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

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 102392/2007

FEINBERG, ROBERTA

VS

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. 102392/2007

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits [illegible]	2, 3, 6
Replying Affidavits [illegible]	4, 5, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND 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: 12/10/07 [signature] J.S.C.

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 52
----------X
In the Matter of ROBERTA FEINBERG,
Petitioner,

Index Number 102392/2007
Mot. Seq. No. 001

For a Judgment Pursuant to Article 78 of the CPLR reviewing and annulling a determination denying her a City of New York Department of Transportation Parking Permit for People with Disabilities on the ground said denial was unlawful, arbitrary, and capricious,

DECISION, ORDER AND JUDGMENT

- against -

THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION,
Respondent.
----------X

For the Petitioner:
Fabian G. Palomino, Esq.
16 Court St., 32nd Floor
Brooklyn NY 11241
718-855-5100

For the Respondent:
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
By: Christina L. Hoggan, ACC
100 Church St.
New York NY 10007
212-788-0461

Papers considered in review of this petition to annul:

Papers	**Numbered**
Notice of Petition and Affidavits Annexed	1
Verified Answer, Memo of Law	2, 3
Reply and Memo of Law	4, 5
Respondent's Sur-Reply Memo of Law	6
Petitioner's Sur-Reply Memo of Law	7

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul a determination that denied her a Parking Permit for Persons with Disabilities pursuant to CPLR 7803(3). For the reasons which follow, the petition is granted to the extent of remanding this matter to the City of New York Department of Transportation for consideration *de novo* consistent with this opinion.

Factual and Procedural Background

Petitioner has degenerative arthritis in her right ankle as the result of a motor vehicle accident in 1995 requiring open reduction surgery with internal fixation. Over the years she has experienced decreasing mobility and increasing difficulty in negotiating stairs, along with periodic "intense, excruciating pain" such that she finally sought and was granted an accommodation from her employer in order to conduct necessary and daily duties that involved walking in her position as a full time kindergarten school teacher (Ver. Pet. ¶ 4).

On July 31, 2006, she applied to respondent, the New York City Department of Transportation (DOT), for a disabled person's parking permit. She also applied for and received a New York State special vehicle identification parking permit (Ver. Pet. ¶¶ 5, 10). Pursuant to the requirements of the application process, she included a report from her physician describing her medical condition. It indicated that she has degenerative arthritis, was currently on Motrin, can walk about 5-6 blocks although on bad days cannot walk even two blocks, and that the condition is permanent in nature and requires her to use a private automobile (Ver. Pet. Ex. A). She also submitted x-rays and a diagnostic report from her orthopedic surgeon, which reported that her right ankle shows osteoarthritic changes, ossification of the syndesmosis, but no osteomyelitis, and diagnoses her with "[a]natomic reduction. Osteoarthritis at the tibiotalar articulation." (Ver. Pet. Ex. B).

As part of the application process, petitioner was assigned to a physician at Bellevue Hospital for assessment in August 2006 (Ver. Ans. Ex. B). According to the petition, the physician is an allergist at Bellevue Hospital who, in the under ten minutes spent with petitioner, indicated that she was uninterested in hearing about petitioner's pain or that the reason she did

not need a therapeutic device in her classroom was because she sat on the floor with the students, or that she had been given an accommodation of use of the school's elevator (Ver. Pet. ¶ 8). Although petitioner, and her orthopedist, both state that she is on Motrin, and describe that on a "good day" she can walk "about" six blocks, and on a bad day cannot even walk two blocks, the certifying physician's report, dated August 17, 2006, set forth petitioner's relevant medical history indicating that she "walks 2-6 blocks, variable." In addition, the certifying physician's notes state: "step ascent worse descent; works FT kg tchr; no accommodations," and "walks fair gait," noted that her ankle is "non tender, slightly decreased R[ange] o[f] M[otion]"; that she had a "fair" range of motion in her right hip and knee, and on her left side, "fair strength, ROM @ hip, knee, ankles, no joint swelling or tenderness; climbs 9" step W[ithin] N[ormal] L[imits]." (Ver. Pet. Ex. D). The physician recommended denial of her application.

