

Lopez v Shea
2020 NY Slip Op 34023(U)
December 8, 2020
Supreme Court, New York County
Docket Number: 151637/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND **PART** **IAS MOTION 35EFM**

Justice

-----X

DAVID LOPEZ,

Plaintiff,

- v -

DERMOT SHEA, BOARD OF TRUSTEES POLICE
PENSION FUND

Defendant.

-----X

INDEX NO. 151637/2020

MOTION DATE 12/11/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

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

ORDERED that counsel for Respondent Police Commissioner of the City of New York 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 David Lopez (Lopez) seeks an order to vacate a determination of the respondent Board of Trustees of the Police Pension Fund, Article II (the PPF Board), and its chairman, Police Commissioner Dermot F. Shea (the Commissioner; together, respondents) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied.

FACTS

Lopez was employed as a detective by the New York Police Department (NYPD) from April 2, 1995 until his retirement on October 15, 2019.¹ *See* verified petition, ¶ 3; verified answer, ¶¶ 21, 49. The PPF is the independent body that reviews retired NYPD officers' pension applications. *Id.*, ¶ 2; verified answer, ¶¶ 15-16.

During the course of his employment, Lopez suffered four separate "line of duty" (LOD) injuries on: 1) May 17, 1995 (LOD-1); 2) August 21, 1996 (LOD-2); 3) 1996, October 20, 2011 (LOD-3); and 4) March 25, 2014 (LOD-4). *See* verified answer, ¶¶ 22-26; exhibits A-D. Lopez sustained LOD-1 while carrying out an arrest, during which he suffered injuries to his lower back left leg, and left hand. *Id.*, ¶ 22; exhibit A. Lopez sustained LOD-2 while responding to a call in a subway, during which he fell down a flight of stairs and suffered injuries to his back. *Id.*, ¶ 23; exhibit B. Lopez sustained LOD-3 while carrying out another arrest, during which he suffered injuries to his lower back. *Id.*, ¶ 24; exhibit C. Lopez sustained LOD-4 while unloading boxes

¹ Lopez was initially employed as a Transit Police officer on June 30, 1992, and later was appointed as an NYPD detective on April 2, 1995. *See* verified answer, ¶ 21. June 30, 1992.

and furniture from a truck at One Police Plaza, during which he suffered injuries to his back. *Id.*, ¶ 26; exhibit D.

On March 29, 2018, the NYPD's Supervising Chief Surgeon submitted a recommendation to the Commissioner that Lopez be "surveyed" (i.e., evaluated) to determine whether he had become disabled during the course of his employment. *See* verified petition, ¶ 40; exhibit W. On July 30, 2018, the Commissioner issued an order that Lopez be evaluated by the PPF's Medical Board (the Medical Board), and simultaneously submitted applications on Lopez's behalf for both "ordinary disability retirement" (ODR), pursuant to New York City Administrative Code (NYC Admin Code) § 13-251, and "accident disability retirement" (ADR), pursuant to NYC Admin Code § 13-252. *See* verified answer, ¶ 27; exhibit E.

Lopez was ultimately examined three times by the Medical Board, after which the PPF Board reviewed the Medical Board's findings on several subsequent dates. *See* verified answer, ¶¶ 28-49; exhibits F-R. The Medical Board's original report, dated August 28, 2018, found that Lopez was disabled as a result of LOD-4, and recommended approval of his ADR application. *Id.*, ¶ 31; exhibit F. After remand from the PPF Board, the Medical Board's second report, dated January 29, 2019, rescinded the earlier finding of a causal link between Lopez's disability and LOD-4, and recommended denial of his ADR application, and approval of his ODR application. *Id.*, ¶¶ 33-37; exhibit K. The Medical Board's final report, dated May 14, 2019, considered Lopez's new evidence linking his disability to LOD-3, and concluded as follows:

"8. The Medical Board notes that there is a paucity of medical documentation from 2011 to 2013. The line of duty injury that occurred on October 20, 2011 [i.e., LOD-3] did not result in any radiological studies. The detective's first MRI was performed on April 9, 2013. Additionally, there is also a paucity of medical documentation between 2014 and 2016. These dates are noted in the newly submitted documentation; however, the Medical Board finds that there is a lack of medical documentation to support a causal relationship between the line of duty injury in 2011 and the subsequent spinal derangement.

“9. Based on the review of the history, the medical records, the medical evidence submitted, the clinical findings and the symptomology, the Article II Medical Board reaffirms its previous decision and recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the Police Commissioner's application for Accident Disability Retirement. The final diagnosis is Status Post Lumbar Fusion with Residual Sensory Symptomatology.” *Id.*, ¶¶ 40-43; exhibit N. At its’ final meeting on October 15, 2019, the PPF Board voted 6-6 on the Medical Board’s final report, which resulted in a resolution that granted Lopez’s ODR application and denied his ADR application. *Id.*, ¶¶ 44-50; exhibit R. The PPF Board thereafter sent Lopez a letter, dated November 6, 2019, that officially notified him of its’ decision to grant his ODR application and deny his ADR application, but also noted that, as a result of his prior decision to withdraw his ODR application, he would receive only a “service pension.” *Id.*; exhibit S.

Lopez commenced this Article 78 proceeding by filing a petition and notice of petition on February 13, 2020. *See* verified petition. The Covid-19 national pandemic caused the courts to suspend operations indefinitely in March 2020; however, counsel duly executed several stipulations that granted respondents extensions of time to file responsive pleadings. Respondents eventually filed an answer on July 31, 2020. *See* verified answer.

Subsequent to receiving the PPF Board’s November 6, 2019 notification letter, Lopez filed an application for a World Trade Center (WTC) ADR pension enhancement, pursuant to New York City Administrative Code § 13-252.1. *See* verified answer, ¶ 52. The court contacted counsel for both parties to inquire about the status of that application. Counsel both assured the court via email correspondence that Lopez’s WTC ADR application is unrelated to this proceeding, and that it is not based on any of the LOD injuries that gave rise to the PPF Board’s November 6, 2019 final order. In reliance on those assurances, the court considers that this matter is now fully submitted and ready for disposition (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether an agency's 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 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 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 a case such as this one, the PPF Board "is bound by the Medical Board's determination of disability" (*Matter of Richter v Kelly*, 111 AD3d 538, 539 [1st Dept 2013], citing *Matter of Canfora*, 60 NY2d 347, 351 [1983]), but it has a "duty to independently evaluate causation" (*Matter of Santangelo v Kelly*, 81 AD3d 439, 440 [1st Dept 2011]). Where a petitioner's ADR application is denied as a result of a tie vote on the issue of whether his or her disability was caused by a service-related accident, the petitioner bears the burden to "establish[] that the determination is completely unsupported by credible evidence...and that the disability at issue is, as a matter of law, the natural and proximate result of a service-related accident." *Matter of Deleston v Safir*, 294 AD2d at 2007; *see also Matter of Baudille v Kelly*, 95 AD3d 415, 415 (1st Dept 2012). Conversely, a Medical Board's determination of "no causation" will be not be

deemed arbitrary and capricious as long as there is “some credible evidence” to support it. *Matter of Paccio v Kelly*, 97 AD3d 415, 415-416 (1st Dept 2012), citing *Matter of Beckles v Kerik*, 1 AD3d 215 (1st Dept 2003). The Appellate Division, First Department, routinely upholds denials of Article 78 petitions where “some credible evidence” consists of, e.g., proof of gaps between the time that an applicant sustains an LOD injury and the time he or she seeks treatment for it, a lack of contemporaneous treatment for the LOD injury and/or a conservative course of treatment for it, and/or an applicant’s return to duty after an LOD injury along with consideration of the length of time that he or she remains in service. *See e.g., Matter of Chacon v O’Neill*, 175 AD3d 426 (1st Dept 2019); *Matter of Visconti v Kelly*, 49 AD3d 273 (1st Dept 2008); *Matter of Meehan v Kelly*, 50 AD3d 523 (1st Dept 2008); *Matter of Doyle v Kelly*, 8 AD3d 125 (1st Dept 2004).

Here, respondents assert that there is a rational basis in the administrative record to support the PPF Board’s October 15, 2019 decision to adopt the Medical Board’s finding of a lack of causation between Lopez’s October 20, 2011 injury (LOD-3) and his subsequent disability in 2018. *See* respondents’ mem of law at 8-14. Respondents particularly note that the Medical Board based its May 14, 2019 final report on the facts that: (1) Lopez returned to full-time NYPD duty status shortly after sustaining LOD-3 and remained in that status through 2018; (2) he did not schedule an MRI for LOD-3 or seek other treatment until 2013; and (3) he presented “a paucity of evidence” regarding the medical treatment that he claimed to have sought for LOD-3 during the periods of 2011-2013 and 2014-2016. *Id.* at 9; verified answer, exhibit N. Pursuant to the First Department precedent cited above, the court finds that the material in the administrative record on which the Medical Board based its final report constitutes “some credible evidence” of lack of causation sufficient to justify denial of Lopez’s Article 78 petition.

Lopez nevertheless raises arguments that the PPF Board's decision to accept the Medical Board's determination was arbitrary and capricious.

In his petition, Lopez argues that the Medical Board's finding of lack of causation based on a gap in treatment and/or paucity of evidence was "conclusory." *See* verified petition, ¶¶ 50-56. However, the cases which Lopez cited to support this argument are all factually inapposite to this one. In each of those cases, the Medical Board based a finding of "no causation" on a gap in treatment coupled with a petitioner's return to NYPD duty, but disregarded the "causation" evidence that said petitioners presented in the form of reports from the surgeons who treated their respective LODs. *See Matter of Sigmon v O'Neill*, 180 AD3d 479 (1st Dept 2020); *Matter of Boder v O'Neill*, 170 AD3d 528 (1st Dept 2019); *Matter of Salvia v Bratton*, 159 AD3d 583 (1st Dept 2018). Here, Lopez has presented no similar surgeon's report, or any evidence regarding his medical treatment during the "paucity" periods of 2011-2013 and 2014-2016. Therefore, the cited First Department case law does not support the "conclusory determination" argument that Lopez wishes to assert, and the court rejects that argument.²

Lopez's reply papers argue that "respondents' determination is not based on credible evidence." *See* petitioner's reply mem at 3-6. However, it is apparent that this argument merely asserts that the Medical Board and the PPF Board did not accord the evidence that Lopez presented the weight that Lopez wished. For example, Lopez specifically asserts that the Medical Board should have given more consideration to the fact that "the NYPD's own Medical Division explicitly authorized the lumbar fusion surgery based on [LOD-3]" when it considered the issue of causation in its final report, especially in light of the fact that that report confirmed

² Lopez's reply papers restate his "conclusory determination" argument and cite the same case law. *See* petitioner's reply mem at 7-9. The court restates its rejection of that argument for the reasons just discussed.

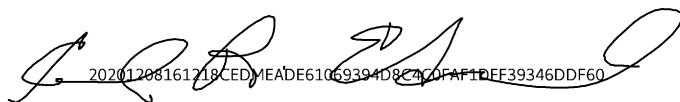
that he was disabled. *Id.*, at 4. However, the evidence that Lopez cites to support this argument is the Medical Board's first report, dated August 28, 2018, which found that he was disabled as a result of LOD-4 - a finding that the Medical Board later rescinded for lack of evidence in its second report, dated January 29, 2019. *See* verified answer, exhibits F, K. The court finds that it was reasonable that the Medical Board's final report not accord that rescinded finding the weight that Lopez wished. In any case, the Medical Board's reversal hardly constitutes sufficient proof to meet Lopez's burden to "establish that the determination is completely unsupported by credible evidence" of causation. *Matter of Deleston v Safir*, 294 AD2d at 2007 *see also Matter of Baudille v Kelly*, 95 AD3d 415, 415 (1st Dept 2012). Here, the record establishes that the Medical Board reviewed all of Lopez's evidence concerning his 2013 lumbar fusion surgery subsequent to his sustaining LOD-3 on October 20, 2011, yet still concluded that it was insufficient proof of a causal connection between LOD-3 and his 2018 disability determination. The PPF Board chose to rely on the Medical Board's determination, as it is permitted to do even where there is conflicting evidence. *See e.g., Matter of Bailey v Kelly*, 11 AD3d 208 (1st Dept 2004); *Matter of Guzman v Safir*, 293 AD2d 281 (1st Dept 2002). Therefore, the court rejects Lopez's "credible evidence" argument because he has failed to sustain his burden of proof. Accordingly, having found that there was a rational basis for respondents' October 15, 2019 final determination, and having rejected Lopez's arguments that it was arbitrary and capricious, the court concludes that Lopez'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

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

ORDERED that counsel for Respondent Police Commissioner of the City of New York shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



12/8/2020

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE