

**Gomez v Shea**

2024 NY Slip Op 31277(U)

April 11, 2024

Supreme Court, New York County

Docket Number: Index No. 157183/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARLENE P. BLUTH **PART** **14**

*Justice*

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HAMLET GOMEZ,

Petitioner,

- v -

DERMOT SHEA, AS THE POLICE COMMISSIONER OF  
THE CITY OF NEW YORK, AND AS THE CHAIRMAN OF  
THE BOARD OF TRUSTEES OF THE POLICE PENSION  
FUND, ARTICLE II, THE BOARD OF TRUSTEES OF THE  
POLICE PENSION FUND, ARTICLE II

Respondents.

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**INDEX NO.** 157183/2020

**MOTION DATE** 04/10/2024<sup>1</sup>

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for ARTICLE 78.

The petition to annul respondents’ determination denying petitioner’s request for accident disability retirement (“ADR”) is denied.

**Background**

Petitioner started working as a police officer in 1994 and served until April 2015. He claims that he was injured in a line-of-duty incident on May 7, 2013 while working as an undercover officer in the Bronx. Petitioner observes that during a “buy and bust operation” he was attacked by four individuals. He insists he suffered injuries to right wrist, right thumb, left shoulder and back. Petitioner also details an incident from September 10, 2014 in which he suffered injuries to his neck and left shoulder while again working undercover in the Bronx.

<sup>1</sup> Although this proceeding was only reassigned to the undersigned this week, the Court is well aware that this proceeding has been pending for far too long. The Court apologizes, on behalf of the Court system, for the inexplicable and inexcusable delay in the resolution of this proceeding.

Petitioner observes that he previously sought ADR, was denied and brought an Article 78 proceeding. The judge in that proceeding remanded the dispute, in a decision issued in January 2018, back to respondents' Medical Board for another evaluation "by a different medical board" (NYSCEF Doc. No. 31 at 1).

The Medical Board then evaluated petitioner again on May 18, 2018 (NYSCEF Doc. No. 33). It found after examining petitioner that:

"In summary, review of medical records reveals that the retired detective had a line of duty injury to his neck and shoulder area on September 10, 2014. Subsequently, he was diagnosed with cervical radiculopathy with mild to moderate degree cervical spine stenosis in March of 2015, with subsequent persistent pain in the neck as well as radicular symptoms warranting epidural injections. A subsequent MRI of the cervical spine done in April 2016, which showed moderate to severe findings in the foraminal area at the C5-6 levels. A nerve conduction study also shows chronic bilateral C5-C6-C7 polyradiculopathy. On physical examination, the retired detective presents with objective findings that were not consistent with subjective complaints. There was no significant atrophy and there was no focal neurological deficit that would indicate either an upper or lower motor neuron lesion" (*id.* at 4-5).

The Medical Board concluded that "Based on the history, the medical records, the new medical evidence provided, the clinical findings, the symptomatology and today's physical examination, the Article II Medical Board reaffirms its previous decision and recommends disapproval of the application retired detective's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement" (*id.* at 5).

Petitioner's ADR application was then remanded back to the Medical Board for another evaluation in February 2019 (NYSCEF Doc. No. 34). This evaluation was precipitated by purportedly "new medical evidence" in form of notes from petitioner's neurologist (*id.* at 2). During this evaluation, "The Medical Board notes that during the interview, retired detective demonstrated [an] adversarial attitude and this contributed to the lack of credibility" (*id.*). The

Medical Board stressed that during their examination, petitioner was able to raise both arms fully, that there was no weakness in his shoulder, elbow, wrist or hand and that he was able to perform a push-up against a wall (*id.* at 3).

It added that “In summary, the Article II Medical Board feels that the new medical evidence submitted is superficial and does not demonstrate any focal findings and the findings on the previously obtained electrodiagnostic (EMG/NCV) studies were minimally positive with no paraspinal EMG results recorded, no increased insertional activity and no fibrillations” (*id.*).

