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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF BITCHATCHI,  
Respondent,

-against-

No. 219

BOARD OF TRUSTEES OF THE  
NEW YORK CITY POLICE DEPARTMENT  
PENSION FUND, ARTICLE II,  
Appellant.

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MATTER OF MALDONADO,  
Appellant,

-against-

No. 220

KELLY,  
Respondent.

-----

MATTER OF MACRI,  
Respondent,

-against-

No. 221

KELLY,  
Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
November 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

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Appearances:

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1 CHIEF JUDGE LIPPMAN: 219, 220, 221.

2 MR. REPHEN: May it please the Court, my  
3 name is Paul Rephen. I represent the Police Pension  
4 Fund in this case, Your Honor. May I reserve three  
5 minutes both as - - -

6 CHIEF JUDGE LIPPMAN: Three minutes? Yeah.

7 MR. REPHEN: - - - respondent in Maldonado  
8 and reply in Macri.

9 CHIEF JUDGE LIPPMAN: Yes, three minutes.  
10 Go ahead.

11 MR. REPHEN: Okay. It is our position that  
12 there is clearly rational, fact-based medical  
13 evidence to support the determination of the medical  
14 board in each of these cases, not conjectural, not  
15 speculative, not unbased suspicion. Where credible  
16 evidence exists to rebut the presumption, the  
17 determination whether or not to credit the medical  
18 experts is up to the trustees themselves, not - - -

19 JUDGE CIPARICK: But what - - - how do you  
20 define credible evidence?

21 MR. REPHEN: Credible evidence, as this  
22 court determined in Meyer and in Borenstein, is  
23 rational, fact-based medical evidence. In other  
24 words - - -

25 JUDGE CIPARICK: So what about the

1 literature that they refer to?

2 MR. REPHEN: The court - - - no decision  
3 has, of this court or any court, has required the  
4 medical board to turn to literature. The legislature  
5 has created a medical board of three doctors.

6 JUDGE SMITH: You say the medical board's  
7 opinion is in itself credible evidence?

8 MR. REPHEN: The med - - - if it is  
9 rational, if it is supported in the - - -

10 JUDGE SMITH: Then why did they bother to  
11 pass the bill shifting the burden, if - - -

12 MR. REPHEN: Well, it creates a presumption  
13 - - -

14 JUDGE SMITH: -- if your board's own  
15 opinion - - -

16 MR. REPHEN: Their opinion has to be fact-  
17 based. They have to look at medical evidence - - -

18 JUDGE SMITH: Well, okay, well, say in  
19 Macri, what are the facts such that - - -

20 MR. REPHEN: In Macri, what the medical  
21 board said, in July 2002, he was diagnosed with stage  
22 IV pulmonary lung cancer, which had spread to such an  
23 extent, that it had created a fairly large tumor in  
24 his sacrum. The medical board is saying, based on  
25 their experience - - -

1 JUDGE SMITH: It's based on literature,  
2 that's what they said.

3 MR. REPHEN: No, it's based on an initial -  
4 - - in their initial report, they said based on their  
5 experience. It was only - - -

6 JUDGE SMITH: They said no - - - so if the  
7 police board doctor or the medical board says, I've  
8 looked at this situation, and based on my experience,  
9 it doesn't look like the World Trade Center caused  
10 it, that's enough?

11 MR. REPHEN: It's enough based upon looking  
12 at the medical evidence that was before them. Based  
13 upon - - -

14 JUDGE SMITH: Yes, yes, they look at the  
15 medical evidence, and they're doctors, and they say,  
16 without explaining exactly why, they say, no, no, it  
17 didn't happen this way.

18 MR. REPHEN: They explain that. What  
19 they're explaining - - - what they were saying in  
20 this case is, simply put, lung cancer does not spread  
21 that quickly. It does not - - -

22 JUDGE SMITH: Right. I understand that  
23 they're saying that.

24 MR. REPHEN: Based upon their professional  
25 - - -

1 JUDGE SMITH: And you're saying that their  
2 word - - - their word stating that conclusion is  
3 enough?

4 MR. REPHEN: Yes, Your Honor. Yes.

5 JUDGE READ: But didn't they claim - - -

6 CHIEF JUDGE LIPPMAN: Even in the face of  
7 medical testimony saying that it's consider - - - a  
8 significantly contributing factor?

9 MR. REPHEN: There is nothing saying that  
10 is was a significantly contributing factor. The  
11 experts for Mr. Macri were not saying that it pre-  
12 existed and this aggravated it. They were saying - -  
13 -

14 JUDGE CIPARICK: But he had a chest X-ray  
15 on that same day, because he with the debris and - -  
16 -

17 MR. REPHEN: There was a chest X-ray, but  
18 that X-ray was not presented to the medical board.  
19 They never saw the films. It was on 9/11. We don't  
20 know - - -

21 JUDGE SMITH: Wait a minute. This is a  
22 case in which you have the burden of proof.

23 MR. REPHEN: Yes, but if we're going to  
24 rely on a chest X-ray, it was not before the medical  
25 board at all. I don't think that's relevant

1 evidence. It was done in the chaos of - - -

2 JUDGE SMITH: Okay, but you can't - - - but  
3 you can't win the case just by knocking down the  
4 petitioner's evidence.

5 MR. REPHEN: No, but - - - no, we're not  
6 trying to do that.

7 CHIEF JUDGE LIPPMAN: What is your  
8 evidence? What is the basis? Just that you say  
9 that's what it is?

10 MR. REPHEN: It wasn't saying that's what  
11 it is.

12 CHIEF JUDGE LIPPMAN: In your medical  
13 opinion that's what it is?

14 MR. REPHEN: It was the medical opinion of  
15 the physicians of the medical board, given the rate  
16 at which cancer spreads, that this individual could  
17 not have, based on the exposure of the - - -

18 CHIEF JUDGE LIPPMAN: Even when there's  
19 other testimony that says it's a plausible  
20 relationship, you say - - -

21 MR. REPHEN: We're saying if there is  
22 credible evidence, rational, medical fact-based  
23 evidence - - -

24 CHIEF JUDGE LIPPMAN: And define "credible  
25 evidence"?

1                   MR. REPHEN: Define cred - - - is rational,  
2 fact-based medical evidence. In other words, the  
3 board of trustees - - -

4                   JUDGE SMITH: How do we know it's fact - -  
5 - I mean, on your theory, why can't the medical board  
6 turn down every claim? Why can't they say, we have  
7 looked carefully at the medical evidence; we are very  
8 experienced - - -

9                   MR. REPHEN: Because then - - - because  
10 what the medical - - -

11                  JUDGE SMITH: Let me finish the question.  
12 Let me finish the question.

13                  We have looked carefully at the medical  
14 evidence. We are experienced doctors. In our  
15 opinion, science doesn't work that way. We reject  
16 the claim. Does that - - - is there a case in which  
17 that would not work?

18                  MR. REPHEN: Yes. Yes, if there's - - -  
19 it's simply - - - they didn't do that in this case.  
20 They looked at Mr. Macri's - - -

21                  JUDGE SMITH: Well, then take it as a  
22 hypothetical. Would it work?

23                  MR. REPHEN: It - - - you have to look at  
24 the facts of each case.

25                  JUDGE SMITH: Well, what facts in this case

1 are so different from what I just told you?

2 MR. REPHEN: They looked at Mr. Macri's  
3 medical condition, which was in July 2002, nine  
4 months after exposure to 9/11, he had stage IV - - -  
5 the final stage of cancer.

6 JUDGE SMITH: And they say you can't get  
7 through four stages in nine months, but how do I - -  
8 - how is anyone supposed to know whether there's a  
9 sound basis for that?

10 MR. REPHEN: Well, it's up to the trustees  
11 then. The individuals - - -

12 JUDGE GRAFFEO: But if they don't provide  
13 some basis to justify their medical board  
14 determination, how are the courts supposed to  
15 evaluate?

16 MR. REPHEN: Well, you know, the approach  
17 that they did - - - one of the things that they have  
18 done is almost the same as what the federal  
19 government has done on the federal 9/11 Act, which is  
20 they have established criteria for compensation under  
21 the 9/11 Act and one of the criteria are the nature  
22 of the symptoms and the temporal sequence of those  
23 symptoms.

24 JUDGE GRAFFEO: Well, they're - - -

25 JUDGE SMITH: Are those criteria on the

1 record?

2 MR. REPHEN: Yes, they are in the federal  
3 register.

4 JUDGE GRAFFEO: If the medical testimony  
5 was so clear here, then why - - - aren't all three of  
6 these cases a split in the trustees?

7 MR. REPHEN: I can't explain why the  
8 representatives of the police always - - - almost  
9 always vote in these cases - - -

10 JUDGE GRAFFEO: Well, then that means we're  
11 going to end up with a lot of these Article 78s,  
12 correct? So if there's no - - -

13 MR. REPHEN: Well, of course - - - of  
14 course, as a matter of fact - - -

15 JUDGE GRAFFEO: - - - there's no  
16 justification from the medical board, I go back to my  
17 question: how are the courts supposed to evaluate  
18 this?

19 MR. REPHEN: The courts do have a lot of  
20 these cases. And I want to point out - - -

21 JUDGE SMITH: Suppose that the cancer here  
22 had been stage II, rather than stage IV, and the  
23 medical board had said, in our opinion, stage II  
24 can't happen that fast. How would we know whether  
25 they were making sense or not?

1 MR. REPHEN: It's not - - - in all due  
2 respect, I don't think it's for the courts; it's for  
3 the trustees to make that determination.

4 CHIEF JUDGE LIPPMAN: Counselor, do you  
5 have to lay out data to support your position? Or  
6 when you refer to data, do you have to say what it  
7 is?

8 MR. REPHEN: I don't think they're required  
9 - - - I don't think they are required to - - -

10 CHIEF JUDGE LIPPMAN: And in Macri's case,  
11 what did you do?

12 MR. REPHEN: In what - - - in respect - - -

13 CHIEF JUDGE LIPPMAN: Well, what did - - -  
14 what data did you refer to?

15 MR. REPHEN: The medical board reviewed his  
16 medical record in detail.

17 JUDGE READ: Well, I thought there was  
18 reference to substantial medical literature and  
19 copious data of survival times, too, right?

20 MR. REPHEN: Yes, they didn't - - - they  
21 didn't - - - they didn't - - - it's true they didn't  
22 refer to it, but it's our position that they didn't  
23 have to. And I want to point out that Mac - - -

24 JUDGE READ: But they did.

25 MR. REPHEN: Mac - - - excuse me?

1 JUDGE READ: They did refer to that as a  
2 basis.

3 MR. REPHEN: They refer to it, but they  
4 didn't - - - it's basically - - -

5 JUDGE SMITH: Is there a reason they've  
6 never identified it?

7 MR. REPHEN: I don't know.

8 CHIEF JUDGE LIPPMAN: But if you refer to  
9 it, isn't there a requirement that - - -

10 MR. REPHEN: Yeah, I want to point - - -

11 CHIEF JUDGE LIPPMAN: - - - yeah, I mean,  
12 it's just like throwing out, saying we're right, and  
13 there's data that supports us. Isn't that all you're  
14 saying?

15 JUDGE READ: But you can't see it.

16 MR. REPHEN: But let me say also, Macri's  
17 doctors did not disagree with the doubling time at  
18 all. That was not the issue. They didn't, in their  
19 reports - - - and they had access to the reports of  
20 the medical board - - - they didn't say the medical  
21 board was wrong in terms of the doubling time.

22 JUDGE SMITH: Well, I guess what I'm saying  
23 is Macri - - - absent something from your client,  
24 Macri could win this case without producing anything  
25 except the presumption.

1 MR. REPHEN: That's correct.

2 JUDGE SMITH: And I'm still having trouble  
3 with what you have other than - - - to rebut the  
4 presumption - - - other than, I'm a doctor; I looked  
5 at it; I don't think it works.

6 MR. REPHEN: That's the responsibility of  
7 the medical board to make an informed medical  
8 decision based - - -

9 JUDGE SMITH: And they don't have to  
10 explain it - - -

11 MR. REPHEN: - - - based - - -

12 JUDGE SMITH: - - - so there's - - -

13 MR. REPHEN: - - - it could be explained.

14 JUDGE SMITH: - - - so that some neutral  
15 third party can see whether it makes sense or not?

16 MR. REPHEN: Just - - - what they said was  
17 given the advanced - - - given the advanced stage of  
18 his cancer, in July 2002, they believe to a high  
19 degree of medical certainty, it could not have been  
20 caused by 9/11.

21 JUDGE SMITH: And they couldn't - - - but  
22 what would stop them, other than their consciences,  
23 from making that statement in every case, just  
24 substituting whatever the date was?

25 MR. REPHEN: Because it wouldn't work. It

1 wouldn't work. They could not say medically - - -  
2 I'm not sure I understand what you're arguing - - -

3 JUDGE SMITH: I guess I'm - - - assume - -  
4 - be cynical for a moment. Assume you've got a  
5 doctor who would say anything. I know there are no  
6 such doctors, but assume you've got a doctor who will  
7 say anything. Why can't that doctor win every case  
8 for you - - -

9 MR. REPHEN: It would not be - - -

10 JUDGE SMITH: - - - by saying - - -

11 MR. REPHEN: - - - it would not be - - -

12 JUDGE SMITH: - - - by saying this - - -  
13 it's been my - - - in my medical opinion, to a high  
14 degree of certainty, this was not caused by the World  
15 Trade Center.

16 MR. REPHEN: It would not be a rational,  
17 fact-based medical opinion.

18 JUDGE SMITH: How are we supposed to know  
19 that?

20 MR. REPHEN: It's - - -

21 CHIEF JUDGE LIPPMAN: Particularly in the  
22 face of a presumption the other way.

23 JUDGE CIPARICK: It seems that what's  
24 happened here has totally nullified the presumption,  
25 because you're putting the burden of causation on the

1 patient as opposed to you.

2 MR. REPHEN: No, I don't think so. The  
3 burden was still with the Police Pension Fund, and  
4 the medical board examined him. They took into  
5 account his experts' responses, and what they were  
6 saying based upon that is that, in their professional  
7 experience, they do cite - - - given this copious  
8 literature - - -

9 CHIEF JUDGE LIPPMAN: So the rule is if you  
10 say that their medical evidence is not credible, that  
11 makes you credible.

12 MR. REPHEN: No, it's not their - - - it's  
13 whether or not the medical board's recommendation is  
14 credible, based upon their experience, based upon - -  
15 -

16 JUDGE SMITH: How - - - I think I've asked  
17 this - - -

18 JUDGE GRAFFEO: Then there's - - - so then  
19 there's no presumption, because anytime the medical  
20 board issues a determination, we have to accept that  
21 as sufficient evidence to eliminate the presumption.

22 MR. REPHEN: No, it's a question - - - it's  
23 a question of whether a trustee could accept that.

24 JUDGE SMITH: But how is a trustee or a  
25 judge supposed to tell whether the medical opinion is

1 credible or not credible?

2 MR. REPHEN: But in this case - - - in this  
3 case, the question was, the cancer spread - - - the  
4 cancer couldn't have spread so quickly. They're  
5 looking at the experts that - - -

6 JUDGE SMITH: But I don't have the  
7 slightest idea whether that's a hundred percent true  
8 or a hundred percent false. How - - - how in - - -  
9 what in this record, other than the fact that these  
10 people are doctors, tells me?

11 MR. REPHEN: If you look at the - - - if  
12 you look at what the petitioner - - - what the  
13 officer's experts say, and we find out in this  
14 situation they didn't agree - - - they don't disagree  
15 with the medical board on the spread - - - the  
16 doubling time - - - the rate of spread. What they  
17 say, it's an entirely different cancer. It's an  
18 especially aggressive cancer - - -

19 CHIEF JUDGE LIPPMAN: Do you think what  
20 your position does really creates a presumption the  
21 other way?

22 MR. REPHEN: No, Your Honor, we don't. We  
23 don't think this - - - what we've done here is any  
24 different then what the courts have sustained under  
25 the Heart Bill.

1                   JUDGE SMITH: In the very little time you  
2 have left, can you just give me an idea of what you  
3 think are the factual differences among the three - -  
4 - we've been talking all about Macri, but tell us  
5 about Bitchatchi and Maldonado quickly.

6                   MR. REPHEN: Well, Maldonado I'm a  
7 respondent, but - - -

8                   JUDGE SMITH: I'm sorry.

9                   MR. REPHEN: But at least in Bitchatchi - -  
10 -

11                  JUDGE SMITH: Well, I'll let you talk about  
12 it anyway.

13                  MR. REPHEN: - - - Bitchatchi had a lengthy  
14 history of colitis. Cancer, rectal cancer is clearly  
15 - - -

16                  JUDGE SMITH: I guess my real question is  
17 do you think - - - would you say that Macri and  
18 Bitchatchi are essentially identical cases, or is one  
19 stronger than the other for you?

20                  MR. REPHEN: Well, I - - - if anything,  
21 clearly Bitchatchi is a stronger case for us. The  
22 person had a risk factor for rectal cancer, and the  
23 medical board, again, said given the size of the  
24 tumor - - -

25                  JUDGE CIPARICK: Wasn't it presumed that

1 the hours of work - - -

2 JUDGE GRAFFEO: Wasn't it about twenty  
3 years, though, that he had the surgery - - -

4 MR. REPHEN: The medical - - -

5 JUDGE GRAFFEO: - - - and then didn't it -  
6 - -

7 MR. REPHEN: - - - again, the medical board  
8 - - -

9 JUDGE GRAFFEO: - - - wasn't he cancer-free  
10 for a couple decades?

11 MR. REPHEN: The irony is, in the  
12 Bitchatchi case, the medical board actually cited  
13 literature that said it can be as long as twenty-five  
14 years, and that was rejected by the court.

15 JUDGE SMITH: Well, but I guess my problem  
16 with Bitchatchi is, I understand that there's a - - -  
17 I can see that there would be credible evidence that  
18 her previous ulcerative colitis had something to do  
19 with the cancer, but as I understand her whole theory  
20 was, yeah, I had - - - I was at risk for the cancer,  
21 but the World Trade Center triggered it. What  
22 credible evidence in the record refutes that?

23 MR. REPHEN: Given what - - - again, what  
24 the medical board says, given the size of the tumor,  
25 in October 2002 - - - given the size of the tumor,

1           they again, felt that - - -

2                   JUDGE SMITH:  So this is Macri all over  
3           again.  We've looked at it and doesn't it - - - and  
4           Mother Nature doesn't work that way.

5                   MR. REPHEN:  Well, it's more than that.  
6           It's a professional thinking and process.

7                   CHIEF JUDGE LIPPMAN:  You don't think that  
8           that's conclusory on your part to just say that, you  
9           know, we don't think so?

10                  MR. REPHEN:  It's not conclusory.  I don't  
11           think they were cavalier about this.

12                  CHIEF JUDGE LIPPMAN:  Without more?  Yeah.

13                  MR. REPHEN:  I don't think they were  
14           cavalier about this.  They're saying, in their  
15           professional experience - - -

16                  JUDGE SMITH:  Doesn't it seem cavalier to  
17           you to announce that there's data and not tell anyone  
18           what it is?

19                  MR. REPHEN:  I don't think in that case  
20           that the data - - - that was the issue, because the  
21           experts who responded to the medical board never  
22           challenged that data.  They never said the doubling  
23           time was incorrect.  It is a red herring.  They said  
24           this was a different cancer.  Not that the medical  
25           board was wrong in determining what the doubling time

1 was.

2 JUDGE CIPARICK: Do you draw a distinction  
3 between competent evidence and credible evidence?

4 MR. REPHEN: I think competent and credible  
5 evidence is competent evidence to rebut the - - -

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MR. REPHEN: Thank you.

8 CHIEF JUDGE LIPPMAN: You'll have rebuttal.  
9 Counselor?

10 MR. LUKASZEWSKI: Good afternoon, Your  
11 Honors, may it please the Court, Chet Lukaszewski for  
12 petitioner/appellant Maldonado. Three minutes in  
13 reply if you will, Your Honor?

14 CHIEF JUDGE LIPPMAN: Three minutes of your  
15 eight, okay.

16 MR. LUKASZEWSKI: Yes, please.

17 CHIEF JUDGE LIPPMAN: Go ahead.

18 MR. LUKASZEWSKI: Thank you, Your Honor.  
19 Your Honors, I think you've hit the nail on the head  
20 with regard to - - - a conclusory opinion can be put  
21 forth in every single World Trade Center case, if the  
22 decisions at issue herein - - -

23 JUDGE SMITH: But your guy - - - your  
24 client actually had symptoms before September 11.  
25 Doesn't that distinguish him from the others?

1                   MR. LUKASZEWSKI: The secondary arguments,  
2 I believe, in the other cases, Your Honor, are, even  
3 if it can't be established that the cancer was  
4 nonexistent on 9/11, there's a strong possibility,  
5 supported by the medical literature in every case,  
6 even supported by the NIOSH study which has been  
7 submitted by the City in every case, that the toxins  
8 could exacerbate a pre-existing cancer.

9                   JUDGE SMITH: So, but - - -

10                  JUDGE READ: That's what - - -

11                  JUDGE CIPARICK: - - - he had this  
12 tightness in his thigh and didn't quite yet feel the  
13 lump; maybe it was growing. You say that it could  
14 have been exacerbated by his work at the World Trade  
15 Center site?

16                  MR. LUKASZEWSKI: I say it based on the  
17 report of his oncologist, who's a renowned expert,  
18 who provided medical theory - - -

19                  CHIEF JUDGE LIPPMAN: But the - - - but  
20 what did the oncologist exactly say?

21                  MR. LUKASZEWSKI: He said that the theory  
22 of angiogenesis was the scientific explanation for  
23 why the growth was so extreme, and so great, and that  
24 - - -

25                  CHIEF JUDGE LIPPMAN: Could the pre-

1 existing - - - could the pre-existing condition, the  
2 factual scenario here - - - basically rebut the  
3 presumption, the statutory presumption?

4 MR. LUKASZEWSKI: The language of the law  
5 calls for the disability, Your Honor. So if a pre-  
6 existing condition, particularly under the Tobin  
7 case, existed but was not disabling, then the basic  
8 principles established in Tobin would apply.

9 JUDGE READ: Well, that's what - - - I  
10 wondered about that. I mean, is this - - - you're  
11 really arguing a Tobin issue, aren't you? And isn't  
12 the burden - - - the presumption is gone, or - - -

13 MR. LUKASZEWSKI: I don't - - - I don't see  
14 why they wouldn't operate hand in hand, Your Honor.  
15 And in my briefs, I provided the examples of - - -

16 JUDGE READ: Yeah.

17 MR. LUKASZEWSKI: - - - you could have  
18 minor asthma, you could have minor GERD, you could  
19 have minor depression, you could take medication, you  
20 could pre-disclose, and you could not miss a single  
21 day of work your entire career.

22 JUDGE READ: Well, if it - - -

23 MR. LUKASZEWSKI: Then all of a sudden,  
24 you're a first responder; you're exposed to the  
25 toxicity, and if you're to apply later, then all of a

1 sudden you don't get the burden? Then it makes the  
2 role of the medical board even easier.

3 JUDGE READ: But what - - - but you have  
4 the burden, then, of showing that, though, don't you  
5 - - - that the exposure exacerbated it. It's not the  
6 same thing as the presumption in your favor. Or am I  
7 missing something?

8 MR. LUKASZEWSKI: Well, it's a presumption  
9 of contribution, of a causal connection that there  
10 was an exacerbation. Yes, no, I agree that I have  
11 the burden to - - -

12 JUDGE READ: Yeah.

13 MR. LUKASZEWSKI: I'm not claiming that  
14 there wasn't a pre-existing condition. My doctor - -  
15 -

16 JUDGE SMITH: But on your theory, can  
17 anyone who had cancer before September 11, and it  
18 gets worse after September 11, as cancers, I guess,  
19 have a way of doing, can he go - - - can he come in  
20 and say, by virtue of the presumption, the worsening  
21 of my condition is due to 9/11, now you disprove it?

22 MR. LUKASZEWSKI: No, Your Honor. I think  
23 the law discusses the fact with regard to medical  
24 literature. If there's medical literature that an  
25 officer had stage III or stage IV cancer prior,

1           didn't - - -

2                       JUDGE SMITH:   So, I guess you're - - - if I  
3           understand you right, you're conceding that it - - -  
4           with somebody who's already - - - who already has a  
5           condition, he can't just come in and rest on the  
6           presumption.  He has to have some other proof?

7                       MR. LUKASZEWSKI:  Absolutely, Your Honor.  
8           I think that's where the facts, especially in this  
9           case, are very relevant.  Like I said, if my client,  
10          or if any applicant, was disclosing a major form of  
11          cancer that, regardless had 9/11 happened, or not  
12          9/11 happened, it would have been deemed disabling,  
13          to come forward after that, and say, well, I'm  
14          disabled because I was exposed, that's not going to  
15          pass the rational or facts-based test.

16                      JUDGE SMITH:  So, if I'm understanding you,  
17          this is not a case about the presumption.  This is  
18          just a case about what is or isn't supported by the  
19          record.

20                      MR. LUKASZEWSKI:  It's also a case about  
21          the presumption, Your Honor, because in this case,  
22          the conclusory opinion of the medical board based on  
23          no data, based on no explanation, of why my doc - - -  
24          of my client's top oncologist, who explained that  
25          this was rapid growth - - -

1 JUDGE SMITH: Yeah, but you don't need a  
2 presumption for that - - - I mean, if their proof is  
3 as bad as you say, you win without the presumption.

4 MR. LUKASZEWSKI: And with the presumption,  
5 I'm hoping that's even more evidence of the  
6 wrongdoing in this case. And again, it boils down to  
7 - - -

8 JUDGE READ: But if you're saying - - - you  
9 can - - - I'm still - - - you can say you're relying  
10 on the presumption even though it's pre-existing.

11 MR. LUKASZEWSKI: I'm relying on the  
12 presumption, because I can't prove - - - I have no  
13 litmus test, I have no MRI, I have no X-ray that  
14 toxins fuel cancer. It's simply a medical theory  
15 that the experts who have studied this subject have  
16 formulated. It's the whole basis and in every  
17 journal article, in every case, even by the First  
18 Department - - -

19 CHIEF JUDGE LIPPMAN: How do you know  
20 whether - - - what's speculative, and what's, you  
21 know, based on medical evidence? Can medical  
22 evidence be speculative?

23 MR. LUKASZEWSKI: I think medical evidence,  
24 in a case like this with cancer, is a scientific  
25 theory that while there's no proof positive - - -

1           like angiogenesis, like having an oncologist from  
2           Mount Sinai say, I've never seen growth like this;  
3           I've never seen something go from this to this in  
4           fifty-eight days - - -

5                         JUDGE READ:   Well, so what if it had grown  
6           - - -

7                         MR. LUKASZEWSKI:   - - - and then spread  
8           from soft tissue to bone and lung.

9                         JUDGE READ:   What if it had grown more - -  
10          - what if it had been clearly pre-existing, and it  
11          had grown more slowly, then are you saying, then - -  
12          -

13                        MR. LUKASZEWSKI:   Then, again, with the  
14          language of the presumptive bill - - - competent  
15          evidence, the medical board could say, no, we have  
16          the New England Journal of Medical article that says  
17          angiogenesis causes such growth and not such growth.  
18          Or they can come and say, the cancer textbook says  
19          that the progression of ten months on a tumor is  
20          standard and was unaffected.   That's not the facts of  
21          this case.

22                        We have a small lump that went to the size  
23          of a softball and jumped from soft tissue to bone and  
24          lung, which a top oncologist - - - this isn't me - -  
25          - this is an oncologist saying, I haven't seen this.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 You'll have some rebuttal, thanks.

3 MR. LUKASZEWSKI: Thank you, Your Honors.

4 CHIEF JUDGE LIPPMAN: Counselor?

5 MR. MCGUIRE: May it please the Court, I'd  
6 like to try to offer a simple syllogism that I think  
7 might - - - on behalf of Mrs. Macri, that I think can  
8 be helpful.

9 One, I begin with the premise that the  
10 legislature must have intended the World Trade Center  
11 presumption to mean something. And that's why the  
12 City opposed it.

13 Two, the least the presumption can mean is  
14 that an ipse dixit from the City's doctors is not  
15 enough to rebut the presumption.

16 And if that's so, two corollaries  
17 necessarily follow. One, it's not enough to point to  
18 medical literature and data that won't be identified  
19 and can't be contested. And that's this case; it's  
20 Bitchatchi; it's Maldonado, and it's Matter of  
21 Dement, which I understand is a leave application  
22 currently pending before this Court.

23 JUDGE CIPARICK: So what do they need - - -

24 CHIEF JUDGE LIPPMAN: What do they need to  
25 do - - -

1 MR. MCGUIRE: All those cases - - -

2 CHIEF JUDGE LIPPMAN: What do they need to  
3 do to rebut the presumption, the City?

4 MR. MCGUIRE: I'm not a physician, Your  
5 Honor, as of course you appreciate, but they cannot  
6 rely on completely conclusory data that they don't  
7 identify.

8 JUDGE SMITH: If they attached data that  
9 met their description, would that do it?

10 MR. MCGUIRE: That would be a different - -  
11 - it's a different case if they articulated what the  
12 doubling times are, identified the literature, so  
13 they could be contested. These are, in effect,  
14 adversarial proceedings. Mrs. Macri couldn't contest  
15 unidentified - - - doubling time literature that was  
16 never identified. It wasn't even stated that it  
17 included - - -

18 JUDGE SMITH: Why do you say that - - -  
19 maybe it isn't your problem - - - why do you say - -  
20 - I think I understand why you think your description  
21 fits Macri and Bitchatchi. Why Maldonado?

22 MR. MCGUIRE: Because in Maldonado, too,  
23 there was a reference in Maldonado to the size of the  
24 growth. And it's just again, ipse dixit. It  
25 couldn't have grown, you know - - - the growth of

1           that is just inconsistent with anything - - -

2                   JUDGE SMITH:   Why?   Why isn't the pre-  
3           existence of - - - the existence of symptoms before  
4           September 11, and - - -

5                   MR. MCGUIRE:   That's a different question.  
6           To the extent that my adversary - - - my colleague  
7           here, Mr. Lukaszewski - - - I'm not sure I understood  
8           him - - - took the position that the presumption - -  
9           - the Tobin presumption - - - excuse me, that the  
10          World Trade Center presumption does not apply to  
11          Tobin causation, that's our second argument.   I  
12          respectfully disagree with him.   That is, I think,  
13          dead wrong, if that's what his position is.

14                   The presumption does apply.   There is no  
15          authority that does not apply.   Tobin is the back - -  
16          - is the fabric of the law in this state.   And this  
17          Court has recognized that causation includes  
18          aggravating a condition.

19                   JUDGE SMITH:   Okay, but isn't - - -

20                   MR. MCGUIRE:   And there is - - -

21                   JUDGE SMITH:   Doesn't there come a point -  
22          - - I mean, suppose a guy has cancer before September  
23          11, and he shows up on September 12 with some hideous  
24          stage IV cancer, can he use the presumption to say,  
25          it was September 11 that did it, or just does it come

1 a point where it's just ridiculous?

2 MR. MCGUIRE: Well, the answer is, he  
3 certainly can use the presumption, and in the case  
4 that Your Honor identified, I don't think that  
5 there's going to be too much trouble for the medical  
6 board to come forward with nonconclusory ipse dixit,  
7 that just simply says, no, trust us. That's not  
8 right. That's what - - - that's what the responders  
9 got.

10 JUDGE GRAFFEO: So, how would you - - -

11 MR. MCGUIRE: They recognize - - -

12 JUDGE GRAFFEO: How would you propose that  
13 we tell the City what it is they have to present to  
14 overcome the presumption, in whatever hypothetical  
15 case?

16 MR. MCGUIRE: I don't think that Your  
17 Honors can do more than you already have, which is  
18 laid out in Matter of Meyer, what the standard for  
19 credible evidence is. Let's just continue with the  
20 assumption, for the presence and purpose of this  
21 appeal, that credible evidence and competent evidence  
22 are the same. Your Honors have made clear what that  
23 is.

24 JUDGE GRAFFEO: So if they cite studies,  
25 that's sufficient on their side, and then - - -

1                   MR. MCGUIRE: But they can't just - - -  
2 they can't just - - -

3                   JUDGE GRAFFEO: - - - and then the  
4 applicant for the retirement benefits has to contest  
5 that sort of - - -

6                   MR. MCGUIRE: They can't just cite studies,  
7 like they did here, which they don't even identify,  
8 and refer to doubling times, and not tell you whether  
9 the doubling times, it's the average, it's the median  
10 - - -

11                  JUDGE SMITH: Okay, but if they cite  
12 studies that do in fact say what they say they say,  
13 that would be good enough?

14                  MR. MCGUIRE: It could be. It could be.  
15 Suppose, Your Honor, suppose they cited a study that  
16 showed forty percent of the cases of pulmonary  
17 cancers like this grew to 2 centimeters by 2  
18 centimeters by .9 centimeters in less than nine  
19 months. That's a hard case. I don't - - - I'm not  
20 sure if I know what the answer is to that one. But  
21 we don't know here - - -

22                  JUDGE CIPARICK: But you would identify  
23 those studies. That's something you - - -

24                  MR. MCGUIRE: Right. You can't know. You  
25 know, and it's such an irony. My adversary here, a

1 moment ago, was talking about the X-ray. And he was  
2 saying with respect to the X-ray. Well, the X-ray  
3 was never - - - it was never, you know, brought - - -  
4 it was never brought in. It was never produced. In  
5 fact, what it says in his brief, in the reply brief,  
6 is that the X-ray film was never - - - "never  
7 produced and could never be examined or verified".  
8 Now, that's our point.

9 JUDGE CIPARICK: You have the same  
10 disability - - -

11 MR. MCGUIRE: That's our point.

12 JUDGE CIPARICK: - - - because obviously  
13 you can't - - -

14 MR. MCGUIRE: Right. I mean, what's - - -

15 JUDGE CIPARICK: - - - verify.

16 MR. MCGUIRE: - - - what double standard  
17 couldn't be palpable?

18 JUDGE CIPARICK: Um-hum.

19 MR. MCGUIRE: It's okay for the City to  
20 object that the X-ray film, you know, couldn't be  
21 examined or verified, but it's okay for the City that  
22 bears the burden to rely on data that can't be  
23 examined or verified? That can't be right. That  
24 can't be what the legislature intended in enacting  
25 this statute.

1           So, but I want to continue with the Tobin  
2           analysis. That is our second argument. And I just  
3           want to say, it is the fabric of the law. There is  
4           not a shred of support in the statute for the  
5           proposition that the legislature inexplicably  
6           intended to deny 9/11 responders the same causation  
7           benefit of the Tobin rule to them. They don't get  
8           it. All the other police officers in garden variety  
9           accidents, they get the benefit, and the 9/11  
10          responders who faced tremendous medical uncertainty  
11          about what caused that - - - what's going to cause  
12          it, they don't get it. That makes no sense.

13           My adversary's sole argument is based on 2  
14          - - - Section 2(36)(a)(iii) of the statute. And all  
15          that says - - - it's part of the 2008 chapter  
16          amendments - - - it says that - - - it says - - - it  
17          arguably conditions the presumption. And I stress  
18          "arguably" because there are sophisticated issues  
19          here, but it arguably conditions the presumption on  
20          the appearance in medical records prior to September  
21          25th of evidence of the condition. That's not my  
22          case, right?

23           And that's not - - - that's not even the  
24          Maldonado case. That evidence doesn't come up until  
25          later. So, again, just quickly with - - -

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 MR. MCGUIRE: - - - one second - - - with  
3 respect to what this court has already said. This  
4 court has already said, time and again, in Matter of  
5 Meyer, credible evidence can't be conclusive. It  
6 must be evidentiary in nature. It's evidence that  
7 proceeds from a credible source. An anonymous source  
8 is a credible source? And just as importantly, in  
9 this case, the court can't have any idea whether the  
10 medical board's no causation proposition is  
11 reasonable.

12 CHIEF JUDGE LIPPMAN: Okay, counselor.

13 MR. MCGUIRE: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you, counselor.  
15 Counselor, rebuttal.

16 MR. REPHEN: So with regard to the question  
17 of pre-existing condition, the Retirement and Social  
18 Security Law created the presumption in the World  
19 Trade Center, Section 2(36), makes it clear that  
20 there was - - - if there was evidence in any pre-  
21 employment physical, or any evidence in the medical  
22 records indicating the individual had cancer before  
23 9/11, there is no presumption.

24 JUDGE SMITH: You're saying that - - -  
25 you're saying that - - - you're not saying that his

1 clients can't take advantage of Tobin, but you're  
2 saying that, as far as Tobin is concerned, they're on  
3 no better footing then if the law had never been  
4 passed?

5 MR. REPHEN: Yes, that is correct. And  
6 more importantly, in terms of Macri, his experts  
7 never claimed pre-existing condition. Again, I come  
8 back to the fact that they were saying that this was  
9 a different cancer. This is a more aggressive  
10 cancer. None of his doctors said the cancer pre-  
11 existed, and that's a critical factor, at least in  
12 terms of the Tobin analysis in the Macri case.

13 With regard - - -

14 CHIEF JUDGE LIPPMAN: Counselor, what about  
15 the issue of the data that - - - do you contest the  
16 fact that the board can't just cite data and not say  
17 what it is, and yet have credibility - - -

18 MR. REPHEN: Yes, Your Honor - - - Your  
19 Honor, there is no ca - - -

20 CHIEF JUDGE LIPPMAN: But your case is no  
21 stronger or weaker than if they had not cited data at  
22 all, because that's worthless, right?

23 MR. REPHEN: If they had not cited data at  
24 all, which is what the - - -

25 CHIEF JUDGE LIPPMAN: No, but what I'm

1 saying is, that's worthless to say there's data out  
2 there, without saying - - -

3 JUDGE CIPARICK: What it is.

4 MR. REPHEN: No, I think - - - no, the  
5 Court has never required the medical boards to cite  
6 literature - - -

7 CHIEF JUDGE LIPPMAN: I know, but that's -  
8 - - but my question is that - - - what they did there  
9 was worthless, right? Citing data but not saying  
10 what it is.

11 MR. REPHEN: No, what they were doing, they  
12 were saying in our professional experience, this  
13 cancer could not have spread so quickly.

14 CHIEF JUDGE LIPPMAN: Yeah, so, the answer  
15 is - - -

16 MR. REPHEN: By the - - - yeah, by the way  
17 - - -

18 CHIEF JUDGE LIPPMAN: So the answer is it's  
19 worthless.

20 MR. REPHEN: - - - by the way, this is  
21 supported by - - -

22 CHIEF JUDGE LIPPMAN: Yes, but that's a  
23 throwaway. It's like - - -

24 MR. REPHEN: It's not a throwaway, because  
25 - - -

1 CHIEF JUDGE LIPPMAN: No.

2 MR. REPHEN: - - - because again, because  
3 again, his experts did not challenge that. That was  
4 not an issue.

5 CHIEF JUDGE LIPPMAN: They didn't challenge  
6 what they didn't know what it was.

7 MR. REPHEN: But they didn't challenge - -  
8 - they didn't - - - they did not say that the  
9 doubling time analysis, the whole basis of what the  
10 medical board did, was wrong. They said this was a  
11 different type of cancer. It's more aggressive than  
12 the normal type. So the question of the doubling  
13 time was not even an issue for - - -

14 JUDGE SMITH: But how - - - I mean, how do  
15 you challenge data or studies you haven't seen?

16 MR. REPHEN: They weren't challenging the  
17 data; that's my point.

18 JUDGE PIGOTT: Well, you're saying it, but  
19 that's not true. I mean, you're saying the doubling  
20 time doesn't work, and they're saying it does work;  
21 you're just not using the right data. And you're  
22 saying, well, what we say is absolutely true, so you  
23 must have a different - - -

24 MR. REPHEN: Trying to say - - - what I'm  
25 saying - - - or I'm trying to say, Your Honor, is

1           that his experts didn't question the doubling time  
2           analysis of - - -

3                        JUDGE PIGOTT: Right, they didn't dispute  
4           that one and one equals two. What they're saying is  
5           that's not the issue.

6                        MR. REPHEN: Yes.

7                        JUDGE PIGOTT: One and one equals two in  
8           this case - - -

9                        MR. REPHEN: Right.

10                      JUDGE PIGOTT: - - - we've got a two plus  
11           two equals four case - - -

12                      MR. REPHEN: And our position is - - -

13                      JUDGE PIGOTT: - - - and you don't have any  
14           basis for disputing our two plus two equals four  
15           case.

16                      MR. REPHEN: Yes, and what the medical  
17           board says, yes, in our position - - - in our view,  
18           to a high degree of medical certainty, given the  
19           normal clinical course of cancer and its advanced  
20           stage in July - - -

21                      JUDGE PIGOTT: You're saying all cancers  
22           are one and one plus two, and they're saying ours is  
23           a two plus two equals four - - -

24                      MR. REPHEN: And they're saying - - - what  
25           the medical board is saying - - -

1                   JUDGE PIGOTT: - - - and you can interrupt  
2 me anytime you want.

3                   MR. REPHEN: And the medical board - - - in  
4 the end, we're saying that's for the trustees to  
5 decide which of the experts to credit.

6                   CHIEF JUDGE LIPPMAN: Okay, counselor,  
7 thanks. Counselor, rebuttal?

8                   MR. LUKASZEWSKI: Your Honor, just two  
9 quick points if you would?

10                  CHIEF JUDGE LIPPMAN: Sure.

11                  MR. LUKASZEWSKI: I hope my colleague  
12 misheard me. I hope I was clear to the court that I  
13 emphatically feel Tobin does apply in conjunction  
14 with the WTC presumption.

15                  Second, with regard to the board of  
16 trustees - - - and I will get Your Honors the cite; I  
17 don't know it off the top of my head - - - the way  
18 the board of trustees is formed, is that it's a board  
19 which consists of twelve votes, six go to the "city  
20 side", six go to the "union side". Throughout the  
21 history of these cases - - -

22                  JUDGE SMITH: So, tie votes are not unheard  
23 of?

24                  MR. LUKASZEWSKI: Tie votes, thanks to the  
25 Schoeck case - - - and again, I'll get you the cite -

1 - - go to the city side. So to say that to convince  
2 a trustee - - -

3 CHIEF JUDGE LIPPMAN: Overwhelmingly, are  
4 most of the cases six-six?

5 MR. LUKASZEWSKI: Always, ninety-nine out  
6 of a hundred. I apologize. I know of one case. So  
7 to say that - - -

8 JUDGE PIGOTT: Anybody do any self-  
9 examination of why they're sitting there, then? I  
10 mean - - -

11 MR. LUKASZEWSKI: Your Honor, from your  
12 mouth to the board. I've tried to raise that, but it  
13 seems to - - -

14 JUDGE SMITH: Let me go back to how Tobin  
15 works with the presumption. It - - - you say Tobin  
16 certainly applies. On the other hand, it can't mean  
17 that every time somebody has a condition that gets  
18 worse - - - gets worse after September 11th, it's  
19 presumed to be due to the exposure. Is that what it  
20 means?

21 MR. LUKASZEWSKI: No, Your Honor - - -  
22 again, Your Honor, I - - - that would be a case where  
23 the competent evidence has to be put forth. And I  
24 think with regard to what - - -

25 JUDGE READ: I mean, just as a matter of



1 forward with something. You - - - even in a World  
2 Trade Center case. If it's a Tobin case, you have to  
3 come forward with something that says I can - - -  
4 there's a reason to connect the worsening to the  
5 World Trade Center?

6 MR. LUKASZEWSKI: Absolutely, Your Honor,  
7 and that's why I believe, especially in - - - or for  
8 my case that I'm here to argue, he did come forth.  
9 He came forth with a top oncologist who said this is  
10 rare; I've never seen it. And the medical theory of  
11 angiogenesis is what could have caused this with the  
12 toxicity - - -

13 JUDGE SMITH: But is that - - - would that  
14 not have been a sufficient claim even before they  
15 passed the presump - - - the new law?

16 MR. LUKASZEWSKI: Do you want my opinion?  
17 Because in my opinion, it wouldn't have sufficed,  
18 because it didn't suffice with the law. But should  
19 it have - - - should it - - -

20 JUDGE SMITH: Well, you're - - -

21 MR. LUKASZEWSKI: - - - should it - - -  
22 should it have sufficed?

23 JUDGE SMITH: You also say it does suffice.

24 MR. LUKASZEWSKI: Should it have sufficed?  
25 Possibly, but with the law, I think it certainly

1 does, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay, thank you all;  
3 appreciate it.

4 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF BITCHATCHI V. BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE DEPARTMENT PENSION FUND, ARTICLE II, No. 219, and MATTER OF MALDONADO V. KELLY, No. 220, and MATTER OF MACRI V. KELLY, No. 221, were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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