

Matter of Brown v Board of Trustees of the N.Y. City Police Pension Fund, Art. II
2011 NY Slip Op 31191(U)
May 3, 2011
Sup Ct, NY County
Docket Number: 113641/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 113641/2010
BROWN, JOHN
VS.
BD OF TRUSTEES OF NEW YORK CITY
SEQUENCE NUMBER : 001
ARTICLE 78
CAL # 26

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1
2, 3
4, 5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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).

Dated: 5/3/11
MAY 03 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of JOHN BROWN,

Index No. 113641/10

Petitioner,

Motion Date: 3/1/11
Motion Seq. No.: 001

For an Order and Judgment Pursuant to Article 78, CPLR,

DECISION & JUDGMENT

-against-

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 1418).

THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND, ARTICLE II, THE CITY OF NEW YORK, MICHAEL BLOOMBERG, Mayor of the City of New York, and RAYMOND KELLY, Police Commissioner of the City of New York,

Respondents.

-----X
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By notice of petition and verified petition dated October 15, 2010, petitioner brings this Article 78 proceeding seeking an order annulling respondents' denial of his application for an accident disability pension and upgrading his pension to an accidental disability pension.

Respondents oppose the petition.

I. BACKGROUND

Commencing on July 15, 1986, petitioner was employed by the New York City Police Department (NYPD) as a police officer. During his employment, he twice suffered smoke

inhalation that required medical attention while trying to rescue people from buildings on fire. On September 11, 2001, petitioner went to the World Trade Center site to assist with rescue operations. Between September and November 2001, petitioner worked at the site and the Freshkill Landfill depository on Staten Island for approximately 159 hours, and while smoke and particles permeated the air, he was not given and did not use any protective gear. (Petition, dated Oct. 15, 2010 [Pet.]).

Afterward, petitioner resumed his normal activities but began to feel tired and fall asleep without warning, and his breathing became labored and shallow. He sought medical attention beginning in October 2001 and continuing to the present. (Pet.).

On February 10, 2004, the NYPD recommended that a survey be conducted in order to determine whether petitioner was incapacitated from performing his duties and should be retired, observing that petitioner had been on sick/restricted duty since February 10, 2004 with a complaint or diagnosis of obstructive sleep apnea. (Verified Answer, dated Dec. 7, 2010 [Ans.], Exh. 2).

On April 12, 2004, petitioner completed a line of duty injury report, stating that “[o]n 5/11/03, [petitioner] was treated by Dr. S. Racof, chief, Division of Pulmonary and critical care medicine. This was part of the 911/WTC screening . . . [Petitioner] was diagnosed with restrictive airway disease.” Petitioner stated that his injury was sustained while working at the World Trade Center site in 2001, that he was initially examined in October 2001, and after the 2003 examination, he was diagnosed with restrictive airway disease, a permanent lung condition. (*Id.*, Exh. 6). On June 2, 2004, the Commanding Officer of the NYPD’s Medical Division denied designation of petitioner’s injury as a line of duty injury. (*Id.*, Exh. 6).

On June 22, 2004, the NYPD issued an "Ordinary Disability Examination" order, directing respondents' Medical Board to examine petitioner to determine whether he should be retired; in the order, petitioner's disability is described as obstructive sleep apnea. (*Id.*, Exh. 2).

On July 21, 2004, the Medical Board unanimously determined that petitioner was disabled from working as a police officer based on a diagnosis of obstructive sleep apnea, and approved his application for an ordinary disability retirement (ODR). (*Id.*, Exh. 7).

On October 13, 2004, November 10, 2004, and February 9, 2005, respondent Board of Trustees tabled a vote on petitioner's ODR application. On April 13, 2005, the Board remanded the application to the Medical Board for re-examination as petitioner had undergone surgery and new evidence would be submitted. (*Id.*, Exh. 8).

On May 25, 2005, the Medical Board reviewed petitioner's new evidence, consisting of an operative report following the insertion of a laparoscopic lap band in petitioner's stomach to help him lose weight, and a note from a pulmonologist stating that since the lap band surgery, petitioner's apnea had nearly completely resolved and that petitioner "no longer [had] a problem from a pulmonary perspective." The pulmonologist also stated that petitioner's pulmonary functions were restricted and observed that petitioner had "a long history of asthmatic bronchitis, smoke inhalation and environmental allergies" and that he had been diagnosed with an exacerbation of his respiratory ailments due to his work at the World Trade Center site. The Medical Board delayed a determination on petitioner's application pending a letter from his pulmonologist stating whether it was his opinion that petitioner could perform the full duties of a police officer. (*Id.*, Exh. 9).

On August 3, 2005, after reviewing a letter from petitioner's pulmonologist in which he

stated that petitioner no longer had any apnea-related symptoms and was able to resume full police duties, the Medical Board rescinded its prior decision and disapproved petitioner's ODR application. (*Id.*, Exh. 10). On November 9, 2005, the Board of Trustees upheld the Medical Board's disapproval. (*Id.*, Exh. 11).

Between November 9, 2005 and July 29, 2009, petitioner missed only four days of work due to illness. (*Id.*, Exh. 12).

On July 29, 2009, petitioner applied for an ADR pursuant to Chapter 93 of the Laws of 2005, known as the WTC Disability Law or WTC Law, describing his disability as "a pulmonary condition which causes me to have shortness of breath, dizziness and blackout upon physical exertion." (*Id.*, Exh. 4). On July 31, 2009, petitioner retired from the NYPD on a twenty-year service retirement. (Pet.; Ans., Exh. 13).

By Ordinary Disability Examination order dated October 14, 2009, the NYPD asked the Medical Board to determine if petitioner should be retired on an ODR, with his disability described as a pulmonary derangement. (Ans., Exh. 5).

On November 13, 2009, the Medical Board reviewed petitioner's ADR application and examined him, observed that petitioner's pulmonary function tests between 2005 and 2009 showed a mild restrictive defect, and detailed petitioner's history with sleep apnea and the lap band surgery. Based on a lack of objective evidence that petitioner suffered from a pulmonary disability, it denied unanimously petitioner's application for an ADR or ODR, finding that:

It is the opinion of the [Medical Board] that serial pulmonary function studies since 2003 through 2009 show no significant change and no significant deterioration consistent with a mild restrictive pattern secondary to his weight. There is no evidence of obstructive lung disease and he has never been given any medication. Episodes of near syncope are not well-documented and may be cough syncope. Except of one episode in 2003, these have never been reported to the Police Department.

[* 6]
(Id., Exh. 14).

On January 13, 2010, the Board of Trustees remanded the matter to the Medical Board to consider new evidence. *(Id.*, Exh. 15). On April 23, 2010, the Medical Board re-examined petitioner and considered a letter from petitioner's pulmonologist, in which he stated that:

“as [petitioner's] lung volumes have not improved, despite his significant weight loss, it is unlikely that his restrictive process is related to his weight. It is most probably related to intrinsic lung disease. Should weight have played a significant role in the restriction, they [sic] should have been a significant improvement in [petitioner's] lung volumes following the loss.”

The Medical Board also reviewed petitioner's chart and observed that petitioner's lung capacity improved after his weight loss and decreased once he re-gained some weight, noting that “considering that six years have passed, there should have been actual deterioration in these readings since there is normally a fall in pulmonary function over time.” It observed that November 2007 and May 2008 CT scans of petitioner's chest showed no significant pulmonary disease, that petitioner's lungs were clear with minimal linear scarring in his right lower lobe, and that most importantly, there were no interstitial fibrotic changes or bronchiectasis. Petitioner's pulmonary function tests had also consistently shown normal diffusion capacity, indicating against interstitial lung disease. The Medical Board thus unanimously reaffirmed its denials of petitioner's ADR and ODR applications, finding that there was “no evidence of any intrinsic lung disease with normal chest CT scans and normal diffusion capacity and no evidence of oxygen desaturation on exercise.” *(Id.*, Exh. 16).

On June 9, 2010 and July 14, 2010, the Board of Trustees delayed a vote on petitioner's application, and on August 11, 2010, affirmed the Medical Board's disapproval. *(Id.*, Exh. 17).

II. CONTENTIONS

Petitioner argues that the evidence before the Medical Board indicated that he had lung problems, that his deteriorated health resulted directly from his employment as a police officer including his work at the World Trade Center site, and that respondents' denial of his ADR application was arbitrary and capricious, unreasonable, and illegal. (Pet.).

Respondents contend that the Medical Board's determination is based on credible evidence as it fully reviewed petitioner's application and the submitted evidence, including the new evidence submitted to it on remand, and that the credible evidence establishes that petitioner was not disabled from performing police duties. Respondents observe that petitioner's pulmonologist's conclusion that his lung condition was not related to his weight was based on his erroneous observation that petitioner's lung function had not improved after he lost weight. They also argue that the results of petitioner's examinations by the Medical Board and statements made by him indicate that he is not disabled, as his vital signs were normal, he was not taking any medication, and he could walk slowly or up two or three flights of stairs, and observe that petitioner was able to perform all of his duties between 2005 and 2009, having missed only four days of work due to illness during that time. (Ans.; Memo. of Law, dated Dec. 7, 2010 [Memo.]).

In reply, petitioner maintains that it is undisputed that his condition arose while he was performing official police functions, and observes that one of his medical reports reflects that he had ground glass opacities in his lungs and he surmises that his lungs may contain other contaminants from the World Trade Center site. He also states, upon information and belief, that his lung function is reduced by an amount that would qualify a New York City firefighter for an ADR and that treating a police officer differently constitutes a constitutional violation, and

contends that the medical conditions and symptoms from which he suffers are recognized medical problems linked to exposure to the World Trade Center site thus entitling him to a statutory presumption of disability, and that the NYPD's submission of an ODR on his behalf reflects its belief that petitioner was unable to perform his duties, which conflicts with the Medical Board's determination of no disability and has not been addressed by respondents. And, as the NYPD's opinion conflicts with the Medical Board's determination, petitioner argues that Corporation Counsel's simultaneous representation of both entities constitutes a conflict of interest. (Verified Reply, dated Dec. 23, 2010).

In sur-reply, respondents maintain that petitioner may not raise new issues in his reply papers, and that in any event, the Medical Board considered the report which indicated that petitioner had ground glass opacities in his lungs, and that petitioner is not entitled to the World Trade Center statutory presumption as the Medical Board found in the first instance that he was not disabled. Respondents also argue that New York City firefighters and police officers have different ADR requirements, and deny that there is any conflict of interest in Corporation Counsel representing both the NYPD and the Medical Board as the NYPD did not determine that petitioner was disabled but only recommended that he be examined to determine if he was disabled and it had a representative at the meetings of the Board of Trustees when the Board upheld the Medical Board's decision. (Sur-Reply, dated Jan. 10, 2011).

III. ANALYSIS

A. Applicable law

The only questions that may be raised in a proceeding to challenge action or inaction by a state or local government agency are, in pertinent part, whether a determination was made in

violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . (CPLR 7801, 7803[3]). The determination of an administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency’s determination is supported by the record.” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

In reviewing an administrative agency’s determination as to whether it is arbitrary and capricious, the test is whether the determination “is without sound basis in reason and is generally taken without regard to the facts.” (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 701; *Matter of Mankarios v New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

If the court determines that the administrative determination has a rational basis, the court’s inquiry is complete; it may not substitute its judgment for that of the administrative agency. (*Paramount Communications, Inc. v Gibraltar Cas. Co.*, 90 NY2d 507 [1997], *rearg denied* 90 NY2d 1008). Moreover, where a determination has a rational basis, “an administrative agency’s construction and interpretation of its own regulations and of the statute under which it

functions are entitled to great deference.” (*Matter of Arif v New York City Taxi and Limousine Commn.*, 3 AD3d 345 [1st Dept 2004], *lv granted* 2 NY3d 705, *appeal withdrawn* 3 NY3d 669).

Pursuant to Administrative Code § 13-252, a police officer may retire with an ADR upon application to the commissioner stating that the applicant:

is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired.

The determination of an ADR application requires consideration of two factors. First, the Medical Board decides whether the applicant is disabled and should be retired (*Matter of Meyer v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145 [1997]). It must then decide whether the disability resulted from a service-related accident, and certify its recommendation on this issue to the Board of Trustees. (*Id.* at 144-145). The Board of Trustees must then determine whether the disability was caused by a service-related accident. (*Id.*).

Pursuant to the WTC law:

if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, 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.

(Admin Code 13-252.1[1][a]).

B. Is the Medical Board's determination arbitrary and capricious or irrational?

The Medical Board's determination will be sustained unless it lacks a rational basis or is arbitrary or capricious, and it must be based on "some credible evidence." (*Matter of Borenstein v New York City Empls.' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]). The Medical Board

has the authority to resolve any conflicting medical evidence or opinions, and in reviewing the Medical Board's decision, the court may not examine the medical evidence and substitute its own judgment for that of the Medical Board. (*Id.*).

Here, the Medical Board's conclusion that petitioner was not disabled was based on its examinations of him and review of his medical reports including any new evidence submitted to it on remand, which reflected that petitioner's restricted lung functions were related to his weight and not to any intrinsic lung disease. Particularly significant is petitioner's improvement in lung function after his weight-loss surgery and his physician's opinion that he was able to resume full police duties, and the fact that petitioner subsequently missed only four days of work during the four years before he retired. The Medical Board's opinion was thus based on credible evidence. (*See Matter of Lewis v Kelly*, 22 Misc 3d 1137[A], 2009 NY Slip Op 50477[U] [Sup Ct, New York County 2009] [while petitioner suffered lung impairment after working at World Trade Center site, Medical Board's finding that impairment did not rise to disability supported by credible evidence, including medical evidence showing either normal test results or mild restrictive lung function]; *see also Matter of Meyer*, 90 NY2d at 139 [Medical Board's detailed and fact-based reports explaining basis for determination constituted credible evidence]; *Matter of Borenstein*, 88 NY2d at 761 [as Medical Board "detailed what medical proof had been considered, specified the nature of respondent's complaints and outlined the results of its physical examinations of respondent," determination was based on some credible evidence and was not arbitrary or capricious]; *Matter of Christian v New York City Empls. ' Retirement Sys.*, 56 NY2d 841 [1982] [Medical Board explained reasoning behind decision which was warranted by evidence before it]; *Schwartz v Kelly*, 36 AD3d 563 [1st Dept 2007] [Medical Board's decision

that petitioner not disabled supported by some credible evidence including its own examinations of petitioner and medical reports]; *Matter of Goffred v Kelly*, 13 AD3d 72 [1st Dept 2004] [finding of no disability supported by credible evidence as Medical Board considered petitioner's application six times and each time it reviewed medical evidence and examined petitioner]).

The sole evidence to the contrary, the letter from petitioner's pulmonologist, was based on the erroneous assumption that petitioner's lung capacity had not improved after he lost weight. However, even if petitioner's pulmonologist's opinion was based on a correct assumption, the Medical Board was entitled to disregard it. (See *Khurana v Kelly*, 73 AD3d 497 [1st Dept 2010], *lv denied* 15 NY3d 715 [finding of no disability based on credible evidence as Medical Board considered petitioner's case four times and each time Medical Board examined petitioner and reviewed medical evidence, and Medical Board not bound by petitioner's experts' contrary opinions]; *Matter of Finkelstein v Kelly*, 41 AD3d 122 [1st Dept 2007] [Board properly considered conflicting medical evidence]; *Matter of Dittrich v Bd. of Trustees, Police Pension Fund, Art. II*, 37 AD3d 342 [1st Dept 2007] [conflicts in medical evidence were for Medical Board to resolve]).

And as the Medical Board found that petitioner is not disabled, the statutory presumption set forth in the WTC law is inapplicable. Moreover, petitioner submitted no evidence showing that he was treated differently than New York City firefighters, and the NYPD's submission of an ODR application on his behalf is irrelevant as the NYPD made no finding or determination that petitioner was disabled. Similarly, there is no conflict of interest in Corporation Counsel's representation of the NYPD and the Medical Board as both ultimately determined that petitioner was not disabled. Thus, petitioner has failed to establish that the Medical Board's determination

is arbitrary or capricious or irrational.

C. Is the Board of Trustees's determination arbitrary and capricious or irrational?

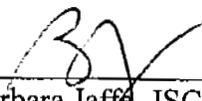
The Board of Trustees is bound by the Medical Board's determination as to whether an ADR applicant is disabled but must make its own determination as to whether the disability was caused by a service-related accident. (*Matter of Canfora v Bd. of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347 [1983]). Here, as the Medical Board determined that petitioner was not disabled, the Board of Trustees was required to uphold that determination.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: May 3, 2011
New York, New York

UNFILED JUDGMENT

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