

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 513902/2020
Motion Date: 06/16/2021
Motion Seq.: 01

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In the Matter of the Application of

ANTHONY RAMOS,

DECISION AND ORDER

Petitioner,

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

-against-

THE NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM,

Respondent.

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The following e-filed documents, listed by NYSCEF document number 1-23 and 29-58 were read on this motion seeking a judgment pursuant to Article 78 of the CPLR.

The petitioner, Anthony Ramos, a former New York City Department of Sanitation (hereinafter DSNY) worker, has commenced this proceeding pursuant to Article 78 of the CPLR seeking the following relief: 1) reviewing and annulling the action of the respondents herein in denying the petitioner a Uniformed Sanitation 3/4 Accidental Disability pension pursuant to Retirement and Social Security Law § 605-B for his disabling World Trade Center pulmonary impairment and/or his line-of-duty knee condition, and declaring said action to be arbitrary, capricious, unreasonable, and unlawful; and 2) directing and ordering the respondents to retire petitioner with a Uniformed Sanitation 3/4 Accidental Disability pension, including under the World Trade Center Disability Law, retroactive to his last day on the New York City Department of Sanitation payroll; or, in the alternative, 3) remanding the matter to the respondents for an appropriate review, as set forth in *Matter of Muniz v Nigro et al.*, Index No. 6077/2016 (Sup Ct, Kings Cty 2017). The petitioner also seeks an order, pursuant to CPLR § 2307, directing the respondents herein to serve and file upon the date hereof: 1) all reports, recommendations, certificates and all other documents submitted to the NYCERS in connection with the petitioner's disability retirement application; 2) copies of the minutes of each meeting of the Medical Board and Board of Trustees in which the Medical Board or Board of Trustees considered, discussed, or acted upon of the petitioner's retirement application; and 3) copies of any and all medical records, reports or notes relating to petitioner which are on file with the NYCERS, the DSNY Medical Division, and the DSNY Freedom of Information Law Officer.

Petitioner was appointed as a sanitation worker with DSNY on July 28, 1997 and continued to serve in this title until 2018. During his employment, the petitioner was a member of the NYCERS Pension Fund. Following the September 11, 2001 attack on the World Trade

Center (hereinafter WTC), petitioner was assigned for multiple days as a uniformed DSNY member to the recovery and cleanup operations at WTC. Petitioner states that he was exposed to things such as asbestos, silicates, man-made vitreous fibers, and human remains, and as a result has been treated by various physicians for WTC-related respiratory conditions. Furthermore, on May 1, 2017, the petitioner states that he suffered a line-of-duty accident when he stepped out of his collection truck, tripped in a pothole, and twisted his left knee. On or about January 5, 2018, petitioner submitted a Uniformed Sanitation 3/4 Accidental Disability pension application and a disability retirement application under the WTC Law and his May 1, 2017 left knee line-of-duty injury pursuant to RSSL § 605-B. Petitioner also filed an ordinary DSNY disability retirement application on May 24, 2018. The petitioner was interviewed and examined by the NYCERS Medical Board in connection with the accidental disability and ordinary disability applications, and by letter dated August 8, 2018, NYCERS notified petitioner that his ordinary disability application was granted but his accidental disability applications were denied.

On July 24, 2018, the Medical Board reviewed the medical records submitted by the petitioner in support of his application and conducted an interview and physical examination of the petitioner. Findings relating to the physical examination of the petitioner are set forth in the Medical Board's 8-page report of August 24, 2018. *See* NYSCEF Doc. No. 19. The Medical Board found that the documentary and clinical evidence substantiated that Anthony Ramos is disabled from performing DSNY duties due to degenerative arthritis of the left knee. The Medical Board also stated that it did not have documentation to substantiate a disability that precludes him from performing the duties of a DSNY worker related to WTC conditions, which it found mainly constituted complaints of shortness of breath. The Medical Board notes that though he claims his primary problem is shortness of breath, the Board found that Mr. Ramos, who weighed 425 pounds as of February 21, 2018, has only a minor impairment per spirometry reports and appears to be weight-related only, and did not find evidence of a chronic obstructive pulmonary disease (COPD). The Medical Board also determined that the MRI images of the left knee showed conditions more consistent with degenerative disease, and that the incident that allegedly caused the injury did not rise to the level of being an accident. The Medical Board determined that, upon being questioned, Mr. Ramos could not say with certainty that his injury was caused by a crack in the road, and that his description of the incident was not consistent. The Medical Board further noted that even if petitioner had stepped in a pothole, this constitutes a normal, everyday condition encountered by sanitation workers that was not obscured and could have been avoided with observation. As a result, the Medical Board recommended denial of Anthony Ramos' application for accidental disability under the provisions of RSSL § 605-B and approval of the agency's application for ordinary disability.

By letter to NYCERS dated July 23, 2019, petitioner's attorney requested a re-examination of the petitioner based on the submission of new medical documentation. Following a meeting on September 3, 2019, the Medical Board again recommended approval of the application filed on May 24, 2018 for ordinary disability under the provisions of RSSL § 605 but reiterated its denial of the application filed on January 5, 2018 for accidental disability under the provisions of § 605-B pursuant to the WTC Law. By letter dated September 20, 2019, NYCERS advised petitioner that the Medical Board reconsidered petitioner's application for accidental disability retirement. The NYCERS Board of Trustees also reconsidered the matter on December 12, 2019 and February 13, 2020, but the denial remained in place on the ground

that the incident that allegedly caused the injury to the petitioner's left knee was not an "accident." See NYSCEF Doc. Nos. 17 and 20.

Petitioner argues that NYCERS' denial of the accidental disability applications is arbitrary, capricious, unreasonable, unlawful, and contrary to the provisions of the Constitution of the State of New York, and its statutes, laws, ordinances, rules and regulations applicable to these circumstances, and Court of Appeals and Appellate Division rulings in that: 1) the action of the Medical Board failed, neglected and refused to use the proper legal test of entitlement to disability pensions applicable in the circumstances; and 2) the action of the Medical Board was contrary to the competent evidence establishing that the petitioner is entitled to both disability pensions.

NYCERS opposes the petition, contending that in order to receive accidental disability, applicants must demonstrate that they were disabled from performing their job duties due to an unforeseeable accident sustained on the job, and that the petitioner herein failed to meet this burden. NYCERS argues that the Board of Trustees correctly found that stepping out of a sanitation truck is a regular duty of the job of a sanitation worker, and a pothole in a road is not so unexpected or out of the ordinary that stepping in one would amount to an "accident." NYCERS further argues that it rationally denied the petitioner's application for disability retirement under the WTC law because the medical documentation submitted by petitioner did not establish that he was disabled from performing the duties of a sanitation worker as a result of WTC-related conditions.

Turning to the petitioner's claim to accidental disability retirement benefits under the World Trade Center law, RSSL § 605-B(c)(1) states that:

[I]f 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.

RSSL § 2(36) defines a "qualifying WTC condition" as a "condition or impairment of health resulting in disability." An applicant seeking disability retirement has the burden of establishing that the disability is causally related to a line-of-duty accident. See *Halloran v NYC Employees' Retirement System*, 172 AD3d 715 (2d Dept 2019). Moreover, a line-of-duty accident is considered the proximate cause of a disability if the accident "either precipitated the development of a latent condition or aggravated a preexisting condition... Where the medical evidence with respect to causation is equivocal, the burden has not been sustained." See *Matter of Kmiotek v Board of Trustees of N.Y. City Fire Dep., Art. 1-B Pension Fund*, 232 AD2d 640, 640-641 (2d Dept 1996); see also *Halloran* at 716. Furthermore, "the courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." See *Giuliano v New York Fire Dept. Pension Fund*, 185 AD3d 812, 814 (2d Dept 2020), quoting *Matter of Santoro v Board of Trustees of N.Y. City Fire Dept. Art. 1-B Pension Fund*, 217 AD2d 660, 660 (2d Dept 1995) (internal quotation marks omitted). Where conflicting medical evidence and medical reports are presented to the Board, it is solely within the Board's province to resolve

such conflicts. *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 8 AD3d 283 (2d Dept 2004); see also *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756 (1996); *Matter of Zamelsky v New York City Employees' Retirement Sys.*, 55 AD3d 844 (2d Dept 2008).

Although a claimant filing for accidental disability benefits usually has the burden of proving causation in administrative proceedings, statutes were “enacted creating a presumption in favor of accidental disability benefits for police officers who performed rescue, recovery or cleanup operations at specified locations, including the World Trade Center.” *Bitchatchi v Board of Trustees of New York City Police Dept. Pension Fund*, 20 NY3d 268, 276 (2012). “[T]he 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.* at 276. “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.* quoting RSSL § 2(36)(g).

Courts have remanded determinations of the Medical Board and the Board of Trustees where medical evidence did not sustain the determinations, the records did not reveal rational evaluations of the medical evidence, or where the bases of the determinations were not adequately articulated. *Quinn v Cassano*, 29 Misc3d 1203(A) (Sup Ct, Kings Cty 2010); see, e.g., *Stack v Board of Trustees of New York City Fire Dept., Article I-B Pension Fund*, 38 AD3d 562 (2d Dept 2007); *Matter Muniz v Nigro*, 6077/16, NYLJ 1202796849481 at *1 (Sup Ct, Kings Cty 2017).

In the instant matter, as it pertains to the petitioner’s alleged WTC-related conditions, the Medical Board considered the medical evidence submitted by the petitioner, which included an operative visit summary dated January 30, 2019, a document from Dr. Alexander Gecht dated January 30, 2019 reporting a cough, acute bronchitis, unspecified asthma, and a pulmonary function study taken on March 9, 2019 that the Medical Board found showed significant improvement in petitioner after he had taken Albuterol. The Medical Board also considered its examinations and interviews of the petitioner performed on July 24, 2018, and September 3, 2019. After review of the evidence before it, the Medical Board reasoned that although the petitioner suffers from obstructive sleep apnea, gastroesophageal reflux disease, and COPD, which is a qualifying condition under the WTC Law, these conditions did not prevent the petitioner from performing his duties as a sanitation worker and was not “disabled” in this regard.

The court notes that the instant case differs from other 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 time spent at the WTC site. See, e.g., *Bitchatchi* at 278; *Boyer v New York City Employees' Retirement System*, 41 Misc3d 987 (Sup Ct, Kings Cty 2013). Here, the Medical Board found that petitioner suffers from COPD, a qualifying condition, and stated that it was related to his WTC exposure. However, while the Medical Board has concluded that petitioner is not disabled from performing his duties as a result of his WTC contracted disease, the reasons for reaching this conclusion are not clearly stated in the Medical Board's report. See

Matter of Guillo v New York City Employees' Retirement Sys., 39 Misc3d 1208(A), 2013 NY Slip Op 50539(U) (Sup Ct, Kings Cty 2013) (finding that the Medical Board failed to articulate 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). As such, the Medical Board's decision is not "rational" in that it did not fully set forth its reasoning, and therefore its final determination is not in such form as to permit adequate judicial review. *Fernandez v Board of Trustees of New York Fire Dept. Pension Fund*, 81 AD3d 950 (2d Dept 2011) (the Medical Board's explanation that a firefighter's drowning did not "appear" to be a consequence of exposure to toxins in the course of his work at the World Trade Center site was insufficient in that it failed to address evidence offered by the petitioner that allegedly established that the decedent's exposure to toxins at the World Trade Center site caused his heart condition, which, in turn, caused him to drown). "Failure of the agency 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 Imp., Inc. v Proccacino*, 41 NY2d 913, 914 (1977). Accordingly, the court finds that the matter should be remanded for new medical findings and reports by the Medical Board and a new determination as it relates to the petitioner's WTC-related conditions.

However, regarding the alleged injuries to petitioner's left knee, RSSL § 605-B of the New York Retirement and Social Security Law (hereinafter RSSL), sets forth the criteria for members of NYCERS to qualify for accidental disability retirement, stating as follows:

A New York city uniformed sanitation member who... is determined by NYCERS to be physically or mentally incapacitated for the performance of duty as the natural and proximate result of an accident, not caused by his or her own willful negligence, sustained in the performance of such uniformed sanitation service while actually a member of NYCERS shall be retired for accidental disability.

The Court of Appeals has defined an accident as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." *Kelly v DiNapoli*, 30 NY3d 674, 678 (2018), quoting *Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of New York*, 57 NY2d 1010, 1012 (1982). "Stated otherwise, an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury." *Kelly* at 678 (internal quotation marks removed); see also *Kehoe v City of New York*, 81 NY2d 815 (1993) (the Board of Trustees' acceptance of the Medical Board's finding that the petitioner, a sanitation worker, was injured while performing his usual duties was not arbitrary and capricious and the accidental disability retirement was therefore properly denied).

Here, the determination of the Board of Trustees denying the petitioner's application for accidental disability retirement as a result of an injury to his left knee was based on credible evidence, as the petitioner has failed to establish that his disability was caused by an "accident." In making its determination, the Board of Trustees considered the evidence submitted by the petitioner, his answers to their questioning, and relevant case law such as *McCambridge v McGuire*, 62 NY2d 563 (1984). The Board of Trustees noted that there are no photographs of the pothole petitioner allegedly stepped in, and further reasoned that the existence of potholes in

the street is an ordinary condition that one could regularly expect to encounter in the course of performing the duties of a sanitation worker. *See* NYCERS Board of Trustees Meeting Minutes dated February 13, 2020, NYSCEF Doc. No. 20; *see also Matter of Cravotta v New York City Employees' Retirement System*, 89 AD3d 842 (2d Dept 2011) (NYCERS' decision to deny accidental disability retirement benefits to a sanitation worker who injured his knee when he allegedly slipped on the step of his truck due to a substance from a dump site that formed on his shoe was not arbitrary and capricious). As such, this Court finds that the Board of Trustees' determination with respect to the left knee injury should not be disturbed.

In light of the foregoing, the petition is granted to the extent of annulling the determination of the Medical Board 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, *inter alia*, certain records, reports, recommendations, and minutes of each Board of Trustees meeting in connection with the petitioner's disability retirement application is denied. The respondent represents that it has complied with its obligation under CPLR § 7804(e) and filed with the Court the entire administrative record considered by the agency, Medical Board and Board of Trustees in rendering its decision, which are attached to the respondent's submissions as exhibits.

The remaining contentions are without merit.

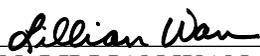
Accordingly, it is hereby

ORDERED, that the petition for relief, pursuant to CPLR Article 78, of petitioner Anthony Ramos is GRANTED to the extent that the Medical Board's determination is annulled with respect to the petitioner's WTC-related conditions, and the matter is remanded for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees as to these conditions; and it is further

ORDERED, that the petition is in all other respects denied.

This constitutes the decision and order of the Court.

Dated: August 13, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.