

At an IAS Term, Part 8 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 7th day of April, 2009.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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IN THE MATTER OF THE APPLICATION OF
ANTHONY SCIALO,

Index No. 20948/08

Petitioner,

- against -

NICHOLAS SCOPETTA, 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,
et. al.,

Respondents.

For a Judgment pursuant to Article 78, CPLR, to
review and annul the determination made by
respondents.

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The following papers numbered 1 and 2 read on this motion:

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

Upon the foregoing papers, petitioner Anthony Scialo (Scialo) moves:

1. for a judgment pursuant to Article 78 of the CPLR:
 - A. reviewing and annulling the action of the respondents herein in denying petitioner a line of duty (LOD) accident disability retirement (ADR) pursuant to the Administrative Code § 13-353 and declaring said action to be arbitrary, capricious,

unreasonable and unlawful; and

B. directing and ordering the respondents to review petitioner's application for accident disability retirement or, in the alternative,

C. directing that the Board of Trustees of the New York City Fire Department Article 1B Pension Fund (Board of Trustees) allow petitioner and/or his representatives to present such testimony as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to a LOD accident disability retirement allowance;

2. For an order pursuant to CPLR 2307(a) directing respondents to serve and file:

A. all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of petitioner herein;

B. copies of the minutes of each meeting of the Board of Trustees wherein the Board of Trustees considered, discussed or acted upon the retirement application of the petitioner; and

C. copies of any and all records, reports or notes relating to petitioner which are on file with the Article 1B Pension Fund and/or the New York City Fire Department (the FDNY).

This Article 78 proceeding results from a "no-disability" determination regarding petitioner's alleged heart, lung, right knee, upper and lower back injuries by the 1-B Medical Board of the New York City Fire Department Pension Fund, Subchapter 2 (the Medical Board.¹) As the majority of debate in this matter involves the circumstances surrounding petitioner's right knee injury, said injury and the subsequent investigations performed are the focus of this court's decision.

¹ The Medical Board is composed of a group of doctors, who are not employees of the FDNY, but specialists in their respective fields in private practice. Once the FDNY Medical Board Committee has reported a firefighter as unfit for full firefighting duty and the Fire Commissioner has applied for the firefighter's retirement with the Pension Fund by endorsing the Committee's report, the Medical Board reviews all of the medical records of the firefighter, performs physical examinations and does its own referrals for outside examinations and reports, where necessary. The Medical Board then prepares a report for the Board of Trustees. The Medical Board's determination regarding the firefighter's disability must be accepted by the Board of Trustees.

BACKGROUND

On May 7, 1983, petitioner was appointed to the uniformed force of the NYFD and served continuously as a member until his retirement. At all relevant times, petitioner was a member of the NYFD Pension Fund. Petitioner first injured his right knee on September 27, 1984 while working at a building that had collapsed. While stepping off of a portable ladder, petitioner slipped on debris from the collapse and twisted his right knee.

Petitioner's second injury to his right knee occurred on April 10, 2000 while he was responding to a motor vehicle collision. As one of the vehicles abruptly lurched, petitioner dove out of the way, slipping on broken glass and spilled fluids. As he fell to the ground, he felt a sharp pain in his right knee. On April 14, 2000, an MRI of petitioner's right knee was taken by Sam Mayerfield, M.D., a radiologist. Based on this MRI, Dr. Mayerfield concluded that Scialo suffered: (1) a horizontal cleavage tear posterior horn medial meniscus; (2) oblique tear, posterior horn of lateral meniscus and (3) a suspected additional oblique tear, anterior horn lateral meniscus. On May 4, 2000, as a result of the pain in his knee and the MRI findings of Dr. Mayerfield, petitioner was evaluated by Jo A. Hannafin, M.D. Dr. Hannafin confirmed that Scialo "has a history and exam consistent with medial and lateral meniscal pathology and a questionable partial ACL..." Dr. Hannafin recommended an arthroscopy² to repair the damage to petitioner's right knee. Dr. Hannafin performed the arthroscopic procedure on May 17, 2000. His post-operative diagnosis was, "[a] complex medial meniscal tear, partial anterior cruciate ligament injury without instability and

² An "arthroscopy" is a surgical technique whereby a tube-like instrument is inserted into a joint to inspect, diagnose and repair tissues.

synovitis.³ At the time of his surgical followup on October 4, 2000, Dr. Hannafin cleared Scialo for return to full duty. This injury and subsequent surgery caused petitioner to lose 180 days of work, from April 11, 2000 until October 8, 2000.

