

**Matter of Spears v New York City Empls.
Retirement Sys.**

2009 NY Slip Op 31012(U)

April 22, 2009

Supreme Court, New York County

Docket Number: 108389/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Index Number : 108389/2008

SPEARS, DIANNE

INDEX NO. _____

vs

NYC EMPLOYEES' RETIREMENT SYS

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

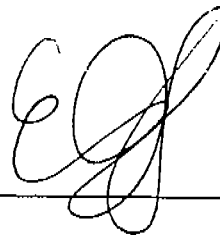
Peterson's

decided per attached

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: 4/22/09



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

-----X
In the Matter of the Application of

DIANNE SPEARS,

Petitioner,

-against-

Index No. 108389/08

NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM AND THE CITY OF NEW YORK,

Respondents.
-----X

EMILY JANE GOODMAN, J.:

Petitioner Dianne Spears (Spears) seeks an order, pursuant to CPLR 7803 (3) and (4) finding that the February 14, 2008 determination of respondent New York City Employees' Retirement System (NYCERS) denying her application for disability retirement benefits under section 605 of the Retirement and Social Security Law was arbitrary and capricious.

Spears was employed by the New York City Transit Authority (TA) as a station agent when, on June 10, 2005, a co-worker allegedly sprayed a chemical substance in the transit booth where she was working. According to Spears, the chemical caused her to have difficulty breathing, triggered respiratory problems, and caused her to have a hoarse voice. According to NYCERS' records, Spears continued working until August 3, 2005.

On June 30, 2005, the TA filed a Workers' Compensation report noting that Spears had reported the June 10, 2005, incident to the TA on June 29, 2005. Claim No. TA 2005 01180.

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).

Apparently Spears did not seek medical treatment immediately after the June 10, 2005 incident, but on August 4, 2005, she was admitted to St. Barnabas Hospital in the Bronx for four days in connection with complaints of respiratory congestion. She was again hospitalized at St. Barnabas Hospital on September 29, 2005 for two days for blurred vision (her hospital records state: back pain, new onset b.m., kidney stone, and carpal tunnel syndrome bilaterally), and again for one week in November 2005, for pain, which Spears believed was caused by a steroid treatment she had several weeks earlier.

On February 28, 2006, Dr. Joseph A. Grossman examined Spears for the purposes of an Independent Internist Evaluation, apparently in connection with her Workers' Compensation claim. Grossman's report includes the following medical evaluation:

Impression: chronic hoarseness. ... I do not know whether her hoarseness is based on vocal cord or throat pathology or whether it is functional.
Employment Capacity: The claimant cannot perform her regular duties in the Transit Authority because of hoarseness of voice and, therefore, difficulty in communicating with the public.

Letter To Whom It May Concern from Dr. Joseph A. Grossman,, dated February 28, 2006, Claim # TA 2005 01180, at 3.

On March 7, 2006, Spears saw Dr. Alvin Katz in connection with her respiratory condition. In contrast with the evaluation of Dr. Grossman, Katz concluded that

there are no causally related residual disabilities or dysfunctions of the ear, nose, and throat system

related to the patient's claim of chemical exposure in a work booth on 6/10/05. Based on this extensive evaluation, Ms. Spears should be able to function in a work environment from an ear, nose and throat point of view in my medical opinion.

Letter from Dr. Alvin Katz to New York City Transit Authority, dated March 7, 2006, at 5.

Spears again saw Katz on September 19, 2006, although Dr. Katz observed a tense and strained vocal quality and subjectively hyperventilation, he concluded that

Ms. Spears was unable to substantiate ... any voice or laryngeal dysfunction referable to work exposure on 06/10/05.

There is evident functional dysfunction, however this functional dysfunction should not preclude Ms. Spears from returning to her usual job and functioning from an ear, nose and throat point of view. She has received maximum benefit from evaluations and treatment and requires no further medical, surgical or ear, nose and throat treatment.

Letter to New York City Transit Authority from Dr. Alvin Katz, dated September 19, 2006, at 3.

In August 2006, Spears sought help for depression that she was experiencing. On the basis of an intake evaluation conducted on August 10, 2006 by Dr. Kari Sherman, licensed psychologist, Dr. Howard M. Rombom prepared a Psychological Evaluation and Consultation report, dated 8/15/06, which contained the following diagnosis:

Major Depressive Episode, Severe
Pain Disorder Associated w/General Medical Disability.
Injury Sustained on 6/10/05
Chronic Pain/Disability - Consequential Depression.

Report by Howard M. Rombom, Ph.D., P.C., to Dr. Michael Hearn, dated August 15, 2006, at 3.¹

In late August 2006, Spears apparently sought help for her depression at Lincoln Hospital; the hospital records contain the following instructions: "come back to the ER or call 911 if you feel any suicidal or Homicidal (sic) or if you feel the need to." Lincoln Hospital, August 29, 2006.

In September 2006, Spears saw Dr. Daria Jan Salzman at what appears to be the request of the TA for an independent evaluation by an internal medicine doctor. In her report, Dr. Salzman concluded: "[t]he claimant will have difficulty working and communicating because of hoarseness in her voice, but otherwise would be able to return to work." Letter from Daria Jan Salzman, M.D., To Whom It May Concern, dated September 29, 2006, at 2.

On October 2, 2006, Spears was seen at the Central Medical Services of Westrock, where she was diagnosed with depression, asthma, chronic laryngitis and back pain.

On October 3, 2006, Spears applied to NYCERS for disability retirement, indicating the nature of her injury to be: "Reactive

¹ Dr. Rombom continued to see Spears at least until November 14, 2007. In the Workers Compensation Board form covering the period from October 17, 2007 to November 14, 2007 he again stated that her condition was a "consequential psychological injury secondary to physical injury" and characterized her condition as "DSM IV 296.23 major depressive episode severe, DSM IV pain disorder ass. w/general medical condition."

Airway Disease, Chronic Hoarse Voice due to damaged Vocal Chords, Lumbar Radiculopathy, Severe Depression, and Diabetes" (NYCERS Application for Disability Retirement, at 5), resulting from the June 10, 2005 incident when chemicals were allegedly sprayed in her booth. In response to the question on the retirement application regarding whether she had any other accidents or injuries on the job, she indicated that in 1996 her hand had been slammed in the door of her booth. Spears submitted Physician's Reports of Disability from Dr. Nicholas Gno and Dr. Linotte Jean-Jeune in support of her application.

On October 25, 2006, Spears was evaluated by Dr. Lawrence Scharer for Nationwide Evaluation Services. In his evaluation he stated:

Since her last visit here in April 2006 her primary problems continue to be orthopedic with diffuse body pain and weakness.² She has daily cough and shortness of breath with activity but her activity seems limited more by weakness and pain than by asthma. Her primary care physician doesn't mention respiratory problems keeping her from working. She only needs her albuterol inhaler a few times each week. Her pulmonary disability is mild but she now needs assistance with various activities of daily living making her overall degree of disability moderate.

Letter from Dr. Lawrence Scharer to Nationwide Evaluation Services, dated October 25, 2006, at 2.

In connection with her complaints of depression, in November

² Spears had MRI's in 2005 and 2006 in connection with spine and hip problems.

2006 Spears consulted Dr. Hugo M. Morales, who made the following evaluation:

Mental Status

Throughout this evaluation Patient depicted a sad, worrisome, tearful demeanor. She was neat in her personal appearance, but quite detached from the interview situation with obvious retarded psychomotor activity. After I questioned her repeatedly she appeared to be well oriented to time, place and person. Her stream of mental activity was coherent and relevant. Her emotional reactions were appropriate with thought content.

