

At an IAS Term, Part 36 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 14th day of November, 2016.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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IN THE MATTER OF
MICHAEL ABRAMOWITZ,

Petitioner,

- against -

Index No. 9470/15

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

THE NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM,

Respondent.

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The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Amended Verified Petition, Amended Verified Petition and Supplemental Verified Petition Annexed _____	1-3
Verified Answer To Amended Petition _____	4
Reply Affidavits (Affirmations) _____	
_____ Affidavit (Affirmation) _____	
Other Papers <u>Memoranda of Law</u> _____	5-7

Upon the foregoing papers, petitioner Michael Abramowitz moves:

- 1) for a judgment, pursuant to Article 78 of the CPLR:

- A. Reviewing and annulling the action of the respondent New York City Employees' Retirement System (NYCERS) in denying petitioner an accidental disability retirement pursuant to the World Trade Center Disability Law; Retirement and Social Security Law (RSSL) § 607-b.c.1, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and
- B. Directing and ordering the respondent to retire petitioner with a disability retirement allowance under the World Trade Center Disability Law; or, in the alternative;
- C. Remanding the matter to the respondent for an appropriate review.

2. For an order, pursuant to 2307 (a) of the CPLR, directing the respondents herein to serve and file upon the date hereof:

- A. All reports, recommendations, certificates and all other documents submitted to NYCERS in connection with the petitioner's disability retirement application;
- B. Copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon the petitioner's retirement application; and
- C. Copies of any and all medical records, reports or notes relating to petitioner which are on file with NYCERS.

Background

Petitioner was appointed as an emergency medical technician (EMT) with the New York City Health and Hospitals Corporation's Emergency Medical Services (EMS) on September 26, 1983. On March 17, 1996, EMS was merged with the New York City Fire Department (FDNY), and petitioner continued to work as an EMT until his retirement in 2010. Petitioner was a member of NYCERS throughout his employment. On September 11, 2001 and for several days thereafter, petitioner served as a first responder to the World Trade Center disaster and assisted in rescue, recovery and cleanup operations. It appears that

petitioner began experiencing various health-related conditions beginning in 2003. The records submitted by petitioner indicate that in 2006 and 2007 he underwent pulmonary function tests which revealed “low vital capacity possibly due to restriction of lung volumes.” In 2008 he was diagnosed with a deviated septum and underwent various other medical testing during that year. He includes a copy of a September 22, 2008 FDNY WTC Monitoring and Treatment form which indicates that he was diagnosed with gastroesophagitis. Petitioner was examined by Dr. David Prezant, the FDNY’s chief pulmonologist at the FDNY Bureau Of Health Services (BHS), on April 9, 2010 and May 9, 2010. Dr. Prezant diagnosed petitioner as suffering from gastroesophagitis, asthma/reactive airway disease syndrome (RADS), sinusitis and psoriasis. Dr. Prezant noted that due to these conditions it was not possible for petitioner to work full duty. He was referred to have further tests performed and he underwent a CT scan of the chest and a pulmonary function test at New York University Medical Center. He was diagnosed with asthma and RADS. On April 9, 2010 petitioner filed a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-up operations certifying that he had worked at least 40 hours at the site after September 11, 2001. On May 18, 2010, the FDNY filed an agency report under the World Trade Center Disability Law related to petitioner. On June 20, 2010, Dr. Kerry Kelly, Chief Medical Officer for the FDNY BHS, deemed petitioner to be permanently unfit for EMS activities due to his psoriasis and asthma.

On September 13, 2010 petitioner filed a disability retirement application under the WTC disability provision reflected in RSSL §607 -b (c) (1) (a) which provides for tax -free, three-quarters of final pay benefits to EMTs disabled in the course of duty. His application cited asthma, chronic obstructive pulmonary disease (COPD), reactive airway dysfunction syndrome (RADS), and gastrointestinal reflux disease (GERD) as his disabling conditions. By letter dated October 29, 2010, NYCERS requested additional information from petitioner related to his medical care. The NYCERS Medical Board interviewed and examined petitioner on December 9, 2010 and reviewed his medical records. The Board concluded that it was going to defer its final recommendation pending the submission of any early treatment records related to his asthma. On March 3, 2011, petitioner was examined by the Board's doctors again and the Board reviewed all of the evidence submitted by petitioner since the case had been deferred in December 2010. The Board concluded:

The Medical Board finds that the applicant does suffer from asthma and that he would be considered a class II/IV American Thoracic Society disability. However, the Medical Board does not find the applicant's asthmatic condition to be disabling, although it is of the opinion that this condition is related to the applicant's World Trade Center exposure. The Medical Board is of the opinion that the applicant's mild restrictive pulmonary disease is secondary to his weight gain over the years. The applicant weighed 225 pounds in September 2003 and his weight had increased to 282 pounds by May 14, 2010.

NYCERS advised petitioner by letter dated March 15, 2011, that the Board had recommended denial of his disability retirement application and on May 19, 2011, the

NYCERS Board of Trustees adopted the Board's recommendation and denied petitioner's application for disability retirement.

On May 10, 2012, petitioner re-filed a WTC disability retirement application citing WTC lung, gastrointestinal and skin conditions. On June 12, 2012, the Medical Board reviewed petitioner's case. They reviewed the medical reports he submitted with his application which included a report from Dr. Charnjit Singh who stated that he had been treating petitioner since October 2004 for chronic reflux and GERD symptoms. Dr. Singh noted that petitioner had been diagnosed with emphysema and asthma and that GERD can exacerbate pulmonary issues. In addition, the Board reviewed a report from petitioner's dermatologist, Dr Lesesky, which stated that petitioner was being treated for psoriasis of the palms, soles, back, buttocks and legs and that the severe involvement of palms would prevent him from performing the duties of an EMT unless the disease was controlled. The Board also reviewed a report form Dr. Ciro Ciccarelli, who was treating petitioner for RADS, severe obstructive sleep apnea, GERD, dyspnea on exertion and noted that petitioner was unable to climb stairs.

On June 12, 2012, the Medical Board also interviewed and examined petitioner. The interview revealed that petitioner stopped working as an EMT after the FDNY doctors determined that he was disabled because of GERD, psoriasis and his breathing problems. The Board noted that petitioner was 5 feet 9 inches tall and weighed 285 pounds and that his chest showed decreased breath sounds with no wheeze or adventitious sounds. They noted

that he had psoriasis on his body especially on his arms and extremities. However, the Medical Board concluded that the documentary and clinical evidence failed to substantiate that he was disabled from performing his duties as an EMT finding that his asthmatic condition was not disabling and that his respiratory problems were primarily due to his weight. They further found that his psoriasis could have been better controlled if he used different medication. Thus, the Medical Board recommended that his application be denied. On September 13, 2012, the Board of Trustees adopted the Medical Board's recommendation and denied petitioner's second application.

On August 11, 2014, petitioner re-filed a WTC disability retirement application (the third application) citing asthma, COPD, RADS, GERD, severe obstructive sleep apnea, rhinitis, sinusitis and depression. On October 21, 2014, the Medical Board reviewed petitioner's third application and the medical reports he submitted in support thereof. The Board reviewed a physician's report of disability prepared by Dr. Ciccarelli who diagnosed petitioner with RADS, severe obstructive sleep apnea, shortness of breath, GERD, and noted the presence of a lung nodule. A report by Dr. Genovese was reviewed wherein petitioner was diagnosed with obstructive airway disease, obesity, chronic sinusitis and GERD and noted that spirometry testing showed moderate airway restrictions. The Board also reviewed and referenced an April 17, 2012 letter from Dr. Singh, which listed diagnoses of pulmonary disease, emphysema and asthma with GERD-exacerbating bronchospasm, and noted the results of a September 12, 2013 chest CAT scan which revealed stable lung nodules, a slight

scar and atelectasis (an abnormal condition characterized by the collapse of alveoli, which prevents the exchange of carbon dioxide and oxygen in part of the lungs).

The Medical Board also reviewed an April 10, 2014 otolaryngologist evaluation performed by Dr. Witsell which appears to show no signs of reflux and a report by a speech pathologist Tara Nixon, which showed a mild abnormality in petitioner's speaking voice and a mild supraglottic hyperfunction. The Board reviewed a June 20, 2014 evaluation performed by Dr. Huff, which indicated that petitioner had mild pulmonary restriction due to obesity as well as obstructive sleep apnea and recommended an updated spirometry with bronchodilator challenge. It appears that a spirometry was performed on June 18, 2014, by Dr. Scott Shoffer. His report states that petitioner had "combined obstructive and restrictive respiratory defect with significant bronchodilator response on recent spirometry consistent with RADS. This is consistent with RADS related to 9/11 related dust exposure." The Board also reviewed an August 1, 2014 spirometry report which showed mild restriction with no significant improvement with medication. The Board reviewed documentation from Dr. Ronald Halbrooks which diagnosed petitioner with gouty arthropathy, heartburn, mental depression, chronic obstructive asthma, psoriasis, and obstructive sleep apnea.

Petitioner was examined by the Medical Board on October 21, 2014. In the Board's report they note that they listened to his heart with a stethoscope and found a regular rate and rhythm and that there was no wheezing or rales. The Medical Board noted that his psoriatic rashes were healing and noted that he weighed 291 pounds. Based upon this review, the

Medical Board found that the clinical and documentary evidence failed to substantiate that petitioner was disabled from performing the duties of an EMT because of asthma, obstructive sleep apnea, rhinitis, sinusitis, depression, COPD and reactive airway syndrome (RADS) and noted that the pulmonary function studies submitted showed minimal restriction. Thus, the Medical Board recommended denial of petitioner’s application. Petitioner was notified of this by letter dated October 24, 2014. The Medical Board stated in its report that it “finds that the clinical and documentary evidence fail to substantiate that [petitioner] is disabled from performing the duties of an EMT with the FDNY because of asthma, obstructive sleep apnea, rhinitis, sinusitis, depression, COPD, and restrictive airways dysfunction syndrome.”

By letter dated December 1, 2014, petitioner’s counsel sent a letter to NYCERS requesting a copy of the Medical Board’s report and also submitted an additional report, dated November 10, 2014, from petitioner’s treating physician at Duke Medicine (which appears to show that a spirometry was performed which found moderate airway restriction). The letter also requested that the Board of Trustees either remand the case to the Medical Board based upon the new physician’s report or table the case until counsel received a copy of the Medical Board report. On December 11, 2014, the Board of Trustees laid over petitioner’s disability retirement application. By letters dated February 13, 2015 and March 10, 2015, petitioner’s counsel submitted additional physician’s reports, including an October 31, 2014 report from Duke Medicine and a February 9, 2015 report from Dr. Ciccarelli. It appears that the pulmonologists he saw at Duke, Drs. Dahhan and Govert, found that

petitioner had moderate airway obstruction with a significant bronchodilator response pointing to asthma. They suggested further tests and recommended that petitioner lose weight to help alleviate his symptoms. The February 9, 2015 report from Dr. Cicarelli indicated that he examined petitioner and found that, due to the fact that petitioner suffers from RADS, he would not be able to carry out the duties of an EMT. Specifically he noted that any exposure to fumes would exacerbate his condition and put him, and any patients he was treating, at risk. He noted that petitioner would not be able to lift patients and equipment up and down stairs due to his breathing issues. Thus, he opined that even if petitioner was: "stable in his own environment," he didn't see any way that he could carry out his job duties in the "real work environment."

On March 12, 2015, the NYCERS's Board of Trustees had a meeting and laid over petitioner's disability application. On April 9, 2015, the Board of Trustees adopted the Medical Board's recommendations and denied petitioner's application for disability retirement. Petitioner commenced the instant Article 78 proceeding challenging the April 9, 2015 Board of Trustee's determination to deny his disability retirement application.

Petitioner argues that the Medical Board's non-disability finding is conclusory and not based on the evidence. He notes that the Medical Board admits that he suffers from asthma and that it is related to his WTC exposure but finds that it is not disabling (this finding was actually made regarding his initial application for WTC disability retirement benefits). He contends that the Board (1) failed to consider the requirements of his former job as an EMT,

and (2) its determination that his asthma does not prevent him from fulfilling the requirements of an EMT is not adequately addressed or explained. He also contends that the Medical Board failed to consider his complaints of psoriasis. However, the court notes that petitioner's third application, which is the subject of this Article 78 review, never listed psoriasis as a basis for WTC disability retirement benefits.

Next, he contends that respondent failed to remit his additional and final evidence dated October 31, 2014 and February 9, 2015, to the Medical Board for review. Petitioner claims that during a March 10, 2015 telephone conversation with his counsel, respondent claimed that the Medical Board reviewed these materials on or about February 18, 2015. However, he notes that there are no Board minutes to reflect that this actually occurred. He argues that there is no legal basis for the Trustees to schedule a Medical Board review without informing the applicant.

Petitioner points out that on October 8, 2015, the City of New York entered into a stipulation with him in connection with his case before the New York State Workers' Compensation Board wherein the parties stipulated that he is classified with a permanent partial disability finding that he is 72 percent disabled. Petitioner notes that a New York City Law Department representative signed this stipulation on behalf of the City. Thus, he argues that respondent's action in denying his application, and determining that he is not disabled from performing EMT duties, is arbitrary and capricious.

Finally, petitioner argues that there is ample precedent for this court to annul the Board's disability finding and remand the application for a more appropriate review since the Board failed to consider evidence of disability. Specifically, petitioner argues that the case of *Matter of Samadjopoulos v NYCERS*, (104 AD3d 551 [2013]), a WTC disability case in which the court overruled the Medical Board and found the petitioner disabled as a matter of law, to be instructive. The *Samadjopoulos* court held (104 AD3d at 553) that "respondents' assertion that petitioner is not 'disabled' is itself irrational and arbitrary. Respondents admit that petitioner suffers from several qualifying conditions, yet state without any medical evidence to rebut the conclusion that the conditions are disabling-that no disability exists."

In opposition, respondent argues that its determination denying petitioner's application for disability retirement was supported by credible medical evidence and thus was neither arbitrary nor capricious. Respondent also points out that petitioner's application never mentioned psoriasis. Respondents contend that "[p]ursuant to normal operating procedures, the Medical Board reviewed the alleged 'new' evidence submitted by petitioner's counsel and determined that it was insufficient to warrant another formal Medical Board review." Respondents also argue that a Workers' Compensation Board finding of a work-related injury is not binding upon the NYCERS Medical Board. Additionally, respondent notes that the October 8, 2015 stipulation was entered into after the last Medical Board review and after the Board of Trustees' determination, thus the stipulation was not even part of the record before the Boards when this determination was made.

Discussion

At the outset, the court notes that a disability determination by the Workers' Compensation Board or the Social Security Administration does not control the Medical Board's disability determination (*see Vargas v New York City Employees' Retirement System*, 95 AD 3d 1345 [2012]; *Matter of Stephenson v New York City Employees' Retirement Sys.*, 35 AD 3d 484, 485 [2006]; *Matter of Knight v New York State & Local Employees' Retirement Sys.*, 266 AD 2d 774, 776 [1999]). Indeed, respondents were under no obligation even to consider such evidence (*see Matter of Knight v New York State & Local Employees' Retirement Sys.*, 266 AD 2d 774, 776 [1999]; *Matter of Achatz v New York State & Local Police & Fire Retirement Sys.*, 239 AD 2d 857, 858 [1997]). "[A]n administrative determination under one statute is not binding on another agency when the same question arises under another statute" (*Matter of Dickstein v State Tax Commn.*, 67 AD2d 1033, 1034 [1979]; *Matter of Pellittiere v New York State & Local Police & Fire Retirement System*, 121 AD3d 1143 [2014]; *Keller v Regan*, 212 AD2d 856, 858 [1995]). Importantly, the court notes that respondents correctly point out that the Workers' Compensation determination occurred after the determination by both the Medical Board and the Board of Trustees.

"Retirement and Social Security Law article 15 provides a comprehensive scheme of retirement benefits through which city employees may receive a pension upon retirement from service, after meeting specified age and length-of-service requirements" (*Roberts v Murphy*, 2 NY3d 641, 644 [2004], citing Retirement and Social Security Law §§

600--604-h). In particular, “Retirement and Social Security Law § 605 . . . governs emergency medical technicians' retirement for ordinary disabilities” otherwise known as ODR benefits (*Matter of Aitola v New York City Employees' Retirement Sys.*, 25 AD3d 604, 605 [2006]), while “Retirement and Social Security Law § 607-b . . . governs emergency medical technicians' retirement under a disability received in the line of duty,” namely ADR benefits (*id.*). With respect to ADR benefits for emergency medical technicians employed by the City of New York, Social Security Law § 607-b (a) provides, in pertinent part, that if he or she, on or after March 17, 1996:

“becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties [he or she] shall be paid a performance of duty disability retirement allowance equal to three-quarters of final average salary.”

