

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

2011 NY Slip Op 30176(U)

January 24, 2011

Supreme Court, New York County

Docket Number: 400912/10

Judge: Martin Schoenfeld

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Schwarzfeld
Justice

PART 28

Index Number : 400912/2010
SAMADJOPOULOS, DEMETRIUS
VS.
NYC EMPLOYEES' RETIREMENT SYSTEM
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

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

1-3

Answering Affidavits — Exhibits _____

4-5

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

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

FILED

JAN 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/24/11

[Signature]
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: PART 28

-----X
In the Matter of the Application of
Demetrius Samadjopoulos,

Petitioner,

**MEMORANDUM DECISION
AND ORDER**

-against-

Index No.: 400912/10

New York City Employee's Retirement System, and the
Trustees of New York City Employees' Retirement
System and the City of New York,

Respondents.

-----X
For Petitioner:
South Brooklyn Legal Services
105 Court Street, 3rd Floor
Brooklyn, New York 11201

For Respondents:
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, New York 10007

FILED

JAN 26 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. MARTIN SCHOENFELD, J.:

In this Article 78 proceeding, Petitioner Demetrius Samadjopoulos ("Petitioner") seeks an order from this court to direct Respondents, New York City Employee's Retirement System ("NYCERS"), the Trustees of New York City Employees' Retirement System, and the City of New York (collectively "Respondents") to reclassify his ordinary disability benefits to a World Trade Center Disability pension and to grant him such benefits. Respondents oppose the Petition.

Background

Petitioner began working for the New York City Department of Transportation ("DOT") in February 1990 and became a member of NYCERS on or about August 20, 1990. He continued to work for DOT for nearly 15 years as a carpenter assigned to the emergency repair of

bridges and elevated highways. According to his affidavit, Petitioner described his work as follows:

I had to do this emergency work year round, regardless of the weather. And I always had to do this emergency work in an environment of dust and filth, and close to the fumes of cars, buses, and trucks. The work also had to be done in the openings in the structures beneath the roads of bridges and elevated highways, which are often full of birds and the stench released by all their feces.

On September 11, 2001, and in the subsequent weeks, Petitioner participated in the recovery and cleanup efforts at Ground Zero. During the first six weeks, Petitioner worked twelve hour shifts, seven days per week, without a day off. After almost two months, as the need lessened, Petitioner was phased out of Ground Zero, working there periodically until the end of October.

Shortly after he completed his work at Ground Zero, Petitioner began experiencing shortness of breath, wheezing, and a general difficulty in breathing. On November 14, 2001, Petitioner went for treatment at Mount Sinai and later participated in Mount Sinai's World Trade Center Monitoring & Treatment Program. Petitioner was treated by Dr. Jacqueline Moline, Principle Investigator and Director of the Program.

He was also seen by Dr. Elizabeth Glass, who examined Petitioner for the Monitoring Program on December 7, 2002, and, two years later, by Dr. Pericles Lanz of the Monitoring Center. They both noted normal spirometry (breathing) tests, while Glass diagnosed Petitioner with asthma and Lanz diagnosed Petitioner with rhinitis (nasal inflammation) and gastro-esophageal reflux disease ("GERD").

On November 3, 2005, Petitioner left his work with DOT. In February 2007, Petitioner sought treatment for diagnosed depressive disorder and generalized anxiety disorder. He saw

[*4]
psychiatrist Dr. Malgorzata Witek at the WTC Monitoring Center at Mt. Sinai.

On or about September 11, 2006, Petitioner filed an Application for Disability Retirement, alleging that he was disabled from performing the duties of a carpenter with the DOT. Petitioner complained of orthopedic and respiratory problems as the basis for his claim for disability retirement. On October 24, 2006, the NYCERS Medical Board (hereinafter "Medical Board" or "Board") reviewed the application and recommended a denial of his retirement disability application. On April 13, 2007, NYCERS sent Petitioner a letter that its Board of Trustees had adopted the recommendation of the Medical Board and denied his disability retirement application.

