

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS - PART 24

-----X  
In the Matter of the Application of  
MICHAEL ABRAMOWITZ,

Petitioner,

Index # 22/2018

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

**ORDER**

-against-

THE NEW YORK CITY EMPLOYEES' RETIREMENT  
SYSTEM,

Respondent.  
-----X

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this  
Notice of Motion for Summary Judgment submitted on September 17, 2018.

Papers	Numbered
Notice of Petition and Verified Petition.....	1&2 [Exh. A-WW]
Verified Answer.....	4 [Exh. 1 - 66]
Order to Show Cause and Affidavits.....	
Answering Affidavits.....	
Replying Memorandum of Law.....	
Supplemental Affidavits.....	
Exhibits.....	
Other [Memoranda of Law ].....	3 & 5

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Upon the foregoing cited papers, careful review of the papers and opposition  
thereto, the court finds as follows:

The Petitioner, Michael Abramowitz commenced this proceeding pursuant to CPLR  
Article 78, (1) seeking a review of the determination of the Board of Trustees of the New  
York City Employees' Retirement System, hereinafter "NYCERS," which denied the  
petitioner's performance of duty disability retirement pursuant to the World Trade Center  
Disability Law and the Retirement and Social Security Laws §607-b.c.1; (2) declaring the  
denial as arbitrary and capricious, unreasonable and unlawful; directing and ordering the

respondents to retire petitioner with a performance of duty disability retirement allowance under the WTC Disability Law retroactive to his initial performance of duty disability application; (4) ordering respondents to pay for costs and reasonable attorneys fees; and (5) directing respondent pursuant to CPLR 2307(a), to serve and file all reports, recommendations, certificates, and all other documents submitted to NYCERS; copies of minutes of each meeting of the Board of Trustees wherein the Board considered, discussed, or acted upon the petitioner's retirement application; and copies of any and all medical records, reports or notes relating to petitioner on file with NYCERS. Petitioner requests the following relief: a judgment annulling the determination of the Respondent, NYCERS.

### HISTORY

Petitioner was appointed as an emergency medical technician, hereinafter "EMT" with the New York City Health and Hospitals Corporation on September 26, 1983, and continued to serve as an EMT since the merger between NYC Health and Hospitals Corporation and the New York City Fire Department, until his retirement from service in 2010. During his employment as an EMT petitioner was a member of the NYCERS Pension Fund, and as a member made any and all contributions as required by law, pursuant to Code §13-104. Petitioner was a first responder to the World Trade Center disaster on September 11, 2001, whereby he assisted in rescue, recovery and cleanup operations. The World Trade Center Report indicates that the petitioner was exposed to WTC particulate matters, smoke from fires, jet fuel and combustibles, asbestos, silicates, man-made vitreous fibers, polycyclic aromatic hydrocarbons (PAHS), PCBs, dioxins, heavy metals and human remains. Petitioner was treated for WTC related respiratory conditions by the FDNY's Bureau of Health Services (BHS) as early as 2003, and in 2007 the petitioner underwent pulmonary function test authorized by BHS, which revealed low vital capacity possibly due to restriction of lung volumes. In May 2008, petitioner underwent a nasal endoscopy, which revealed a nasal septum, and a CT scan of the sinuses revealed polypoid mucosal disease in the maxillary sinus with some variations in the ethmoid pneumatization which potentially could pre-dispose the petitioner to bouts of inflammatory sinus disease. In September 2008, petitioner underwent a CT Chest scan and was diagnosed with gastroesophagitis, and in February and April of 2009, petitioner was diagnosed with psoriasis by FDNY BHS. Thereafter, in September 2009, petitioner underwent a PFT which revealed low vital capacity possibly due to restriction of lung volumes. Petitioner continued to undergo several tests in 2010 whereby he was diagnosed with asthma and reactive airways disease syndrome [RADS], GERD, sinusitis with polyps and depression.