Patient's mood was severely depressed as manifested by her somatic manifestations, frequent and prolonged crying spells, apathy, anhedonia, inability to cope with day-to-day activity, and feelings of helplessness, hopelessness and uselessness. During this evaluation she stated repeatedly that she has a long history with various companies without any serious problems but after this incident she feels totally destroyed. Her memory is fairly intact. Her insight and judgment are lacking.

DIAGNOSIS & CODE NO. 296.33
Major Depressive Disorder, Chronic, Severe.

CAUSALITY

It is my professional opinion, based on a reasonable degree of medical certainty, that Patient's present psychiatric condition was precipitated by the traumatic experience she suffered on June 10, 2005. This experience has not only affected her physically, but also mentally. It is also my professional opinion that she is temporarily marked partially disabled.

Letter from Dr. Hugo M. Morales to N.Y.C. Transit Authority, dated November 3, 2006, at 2. Spears continued to see Dr. Morales for depression at least once a month, until August 2007.

In the meantime, in January 2007, Spears came under the care of Dr. Shashi Patel, in connection with her respiratory problems.

Patel evaluated Spears as follows:

This 54-year-old patient developed acute pulmonary symptoms after being exposed to chemical at work and subsequently has continued to have increased difficulty in breathing and wheezing with persistent cough and also change in her voice. The complete PFT shows severe restrictive impairment with severely reduced diffusion capacity indicating a combined severe impairment as well as obstructive capacity.

Letter from Dr. Shashi Patel to Dr. Michael Hearn, January 25, 2007.

On February 7, 2007, the NYCERS Medical Board issued a report concluding that

the documentary and clinical evidence fail to substantiate that Diane Spears is disabled from performing the duties of a Station Agent with the Transit Authority.

The Medical Board finds insufficient support to warrant the conclusion that the events alleged to have occurred on June 10, 2005 were the competent cause of the claimant's upper respiratory and pulmonary symptoms.

The Board also finds that the injury of April 25, 1996 is not an accident and is not the competent cause of carpal tunnel syndrome of both wrists.

Therefore, the Medical Board recommends that Dianne D. Spears' application for Disability Retirement because of an accident be denied.

Medical Board Report, dated February 7, 2007, at 7.

Spears had also applied for Workers' Compensation, and on April 24, 2007, a Workers' Compensation Board hearing was held regarding her application. On April 30, 2007, the Board issued a decision determining that Spears "had a work related injury which

is amended to include consequential depression, chronic hoarseness and restrictive airway disease."

On April 17, 2007, Spears again saw Dr. Patel in connection with coughing and wheezing she had been experiencing since she was exposed to a lot of pollen while she was in North Carolina. In his evaluation of Spears, Dr. Patel noted that she had been having pulmonary problems since she was exposed to chemicals at her workplace in June 2005. ~~Letter from Dr. Sashi Patel to Dr. Michael Hearn, dated April 16, 2007.~~

On May 7, 2007, Spears' former counsel sent the decision of the Workers' Compensation Board and additional medical records to NYCERS. In response to those submissions, on July 12, 2007, the NYCERS Board of Trustees referred Spears' case back to the Medical Board for further consideration.

NYCERS referred Spears to Dr. Jochanan M. Weisenfreund, who examined her on August 20, 2007. Weisenfreund reviewed Dr. Morales's evaluation of Spears and concluded that "[s]ince the patient has not improved in spite of prolonged drug augmented psychiatric treatment, I find the patient unable to perform her duties as a station agent." Letter from Dr. Jochanan M. Weisenfreund to Karina Yu, Medical Division NYCERS, dated August 20, 2007, at 4. However Weisenfreund also stated

[n]o incident report by the employer and no medical evaluation or hospital report confirming a *sudden* inflammation of vocal cords and pulmonary problems secondary to possible toxic spray was submitted for my

review. I am therefore unable to confirm causal relationship between the psychiatric condition and the alleged incidents.

Id.

On September 19, 2007, Spears appeared before the Medical Board for a further interview and examination. On the basis of that further interview and examination the Medical Board concluded that

the documentation and clinical evidence substantiate that Dianne Spears is disabled on psychiatric grounds; however again, the Medical Board reaffirms that the two incidents described are not accidents and are not the cause of her current disability.

Medical Board Report, dated September 19, 2007, at 3.

On November 28, 2007, Spears again saw Dr. Morales, who concluded the following regarding the cause of her depression:

I have carefully reviewed patient's history and there is no clinical evidence of psychiatric treatment or psychological problems prior to patient's accident on June 10, 2005, when "a co-worker sprayed some kind of chemical component into the booth she was working." Patient developed a burning sensation on her throat and breathing difficulties. From a psychiatric point of view this incident has been perceived by patient as a serious and impacting stressor capable of precipitating a serious Major Depressive Disorder. It is a well establish (*sic*) factor that a severe stressor can cause PTSD and also Traumatic Major Depressive Disorders, which in my opinion is what happen (*sic*) to Ms. Spear. Treatment must continue."

Letter from Dr. Hugo M. Morales to NYC Transit Authority, dated November 28, 2007, at 2.

On December 28, 2007, in an Addendum to its September 19, 2007, the Medical Board specifically noted that it was in

agreement with Dr. Weisenfreud, finding:

that the documentary and clinical evidence substantiate that Diane D. Spears is disabled from performing the duties as a Station Aide with the Transit Authority due to major depression.

The Medical Board fails to find a causal relationship with the incidents of April 25, 1996 and June 10, 2005.

The Medical Board does not find a disability related to the reactive airway disease or other upper respiratory problems that will preclude her from performing the full duties of a Station Agent with the Transit Authority.

Medical Board Report, Addendum, dated December 28, 2007, at 4.

On February 14, 2008, the Board of Trustees adopted the recommendation of the Medical Board that Spears' application for Disability Retirement be denied. It is that decision which is challenged in this Article 78 proceeding.

Spears continued under Dr. Patel's care even after the Trustee's decision, and on March 6, 2008, Dr. Patel indicated in a letter To Whom It May Concern, that Spears was "totally disabled from her pulmonary condition." The letter noted that Spears is not able to climb stairs and needs to relocate to a ground floor apartment or to a building where there is a functioning elevator.

Discussion

When a member of the New York City Employees Retirement System, who has less than 10 years service, applies for disability retirement, she must show that she "was physically or

mentally incapacitated for performance of gainful employment as the natural and proximate result of an accident not caused by [her] own willful negligence sustained in the performance of [her] duties in active service while actually a member of the retirement system." Retirement and Social Security Law § 605 (b) (3).

The determination of whether she is entitled to accident disability retirement is a two-step process. The Medical Board must determine both whether the employee is "'physically or mentally incapacitated for the performance of city-service'" and if disabled, "whether the disability was 'a natural and proximate result of an accidental injury received in such city-service.'" *Matter of Borenstein v New York City Empls. Retirement Sys.*, 88 NY2d 756, 760 (1996), quoting Administrative Code of City of N.Y., § 13-168 (a).

Where the Medical Board's disability determination is being challenged, it will not be disturbed if it is based on substantial evidence. *Id.* As the Court of Appeals indicated, "[w]hile the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require 'some credible evidence.'" (citations omitted). *Id.*

Here, although the Medical Board initially determined that Spears was not disabled because of her upper respiratory and

pulmonary symptoms or her carpal tunnel syndrome, in its September 2007, and December 2007, decisions it concluded that Spears is disabled by depression. The Medical Board's disability determination is, therefore, not being challenged.

Despite the finding of disability, however, in its December 28, 2007 Addendum decision, the Medical Board denied Spears' application for disability retirement, because it failed to find a causal relationship between her depression and either her 1996 hand injury, or the June 2005 incident, when chemicals were allegedly sprayed in her booth. The Medical Board further concluded that her respiratory problems did not prohibit her from performing her full duties as a Station Agent. The issue before this Court is whether Respondent's determination, that Petitioner failed to establish that her disability was causally related to the June 10, 2005 incident, was arbitrary and capricious.³

³Respondent's Memorandum of Law states that the issue of whether the incident of June 10, 2005 constitutes an accident (which Respondent notes is defined as an incident which is "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact") is not at issue in this Article 78 proceeding because Petitioner failed to prove that she was disabled as a result of a work-related injury. It is not clear whether the NYCERS Board of Trustees denied Petitioner's claim on the basis that Petitioner failed to show that she was disabled as the result of an accident. In its October 1, 2007 letter, the Trustees advised Petitioner that the "Medical Board found that you are disabled but determined that the incident was not an accident." However, the Trustees issued a subsequent letter, dated February 4, 2008, denying Petitioner's application, stating only that it "adopted the recommendation of the Medical Board." The December 28, 2007 Addendum decision of the Medical Board

The second step of the process of determining a claim for disability retirement involves the NYCERS Board of Trustees (the Trustees). The Trustees are bound by the Medical Board's determination regarding disability, however, the Trustees must make an independent determination regarding causation, although the Medical Board may make a recommendation regarding causation. *Matter of Borenstein v NYCERS*, 88 NY2d 756, 760 [1996]). With respect to the second stage, a court may not disturb the Trustees' finding of no causation if "there was any credible evidence of lack of causation before the Board of Trustees." *Matter of Meyer v Board of Trustees of the N. Y. City Fire Dept. Art. 1-B Pension Fund*, 90 NY2d 139, 145 (1997). The credible evidence must be "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion." *Id.* at 147. An absence of substantial evidence has been found "when the denial was premised only on a summary conclusion of no causation and lacked any factual basis" (*id.*) as, for example,

found that "there was insufficient evidence that the events alleged to have occurred on June 10, 2005 was a competent causal factor of her disability" and that the June 10, 2005 incident was not "an accident." However, the conclusion, that the June 10, 2005 incident was not an accident, is not re-iterated in the Addendum's last paragraph entitled FINDING AND CONCLUSIONS. Upon remand (discussed *infra*), the Trustees are directed to clarify whether the denial is also based on a determination that the June 10, 2005 incident is not an accident and the basis for such determination.

where the Trustees relied on incomplete investigation and conclusory reporting by the Medical Board or merely accepted the bald finding of the Medical Board. *Id.*, citing *Matter of Bennett v Board of Trustees of Police Pension Fund of City of N. Y.*, 20 AD2d 522, 522-523 (1st Dept 1963), *affd* 16 NY2d 562 (1965). The failure of an agency to set for an adequate statement of the factual basis for a determination precludes fair judicial review in an Article 78 proceeding and requires the annulment of that determination. *Montauk Improvement Inc. v Proccacino*, 41 NY2d 913 [1977]).

To meet her burden of proof on causation, Petitioner points to (1) the report of Dr. Rombom, which indicated that Petitioner's complaints of depression were consistent with his diagnosis of a "Major Depressive Episode" associated with the June 2005 incident and (2) the report of Dr. Morales, which indicated that Petitioner's complaints of depression were consistent with his diagnosis of a "Major Depressive Disorder, Chronic, Severe" which was "precipitated by the traumatic experience she suffered on June 10, 2005." Dr. Morales further stated his opinion that the incident on June 10 2005 was perceived by Petitioner "as a serious and impacting stressor capable of precipitating a serious Major Depressive Disorder." Petitioner further points to the ruling of the Workers' Compensation Board, determining that she had a work related

injury resulting in disability. Further, from the fall of 2006, the evidence indicates that Petitioner consistently reported to her doctors that her depression resulted both from her physical pain and from the trauma she experienced when her booth was sprayed with chemicals by a co-worker.