Petitioner then commenced an Article 78 proceeding. On or about April 1, 2008, the Honorable Walter B. Tolub issued an order annulling NYCERS' denial of Petitioner's September 11, 2006 disability retirement application and remanded the application to the medical Board and NYCERS' Board of Trustees for reconsideration.

On July 31, 2008, Dr. Jodilyn Gingold conducted an Independent Medical Examination for the Workers Compensation Board. Dr. Gingold recommended that Petitioner "should be seen every three to four months or as needed." The doctor recommended that he continue taking his present medications and avoid high dust environments.

In accordance with Justice Tolub's order, the Medical Board reconsidered Petitioner's case on August 12, 2008. The Board again reviewed the medical evidence regarding Petitioner's orthopedic and respiratory health. Petitioner was also interviewed and examined. At that point, the Board determined that Petitioner was disabled as a result of orthopedic injuries to his right shoulder. NYCERS found, however, that all of Petitioner's breathing tests were normal and

therefore did not find a respiratory disability. Based upon Petitioner's right shoulder disability, the Medical Board recommended that his September 11, 2006 disability retirement application be approved. On or about October 17, 2008, NYCERS sent Petitioner a letter approving his September 11, 2006 disability retirement application. Petitioner is currently retired on disability retirement based upon his right shoulder injury.

Immediately following the Medical Board's August 12, 2008 report, but prior to NYCERS' October 2008 letter, Petitioner filed another Application for Disability Retirement, this time under RSSL §605(h) (the "WTC Disability Law"), claiming to have suffered respiratory and psychological disabilities as the result of the work that he performed during the World Trade Center clean-up operations. Specifically, Petitioner sought to reclassify his benefits under the WTC Disability Law provision in RSSL §605(h). Such reclassification, according to Respondents and not refuted by Petitioner, would only enhance his current disability award solely by providing him with additional tax benefits.

On July 21, 2009, Petitioner's attorneys sent a letter to the Medical Board in support of his WTC Disability Law retirement application, along with an affidavit of Petitioner dated July 20, 2009. On July 23, 2009, the Medical Board reviewed this new application, conducted an additional interview and physical examination of Petitioner and determined that he did not have a qualifying respiratory or psychological disability. It recommended denial of Petitioner's application for reclassification under the WTC Disability Law.

On December 11, 2009, NYCERS sent a letter to Petitioner informing him that the Board of Trustees had adopted the recommendation of the Medical Board and denied his application for reclassification under the WTC Disability Law.

[* 6]

Petitioner now seeks an order annulling this decision and directing that Respondents grant reclassification of his benefits.

Discussion

Courts will uphold a NYCERS Medical Board's disability determination in an Article 78 proceeding unless the decision "lacks rational basis, or is arbitrary or capricious." *Borenstein v. New York City Employees' Retirement System*, 88 N.Y.2d 756, 760 (1996) (citations omitted). The Medical Board's determination must be based on "substantial evidence," which in disability cases has been construed to require only that there be "some credible evidence" to support the determination. *Id.* at 760-61 (citations omitted). This standard "strikes a proper balance between deference to the Medical Board and accountability to NYCERS members." *Id.* at 761.

Here, the court finds that the Medical Board's decisions with regard to Petitioner's claim of respiratory and psychological disabilities were supported by the evidence and thus were not arbitrary or capricious.

1. Petitioner's Claim for a Respiratory Disability

With respect to his respiratory condition, Petitioner argues that the Board's decision was arbitrary and capricious because the Board did not take into consideration the credible evidence offered. Specifically, Petitioner contends that the Board disregarded: (1) Dr. Gingold's findings that Petitioner's tests were consistent with reactive airway disease (RAD) and that Petitioner had a "mild obstructive lung defect mainly in the small airways;" and (2) Dr. Moline's diagnosis of RAD, and her further finding that individuals with RAD who are on maintenance medications and tested in a doctor's office away from a dusty work environment are likely to have fewer symptoms and normal pulmonary test results.

In *Borenstein v. New York City Employees' Retirement System*, supra, the Court of Appeals reviewed a decision by the Appellate Division which reversed the lower court's denial of an Article 78 disabilities benefit claim. There, the Petitioner, an Assistant Deputy Warden, had sustained injuries after slipping on loose carpeting in the supervisor's bathroom. Despite doctors' opinions that Petitioner was unfit to work because of her injuries, the NYCERS Medical Board found that she was not "medically disabled for the performance of city service." *Id.* at 759. While the lower court denied Petitioner's Article 78 Petition, the Appellate Division reversed. In granting the application for an accident disability pension, the Appellate Division noted that the Board had based its decision on "its own examination" ignoring "the 'conclusive proof' of disability" provided by MRI scans performed by Petitioner's doctor. *Id.* at 761. The Court of Appeals upheld the lower court, and reversed the Appellate Division. In so doing, it stated that the Appellate Division "did what it should not do: 'substitute [its] own judgment for that of the Medical Board'" *Id.* (quoting *Matter of Santoro v. Board of Trustees*, 217 A.D.2d 660, 660-661 (2d Dept. 1995)) (other citations omitted). The Court of Appeals emphasized that the Board had found that Petitioner's evidence "was not dispositive on the issue of disability but was subject to conflicting interpretations," and concluded that in such situations "[t]he Board alone had the authority to resolve such conflicts." *Id.*; see e.g., *Manza v. Malcolm*, 44 A.D.2d 794, 795 (1st Dept. 1974) ("There being a conflict in the medical evidence, it was solely within the province of the Medical Board, and the Trustees to resolve such conflict."); *Whitton v. Spinnato*, 143 A.D.2d 274, 275 (2d Dept. 1988); *Bartsch v. Board of Trustees of New York City Fire Dept.*, 142 A.D.2d 577, 578 (2d Dept. 1988).

Here, as in *Borenstein*, the Board based its decision on all relevant evidence before it, but

had the authority to resolve any conflicting interpretations of that evidence. Contrary to Petitioner's contention, the Board clearly indicates in its report that it reviewed all medical reports concerning Petitioner's respiratory conditions, including the information submitted by Drs. Moline and Gingold, in making its decision. For instance, in discussing Dr. Moline's finding that Petitioner is "unable to work" because he has "a bronchodilator response on PFTs, inflammation of nasal mucosa and EGD with gastritis and esophagitis," the Board emphasized that Dr. Moline also indicated that these symptoms could be "controlled on Advair and albuterol." Further, the Board while acknowledging that Petitioner appeared to have RAD on his numerous visits to Dr. Moline, also pointed out that despite this diagnosis, Dr. Moline indicated that Petitioner's PFT was normal on these visits.

Likewise, the Board took into consideration the results of Dr. Gingold's tests, acknowledging that Dr. Gingold said "that there was a mild obstructive lung defect." Nevertheless, the Board found "that these were essentially within normal limits with good bronchodilator response", and therefore did not create a disability. Thus, the Board's decision was neither arbitrary nor capricious, but rather was based on at least "some credible" evidence in the record.

2. Petitioner's Claim for a Psychological Disability

Petitioner also challenges the Board's decision that there was no proof of causation between Petitioner's work at Ground Zero and his psychological complaints.

Again, however, this court finds that the Board based its decision on the "credible evidence" before it. Specifically, the Board relied on a letter from Dr. Robert Reich who met

Petitioner "to determine whether his psychiatric impairment prevents him from performing his duties as a Carpenter." The Board emphasized that "[a]t the time of the examination dated June 16, 2009, [Dr. Reich found] that his psychiatric problems are not due to the effects of 9/11." The Board, therefore, held that Petitioner's evidence was "not sufficient to warrant disability Retirement on psychiatric grounds." Such a finding, is neither arbitrary nor capricious.

Therefore, in accordance with all of the foregoing, it is

ORDERED that Petitioner Demetrius Samadjopoulos's application pursuant to CPLR Article 78 to annul the July 23, 2009 determination of the Board of Trustees of the New York City Employees' Retirement System is denied and dismissed ; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the Court.



J.S.C.

Dated: New York, New York
January 24, 2011

FILED

JAN 26 2011

**NEW YORK
COUNTY CLERK'S OFFICE**