

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36645
C/hu

_____AD3d_____

Argued - October 9, 2012

PETER B. SKELOS, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2011-02028

DECISION & ORDER

In the Matter of Michael Schlesinger, appellant, v
New York City Employees' Retirement System, et al.,
respondents.

(Index No. 14369/09)

Jeffrey L. Goldberg, P.C., Lake Success, N.Y., for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Paul Rephen and Keith M. Snow of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of the Board of Trustees of the New York City Employees' Retirement System dated February 12, 2009, which denied the petitioner's application for service-related accidental disability retirement benefits, the petitioner appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Schneier, J.), dated November 23, 2010, as, upon reargument, vacated a judgment of the same court dated April 7, 2010, granting the petition and annulling the determination of the Board of Trustees of the New York City Employees' Retirement System dated February 12, 2009, and thereupon denied the petition, reinstated the determination of the Board of Trustees of the New York City Employees' Retirement System dated February 12, 2009, and dismissed the proceeding.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The issue of whether a correction officer is disabled as a result of a service-related incident is determined by the Medical Board of the New York City Employees' Retirement System (hereinafter the Medical Board) (*see Borenstein v New York City Employees' Retirement System*, 88

December 5, 2012

Page 1.

MATTER OF SCHLESINGER v NEW YORK CITY
EMPLOYEES' RETIREMENT SYSTEM

NY2d 756, 760). In a proceeding pursuant to CPLR article 78 challenging a disability determination, the court must determine whether the determination of the Medical Board is supported by “credible” evidence (*id.*; *cf. Matter of Deering v Scopetta*, 71 AD3d 1141, 1142). “Credible evidence” means “evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . and . . . it 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 N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d at 139, 147; *see Matter of Deering v Scopetta*, 71 AD3d at 1142). As long as there is “some credible evidence” supporting the Medical Board’s determination, its determination must be upheld (*Matter of Borenstein v New York City Employees’ Retirement Sys.*, 88 NY2d at 761; *Matter of Deering v Scopetta*, 71 AD3d at 1141).

The Medical Board's conclusion that the petitioner’s injury was not a service-related injury is supported by credible evidence consisting of, inter alia, a magnetic resonance imaging report and an operative report showing degenerative changes. It was solely within the province of the Medical Board to resolve any conflicts in the medical evidence and medical reports presented to it (*see Matter of Borenstein v New York City Employees’ Retirement Sys.*, 88 NY2d at 761; *Matter of Deering v Scopetta*, 71 AD3d at 1141; *Matter of Kuczinski v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 8 AD3d 283, 284). Thus, the Board of Trustees of the New York City Employees’ Retirement System (hereinafter the Board of Trustees) properly upheld the Medical Board’s recommendation, and the Supreme Court, upon reargument, properly vacated its prior judgment granting the petition and annulling the Board of Trustees’ determination, and thereupon properly denied the petition and dismissed the proceeding.

SKELOS, J.P., FLORIO, LEVENTHAL and HALL, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court