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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 113654/2008

SHA-BETHEA, AARON

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 3-12-09

MOTION SEQ. NO. _____

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~~ petition is decided in accordance with the annexed Memorandum Decision Order + 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: July 22, 2009

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------X Index No. 113549/08

In the Matter of the Application of AARON SHA-BETHEA,

Petitioner,

Decision Order & Judgment

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

-against-

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

Respondents.

----------X

Joan A. Madden, J.:

Petitioner Sha-Bethea ("Petitioner"), a retired New York City police officer, moves, pursuant to CPLR Article 78, for a judgment: (1) reviewing and annulling the action of the respondents denying Petitioner an accident disability retirement ("ADR") allowance, pursuant to the General Municipal Law § 207-k, and declaring said action to be arbitrary, capricious, unreasonable, and unlawful; and either (2) directing and ordering respondents to retire Petitioner with an ADR allowance retroactive to the date of his ordinary disability retirement ("ODR") plus interest thereon; or in the alternative, (3) directing that the Board of Trustees of the Police Department Article II Pension Fund ("Board of Trustees") allow Petitioner 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 an ADR.

Background

Petitioner entered the uniform force of the New York City Police Department on June 30, 1992, and served continuously with the police force until his ODR (Ver. Pet. ¶ 4). Prior to his appointment, Petitioner passed all physical and mental examinations, and was deemed fit to perform full duties as a police officer (Id.).

During all times of his employment with the police department, Petitioner was a member of the Pension Fund, and made all contributions to the fund as required by law (Id. at ¶ 5).

On June 18, 1998, Petitioner went to the emergency room of St. Luke's Roosevelt hospital for a line of duty ("LOD") injury to his elbow and wrists (Ver. Pet. Ex. A). His blood pressure was taken at this time, and was recorded as 130/82 (Id.). On November 14, 2002, Petitioner again went to the emergency room of the same hospital for a LOD injury to his wrist; at this time, Petitioner's blood pressure registered 148/90 (Id.). The next day Petitioner returned to the emergency room because of a swelling in his wrist, and his blood pressure was 132/89 (Id.).

At routine physical examinations, Petitioner's blood pressure registered as follows: July 11, 2001, 150/100; August 12, 2003, 160/102; August 19, 2003, 150/98. (Ver. Pet. Ex. B).

On November 26, 2003, Petitioner underwent a CT scan of the thorax[1] (Ver. Pet. Ex. C). The report indicated:

1 The thorax is the "part of the mammalian body between the neck and the abdomen; also: its cavity in which the heart and lungs lie." Merriam-Webster.com, "Thorax," http://www.merriam-webster.com/dictionary/thorax.

> cardiomegaly[2] with right-sided aorta[3] with aberrant carotid[4] origins with left common carotid extending anterior to trachea.[5] Dilated left coronary artery, aneurysm[6] cannot be excluded. Aortic dissection[7] (complex flap) extending down from distal aortic arch to left common iliac artery[8] with parts of the dissection flap extending along the left subclavian artery[9] and superior mesenteric artery.[10](Id.).

On November 28, 2003, Petitioner underwent an MRA[11] of the chest, which revealed right-sided aorta with complex dissection, cardiomegaly and pleural effusion.[12] (Ver. Pet. Ex. D).

---

2 Cardiomegaly is an "enlarged heart seen on chest X-ray before other tests are performed to diagnose the specific condition causing [the] enlarged heart." MayoClinic.com, "Enlarged heart," http://www.mayoclinic.com/health/enlarged-heart/DS01129.

3 The aorta is the "arterial trunk that carries blood from the heart to be distributed by branch arteries through the body." Merriam-Webster.com, "Aorta," http://www.merriam-webster.com/dictionary/aorta.

4 "Carotid" means "of, relating to, or being the chief artery or pair of arteries that pass up the neck and supply the head." Merriam-Webster.com, "Carotid," http://www.merriam-webster.com/dictionary/carotid.

5 The trachea is "the main trunk of the system of tubes by which air passes to and from the lungs in the vertebrates." Merriam-Webster.com, "Trachea," http://www.merriam-webster.com/dictionary/trachea.

6 "An aneurysm . . . is a balloon-like bulge in an artery." National Heart Lung and Blood Institute Diseases and Conditions Index, "Aneurysm," http://www.nhlbi.nih.gov/health/dci/Diseases/arm/arm_what.html.

7 "Aortic dissection is a potentially life-threatening condition in which there is bleeding into and along the wall of the aorta, the major artery leaving the heart." MedlinePlus Medical Encyclopedia, "Aortic dissection," http://www.nlm.nih.gov/medlineplus/ency/article/000181.htm.

8 The iliac arteries are "two terminal branches of the abdominal aorta, becoming the internal iliac artery and giving off the external iliac artery . . . ." American Heritage Medical Dictionary, "Iliac Artery," available at http://medical-dictionary.thefreedictionary.com/Iliac+artery.

9 The subclavian artery is "the proximal part of the main artery of the arm or forearm." Merriam-Webster.com, "Subclavian Artery," http://www.merriam-webster.com/dictionary/subclavian+artery.

10 A mesenteric artery is "[o]ne of the arteries which arises from the abdominal portion of the aorta and distributes blood to most of the intestines." MedicineNet.com, "Mesenteric Artery," http://www.medterms.com/script/main/art.asp?articlekey=9913.

11 An MRA is a magnetic resonance angiogram, which "uses a magnetic field and pulses of radio wave energy to provide pictures of blood vessels inside the body." WebMD, "Magnetic Resonance Angiogram," http://www.webmd.com/heart-disease/magnetic-resonance-angiogram-mra.

12 "A pleural effusion is an accumulation of fluid between the layers of tissue that line the lungs and chest cavity." MedlinePlus Medical Encyclopedia, "Pleural Effusion," http://www.nlm.nih.gov/medlineplus/ency/article/000086.htm.

On February 5, 2004, Petitioner underwent surgery, which included "repair of the ascending thoracic[13] aortic aneurysm under deep hypothermia[14] and circulatory arrest with retrograde cerebral perfusion[15]" and "left subclavian bypass[16] with 6 millimeter graft." (Ver. Pet. Ex. E). The diagnosis was "type B aortic dissection,[17 and] dilation of the ascending thoracic aorta, [the] right sided aortic arch, [and the] retroesophageal left subclavian artery." (Id.).

On May 24, 2004, Petitioner underwent an MRI/MRA of the thorax, which revealed "[r]ight-sided aortic arch with status post repair of a descending thoracic aortic aneurysm and dissection. An aberrant subclavian vessel appears to have been reimplanted on the aortic arch." (Ver. Pet. Ex. F).

On May 26, 2004, Petitioner underwent an MRI/MRA of the abdomen, which revealed "[c]omplex aortic dissection of the abdominal aorta as described which extends into the common iliac arteries." (Ver. Pet. Ex. G).

On June 24, 2004, Petitioner underwent an echocardiogram, which revealed that his left ventricle[18] was dilated with overall normal systolic[19] function; the aortic root was dilated; the

13 "Thoracic" is the adjective form of "thorax." Cf. supra, note 1.
14 "Hypothermia," in a surgical context, means "the deliberate and controlled reduction of body temperature with cooling mattresses or ice as preparation for some surgical procedures." Mosby's Medical Dictionary, "Hypothermia," (8th ed. 2009), available at http://medical-dictionary.thefreedictionary.com/hypothermia (last visited July 14, 2009).
15 Perfusion is the "injection of fluid into a blood vessel in order to reach an organ or tissues, usually to supply nutrients and oxygen." American Heritage Dictionary, "Perfusion," available at http://medical-dictionary.thefreedictionary.com/perfusion (last visited July 14, 2009).
16 An arterial bypass surgery takes a healthy vein from the patient's leg or arm to bypass the blockage or to replace the aneurysm section of the artery. Northwestern Medical Hospital Bluhm Cardiovascular Institute, "Arterial Bypass Surgery," http://www.nmh.org/nmh/heart/vasculardisease/treatments/arterialbypasssurgery.htm.
17 Type-C aortic dissection "begins in the last (descending) part of the aorta and moves down the abdomen." MedlinePlus Medical Dictionary, "Aortic Dissection," http://www.nlm.nih.gov/medlineplus/ency/article/000181.htm.
18 A ventricle is a chamber of the heart which receives blood from a corresponding atrium and which forces blood into the arteries. Merriam-Webster.com, "Ventricle," http://www.merriam-

ascending aorta was dilated, measuring 3.6 cm.; mild mitral insufficiency;[20] and mild tricuspid insufficiency[21] with normal right ventricular systolic pressure." (Ver. Pet. Ex. H).