Petitioner subsequently injured his right knee a third time, as well as receiving injuries to his back, on September 3, 2002 when a set of basement stairs he was climbing collapsed, causing him to fall into the basement of the premises. According to the petitioner's medical history, this incident resulted in his missing 46 days of work.

On April 14, 2004, petitioner submitted an application for ADR for injuries he allegedly sustained in the line of duty, including the injuries to his knee sustained in April of 2000⁴. In response to petitioner's application and on his behalf, the Fire Commissioner submitted an application for non-service incurred disability retirement, also referred to as ordinary disability retirement (ODR). Petitioner also submitted an application for Service Retirement since he had 20 years of service as a member of the FDNY. Petitioner retired on May 21, 2004, after 22 years of service, with a service pension.

On May 17, 2004, just five days prior to his retirement, petitioner underwent another MRI of his right knee. Narendra Patel, M.D., a radiologist, concluded that petitioner exhibited: (1) status post partial meniscectomy of the posteromedial meniscus; (2) suspect partial incomplete tear of the femoral attachment of the anterior cruciate ligament with buckling of the posterior cruciate ligament;

³ "Synovitis" an inflammatory condition of the synovial membrane of a joint (here, the knee joint) as the result of an aseptic wound or a traumatic injury, such as a sprain or severe strain. Fluid accumulates around the capsule causing the joint to swell, restricting its movement.

⁴ According to the petitioner's application, he stated that the knee injury necessitating his retirement occurred in May of 1999; however, based on a review of the file, it is the April 10, 2000 injury that was the basis for his ADR application as there is no reported injury to the right knee in or around May 1999.

(3) a small intrasubstance tear of the posterolateral meniscus; (4) mild tendinitis of the infrapatellar tendon and (5) mild bone marrow edema of the posteromedial tibial condyle.⁵ On May 21, 2004, the same day he was retired by the FDNY, petitioner was examined by his treating physician, Jo A. Hannafin, M.D., the same doctor who performed the arthroscopic surgery on his knee. The purpose of this examination was for a followup evaluation and to determine the status of his right knee. According to Dr. Hannafin, after his surgery, "[petitioner] subsequently had a somewhat slow postoperative course with recurrence of an effusion⁶ within the knee." Dr. Hannafin further stated that, since the petitioner's October 4, 2000 surgical followup (the examination where Dr. Hannafin cleared Scialo for return to full fire duty), "[petitioner] has had a number of small episodes where his knee became sore but states overall it is doing very well. . . he notes occasional achiness and pain particularly along the posteromedial joint line." Dr. Hannafin finished his report with the following impression:

"Mr. Scialo has a history and examination consistent with early posttraumatic arthrosis of the medial compartment of his knee. At this point his symptoms are mild but they do have the potential to progress over time. . . [t]he status of his knee, as documented on [the] current [5/17/2004] MRI, is directly related to the injury that he sustained in 2000 and the subsequent partial medial meniscectomy." [emphasis added]

On June 14, 2004, petitioner was examined by the FDNY Medical Board Committee (the BHS Committee⁷) which stated that petitioner should perform light duty and had a partial permanent

⁵ A "condyle" is a rounded projection at the end of a bone that anchors muscle ligaments and articulates with adjacent bones.

⁶ An "effusion" is the escape of fluids into a body part or cavity.

