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3/28/19  
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

Index Number : 100468/2018

RIVERA-DIAZ, DAMARIS

vs

O'NEILL, JAMES

Sequence Number : 001

ARTICLE 78

PART II

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for part Article 78 relief.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

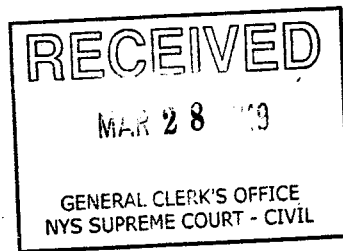
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is Article 78 part is decided in accordance with the annexed memorandum Decision Order Judgment.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



Dated: March 26, 2019

[Signature]  
**HON. JOAN A. MADDEN** J.S.C.  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

-----X  
In the Matter of the Application

DAMARIS RIVERA-DIAZ,

Petitioner,  
-against-

100468/18  
INDEX NO. 100552/18

JAMES O'NEILL, as the Police Commissioner of  
the City of New York, and as Chairman of the  
Board of Trustees of the Police Pension Fund,  
Article II and THE BOARD OF TRUSTEES  
of the City of New York Police Department,

Respondents.

-----X  
JOAN A. MADDEN, J.:

This is an Article 78 proceeding brought by petitioner Damaris Rivera-Diaz ("Ms Rivera-Diaz" or "petitioner"), a former New York City Police officer, seeking to annul the final determination of respondent Board of Trustees of the New York City Police Pension Fund ("Board of Trustees) to deny her request for accident disability retirement ("ADR") benefits under § 13-252.1(a) of the Administrative Code applicable to conditions related to work at the World Trade Center (WTC) site. Respondents oppose the petition.

Background

Petitioner, who was appointed to the uniformed force of the NYPD on August 30, 1993, retired on March 31, 2009. On October 21, 1996, petitioner sustained injuries to her neck and right leg when she was involved in a motor vehicle accident while in the line of duty ("1996 LOD Incident"). On September 11, 2001, and for multiple days thereafter, petitioner was a first responder at the WTC disaster.

As a result of the 1996 LOD incident, petitioner filed multiple applications for ADR benefits. The applications were filed on August 13, 2002, November 2, 2005, and in March 24,

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2009 (“the 2009 ADR application”), and alleged symptoms of neck and back pain as well as radicular pain, rheumatoid arthritis and carpal tunnel syndrome. The Police Commission also submitted applications of Ordinary Disability Retirement (“ODR”) on behalf of petitioner in connection with the 1996 LOD incident, including in 2009 (“the 2009 ODR application”). Petitioner appeared before the Medical Board of the Police Pension Fund (“Medical Board”) seven times in connection with these applications. On August 5, 2009, the Medical Board recommended approval of the 2009 ODR application and recommended disapproval of the 2009 ADR application, finding that petitioner’s disability was not caused by the 1996 LOD Incident and that she was disabled from “Status Post Anterior Cervical Fusion Decompression Fusion C4-5 with Pseudoarthritis.” On March 23, 2012, the Board of Trustees denied the 2009 ADR application and determined that petitioner’s status would remain ODR.

On February 2, 2016, petitioner filed for ADR under the WTC Disability Law, Administrative Code § 13-252.1. Her application states “[o]n September 11, 2001, I was assigned to the License Division at One Police Plaza. As a result of my exposure to airborne contaminants from the WTC disaster, I suffer from rheumatoid arthritis and fibromyalgia.”

The fibromyalgia diagnosis was first raised in a report dated September 9, 2004, by Miodrag Velickovic, M.D., a board certified neurologist who examined petitioner, and indicated that petitioner complained of pain in her neck, back, and tingling and numbing sensations in both hands and feet [and of] ...constant headaches.” Dr. Velickovic wrote that “[m]y impression is that [petitioner] suffers from muscle pain, possibly caused by fibromyalgia, restless leg syndrome, polyneuropathy and migraines.” She recommended a “[r]heumatogical consult ...for further evaluation for possible fibromyalgia,” and referred petitioner to Dr. [Artur] Rand for such consult.

Dr. Rand diagnosed petitioner with rheumatoid arthritis on June 12, 2007, and

fibromyalgia on January 29, 2008. In 2013, petitioner came under the care of Marcie Wolinsky-Friedland, M.D., who is Board-certified in rheumatology and internal medicine, and diagnosed petitioner with, *inter alia*, fibromyalgia, rheumatoid arthritis, and carpal tunnel syndrome in 2015.

On October 13, 2016, petitioner was examined by Dr. Wolinsky-Friedland, who issued a report stating that:

Ms. Rivera Diaz was an active member of the NYCPD at the time of the terrorist attack on 9/11 at ground zero. She was a first responder. Subsequent to her exposures, she developed respiratory disease requiring a variety of inhalers and courses of oral steroids to control. She also developed symmetric pain and swelling in her upper and lower extremities and neck and back pain. She ultimately was diagnosed with Seronegative Rheumatoid Arthritis and Fibromyalgia. She has failed multiple DMARDS including Plaquenil, Arava, Methotrexate and Remicade. Her FM (i.e. fibromyalgia) has slightly responded to Lyrica and Gabapentin. We continue to explore alternative biologic and pain management therapies and approaches. She is definitely disabled related to the FB and the Seronegative RA due to 9/11 exposures. There are several studies confirming this association.

On October 19, 2016, the Medical Board in connection with its consideration of petitioner's WTC Application, conducted an interview and physical examination of Ms. Rivera-Diaz. The Medical Board recommended based on its review of "the history, the medical records, medical evidence submitted, the clinical findings, the symptomology and today's examination that... [petitioner] is not permanently disabled from performing the full duties of a New York City Police Officer due to the diagnosis of fibromyalgia and rheumatoid arthritis." It noted that Ms. Rivera-Diaz is "pending further treatment with biologics with regards to rheumatoid arthritis. The Medical Board does not find significant erosive arthritis in the x-rays of her joints or on her examination today."

In making this recommendation, the Medical Board noted that petitioner, who retired in 2009, had been diagnosed with rheumatoid arthritis in 2007 and with fibromyalgia in 2004. It

also noted that in a report from Dr. Rand dated January 15, 2007, Dr. Rand stated that petitioner's "complaints of pain and swelling in her hands, wrists, feet, ankles and knees [are] of 10 years in duration," which is before September 2011. The Medical Board stated that while petitioner complained of swelling and pain in the joints of her hands, ankles, knees, wrists and elbows, a physical examination of petitioner revealed that the joints of petitioner's hands, wrists, elbows, and ankles showed no edema, erythema, or swelling, and observed that there was no increased warmth in petitioner's hands. It also stated that while there was tenderness on palpitation of petitioner's right elbow, there was no ulnar deviation<sup>1</sup> and that the range of motion of both elbows, wrists and fingers was within normal limits. The Medical Board noted that petitioner reported that she weighed 231 pounds as compared to 207 pounds when she retired in 2009, had symptoms of irritable bowel syndrome and when asked how her fibromyalgia was now compared to when she was working as a police officer, petitioner reported that she had more problems with her irritable bowel syndrome.

At its March 8, 2017 meeting, the Board of Trustees considered the WTC Application and remanded the application to the Medical Board.

On August 16, 2017, the Medical Board again considered the WTC Application, and reviewed petitioner's medical records and conducted an interview and physical examination of petitioner. In its report dated August 16, 2017, the Medical Board again found that petitioner was not permanently disabled from performing the full duties of an NYPD officer due to the diagnosis of rheumatoid arthritis and fibromyalgia stating that petitioner's "x-rays on file do not show significant erosive arthritis and our examination today did not indicate that she is disabled due to the diagnosis of fibromyalgia and rheumatoid arthritis." The Medical Board also

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<sup>1</sup>Respondents, citing MOSBY's Dictionary of Medicine, Nursing & Health Professionals (9<sup>th</sup> ed 2013), note that ulnar deviation is "a change in the metacarpophalangeal joints because of rheumatoid arthritis an chronic synovitis."

referenced new evidence in the form of a Progress Note from Dr. Wolinsky-Friedland dated March 2, 2017, which cited Ms. Rivera-Diaz's complaints of pain in the back of her knees and frequent headaches, and under assessments stated, *inter alia*, Rheumatoid arthritis, degeneration of cervical intervertebral disc, overweight. However, not addressed by the Medical Board is the statement in the Progress Note that Dr. Wolinsky-Friedland "agree[s] with disability request." The Medical Board noted that Dr. Wolinsky-Friedland prescribed Xeljanz XR but that petitioner stated she had not taken it because of insurance issues.

During her interview by the Medical Board, Ms. Rivera-Diaz reported that her chest felt swollen, she had chest pain and pain her neck elbows and wrists and that she gained 100 pounds since her 9/11 World Trade Center exposure and now weighs 240 pounds. She also reported being bothered by severe irritable bowel syndrome complicated by post gallbladder surgery and had daily problems with diarrhea limiting her activity. As for its physical examination of petitioner, the Medical Board stated that petitioner "was obviously overweight but her hands did not appear to be deformed and inspections of her hands, wrists, elbows and ankles showed no edema, erythema or swelling. There was tenderness over the right elbow and the examination was similar to last year."

On December 13, 2017, the Board of Trustees considered that WTC Application and adopted the Medical Board's recommendation and passed a resolution to disapprove the WTC Application ("the Final Determination").

On April 5, 2018, petitioner filed this proceeding challenging the Final Determination denying petitioner her reclassification to ADR under WTC disability law.

### Discussion

In an Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious. See Matter

of Borenstein v. New York City Employees' Retirement System, 88 NY2d 756, 760 (1996).

Ordinarily, the Medical Board's disability determination will not be disturbed if it is supported by substantial evidence which, in the context of disability cases, has been construed "to require some credible evidence." Id at 760. Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered... [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion." Matter of Meyer v. Board of Trustees of the New York City Fire Department, 90 NY2d 139, 146-147 (1997). Where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve any conflicts. Matter of Borenstein, 88 NY2d at 760. However, recommendations of the Medical Board, as accepted by Board of Trustees, have been annulled and the matter remanded for further review where the medical issues presented by the petitioner were not adequately addressed or when the medical evidence did not sustain the recommendation. See In the Matter of Kiess v. Kelly, 75 AD3d 416 (1<sup>st</sup> Dept 2010)

"Applying for ADR involves a two step process. Initially, the pension fund's Medical Board conducts a physical examination, interviews the applicant, and reviews the submitted evidence, before submitting a recommendation to the Board of Trustees. In the second step, the Board of Trustees votes to either grant or deny ADR benefits." Stavropoulos v. Bratton, 148 AD3d 449, 450 (1<sup>st</sup> Dept 2017). While an applicant for ADR normally has the burden to show an injury suffered in the line of duty caused a disabling condition, "a police officer who worked the requisite hours at the WTC site, and is diagnosed with one of several statutorily enumerated conditions, is entitled to a statutory presumption [under § 13-252.1(a) of the Administrative Code] that contaminants at the WTC site caused the condition." Id

Section 13-252.1(a) provides, in relevant part that:

[I]f any condition or impairment of health [of a service member] is caused by a qualifying World Trade Center condition as defined in [Retirement

and Social Security Law § 2], 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.”

Retirement and Social Security Law § 2(36)(a) defines a “qualifying World Trade Center condition” as “a qualifying condition or impairment of health resulting in disability to a [service] member who participated in World Trade Center rescue, recovery or cleanup operations for a qualifying period.<sup>2</sup>” Retirement and Social Security Law § 2(36)(c) provides that the physical conditions within this category include, in pertinent part:

...“(v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease.”

Of relevance here, in Sheldon v. Kelly, 126 AD3d 138 (1<sup>st</sup> Dept), lv denied 25 NY3d 908 (2015), the First Department held that fibromyalgia falls within the broad parameters of a “musculoskeletal disease” and thus qualifies as a “new onset disease.”

In support of her petition, petitioner asserts that the medical evidence shows that she did not have fibromyalgia prior to her work at the WTC. Specifically, she points to medical records, including a report from Miodrag Velickovic, M.D., a Board certified neurologist, on September 9, 2004, that petitioner “suffers from muscle pain, possibly caused by fibromyalgia.” She also relies on the medical reports/records of Dr. Wolinsky-Friedland that subsequent to her exposure at the WTC site, she

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<sup>2</sup>To qualify for 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” (Retirement and Social Security Law § 2[36][g][I], [ii] ). Respondents assert that they have not “initiated the verification process to determine whether petitioner has worked the number of requisite hours to qualify for the presumption.” See Respondents’ Memorandum of Law at 30.



developed fibromyalgia and Seronegative Rheumatoid Arthritis, and that she is disabled as result. Accordingly, petitioner asserts that because her fibromyalgia is a qualifying WTC condition, she is entitled to a presumption that the condition was incurred in the performance and discharge of duty for the purposes of determining entitlement to ADR benefits. Furthermore, petitioner argues that under these circumstances, the court is not bound by the Medical Board's disability determination, citing Matter of Samadjopoulos v. NYCRES, 104 AD3d 551 (1<sup>st</sup> Dept 2013)(annulling the determination of the Board of Trustees that petitioner was not disabled and therefore was not entitled to WTC disability benefits where four doctors found that petitioner suffered from reactive airway disease and/or asthma, reflux, as well as post-traumatic stress disorder). At the very least, petitioner argues that the matter should be remanded to the Medical Board as the evidence does not sustain respondents' determination.

In opposition, respondents argue that since petitioner has not shown that her condition "resulted in a disability" due to fibromyalgia or rheumatoid arthritis, she has failed to demonstrate that she suffers from a "qualifying WTC condition" pursuant to RSSL § 2(36). Accordingly, respondents contend that as petitioner did not meet the threshold finding of disability based on fibromyalgia or rheumatoid arthritis, the issue of causation and entitlement to WTC Law presumption was not reached by the Medical Board. In this connection, respondents argue that the question of whether an applicant has the injury claimed and whether the injury incapacitates the applicant from performance of duty is solely for the Medical Board, a panel of experts consisting of three impartial physicians.

Moreover, respondents assert that judicial review in disability retirement cases is very narrow, and a determination that a police officer is not disabled must be sustained as long as it is based on "some credible evidence," citing Matter of Borenstein, 88 NY2d at 760-761. Respondents also argue that when Medical Board issues a report to the Board of Trustees "detail[ing] what medical proof ha[s] been considered, specified the nature of respondent's complaints and outline[s] the results of its physical examinations of respondent, concluding that respondent's physical condition was not disabling for

duty,” the court may not substitute its judgment for that of the Board. Id. at 761.

In this case, respondents argue that the credible evidence supports the Medical Board’s finding that petitioner is not disabled as a result of fibromyalgia or rheumatoid arthritis, since “in making its recommendation, the Board, on two separate occasions, reviewed all the evidence that petitioner submitted in support of the WTC application...[and] conducted physical examinations and interviews of petitioner.” Respondents further argue that “the physical, documentary and testimonial evidence supporting the Medical Board’s determination on the threshold issue of disability clearly exceeds the ‘some credible evidence’ standard.” Moreover, respondents assert that petitioner “overstates the holding in Samadjopoulos as permitting the Court to overrule the Medical Board, per se.” Instead respondents assert that holding in Samadjopoulos was based on the court’s finding that “the record contained ‘no affirmative credible evidence supporting the determination that petitioner’s qualifying condition were not incurred in the line of duty.’” citing Matter of Samadjopoulos 104 AD3d at 554.

In reply, petitioner reject respondents’ interpretation of the holding in Samadjopoulos and argue that as petitioner has qualifying condition under the WTC Law, she is entitled to enhanced WTC benefits despite the Medical Board’s finding that she is not disabled.

In Matter of Samadjopoulos, the issue before the court was whether a carpenter, who was previously found to be disabled due to a shoulder injury, was entitled to enhanced benefits under the WTC Law based on four enumerated WTC conditions. The First Department reversed the trial court decision denying the petition, finding that respondents failed to rebut the presumption that these conditions were caused by petitioner’s work at the WTC site. Of relevance here, with respect to respondents’ position that petitioner did not suffer from a disabling condition, the First Department wrote:

Respondents are reduced to arguing that the WTC presumption does not apply because petitioner’s four enumerated WTC conditions are not “disabling.” We reject this cynical attempt to circumvent the clear intent of the statute. Petitioner is entitled to have his previously established

disability reclassified to include his WTC-related conditions. In any event, 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.

Id. at 553.

As in Matter of Samadjopoulos, respondents here assert that petitioner, who previously had disabling condition, is not entitled to reclassification of the disability as WTC related, since petitioner is not disabled as a result of the asserted WTC qualifying conditions, which in this case are rheumatoid arthritis and fibromyalgia. Here, the Medical Board's recommendation is flawed as it fails to consider and analyze petitioner's physical condition and disability in light of petitioner's medical records detailing her history of rheumatoid arthritis and fibromyalgia. For the reasons discussed below, the petition is granted to the extent of remanding this matter for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees with respect to its finding that petitioner is not disabled due to rheumatoid arthritis and fibromyalgia. In reaching this conclusion, the court notes that although "the Medical Board is entitled to resolve conflicts in the medical evidence and rely on its own physical examinations of the applicant ...fairness demands that all available relevant medical evidence be considered by the medical board and the board of trustees ... [and] the Medical Board [must] clearly state the reasons for its recommendations." Matter of Kiess, 75 AD3d at 417.