Mr. Abramowitz was examined by the FDNY BHS medical doctor, David Prezant, M.D., in May 2010 and the findings/report stated in sum that it was not possible for petitioner to work full duty. Dr. Prezant found open cracks due to psoriasis on the petitioner's hands and fingers which he deemed to be potential for blood exposure issues at work, and open cracks on the lower legs and lower back. On June 20, 2010, the FDNY BHS deemed petitioner to be permanently disabled as a result of psoriasis, asthma, GERD, and sinusitis with polyps. Dr. Kerry J. Kelly, the FDNY Chief Medical Officer's report stated that

given the issues (weeping sores and extreme risk for any bloodborne exposure given petitioner's work activities), not being able to wear gloves for prolonged periods of time, inasmuch as doing so could irritate the psoriasis, that "EMT Abramowitz is unfit for EMS activities due to his psoriasis." It was also noted that petitioner has increasing shortness of breath over the last several years with wheezing and bronchospasm that occurs with irritant or exertional activities which makes petitioner unfit for EMS activities. The report further stated that petitioner would be incapable of climbing anywhere from two to six flights of stairs carrying 40 lbs of equipment, and incapable of having significant irritant exposure in an EMS environment.

Thereafter, petitioner filed the first application for Performance-of-Duty Disability Retirement, pursuant to RSSL §607-b, and for Disability Retirement under the World Trade Center Disability Law, pursuant to RSSL §607-b.c.1.(a), based on the fact that he was deemed unfit and incapable of carrying out his work activities, as a result of WTC related conditions. On December 9, 2010, the Medical Board for NYCERS deferred its final recommendation pending any early treatment records petitioner could submit with regard to his asthma. On March 3, 2011 the petitioner was examined by the Medical Board and concluded that petitioner's asthmatic condition while disabling, was not related to WTC exposure. In addition, the Medical Board was of the opinion that the petitioner's mild restrictive pulmonary disease is secondary to his weight gain over the years, and that the documentary and clinical evidence fail to substantiate that Mr. Abramowitz is disabled from performing the duties of an EMT.

Petitioner continued to seek medical attention, coming under the care of Dr. Ronald Halbrooks, an internist; and Dr. Erin B. Lesesky, a dermatologist, from December 2010 through May 2011. In June 2011 he underwent more tests which was positive for asthma, and Dr. Joseph Genovese, an internist for pulmonary disease and critical care medicine found a combination of obstruction and restriction with some improvement in post-bronchodilator; ATS criteria for disability due to asthma was calculated based on the most significant study and petitioner was found to be a class 2 out of 5 based on the test data. Most importantly, Dr. Genovese's findings indicated that petitioner is disabled from performing his duties as an EMT due to his exposure to the WTC site which "was the most likely competent causal factor of the patient's disability."

In 2011, petitioner continued to undergo several tests relating to his internal and external ailments, none of which resulted in finding that petitioner was fit to return to work as an EMT, inasmuch as the petitioner would not be effective as an EMT given his job description and petitioner could endanger the lives of the people he was hired to help. The tests continued through 2012 and the findings do not change for the better, and the medical reports were submitted to NYCERS. On June 12, 2012, petitioner was examined by the Medical Board who reviewed the evidence. The Medical Board concluded that the documentary and clinical evidence failed to substantiate that Mr. Abramowitz was disabled from performing the duties of an EMT; his asthmatic condition was not disabling and, in large part his respiratory problems were due to weight gain.

In August 2012, the petitioner having applied for Social Security Disability Benefits, was awarded disability benefits. Petitioner was also awarded disability benefits by the New York State Workers' Compensation Board based on his diagnoses of RADS, asthma, GERD, sleep apnea, sinusitis and COPD, finding that petitioner was disabled as a result of these conditions since February 15, 2010, listing September 11, 2011 as the date of injury. Respondent's request for administrative review of the NYS Worker's Compensation Board's decision ruled in petitioner's favor in 2014. On October 21, 2014, petitioner was examined again by NYCERS Medical Board. The Medical Board conducted a brief interview, physical examination and reviewed petitioner's medical records and denied petitioner's application.

Petitioner's attorney continued to request review by the Medical Board of documentary and clinical evidence submitted on behalf of petitioner, but was informed by a NYCERS employee that the Medical Board review took place on February 18, 2015, and that the Board of Trustees were preparing to finalize the denial of petitioner's application. Petitioner's attorney prepared a letter on March 10, 2015, informing NYCERS as to lack of notice of a review on February 18, 2015 and requested that the case be tabled until April 9, 2015, to allow petitioner to submit updated evidence. On April 9, 2015, the Board of Trustees finalized the denial of petitioner's application for benefits.

