discount the affidavits in denying ADR benefits as they conflicted with “NYPD records, including roll call records that petitioner signed” and that the affidavits from petitioner's family and friends were “conclusory, insufficiently specific, or not based on the affiants' personal

knowledge” (220 AD3d at 565). Respondents also rely on *Matter of Salerno v Kelly*, where the Board rejected an application for ADR benefits where respondent provided letters from two superior officers, which did not specify the work location was “within the statutorily defined area”, and photographs, in which petitioner did not appear and were undated (139 AD3d at 517).

Both of these cases can be distinguished from the current action. Where in *Matter of Cameron* the affidavits were not based on personal knowledge or were insufficiently specific, the affidavits provided by Lopez were based on personal knowledge of the affiants and placed Lopez at the WTC during the qualifying time period (220 AD3d at 565). Lopez not only had three officers submit affidavits stating they were at Ground Zero performing search and rescue operations with Lopez but submit color photos of the four of them amongst the rubble, further adding credibility to the claim. In *Matter of Salerno*, the letters by the superior officers did not specify the location qualified, however all of the affidavits given by Lopez’ officers specifically stated that they worked together at Ground Zero, a qualifying location (139 AD3d at 517). Additionally, the photos provided in *Matter of Salerno* did not contain the petitioner nor identify the photographer, in contrast to the present case where the photos contain both Lopez alone and Lopez with the officers who wrote affidavits on his behalf (*id.*).

While respondents argue that NYPD records conflicted with the statements, they base their position not on evidence that Lopez was somewhere else, but rather that there was not evidence to corroborate that Lopez was present at the WTC on September 12 within the NYPD records. In Lopez’ response, he explains that despite NYPD records showing the two T11 assignments in the Bronx, he was mobilized as part of Level 4 Mobilization effort to go to Ground Zero, as is reflected in his logbook. The inconsistency is reasonable as updating outdated assignments in the face of the emergency would not be as important as rerouting officer

assignments in real time. There is no evidence that Lopez was actually in the Bronx as his pre-mobilization assignment purports, and Lopez provided sufficient evidence to convince a reasonable mind that he was in fact at Ground Zero within 48 hours of the September 11, 2001 attack. Based on the evidence presented, this court finds that Lopez qualifies for ADR as a matter of law, and the determination denying him these benefits by respondents was lacking a rational basis.

For the reasons above, the petition is granted.

Conclusion

Based on the foregoing, it is hereby

ADJUDGED and ORDERED that the petition is granted; and it is further

ADJUDGED and ORDERED that December 13, 2023 denying David Lopez Accident Disability Retirement benefits is annulled; and it is further

ADJUDGED and ORDERED that respondents shall grant petitioner David Lopez Accident Disability Retirement benefits.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/3/2024
DATE

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LYNN R. KOTLER, J.S.C.

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