In this case, while the Medical Board relies on its interviews and physical examinations of petitioner to support its finding that petitioner is not disabled as a result of rheumatoid arthritis or fibromyalgia, it fails to connect the information obtained from these examinations and interviews to petitioner's complaints and symptoms, or to consider Dr. Rand's and Dr. Wolinsky-Friedland's medical records. Moreover, the Medical Board fails to offer any explanation as to

how the cited medical records on which it relies, including x-rays and 10-year old blood tests,<sup>3</sup> support its conclusion. See e.g., Agnelli v. Kelly, 96 AD3d 471 (1<sup>st</sup> Dept 2012)(remanding matter to Medical Board when it did not adequately explain its finding that petitioner’s line of duty neck and back injuries were not the cause of his disabling vertigo).

Significantly, the Medical Board fails to provide a medical basis for its disagreement with Dr. Wolinsky-Friedland’s opinion that petitioner is disabled as a result of rheumatoid arthritis or fibromyalgia as the result of her 9/11 service. See e.g., O’Brien v. Kelly, 126 AD3d 437, 438 (1<sup>st</sup> Dept 2015)(reversing trial court’s dismissal of petition and remanding matter to Medical Board where it failed “to discuss why it rejected the conclusion of petitioner’s otolaryngologist—the only medical doctor who actually examined petitioner in connection with his application for ADR—stating that the April 2009 incident did, in fact, exacerbate petitioner’s tinnitus and hearing loss”).<sup>4</sup>

Furthermore, to the extent that the Medical Board’s recommendation is based on its finding that petitioner’s disability is related to her pre-9/11 conditions, including cervical fusion, and/or her weight gain, such finding does not preclude a conclusion that fibromyalgia and/or rheumatoid arthritis are disabling conditions related to her 9/11 service. See Dement v. Kelly, 97 AD3d 223, 224 (1<sup>st</sup> Dept 2012)(rejecting the respondents’ argument that petitioner was not entitled to WTC enhanced benefits as his weight gain was the cause of his sleep apnea and such sleep apnea pre-existed his 9/11 exposure, finding that petitioner was entitled to an enhanced WTC pension even if the exposure “precipitated the development of a latent condition or

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<sup>3</sup>The blood tests relied on by respondents are from January 2007.

<sup>4</sup>While in its second review of petitioner’s application the Medical Board cites Dr. Wolinsky-Friedland’s progress note, it does not explain the significance of the note or why it rejects the statement in the note that petitioner is disabled.

aggravated a preexisting condition resulting in disability”).<sup>5</sup>

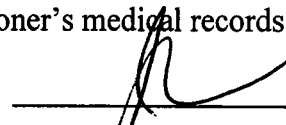
Finally, the Medical Board’s reference to various medications that might improve petitioner’s condition, is insufficient to show that petitioner is not disabled as a result of her fibromyalgia and/or rheumatoid arthritis, particularly in light of medical evidence that her treatment with various medications since her diagnosis with these conditions more than ten years ago has not significantly reduced her symptoms.<sup>6</sup>

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent of remanding this matter to respondents for new medical findings and reports by the Medical Board and a new determination by the Board of Trustees which findings and reports shall include, *inter alia*, an analysis of the history, diagnoses, and conclusions in petitioner’s medical records.

DATED: March 26 2019

  
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J.S.C.

**HON. JOAN A. MADDEN**  
**J.S.C**

**UNFILED JUDGMENT**

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<sup>5</sup>The two trial court decisions cited by respondents (Troise v. Bratton, 2016 NY Misc. Lexis 4847 [Sup Ct NY Co]; Brown v. Board of Trustees of the New York City Police Pension Fund, 2011 WL 1821681 [Sup Ct NY Co]) do not provide a basis for denying the instant petition as the holdings in those cases were based on the specific facts and circumstances at issue.

<sup>6</sup>Petitioner’s request for certain documents pursuant to CPLR 2307 need not be considered as such request is moot in light of the court’s decision.