

Carter v New York City Empls. Retirement Sys.

2020 NY Slip Op 33535(U)

October 27, 2020

Supreme Court, New York County

Docket Number: 155095/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

MICHELLE CARTER,

Plaintiff,

- v -

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,
MELANIE WHINNERY, NEW YORK CITY EMPLOYEES
RETIREMENT SYSTEM BOARD OF TRUSTEES

Defendant.

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INDEX NO. 155095/2020

MOTION DATE 12/13/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 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

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

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Michelle Carter (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Michelle Carter (Carter) seeks an order to vacate a determination of the respondent New York City Employees' Retirement System (ERS) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and the proceeding is dismissed.

BACKGROUND FACTS

Carter has been employed by the New York City Fire Department (FDNY) as an emergency medical technician (EMT) since April 26, 2002, and she thereafter also became a member of the ERS on July 22, 2002. *See* verified answer, ¶¶ 12-13; exhibits 1, 2.

On May 31, 2017, Carter suffered a line of duty (LOD) injury to her right foot while employed as an EMT. *See* verified answer, ¶ 14; exhibit 3; verified petition, ¶ 3. On August 13, 2018, Carter filed an application for disability retirement with ERS which sought both "Ordinary Disability Retirement" pursuant to RSSL § 605 (ODR) and "Performance of Duty Disability Retirement" pursuant to RSSL § 607-b (PDR). *Id.*, ¶ 15; exhibit 4, verified petition, ¶ 4. Carter was subsequently examined by the Medical Board (the ERS Medical Board) that reports to the respondent ERS Board of Trustees (the ERS Board) on November 19, 2018 and again January 28, 2019. *Id.*, ¶¶ 21-38. Both times the ERS Medical Board issued reports that: (a) found that Carter was disabled; (b) her disability was not caused by her LOD injury; and (c) recommended that her ODR application be granted and that her PDR application be denied. *Id.*; exhibits 11, 16. On February 14, 2019, the ERS Board issued a resolution that retired Carter effective as of that day and granted her application for ODR. *Id.*, ¶¶ 39-41; exhibit 19. The ERS Board later granted Carter's appeal request to permit her to resubmit her application for disability retirement to the ERS Medical Board with new supporting medical evidence. *Id.*, ¶¶ 42-44.

The ERS Medical Board subsequently considered Carter's new evidence at meetings on June 12, 2019 and November 26, 2019, after which it returned reports that confirmed: (a) its original finding that Carter's disability was not causally related to her LOD injury; and (b) its original recommendation that her PDR application be denied. *Id.*, ¶¶ 45-51; exhibits 23, 25. The ERS Board then considered Carter's appeal of her application for disability retirement for the final time on March 12, 2020 and issued a resolution on that day that accepted the ERS Medical Board's findings. *Id.*, ¶¶ 52-61; exhibit 28. On March 13, 2020, the ERS Board sent Carter a letter that notified her of its final decision to accept the ERS Medical Board's findings, and of her right to challenge that decision by filing an Article 78 petition within four months. *Id.*, ¶ 62; exhibit 29.

Carter thereafter commenced this proceeding on July 7, 2020 at a time when the majority of the court's functions had been indefinitely suspended because of the Covid-19 national pandemic. *See* verified petition. Respondents eventually filed an answer on September 25, 2020, and Carter submitted reply papers on October 12, 2020. *See* verified answer; Carter reply aff. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating*

Corp. v Popolizio, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

In the context of applications for disability retirement, well settled appellate precedent holds that the ERS Board is generally bound by the ERS Medical Board's determination that an applicant is disabled, but that the ERS Board may make its own determination on the issue of causation. See e.g., *Matter of Spears v New York City Employees' Retirement Sys.*, 116 AD3d 491, 492 (1st Dept 2014), citing *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 (1996); *Matter of Hernandez v New York City Employees' Retirement Sys.*, 148 AD3d 706, 707 (2d Dept 2017), citing *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347 (1983); *Matter of Demarco v New York City Employees' Retirement Sys.*, 211 AD2d 594, 595 (1st Dept 1995).

Here, Carter agrees that she is disabled, but asserts that it was arbitrary and capricious for the ERS Board to issue its March 12, 2020 resolution adopting the ERS Medical Board's determination that her May 31, 2017 LOD injury did not cause her disability. See petitioner's mem of law, ¶¶ 5-19. Carter specifically argues that the ERS Medical Board's original "denial was based on a technicality and a flawed attempt to differentiate between the ankle and the foot," because "her incident report . . . initially listed the injury to her foot, . . . [but she] did not know it was her ankle, not her foot as she is not a physician." *Id.*, ¶¶ 7, 10. She avers that she presented the ERS Medical Board with copies of medical reports which were conducted within a

month after her LOD accident that show an injury to her ankle ligament, rather than her foot, but that the ERS Medical Board chose to ignore those reports. *Id.*, ¶¶ 11-17.

Respondents counter that the ERS Medical Board considered all of Carter's medical submissions on four separate occasions and nevertheless concluded that the evidence did not demonstrate that her May 31, 2017 LOD injury was the cause of her disability. *See* respondent's mem of law at 8-13. Respondents assert that all of that material, taken together, affords sufficient "credible evidence in the administrative record" to "constitute substantial evidence of a lack of causal connection." *Id.*, at 12-14. They also note that New York law permits the ERS Medical Board and the ERS Board to consider not only contemporaneous medical reports about injuries, but also such factors as gaps in time between diagnosis and treatment of such injuries. Carter's reply papers repeat her argument that the ERS Medical Board did not properly take into account all of her medical evidence when it made its recommendation about causation. *See* petitioner's reply affirmation at 2-6 (pages not numbered). After careful consideration, the court finds for respondents.

Respondents correctly cite appellate precedent that holds that the ERS Board's determination of a lack of causation must be upheld if there is "any credible evidence of lack of causation" before it. *See Matter of Baumgarten v New York City Employees' Retirement Sys.*, 6 AD3d 701, 701 (2d Dept 2004), citing *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 (1997) and *Matter of Wahl v Board of Trustees of N.Y. City Fire Dept.*, 89 NY2d 1065, 1067 (1997). They also cite precedent that establishes that the burden of proof lies on the applicant to demonstrate that there was no such "credible evidence of lack of causation." *See Matter of Carney v New York City Employees' Retirement Sys.*, 162 AD2d 382, 383 (1st Dept 1990).

It is notable that neither Carter’s original nor reply memoranda cite any case law whatsoever. Instead, those papers merely set forth the factual assertions discussed above. However, Carter does not demonstrate that the ERS Board’s finding of lack of causation was incorrect as a matter of law. As a result, the court rejects Carter’s argument, and finds that there was credible evidence before the ERS Board to support its finding of lack of causation- specifically, the multiple medical reports that Carter herself submitted to the ERS Medical Board. Accordingly, the court finds that Carter’s Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

CONCLUSION

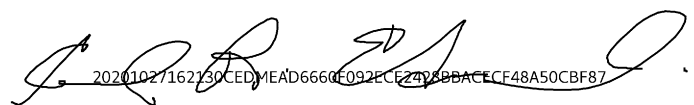
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED and ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Michelle Carter (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

Dated:



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10/27/2020
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE