

<b>Matter of Athanassiou v Kelly</b>
2009 NY Slip Op 31651(U)
July 21, 2009
Supreme Court, New York County
Docket Number: 116565/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon John A. Middleer

PART 11

Index Number : 116565/2008

ATHANASSIOU, THEOPHILOS

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 4/30/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

on this motion <sup>to hear</sup> ~~to~~ for Article 78 relief

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 <sup>petition</sup> is decided in accordance with the attached <sup>Memorandum Decision Order + Judgment</sup>

**UNRECORDED 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: July 21, 2009

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 11

-----X  
In the Matter of the Application of  
THEOPHILOS ATHANASSIOU,

Petitioner,

Index No. 116565/08

For a Judgment under Article 78 of the Civil Practice Law  
and Rules,

- against -

RAYMOND KELLY, as the Police Commissioner of the City  
of New York, and as Chairman of the Board of Trustees of the  
Police Pension Fund, Article II, THE BOARD OF TRUSTEES  
of the Police Pension Fund, Article II, NEW YORK CITY  
POLICE DEPARTMENT and THE CITY OF NEW YORK  
OF BOARD OF TRUSTEES NEW YORK CITY  
PENSION FUND,

Respondents.

**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).

-----X  
JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Theophilos Athanassiou seeks a judgment annulling the determination of the respondents, which denied him a line of duty accident disability retirement ("ADR") pursuant to Administrative Code § 13-252, and ordering respondents to retire him with a line of duty ADR allowance, retroactive to the date of his service retirement. In the alternative, petitioner requests that the court direct a hearing on the matter, or allow petitioner to present testimony to the Board of Trustees in order to prove his entitlement to ADR. Respondents seek dismissal of the petition, and contend that they acted reasonably, lawfully and properly in denying petitioner an ADR.

Background

Petitioner received an appointment to the uniformed force of the New York City

Police Department (“NYPD”) on February 4, 1988 and became a member of the Police Pension Fund (“PPF”) thereafter. Petitioner was on-duty on September 11, 2001, and responded to the World Trade Center attacks. (Ver. Pet. ¶ 6). He was in the “immediate vicinity” when there was a loud explosion and when the first tower began to collapse. (Ver. Pet. Ex. A). Immediately after this incident, petitioner sought treatment at the Chelsea Piers Triage Center for painful and constant ringing in his ears. (See Ver. Ans. Ex. 2). He did not seek treatment again for this condition until April 28, 2005 (see Ver. Pet. Ex. B), following which he underwent a long sequence of tests and examinations (see Ver. Pet. Exs. C-H). Drs. Kenneth J. Wooh and Helen H. Kim performed the April 28, 2005 evaluation, finding that petitioner had “severe tinnitus due to bilateral[,] moderately severe hearing loss” (Ver. Pet. Ex. B).

Dr. Nicholas Tsirilakis, an NYPD Neurologist, conducted examinations on May 24, 2005 and October 20, 2005. (Ver. Ans. Exs. 4, 5). He diagnosed petitioner as having “severe bilateral hearing loss, worsening and with persistent tinnitus ... after hearing aids evaluation [sic] retirement on accident disability is suggested.” (Ver. Ans. Ex. 5).

Following Dr. Tsirilakis’ findings, petitioner began seeking medical attention at the League for the Hard of Hearing (Ver. Pet. Exs. F-J). Similarly to Dr. Tsirilakis’ findings, the first League report, by Jennifer Main, Clinical Fellow of Audiology; Susan Adams, Senior Audiologist; and Dr. J. Thomas Roland, dated October 21, 2005, “indicate[d] that Mr. Athanassiou has a bilateral moderate to severe sensorineural hearing loss.” (Ver. Pet. Ex. F). However, the report also noted that the testing of petitioner’s speech recognition thresholds and his puretone recognition thresholds provided inconsistent results, and recommended reevaluation (Id.).

Susan Adams conducted that follow-up on December 23, 2005, this time finding that “[t]hree frequency pure tone averages are 15 dB HL in the right ear and 15 dB HL in the left ear. Speech recognition thresholds were obtained at 15 dB HL in both ears.” (Ver. Pet. Ex. G). Adams’ further assessments revealed that petitioner “has difficulty hearing in the presence of background noise while holding a conversation while on the street. . . . The[ test] results indicate that [petitioner] can be expected to have difficulty communicating in situations where people are speaking in a background of noise, however he is a very borderline candidate for amplification. . . . Due to the configuration of the hearing loss it is expected that Mr. Athanassiou will have difficulty differentiating between high frequency speech sounds such as sh, s, f and t . . . .” (Id.).

