

Hendrickson v O'Neill
2019 NY Slip Op 31626(U)
June 6, 2019
Supreme Court, New York County
Docket Number: 160347/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 160347/2018

EDWARD HENDRICKSON,

MOTION DATE 11/08/2018

Petitioner,

MOTION SEQ. NO. 001

- v -

JAMES O'NEILL, THE BOARD OF TRUSTEES OF THE POLICE
PENSION FUND

DECISION AND ORDER

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Upon the foregoing documents, the motion is denied.

Petitioner, a retired New York City Police Department ("NYPD") officer, seeks to challenge the determination of the Police Pension Fund ("PPF") Board of Trustees denying his application for accident disability retirement ("ADR") benefits under the World Trade Center ("WTC") Disability Law dated December 11, 2015.

In his application, petitioner claimed that he was permanently disabled from performing the duties of an NYPD officer due to renal cancer for which he was diagnosed in 2015. The cancer is in remission and has not reoccurred. The PPF Board disagreed and determined that petitioner is not permanently disabled from performing the full duties of an NYPD officer due to renal cancer.

When applying for ADR benefits, a police officer must show that he or she is "a member in city-service" who is "physically or mentally incapacitated for the performance of city-

service...” NYC Admin. Code § 13-252. The applicant has the burden of proving incapacitation. *Califano v. DiNapoli*, 147 AD3d 1177 (2017).

Provided that certain conditions are met, police officers (or retirees) may also apply for ADR benefits under the WTC Disability Law for any condition or impairment of health that is caused by a qualifying World Trade Center condition, as defined in Section 2 of the New York Retirement and Social Security Law (“RSSL”).

RSSL § 236 defines “Qualifying [WTC] condition as “a qualifying condition or impairment of health resulting in disability...” and defines “qualifying condition or impairment of health” as one of the listed physical and psychological conditions. The applicability of the WTC Disability Law and any reclassification thereupon is predicated upon the initial finding of disability. In this matter, the Medical Board found that the petitioner had not proven that he was incapacitated and is thereby not disabled under the statute. As such, the respondent claims that the statutory presumption set forth in the WTC law is inapplicable to this case. When an applicant fails to establish that he is disabled due to a qualifying physical or psychological condition, as defined in RSSL § 2(36), the WTC Disability law is inapplicable and no further findings are required. *Borenstein v. NYC Emps Ret. Sys.*, 88 NY2d 756 (1996).

The threshold question of whether an applicant has the injury claimed and whether the injury incapacitates the applicant from the performance of duty is solely for the Medical Board. *Borenstein*, 88 NY2d at 760. It has been held that a Medical Board’s determination regarding disability is binding is on the Board of Trustees. If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny the applicant’s claim. The Board of Trustees is equally bound by a Medical Board finding that

the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board's recommendation regarding.

As long as "some credible evidence" supports the Medical Board's disability determination, that determination cannot be disturbed by the courts. "Credible evidence" is defined as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered....which must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion. *Meyer v. Bd. Of Trs. NYC Fire Dep't Article 1-B Pension Fund*, 90 NY2d 139 (1997). The Medical Board's expert opinion constitutes credible evidence when it is based on objective medical evidence, or where the Medical Board clearly articulates a rational fact-based medical explanation. *Meyer* at 145-146. In addition, the resolution of conflicts between the medical conclusions of the Medical Board and an applicant's treating physicians is the sole province of the Medical Board. *Russell v. NYC Emps. Ret. Sys.* 155 AD3d 1046 (2017).

In the case at bar, the Medical Board convened and considered petitioner's application on three occasions, reviewed his voluminous medical records, and conducted three separate physical examinations and three separate interviews of petitioner. The Board ultimately determined that petitioner was not permanently disabled from performing the full duties of an NYPD officer due to his renal cancer, which was diagnosed in 2015, is in remission and has not reoccurred, exceeding the "some credible evidence" standard. *Matter of Longo v. City of New York*, 178 AD2d 253; *Matter of Goldman v. McGuire*, 101 AD2d 768.


The determination of the Medical Board was not arbitrary and capricious, The Medical Board did consider respondent's subjective complaints of pain when determining the issue of disability and the record indicates that the Board disagreed. As the Medical Board found that the

medical evidence submitted by respondent was not dispositive of on the issue of disability but was subject to conflicting interpretations. The Board alone had the authority to resolve such conflicts. *Matter of Cassidy v. Ward*, 169 AD2d 482.

The Medical Board detailed what medical proof had been considered, specified the nature of the of respondent's complaints and outlined the results of its physical examinations of respondent, concluding that respondent's physical condition was not disabling for duty. The Board did not need to specify each and every possible task that petitioner could not perform in order to determine that petitioner was not permanently disabled from performing his duties as an NYPD officer.

Here, petitioner has failed to present a meritorious argument to disturb the finding of the Board of Trustees' adoption of the Medical Board's credible and objective findings. Thus, this court will not substitute its judgment for that of the Medical Board. *Matter of Santoro v. Board of Trustees*, 217 AD2d 660.

ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to respondent, as taxed by the Clerk, and that respondent have executive therefor.

6/6/2019					
DATE			W. FRANC PERRY, J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>