

Ramos v O'Neill

2021 NY Slip Op 31269(U)

April 16, 2021

Supreme Court, New York County

Docket Number: 156853/2019

Judge: Carol R. Edmead

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

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

Justice

-----X

JOSE RAMOS,

Plaintiff,

- v -

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

Defendant.

-----X

INDEX NO. 156853/2019

MOTION DATE 07/12/2019

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, 15, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

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 Jose Ramos (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent Board of Trustees of the Police Pension Fund shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Jose Ramos (Ramos) 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, current Police Commissioner Dermot Shea (the Commissioner),¹ as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied, and this proceeding is dismissed.

FACTS

Ramos was employed as a officer by the New York Police Department (NYPD) from April 15, 1997 until his retirement on April 30, 2017. *See* amended verified petition, ¶ 11; verified answer, ¶¶ 2, 14, n 4. The PPF is the independent body that reviews retired NYPD officers' pension applications. *Id.*, ¶ 14; verified answer, ¶ 2.

During the course of his employment, Ramos suffered three “line of duty” (LOD) injuries on: 1) June 5, 2001 (LOD-1); 2) June 27, 2007 (LOD-2); and 3) July 2, 2012, (LOD-3). *See* verified answer, ¶¶ 8-12; exhibits 2-6. Ramos sustained LOD-1 during an automobile accident in an NYPD patrol car, in which he suffered “neck strain, [a] knee contusion and back pain.” *Id.*, ¶¶ 8-10; exhibits 2, 3, 4. Ramos sustained LOD-2 when he slipped on stairs entering a dugout at Shea Stadium, and later suffered back spasms and numbness in his left hand. *Id.*, ¶ 11; exhibit 5. Ramos sustained LOD-3 while carrying out an arrest of an emotionally disturbed person, during which he injured his left knee, ankle and lower back. *Id.*, ¶¶ 12-13; exhibit 6. After he sustained LOD 3, Ramos returned to work on August 2, 2012 and was on “limited capacity” duty until October 9, 2012, when he returned to “full duty” for three days. Ramos was then placed on

¹ Respondents note that James O'Neill resigned as Police Commissioner of the City of New York in November 2019, and that the current Police Commissioner is Dermot Shea. *See* verified answer, ¶ 1, n 1.

“restricted duty” from October 12, 2012 through February 10, 2013, and and again returned to “full duty” for 2 years and 4 months. Ramos was finally placed on “restricted duty” from June 10, 2015 through his retirement on April 30, 2017. *Id.*, ¶ 14; exhibit 4.

On January 22, 2016, the NYPD’s Supervising Chief Surgeon submitted a recommendation to the Commissioner that Ramos be “surveyed” (i.e., evaluated) to determine whether he had become disabled during the course of his employment. *See* verified answer, ¶ 15; exhibit 9. On November 14, 2016, the Commissioner issued an order that Ramos be evaluated by the PPF’s Medical Board (the Medical Board), and simultaneously submitted applications on Ramos’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. *Id.*, ¶ 15; exhibit 9.

Ramos was ultimately examined four times by the Medical Board, after which the PPF Board reviewed Medical Board’s findings at subsequent meetings. *See* verified answer, ¶¶ 16-45; exhibits 10-46. The Medical Board’s first report, dated January 24, 2017, found that Ramos was disabled, but that his disability was not causally related to any of his LOD injuries, and therefore recommended approval of only his ODR application. *Id.*, ¶¶ 16-28; exhibits 10-30. After remand from the PPF Board, the Medical Board’s second report, dated July 11, 2017, considered other new evidence but nevertheless concluded that Ramos’s injuries were “chronic and degenerative” in nature, and reaffirmed its recommendation that Ramos ODR application be approved and that his ADR application be denied. *Id.*, ¶¶ 29-34; exhibits 31-35. After another remand from the PPF Board, the Medical Board’s third report, dated February 13, 2018, considered other new evidence and deferred its final decision to allow Ramos to obtain lumbar spine x-rays and a report thereof. *Id.*, ¶¶ 35-38; exhibits 37-40. The Medical Board’s final

report, dated October 16, 2018, considered that evidence, but found that “the interpretation of the radiology is consistent and indicates the presence of a chronic degenerative process with no indication that the pars defects are related to a traumatic ‘fracture.’” *Id.*, ¶¶ 39-42; exhibits 41-43. As a result, the Medical Board reaffirmed its initial finding that Ramos’s disability was not causally related to an LOD injury, and also reaffirmed its recommendation that his ODR application be granted and his ADR application be denied. *Id.*, ¶ 42, exhibit 39. At meetings on January 9, 2019 and February 13, 2019, the PPF Board considered and tabled Ramos’s disability applications. *Id.*, ¶ 43; exhibits 44, 45. At a final meeting on March 13, 2019, the PPF Board reached a 6-6 vote, which resulted in a decision to deny Ramos’s ADR application. *Id.*, ¶ 43; exhibit 46. The PPF Board noted that Ramos had previously withdrawn his ODR application voluntarily, which resulted in his being eligible for only a “service pension.” *Id.* The PPF Board thereafter sent Ramos a letter, dated March 15, 2019, that officially notified him of its’ decision to deny his ADR application and approve his “service pension.” *Id.* ¶ 44; exhibit 49.

Aggrieved, Ramos commenced this Article 78 proceeding by filing a petition and notice of petition on July 25, 2019. *See* verified petition. Ramos later filed and served an amended petition on February 21, 2020. *See* amended verified petition. The Covid-19 national pandemic caused the court to suspend most of its operations indefinitely in March of 2020, however the parties executed a number of stipulations granting respondents extensions of time to respond, and respondents eventually filed an answer on December 4, 2020. *See* verified answer. This 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 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 207 (1st Dept 2002); *see also Matter of Baudille v Kelly*, 95 AD3d 415, 415 (1st Dept 2012). Conversely, a Medical Board's determination of “no causation” will 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, however, Ramos asserts five arguments that the Medical Board and/or the PPF Board acted arbitrarily and capriciously in making their findings and recommendations.

Ramos’s first two related arguments are that his disability was “the natural and proximate result of [LOD-3] and that he is entitled to ADR benefits as a matter of law,” and that the “[Medical] Board failed to introduce substantial, credible, evidence in support of its recommendation to deny [his ADR] Application.” *See* petitioner’s mem of law at 8-12. Ramos bases these arguments on the First Department’s recent decisions in *Matter of Sigmon v O’Neill* (180 AD3d 479 [1st Dept 2020]) and *Matter of Boder v O’Neill* (170 AD3d 528 [1st Dept 2019]), which both overturned trial court dismissals of the Article 78 petitions by disabled NYPD officers who had presented evidence including: 1) LOD accident reports; 2) contemporaneous emergency room reports; and 3) the reports of their surgeons and/or treating physicians which concluded that their subject LOD injuries were the cause of each petitioner’s subsequent disability. In both cases, the First Department found that the petitioners’ evidence was sufficient to sustain their burden of proof on the issue of causality as a matter of law, and held that the PPF Board could not simply ignore it in favor of a “conclusory” finding that causality was disproven by a two-year gap between each petitioner’s LOD and the time they sought treatment for it.

Matter of Sigmon v O'Neill, 180 AD3d at 480; *Matter of Boder v O'Neill*, 170 AD3d at 529.

Ramos argues that he, too, has presented the requisite evidence, that the Medical Board did not identify any evidence which contradicted it, and that the PPF Board ignored his evidence and made an improper “conclusory” finding of no causality based on his own gap in treatment. *See* petitioner’s mem of law at 8-12.

The NYPD responds that the PPF’s no causality determination was not “conclusory” because it was not based solely on a gap in Ramos’s treatment, but was instead supported by contrary evidence that the Medical Board identified, including five reports by separate examining physicians who each concluded that Ramos’s disability was caused by “degenerative changes to his lumbar spine.” *See* respondents’ mem of law at 6-9; verified answer, exhibits 15, 16, 17, 20, 42. The NYPD argues that the *Sigmon* and *Broder* holdings are therefore factually inapposite, and that this case is instead governed by appellate caselaw holding that the Medical Board is *not* bound by the diagnosis of a petitioner’s treating physician, as a matter of law, and that the PPF is instead permitted to rely on the Medical Board’s findings in cases which involve conflicting medical evidence. *Id.* at 9-10. The court notes that settled First Department precedent does indeed hold that the Medical Board’s findings will prevail, as a matter of law, where they are supported by “credible evidence.” *See e.g., Matter of Russell v New York City Fire Pension Fund*, 139 NYS3d 805 (1st Dept 2021); *Matter of Dalton v Kelly*, 16 AD3d 200 (1st Dept 2005); *Matter of Quill v Ward*, 138 AD2d 305 (1st Dept 1988). The First Department also recognizes that the PPF Board may rely on the Medical Board’s recommendation that there is no causal connection between an LOD injury and a petitioner’s disability in cases 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). In fact, the First Department has expressly

stated that it is within “the sole province of the Medical Board and the Board of Trustees to resolve the conflicts in evidence.” *Matter of Higgins v Kelly*, 84 AD3d 520, 520-521 (1st Dept 2011), citing *Matter of Santoro v Board of Trustees of N.Y. City Fire Dept. Art. I–B Pension Fund*, 217 AD2d 660, 660 (2d Dept 1995). Here, the administrative record indicates that the Medical Board identified five reports concluding that Ramos’s disability was the result of a degenerative condition, and that it was consequently unrelated to LOD-3. This objectively disproves Ramos’s contention that the Medical Board failed to introduce any “substantial credible, evidence.” The administrative record also shows that the PPF Board relied on and adopted the Medical Board’s finding of no causal relationship between LOD-3 and Ramos’s disability. The First Department caselaw discussed above indicates that it was both permissible and proper for the PPF Board to do so. As a result, the court concludes that there was a rational basis for the PPF Board’s decision, and therefore rejects Ramos’s first two arguments.

Ramos next argues that “where it can be demonstrated that an administrative body has not observed its own standards or has acted in a way that is prejudicial . . . there is ample precedent for a judicial award of the pension sought . . . or at least a reversal and remand.” *See* petitioner’s mem of law at 12-13. Ramos restates this argument more clearly in his reply papers, which assert that, “in violating their own rules and failing to properly review and consider all of [Ramos’s] medical evidence, [respondents] denied his [pension] application in a manner . . . which violated his Due Process rights.” *See* petitioner’s reply mem at 1-2. The NYPD responds that “[t]he Medical Board properly conducted an analysis pursuant to [*Matter of*] *Tobin v Steisel* [64 NY2d 254 (1985)] as to whether the record supported a determination that petitioner’s LOD injuries aggravated a pre-existing condition or caused a latent condition that did not immediately prevent petitioner from working.” *See* respondents’ mem of law at 11-12. As the court found in

this decision's preceding paragraph, the administrative record bears out the NYPD's assertion. Further, the First Department has long recognized that a Medical Board analysis conducted pursuant to the holding of *Matter of Tobin v Steisel* and its progeny comports with principles of Due Process. See e.g., *Matter of Amar v New York City Empls.' Retirement Sys.*, 187 AD3d 687, 688 (1st Dept 2020), citing *Matter of Calzerano v Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 245 AD2d 84, 85 (1st Dept 1997]. Therefore, the court rejects Ramos's third argument because it has no foundation in the law or the facts of this case.

Ramos next argues that LOD-3 "either caused or aggravated a preexisting lumbar condition and was therefore the proximate cause of Officer Ramos' disability." See petitioner's mem of law at 13-16. The Court of Appeals holding in *Matter of Tobin v Steisel* permits disabled officers to claim ADR pensions by demonstrating that an LOD injury precipitated the development of a latent condition, or aggravated a pre-existing condition, to the point of disability. 64 NY2d at 259-260. However, the Court of Appeals squarely holds that the petitioner bears the burden of proof in such situations. See *Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268, 284 (2012). Thus, Ramos's contention that the Medical Board "never once took into consideration" the possibility that LOD-3 had precipitated a latent condition or aggravated a pre-existing condition is unavailing. It was incumbent on Ramos to present proof of this allegation, and he failed to do so. Indeed, his only offer of proof appears to be counsel's conclusory assertion that it would be "nonsensical" to conclude that LOD-3 had not aggravated the conditions caused by the injuries that Ramos sustained in LOD-1 and LOD-2. See petitioner's mem of law at 14. It goes without saying that this assertion is not "credible evidence," as the First Department understands that term. *Matter of Russell v New York City Fire Pension Fund*, 139 NYS3d at 805. Further, the

First Department has long recognized that it is not incumbent on the Medical Board to provide a petitioner with an alternate explanation for causation. *See e.g., Matter of Mackey v Ward*, 166 AD2d 379, 379-380 (1st Dept 1990), citing *Matter of Bombacie v Board of Trustees of Police Pension Fund, Art. II, N.Y. City Police Dept.*, 74 AD2d 530 (1st Dept 1980). Therefore, because Ramos has plainly failed to carry his burden of proof, the court rejects his fourth, alternative causation - *Matter of Tobin v Steisel* argument.

Finally, Ramos argues that the PPF Board's "denial of [his ADR application] was arbitrary, capricious and an abuse of discretion as Respondents failed to adequately conduct the type of thorough, independent investigation required of them." *See* petitioner's mem of law at 16-21. However, a close reading of this argument discloses that it merely repeats Ramos's factual contention that the Medical Board did not identify any "credible evidence" to support its recommendation that the PPF find that there was no causal connection between LOD-3 and his lumbar spine disability. *Id.* The court has already determined that there was such evidence in the administrative record, in the form of the five examining physicians reports that the Medical Board identified. *See* verified answer, exhibits 15, 16, 17, 20, 42. Therefore, the court rejects Ramos's fifth argument for that same reason, and also rejects his contention that the PPF Board's March 15, 2019 final determination was an arbitrary and capricious ruling. It was not.

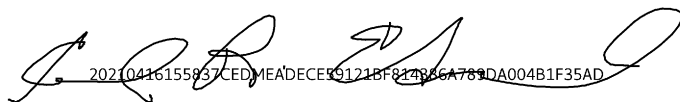
Accordingly, having concluded instead that there was a rational basis for the PPF Board's final determination, the court also concludes that Ramos's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

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

ORDERED that counsel for respondent Board of Trustees of the Police Pension Fund shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.


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4/16/2021
DATE

CAROL R. EDMED, 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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
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