Petitioner’s January 11, 2006 examination at the League, by Adams and Dr. Roland, had similar conclusions. In their report, they remarked that petitioner “described his difficulty tolerating loud sounds like ‘an ice pick’ in his ear. . . . [Petitioner] reports that over the past month tinnitus was present 100% of his waking hours and that its presence was annoying or distressing 100% of the time that it was heard.” (Ver. Pet. Ex. H). Petitioner’s final examination at the League, which Adams conducted on June 14, 2006, had similar test findings as previously. (See Ver. Pet. Ex. I).

On August 18, 2005, petitioner submitted a Line of Duty (“LOD”) injury report alleging that he injured his hearing as a result of being present during the collapse of the towers. (Ver. Pet. Ex. A). On March 31, 2006, he submitted an application for ADR alleging hearing loss. (Ver. Ans. Ex. 1). In addition to petitioner’s application for ADR, the Police Commissioner filed an application on petitioner’s behalf for Ordinary Disability Retirement (“ODR”). (Ver. Pet. Ex. K).

Pursuant to these applications and the reviews of the Medical Board Police Pension Fund (“Medical Board” or “Board”), petitioner also underwent further medical examinations as described infra.

Medical Board’s First Review:

The Medical Board first interviewed petitioner and considered his application for ADR on July 19, 2006. (Ver. Ans. Ex. 3). The Medical Board noted three of petitioner’s medical reviews, the two dated May 24, 2005, and October 20, 2005, both by Dr. Tsirilakis, and the one date January 11, 2006, by Dr. Roland (see id. ¶¶ 3-5). It is unclear whether the Board had petitioner’s other examinations to date on its record; at the very least, the NYPD funded petitioner’s League examinations (see Ver. Pet. Exs. C-H).

After noting these medical reports and examining the petitioner himself, the Board stated:

Multiple audiograms were performed throughout the past few years and they reveal inconsistent changes.<sup>[1]</sup> On interview, the officer stated that he sustained a hearing injury on September 11, 2001, while working at the World Trade Center collapse. He stated that he had some hearing loss and tinnitus for a four year period before he went to see a doctor. The tinnitus in the left ear became very severe approximately one year ago. He was given a bilateral hearing aid, which produces light noise to help him with his persistent tinnitus. He stated that he is now able to sleep at night. He has no difficulty driving a car but recently has developed dizziness. (Ver. Ans. Ex. 3 ¶¶ 5-6).

The Board decided to defer its final decision until petitioner received an evaluation from Marc Kramer, Ph.D, Consultant in Audiology-NYPD. (Id. at ¶ 7).

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<sup>1</sup> The Court notes that it is unclear what inconsistent changes the Board is referring to, since it does not appear the Board discussed the inconsistent test results of October 21, 2005, and the Board fails to explain whether or how petitioner’s auditory changes over time were somehow self-inconsistent or were inconsistent with some external observation.

Medical Board's Second Review:

Dr. Kramer assessed petitioner on July 25, 2006, and in his concomitant report to the Board, Dr. Kramer wrote:

The magnitude of this member's hearing loss, including his depressed speech sound discrimination (recognition) scores in the soundfield both in quiet and in noise, suggest that his hearing abilities no longer meet a reasonable standard with regard to performing the duties generally associated with the title of police officer. The etiology of this hearing loss is somewhat unclear in that both with respect to the magnitude of the low frequency component [sic]. My own assessment of a group of firefighters who felt that they had lost hearing as a result of being in closer proximity to the collapses of the World Trade Center buildings revealed that a comparison of their audiologic findings with tests that had been conducted prior to their exposures failed to demonstrate any change in auditory status.

(Ver. Ans. Ex. 8).

At the conclusion of his report, Dr. Kramer found that "[t]he etiology of this hearing loss is unclear and review of these findings with an otolaryngologist is recommended." (Id.)