On June 22, 2004, Petitioner submitted an application for ADR, under the provisions of Gen. Mun. L. § 207-k, generally referred to as "the Heart Bill." (Ver. Ans. Ex. 1). In response to this application, the Police Commissioner had an application for ODR submitted. (Ver. Ans. Ex. 2 ¶ 1).

On October 22, 2004, the Medical Board conducted its first review of Petitioner's application. (Ver. Ans. Ex. 2). The Medical Board first examined a discharge summary from Einstein Montefiore Hospital, dated December 10, 2003, which described Petitioner as having a past medical history significant for hypertension.[22] (Id. at ¶ 3). The report indicated that Petitioner was advised to see a cardiothoracic surgeon regarding repair of the aortic aneurysm, and received prescriptions for several medications. (Id.). The Medical Board also reviewed the operative report dated February 5, 2004, which listed pre-operative and post-operative diagnoses of "Type B aortic dissection, dilation of the ascending thoracic aorta, right sided aortic arch,

---

webster.com/dictionary/ventricle.

19 The systolic blood pressure is the "maximum pressure exerted when the heart contracts." MedlinePlus Medical Encyclopedia, "Blood Pressure," http://www.nlm.nih.gov/medlineplus/ency/article/003398.htm.

20 "Mitral insufficiency" is an alternative name for "mitral regurgitation," which "is a disorder in which the heart's mitral valve suddenly does not close properly, causing blood to flow backward (leak) into the upper heart chamber when the left lower heart chamber contracts." MedlinePlus Medical Encyclopedia, "Mitral Regurgitation," http://www.nlm.nih.gov/medlineplus/ency/article/000177.htm.

21 "Tricuspid insufficiency" is an alternate name for "tricuspid regurgitation," which "is a disorder in which the heart's tricuspid valve does not close properly, causing blood to flow backward (leak) into the right upper heart chamber (atrium) when the right lower heart chamber (ventricle) contracts." MedlinePlus Medical Encyclopedia, "Tricuspid Regurgitation," https://www.nlm.nih.gov/medlineplus/ency/article/000169.htm.

22Hypertension is consistently high arterial blood pressure. Dorland's Medical Dictionary (27th ed. 1988).

retroesphageal left subclavian artery." (Id. at ¶ 5). The Medical Board also considered the post-operative MRI/MRA report indicated above, (id. at ¶ 6), as well as the June 24, 2004, echocardiogram (id. at ¶ 7). In addition to the submitted reports, the Medical Board interviewed Petitioner, who stated that he did not smoke and that there was no family history of hypertension or heart disease, and requested a physical examination of Petitioner which showed a blood pressure reading of 170/120 at the beginning of the examination, and 160/120 at the end of the examination. (Id. at ¶¶ 8, 9). The Medical Board noted petitioner "gave a history of hypertension for several months before the acute event," (id. at ¶ 10).

Despite such history, the Medical Board concluded that it was unable to determine whether Petitioner "had hypertension severe enough to have been significantly causative of the dissection," and indicated that it needed to know whether the wall of Petitioner's aorta was abnormal since "this information would be an important factor in determining whether his dissection was on the basis of a congenital abnormality . . . , or whether it was due to hypertension" (Id.). Consequently, the Medical Board deferred making a recommendation pending a receipt of a report relating to the quality of his aorta. (Id.).

On June 30, 2004, Dr. Danny Woo, one of Petitioner's treating physicians, wrote that Petitioner had "a history of hypertension and a type-B aortic dissection requiring emergent repair . . . . His dissection was likely secondary to his underlying hypertension." (Id.).

On January 14, 2005, the Medical Board reviewed Petitioner's case for the second time. (Ver. Ans. Ex. 9). The Medical Board received the MRI/MRA reports, which the Board had already seen. (Id. at ¶ 2). The Medical Board again deferred making a recommendation, pending receipt of a pathology report on the condition of Petitioner's aorta. (Id. at ¶ 3).

