

**Jackson v New York City Empls.' Retirement Sys.**

2019 NY Slip Op 31218(U)

March 15, 2019

Supreme Court, Kings County

Docket Number: 522908/2018

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At 1.A.S. Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 15th day of March 2019.

P R E S E N T:

Honorable Reginald A. Boddie  
Justice, Supreme Court

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GREGORY JACKSON,

Petitioner,

Index No. 522908/2018

Cal. No. 22

For an Order and Judgment Pursuant to Article 78 of the CPLR

-against-

DECISION AND ORDER

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

Respondents.

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

<u>Papers</u>	<u>Numbered</u>
Notice of Petitioner & Annexed Affirmation/Affidavits	1-2
Affirmation in Opposition	3
Reply	4

Upon the foregoing cited papers, the decision and order on petitioner's petition, pursuant to CPLR Article 78, is as follows:

Petitioner, a retired Corrections Officer, seeks judicial review, pursuant to CPLR 7801, to annul the New York City Employees' Retirement Systems Board of Trustees' (NYCERS Board) denial of petitioner's application for disability retirement benefits pursuant to section 507-c of the Retirement and Social Security Law. On June 20, 2016, petitioner sustained injuries to his right

shoulder, knee and ankle restraining an inmate at the correctional facility where plaintiff was employed. Petitioner received emergency treatment for these injuries. Dr. Louis Rose subsequently treated petitioner for these injuries. Petitioner underwent a course of conservative treatment including physical therapy and pain management. MRI studies were conducted on petitioner's right shoulder and knee in July 2016. Dr. Rose performed surgery on petitioner's right shoulder in October 2016, and his right knee in December 2016. Petitioner initially suffered injuries to his right shoulder in 2013, and right knee in 2014, which he averred resolved with physical therapy and during which he worked full duty. Petitioner further averred that following the 2016 surgeries, the pain increased and his range of motion decreased rendering him permanently disabled from performing his duties as a corrections officer.

Petitioner submitted an application for disability retirement benefits based on disabling conditions to his right shoulder and right knee. On July 25, 2017, the Medical Board reviewed the application and the accompanying medical records dated June 22, 2016, through June 7, 2017, and interviewed and examined petitioner. There is no dispute that petitioner was injured during the June 20, 2016 incident with an inmate. However, the Medical Board found petitioner offered no complaints during the exam and his range of motion in the shoulder and knee was similar on the right and left sides. The Medical Board deferred its decision pending a review of the MRI studies and medical notes of the 2013 and 2014 shoulder and knee injuries.

The Medical Board issued a determination on September 11, 2017, upon review of petitioner's medical records related to his prior injuries, dated January 17, 2015, through December 15, 2015. The Medical Board did not find significant impairment of the right shoulder and right knee to indicate permanent disability and denied petitioner's application. It noted that

petitioner's range of motion in his right shoulder as determined in its July 25, 2017 exam improved as compared to Dr. Rose's December 15, 2015 exam of petitioner's right shoulder. It reiterated its findings of the July 25, 2017 exam, and further noted "similar exams from his physical therapy and his physician prior to the injury of June 20, 2016" with regard to the right knee.

Petitioner submitted a second application seeking disability retirement benefits based on a disabling condition to his right shoulder including continuing pain and decreased range of motion. On April 16, 2018, the Medical Board reviewed this application, additional medical records dated August 8, 2017, through February 5, 2018, and interviewed and examined petitioner. The Medical Board denied the application noting that its exam revealed a "well preserved and functional right shoulder range of motion" . . . "symmetric to his non-affected left side" . . . [with] "good strength without evidence for [sic] muscle atrophy." The NYCERS Board adopted this decision on July 12, 2018.

The Medical Board determines whether a member applying for disability retirement benefits is disabled (*see* Administrative Code of the City of New York § 13-168; *Matter of Vargas v New York City Employees' Retirement Sys.*, 95 AD3d 1345, 1346 [2d Dept 2012] [citations omitted]). The Board of Trustees is bound by the Medical Boards's determination as to whether an applicant is disabled (*Matter of Vargas*, 95 AD3d at 1346 [citations omitted]). The Medical Board's determination is conclusive if it is supported by substantial evidence, which in disability cases has been construed as some credible evidence, and is not irrational (*Matter of Vargas*, 95 AD3d at 1346 [citations omitted]).

Consequently, the court's function in an Article 578 proceeding is to determine if the

determination of the administrative agency is supported by credible evidence, or is arbitrary and capricious (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230 [1974]). It is well settled that on review pursuant to Article 78, courts may set aside an administrative determination where it is evident that the administrative body applied an erroneous standard or the determination is unsupported by substantial evidence (*Matter of Pell*, 34 NY2d at 230 [citations omitted]). However, the court has no authority to upset the Medical Board on a question of fact or to review the facts as to weight of evidence (*Id.* [citations omitted]).

Here, the record demonstrates that the Medical Board considered all of the medical evidence submitted by petitioner, interviewed and performed its own physical examinations of him. Although the medical conclusions of Dr. Rose differed from that reached by the Medical Board, the resolution of such conflicts is solely within the province of the Medical Board [*Matter of Vargas*, 95 AD3d at 1346 [citations omitted]]. The Medical Board's examinations in July 2017, and April 2018, revealed that petitioner's range of motion was similar bilaterally, his range of motion had improved since 2015, when he suffered prior injuries, but was able to work at full duty during his recovery, and he showed good strength without atrophy. Based upon the credible evidence before the Medical Board, the determination of the Board of Trustees was not irrational and was supported by some credible evidence (*Matter of Vargas*, 95 AD3d at 1345 [citations omitted]).

Petitioner now proffers reports of Dr. Rose, dated May 8, 2018, indicating petitioner is permanently disabled. These reports, generated after the Medical Board's April 2018 review, were not part of the record reviewed by the Medical Board, and are not subject to judicial review

in this proceeding (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000][quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept 1982], “[j]udicial review of administrative determinations is confined to the ‘facts and record adduced before the agency when the administrative determination was rendered’”).

Accordingly, the petition is denied.

E N T E R:



Hon. Reginald A. Bobbie  
Justice, Supreme Court

HON. REGINALD A. BOBBIE  
J.S.C.