The Trustees' determination is arbitrary and capricious for two reasons. First, the Court cannot determine if the Trustees made an independent determination of causation, as mandated by law. In the denial of Spears' application, the Trustees merely stated that Petitioner's application was denied and that the Trustees "adopted the recommendation of the Medical Board." Although the Trustees were not required to adopt Dr. Rombom's or Dr. Morales' evaluations of Spears' condition on the issue of causation, there is no indication that they considered the doctors' assessments on that issue. Further, although it is true that NYCERS is not bound by the ruling of the Workers' Compensation Board (*see Matter of Kalachman v Board of Trustees of the N. Y. City Fire Dept., Article 1-B Pension Fund*, 224 AD2d 619, 620 [2d Dept 1996]), it is also not clear whether the Trustees considered the determination of the Workers' Compensation Board that Spears' depression was workplace-related.

Second, to the extent that the Trustees relied upon the Medical Board's findings as to causation, which in turn relied upon the findings of Dr. Weisenfreund, the determination is also

arbitrary and capricious. With respect to the issue of causation, the Medical Board stated that

Medical Board has reviewed the entire documentation submitted and finds no contemporaneous documentation of treatment immediately following or within proximity of related to this exposure. This includes review of the entire medical documentation submitted as well as review of the Workman's Compensation case history review. Therefore, we are in agreement with Dr. Weisenfreund, there is insufficient documentation to substantiate her psychiatric disability to this alleged event.

Addendum at 3.

As to causation, Dr. Weisenfreund stated that

No incident report by the employer and no medical evaluation or hospital report confirming a *sudden* inflammation of vocal cords and pulmonary problems secondary to possible toxic spray was submitted for my review. I am therefore unable to confirm causal relationship between the psychiatric condition and the alleged incident.

Weisenfreund letter, at 4.

However, Weisenfreund's determination, that he could not confirm "a causal relationship between the psychiatric condition and the alleged incident" because of the lack of a "medical evaluation or hospital report confirming a *sudden* inflammation of vocal cords and pulmonary problems secondary to possible toxic spray" is irrational.⁴ Pursuant to statute, the issue is whether

⁴Weisenfreund's requirement, that he review an incident report to determine whether causation existed, is also misplaced as there is no indication that the Transit Authority contests Petitioner's allegation that a co-worker sprayed her booth with chemicals on June 10, 2005.

Petitioner's depression was "a natural and proximate result" of the incident on June 10, 2005, and that has nothing to do with whether Petitioner documented a sudden physical condition. Although it is not clear whether Weisenfreud presumed that a mental disability can only arise from a sudden physical condition (which is irrational), it is clear that whatever his thinking, he applied an incorrect standard of causation, which was relied upon by the Medical Board and the Trustees (*Matter of Tobin v Steisel*, 64 NY2d 254 [1985] [Trustees' determination reversed where Medical Board and Trustees applied an incorrect standard of causation]).⁵

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the February 14, 2008 determination of respondent New York City Employees' Retirement System denying Spears' application for disability retirement benefits under section 605 of the Retirement Social and Security Law and the determination of the Medical Board are vacated and annulled, and, the matter is remanded to the Board of Trustees to clarify the issues raised

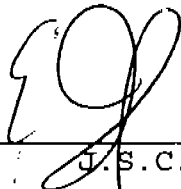
⁵To the extent the Medical Board's finding on causation was separately based on the lack of "contemporaneous documentation of treatment," it is not clear whether the Board is referring to Petitioner's respiratory/pulmonary treatment or psychiatric treatment. Nor is the medical significance of this lack of documentation clear, as it relates to the cause of Petitioner's mental disability.

herein and to give full and independent consideration to the question of causation of Spears' disability due to depression.

This Constitutes the Decision and Judgment of this Court.

Dated: April 22, 2009

ENTER:



U.S.C.
EMILY JANE GOODMAN