

**Matter of Carlock v Board of Trustees of the N.Y.  
Fire Dept. Pension Fund, Subchapter Two**

2016 NY Slip Op 32943(U)

March 29, 2016

Supreme Court, Kings County

Docket Number: 10122/2015

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the **29** day of March, 2016.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CIVIL TERM PART 65**

In the Matter of the Application of,  
**SHIRLEY J. CARLOCK,**

Petitioner,

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

- against -

**The Board of Trustees** of the New York Fire Department Pension Fund, Subchapter Two, and **DANIEL A. NIGRO**, as Fire Commissioner of the Fire Department of the City of New York and as Chairperson of the Board of Trustees of the New York Fire Department Pension Fund Article I-B Pension Fund, The Board of Trustees of the New York City Fire Department, Pension Fund, Subchapter Two,

Respondents.

Index No.: **10122/2015**

**Decision and Order**

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion	3
Plaintiff's Reply Affirmation, Affidavit and Exhibits	4

Upon the foregoing papers Petitioner, Shirley J. Carlock (hereinafter "Petitioner") seeks a judgment pursuant to CPLR Article 78: (1) annulling the prior determination by Respondent, the Board of Trustees of the New York Fire Department Pension Fund ("NYFDPF") dated February 17, 2015; (2) directing Respondent to grant Petitioner's application for a line-of-duty death benefit pension, or in the alternative; (3) remanding this matter back to the NYFDPF for a hearing and reconsideration of Petitioner's application.

Petitioner is the surviving spouse of a deceased former New York City Firefighter, Owen T. Carlock (hereinafter "Carlock"). Carlock was a first responder at the World Trade Center ("WTC")

disaster on September 11, 2001 ("9/11") and worked at the site for several months thereafter. As part of the Legislature's response to the WTC tragedy, a new statute was enacted creating a presumption in favor of providing Additional Disability Retirement (ADR) benefits for the first responders involved in the rescue, recovery and cleanup of the site. *Administrative Code of City of NY § 13-352, 13-353*. If a first responder meets the requirements as set forth in the statute it is presumed that certain injuries, diseases, conditions, whether physical or psychological suffered by him, resulted from the work at the WTC site. *NYR & SS Law §2; Quinn v Cassano, 29 Misc3d 1203(A)*. Accordingly, once a disability is established and the requisite criteria for the WTC presumption is shown, Petitioner is not required to prove a causal relationship between the alleged injury and the work performed at the WTC site. Pulmonary disorders and diseases are specifically included in the statute.

Carlock retired from the FDNY and was receiving a pension for about four years when he applied to the NYFDPF to reclassify his pension due to his worsening sinusitis, esophagitis, reflux disease, difficulty breathing, dysphagia and obstructive sleep apnea. When such an application is made the Pension Fund's Medical Board ("Board") conducts its own evaluation that may include a review of the medical evidence relied upon by Petitioner and anything else that the Board relies upon to reach a determination. Carlock's application was denied. Thereafter, and several unsuccessful requests for reconsideration were made and additional physical examinations were conducted. Carlock appealed to the Board of Trustees of the NYFDPF and after two more denials, on or about November 19, 2009, he was reclassified as eligible for ADR benefits based upon a finding by Dr. Jordan Stern that he suffered from "*severe larynopharyngeal reflux disease.*"

Carlock was 58 years old when he died while in Myrtle Beach, South Carolina. John Martorana, a Battalion Commander for the FDNY; Michael Martorana, a firefighter for the FDNY;

and a friend, Vincent De Marinis, Jr., were with Carlock at the time of his death. According to the eyewitnesses, at approximately 3:00am on May 23, 2012, Carlock was coughing, having trouble breathing, looked very pale and could not speak. Carlock appeared to be extremely weak, his knees buckled slightly and he extended his arms looking for support. With someone on either side supporting him, Carlock was able to take a few steps to the couch and sit down. Carlock stopped breathing almost immediately upon sitting down. Despite all attempts at resuscitation, Carlock was not able to breath again and did not regain consciousness.

On September 28, 2012, Petitioner filed an application with the NYFDPF for a line-of-duty death benefit pursuant to the WTC Statue. In support of the application Petitioner submitted reports by Dr. Charles Ladoulis and Dr. Barbara Courtney. Dr. Ladoulis acknowledged that there was a narrowing of the coronary arteries, but since there was no evidence of thrombotic occlusion he concluded and Dr. Courtney agreed that Carlock suffered an acute episode of laryngospasm that precipitated cardiac arrhythmia. However, the NYFDPF denied the application stating that there was no objective evidence that a laryngospasm precipitated a cardiac arrhythmia and instead relied upon the autopsy report by Dr. Edward Proctor that concluded that Carlock died as a result of an early acute myocardial infarction.

A subsequent application for a line-of-duty death benefit was made based upon Dr. Proctor's addendum to the autopsy report dated May 23, 2013 that stated, in relevant part, that Carlock suffered from laryngospasm and reflux, and at the time of his death was noted to be coughing extensively. Based upon this information Dr. Proctor opined that an episode of laryngospasm, in conjunction with Carlock's significant degree of arteriosclerotic disease and COPD accentuated the onset of his sudden infarction. Despite Dr. Proctor's addendum to the autopsy report, the Medical Board found that there was no objective evidence that laryngospasm led to

Carlock's myocardial infarction and the NYFDPF denied Petitioner's claim again on July 18, 2013.

Petitioner made another application for a line-of-duty death benefit based upon a report dated October 25, 2013 by Dr. John Bogdasarian, a specialist in Otolaryngology, who opined:

Since reflux of acidic gastric contents causes laryngeal irritation and cough, these episodes of cough may be difficult to control and may be severe. It is my opinion, to a reasonable degree of medical certainty, that the severe coughing spell experienced by Owen Carlock early in the morning of May 23, 2012 caused stress upon Mr. Carlock's heart and precipitated an arrhythmia and myocardial infarction resulting in his death. (Emphasis added).

The NYFDPF convened two separate panels of the Medical Board to review Dr. Bogdasarian's report. While one panel stated "... it is more likely that the member sustained an acute myocardial infarction secondary to obstructive coronary artery disease *with an accompanying arrhythmia* and pulmonary congestion ... prompting a severe coughing episode secondarily"; the other panel found "there was *no evidence* that Carlock had a cardiac *arrhythmia*." Nonetheless, the NYFDPF issued two denials dated January 21, 2014 and January 30, 2014, respectively based upon the Medical Board's findings. Thereafter, Petitioner commenced an Article 78 proceeding and by order dated November 14, 2014, Hon. Yvonne Lewis remanded the instant matter back to the NYFDPF and directed the Medical Board to address the eyewitness statements. Two separate panels of the Medical Board were convened and on January 8, 2015, the NYFDPF issued a denial stating that the eyewitness' testimony was inconsistent with a finding of acute laryngospasm. The Board reasoned that there should not be any breath sounds from someone suffering an acute episode of laryngospasm. Specifically, the denial referred to the fact that Carlock "... complained of burning in the throat and that he could not breathe." However,

the record is clear that Carlock made these statements by all accounts, at least 30 minutes prior to the severe coughing spasm that occurred just moments before his death. The Board also referenced Mr. De Marinis, Jr.'s statement wherein he reported that Carlock's breathing sounded labored, best described as gurgling sounds. The denial dated February 17, 2015 found that the eyewitness "... statements do not provide evidence that Carlock experienced an episode of acute laryngospasm, nor do these statements provide evidence that laryngospasm was the basis for his acknowledged cause of death, i.e., acute myocardial infarction due to arteriosclerotic heart disease."

There is no dispute that Carlock suffered from a qualifying condition pursuant to the WTC Statue, but the NYFDPF contends that his death was caused by cardiac arrest completely unrelated to an episode of laryngospasm. The law is clearly established that a determination by the NYFDPF is conclusive only if it is supported by some credible evidence and is rational. *Matter of Campbell v Board of Trustees of NY City Fire Dept, Article 1-B Pension Fund*, 47 AD3d 926, 927 (2<sup>nd</sup> Dept 2008)(*emphasis added*), (*citations omitted*), *lv denied* 10 NY3d 715 (2008); *See also, Matter of Kuczinski v Board of Trustees of NY City Fire Dept, Art 1-B Pension Fund Civil Service*, 8 AD3d 283, 284 (2<sup>nd</sup> Dept 2004); *Matter of Rodriguez v Board of Trustees of NY City Fire Dept, Art 1-B Pension Fund*, 3 AD3d 501, 502 (2<sup>nd</sup> Dept 2004 ). The NYFDPF first argued that an episode of laryngospasm is never fatal. However, Petitioner has always taken the position that an episode of laryngospasm precipitated Carlock's "early acute myocardial infarction<sup>1</sup>." The denials consistently referred to the autopsy report but never addressed the addendum by Dr. Proctor. Respondent's final denial states

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<sup>1</sup> Autopsy report annexed to moving papers as Exhibit "R."

that the "acknowledged cause of death, i.e., acute myocardial infarction, was due to arteriosclerotic heart disease." However, there is absolutely nothing in the record that states Carlock's heart attack resulted from arteriosclerotic heart disease. Dr. Proctor never reached that conclusion and specifically amended the autopsy report to reflect findings consistent with the position Petitioner take herein.

The Medical Board is required to set forth its findings in a detailed, fact-based report that sets forth the basis for its conclusion and is supported by evidence that is substantial, credible, relevant and reasonably adequate to support a fact or conclusion. *Matter of Meyer v Board of Trustees of NY City Fire Dept*, 90 NY2d 139, 152 (1997), rearg den, 90 NY2d 936 (1997); *Jennings v NYS Office of Mental Health*, 90 NY2d 227, 239 (1997); *Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756,760 (1996). Moreover, the law requires that Respondent review and consider all available relevant medical evidence. *Quinn v Cassano*, 29 Misc3d 1203 (A)(Sup Ct, Kings County, 2010), citing *Matter of Meyer, supra* at 147; *Matter of Kiess v Kelly*, 75 AD3d 416, 417 (1<sup>st</sup> Dept 2010), citing *Kelly v Board of Trustees*. 47 AD2d 892,893 (1<sup>st</sup> Dept 1975). After a complete review "... the Medical Board must do more than simply identify reports and tests and state its conclusion; it must address the evidence before it and explain why the evidence it discounts is not valid, and why the evidence it relies upon is more persuasive, explaining why the opinions and diagnoses that are not relied upon are incorrect." *Quinn v Cassano*, 29 Misc3d 1203 (A)(Sup Ct, Kings County, 2010), citing *Matter of Rocco 2007 Slip Op 51179 (U)(Sup Ct, Kings County, 2007)*.

Petitioner submitted eyewitness accounts as well as medical evidence supporting her

position that Carlock experienced an episode of larygospasm that precipitated his cardiac arrest. The NYFDPF's own physician, Dr. Stern diagnosed Carlock as suffering from *chronic severe laryngopharyngeal reflux disease* on October 15, 2009. The NYFDPF offered no competent medical evidence to refute the opinions by Dr. Proctor, Dr. Ladoulis, Dr. Courtney or Dr. Bogdasarian. Speculation, conjecture or conclusions of law are an insufficient basis for a denial of benefits. *Matter of Fernandez v Board of Trustees of the New York Fire Department Pension Fund, Subchapter 2, 81 AD3d 950 (2<sup>nd</sup> Dept 2011); Matter of Meyer, supra at 145; Matter of Urena v Kelly 2013 NY Slip Op 32282 (Sup Ct NY County, 2012), citing Matter of Bitchatchi v Police Dept Pension Fund, supra at 276.*

Thus while recognizing that this court is precluded from second guessing the conclusions of the Medical Board and substituting its own judgment, the history of the case at bar as set forth herein indicates that the NYFDPF was given numerous opportunities to address the evidence before it and failed to do so. This Court therefore finds Carlock died as a result of a qualifying condition pursuant to the WTC Statute.

Accordingly, it is

ORDERED, the determinations of the NYFDPF dated January 8, 2015 and February 17, 2015 are annulled, and it is

ORDERED, that Petitioner is entitled to a line-of-duty death benefit pursuant to WTC Statute *nunc pro tunc* to the date of the first application.

This is the Decision and Order of the Court.

ENTER



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LOREN BAILY-SCHIFFMAN  
JSC