

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

2013 NY Slip Op 30694(U)

April 1, 2013

Sup Ct, New York County

Docket Number: 103510/12

Judge: Cynthia S. Kern

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publication.

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

PRESENT: _____
Justice

PART _____

Index Number : 103510/2012
SPEARS, DIANNE
vs
NYC EMPLOYEES' RETIREMENT SYS
Sequence Number : 001
ARTICLE 78

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED
APR 09 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
APR - 9 2013
JAS. PATRICK, CLERK OF THE COURT
135 BROADWAY, 13TH FLOOR
NEW YORK, N.Y. 10004

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

Dated: 4/1/13

PK J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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

DIANNE SPEARS,

Petitioner,

Index No. 103510/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

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

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

FILED

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	APR 09 2013
Answering Affidavits.....	NEW YORK
Replying Affidavits.....	COUNTY CLERK'S OFFICE
Exhibits.....	

1
2
3
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Petitioner Dianne Spears brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge the determination made by respondents New York City Employees' Retirement System (the "ERS") and the City of New York (the "City") denying petitioner's application for disability retirement benefits. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner became a member of the ERS on or about July 28, 1996 by virtue of her employment as a Station Agent with the New York City Transit Authority (the "Transit Authority"). On April 25, 1996, petitioner allegedly injured three fingers

when, while she attempted to close a station booth door, a co-worker slammed the door shut on petitioner's right hand as the co-worker was exiting. Additionally, on June 10, 2005, petitioner allegedly sustained nose, throat and respiratory injuries, when she inhaled an unidentified chemical that a co-worker had allegedly sprayed into the booth where petitioner was working.

On or about October 16, 2006, petitioner filed an Application for Disability Retirement (the "Application"), claiming to be disabled as a result of injuries she allegedly received on June 10, 2005. The disabling conditions that petitioner cited as the basis for her Application include reactive airway disease, chronic hoarse voice due to damaged vocal chords, lumbar radiculopathy, severe depression and diabetes. On November 20, 2006, ERS sent a letter to the Transit Authority requesting information regarding petitioner's work history and status. On December 20, 2006, ERS notified petitioner that the Medical Board had noted the documents in her file and requested that she submit additional medical evidence.

The Medical Board first interviewed and examined petitioner on February 7, 2007. The Medical Board reviewed petitioner's medical records and reports, which included the two Agency Reports on Accident for petitioner's April 25, 1996 and June 10, 2005 incidents. The Medical Board also reviewed the Questionnaire in support of petitioner's Application, noting petitioner's allegedly disabling conditions and other hospitalizations and medical treatment petitioner listed as having received. The medical reports included various doctors' reports from pulmonologists and psychiatrists, with the majority of them concluding that while petitioner exhibited respiratory and psychological problems, no issues were significant enough to prevent her from returning to work.

The Medical Board also conducted an interview and physical examination of petitioner. At the interview, petitioner stated that subsequent to her co-worker spraying the toxic substance,

her chest felt tight as a result of the inhalation and that her voice “became hoarse” the following morning and that petitioner did not return to work for three weeks thereafter. She reported to the Medical Board that she resumed work for approximately one month but that she stopped due to shortness of breath and hoarseness. On examination, the Medical Board noted that petitioner coughed often and spoke with a hoarse voice but that her speech was fluent and on auscultation, her breath sounds were clear and her respiratory rate was regular.

Based upon its review of petitioner’s medical documentation and its interview and physical examination of petitioner, the Medical Board found that the documentary and clinical evidence failed to substantiate that petitioner was disabled from performing the duties of a Station Agent with the Transit Authority and did not find that petitioner’s two work-related incidents were the competent cause of her upper respiratory and pulmonary symptoms, the carpal tunnel symptoms complained of in her wrists or her psychological issues. Thus, the Medical Board recommended that the ERS Board of Trustees deny petitioner’s Application.

On February 20, 2007, ERS advised petitioner by letter that the Medical Board had recommended denial of her Application and informed petitioner that the recommendation would thereafter be presented to the Board of Trustees for consideration. On July 31, 2007, ERS notified petitioner that, upon review of the new medical evidence that she submitted subsequent to the Medical Board’s February 7, 2007 examination, the Board of Trustees had referred her case back to the Medical Board for reconsideration of the new evidence. ERS also notified petitioner of her upcoming appointment with Dr. J. Weisenfreund, a psychiatrist, who would evaluate petitioner and report to the Medical Board regarding her psychiatric status his opinion regarding whether such status prevented her from performing her duties as a Station Agent.