### Discussion

RSSL § 607-b which governs performance of duty disability retirement for NYCERS members states:

a. Any member of the New York City employees' retirement system who is employed by the City of New York or by the New York City Health and Hospital Corporation in the position of emergency medical technician or advanced emergency medical technician, as those terms are defined in section three thousand one of the public health law, who, on or after March seventeenth, nineteen hundred ninety-six, becomes physically or mentally incapacitated for the performance of duties as natural and proximate result of an injury, sustained in the performance or discharge of his or her duties shall be paid a performance of duty disability retirement allowance equal to three-quarters of final average salary, subject to section 13-17 of the administrative code of the City of New York. Any member who has made application or who, after the effective date of the chapter of the laws of two thousand four which amended this subdivision, makes application for such performance of duty pension shall be entitled to invoke the medical review procedure provided for in subdivision e of section six hundred five of this article, subject to the terms and conditions set forth in such subdivision.

RSSL § 607-b.c.1 (a) which governs performance of duty disability retirement for NYCERS members who worked in the World Trade Center rescue, recovery, or clean up

operations, provides as follows:

1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter 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.

In the case at bar, the Petitioner applied under the two sections above for disability retirement which was denied by the Board of Trustees.

The Retirement and Social Security Law § 2.36 defines terms used in the World Trade Center Disability Law as follows:

36. (a) "Qualifying World Trade Center condition" shall mean a qualifying condition or impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a qualifying period, as those terms are defined below, provided the following conditions have been met: (i) such member, or eligible beneficiary in the case of the member's death, must have filed a written and sworn statement with the member's retirement system on a form provided by such system indicating the underlying dates and locations of employment not later than September eleventh, two thousand ten; and (ii) such member has either successfully passed a physical examination for entry into public service, or authorized release of all relevant medical records, if the member did not undergo a physical examination for entry into public service; and (ii) there is no evidence of the qualifying condition or impairment of health that formed the basis for the disability in such physical examination for entry into public service or in the relevant medical records, prior to September eleventh, two thousand one.

(b) "Qualifying condition or impairment of health" shall mean a qualifying physical condition, or a qualifying psychological condition, or both, except that for any member identified in paragraph (vi) of paragraph (e) of this subdivision, it shall only mean a qualifying psychological condition.

(d) "Qualifying psychological condition" shall mean one or more of the following: (i) diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions; or (ii) new onset diseases resulting from exposure as such diseases occur in the future including chronic psychological disease.

There is no dispute that petitioner meets the requirement that he must have participated in operations at the World Trade Center. Therefore, the petitioner has established the requisite time spent at the World Trade Center, and the causal relationship is presumed as set forth in the statute. The burden then shifts to the FDNY to prove that the qualified injury was not caused by the hazards encountered at the WTC site. See, Matter of Bichatchi v. Board of Trustees of New York City Police Dept., Pension Fund, et. al., 20 N.Y.3d 268, 958 N.Y.S.2d 680 [2012].

While this Court agrees with the Board of Trustees that its decision should be given deference, as well as the fact that the findings of other agencies are not binding upon the Medical Board, the opinions and findings by the Medical Board as adopted by the Board of Trustees must be supported by facts and explained in a detailed report which sets forth the basis for the Board's conclusion. The evidence must be substantial, credible, relevant and reasonably adequate to support the facts and conclusions. Matter of Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756, 650 N.Y.S.2d 614 [1996]. As stated in respondent's Memorandum of Law, on page 6, "the threshold matter is to determine whether the applicant is actually physically or mentally incapacitated for the performance of city-service." In the case at bar, the petitioner has submitted documentary evidence which appears to overwhelmingly support his claim for disability. Respondent argues that the evidence supporting the Medical Board's determination that petitioner is not disabled by his asthma, COPD, RADs, GERD, severe obstructive sleep apnea, rhinitis, sinusitis and depression satisfies the "some credible evidence" which requires extreme deference to the Medical Board in its conclusions regarding medical disability and causation. Respondent further argues that since petitioner has not met his burden of demonstrating that he is disabled, the WTC Law's "causation presumption" does not apply in this case. This Court disagrees.

This court does not substitute its judgment for that of the Medical Board. However, the court does not find the respondent's findings to be based on facts which support its finding of petitioner not being permanently disabled, so as to prevent petitioner from performing his work as an EMT. The opinions and findings of the independent doctors fail to address the totality of medical issues in that there is only discussion of the upper respiratory issues. Respondent argues that petitioner's citation to Matter of Gemignani v. Kelly, 2012 N.Y. Slip Op 32597(U), is inapposite and unavailing because in the case at bar, the Medical Board did not fail to consider all medical documentation, and the policy of the New York Police Department is not the same as NYCERS regarding multiple causes of disabling conditions. As pointed out by respondent on page 16 of its Memorandum of Law, in Gemignani, supra, the court held that the Medical Board's conclusion that petitioner's herniated disc was not disabling was arbitrary and capricious because the Medical Board refused to consider certain clarifications from one of petitioner's treating physicians. In addition, the Gemignani, supra decision held that the Medical Board must clearly indicate its cognizance of facts and provide a brief statement as to why it only considered one factor in instances where more than a single cause of a disabling condition conceivably exists. Here, there

were allegedly several causes that prevented the petitioner from performing his work as an EMT, such as to the upper respiratory issues suffered by petitioner, weight gain [obesity], walking, etc. However, no medical evidence has been set forth to rebut the conclusion that the conditions as described are disabling, and that no disability exists. Interestingly, there was a finding by respondent's own Chief Medical physician, Dr. Kerry J. Kelley, which deemed petitioner to be permanently disabled as a result of psoriasis, asthma, GERD, and sinusitis with polyps. Dr. Kerry J. Kelly, the FDNY Chief Medical Officer's report stated that given the issues, to wit, weeping sores and extreme risk for any bloodborne exposure given petitioner's work activities; not being able to wear gloves for prolonged periods of time, inasmuch as doing so could irritate the psoriasis, that "EMT Abramowitz is unfit for EMS activities due to his psoriasis." It was also noted that petitioner has increasing shortness of breath over the last several years with wheezing and bronchospasm that occurs with irritant or exertional activities which makes petitioner unfit for EMS activities. The report further stated that petitioner would be incapable of climbing anywhere from two to six flights of stairs carrying 40 lbs of equipment, and incapable of having significant irritant exposure in an EMS environment.

Absent from the Medical Board and Trustee's determination, is any discussion or explanation of the findings of Dr. Kelley, is explaining in detail why the evidence submitted and reviewed independently fail to support a finding of disability, nor do they give an explanation as to why the opinions and diagnoses that are not relied upon are incorrect. See, Matter of D'Avolio v. Nigoro, 2016 WL 331925 (2<sup>nd</sup> Dept., 2016), N.Y. Slip Op. 62495(U)(*appeal withdrawn*); Sup. Ct., Index # 17849/14 (7/20/15), citing, Matter of Quinn v. Cassano, 29 Misc.3d 1203(A)(Sup.Ct., Kings Co., 2010).

Based upon the foregoing, the court finds that the Board's finding that no disability exists is not supported by medical findings, and therefore must be deemed irrational and arbitrary. See, Matter of Stock v. Board of Trustees, 38 A.D.3d 562 [2007]; Matter of Guillo v. NYCERS, 39 Misc.3d 1208(A) (Sup. Ct. Kings Co., 2013). The Board's determination was taken without regard to the facts and lacks a sound basis, and is therefore arbitrary and capricious. In sum, the FDNY took petitioner off of his job because his WTC-related physical impairments, which included an asthma condition, were a liability to the department. Respondent, New York City Employees' Retirement System and the City of New York however are claiming denial of disability benefits due to the same conditions. It is a direct contradiction that the city is both laying off the petitioner from work due to liability reasons and then also refusing to pay him just compensation for medical costs through disability. The findings were not based upon "an articulated medical opinion" constituting credible and rational evidence.

Accordingly, it is hereby ORDERED, that petitioner's application pursuant to Article 78 is granted, and the determination of the New York City Employees' Retirement System, is annulled as arbitrary and capricious, and it is further,

ORDERED, that respondent is directed to retire petitioner with a performance of duty disability retirement allowance under the World Trade Center Disability Law retroactive to his initial performance of duty disability application.

The relief requested by the petitioner directing respondents to serve and file all reports, recommendation, certificates and all other documents submitted to NYCERS, including but not limited to the minutes of each meeting of the Board of Trustees which were considered, discussed or acted upon concerning petitioner's retirement application, as well as copies of any and all medical records, reports or notes relating to petitioner on file with NYCERS, is granted and are to provided to petitioner's attorney forthwith.

This constitutes the Order of this Court.

Dated: Brooklyn, New York  
February 14, 2019

  
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LISA S. OTTLEY, J.S.C.  
HON. LISA S. OTTLEY

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