“Based on the review of the history, the medical records, the new medical evidence provided, the clinical findings, the symptomatology and today's physical examination, it that does not reveal any objective deficit. It is the opinion of the Article II Medical Board with reasonable degree of medical certainty feels that there is insufficient evidence that the retired detective is unable to perform the full duties of the New York City Police Officer. In light of this, and the Article II Medical Board reaffirms its previous decision and recommends disapproval of the retired detective's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement” (*id.*).

The Medical Board evaluated petitioner again in November 2019 based on new evidence from petitioner's neurologist (NYSCEF Doc. No. 36). It observed that petitioner admitted “that he was under no treatment since his previous evaluation by the Medical Board in February 2019. He stopped physical therapy because it was aggravating him” (*id.* at 2). The Medical Board observed that petitioner refused to do a push-up against the wall and claimed he had increased pain since the last exam (*id.* at 3). Petitioner also apparently refused to do a range of motion test for his neck (*id.*). It concluded that the findings of petitioner's neurologist “are not corroborated by today's examination by the Article II Medical Board, especially in the presence of no demonstrable atrophy and variable sensory changes not consistent with any neurological pattern” (*id.* at 4). The Medical Board once again denied petitioner for both Ordinary Disability Retirement (“ODR”) and for ADR.

Petitioner contends that following this examination, the Board of Trustees confirmed the denial of his ADR request. Petitioner contends that this denial was arbitrary and capricious on the ground that there is no doubt he is unable to perform his work as a police officer. He emphasizes that the Medical Board is biased against him and that their brief examinations should not constitute a basis to deny his ADR request. Petitioner argues that the Medical Board ignored substantial medical evidence that corroborates his debilitating conditions, which include continuing neck pain and a decreased range of motion.

In opposition, respondents observe that following the previous Article 78 proceeding a second Medical Board of three board-certified physicians examined petitioner and found that there were inconsistencies between petitioner's physical condition and his claimed symptoms. Respondents argue that petitioner was not credible due, in large part, to the apparent voluntary nature of his alleged diminished range of motion and lack of strength.

Respondents maintain that there was simply no credible medical evidence that petitioner was disabled due to a cervical spine/neck condition. They contend that his subjective complaints of neck pain were not consistent with the physical examination conducted by the Medical Board.

Petitioner did not file a reply.

## **Discussion**

In an article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to

the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

“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, 50 NYS3d 2 [1st Dept 2017]).

Here, the Medical Board found, on three separate occasions, that petitioner was not disabled and therefore not entitled to either ODR or ADR. The Court finds that these three medical evaluations constituted “ample credible evidence” to justify the denial of the petition (*Lamar v Nigro*, 223 AD3d 470, 203 NYS3d 66 [1st Dept 2024]). That petitioner and his doctors contend he suffers from debilitating conditions is not a basis for this Court to grant the petition as “it is the sole province of the Medical Board and the Trustees to resolve conflicts in evidence” (*id.*). This Court must defer to the Medical Board’s “expertise” (*id.*).

Simply put, the evaluations described in detail above suggest that the Medical Board did not believe petitioner’s assertions about his physical ailments or the conclusions from his doctor. The Medical Board claims that petitioner was capable of performing a variety of tasks, such as performing a push-up against the wall during one exam, that were inconsistent with his claimed symptoms. This Court’s role is to evaluate whether or not the Medical Board had a sufficient basis to deny petitioner’s ADR request and the Court finds that there was sufficient medical evidence to support that conclusion.

The Court recognizes that petitioner believes that the Medical Board was biased against him. But, unfortunately, that subjective assertion is not a basis to grant him ADR. And the Court

also observes that the previous judge that presided over petitioner’s first Article 78 proceeding characterized the first Medical Board’s findings as “absurd” (NYSCEF Doc. No. 31 at 3). But that proceeding merely resulted in three additional Medical Board evaluations and the Court finds that the conclusions of this *second* Medical Board were rational.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

<u>4/11/2024</u> <b>DATE</b>			 <hr/> <b>ARLENE P. BLUTH, J.S.C.</b>	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE