[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
PIERINO ANASTASIO,

Petitioner,

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, and THE BOARD OF TRUSTEES of the Police Pension Fund, Article II, New York City Police Department,

Respondents.

INDEX NO. 101014/11

MOTION SEQ. NO. 001

The following papers were read on this motion by petitioner for a judgment pursuant to Article 78.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

In this CPLR Article 78 proceeding, Pierino Anastasio (petitioner), a retired New York City police officer, seeks to annul the determination of the respondents which denied his application for an accident disability retirement (ADR) pension. Petitioner argues that this determination was arbitrary and capricious and contrary to established law.

Petitioner became a member of the New York City Police Department (NYPD) on September 29, 2000. In March of 2007, the petitioner sought treatment for congestion and headaches that had been ongoing for approximately three months, as well as a recent outbreak of fatigue. In April of 2007, the petitioner was diagnosed with acute mononucleosis (*see* Verified Answer, exhibits 22, 23-29, 37). Thereafter, petitioner experienced continued headaches and extreme fatigue and was diagnosed with myalgic encephalomyelitis (chronic

fatigue syndrome or CFS) and related lightheadedness and syncope (*id.*, exhibits 32, 36-38).

On July 11, 2007, petitioner filed an ADR application alleging that he was disabled from performing police duties due to CFS, that he claimed to have developed as a result of participating in the rescue, recovery and clean-up operations at the World Trade Center (WTC) Ground Zero site following the events of September 11, 2001, as well as immune system problems related to CFS. As is customary, the police commissioner filed an application for ordinary disability retirement (ODR) on the petitioner's behalf.

Section 13-252 of the New York City Administrative Code governs ADR pensions for members of the NYPD Pension Fund. It provides that upon application by a member or by the NYPD Commissioner, the Police Pension Fund Medical Board ("Medical Board") shall certify to the Police Pension Fund Board of Trustees ("Board of Trustees") that the member is entitled to an ADR pension if a medical examination and investigation by the Medical Board show that the member is "physically or mentally incapacitated for the performance of city service as a natural and proximate result of an accidental injury received in such city-service while a member." Generally, it is the applicant who bears the burden of proving to the Medical Board such incapacity and its causation (*see Matter of Evans v City of New York*, 145 AD2d 361 [1st Dept 1988]; *Matter of Archul v Bd. Of Trustees of N.Y. City Fire Dept., Art 1B Pension Fund*, 93 AD2d 716 [1st Dept 1983]). The fact that there may be a difference of opinion between the Medical Board and a petitioner's own physicians does not provide an "occasion for judicial interference" (*Matter of Muffoletto v New York City Employees' Retirement Sys.*, 198 AD2d 7 [1st Dept1993]).

However, a different standard applies when the officer has retired due to a disabling condition that was allegedly caused by exposure during WTC rescue, recovery or clean-up operations. Sections 13-252.1 of the Administrative Code (Admin Code) of the City of New York (the WTC Law) amends the code to address cases involving WTC injuries. The WTC

Law establishes a presumption that "any condition or impairment of health . . . caused by a qualifying World Trade Center condition" as defined in the Retirement and Social Security Law (RSSL), "shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident . . . unless the contrary be proved by competent evidence" (Admin Code § 13-252.1[1][a]). "Qualifying World Trade Center condition" is defined as, *inter alia*, "a Qualifying condition or impairment of health" (RSSL § 2[36][a]), which in turn is defined as, *inter alia*, a Qualifying physical condition or a Qualifying psychological condition, or both (RSSL § 2[36][b]). "Qualifying physical condition" is defined to include, "[n]ew onset diseases resulting from exposure as such diseases occur in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease and chronic psychological disease" (RSSL § 2[36][c][v]).

The Medical Board reviewed the applications for ADR and ODR for the first time on November 21, 2007, and initially recommended that petitioner's ADR application and the Commissioner's application for ODR be denied. The Medical Board found that the petitioner had some normal findings and reported improvements in the petitioner's complaints. The Medical Board found that the petitioner had failed to demonstrate that he suffered from a permanent debilitating condition due to CFS at that time (Verified Answer, exhibit 5). At its April 9, 2008 meeting, the Board of Trustees voted to remand the applications back to the Medical Board for further review in light of new evidence subsequently submitted by the petitioner. The Medical Board again reviewed the petitioner's application on May 21, 2008. This time, the Medical Board recommended that the Board of Trustees deny petitioner's ADR application but approve the Police Commissioner's application for ODR. Although the Medical Board noted that petitioner's prognosis was unknown at the time and could possibly improve, at that present time, the petitioner was suffering from disabling CFS. The Medical Board further noted that while it could not determine the exact cause of the petitioner's CFS, it considered the fact that

CFS had been linked to viral infections, including the Epstein-Barr virus that petitioner had been treated for in 2007 (*id.,* exhibit 7). The Medical Board also found that CFS is not a covered condition under the WTC Law and that petitioner's condition was not related to his work at the WTC (*id.).*

At its September 10, 2008 meeting, the Board of Trustees once again voted to remand petitioner's ADR application back to the Medical Board. The Medical Board reviewed the petitioner's application a third time on November 5, 2008 and reaffirmed its previous recommendation to deny the petitioner's ADR application. The petitioner again noted that CFS is not referenced in the WTC Law and further claimed that "there is no epidemiological evidence at this time linking CFS to the events of the World Trade Center. . ." (*id.*, exhibit 9). On May 13, 2009, the Board of Trustees adopted the recommendation of the Medical Board to deny the petitioner's ADR application. The Board of Trustees affirmed the Medical Board's recommendation that CFS is not a qualifying condition under the WTC Law and accordingly found that the petitioner was not entitled to the presumption afforded under the law (*id.,* exhibit 12).

On September 9, 2009, petitioner commenced an Article 78 proceeding, challenging the denial of his ADR application for CFS. In an Order and Judgment dated February 1, 2010, the Honorable Michael D. Stallman, J.S.C., remanded petitioner's application back to the Medical Board for reconsideration and a new decision. Justice Stallman found that upon remand, the Medical Board should reconsider and determine whether CFS should be considered a qualifying condition under the WTC Law and, assuming that it is, discuss whether or not there is competent evidence that rebuts the WTC Law's presumption that the petitioner's exposure at the WTC site caused an exacerbated CFS. Justice Stallman stated that the Medical Board ". . . may have relied on the fact that CFS is not listed in the WTC-presumption law, thus may have incorrectly excluded this case from the WTC presumption and may have applied the incorrect

legal standard" (*id,* exhibit 14). The petitioner's counsel requested that the Medical Board classify CFS as a "new onset" disease under RSSL § 2(36)(c)(v).

On May 26, 2010, the Medical Board considered the petitioner's ADR application for the final time. Based on its review of the WTC Law and the "specific disease entities cited" in the statute, the Medical Board once again opined that CFS and immunosuppresion were not covered as qualifying conditions under the WTC Law. The Medical Board found that no link between WTC exposure and immunosuppresion had been established in the nearly nine years since the attacks. The Medical Board further concluded that the petitioner's CFS was caused by his exposure to the Herpes virus and the Epstein-Barr virus, conditions which it classified as infectious diseases that were also not covered under the WTC Law (*id.*, exhibit 17). The Medical Board found that even assuming that CFS and immunosuppresion were included as qualifying conditions under the WTC Law, there was sufficient evidence to rebut the presumption. The Medical Board indicated that the viral infections that likely caused the petitioner's CFS would not have been contracted due to his exposure at WTC but rather were contracted through contact with infected individuals (*id.*). Accordingly, the Medical Board reaffirmed its previous finding and recommended that petitioner's ADR application be denied. The Board of Trustees accepted this recommendation and this Article 78 proceeding followed.

DISCUSSION

It is well settled that in an article 78 proceeding challenging a disability determination by the Medical Board, the determination should be sustained if it is based on "some credible evidence" *(see Matter of Borenstein v New York City Employees' Ret. Sys.*, 88 NY2d 756, 760-61 [1996]). Where the Medical Board issues a report detailing the medical proof considered, including the results of any tests and/or physical examinations of the applicant, its determination should be respected and the court should not substitute its own judgment for that of the Board unless the determination is clearly irrational (*id.* at 761). In order to rebut the presumption of

the WTC Law, there must be "some credible medical evidence in the record on which to base the determination that the (presumed) accidental injury did not cause the disability" (*Jefferson v Kelly*, 14 Misc3d 191, 196-197 [Sup Ct NY County 2006], *aff'd* 51 AD3d 536 [1st Dept 2008]; *see also Matter of Mulet v Kelly*, 49 AD3d 336, 336 [1st Dept 2008]; *Matter of Picciurro v Bd. of Trustees*, 46 AD3d 346, 348 [1st Dept 2007]). Here the Medical Board found, *inter alia*, that even assuming, *arguendo*, that the WTC Law presumption applied, there was sufficient evidence to rebut the presumption and determine that petitioner's CFS was not caused by WTC exposure. Respondents argue that this determination was supported by credible medical evidence in the record, is neither arbitrary nor capricious and therefore should be upheld.

Here the Medical Board's conclusions are supported by credible medical evidence and therefore must be affirmed. On four separate occasions, the Medical Board detailed the history of petitioner's condition. In its reports, the Medical Board describes numerous tests and laboratory data, as well as the analysis of the petitioner's treating physicians (*see* Verified Answer, exhibits 5, 7, 9, 17). The parties appear to agree that the precise etiology of CFS is unknown but that it can be linked to the contraction of any one of a number of viral infections (*id.*, exhibits 5, 7, 9, 17, 30 and 37). In the case of the petitioner, the Medical Board found that the petitioner's blood-test reports indicate that he had increased levels of Epstein-Barr virus antibodies, as well as other antibodies, which indicated he had contracted Epstein-Barr (*id,* exhibits 29 and 30). The blood work also showed that he had increased levels of the Herpes virus, which was interpreted as demonstrating a past infection with Herpes (*id.*, exhibits 34, 46, 50).

The Medical Board reasonably found that the blood test reports and the medical reports submitted by petitioner supported their conclusion that it was the petitioner's viral infections and not his exposure to the WTC site that caused his CFS. Several of the petitioner's treating physicians acknowledged in their reports that the viral infections the petitioner contracted can

be implicated as a cause of CFS (*id.*, exhibits 29, 30, 34, 37, 43, 46, 50). The Medical Board also credibly found that the fact that the petitioner did not develop symptoms of CFS until late 2006 demonstrates that his CFS was caused by his exposure to the Epstein-Barr virus. Notably, the petitioner developed CFS and its accompanying symptoms immediately after he suffered from mononucleosis resulting from an acute Epstein-Barr virus infection he contracted in late 2006 or early in 2007, some five years after his WTC work (*id.*, exhibits 5, 7, 9, 17). Furthermore , the earliest medical report in the record documenting the petitioner's CFS symptoms is dated March 16, 2007 (*id.*, exhibit 22).

Although some of the petitioner's treating physicians opine that his alleged exposure to the WTC site weakened his immune system and made him susceptible to developing CFS, that difference in medical opinion does not make the Medical Board's determination unreasonable or arbitrary and capricious. At most, the difference in opinion between the Medical Board and petitioner's treating physicians is a conflict of medical opinion which the Medical Board is empowered to resolve (*see Muffoletto*, 198 AD2d at 7). The Medical Board also pointed out that although one of petitioner's treating physicians, Dr. Susan Levine, opined that the petitioner's CFS was related to his WTC work in her September 28, 2007 report, she failed to mention any such correlation in her previous report which was less than two months earlier (*see* Verified Answer, exhibits 37, 42).

Because the determination that the petitioner's CFS was not caused by his work at WTC was credible and based on medical evidence sufficient to rebut the presumption of the WTC Law, the Court need not and does not now determine the broader question raised by the parties concerning whether CFS and its accompanying symptoms and immunosuppresion are not Qualifying Conditions under the WTC Law. The Medical Board's determination was based on credible medical evidence and was not arbitrary or capricious. Accordingly, the determination should be upheld and the petition dismissed.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that the respondents shall serve a copy of this Order, with Notice of Entry, upon petitioner.

This constitutes the Decision and Order of the Court.

Dated: 4-17-13

Enter:

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**