On February 25, 2005, the Medical Board reviewed Petitioner's application for the third time. (Ver. Ans. Ex. 11). This time, the Medical Board reviewed a newly submitted surgical

pathology report from the Montefiore Medical Center, dated February 5, 2005. (Id. at ¶ 2). The Medical Board stated that it required the histology[23] report in order to make a definitive diagnosis as to the cause of Petitioner's aortic dissection, and, therefore, again deferred making a final determination. (Id.).

In response to the Medical Board's inquiries, Dr. Woo wrote on May 10, 2005, and again emphasized Petitioner's "notable" history of hypertension:

> In view of his medical conditions, and his medical regimen, I feel that [Petitioner] is unable to resume his prior line of employment as a police officer. He cannot be subject to the daily physical, mental, and emotional requirements of the position as it will prove deleterious to his health. Furthermore, he is not optimal to serve his fellow officers, or the public, if he were to return to the field in view of the above medical issues.
>
> (Ver. Pet. Ex. I).

Additionally, in response to the Medical Board's query, Kathleen Whitney, M.D. wrote a letter clarifying that the surgical pathology report from the February, 2004, surgery already included the histology findings. (Ver. Pet. Ex. L).

The Medical Board reviewed Petitioner's case for a fourth time on July 8, 2005, taking into consideration the above-referenced letters and a new physical examination of Petitioner, and disapproved his application for ADR and approved the Commissioner's recommendation for ODR. (Ver. Pet. Ex. M). A member of the Medical Board discussed the pathology with Dr. Whitney, who concluded she could not determine whether the "degenerative changes" in the aortic wall were a congenital abnormality, an inflammatory process, or hypertension. (See id. at ¶ 8). The Medical Board stated that "[b]ecause one cannot establish a definitive relationship

---

23 Histology is a "branch of anatomy that deals with the minute structure of animal and plant tissues as discernable with a microscope." Merriam-Webster.com, "Histology," http://www.merriam-webster.com/dictionary/histology.

between hypertension and the officer's aneurysm dissection, it is the unanimous decision . . . [of the] Medical Board to recommend approval" of ODR and "disapproval of" ADR. (Id. at ¶ 9).

Petitioner underwent an electrocardiogram on September 7, 2005, which revealed that "[l]eft ventricular hypertrophy [is present], the aortic root[24] is dilated, there is an intimal flap[25] visualized in the descending aorta, the ascending aorta is dilated and measures 3.6 cm. There is a trivial pericardial effusion,[26] trace mitral insufficiency and mild tricuspid insufficiency with normal right ventricular systolic pressure." (Ver. Pet. Ex. N).

On November 9, 2005, the Board of Trustees considered the Medical Board's recommendation, and approved the ODR application filed by the Police Commissioner, but remanded Petitioner's request for ADR for reconsideration based on new medical evidence, (Ver. Ans. Ex. 16), namely a new letter from Dr. Woo, and the results of the September 7, 2005 electrocardiogram (Ver. Ans. Ex. 18 ¶ 4). Petitioner received a letter dated July 6, 2006, that informed him of this decision. (Ver. Ans. Ex. 17).

On August 25, 2006, the Medical Board considered Petitioner's case for the fifth time, (Ver. Ans. Ex. 18), taking into consideration a letter newly submitted by Dr. Woo, dated November 2, 2005, which stated:

---

24 The aortic root is "the part of the aorta attached to the . . . myocardium." The Free Dictionary, "Aortic Root," http://medical-dictionary.thefreedictionary.com/aortic+root. The myocardium is "the middle and thickest layer of the heart wall, composed of cardiac muscle." The Free Dictionary, "Myocardium," http://medical-dictionary.thefreedictionary.com/myocardium.

25 An intimal flap is a "pseudo-aneurysm." Guillaume Sebire et al., "Toward the Definition of Cerebral Arteriopathies of Childhood," 16 Current Opinion in Pediatrics 617 (Dec. 2004), available at http://journals.lww.com/co-pediatrics/Abstract/2004/12000/Toward_the_definition_of_cerebral_arteriopathies.3.aspx.

26 "A pericardial effusion is a fluid collection that develops between the pericardium, the lining of the heart, and the heart itself." HealthLine, ""Pericardial Effusion Health Article," http://www.healthline.com/galecontent/pericardial-effusion.

> I have reviewed [Petitioner's] prior imaging studies and feel that his dissection was related to his underlying hypertension. . . . . On my review of the operative reports, there is no mention of any connective tissue disease or any other congenital tissue abnormality which gave rise to the dissection. Therefore, it is my conclusion that Mr. Sha-Bethea's dissection was related to hypertension and hypertensive heart disease.

(Ver. Pet. Ex. I). The Medical Board noted that Dr. Woo did not supply any records to document the hypertension that preceded Petitioner's aortic dissection. (Ver. Ans. Ex. 18 at ¶ 4). The Medical Board also indicated that Petitioner's abdominal aortic aneurysm "raises the possibility" of an underlying, possible congenital, abnormality of the aorta. (Id.). Based on this information, the Medical Board re-affirmed its earlier determination. (Id. at ¶ 5).

On February 14, 2007, the Board of Trustees remanded Petitioner's case to the Medical Board for a sixth time to consider new medical evidence, (Ver. Ans. Ex. 20), specifically a January 3, 2007, letter from Dr. Woo which stated:

> On January 3, 2007, Dr. Woo wrote another letter which stated:
>
> In view of [Petitioner's] echocardiogram findings and his history, it is still my overall feeling that [his] dissection was likely secondary to his underlying hypertension and hypertensive heart disease.
>
> As you know, patients with hypertension, unfortunately, are at risk for aortic aneurysms, which can occur in the thorax or the abdomen. Furthermore, his operative pathology reports fail to document any underlying congenital abnormality.
>
> (Ver. Pet. Ex. I).

On November 16, 2007, the Medical Board reviewed Petitioner's case and again affirmed its earlier conclusion, stating that:

> In summary, [Petitioner] has severe hypertension which apparently started at the time of his thoracic aortic dissection. There is no evidence of hypertension prior to the aortic dissection. An echocardiogram taken June 29, 2004, shows no

> evidence of left ventricular hypertrophy. Measurement of the septum[27] and posterior wall were given as 1.1 cm and 1.0 cm respectively. Previously reviewed reports indicated that he had a congenital abnormality in his aorta, namely a right sided arch.

(Ver. Pet. Ex. P at ¶ 7).

On February 10, 2008, Petitioner went to the emergency room of Montefiore Medical Center due to chest pain. (Ver. Pet. Ex. Q). While in the emergency room, he underwent a CT scan of the chest, abdomen and pelvis, which revealed:

> Status post aortic graft placement with the suspected changes however thoracic aorta is in the right side of chest. Fusiform[28] aneurysmal dilation of the suprarenal[29] abdominal aorta with fusiform aneurysmal dilation of the infrarenal abdominal aorta containing moderate amount of thrombus[30] measuring up to 48mm in diameter. Minor asymmetric perfusion of kidneys as the left comes off of false lumen.[31] Left subclavian artery appearing to come off an aberrant position across and behind the esophagus and presumed graft or bypass between left subclavian artery and left common carotid artery.[32] Independent right subclavian artery and right common carotid artery origins.

(Id.).

Petitioner was admitted to the hospital the next day, and discharged on February 16, 2008. (Id.).

---

27 A septum is "a dividing wall or membrane especially between bodily spaces or masses of soft tissue . . . ." Merriam-Webster.com, "Septum," http://www.merriam-webster.com/dictionary/septum.

28 "Fusiform" denotes "tapering towards each end." Merriam-Webster.com, "Fusiform," http://www.merriam-webster.com/dictionary/fusiform.

29 "Suprarenal" denotes "situated above or anterior to the kidneys." Merriam-Webster.com, "Suprarenal," http://www.merriam-webster.com/dictionary/suprarenal.

30 A thrombus is "a clot of blood formed within a blood vessel and remaining attached to its place of origin . . . ." Merriam-Webster.com, "Thrombus," http://www.merriam-webster.com/dictionary/thrombus.

31 A false lumen is a particular "abnormal channel within the wall of [an] involved artery." MediLexicon, "False Lumen," http://www.medilexicon.com/medicaldictionary.php?t=51453.

32 A common carotid artery is "either of two major arteries of the neck and head[, which] branches from the aorta." The Free Dictionary, "Common Carotid Artery," http://www.thefreedictionary.com/common+carotid+artery.

On April 22, 2008, Petitioner underwent surgery, including a "re-do Bentall procedure,[33 and] aortic root repair." (Ver. Pet. Ex. R).

The Board of Trustees again reviewed Petitioner's application on June 11, 2008, and affirmed the Medical Board's determination denying ADR. (Ver. Ans. ¶ 44). The instant proceeding ensued.

Petitioner argues that the Medical Board failed to rebut the presumption of the Heart Bill, claiming its review was unclear and conclusory. Respondents reply that the Medical Board met its burden of rebutting the presumption of the Heart Bill with supporting competent evidence which includes the alleged absence in Petitioner of pre-existing, stress-related conditions such as hypertension. Respondents further argue that due process does not require allowing Petitioner to appear before the Board of Trustees personally.

Discussion

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" Matter of Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County, 34 N.Y.2d 222, 232 (N.Y. 1974) (emphasis in original) (internal quotation marks and citations omitted). The test is whether the action taken is justified or without foundation in fact. Id. at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. The Board of Trustees' determination "is subject to judicial annulment only if it can be determined on the record that the retiree is entitled to greater benefits as a matter of law." Matter of Mejia v. Kerik, 301 A.D.2d

33 A Bentall procedure is "a type of open-heart surgery in which the ascending aorta and aortic valve are replaced." Meriter Health Services, "Bentall Procedure," http://meriter.com/mhs/hospital/heart/procedures/bentall.htm.

385, 385 (1st Dep't 2003). "Respondent's determination will be upheld if supported by credible evidence in the form of an articulated, rational and fact-based medical opinion." Matter of Kratunis v. DiNapoli, 60 A.D.3d 1250 (3d Dep't 2009) (internal quotation marks and citations omitted).

The Medical Board's procedure for reviewing ADR applications involves a two-tier administrative process. First, the Medical Board makes a determination of disability, based on medical reports and a physical examination of the applicant. See Matter of Borenstein v. New York City Employees' Retirement Sys., 88 N.Y.2d 756, 760 (N.Y. 1996). Secondly, if the Medical Board determines that the applicant suffers a disability, it must then decide whether the injury causing the disability was an accidental injury resulting from the performance of the applicant's duties. Id. Regarding causality, Section 207-k of the General Municipal Law,

> known generally as the Heart Bill, provides essentially that any impairment of health caused by diseases of the heart, resulting in total or partial disability or death of any fireman or policeman who successfully passed a physical examination upon entry into the service shall be presumptive evidence that it was incurred in the performance of duty unless the contrary be proved by competent evidence.

Matter of Goldman v. McGuire, 101 A.D.2d 768, 769 (1st Dep't 1984), aff'd 64 N.Y.2d 1041 (1985). The theory behind the Heart Bill's presumption is that heart conditions are an occupational hazard for police officers, and are generally not the result of an isolated incident, but involving a gradual degeneration as a result of the continuous stress and strain of the job. Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO v. Beekman, 52 N.Y.2d 463, 468-470 (1981) (reviewing the political and legislative history).

To rebut the presumption of a service-related disability, the Board of Trustees must exclude the possibility that service-related performance did not proximately cause the injury. See

Matter of Stegmuller v. Brown, 216 A.D.2d 23 (1st Dep't 1995) (holding that, to rebut the presumption, the Medical Board need not determine the condition's actual cause as long as it can exclude job-related stress as a cause), Matter of Quilty v. Ward, 193 A.D.2d 439 (1st Dep't 1993) (excluding job-related stress because the Medical Board established that a congenital abnormality was the cause). However, merely conclusory opinions of the Medical Board that the disability stems from unknown causes cannot constitute the competent medical evidence necessary to rebut the presumption of the Heart Bill. See Matter of Lunt v. Ward, 159 A.D.2d 404, 404 (1st Dep't 1990).

After the Medical Board assesses causality, it makes a recommendation to the Board of Trustees, which has the ultimate responsibility for determining service-related disabilities. If the Board of Trustees has a tie vote, it denies the application for ADR. Matter of Meyer v. Bd. of Trs. of the New York City Fire Dep't, Article 1-B Pension Fund, 90 N.Y.2d 139, 145 (1997).

In the instant matter, the Court finds that the Medical Board failed to exclude job-related stress as a cause of Petitioner's heart problems, and consequently that the Board failed to rebut the Heart Bill presumption. The Medical Board has adopted the position that either it lacked evidence to establish that hypertension caused Petitioner's dissection (Ver. Pet. Ex. M at ¶ 9), or that no evidence exists to establish that Petitioner had hypertension prior to his dissection, (Ver. Pet. Ex. P at ¶ 7), in which case the Board could exclude job-related stress as a cause, cf. Stegmuller, 216 A.D.2d at 23 (providing at least one case where the absence of hypertension or other stress-related conditions demonstrated that job-related stress did not cause an officer's heart problems). The Medical Board also mentions Petitioner's right-sided aorta, although it fails to explain or even state how such a condition excludes hypertension as a possible cause of dissection. (Id.).

Notably, the Medical Board had evidence that Petitioner suffered hypertension before his dissection, and without explanation rejected such evidence. The Board rejected Dr. Woo's report that Petitioner had a history of hypertension and that the dissection was secondary to the hypertension. Specifically, Dr. Woo's letter of November 2, 2005 states that his opinion is based on the prior imaging studies and the absence of any mention of connective tissue disease and congenital tissue abnormality in the operative report of February 5, 2005. In his January 3, 2007 letter, Dr. Woo reiterating his foregoing opinion states that it is based on the electrocardiogram of September 7, 2005, Petitioner's medical history, and the absence of any documentation of the operative or pathology reports documenting any congenital abnormality. The Board itself noted the Einsten Montefiore Hospital's discharge summary document, dated to December 10, 2003 (less than two weeks after Petitioner's dissection presented itself), which indicated that Petitioner had "a past medical history significant for hypertension." Thus, the Medical Board's later pronouncement that "[t]here is no evidence of hypertension prior to the aortic dissection," fails to interpret the record rationally.

The Medical Board's other rationale, namely that it cannot be established that hypertension caused the dissection, has a basis in the record given Dr. Witney's conclusion that a congenital disorder, inflammation, and hypertension were each viable explanations that the evidence could not exclude, but fails to rebut the Heart Bill presumption. To rebut the presumption, the Medical Board must exclude job-related stress as an explanation, not leave it as one of several viable explanations. See Stegmuller, 216 A.D.2d at 213 (upholding the Medical Board's determination because it excluded job-related stress as a cause), Matter of Liston v. City of New York, 161 A.D.2d 491, 492 (1st Dep't 1990) (holding that the Medical Board's conclusory rejection of hypertension as a cause in favor of a psychosomatic explanation "did not

constitute competent evidence sufficient to defeat the presumption"), Tuffillaro v. City of Elmira, 94 A.D.2d 882, 883 (3d Dep't 1983) (requiring the Medical Board to offer affirmative "proof" to rebut the presumption).

The Board of Trustees has a duty to see that competent evidence is relied upon and sufficient explanations are given by the Medical Board to disprove Petitioner's entitlement to the benefits of the Heart Bill. See Matter of Duester v. McGuire, 81 A.D.2d 553 (1st Dep't 1980). In the instant matter, the Court finds that the Board of Trustees has not met its duty, and that the Board of Trustees adopted the Medical Board's conclusory decision.

The Court rejects Petitioner's request that it direct the Board of Trustees to allow Petitioner to present testimonial evidence to the Board of Trustees, as Petitioner has failed to establish a clear legal basis for such a right. Finally, the Court rejects Petitioner's request that it issue a subpoena duces tecum on respondents pursuant to CPLR 2307 to produce all documents connected to Petitioner's retirement as Petitioner has failed to provide the factual necessity to issue such a subpoena.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner for a judgment annulling the action of the respondents herein is granted with respect to the disapproval of the petitioner's application for ADR; and it is further

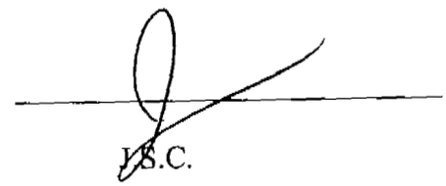
ORDERED and ADJUDGED that the petition is granted to the extent of directing that the Medical Board conduct a further evaluation of the petitioner's application for ADR with respect to the causation of petitioner's disability, and issue a determination on the subject application

which, if rejecting ADR, delineates the medical proof that job-related stress did not induce Petitioner's condition; and it is further

ORDERED that the Board of Trustees is hereby directed to allow Petitioner and/or his representatives to present such documentary evidence and documentary testimony, including affidavits and affirmations, as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to an accident disability retirement; and the petition is otherwise denied.

Dated: July 30, 2009

ENTER:



J.S.C.