⁷ The BHS Committee, is composed of physicians from the FDNY's Bureau of
(continued...)

disability. Specifically, quoting from respondent's answer, the BHS Committee found petitioner "unfit for fire duty with a diagnosis of . . . status post right knee arthroscopy with medial meniscectomy and ACL tear." As indicated by his stamped endorsement on the June 14, 2004 BHS Committee report, the Fire Commissioner submitted an application for ODR. Nearly two years later, on March 2, 2006, the Medical Board first reviewed Scialo's application for ADR. The Medical Board referred Scialo to its impartial orthopedic consultant, Dr. Basil Dalavagas, to determine if he had a disability of his right knee that would preclude full fire duty. Dr. Dalavagas examined petitioner on May 11, 2006. His report notes that a "[r]eview of the patient's X-Ray shows no significant degenerative changes in the knee. . ." and, ". . . in the MRI done in May/2004, there was evidence of S/P meniscectomy, partial, and there was evidence of partial ACL [anterior cruciate ligament] tear and questionable buckling of the PCL [posterior cruciate ligament]." Dr. Dalavagas also found right quadricep⁸ muscle atrophy that he felt could be corrected with intensive physical therapy. Despite these findings, Dr. Dalavagas found that the petitioner was "not permanently disabled for the performance of full fire duty. On June 15, 2006, based upon Dalavagas' May 11, examination, the Medical Board denied petitioner's application for ADR.

On October 3, 2006,⁹ in response to his being denied an ADR for his back and knee injuries,

⁷(...continued)

Health Services and chaired by the FDNY's chief medical officer. It is the duty of the Committee to examine a firefighter for the purposes of determining if he or she is fit for full firefighting duty, for performing only light duty assignment, or if he or she must be placed on medical leave.

⁸ The quadricep, or *quadriceps femoris*, muscle includes the four prevailing muscles on the front of the thigh. It is the main extensor muscle of the knee.

⁹ On August 31, 2006, the Medical board denied petitioner an ADR for his back injuries after reviewing additional evidence submitted.

petitioner went to Dr. Hannafin for a reevaluation of his right knee. After his examination, Dr.

Hannafin concluded that:

"Mr. Scialo is continuing to have symptoms related to his knee. I have recommended to him that we repeat the MRI of his knee as his prior one has been almost two years. We would like to see whether he has had any further loss of articular cartilage in the medial compartment, or whether he is beginning to develop any subchondral edema from overload of the bone."

On October 6, 2006, Douglas Mintz, M.D. performed a third MRI of petitioner's right knee. After reviewing the film, Dr. Mintz reported the following impression: "Magnetic resonance imaging of the right knee demonstrating medial meniscectomy, with focal full-thickness cartilage loss over the plateau and more diffuse grade III changes over the condyle posterior weight-bearing aspect. There is a chronic high-grade tear of the anterior cruciate ligament without acute translation." Based upon this MRI, Dr. Hannafin made the following report on October 19, 2006:

"The MRI demonstrated significant progression of cartilage loss with grade III chondral loss medial femoral condyle. There is no re-tear of the medial meniscus. There is also grade II - III changes of the tibial plateau. This has clearly progressed from the arthroscopy photos of 5/2000 which demonstrated no cartilage loss on the tibial plateau and only grade I changes on the medial femoral condyle."
[emphasis added]

Dr. Hannafin also prescribed an "unloader brace" for petitioner to wear on his knee to help alleviate some of his symptoms.

On January 18, 2007, the Medical Board again considered Scialo's ADR application on remand from the Board of Trustees. After reviewing Dr. Hannafin's reports of October 3, 2006 and October 19, 2006, the Medical Board deferred making a decision until the MRI and Dr. Hannafin's reports could be referred back to its impartial orthopedic consultant, Dr. Basil Dalavagas, to determine if this would alter his previous opinion. The Medical Board also requested that Dr.

Dalavagas re-interview and examine the petitioner.

On March 1, 2007, less than 10 months after his first examination of the petitioner, Dr. Dalavagas re-evaluated Scialo. Dr. Dalavagas reported that, at the time of this examination, petitioner now has "marked atrophy of the right quadriceps more than 3 cm." Dr. Dalavagas reviewed the October 2006 MRI of petitioner's right knee and stated:

"[t]here is significant Grade III degenerative changes with chondral loss in the medial femoral condyle, softening of the articular cartilage in the medial tibial plateau and some softening of the articular cartilage in the lateral tibia plateau."

Based on this examination, Dr. Basil Dalavagas stated:

"Patient is [status post] arthroscopic partial medial meniscectomy in the right knee, approximately more than 6 years ago with clinical and MRI evidence of significant degenerative changes mainly in the medial compartment, less in the lateral compartment, with marked right quadricep atrophy with significant functional deficit in the right knee."

Dr. Dalavagas concluded by stating that, "I believe that now [firefighter] Anthony Scialo is permanently disabled for the performance of full fire duty."

On May 3, 2007, the Medical Board again reviewed petitioner's case. Based upon Dr. Dalavagas' March 1, 2007 report and the October 6, 2006 MRI report of petitioner's right knee, the Medical Board concluded, that while petitioner is now disabled, "there is insufficient evidence available to us that he was disabled for full fire duty at the time of his retirement and therefore it is our opinion that our previous recommendation remains unchanged."

At its June 22, 2007 meeting, the Board of Trustees discussed petitioner's case. After some contentious discussion, the Board of Trustees decided to table the issue until its next meeting so it could obtain Scialo's medical folder and "additional medical information."

The Board of Trustees reconvened on July 25, 2007. After similar contentious debate on the

issues detailed, *supra*, Commissioner Douglas White (Commissioner White), the Deputy Fire Commissioner and Acting Chairman of the Board of Trustees stated:

"I propose that we remand this to the IB Board [Medical Board] with a copy of the discussion and the minutes that we've discussed in the last half hour, twenty minutes, with an instruction to clarify why they do not believe there was sufficient evidence that the member was disabled at the time of his retirement. . . [we're remanding with the minutes so the IB Board can understand the views that have been expressed here with the instructions to clarify why they do not believe there was sufficient evidence that the member was disabled at the time of his retirement.]"

In response, Steven Cassidy (Cassidy), President of the Uniformed Firefighters Association of Greater New York, and First Vice Chair volunteered to create a summary of the issues in order to aid the Medical Board in understanding the Board of Trustees' questions.¹⁰ Instead of remanding the matter after this meeting, on the advice of Cassidy, the issue was held over one month until the Board of Trustees' next meeting so it could discuss the issues with petitioner's attorney.

On September 5, 2007, the Board of Trustees again discussed petitioner's case. The debate covered the discrepancy between Dr. Dalavagas' two reports, the length of time it took this case to move through the system, and questions as to why the Medical Board would refer this case a second time to Dr. Dalavagas and then not take his recommendation that petitioner was now disabled. While discussing what questions the Board of Trustees wanted answered on remand to the Medical Board, Carolyn Wolpert (Wolpert), of the Office of the Corporation Counsel, Law Department, made the following recommendation:

"You might ask the IB [Medical Board] to explain their decision. There is a report from Dr. Dalavagas from 2006 that said he is not permanently disabled, and if there is more reasoning as to why they think he was not disabled in 2004 and they set that forth in the report,

¹⁰ There is no evidence Cassidy ever prepared this summary.

that might help explain the decision.”

Commissioner White then issued the following instruction:

“Remand it back to the MB [Medical Board] with the instructions to look at the injuries of the member and the appropriate -- and the time line and details to determine whether or not there was a disability before retirement, I want them to look at this, the entire record, and explain to us in some detail how they reached that conclusion.”
[emphasis added]

However, after an “off the record” discussion called by Joey Koch, the Mayor’s Representative, Commissioner White stated as follows:

“I said to remand it, but I think we should table it to find out any more information about the case and if we can secure anything from the member that we don’t have in the record. But my inclination is to remand it, not at this point, but we will table it until we can talk to the member to get additional information.”

The Board of Trustees next met on October 31, 2007. After more debate on what issues it wanted clarified by the Medical Board, the Board of Trustees tabled the remand until its next meeting in November in order to “frame these issues.”

At its November 26, 2007 meeting, Cassidy again offered to draft a question for the Medical Board from the Board of Trustees with regard to Scialo’s file.¹¹ To provide Cassidy time to prepare the question and forward same for the Commissioner’s review, Commissioner White tabled the matter until the next meeting in December.

The Board of Trustees met on December 17, 2007. In addition to the debate over the two Dr. Dalavagas diagnosis, the delay in getting the petitioner’s file before the Medical Board, and the opinion of the Medical Board that insufficient evidence of a disability existed at the time the

¹¹ Just as with the July 25, 2007 summary, there is no evidence this document was ever drafted. In fact, Louis Sforza of the Uniformed Firefighters Association of Greater New York confirmed during the November 26, 2007 meeting that this writing was not prepared.

petitioner retired, there was discussion regarding whether or not a framed question even need be prepared. Unable to come to any conclusion, the Board of Trustees tabled the remand of this file until its January 2008 meeting. According to the record, Commissioner White tabled the issue so "[t]he administrative staff [can] look into the case to determine certain coding and be prepared at the next meeting to render a judgment as to the referral of the case back to the IB Medical Board or not."

At this point, the court notes that the last time petitioner's file was before the Medical Board was on May 3, 2007. The Board of Trustees, while trying to determine precisely what it wanted the Medical Board to address, tabled the remand of petitioner's file at its June 22, July 25, September 5, October 31, November 26, and December 17, 2007 meetings. Including the fact that there appears to have been no August 2007 meeting, the Board of Trustees delayed remanding petitioner's ADR application a total of seven months.

The Board of Trustees met again on January 30, 2008. With the decision to remand made, Commissioner White stated:

"I think it should be remanded with the IB Board [Medical Board] to take a look at the 5/11/2006 report of Dalavagas and the 2007 report, and reconcile the issue of the right knee injury, whether or not the right knee injury in 2000 - - that his disability was an aggravation of the 2000 injury, and get back to us." [emphasis added]

After further discussion, Commissioner White supplemented what was going to be remanded. He stated, as follows:

"[s]o as an addendum to the referral back to the IB Board [Medical Board] to take a look at the Dalavagas report from 2006 and 2007, additionally, we're going to forward the May 21, 2004 report of Dr. Hannafin with respect to the member to pay particular attention to the MRI and the impression-plan section of the report." [emphasis added]

Despite these clear instructions, on February 7, 2008, Lei Tan (Tan), a member of the Board of Trustees, prepared the following remand memorandum from the Board of Trustees to the Medical

Board. The memorandum reads, in its entirety, as follows:

"The Board of Trustees reviewed the case of the above noted member during the regular meeting on 01/30/08. At that time it was directed that the Subchapter 2 Medical Board should clarify whether the member's right knee disability was an aggravation from the 04/1-/2000 injury. It was also directed that the following documents be forwarded to the Subchapter 2 Medical Board for review:

1) Dr. Jo A. Hannafin's report dated 05/21/04.

"Thank you for your cooperation in this matter."

There is no indication in the record why the remainder of Commissioner White's January 30, 2008 recommendations were not included in Tan's February 7th memorandum. Further, there is no explanation why any of Commissioner White's recommendations from any of the previous Board of Trustees' meetings, (i.e., remanding all of the minutes of the meetings), were not included in his recommendations from the January 30, 2008 meeting.

Based upon the incomplete February 7, 2008 remand memorandum, on February 28, 2008, the Medical Board again reviewed Scialo's case, for the first time since May 3, 2007, nearly ten months prior thereto. In denying the petitioner's ADR application, the Medical Board's report reads in its entirety:

"On 2/28/08, the 1-B Medical board again considered the case of Anthony Scialo. The case was last reviewed on 5/3/07, at which time the member was denied disability retirement.

The 1-B Medical Board re-evaluated this case at the direction of the board of Trustees dated 2/7/08 and evaluated Dr. Jo A. Hannafin's report dated 5/21/04.

After evaluating the report, it is the opinion of the 1-B Medical Board that the right knee disability of 2007 was not aggravated by the injury of 4/10/00, this is based on a policy that the aggravating injury must be proximate to the disability. Therefore, it is our opinion that our previous recommendation remains unchanged." [emphasis added].

DISCUSSION

"The issue of whether a firefighter is disabled as a result of a service-related accident is

determined by the Medical Board of the New York City Fire Department Pension Fund, Subchapter 2 (formerly Part 1-B) . . . Its determination that a firefighter is not disabled for duty is conclusive if it is supported by some credible evidence and is not irrational" (see *Kuczinski v Board of Trustees of New York City Fire Department, Article 1-B Pension Fund*, 8 AD3d 283, 284 [2004]; see also *Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760 [1996])["In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious"]; *Drew v New York City Employees' Retirement System*, 305 AD2d 408, 409 [2003] ["The Medical Board's determination is conclusive if it is supported by some credible evidence and is not irrational"]; accord *Inguania v Board of Trustees of New York City Fire Dept.*, 302 AD2d 527 [2003]).

"Credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered" (see *Meyer v Board of Trustees of the N.Y.C. Fire Dept., Art 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). "It must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*id.*). "An articulated, rational, and fact-based medical opinion" constitutes "credible evidence" (*id.* at 148). The Medical Board's "detailed and fact-based report," "explaining the basis for its conclusion" constitutes "credible evidence" (*id.* at 152).

If there is a difference in medical opinion on petitioner's non-disability, such difference does not render the Medical Board's determination, nor the Board of Trustees' acceptance of that determination, arbitrary and capricious (see *Manza v Malcom*, 44 AD2d 794 [1974]), since it is solely within the Medical Board's province to resolve any conflict between medical opinions (see *Kuczinski*, 8 AD3d at 283; *Bartsch v Board of Trustees of New York City Fire Dept. Art. 1-B Pension Fund*, 142 AD2d 577 [1988]). "The courts cannot weigh the medical evidence or substitute

their own judgment for that of the Medical Board if the Medical Board's determination is supported by any credible evidence and is not irrational" (*see Ruzicka v Board of Trustees of New York City Fire Dept., Article 1-B Pension Fund*, 283 AD2d 581 [2001]; *see also Borenstein*, 88 NY2d at 761; *Schwarzrock v Board of Trustees of the New York City Fire Dept. Article 1-B Pension Fund*, 238 AD2d 596, 597 [1997]). "Where . . . the [Medical Board] determines that an applicant is not disabled from performing firefighting duty due to an alleged injury or illness, the [Board of Trustees] must accept that determination and deny the applicant's claim" (*see Schwarzrock*, 238 AD2d at 596).

The record bears out the conclusion that, on February 28, 2008, the Medical Board did not possess all of the relevant evidence Commissioner White intended it to review as part of the remand. Additionally, there is a history of delays in this matter, including those delays by the Board of Trustees discussed above, that were not addressed by the Medical Board in its most recent denial, including consideration of the alleged "policy" that the aggravating injury must be proximate to the disability. Moreover, the Medical Board's determination is conclusive only if it is supported by some credible evidence and is not irrational (*see Inguanta*, 302 AD2d at 527). Here, the Medical Board's reference to a "policy", without articulating a rational basis for said policy or providing any details of the policy, does not constitute the requisite "credible evidence" because such credible evidence must be evidentiary in nature and not merely a conclusion of law (*see Meyer*, 90 NY2d at 147). The Medical Board's February 28, 2008 denial based upon causation is arbitrary and cannot be sustained in an Article 78 proceeding, such as the matter at bar (*see Drew*, 305 AD2d at 409).

Under the circumstances, this matter is remanded to the Medical Board for further review and findings with regard to petitioner's claimed line-of-duty right knee injuries. Such remand shall, in addition to the petitioner's complete medical file, include all relevant minutes from the Board of

Trustee meetings dated June 22, 2007, July 25, 2007, September 5, 2007, October 31, 2007, November 26, 2007, December 17, 2007, and January 20, 2008, as well as any memoranda prepared by the Board of Trustees that was not provided to the Medical Board prior to its February 28, 2008 denial.

The foregoing constitutes the decision and order of this court.



HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT