

Matter of Krenitsky v City of New York
2021 NY Slip Op 31287(U)
April 14, 2021
Supreme Court, Kings County
Docket Number: 509256/2020
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of April, 2021

P R E S E N T:

HON. DEBRA SILBER, Justice.

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In the Matter of the Application of

DAVID KRENITSKY,
Petitioner,

For a Judgment pursuant to Article 78 of the CPLR,

- against -

THE CITY OF NEW YORK and
THE NEW YORK CITY EMPLOYEES’
RETIREMENT SYSTEM

Respondents.

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DECISION/ORDER

Index No. 509256/2020

The following papers were read herein:

NYSCEF Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed and Exhibits _____	_____ 1-27 _____
Verified Answer and Exhibits and Memo of Law _____	_____ 29-59 _____
Reply Affidavits (Affirmations) _____	_____

Upon the foregoing papers, petitioner moves for an order annulling respondent NYCERS’ denial of petitioner’s application for a disability retirement.

Facts and Procedural History

Petitioner began working as a New York City maintenance worker in 2007. He first worked for the Health and Hospitals Corporation and in 2010, switched to the New York City Housing Authority. He joined the NYCERS pension system on November 29, 2007. He had an accident on the job on November 14, 2016. Petitioner injured his right hand, wrist, and forearm, allegedly when a cable on a machine used to clear plumbing clogs broke off while he was operating it and caused lacerations to his hand and arm. The day after the accident, he had two surgeries at the hospital, a carpal tunnel release and a “volar forearm fasciotomy.” He applied for a disability retirement on November 13, 2017 and his application was denied by letter from NYCERS dated September 14, 2018, which informed him that the Board of Trustees of NYCERS had adopted the recommendation of the Medical Board denying his application. He reapplied in 2018 and by letter dated January 9, 2020, his application was again denied, by letter from NYCERS dated September 14, 2018, which informed him that the Board of Trustees of NYCERS had adopted the recommendation of the Medical Board denying his application. The letter states that petitioner had the option of filing an Article 78 petition or of applying to have his case reviewed by the Final Medical Review Committee. This petition followed.

While the petition was filed after the expiration of the statute of limitations, the Governor’s Executive Order extended the statute during the COVID-19 Pandemic and respondents do not argue that the petition was late.

Petitioner supports his petition with the records from Elmhurst Hospital, which are not certified and thus are not submitted in admissible form, a copy of a letter from Worker's Compensation which indicates that on March 30, 2018, he reached a settlement with them, which is not in admissible form, and a copy of a letter from the Social Security Administration which states that he was approved for Social Security Disability benefits on February 15, 2019, retroactive to May 2017, as a result of his disability which occurred on November 14, 2016, the date of his accident. This letter is also not in admissible form. Petitioner supplies copies of his handwritten applications to NYCERS and various items of correspondence from NYCERS. For both applications, he provides copies of the Medical Board Report, following his interview and exam, and their addendums. He does not provide any of the medical records which were submitted by petitioner to NYCERS as his medical evidence in support of his application. To be clear, petitioner asks the court to determine that the respondent's decision was, as defined by the caselaw in New York, arbitrary and capricious, but does not provide the court with the same records the Medical Board reviewed. Thus, it is not possible to evaluate their decision under the legal analysis required, as petitioner's papers are defective.

Petitioner also provides (Doc 14) an unexplained "affirmation" which is not admissible as it is not in affidavit form. Document 24 is a "substituted" exhibit, which is notarized but still not in affidavit form. Document 25 is a letter of support from a former union member and friend of petitioner, and while it is notarized, it too is not in affidavit form. Document 21 is a recent affirmation from petitioner's treating doctor, Peter D. Stein,

M.D., an orthopedist, who opines that petitioner is permanently disabled as a result of the accident in question. He annexes an undated narrative report, which is referenced in his affirmation, which concludes that petitioner “will have to undergo additional surgery to his right hand.” This is described as a “right thumb MP Joint arthrodesis.” Doc. 22 is a recent affirmation from Dr. Elvin Ruiz, who seems to be a neurologist. These recent documents could not have been submitted to the Medical Board, as they were created after NYCERS issued its denial. They are therefore inadmissible, not because they are not signed affirmations from medical doctors, who are permitted to affirm by CPLR 2106, but because they were not included in the documents the Medical Board reviewed when it reached its determination.

Discussion

Article 14 Section 605 [c] of the New York Retirement and Social Security Law (hereinafter RSSL), sets forth the criteria for members of NYCERS to qualify for Disability Retirement. As is applicable here, respondent does not dispute that petitioner has "at least ten years of total service credit" and thus was eligible to apply for a Disability Retirement allowance. In order to qualify for disability retirement benefits, however, petitioner must first establish that he is "physically or mentally incapacitated for the performance of gainful employment" (RSSL § 605 [c]).

An applicant seeking disability retirement has the burden of establishing that he is incapacitated and unable to work. Based upon the record, in reaching its determination, the Board of Trustees of NYCERS considered all of the medical evidence submitted by the

petitioner concerning the petitioner's medical and psychological condition. None of this evidence is in this record. It also considered the Medical Board's own physical and psychiatric examination of the petitioner. The Medical Board reviewed the petitioner's file and asked for additional medical records before they scheduled an examination of petitioner. Ultimately, the Medical Board made its recommendation to the Board of Trustees that petitioner's application for Disability Retirement benefits should be denied. This recommendation was to deny petitioner's claims of both physical and mental incapacity.

Where there is conflicting medical evidence presented to the Medical Board, it is solely within its province to resolve such conflicts (*Kuczinski v Board of Trs. of N.Y. City Fire Dept*, 8 AD3d 283, 777 N.Y.S.2d 693 [2d Dept 2004]; *see also Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 673 N.E.2d 899, 650 N.Y.S.2d 614 [1996]; *Matter of Zamelsky v New York City Employees' Retirement Sys.*, 55 AD3d 844, 865 N.Y.S.2d 682 [2d Dept 2008]).

The Medical Board is tasked with determining whether a member applying for disability retirement benefits is disabled (*see* Administrative Code of the City of New York § 13-168; *Matter of Vargas v New York City Employees' Retirement Sys.*, 95 AD3d 1345, 1346, 945 N.Y.S.2d 364 [2d Dept 2012] [citations omitted]). The Board of Trustees is bound by the Medical Boards' determination as to whether an applicant is disabled (*Matter of Vargas*, 95 AD3d at 1346 [citations omitted]). The Medical Board's determination is conclusive if it is supported by substantial evidence, which in disability cases has been

construed to mean some credible evidence, and is not irrational (*Matter of Vargas*, 95 AD3d at 1346 [citations omitted]).

The court's function in an Article 78 proceeding brought following a determination by the Board of Trustees of NYCERS is to determine if the determination of the administrative agency is supported by credible evidence or is arbitrary and capricious (*Matter of Pell v Board of Lefuc. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 230, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). It is well settled that following a review pursuant to Article 78, courts may set aside an administrative determination where it is evident that the administrative body applied an erroneous legal standard or if the agency's determination is not supported by credible evidence (*Matter of Pell*, 34 NY2d at 230 [citations omitted]). However, the court has no authority to upset the Medical Board's decision on a disputed issue of fact or to review the facts and then consider the relative weight of the evidence (*id.* [citations omitted]).

Here, petitioner has not submitted the medical records that he provided to the Medical Board and, thus, he does not even establish that the Medical Board was faced with conflicting medical evidence. In any event, the record demonstrates that the Medical Board considered all of the medical evidence submitted by petitioner, interviewed him, and performed its own physical and psychiatric examinations. Although the medical conclusions of petitioner's doctors may have differed from those reached by the Medical Board, the resolution of such conflicts is solely within the province of the Medical Board

and not the Board of Trustees of NYCERS or of the court (*see Matter of Vargas*, 95 AD3d at 1346 [citations omitted]).

Considering the Medical Board's records, which have been submitted, and unable to see any of the petitioner's medical evidence which the Medical Board reviewed, the court cannot say that the Medical Board's determination, as adopted by the Board of Trustees, was irrational and was not supported by some credible evidence (*see id.* at 1345 [citations omitted]). Without any of petitioner's medical records, and even considering the inadmissible hospital record's description of the surgeries performed, the court must conclude that neither a carpal tunnel release procedure nor a volar forearm fasciotomy would ordinarily result in a person's permanent physical incapacity to work. If petitioner had an unusual outcome and provided medical evidence to support his claim, it is not in the record before the court.

Petitioner now proffers affirmations from Dr. Ruiz and Dr. Stein, which both state that petitioner is permanently physically disabled. These recent reports, created after the Medical Board's review and determination, could not have been part of the record reviewed by the Medical Board and are thus not appropriately submitted in this Article 78 proceeding (*Matter of Yarbough v Franco*, 95 NY2d 342, 347, 740 N.E.2d 224, 717 N.Y.S.2d 79 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757, 455 N.Y.S.2d 814 [1st Dept 1982] ["Judicial review of administrative determinations is confined to the 'facts and record adduced before the agency when the administrative determination was rendered' "]). To be clear, while they are properly

prepared medical affirmations, they cannot be considered by the court. Petitioner has not provided copies of the medical records submitted with his application for a disability retirement, but only affirmations prepared after his application was denied. These subsequent medical opinions were not considered by the Medical Board in reaching the underlying determination and, thus, they cannot be considered in an Article 78 review of the administrative agency's decision.

Accordingly, it is **ORDERED** and **ADJUDGED** that the petition is denied, and concomitantly, dismissed.

This constitutes the decision, order, and judgment of the court.

E N T E R,



Hon. Debra Silber, J.S.C.