

**Russell v O'Neill**

2020 NY Slip Op 31906(U)

June 15, 2020

Supreme Court, New York County

Docket Number: 159239/2018

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

DANIEL RUSSELL, Petitioner, - v - JAMES P. O'NEILL, as Police Commissioner of the City of New York, and as Chairman of the BOARD OF TRUSTEES OF THE POLICE PENSION FUND, KEVIN HOLLORAN, as Executive Director of the New York City Police Pension Fund, THE BOARD OF TRUSTEES of the Police Pension Fund, and THE CITY OF NEW YORK, Respondents.
INDEX NO. 159239/2018
MOTION DATE 02/05/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 22, 23, 24, 26, 71, 72

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

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the petition of petitioner Daniel Russell for relief, pursuant to Article 78 (motion sequence number 001), is granted as follows:

(1) The determination of respondent The Board of Trustees of the Police Pension Fund, dated August 13, 2015, which denied the application for "retirement for accident disability", pursuant to NYC Administrative Code § 13-252 is vacated and annulled and, petitioner's retirement benefits pursuant thereto are awarded retroactively to the date of his retirement on April 1, 2013; and

(2) This matter having come on before this court on April 23, 2019, on motion of the petitioner for a judgment awarding him accidental retirement benefits and the petitioner, having been represented in connection therewith by Philip H. Seelig, Esq., and the respondents having been represented in connection therewith by Ashima Talwar, Esq., pursuant to CPLR § 4317(b), the court having on its own motion determined to consider the appointment of a referee to determine as follows: the issue of an assessment of the accrued accidental retirement benefits in an amount determined by subtracting the amount of ordinary disability retirement benefits actually paid to petitioner between, April 1, 2013, the date of his retirement, and the date of this judgment from the amount to which petitioner was entitled, pursuant to NYC Admin Code § 13-352, is referred to a Special Referee to hear and determine; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following issue: an assessment of the accrued accidental retirement benefits in an amount determined by subtracting the amount of ordinary disability retirement benefits actually paid to petitioner between April 1, 2013, the date of his retirement and the date of this judgment from the amount of accidental retirement disability benefits to which petitioner was entitled, pursuant to NYC Admin Code § 13-352; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 30 days of service of a copy of this order with notice of entry Order, submit to the Special Referee Clerk by electronic court filing, with proof of service by electronic court filing upon counsel for respondents, an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for petitioner and for respondents of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties, accompanied by their counsel, shall appear for the reference hearing, including with all witnesses and evidence they seek to present, if such "in person" appearance is possible, or by the court approved video platform, and shall be

ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED and ADJUDGED that in accordance with the Report of the aforementioned Special Referee, without any further application, petitioner, having an address at 2570 Foxdale Avenue, Oceanside, New York, shall recover from respondent The Board of Trustees of the Police Pension Fund, Article II, \$ \_\_\_\_\_, together with interest at the rate of 9% per annum from April 1, 2013, the aforesaid retirement date, plus costs and disbursements

in the sum of \$ \_\_\_\_\_ as taxed by the Clerk, and the petitioner shall have execution therefor

DECISION

The court shall grant the petition, annul the denial of petitioner's application for "line of duty" Accidental Disability Retirement benefits and direct respondent(s) to pay the upgraded benefit to petitioner, retroactively and prospectively.

This is the second time petitioner's application for Accidental Disability Retirement (ADR) benefits is before a Justice of this court. The prior Justice issued an Order stating in pertinent part that the respondent "Medical Board's determinations were not rationally based in light of all of the medical evidence submitted by the Petitioner . . . Therefore, the Medical Board's disapproval recommendations were arbitrary and capricious, warranting a remand of the ADR application for further review." Russell v Bratton, Index No. 102135/2015, Order dated August 18, 2016, (Sup Ct, NY County, Mendez, J.)

As stated in the prior decision, the Court of Appeals has set forth the standard to be applied by respondents in considering an ADR application stating

The award of accidental disability retirement benefits to a NYCERS applicant is a two-step process (see, Administrative Code of City of NY § 13-168 [a]). The first step involves fact finding by the NYCERS Medical Board (see also, Administrative Code § 13-123 [a]

[composition of Medical Board]). After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually "physically or mentally incapacitated for the performance of city-service." (Administrative Code § 13-168 [a].) If the Medical Board concludes that the applicant is disabled, it must then make a 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" (*id.*).

Matter of Borenstein v New York City Employees' Retirement Sys., 88 NY2d 756, 760 (1996); see Matter of Jefferson v Kelly, 14 Misc3d 191, 195 (Sup Ct, NY County, Oct 17, 2006) ("Generally speaking, an applicant for ADR benefits must prove the existence of a disability and that the disability is causally related to an injury sustained in the line of duty).

The entirety of the applicable Administrative Code 13-252 states as follows:

§ 13-252 Retirement; for accident disability.  
Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of willful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such 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, and that such disability was not the result of willful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

The prior remand by this court (Russell v Bratton, supra) held that the Medical Board's determinations that petitioner was not disabled were not rationally based. The Medical Board upon remand here determined that petitioner was physically 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 of the retirement system. That is, the Medical Board determined that petitioner had established disability and causation. However, at its June 13, 2018 meeting the Board of Trustees of the NYC Police Pension Fund denied petitioner's ADR application on the grounds that petitioner had not established disability as of the date of retirement.

The respondents' imposition of an additional "date of retirement" requirement was an error of law and therefore the denial of ADR on that basis was arbitrary and capricious. The court agrees with the reasoning of a Justice of this court in Drew v O'Neill, (Index No. 100870/2018, Order dated July, 19, 2019, Sup Ct, NY County, Edmead, J.) that subsequent enactments and legislative history indicate that respondents' imposition of an

additional "date of retirement" disability requirement is contrary to not only the plain wording of Administrative Code 13-252 but also the legislative intent. In 2006, the New York State legislature enacted General Municipal law 207-k, and NYC Administrative Code 13-252.1 was enacted in 2008. While both of these provisions created rebuttable presumptions as to causation in applications for ADR benefits, neither included any "date of retirement" requirement evincing the intention of lawmakers that upon a determination of disability and causation ADR benefits should be approved.

6/15/2020  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE