

**Matter of Hayes v Scopetta**

2008 NY Slip Op 30851(U)

March 17, 2008

Supreme Court, Kings County

Docket Number: 0031438/2007

Judge: Sylvia O. Hinds-Radix

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At an IAS Term, Part 50 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17<sup>th</sup> day of March, 2008.

P R E S E N T:

HON. SYLVIA HINDS-RADIX,  
Justice.

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IN THE MATTER OF THE APPLICATION OF  
ROBERT HAYES,

Index No.: 31438/07

Petitioner,

- against -

NICHOLAS SCOPETTA, AS THE FIRE  
COMMISSIONER OF THE CITY OF NEW YORK  
AND AS CHAIRMAN OF THE BOARD OF  
TRUSTEES OF THE NEW YORK CITY FIRE  
DEPARTMENT ARTICLE 1-B PENSION FUND,  
et. al.,

Respondents.

For a Judgment pursuant to Article 78, CPLR, to  
review and annul the determination made by  
respondents.

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The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed <u>Petition</u>	<u>1</u>
Opposing Affidavits (Affirmations) <u>Answer</u>	<u>2</u>
Reply Affidavits (Affirmations) _____	_____
Affidavit (Affirmation) _____	_____
Other Papers <u>Memoranda of Law, and Reply Memorandum</u>	<u>3, 4, 5</u>

Upon the foregoing papers, petitioner moves:

1. For a judgment pursuant to Article 78 of the CPLR:

A. reviewing and annulling the action of the respondents herein in denying petitioner a line of duty (LOD) accident disability retirement pursuant to the Administrative Code § 13-353 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and

B. directing and ordering the respondents to review petitioner's application for accident disability retirement, or in the alternative

C. directing that the Board of Trustees of the New York City Fire Department Article 1B Pension Fund (Board of Trustees) allow petitioner and/or his representatives to present such testimony as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to a LOD accident disability retirement (ADR) allowance;

2. For an order pursuant to CPLR 2307(a) directing respondents herein to serve and file upon the date hereof:

A. all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of petitioner herein;

B. copies of the minutes of each meeting of the Board of Trustees wherein the Board of Trustees considered, discussed or acted upon the retirement application of the petitioner; and

C. copies of any and all records, reports or notes relating to petitioner which are on file with the Article 1B Pension Fund and/or the FDNY.

This Article 78 proceeding results from a "no disability" determination regarding petitioner's alleged neck and back injuries, by the 1-B Medical Board of the New York City Fire Department Pension Fund, Subchapter 2 (the Medical Board)<sup>1</sup>. The Medical Board's decision was rendered after

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<sup>1</sup> The Medical Board is composed of a group of doctors, who are not employees of the FDNY, but specialists in their respective fields in private practice. Once the FDNY Medical Board Committee has reported a firefighter as unfit for full firefighting duty, and the Fire Commissioner has applied for the firefighter's retirement with the Pension Fund by endorsing the Committee's report, the Medical Board reviews all of the medical records of the firefighter, performs physical examinations and does its own referrals for outside examinations and reports where necessary. The Medical Board then prepares a report for the Board of Trustees. The

a court ordered remand of petitioner's case in *Hayes v Board of Trustees of the NYC Fire Dept., Art. 1B Pension Fund, et. al.*, Civil Index No. 24429/ 05 (Kings Sup. Ct. May 15, 2006) by Hon. Lawrence S. Knipel. In *Hayes*, Justice Knipel remanded the matter to the Medical Board for the purpose of an additional review of the relevant medical evidence concerning petitioner's claimed neck and back injuries as the court held that the Medical Board's "no disability" decision was not adequately explained in light of the medical evidence adduced.

On May 7, 1983, petitioner was appointed to the uniformed force of the New York City Fire Department (the NYFD) and served continuously as a member of the NYFD until his retirement. At all relevant times, petitioner was a member of the NYFD Pension Fund. On August 19, 2002, the petitioner sustained an injury to his right elbow while on duty as he was stabilizing a "hazard zone" around a smoking manhole. The "member injury report" for the incident states that "the manhole cover suddenly popped in the air [and] while retreating, [petitioner] slipped on an oily substance in the street causing him to fall backwards on his right elbow and hip." The injury sustained was described in the report as a "contusion to right elbow." On November 2, 2002, petitioner sustained another injury to his right elbow while on duty. The "member injury report" for that incident states that while petitioner was forcing open the trunk of a burning automobile, the gasoline tank of the vehicle suddenly ruptured causing an area under its trunk to "flare up." As a result, petitioner "scrambled to exit [the] area and [fell] backwards over a pile of empty paint cans in [the] lot and struck his right elbow on an old car hood propped up against a fence."

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Medical Board's determination regarding the firefighter's disability must be accepted by the Board of Trustees (*see respondents' Verified Ans.*, p.4, fn. 1).

Petitioner began receiving extensive treatment for his elbow injury.<sup>2</sup> On April 30, 2003, petitioner submitted an application for Service Incurred Disability Retirement (Accident Disability Retirement or ADR). The type of disability claimed was heart, lung and “other.” With regard to the “other” category, petitioner listed his disabilities as “right elbow, neck and back.” He also stated that he was injured on August 19, 2002, and could no longer “crawl, climb or support weight on [his] elbow to perform [his] duties as a firefighter.” Petitioner retired from the FDNY on June 21, 2003 while his application was still pending. On July 1, 2003, petitioner was examined by the FDNY Medical Board Committee (the Committee)<sup>3</sup> which stated that petitioner should perform light duty and had a partial permanent disability. On July 28, 2003, in response to petitioner’s application, and after the examination by the Committee, the Fire Commissioner submitted an application for Non-Service Incurred Disability Retirement (Ordinary Disability Retirement or ODR).

The Medical Board reviewed petitioner’s case three times as follows:

- 1) July 12, 2004: The Medical Board reviewed petitioner’s case and reserved decision, referring petitioner to its outside orthopedic consultant, Dr. Basil Dalavagas, for examination of petitioner’s right elbow. Dr. Dalavagas opined that petitioner was not disabled for the performance of full fire duty.
- 2) October 7, 2004: The Medical Board reviewed petitioner’s case for the second time,

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<sup>2</sup> Petitioner’s treatment was focused on his elbow injury at this point. The treatment performed is listed in great detail in the May 15, 2005 Article 78 proceeding mentioned *supra*. Said treatment is not included in this decision as it does not apply to his claimed neck and back injuries.

<sup>3</sup> The Committee, is composed of Physicians from the Fire Department’s Bureau of Health Services, and chaired by the FDNY’s chief medical officer. It is the duty of the Committee to examine a firefighter for the purposes of being fit for full firefighting duty, for performing only light duty assignment, or if he/ she must be placed on medical leave (*see respondents’ Verified Ans.*, p.4, fn. 1).

including the report of Dr. Dalavagas. The Medical Board agreed with Dr. Dalavagas and denied petitioner's ADR application, stating that he was not disabled with respect to his right elbow.

- 3) March 16, 2005: The Medical Board reviewed petitioner's case for the third time, this time on remand from the Board of Trustees<sup>4</sup>. The Medical Board stated there was no new evidence that would change the recommendation of October 7, 2004 in denying the petitioner's ADR application.

Thereafter, petitioner received a letter dated April 27, 2005 from the Board of Trustees wherein the Board of Trustees "noted" the March 16, 2005 report of the Medical Board during its April 25, 2005 meeting. The letter informed petitioner that the applications for disability retirement were denied as the Medical Board concluded he was not permanently disabled for retirement purposes because of his right elbow.

As a result of the Board of Trustees' letter, on August 9, 2005, petitioner instituted his first Article 78 proceeding to annul the determinations of the respondents. On May 15, 2006, Justice Knipel rendered his aforementioned decision. Regarding the Medical Board's determination of "no disability" with respect to petitioner's elbow injury, the court held:

"As the Medical Board is the final arbiter with regard to conflicting evidence and medical disputes as to petitioner's condition, it was free to credit and reject such evidence as it deemed appropriate as long as its final determination was based upon "some credible evidence." As Dr. Dalavagas' examination and assessment of petitioner constitutes such evidence, this court is constrained from substituting its own judgment for that which was appropriately exercised by the Medical Board." (*see Hayes*, Civil Index No. 24429/05 (Kings Sup. Ct. May 15, 2006).

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<sup>4</sup> There is no direct reason stated for the remand from the Board of Trustees, however, from the language of the March 16, 2005 Medical Board report, it appears the Board of Trustees wanted the Medical Board to review additional medical evidence submitted after the Medical Board's October 7, 2004 report.

However, regarding the petitioner's alleged neck and back injuries, the court remanded the issues to the Medical Board for further consideration. Specifically, the court stated:

“Diagnostic testing of petitioner's cervical and lumbar spines has also revealed evidence of bulging discs and radiculopathy. Such injuries are specifically attributed by his physicians to the line-of-duty accident which occurred on August 19, 2002.

“The Medical Board, however, failed to address such evidence in its reports. As opposed to its explicit acceptance of, and concurrence with, Dr. Dalavagas' assessment of petitioner's elbow injury, the Medical Board has remained silent with respect to petitioner's claimed neck and back injuries. Moreover, Dr. Dalavagas did not assess such injuries during his examination of petitioner. Although the Medical Board is authorized to weigh the medical evidence and reconcile disputes with regard to same, it is appropriate to remand the matter to the Medical Board for further review where the Medical Board's finding is conclusory or not adequately explained in light of the medical evidence adduced (*see generally Matter of Meyer v Board of Trustees*, 90 NY2d 139 [1997]; *Matter of Rodriguez v Board of Trustees*, 3 AD3d 501 [2004]).

“... Accordingly, a remand to the Medical Board for the purpose of an additional review of the relevant medical evidence concerning petitioner's claimed neck and back injuries, including referral of the petitioner to an impartial medical consultant to the extent such referral is deemed necessary, is warranted. (*see Hayes v Scopetta*, Civil Index No. 24429/05 (Kings Sup. Ct. May 15, 2006).”

In accordance with Justice Knipel's decision, on November 30, 2006, the Medical Board, which was comprised of Francis A. Pflum, M.D., Anthony D. Blau, M.D. and Arthur E. Helft, M.D., reviewed petitioner's case with respect to the alleged LOD neck and back injuries. The Medical Board reserved decision, referring petitioner to its outside neurosurgical consultant, Dr. Richard Raynor, for examination of his neck and back.

Dr. Raynor evaluated the petitioner on January 16, 2007 for the complaints regarding his neck and back. Dr. Raynor referred petitioner to Dr. Robert Goldberg for additional EMG testing. In a report dated January 23, 2007, based on the results of his own examination and the results from the

EMG test, Dr. Raynor opined that the petitioner's symptoms were "consistent with some mild degenerative changes in a patient 50 years of age. Taking all of these factors into consideration, from a spinal standpoint he should be able to perform his normal fire duties."

On February 8, 2007, in a four sentence report, the Medical Board adopted Dr. Raynor's recommendation and denied the petitioner's disability with respect to his neck and back.

On April 25, 2007, the Board of Trustees "noted" the February 8, 2007 report of the Medical Board wherein it denied the petitioner's application for disability retirement. Thereafter, on August 20, 2007, petitioner instituted this second Article 78 petition seeking, among other things, to annul the Medical Board's determination of "no disability" regarding his neck and back injury.

"The issue of whether a firefighter is disabled as a result of a service-related accident is determined by the Medical Board of the New York City Fire Department Pension Fund, Subchapter 2 (formerly art 1-B) . . . Its determination that a firefighter is not disabled for duty is conclusive if it is supported by some credible evidence and is not irrational" (*see Kuczinski v Board of Trustees of New York City Fire Department, Article 1-B Pension Fund*, 8 AD3d 283, 284 [2004]; *see also Borenstein v New York City Employees' Retirement System*, 88 NY2d 756, 760 [1996])[*"In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious"*]; *Drew v New York City Employees' Retirement System*, 305 AD2d 408, 409 [2003][*"The Medical Board's determination is conclusive if it is supported by some credible evidence and is not irrational"*]; *accord Inguanta v Board of Trustees of New York City Fire Dept.*, 302 AD2d 527 [2003]).

"Credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered" (*see Meyer v Board of Trustees of the N.Y.C. Fire Dept., Art 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). "It must be evidentiary in nature and not

merely a conclusion of law, nor mere conjecture or unsupported suspicion” (*id.*). “An articulated, rational, and fact-based medical opinion” constitutes “credible evidence” (*id.* at 148). The Medical Board’s “detailed and fact-based report,” “explaining the basis for its conclusion” constitutes “credible evidence” (*id.* at 152).

If there is a difference in medical opinion on petitioner’s non-disability, such difference does not render the Medical Board’s determination, nor the Board of Trustees’ acceptance of that determination, arbitrary and capricious (*see Manza v Malcom*, 44 AD2d 794 [1974]), since it is solely within the Medical Board’s province to resolve any conflict between medical opinions (*see Kuczinski*, 8 AD3d at 283; *Bartsch v Board of Trustees of New York City Fire Dept. Art. 1-B Pension Fund*, 142 AD2d 577 [1988]). “The courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board if the Medical Board’s determination is supported by any credible evidence and is not irrational” (*see Ruzicka v Board of Trustees of New York City Fire Dept., Article 1-B Pension Fund*, 283 AD2d 581 [2001]; *see also Borenstein*, 88 NY2d at 761; *Schwarzrock v Board of Trustees of the New York City Fire Dept. Article 1-B Pension Fund*, 238 AD2d 596, 597 [1997]). “Where . . . the [Medical Board] determines that an applicant is not disabled from performing firefighting duty due to an alleged injury or illness, the [Board of Trustees] must accept that determination and deny the applicant’s claim” (*see Schwarzrock*, 238 AD2d at 596).

In support of his claim that the determination of the Medical Board and the Board of Trustees was arbitrary and capricious, and not based upon credible evidence, petitioner relies upon two arguments, (1) Dr. Raynor is not an impartial consultant and respondents’ reliance on Dr. Raynor does not satisfy the “some credible evidence” requirement for their denial of petitioner’s ADR claim, and (2) Dr. Pflum’s alleged conflict of interest precluded his participation on the petitioner’s Medical Board and his participation tainted the Medical Board’s determination.

The court turns first to petitioner's argument that the lack of impartiality by Dr. Richard Raynor requires the annulment of the Medical Board's February 8, 2007 determination. To bolster his argument, petitioner offers evidence that Dr. Raynor is the only "impartial" neurosurgeon<sup>5</sup> employed by respondents and by reason of the amount of compensation received from the respondents, Dr. Raynor's opinion does not rise to the level of, "some credible evidence." However, as petitioner's "exhibit C" shows, the Medical Board actually utilizes five neurological consultants in total: Dr. Daniel Feuer, Dr. Melpakkam D. Kasy, Dr. Daniel Luciano, Dr. John Mangiardi, and Dr. Richard Raynor. Moreover, just as Justice Knipel held in the first Article 78 proceeding with regard to petitioner's similar allegations against Dr. Delavagas, petitioner offers no evidence as to why the remuneration received by Dr. Raynor automatically necessitates a finding that no credible evidence exists to support the Medical Board's determination. Petitioner has not stated that Dr. Raynor lacks the necessary credentials to assess the petitioner's alleged injuries, that he did not conduct a proper examination of petitioner,<sup>6</sup> or that he failed to review the relevant medical history in preparing his recommendation.

Accordingly, the Medical Board's conclusion that the petitioner was not disabled from performing his duties by an injury to his neck and back is supported by credible evidence consisting of the report of its independent neurological consultant (i.e. Dr. Raynor) who examined the petitioner, reviewed the medical records and reports of other physicians, and concluded that the petitioner was not permanently disabled for the performance of full fire duty (*see Campbell v Board of Trustees of New York City Fire Dept., Article 1-B Pension Fund*, 2008 WL 257405 [2008]). Although the independent

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<sup>5</sup> See petitioner's memorandum of law, p.7, ¶1 and p. 13, ¶1.

<sup>6</sup> As noted in his report, Dr. Raynor referred petitioner to Dr. Robert Goldberg for another EMG examination held on January 18, 2007. (*See respondents' "exhibit 21"*)

consultant's findings differed from that of other physicians who examined the petitioner, where conflicting medical evidence and medical reports are presented to the Medical Board, it is solely within its province to resolve such conflicts (*see Borenstein*, 88 N.Y.2d at 761; *Matter of Vastola v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 37 AD3d 478, 829 [2007]; *Kuczinski*, 8 A.D.3d at 284). The court cannot weigh the medical evidence and substitute its own judgment for that of the Medical Board (*see Borenstein*, 88 NY2d at 761; *Vastola*, 37 AD3d at 478; *Kuczinski*, 8 AD3d at 284).

Petitioner also claims that Dr. Pflum is related to petitioner through marriage and his presence on the Medical Board created an appearance of impropriety, calling into question the Board's determinations. Petitioner made the same allegation in the first Article 78 proceeding. In his decision, Justice Knipel held the following:

“Petitioner also asserts, in similarly conclusory terms, that Dr. Francis Pflu[m], the chair of the Medical Board which initially evaluated petitioner's application for accident disability benefits, is somehow “related to petitioner by marriage.” Petitioner fails, however, to further elucidate the nature of this relationship, much less to provide any details as to the extent or type of interactions, if any, which currently exist, or existed in the past, between petitioner and Dr. Pflu[m]. Accordingly, given the dearth of any evidence demonstrating the existence of a relationship between petitioner and Dr. Pflu[m] which would raise the specter of impropriety with respect to the Medical Board's decision - which was, in any event, largely based upon the assessment of an impartial medical consultant who is not alleged to be related to petitioner - the court finds that the tenuous, ill-defined familial relationship claimed by petitioner cannot serve to undermine the credible evidence supporting the Medical Board's determination.”

In the instant proceeding, to support his contention, petitioner alleges irregularities in the Medical Board's November 30, 2006 and February 8, 2007 reports. These two reports were issued by the Medical Board after Justice Knipel addressed the same allegations against Dr. Pflum in his decision of May 15, 2006. Petitioner's “exhibit EE” and respondents' “exhibit 20” are identical copies of the November 30, 2006 Medical Board decision. Petitioner has alleged respondents tampered with

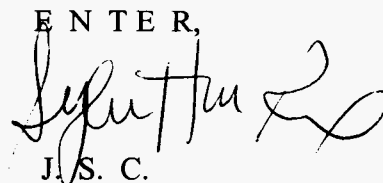
this report by “whiting out” Dr. Pflum’s name and writing in the word “Absent.” In their moving papers, respondents allege, with respect to the November 30, 2006 report, that Dr. Pflum “. . . recused himself from the discussion and did not participate in the determination regarding petitioner’s application” (*see respondents’ Verified Ans.* ¶28).

In their moving papers, as with their November 30, 2006 Medical Board report, respondents allege verbatim that Dr. Pflum “recused himself from the discussion and did not participate in the determination regarding petitioner’s application” (*see respondents’ Verified Ans.* ¶37). However, inexplicably, respondents’ “exhibit 23” - the February 8, 2007 report - clearly shows that Dr. Pflum signed the report. Moreover, petitioner’s “exhibit HH”, contains two copies of the same February 8, 2007 Medical Board Report, one containing Dr. Pflum’s signature and one without Dr. Pflum’s signature affixed. Respondents offer no guidance as to why there are two February 8<sup>th</sup> reports in existence with the aforementioned irregularity, except to incorrectly state:

“Dr. Pflum did not participate in the Medical Board’s deliberations regarding petitioner’s application. See Verified Answer, ¶¶ 28 and 37. The **absence and exclusion of his signature** on these reports reflects this fact.” (*emphasis added*) (*see respondents memorandum of law* at 12)

Under the circumstances this matter is remanded to the Board of Trustees of the NYFD Pension Fund for further clarification of Dr. Pflum’s role since respondents aver that he did not participate in either the November 30, 2006 determination to refer petitioner to Dr. Raynor, or in the February 8, 2007 determination to adopt Dr. Raynor’s recommendation, yet have introduced the February 8, 2007 report containing Dr. Pflum’s signature, adopting the recommendation.

The foregoing constitutes the decision and order of this court.

ENTER,  
  
 J.S. C.

HON. SYLVIA O. HINDS-RADIX JSC