Following this recommendation, Dr. Michael A. Gordon, Head of the Otology and Neurotology Section of the Long Island Jewish Medical Center, saw petitioner on August 7, 2006. (Ver. Ans. Ex. 9). Dr. Gordon reviewed the audiological testing and then concluded, "Mr. Athanassiou has noise-induced hearing losses bilaterally. Based on the history, it is very likely that it was caused or significantly worsened by his noise exposure at the site of the World Trade Center on 9/11/01. The pattern of hearing loss and the history are not at all suggestive of presbycusis (age related hearing loss) or hearing loss caused by other ear disease." (Id.)

In its August 23, 2006 meeting, the Board reviewed the findings of both Dr. Kramer and Dr. Gordon. (Ver. Ans. Ex. 7). The Board then determined that although the

petitioner is disabled from performing the full duties of a New York City Police Officer, the “etiology of the hearing loss is in question and [the Board] does not feel that it is related to the incident of September 11, 2001, based upon the characteristics of the audiologic findings in Dr. Kramer’s report.” (Id. ¶ 4). It concluded that the petitioner suffered from bilateral hearing loss and then it approved the Police Commissioner’s application for ODR and disapproved petitioner’s application for ADR. (Id.)

Medical Board’s Third Review:

On October 18, 2007, the Board of Trustees remanded the petitioner’s ADR application to the Medical Board for the petitioner to be re-examined and the ADR application to be re-evaluated in light of “new evidence.” (Ver. Ans. Ex. 12). The new evidence was an evaluation of petitioner by Dr. R. Richard Leinhardt, Board Certified Otolaryngologist, on February 28, 2007. (Ver. Ans. Ex. 13 ¶ 4; see Ver. Pet. Ex. O). Dr. Leinhardt also had evaluated petitioner on December 12, 2006. (Ver. Pet. Ex. O). Dr. Leinhardt reviewed audiograms on two separate occasions and then concluded in his report to the Board:

Mr. Athanassiou’s diagnosis is Bilateral Noise Induced Neurosensory Hearing Loss which is mild to moderate to severe from the low to the high frequencies. He does not appear to be a candidate for amplification and in view of the degree of loss is unable to carry out the full duties of a New York City police officer. He has applied for disability due to hearing loss and based on the fact that no prior history existed it is most probably, causally related to his exposure to loud noise on September 11, 2001. Contrary to any other objective findings he should be seriously considered for Work Related Accident Disability Retirement.

(Id.).

In its November 28, 2007 meeting, the Board acknowledged the report from Dr. Leinhardt. (Ver. Ans. Ex. 13). It then interviewed the petitioner, who stated that he did not have any significant hearing problems prior to September 11, 2001. (Id. ¶ 6). The

Board noted that the petitioner was “directly below” during the building explosion and then ran from the area during the building collapse. (Id.). It mentioned that petitioner now has severe difficulty hearing, wears hearing aids, and continues to have tinnitus. (Id.). The Board then concluded that it would defer its decision until it reviewed letters from Dr. Gordon and Dr. Leinhardt and had possible discussions with these physicians. (Id.).

Medical Board’s Fourth Review:

The Medical Board reviewed the petitioner’s application for ADR for the fourth and final time on February 6, 2008. (Ver. Ans. Ex. 16). In its evaluation, it reviewed two letters from Dr. Kramer. (Id. ¶ 2).

In his letter dated December 13, 2007, Dr. Kramer challenged both Dr. Gordon’s and Dr. Leinhardt’s conclusions that petitioner’s hearing loss was causally related to September 11, 2001 (Ver. Ans. Ex. 17). Dr. Kramer cited his previous findings regarding the several September 11, 2001, first-responder firefighters to support his position, although he acknowledged that, unlike the firefighters, the petitioner did not have any prior audiologic findings except the one performed prior to his appointment to the police force (Id.).

Dr. Kramer agreed that petitioner could no longer perform his duties as a police officer. At the conclusion of his letter he suggested that he also be provided with any other hearing tests that were performed on petitioner. (Id.).

In his letter dated January 9, 2008, Dr. Kramer reviewed the tests performed on petitioner by the League for the Hard of Hearing on October 21, 2005 and December 23, 2005. (Ver. Ans. Ex. 18). In his letter, Dr. Kramer indicated that the “[i]mport of the[ ]

December [23,] 2005 test findings [is] significant in that they reflect a significantly better auditory status than that which had been previously obtained at the League and subsequently obtained at other locations including Dr. Leinhardt's office and my own." (Ver. Ans. Ex. 18).

Dr. Kramer then wrote that the test result obtained on December 23, 2005 would not generally disable someone from performing his duties as a police officer and if there had been any hearing loss acquired thereafter, "then it would not be as a result of the exposure alluded to at the site of the World Trade Center collapse on September 11, 2001. In addition, the reliability of the subsequent tests reflecting further hearing loss is called into question as are his complaints." (Id.). Dr. Kramer concluded by advising the Board that in light of the discrepancy of the hearing tests, it may want to have Dr. Gordon and Dr. Leinhardt review the testing performed by the League for the Hard of Hearing. (Id.).

The Board found that petitioner could not perform the duties of a police officer, but again did not approve petitioner's application for ADR. (Ver. Ans. Ex. 16 ¶ 3). Using Dr. Kramer's evaluation as a basis, it stated that it fails to ascribe the hearing deficit to the results of September 11, 2001. (Id.). The Board indicated that "based upon the findings of exaggeration, the magnitude as claimed by the officer may not be as severe as suggested. . . . The final diagnosis is Bilateral Hearing Loss." (Id.).

On September 10, 2008, the Board of Trustees adopted the Medical Board's recommendation and disapproved petitioner's ADR application. (Ver. Ans. Ex. 23). Although the Board of Trustees voted 6-6 to upgrade petitioner to ADR, in the case of a tie, the Board awards ODR benefits. (Id.). The union trustees then withdrew petitioner's

ODR application on his behalf, and he retired from service. (Id.).

On or around December 8, 2008, petitioner filed this Article 78 petition.

Petitioner contends that the Board of Trustees should not have adopted the Medical Board's determination because the Medical Board failed to consider competent medical evidence and neglected to determine causation. Respondents allege that petitioner has not met his burden of establishing that he was incapacitated as a result of a work related accident.

#### Discussion

Similar to other city pension funds and retirement systems, there is a two-step process when a member of the police force pursues retirement based on accidental disability. See Matter of Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d 756, 760 (N.Y. 1996); New York City Admin. Code § 13-252. First, a Medical Board must examine and certify whether the applicant is physically or mentally incapacitated for duty. Borenstein, 88 N.Y.2d at 760. The Medical Board has the sole power to determine whether the applicant is injured and whether this disability prevents the applicant from performing his duties. Id. Secondly, if the Board deems the applicant disabled, it makes a recommendation to the Board of Trustees whether the disability was the natural and proximate result of a line-of-duty accident. Id. The natural-and-proximate standard includes "accident[s] which precipitate[] the development of a latent condition or aggravates a preexisting condition . . . ." Tobin v. Steisel, 64 N.Y.2d 254, 257 (N.Y. 1985). The applicant has the burden of proving causality. Archul v. Bd. of Trs. of the New York City Fire Dep't, Article 1-B Pension Fund, 93 A.D.2d 716, 717 (1st Dep't 1983), aff'd, 60 N.Y.2d 567 (1983). Causality is the only issue in this case, since

the Medical Board determined that petitioner is disabled, (Ver. Ans. Ex. 16 ¶ 3).<sup>2</sup>

In an Article 78 proceeding challenging a disability determination, the courts will sustain Medical Board's finding unless it lacks rational basis, or is arbitrary or capricious. Borenstein, 88 N.Y.2d at 760. "[O]rdinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While 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.'" Id. at 761 (internal citations omitted). Credible evidence is "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . [and] must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion [internal citations omitted]." Matter of Meyer v. Bd. of Trs. of the New York City Fire Dep't, Art. 1-B Pension Fund, 90 N.Y.2d 139, 147 (N.Y. 1997) (citing Indiana Metal Prods. v. Nat'l Labor Relations Bd., 442 F.2d 46, 51 (7th Cir. 1971)). When conflicting medical opinions are presented, the Medical Board's opinion takes precedence, Borenstein, 88 N.Y.2d at 760, but the Board must base that opinion on more than a "summary conclusion" lacking factual basis, Meyer, 90 N.Y.2d at 147. When, as here, the determination of the Board of the Trustees has resulted in a tie vote, the court may not disturb the final award, "as long as there was

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<sup>2</sup>New York City Admin. Code § 13-252.1 creates a presumption that any "impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours 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." The statute sets forth varying "qualifying condition[s] or impairment[s] of health," none of which specifically refer to a hearing loss. New York City Admin. Code § 13-252.1(c)(vi). The Medical Board stated "that the presumption of the World Trade Center does not include hearing loss," (Ver. Ans. Ex. 7 ¶ 4), and petitioner does not challenge the Board's conclusions in this regard.

any credible evidence of lack of causation before the Board of Trustees . . . .” Meyer, 90 N.Y.2d at 145.

However, courts have annulled determinations of the Medical Board and Board of Trustees and remanded the matter to the Medical Board for further review when the medical findings do not sustain the Medical Board’s determination or when the petitioner’s medical issues were not adequately addressed. See, e.g., Matter of Rodriguez v. Bd. of Trs. of New York City Fire Dep’t, 3 A.D.3d 501 (2d Dep’t 2004).

Applying this standard to the present case, the court finds that the Medical Board did not sufficiently address the purported lack of causation between petitioner’s hearing loss and his being present during a loud explosion and the World Trade Center tower collapse. The Medical Board acknowledges petitioner’s undisputed disability (see, e.g., Ver. Ans. Ex. 16 ¶ 3), but relies entirely on Dr. Kramer’s position that “the etiology of [petitioner’s] hearing loss is in question,” (Ver. Ans. Ex. 16 ¶ 4), so as to avoid “ascrib[ing] the hearing deficit to the consequences of September 11, 2001.” (Ver. Ans. Ex. 16 ¶ 3).

However, Dr. Kramer’s position lacks supporting credible evidence. After diagnosing petitioner as disabled, Dr. Kramer, who is not a medical doctor but rather a Ph.D., acknowledged in his letter of July 31, 2006, that a specialist in otolaryngology would have to assess causality. (See Ver. Ans. Ex. 8). The otolaryngologist who then examined the case, Dr. Gordon, found that the events of September 11, 2001, “caused or significantly worsened” petitioner’s hearing disability. (Ver. Ans. Ex. 9). Nonetheless, the Board found in its August 23, 2006 review, that the “characteristics of the audiologic findings in Dr. Kramer’s report” of July 26, 2006, precluded a causal relation to

September 11. (Ver. Ans. Ex. 7 ¶ 4). However, the Board does not discuss the basis for this finding, which does not have support from the July 26, 2006, report in which Dr. Kramer simply concluded that the “etiology of [petitioner’s] hearing loss is unclear,” (Ver. Ans. Ex. 16 ¶ 4). Moreover, Dr. Gordon found that the events of September 11, 2001, caused petitioner’s hearing loss, offering the only conclusion regarding causality on the record. (See Ver. Ans. Ex. 7 ¶ 4). Cf. Borenstein, 88 N.Y.2d at 760 (recognizing the Medical Board’s power to select between conflicting medical opinions). The Medical Board’s conclusion thus bore no rational relation to the sole medical assessment regarding causality it had before it.

The Medical Board reviewed petitioner’s case again on November 28, 2007, after receiving the new medical evidence from Dr. Leinhardt. (See Ver. Ans. Exs. 13-16). Dr. Leinhardt, in his letter from April 7, 2007, found petitioner disabled and causally linked this disability to September 11, 2001, “based on this history.” (Ver. Ans. Ex. 15). The Board, rather than accept this conclusion which affirmed the only other conclusion it had on record, decided to defer its decision pending further review. (See Ver. Ans. Ex. 13 ¶ 7). Then, rather than have another medical doctor review the findings, it had Dr. Kramer, a Ph.D., review them, (see Ver. Ans. Exs. 17, 18), despite Dr. Kramer’s previously acknowledged inability to assess causality, (see Ver. Ans. Ex. 8). Doing so was not the Board’s only option; it had mentioned the “possible discussion of [Dr. Gordon’s and Dr. Leinhardt’s] letters with th[o]se physicians.” (Ver. Ans. Ex. 13 ¶ 7).

Dr. Kramer’s first letter, dated December 13, 2007, criticized both Dr. Leinhardt’s findings and the findings of Dr. Gordon, to whom Dr. Kramer had previously turned for assistance in determining the etiology. (Ver. Ans. Ex. 17). Where Dr. Gordon wrote,

“Mr. Athanassiou has noise induced hearing losses, bilaterally,” (Ver. Ans. Ex. 9), Dr.

Kramer wrote:

The hearing loss described by Dr. Gordon ... is not necessarily consistent with hearing losses of [noise related] origin in as much as there is loss of sensitivity in the lower frequencies and an absence of high frequency pathogenomic notch as might be expected in a noise induced hearing loss. If Dr. Gordon is referring to a possible acoustic trauma, (a hearing loss secondary to a single exposure), based upon reports of first responding firefighters who[m] I have previously examined it is highly questionable whether a short term exposure to the noise described [of September 11, 2001] would be capable of creating this hearing loss.

(Ver. Ans. Ex. 17).

The firefighter observations do not provide credible evidence in this case. These observations are not supported by documentary evidence, are not systematic, and lack any basis by which Dr. Kramer could credibly, objectively, and rationally compare them to other patients, such as petitioner. Notably, there is no discussion of whether the firefighters were also “directly below” an explosion, as was petitioner, (see Ver. Ans. Ex. 13 ¶ 6); whether the firefighters had helmets, or enjoyed other insulating obstructions; whether different people necessarily sustain the same level of injury when they undergo the same acoustic trauma; or any other consideration that might allow some rational inference to be drawn from Dr. Kramer’s alleged firefighter observations to other parties. (See Ver. Ans. Ex. 17). Dr. Kramer implicitly conjectures and speculates in his attempt to use the firefighters as an inferential basis, but the Medical Board needs more than “conjecture or unsupported suspicion.” See Meyer, 90 N.Y.2d at 197.

Further, Dr. Kramer discusses Dr. Leinhardt’s report without ever questioning his conclusions as to causality. Dr. Kramer wrote:

In his report dated April 7, 2007 Dr. Leinhardt’s last paragraph states that “Mr. Athanassiou’s diagnosis is bilateral induced sensorineural hearing

loss is mild to moderate to sever from low to high frequencies[.] . . . [I]t is unclear whether . . . Dr. Leinhardt is referring to an acoustic trauma as opposed to a noise induced hearing loss generally associated with long term excessive noise exposures. It remains unclear to me why in his second sentence he states that “he does not appear to be a candidate for amplification[.]” For the most part, patients with a hearing loss of this magnitude and configuration do quite well with appropriately chosen prosthetic amplification. Finally he notes[,] “he has applied for disability due to hearing loss based [sic] on the fact no prior history existed it is most probably related [sic] to his exposure to loud noise on September 11, 2001.[.]” [and that] “contrary to any other objective medical findings he [sic] should be seriously considered for work related accident disability retirement[.]”

(Ver. Ans. Ex. 17).

Dr. Kramer’s first two criticisms, concerning the diagnosis and treatment, do not relate to the causality issue he was considering. In his letter, Dr. Kramer asserted that “the etiology of [petitioner’s] hearing loss is somewhat unclear ” and requested a hearing test performed by either the New York City Police Department or the League for Hard of Hearing in order to assign an etiology for petitioner’s hearing loss (Ver. Ans. Ex. 17).

Dr. Kramer’s second letter, dated January 9, 2008, discussed petitioner’s testing at the League for the Hard of Hearing from October 21, 2005, and December 23, 2005 (Ver. Ans. Ex. 18). Dr. Kramer wrote that in the first test, the speech reception thresholds and the word recognition tests were not in good agreement with pure tones (i.e., suggesting exaggeration.)” (Id.). The second test’s findings, which did not have such a discrepancy, were to Dr. Kramer:

significant in that the[y] reflect a significantly better auditory status th[a]n that which had been previously obtained at the League and subsequently obtained at other locations including Dr. Leinhardt’s office and my own. . .

. . . .  
 In as much as this member provided test results (December 23rd, 2005) suggesting a hearing loss of a magnitude that would not generally qualify as disabling . . . , if there has been any hearing loss acquired thereafter then it would not be as a result of the exposure alluded to at the

site of the World Trade Center collapse on September 11, 2001. In addition, the reliability of subsequent tests reflecting further hearing loss is called into question as are his complaints.

(Id.) (emphasis in the original).

First, Dr. Kramer fails to support with a medical explanation his conclusion that the December 2005 test results call into question the reliability of subsequent tests at his office and at Dr. Leinhardt's office. Specifically, he fails to explain his conclusion that petitioner's hearing loss could not have deteriorated from 2005. Dr. Kramer's discussion is also incongruent with the medical doctors' findings and with his own previous discussion. All the medical professionals who have evaluated petitioner and addressed causality knew that after his triage care for acute, painful tinnitus on September 11, 2001, petitioner enjoyed a period of a period of approximately three-and-a-half years during which he was able to perform his duties, and yet none of these doctors found that this fact precluded the September 11th events as being the cause of petitioner's disability (see Ver. Pet. Exs. D, F-H, N, O). Even Dr. Kramer's original letter failed to preclude September 11, 2001 as the cause, despite Dr. Kramer's awareness that petitioner experienced only mild symptoms for a three-and-a-half year period following September 11th. (Ver. Ans. Ex. 8). Dr. Kramer's conclusion that the December 23, 2005 test result forestalls a conclusion that September 11, 2001 is the cause of petitioner's subsequent disability thus conflicts with his earlier letter and with the opinions of the medical doctors.

The Medical Board cannot use contradictory and unsubstantiated assertions to comprise its requisite substantial evidence. See Meyer, 90 N.Y.2d at 147. Moreover, absent from the Medical Board's determination is any explanation for its rejection of the

findings of Drs. Gordon and Leinhardt that petitioner's hearing loss was casually linked to his service on September 11, 2001. Brady v. City of New York, 22 N.Y.2d 601 (N.Y. 1968) (requiring the Medical Board to make a "careful and painstaking assessment of all available evidence . . ."). Further, even if the medical doctors had not expressed a view that September 11, 2001 was the cause of petitioner's disability, it cannot be said that the Medical Board's reliance on Dr. Kramer's unsubstantiated conclusion that the December 23, 2005 test results precluded September 11, 2001 as an explanation for petitioner's hearing loss was rational. See Meyer, 90 N.Y.2d at 147; McAdams v. Kelly, 2007 WL 2965402 (Sup Ct N.Y. Co. Oct. 2, 2007), 2007 N.Y. Slip Op. 51938(U) (holding that the Medical Board's summary denial of petitioner's application for ADR benefits was arbitrary and capricious).

Notwithstanding Dr. Kramer's opinion, the Medical Board found once again that petitioner "has a hearing deficit which precludes him from performing the full duties of a New York City Police Officer." (Ver. Ans. Ex. 16 ¶ 3). The Board did not provide its own discussion of causality other than to reject September 11, 2001 as an explanation "based upon Dr. Kramer's evaluation . . .," (id.), which does not provide the necessary substantial or credible evidence that the Board must have to formulate its determination, see Borenstein, 88 N.Y.2d at 761, Meyer, 90 N.Y.2d at 147. Cf. Weller v. Kelly, Supreme Court, New York County, 2007, Index. No. 109357/2006, Slip Op at 11 (holding that the Medical Board may not "cherry pick portions of letters and it received [or] disregard completely, without inclusion or comment, the parts that do not support its position."), Abramson v. Kelly, Supreme Court, New York County, 2006, Index No. 100294/2006, Slip Op at 6 ("It may be that this court's perception is the result of the Medical Board not having fully articulated its reasoning behind its determination.

However, because this court is not convinced that the Medical Board's determination is rational . . . petitioner's application is granted . . . annulling the findings.").

Thus as the Medical Board disregarded, without any credible explanation, Dr. Gordon's and Dr. Leinhardt's evaluations which indicated that petitioner did not suffer from any age-related hearing loss or ear disease, and that it was most likely caused or significantly worsened by noise exposure on September 11, 2001. (See Ver. Ans. Exs. 9, 15). As such, the Court must remand the matter to the Medical Board for a new assessment of the causality prong of petitioner's application for ADR.

#### Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of the petitioner's application for ADR; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent of directing that the Medical Board conduct a further evaluation of the petitioner's application for ADR with respect to the causation of petitioner's disability, and issue a determination on the subject application which delineates the medical conclusion and the evidence it finds that supports such conclusions, and upon issuance of its determination, and the Medical Board shall present such determination to the Board of Trustees, and the petition is otherwise denied.

Dated: July 2, 2009

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J.S.C.

**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).