On September 19, 2007, the Medical Board again considered petitioner’s case and

* 5]

reviewed various new medical reports that petitioner had submitted in support of her Application, including a psychological evaluation and consultation report and subsequent progress reports from Dr. Howard Rombom, a clinical psychologist, who first examined petitioner on August 10, 2006 and diagnosed petitioner with major depressive disorder; a series of progress notes from Dr. Hugo Morales, petitioner's treating psychiatrist, who stated that petitioner's condition had deteriorated and noted that she was taking Lexapro and Elavil; and an August 13, 2007 report from Dr. Weisenfreund who diagnosed petitioner with severe, chronic, major depressive episode, associated with phobic anxiety and that she was unable to perform her duties as a Station Agent because of her psychiatric condition.

The Medical Board then interviewed petitioner for a second time. During the interview, petitioner stated that she saw a psychologist once a week and a psychiatrist once a month. She reported taking Lexapro, amitriptyline, Advair, Singulair, hydrochlorothiazide, Nexium, APAP with codeine, aspirin, glyburide, loratadine, enalapril and Combivent. She stated that she felt calmer despite the opinion of her psychiatrist that she had not improved and his advice to her to continue therapy. Petitioner told the Medical Board that she still experienced fear and bad dreams related to being in the station booth on the job and that she sometimes experienced anxiety, depression, mood swings and difficulty caring for her 13 year-old son.

On September 19, 2007, based on the new medical evidence and the second interview of petitioner, the Medical Board determined that petitioner had a psychiatric disability which prevented her from working but found that petitioner's April 25, 1996 and June 10, 2005 incidents were not the cause of such disability. Accordingly, the Medical Board again recommended that the Board of Trustees deny petitioner's Application. On November 19, 2007, ERS sent petitioner a copy of the Medical Board's September 19, 2007 report and informed her

that she could contest the Medical Board's recommendation before the Board of Trustees at its February 14, 2008 meeting.

On December 28, 2007, the Medical Board issued an addendum to its September 19, 2007 report regarding petitioner's case, responding to documentation submitted by petitioner's attorney, Philip Seelig, on December 11, 2007. The new documentation included an Attending Psychologist Report from the Workers' Compensation Board along with a diagnosis of "major depressive disorder severe" and the suggested degree of disability as temporary partial and severe and a letter from Dr. Patel in which he stated that his impression was that petitioner had bronchospastic disease as a result of exposure to chemicals at her job and that she still had not stabilized despite optimal treatment. However, the Medical Board again determined that petitioner was disabled on psychiatric grounds only, but that her two work-related incidents were not the cause of her psychiatric disability.

The Medical Board then stated its findings regarding petitioner's pulmonary and psychiatric conditions, stating that it found insufficient evidence of disability related to reactive airway and asthma, which would preclude petitioner from performing her full duties. It stated that it disagreed with Dr. Patel's contention that petitioner was receiving optimal treatment and noted that she was only using Singular and Advair at the time. The Medical Board noted that the results of petitioner's multiple pulmonary function tests had been inconsistent, followed by the November 29, 2007 test results, which suggested obstructive disease. Thus, regarding petitioner's pulmonary condition, the Medical Board determined that petitioner did not provide sufficient documentary evidence to substantiate that petitioner was disabled. Regarding petitioner's psychiatric disability, the Medical Board noted that it had reviewed all the records and found no documentation of treatment immediately following or in the approximate time

period of the June 10, 2005 incident. Thus, the Medical Board stated that it agreed with Dr. Weisenfreund's determination that there was insufficient evidence to establish a causal relationship between petitioner's psychiatric disability and her incidents. In conclusion, the Medical Board found that the documentary and clinical evidence substantiated that petitioner was disabled from performing her duties as a Station Agent with the New York City Transit Authority due to major depression but found no causal relationship between that disability and her April 25, 1996 or June 10, 2005 incidents. Furthermore, the Medical Board determined that petitioner was not disabled from performing her full duties by reactive airway disease or any other upper respiratory condition. Accordingly, the Medical Board recommended that petitioner's Application be denied. On January 30, 2008, ERS sent petitioner a copy of the Medical Board's December 28, 2007 addendum report and informed petitioner of her opportunity to appeal the Medical Board's decision at the Board of Trustees' upcoming meeting on February 14, 2008. At the meeting, the Board of Trustees discussed petitioner's Application and subsequently notified petitioner that it had adopted the Medical Board's recommendation and denied her Application.

On or about June 16, 2008, petitioner commenced an Article 78 proceeding challenging ERS' determination. By Decision and Order dated April 22, 2009, the Honorable Emily Jane Goodman remanded petitioner's Application back to ERS and directed both the Board of Trustees and the Medical Board to address certain issues. Specifically, Justice Goodman directed respondents to discuss evidence in the record of a causative relationship between petitioner's June 10, 2005 work-related incident, where she was allegedly exposed to a chemical spray, and her psychiatric disability. On or about July 17, 2009, respondents moved for leave to renew and submitted additional evidence, including the transcript from the Board of Trustees' February 14,

2008 meeting, in support of the determination denying petitioner's Application and requested that the court reconsider its April 22, 2009 decision in light of this new evidence. On December 23, 2009, Justice Goodman issued a Decision and Order denying respondents' motion for leave to renew.

On or about March 3, 2011, petitioner moved by Order to Show Cause for a preliminary injunction enjoining ERS and the City from conducting another interview and/or medical examination of petitioner in connection with the remand of her Application. On or about April 14, 2011, the parties entered into a stipulation of settlement and discontinuance (the "Stipulation"), which was adopted by the court as an Order on April 22, 2011. Pursuant to the Stipulation, the parties agreed that the Medical Board would base its review of the remanded Application solely on the records already contained in petitioner's file and that petitioner would not be required to personally appear before the Medical Board for an examination. The Stipulation also explicitly stated that "NYCERS agrees to have the Medical Board's recommendation submitted to the NYCERS Board of Trustees for ratification."

On May 19, 2011, the Board of Trustees held a meeting at which the members discussed petitioner's Application and remanded the matter to the Medical Board to consider the issue of causation again. Regarding the 2005 incident, the Medical Board noted that no documentation, no incident reports and no investigation forms were submitted to substantiate petitioner's claim that chemicals were sprayed inside the booth in which she was working. Additionally, the Medical Board noted a report from Dr. Lawrence Scharer, dated September 27, 2005, who described the incident as follows:

In summary, following alleged exposure to "chemical" odor in her transit booth on June 10, 2005, Ms. Spears has had a raspy voice, excessive fatigue, various aches and pains and intermittent shortness

of breath. She has no significant past medical history except for hypertension, controlled with Diovan. Physical examination shows no evidence of any pulmonary problems and spirometry only showed a poor effect. Her pulmonary complaints do not appear significant enough to cause her any disability and keep her from returning to work at this time.

Additionally, the Medical Board noted that it found no investigation form with regard to the incident of alleged exposure and no evidence of alleged exposure aside from petitioner's own complaints, which were delayed. The Medical Board also noted that petitioner appeared to be uncooperative during the evaluation showing poor effort. The Medical Board further noted that a review of the records from petitioner's psychiatrist and psychologists indicate that no effort was made to determine the veracity of petitioner's account of the 2005 incident but that petitioner's account was taken at face value despite a lack of corroboration by available contemporaneous documentation.

On July 14, 2011, the Medical Board requested an evaluation be performed of the entire medical record by ERS' consulting psychiatrist, Dr. Robert Reich ("Dr. Reich"). Dr. Reich's report (the "Reich Report") first did a comprehensive review of the medical record, noting the importance of the veracity of a patient's statements, and discussed the examination and treatment of petitioner by the various psychologists and doctors. The Reich Report found that

Dr. Sherman accepts everything the patient says and does not exercise any objectivity as to the likelihood and the common sense of the symptom cascade Ms. Spears reports that follows. We would also question whether the toxic gas incident ever occurred. Ms. Spears apparently never really saw the incident and inferred the presence of toxic substance due to some kind of odor. There is no evidence that she sought immediate medical attention and the severe sore throat coming some time late could be due to many other factors...

Dr. Morales' report is similarly flawed. According to his report Ms. Spears became immediately disabled and stopped work after the alleged gas attack (a factual error) without really looking into the

nature of the attack or whether the attack really occurred. He concluded based largely on her statement that her illness was due to the toxic gas and its physiological sequela.

The Reich Report concluded that

In summary we feel that neither of the reports of the psychologists at the Rombom Institute or Dr. Morales make a good case for the connection of the gas attack to her depressed mood. They rather indicate that her main problem is chronic pain which she attributes to the gas attack. There may be many reasons for Ms. Spears to be depressed, serious financial problems for one and a myriad of other losses we know nothing about. She may be in physical pain, again for many reasons, arthritis, diabetic neuropathy, etc. We seriously doubt that the alleged toxic gas attack with symptoms which only seem to have occurred long after the alleged attack are responsible for a chronic pain syndrome and depression. We do not feel there is adequate evidence to confirm that a toxic gas attack ever occurred.

On September 2, 2011, based on its review of the medical record and the Reich Report, the Medical Board issued an addendum regarding petitioner's case, responding to the court's remand. In its addendum, the Medical Board reaffirmed its previous recommendation to deny petitioner's Application as it opined that while petitioner was psychologically disabled, her psychological issues were not caused by the two work-related incidents at issue. Such denial was forwarded to petitioner by letter dated April 5, 2012. On May 10, 2012, the Board of Trustees denied petitioner's Application by resolution and advised petitioner by letter dated May 11, 2012 that her petition had been denied.

By Notice of Petition and Affirmation in Support, dated August 9, 2012, petitioner commenced the instant Article 78 proceeding challenging the denial of her Application and seeking an order declaring that said determination is "in violation of the prior orders of this court, was arbitrary and capricious, an abuse of discretion, affected by error of law [and] not supported by substantial evidence." On or about January 17, 2013, petitioner moved by Order to Show

Cause for leave to amend the Article 78 petition to denominate the original “Affirmation in Support” as the actual “Petition.”

As an initial matter, petitioner’s Order to Show Cause for an Order pursuant to CPLR § 3025 for leave to amend her Article 78 petition is granted without opposition. Therefore, this court will consider petitioner’s “Affirmation in Support” as the actual “Petition.”

On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep’t 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)(“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that respondents’ decision denying petitioner’s Application was made on a rational basis. Where an ERS member has applied for disability retirement, she must show that she is “physically or mentally incapacitated for the performance of gainful employment,” that “[s]he was so incapacitated at the time [s]he ceased h[er] performance of duties” and that such incapacitation was “the natural and proximate result of an accident not caused by h[er] own willful negligence sustained in the performance of h[er] duties

in active service while actually a member of the retirement system.” RSSL §§ 605(b)(3) and (c). The applicant has the burden of proving to the ERS Medical Board such incapacity and its causation. *See Evans v. City of New York*, 145 A.D.2d 361 (1st Dept 1988). There are two stages in the Medical Board’s fact-finding process: (1) the threshold matter of determining “whether the applicant is actually ‘physically or mentally incapacitated for the performance of city-service’;” and (2) the recommendation to the Board of Trustees as to whether the disability was “a natural and proximate result of an accidental injury received in such city-service.” *Borenstein v. New York City Employees’ Ret. Sys.*, 88 N.Y.2d 756, 760-61 (1996). The second step is undertaken only if an applicant is found to be disabled. *See Id.* The threshold question of whether an applicant has the injury claimed and whether that injury incapacitates the applicant from the performance of duty is solely for the Medical Board to decide. *See Borenstein*, 88 N.Y.2d at 760. “It is neither arbitrary nor capricious for the Trustees to rely upon the Medical Board’s conclusion that a disability is not causally connected to an individual’s line of duty injuries,” where the recommendation of the Medical Board is based on some credible evidence. *Matter of Meyer v. Board of Trustees of the New York City Fire Department*, 90 N.Y.2d 139, 146 (1997). The Court of Appeals has held that the Medical Board’s recommendation will be based on “some credible evidence” when it is based on objective medical evidence or where the Medical Board clearly articulates a rational fact-based medical explanation. *See Id.* Additionally, where the Medical Board issues reports to the Board of Trustees “detail[ing] what medical proof ha[s] been considered, specifie[s] the nature of [petitioner’s] complaints and outline[s] the results of its physical examinations of [petitioner], concluding that [petitioner’s]...condition was not disabling for duty,” the Medical Board has satisfied the “some credible evidence” requirement and a court may not substitute its judgment for that of the Medical Board. *Borenstein*, 88 N.Y.2d at 761.

In the instant action, respondents' denial of petitioner's Application was made on a rational basis. Upon remand, the Medical Board reviewed the medical record as well as the Reich Report and determined that petitioner's psychiatric disability was not proximately caused by the alleged June 10, 2005 chemical exposure. The Medical Board based such determination on, among other things, (1) a report from Lincoln Hospital in the Bronx, dated August 29, 2006, which indicates that petitioner was psychiatrically stable and was discharged; (2) a report from Dr. Weisenfreund, ERS' psychiatric consultant, who found that petitioner suffered from major depression but that he could not confirm a causal relationship between petitioner's psychiatric condition and the alleged incident; and (3) the Reich Report, which made an exhaustive analysis of the record and concluded that petitioner's psychiatric disability was not proximately caused by any work-related incident. This court finds that the administrative record as a whole supports the Medical Board's determination regarding the insufficiency of evidence of causation and that such a determination was rational as it is the petitioner's burden to prove causation and not the Medical Board's burden to disprove it. *See* RSSL § 605.

Although petitioner asserts that the Medical Board's determination was arbitrary and capricious because some of her doctors opined that her psychiatric disability was the result of her alleged June 10, 2005 chemical exposure, such assertion is without merit. Although the Medical Board did not reach the same conclusion based on alternative evidence, a difference in medical opinion does not make a determination arbitrary and capricious or irrational. *See Matter of Muffoletto v. New York City Employees' Retirement System*, 198 A.D.2d 7 (1st Dept 1993). At most, the difference in opinion between the Medical Board and petitioner's other physicians is a conflict of medical opinion, which remains solely within the province of the Medical Board to resolve. *See Id* ("conflicting medical opinion provides no occasion for judicial interference.")

Where there is a conflict in medical opinion, the Medical Board's determination to rely on its own medical expertise is not arbitrary or capricious and should not be disturbed. *See Matter of Drayson v. Board of Trustees of the Police Pension Fund of the City of New York*, 37 A.D.2d 378 (1st Dept 1971). Furthermore, the Medical Board may rely on its own examination and diagnosis, and use its own medical knowledge and expertise to reach its conclusion after considering the views of other doctors that treated petitioner or reviewed her case. *See Matter of Tobin v. Steisel*, 64 N.Y.2d 254 (1985). Thus, this court finds that the Medical Board's review of the administrative record, upon remand, and its previous interviews and examination of petitioner, constitute sufficient credible evidence to support its finding that her psychiatric disability is not the result of her June 10, 2005 alleged chemical exposure, and is thus, rational.

Moreover, petitioner's assertion that the Medical Board's determination that her June 10, 2005 chemical exposure was not an accident for pension purposes is a "serious error of law" is without merit as it is irrelevant. When a petitioner fails to prove that she is disabled as a result of a work-related injury, as petitioner has failed to do here, the Medical Board must not reach the question of whether the injurious event constitutes an accident. As petitioner has failed to prove that her psychiatric disability was the result of her June 10, 2005 exposure, the fact that the Medical Board noted that such exposure was not an accident for pension purposes is without merit and need not be addressed by the court.

Additionally, petitioner's assertion that the Workers' Compensation payments she received was an acknowledgment of disability and causation is without merit as a finding of disability by an administrative agency other than the Medical Board of the relevant pension fund is not binding upon that Medical Board. *See Kalachman v. Board of Trustees*, 224 A.D.2d 619 (2d Dept 1996); *see also Matter of Alessio v. New York City Employees' Retirement System*, 114

A.D.2d 774 (1st Dept 1985). Thus, it is immaterial that petitioner received Workers' Compensation benefits.

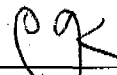
Finally, to the extent petitioner asserts that respondents failed to abide by the court's April 22, 2011 Order, such argument is without merit. The Court's order adopted the Stipulation entered into between the parties on April 14, 2011, in which the parties agreed, *inter alia*, that the Medical Board would base its review of the remanded Application solely on the records already contained in petitioner's file and that petitioner would not be required to personally appear before the Medical Board for an examination. The Stipulation also states that "NYCERS agrees to have the Medical Board's recommendation submitted to the NYCERS Board of Trustees for ratification." Here, the ERS' Board of Trustees reviewed the Medical Board's recommendation, which contained an analysis of the issue of causation, as required by Justice Goodman, and determined that there was no causal link to petitioner's disabling condition of depression and the incidents in question. Thus, the Board of Trustee's determination was in full compliance with the Stipulation and the court's order.

Accordingly, petitioners' petition is denied in its entirety. This constitutes the decision and order of the court.

Dated:

4/11/13

FILED
APR 09 2013
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J.S.C.