By letter dated August 28, 2006, respondent DOT informed petitioner that her disability did not qualify for a special parking permit, based on the disapproval of her application by the Department of Health (DOH) or its designee, Bellevue Hospital, and that she had the right to request reconsideration (Ver. Ans. Ex. C). Petitioner sought a review and on September 25, 2006, the DPH notified her of a medical evaluation by a DOH physician scheduled for October 17, 2006 (Ver. Ans. Ex. E). On that date, she was examined by Dr. Michael Gehl who, according to petitioner, examined her leg, reviewed some papers, asked no questions, and did not respond to her explanation of the pain she experiences in walking and standing (Ver. Pet. ¶ 11).[1]

---

[1]According to petitioner, Gehl's speciality is preventive medicine (Ver. Pet. ¶ 11). According to respondent, Gehl is an Occupational Specialist whose work partly involves determining whether injured individuals are fit to return to work, and he was "significantly involved" in writing the current City regulation setting forth what constitutes a permanent

His written notes state that he found her ankle appeared "normal" upon examination, and that the range of motion was "actually fair for hardware in x-ray," and concluded that she "is not severely mobility impaired." (Ver Ans. Ex. F). By letter of October 23, 2006, the DOT informed her that her application was denied, but that she could reapply after waiting a year (Ver. Ans. Ex. G).

Petitioner timely commenced her petition for judicial review pursuant to CPLR Article 78. She seeks to annul the determination on the bases that she was not allowed to present all her evidence and the doctors distorted what medical evidence she proffered and the determination was made in violation of prescribed procedures and affected by legal errors. She also seeks to challenge the regulation on constitutional grounds.

Respondent filed its verified answer arguing that it followed the procedures as set forth in the regulations, its determination was reasonable and rational and supported by the record, the petitioner does not meet the regulatory requirements to be considered disabled based on arthritis and accordingly the petition should be dismissed. It further argues that the enactment of the regulations was not constitutionally suspect.

Legal Analysis

New York's Vehicle and Traffic Law defines "severely disabled persons" as those with one or more impairments which are permanent in nature, including having "limited or no use of one or both lower limbs," and a "physical . . . impairment or condition . . . of such nature as to impose unusual hardship in utilization of public transportation facilities and such condition is certified by a physician or nurse practitioner . . . as constituting an equal degree of disability

---

disability, codified at 24 RCNY § 16-02 (Ver. Ans. ¶ 30, n. 1).

(specifying the particular condition) so as to prevent such person from getting around without great difficulty." (VTL § 404-a[4]).[2] New York State issues special vehicle identification parking permits to the governing bodies of the State's cities and towns pursuant to VTL § 1203-a(1) and, notwithstanding any local laws to the contrary, the permits entitle vehicles to park "in any area in any city . . . which as been designated by such city . . . as a place for parking for persons with disabilities." In addition, the permits entitle vehicles to park anywhere designated as off-street parking for persons with disabilities (VTL § 1203-a[1], citing VTL §1203-c]). These parking permits are recognized statewide and, according to the statute, except for temporary permits issued by municipalities for no more than six-month periods, are the only valid permit for the purpose of preserving parking spaces for the handicapped (VTL § 1203-a[2], [3]). However, cities and towns may legislate local laws or regulations that make special provisions relating to parking of vehicles bearing handicapped license plates and special vehicle identification parking permits (VTL § 1640[a][17], citing VTL §404-a). In addition, New York City may, by ordinance, rules, regulations, or health code provisions, supersede State laws pertaining to the parking, standing, and stopping of vehicles possessing special vehicle identification parking permits (VTL § 1642[a][25]; VTL § 1600).

The New York City Charter gives the commissioner of the New York City Department of Transportation authority "for all those functions and operations of the city relating to transportation" (NYC Charter § 2903). Among items overseen by the commissioner "without

---

[2]VTL § 404-a allows "severely disabled persons" who are certified by a physician or nurse practitioner authorized by the commissioner, to apply and obtain special motor vehicle license plates.

limitation," is the power to issue special vehicle identification permits to disabled New York City residents who require the use of a private automobile for transportation, and to non-residents who require the use of a private automobile for transportation to school or for employment (NYC Charter § 2903 [a][15][a]). The Charter provides that vehicles bearing these special vehicle identification permits may be parked without penalty in certain areas in which parking is not otherwise allowed (NYC Charter § 2903[a][15][b]).[3] In addition, the Charter empowers the DOT or the DOH to establish standards and guidelines as to what constitutes a "permanent disability seriously impairing mobility." (NYC Charter § 2903[a][15][a]). It provides that persons with disabilities may seek certification by the DOH or a provider designated by the DOT or DOH, and if certified as meeting the standard of "permanent disability seriously impairing mobility," they will be issued a permit (NYC Charter § 2903[a][15][a]).

The regulations enacted by the DOH set forth the criteria for issuing the special vehicle identification parking permits, also called parking permits for people with disabilities (24 RCNY § 16-01, *et seq.*). The regulations authorize the use of physicians designated by the DOH, including New York City Health & Hospitals Corporation-employed physicians who enter into a contract with the DOH, the DOT, and the Health & Hospitals Corporation, to decide whether applicants meeting the eligibility requirements for issuance of a special permit (24 RCNY § 16-

[3]The special permits issued by the DOT and the City entitle certified disabled persons to park in "No Parking" zones, "No Standing Except Authorized Vehicles" zones, at parking meters without using an authorized payment method, and in "No Standing Except Trucks Loading and Unloading" zones (34 RCNY § 4-08[o][1]). Additionally, the DOT regulations state explicitly that handicapped license plates and permits issued by the State of New York or any other state, "shall be valid only in designated off-street parking areas," and "are not valid in on-street parking areas." (34 RCNY § 4-08[d][3]; [d][3][i], [ii]).

01; § 16-03). These physicians "shall be qualified to certify persons" as having permanent disabilities that seriously impair mobility, although "[a] practitioner in an appropriate field of specialization may be used to perform a medical certification when deemed necessary by the non-specialist/physician assessing the person's medical eligibility for" the permit (24 RCNY § 16-03).

The rules establish that the examining physician completes a Physician Certification Form which states that, after a review of the application and accompanying documentation furnished by the applicant's personal physician, if any, the applicant does or does not have a permanent disability that seriously impairs mobility (24 RCNY § 16-04 [a]). Where certification is denied, the physician is to indicate whether that determination was based on the failure of the medical documentation to support a finding of a permanent disability that seriously impairs mobility, or that the clinical findings were inconsistent with the applicant's medical history or otherwise did not support the finding of a permanent disability that seriously impairs mobility (24 RCNY § 16-04 [a]). The appeals process is described in the DOH rule set forth in 24 RCNY § 16-05. If the appeal is made within 30 business days of service of the denial, the DOH will proceed in one of two ways. Where the denial was based on the insufficiency of the medical history, a second physician provided by the Department will review the file. Where the denial was based upon clinical findings, or where the clinical findings were inconsistent with the medical history, the Department will provide a second physician to make a new assessment which may include a physical examination. The applicant is not precluded from engaging an outside medical expert or specialist for purposes of the appeal, and the specialist's examination results and/or conclusions are made part of the appeal record. In addition, the Department may

also provide a second assessment by a specialist when deemed necessary by the physician/provider, and the specialist's examination results are also made part of the appeal record. The determination of the appeal is final when it is adopted by the Department, and precludes the filing of another application for the same condition "unless such person demonstrates that the condition has significantly worsened." (16 RCNY § 16-05).

The DOH has set forth the conditions that are considered permanent disabilities that seriously impair mobility (24 RCNY § 16-02). Pertinent to the case at bar is the condition described in subsection c, as "arthritis of two major weight bearing joints of the lower extremities with clearly substantial X-rays changes and/or MRI changes, such as loss of joint space, severe degenerative changes plus one or more of the following: (1) Objective finding of sizable effusion of joint(s) detected by clinical examination; (2) Gross instability or valgus/varus deformities of joint(s) detected by clinical examination; (3) Ankylosis or contracture of major joint(s) to such a degree as to preclude stair climbing." (24 RCNY § 16-02[c]).

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and

is generally taken without regard to the facts (*Matter of Pell*, at 232). The court is to dispose of an Article 78 proceeding in the same manner as it would a motion for summary judgment (CPLR 409[b]).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and that "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell*, 34 NY2d at 232-234). Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

Petitioner sets forth several arguments as to why the court should annul respondent's determination pursuant to CPLR 7803(3). She notes that neither physician designated to examine her was an orthopedist or podiatrist, and argues that respondent should have provided a "practitioner in an appropriate field of specialization" to perform the certification pursuant to 24 RCNY § 1603. However, that regulation only requires that certifying doctors be physicians, and provides that a certifying doctor may request a specialist when that doctor believes it is necessary. Nonetheless, although the regulation may recognize that qualified physicians have a common core of medical knowledge and can make informed medical judgments on the basis of information submitted to them (*see Christian v New York City Employees' Retirement Sys.*, 83 AD2d 507, 509 [1st Dept. 1981], *aff'd* 56 NY2d 841 [1982] [concerning three-member non-

specialist medical panels reviewing disability claims]), there remains a serious question as to whether an allergist is qualified to conduct an examination and evaluate records of someone with a degenerative bone condition, in particular as petitioner's condition is apparently somewhat variable depending on the day. Respondent indicates that Dr. Gehl was one of the drafters of the disability standards developed for the City, but there is no indication that he has any particular specialization in degenerative arthritis or in orthopedics or podiatry.

Petitioner also argues that the certification procedure was affected with legal error. She argues that the Certification Form completed by the first doctor fails to indicate the basis of the denial as required in 24 RCNY § 16-04.[4] Indeed, the "summary" on the Certification Form describes the medical records and indicates that they support petitioner's medical history. It then sets forth the doctor's findings of the physical examination and concludes that certification should be denied. The physician's summary does not include an explicit conclusion as to whether the doctor's denial of certification was based on the results of the examination, or the records, or both. Of concern is that the certifying physician summarized petitioner's statements that she is currently on Motrin, can walk "about" five to six blocks on a "good day," and on a bad day cannot even walk two blocks, as that petitioner "walks 2-6 blocks, variable," a clear misstatement of petitioner's description. Of even greater concern is that the certifying doctor's findings only describe petitioner's abilities as showing a "fair" gait, a "slightly decreased" range of motion, and that she had "fair strength," and Dr. Gehl's description of an "actually fair" range

---

[4]Her argument concerning the necessity for the second doctor to also complete a Certification Form has no merit, as only the initial certifying doctor is required under the rules to complete such a form (24 RCNY § 16-05).

of motion. Such descriptions, when made in the context of an application for a disability-based permit, are subjective, lack clarity of meaning, and impermissibly allow too much latitude especially when expressed by non-specialist physicians. As argued by petitioner, an objective, clear way of describing strength and limitations would be in terms of percentages or degrees. Although respondent argues that petitioner's orthopedist does not describe her condition in terms of degrees or percentages, that argument only highlights the fact that the certifying doctor failed to indicate whether her determination was based on the failure of the medical documentation to support a finding of a permanent disability, or the clinical findings were inconsistent with the applicant's medical history, or the findings did not support the finding of a permanent disability seriously impairing mobility.

Petitioner surmises that the doctors were biased against her younger age, as they did not allow her to fully explain her circumstances. Although her description of the examinations is subjective, when petitioner's description is combined with the written distortions made by the certifying doctor in describing her ability to walk, along with the failure to delineate the reason for denial, and the lack of objectivity in describing petitioner's physical capacities and limitations, the result is a process seemingly conducted in an arbitrary manner without a sound basis in reason (*Matter of Pell* at 232). Accordingly, the totality of this record requires a new certification hearing where petitioner's medical history and current physical condition are given an objective assessment. As the matter is being remanded for reconsideration of the facts, the court need not reach petitioner's constitutional claims. It is therefore

ORDERED and ADJUDGED that the petition is granted to the extent that the matter is remanded to respondent to conduct a *de novo* certification proceeding to assess whether

petitioner should be granted a special vehicle identification parking permit, and provide for an appeal if requested, and is otherwise denied.

This is the decision, order and judgment of this court.

Dated: December 12, 2007
New York, NY

J.S.C.