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# Matter of D'Avolio v. Nigro, 17849-2014

August 13, 2015

Cite as: Matter of D'Avolio v. Nigro, 17849-2014, NYLJ 1202734528497, at \*1 (Sup., KI, Decided July 20, 2015)

## CASENAME

In the Matter of the Application of, James D'Avolio, Petitioner v. 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 I-B Pension Fund, The Board of Trustees of the New York City Fire Department, Article I-B Pension Fund, Respondents

17849-2014

Justice Loren Baily-Schiffman

[Read Summary of Decision](#)

Decided: July 20, 2015

## **ATTORNEYS**

Petitioner was represented by: Jeffrey L. Goldberg and Eileen J. Goggin of the Law Office of Jeffrey L. Goldberg, P.C.

Respondents were represented by: Yungbi Jang of the NYC Law Department.

## **For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules**

### **Decision and Order**

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In this Article 78 proceeding, Petitioner seeks to annul the determination of Respondent, the Board of Trustees of the New York City Fire Department, Article I-B Pension Fund ("FDNY"), denying his application for accidental disability retirement benefits ("ADR"). Petitioner was a first responder at the World Trade Center ("WTC") disaster on September 11, 2001 ("9/11"). While traveling downtown on Broadway that day, Petitioner saw the north tower collapse. When he reached the WTC, Petitioner immediately started searching for survivors and worked non-stop for the first 60 hours. Thereafter, Petitioner worked at the WTC site every day until December 25, 2001. Nineteen members of his firehouse died on 9/11 and Petitioner was involved in the search and recovery of the remains of these firefighters. For some time thereafter, Petitioner was very involved with the deceased firefighters' widows and their children. In addition to going to work every day at Ground Zero, Petitioner attended many funerals and memorials. The records allegedly reviewed by the

Medical Board of the FDNY Pension Fund ("Board") indicate that Petitioner

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suffered from his extensive exposure to destruction and human remains after 9/11<sup>1</sup>. As the search and recovery efforts wound down Petitioner's complete preoccupation with the events of 9/11 did not abate.

The FDNY contends that no documentation exists to indicate that Petitioner sought any treatment for PTSD, panic attacks and anxiety prior to September 2010. However, the FDNY's own submission herein includes examination reports by FDNY staff as early as January 18, 2002 (approximately 4 months after 9/11). At that time Petitioner presented with agitated, pressured speech and racing thoughts, complaining of a "few months of diffuse myalgias, lethargy, recurrent left nose bleed and chronic insomnia." Petitioner presented to FDNY medical staff again on February 1, 2002 complaining of "chronic pain in the morning" and on February 8, 2002 "diffuse muscle aches and pains after WTC". On February 22, 2002 Dr. Dennihy, a FDNY staff physician, evaluated Petitioner and prescribed celexsa, an anti-depressant; ambien, a sleeping pill; and directed Petitioner to continue counseling<sup>2</sup>. Petitioner reported that thereafter he continued treatment for his PTSD, depression and anxiety privately through 2004; however, those records were not submitted nor considered by the Board.

In January 2010 Petitioner spent 10 days exposed to extensive destruction and human remains, again, as part of a special unit deployed to Haiti to assist in their search and recovery efforts after an earthquake. In April 2010 Petitioner began a Masters program given

by the Department of Homeland Security through the Naval Post Graduate College, focusing on counter-

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terrorism issues. As a result of worsening PTSD, anxiety and depression symptoms Petitioner presented to Dr. Michelle Theoharris, a FDNY psychiatrist on September 3, 2010. Dr. Theoharris noted that Petitioner's symptoms of anxiety and depression were exacerbated since April of 2010 when he began the Master's Program and noted that "...underlying the current stressors was a past history of trauma related to his job (9/11) and personally (suicides of two siblings)."<sup>3</sup> Dr. Theoharris prescribed Lexapro and Xanax XR for anxiety, depression and sleep at that time. Petitioner initially reported an improvement of his symptoms in November 2010. However, in December 2010 Petitioner reported more stress at work and increased thoughts of 9/11 and revealed a history of chronic suicidal ideation. Dr. Theoharris noted that Petitioner reported having suicidal ideation with the fantasy of hanging himself since 2002 but denied ever having made any attempts.

On March 3, 2011, Petitioner returned to the FDNY Counseling Service Unit ("CSU") Complaining of anxiety, panic attacks, cold sweats, difficulty sleeping and functioning. According to Dr. Ira Fierstein, (FDNY staff) Petitioner displayed multiple symptoms of PTSD at that time such as headaches, fatigue, profuse sweating, poor attention, hyper vigilance, nightmares, flashbacks, intrusive images, intense anger, agitation, fear, grief, suspiciousness, increased use of alcohol, acting out and emotional outbursts. As a result of these symptoms, Dr. Fierstein diagnosed Petitioner with Post Traumatic Stress Disorder 309.81.<sup>4</sup> At the same time Dr. Theoharris prescribed Wellbutrin XR and Ambien in addition to the Lexapro and Xanax.

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On March 11, 2011, Petitioner presented to Raymond Brown, LMSW, at CSU with symptoms of anxiety, fearfulness, panic, cold sweats, difficulty sleeping and functioning. Mr. Brown noted Petitioner's diagnosis as including but not limited to, PTSD, WTC. Site Exposure, WTC: Traumatic Grief, and Bereavement. At that time Petitioner began a course of weekly therapy sessions with Mr. Brown<sup>5</sup>. Petitioner consistently reported having issues at the firehouse and expressed feelings of insecurity about his leadership skills. All throughout 2011 Petitioner reported Worsening symptoms of PTSD, anxiety and depression and poor interpersonal relationships at the firehouse. On December 6, 2011 Petitioner complained that he could not control intrusive thoughts, his mind was always racing and he had increasing thoughts of suicide using a gun. Dr. Theoharris, with Petitioner's permission, contacted his wife the very next day and advised her to lock up her guns (she is NYPD) so that Petitioner could not gain access to them. Petitioner's increasing intrusive thoughts of 9/11 prevented him from sleeping and on February 2, 2012 Petitioner was put on light duty. According to Petitioner he was involved in an incident with his Division Commander on February 15, 2012 and was concerned because by his own admission he had acted out verbally. Immediately thereafter Petitioner reported increasing suicidal thoughts, worsening depression and insomnia. Approximately two (2) Weeks after this incident Petitioner received a "bad evaluation" with two unsatisfactory marks and was moved to the anti-terrorist unit on or about February 29, 2012. On March 20, 2012 CSU received a call stating that Petitioner appeared to have had an emotional breakdown and there was an allegation that he threatened a superior. As a result, the FDNY removed Petitioner as Captain of his firehouse, banned him from

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the company and put him on medical leave.

Thereafter, Petitioner was evaluated by the medical committee of the FDNY Bureau of Health Services ("BHS"). In a report dated October 5, 2012 BHS found that Petitioner was permanently unfit for firefighting duties as a result of severe PTSD. BHS set forth Petitioner's symptoms as the following:

"...insomnia, nightmares, early awakening, and restless sleep...he is hypervigilant and always thinking about trauma and terrorism situations...extreme worry about his family and other people close to him...the captain has had recurrent thoughts of suicide since 9/11/01. He explains that in part it seems "normal" for him to think about suicide as his brother suicided (sic) in 1992 and sister suicided (sic) in 1997 there are times when he feels that perhaps he should take his life."<sup>6</sup>

The Fire Commissioner endorsed the BHS report and on January 9, 2013 applied for ADR benefits on his behalf. The Medical Board ("Board") of the FDNY's Pension Fund is entitled to conduct its own evaluation and make recommendations to the Board of Trustees as to whether or not the Applicant is entitled to ADR benefits. On September 26, 2014 the Board issued its recommendations to the FDNY stating that Petitioner's application for ADR benefits should be denied as they concluded that Petitioner was "not permanently disabled due to PTSD"<sup>7</sup> The Board explained in a three (3) page report that Petitioner developed an "Acute Stress Reaction" in response to his participation in the rescue, recovery and clean-up operations at the WTC site after 9/11. The Board found that although "Petitioner has had signs and symptoms of Anxiety, Depression and PTSD at varying times in his life", those issues were resolved and Petitioner only

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met the criteria for Depression at the time of the Board's review. The FDNY accepted the Board's recommendations and issued a denial of ADR benefits on October 22, 2014.

As part of the Legislature's response to the WTC tragedy, a new statute was enacted creating a presumption in favor of providing ADR benefits for the first responders involved in the rescue, recovery and clean-up of Ground Zero. Administrative Code of City of NY §13-352, 13-353. Accordingly, if a first responder meets the requirements asset forth in the statute it is presumed that certain injuries, diseases, conditions, whether physical or psychological, resulted from his/her work at Ground Zero. NY Retirement & Social Security Law §2; Matter of Quinn v. Cassano, 29 Misc3d 1203(A)(S. Ct., Kings County, 2010). Once a firefighter establishes the requisite time spent at Ground Zero, the causal relationship is presumed. Then, the burden shifts to the FDNY to prove that the qualified injury was not caused by the hazards encountered at the WTC site. Matter of Bitchatchi, supra at 276 (emphasis added); NY Retirement & Social Security Law §2(36) (a), (b) and (d); and Samadiopoulos v. NYCERS 104 AD3d 551, 552 (1st Dept., 2013). PTSD and depression are qualifying conditions pursuant to Administrative Code of the City of NY §13-352, 13-353 and if the requisite time was spent at Ground Zero the law presumes that these qualifying conditions resulted from the firefighter's work at the WTC site. Respondent argues however, that since there has been no finding that Petitioner is permanently disabled, that the WTC presumption is inapplicable herein. Jennings v. NYS Office of Mental Health, 90 NY2d 227 (1997); Matter of Borenstein, supra at 760.

The FDNY is entitled to rely on the Board's Recommendations, however, a determination that a firefighter is not disabled must be explained in a detailed, fact-based report that sets forth

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the basis for its conclusion and is supported by evidence that is substantial, credible, relevant and reasonably adequate to support a fact or conclusion. Matter of Meyer v. Board of Trustees of NY City Fire Dept, 90 NY2d 139, 152 (1997), rearg. den., 90 NY2d 936 (1997); Jennings, supra at 239; Matter of Borenstein v. NYCERS, supra at 761-762. The proceedings must disclose the reason for the denial and the determination must be set forth in such a manner as to permit adequate judicial review. Matter of Fernandez, 81 AD3d 950, 952 (2nd Dept., 2011) (citations omitted); Matter of Cocannon v. Board of Trustees of NY City Fire Dept., Article 1-B Pension Fund, 34 Misc3d 1235(A)(Kings County, 2012). The Board's determination that a firefighter is not disabled is conclusive only if it is supported by some credible evidence and is rational. Matter of Campbell v. Board of Trustees of NY City Fire Dept., Article 1-B Pension Fund, 47 AD3d 926, 927 (2nd Dept., 2008)(emphasis added), (citations omitted), lv. denied 10 NY3d 715 (2008); Matter of Kuczinski v. Board of Trustees of NY City Fire Dept., Art. 1-B Pension Fund Civil Service, 8 AD3d 283, 284 (2nd Dept., 2004).

More than 1/3 of the Board's report herein merely lists the documents reviewed. The law clearly establishes that" the Medical Board must do more than simply identify reports and tests and state its conclusion; it must address the evidence before it and explain why the evidence it discounts is not valid, and why the evidence it relies upon is more persuasive, explaining why the opinions and diagnoses that are not relied upon are incorrect." Matter of Quinn, Supra at 1203 (A), citing, Matter of Rocco 2007 Slip Op 51179 (U) (S. Ct., Kings



County). The Board's determination, if not based upon a medical certainly or supported by the medical findings, will be deemed irrational. Matter of Stock v. Board of Trustees, 38 AD3d 562, 563 [2007], citing, Matter of

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Rodriguez, supra at 501-502; Matter of Cocannon, supra at 1235; Matter of Guillo v. NYCERS, 39 Misc3d 1208 (A) (S. Ct., Kings County, 2013) citing, Matter of Quinn supra at 1203; Matter of McAdams v. Kelly, 17 Misc 3d 1112 (A) (S. Ct., NY County, 2007).

The Board herein did not refer to any of Petitioner's medical records to support its finding that no permanent disability exists. The Board does not at any point mention the fact that Petitioner has been on prescription medication to alleviate symptoms of severe PTSD, anxiety and depression on o and off since 2002 and consistently since 2010. The Board disregards the extensive records mostly from the FDNY itself, documenting that Petitioner suffers from severe PTSD. The Board states that Petitioner developed "what appeared to be an Acute Stress Reaction in response to 9/11".<sup>8</sup> However, this Court notes that the term "Acute Stress Reaction" does not appear anywhere in the voluminous record allegedly reviewed by the Board. The Board does not explain what evidence was more compelling of more credible indicating that Petitioner's severe PTSD and anxiety had been resolved.

The Board refers to Petitioner's family discord, subsequent divorce, arrest for criminal mischief and drinking issues as possible reasons for his depression. However, these facts are taken completely out of context and are over-emphasized to support the Board's finding that Petitioner is not disabled. The sequence of events as documented by the record clearly demonstrates that all aspects of Petitioner's life

began a downward spiral as his PTSD symptoms worsened. Dr. Constance Patruno, Ph.D., a licensed clinical psychologist, began seeing Petitioner in January 2013. Dr. Patruno's meticulously detailed report explains that Petitioner meets every single criteria

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necessary for a diagnosis of PTSD 309.81 Including but not limited to: recurrent and distressing dreams that cause him to thrash around in bed kicking, punching and screaming; dissociative flashback episodes; and illusions and hallucinations. Petitioner reported that sometimes he can smell the odor of decomposing flesh and when he is at the beach, the crashing of the waves sounds like towers coming down again.

"At the site, I kept seeing white visions, ghosts, zooming back and forth overhead". At the grand opening of the Tribute Center for deceased emergency Workers" I saw the ghosts again. Then the first time I went back to Ground zero for a 9/11 memorial, the ghosts were there. So I never went there again".<sup>9</sup>

The Board herein concludes that Petitioner's current symptoms are more likely related to his removal from the prestigious position as a Hazmat Captain in the FDNY than his work at Ground Zero.<sup>10</sup> Dr. Patruno Clearly documents that Petitioner's PTSD symptoms and suicidal ideation had already increased to the point where he was considered unstable prior to receiving a negative evaluation from his chief in February 2012. While the Board found that there were many mornings that depression prevented Petitioner from getting out of bed, "his sense of the future may be more optimistic especially if he completes his service with the NYC Fire Department and moves away from New York City"<sup>11</sup> The Board further found that Petitioner was not permanently disabled by depression stating, "In fact, the

completion of his career with the NYC Fire Department and a resolution of his status with the Pension Board

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may lead him towards a better and more stable emotional state."<sup>12</sup> However, the law is clear that speculation conjecture or conclusions of law are an insufficient basis for a Board's recommendation to deny ADR benefits. Matter of Meyer, supra at 145; Matter of Urena v. Kelly 2013 NY Slip Op 32282 (Sup Ct NY County, 2012), citing, Matter of Bitchatchi v. Police Dept. Pension Fund, supra at 276. The Board's failure to address the firefighters' full medical history in explaining its conclusion is an insufficient basis to deny ADR benefits. Quinn v. Cassano, 29 Misc3d 1203 (A)(S. Ct., Kings County, 2010) citing, Matter of Meyer, supra at 147; Matter of Kiess v. Kelly, 75 AD3d 416, 417 (1st Dept., 2010) Citing, Kelly v. Board of Trustees, 47 AD2d 892,893 (1st Dept., 1975).

The Board erroneously reports that Petitioner received a degree from the Naval Post Graduate College for counter-terrorism) when, in fact, he was unable to complete his thesis and the program because of increasing PTSD symptoms. Additionally, the Board erroneously stated that petitioner began counseling sessions only after the incident with the Division Commander in 2012. However, Petitioner began therapy session at CSU a full year prior to that incident. The Board also states that there were several negative job evaluations but the record reflects only one in February 2012. Moreover, the record herein specifically demonstrates that Petitioner's PTSD symptoms were worsening throughout most of 2011 and definitely prior to the negative job performance evaluation.

The Court's function in an Article 78 proceeding is limited to making a determination of whether or not the Agency's findings were arbitrary and capricious. An action taken without

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regard to the facts lacks a sound basis and is therefore deemed arbitrary as a matter of law, Matter of Cocannon, Supra at 1235(A), citing Pell v. Board of Ed 34 NY2d 222, 230-231 (1974). Matter of Weller v. Kelly, Index No. 109357/2006 (2009); Matter of Brady v. Board of Trustees NY City Police Pension Fund, 2008 NY Slip Op 32529[U] (2008). Matter of Dement v. Kelly 97 AD3d 223 (2012). The Board's findings herein are not based upon "an articulated medical opinion" constituting credible, rational evidence. In fact, the Board's recommendations ignore the "firefighter's medical records" and are therefore deemed arbitrary. Matter of Borenstein, supra at 760-761; Matter of Iguanta v. Board of Trustees of NY City Fire Dept., Art. 1-B Pension Fund, 302 AD2d 527 (2nd Dept., 2003). Accordingly, it is

ORDERED, that Petitioner's application pursuant to Art 78 is granted and the determination of the FDNY denying a line of duty accident disability pension to Petitioner, is annulled as arbitrary and capricious, and it is further,

ORDERED that Petitioner is granted ADR pension benefits retroactive to March 12, 2012 the date he was put on Medical leave by the FDNY.

This is the Decision and Order of the Court.

Dated: July 20, 2015

ENTER,

1. EXHIBIT 11 Dr. Ira D. Feirstein, M.D.
2. Respondent's Exhibit "13" to Verified Answer.
3. EXHIBIT 10, Report by Dr. Michelle Theoharris, M.D.
4. EXHIBIT 11 Dr. Ira D. Feirstein, M.D.
5. EXHIBIT 6 & 9, Reports of Raymond Brown, LMSW
6. Please see Medical Committee's report annexed as Exhibit "C" to the petition.
7. Please see Board's Recommendations dated 9/26/14 annexed to Petition as Exhibit "G" p.2.
8. Exhibit 4 annexed to Verified Answer.
9. Report by Dr. Patrino dated 4/24/13, annexed as Exhibit "6" to Respondent's Verified Answer.
10. What is now #14?
11. Please see Exhibit "G" p.3.
12. Please see Exhibit "G" p.3.

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