While a claimant filing for ADR benefits usually has the burden of proving causation in an administrative proceeding (*Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268, 276 [2012]), “as part of the Legislature’s response to the World Trade Center tragedy” new statutes were enacted creating a presumption in favor of ADR benefits for various first responders, including emergency medical technicians, who performed rescue, recovery or cleanup operations at specified locations, including the World Trade Center, the Fresh Kills Landfill, and the New York City morgue (*id.*). Specifically, “[u]nder the WTC presumption, the pension fund bears the initial burden of proving that a claimant’s qualifying condition was not caused by the hazards

encountered at the WTC site" (*id.*). In this regard, Social Security Law § 607-b (c) (1) (a)

provides that:

"Notwithstanding any provisions of this chapter or of any general, special or local law, charter, administrative code or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of this chapter, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence" (emphasis added).

"To take advantage of the presumption, a claimant must have participated in operations at one of the enumerated locations for 'any period of time within the forty-eight hours after the first airplane hit the towers' or 'a total of forty hours accumulated any time between September eleventh, two thousand one and September twelfth, two thousand two" (*id.* at 276-277, quoting Retirement and Social Security Law § 2 [36] [g]).

Here it is undisputed that petitioner, an EMT, performed the requisite hours at the WTC site in order to make a claim under this presumption. Moreover, the conditions he claims to be suffering from are considered qualifying conditions. "Qualifying World Trade Center condition" is defined as, among other items, "a qualifying condition or impairment of health" (Retirement and Social Security Law § 2 [36] [a]), which, in turn, is defined as, among other items, a qualifying physical condition, or a qualifying psychological condition, or both (§ 2 [36] [b]). "Qualifying physical condition" is defined to include, among other matters, "diseases of the upper respiratory tract," "diseases of the lower respiratory tract,

including but not limited to . . . asthma [and] reactive airway dysfunction syndrome," and "diseases of the gastroesophageal tract, including . . . reflux disease" (§ 2 [36] [c]). "Qualifying psychological condition[s]" include post-traumatic stress disorder, anxiety, and/or depression (§ 2 [36] [d])" (*Matter of Samadjopoulos*, 104 AD3d at 551-552 [2013]).

"After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service'" (*Borenstein*, 88 NY2d at 760, quoting Administrative Code § 13-168 [a]). "If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was 'a natural and proximate result of an accidental injury received in such city-service'" (*id.*). The "Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence" (*id.* at 761), which in disability cases has been construed to require "some credible evidence" (*id.*). With respect to this standard, the required quantum of credible evidence has been found lacking when the denial "was premised only on a summary conclusion of no causation and lacked any factual basis" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d at 147, citing *Matter of Brady v City of New York*, 22 NY2d 601, 605-606 [1968]; *Matter of Bennett v Board of Trustees*, 20 AD2d 522, 522-523 [1963], *affd* 16 NY2d 562).

Specifically, “determinations of the Medical Board and the Board of Trustees have been remanded where the medical evidence did not sustain the determination, the record did not reveal a rational evaluation of the medical evidence, or where the basis of a determination was not adequately articulated” (*Matter of Quinn*, 29 Misc 3d 1203 [A], 2010 NY Slip Op 51678[U], * 13-14, citing *Matter of Stack v Board of Trustees*, 38 AD3d 562 [2007]; *Matter of Rodriguez*, 3 AD3d 501 [2004]; *Matter of McAdams v Kelly*, 17 Misc 3d 1112[A], 2007 NY Slip Op 51938[U] [2007]; *Matter of Weller v Kelly*, Sup Ct, NY County, index No. 109357/06, 2010 N Y Misc LEXIS 2768, 2010 NY Slip Op 31581[U] [2010]; and *Matter of Brady v Board of Trustees NY City Police Pension Fund*, Sup Ct, NY County, index No. 116273/07, 2008 N Y Misc LEXIS 9426, 2008 NY Slip Op 32529[U] [2008]; see also *Matter of Dement v Kelly*, 97 AD3d 223 [2012]).

While the Medical Board is entitled to resolve conflicts in the medical evidence and rely on its own physical examinations of the applicant (see *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Matter of Goffred v Kelly*, 13 AD3d 72 [2004]), “fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees before petitioner's claim to accident disability retirement may properly be rejected” (*Matter of Kelly v Board of Trustees of Police Pension Fund, Ari. II*, 47 AD2d 892, 893 [1975]), and that the Medical Board clearly state the reasons for its recommendations (see *Matter of Kiess v Kelly*, 75 AD3d 416 [2010]; *Matter of Sailer v McGuire*, 114 AD2d 334, 335 [1985]). Based upon the record, it

is unclear whether the Medical Board actually considered all of the medical evidence especially those reports submitted after the Medical Board rendered its October 24, 2014 report.

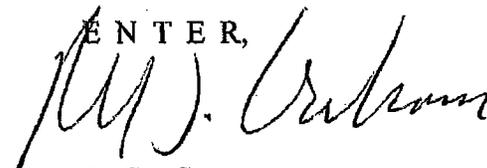
The court notes that the instant case differs from the vast majority of WTC disability pension cases which are generally challenged on the basis of the Medical Board's refusal to find a disease to be causally related to the petitioner's time spent at the WTC site. Here, the Medical Board found that petitioner suffers from asthma, a qualifying condition and found that it was related to his WTC exposure. However, the Medical Board has concluded that petitioner is not disabled from performing his EMT duties as a result of his WTC contracted disease. Significantly, the reasons for concluding that petitioner is not disabled from performing all of the duties of an EMT due to his respiratory diseases which included asthma and RADS, are not clearly stated in the Medical Board's third report (see *Matter of Guillo v New York City Employees' Retirement Sys.*, 39 Misc 3d 1208(A) [2013][court held that Medical Board failed to articulate in its determination how the petitioner could perform the physical duties of a commercial bus operator given the limitations to the range of motion of his back and neck that its own physical examination revealed]; *Matter of Louis v New York City Employees' Retirement Sys.*, 26 Misc 3d 1236[A] [2010]; *Matter of Quinn v Cassano*, 29 Misc 3d 1203(A) [2010][court held that Medical Board's determination that firefighter with mild intermittent asthma was not disabled from performing the duties of a firefighter, and failure to assess "any risk that mild intermittent asthma,[] may pose to the safety of the

petitioner and his colleagues while performing his duties as a firefighter” was not credible]; see also *Matter of Samadjopoulos v New York City Employees' Ret. Sys.*, 19 Misc 3d 1123[A] [2008]). Similarly, in the instant matter, the court finds that the Medical Board’s determination that petitioner was not disabled from performing all of his duties as an EMT is not rational. The Medical Board failed to explain how petitioner was fully capable of performing all of the duties of an EMT which could include having to lift patients on stretchers, walking up several flights of stairs and potentially being exposed to various respiratory irritants (see *Matter of Rodriguez v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501, 502 [2004]; *Matter of Louis v New York City Employees' Retirement Sys.*, 26 Misc 3d 1236(A) [2010]; *Matter of Samadjopoulos*, 19 Misc 3d 1123(A) [2008]).

As such, the Medical Board's final determination is not in "such form as to permit adequate judicial review" (*Perkins v Board of Trustees of the New York Fire Department Article 1-B Pension Fund*, 59 AD2d 696, 697 [1997]). An agency's failure "to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review" (*Montauk Improvement, Inc. v Proccacino*, 41 NY2d 913, 914 [1977]; *Matter of Samadjopoulos v New York City Employees' Retirement Sys.*, 19 Misc 3d 1123(A) [2008]). Accordingly, the court finds that the matter should be remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees (see *Samadjopoulos*, 104

AD3d at 553 [holding that where respondents admitted that a petitioner suffered from several qualifying conditions but failed to point to any medical evidence to rebut the conclusion that the conditions are disabling was arbitrary and capricious]; *Matter of Kiess v Kelly*, 75 AD3d 416, 417 [2010]; *Matter of Stack v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 AD3d 562, 563 [2007]; *Matter of Rodriguez v Board of Trustees of N.Y. Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501 [2004]). Thus, the petition is granted to the extent of annulling the determination of the Board of Trustees denying petitioner's application for WTC disability retirement benefits and remanding the matter for further consideration in light of all of the proffered medical evidence. That branch of the petition seeking copies of the minutes of each meeting of the Board of Trustees wherein petitioner's retirement application was considered, discussed, or acted upon is also granted. The court notes that the copies provided in support of the petition and in opposition merely indicate that a motion to adopt the Medical Board's recommendation to deny the application occurred but there is no record submitted of what discussion, if any, occurred related to petitioner's application. All other requested relief is denied.

This constitutes the decision and order of the court.

ENTER,

 J. S. C.
 HON. BERNARD J. GRAHAM