

**Matter of Pasquale v New York City Empls.  
Retirement Sys.**

2021 NY Slip Op 31514(U)

May 3, 2021

Supreme Court, Kings County

Docket Number: 507194/2020

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3<sup>rd</sup> day of MAY, 2021

P R E S E N T:  
HON. RICHARD VELASQUEZ, Justice.

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In the Matter of the Application of  
PHILIP D. PASQUALE,  
Petitioner,

Index No.: 507194/2020  
Decision and Order

-against-

THE NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM, THE BAORD OF TRUSTEES of the City Employees' Retirement System, and THE CITY OF NEW YORK.

Respondents.

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The following papers NYSCEF Doc #'s 1 to 48 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	1-16
Opposing Affidavits (Affirmations) _____	18-47
Reply Affidavits (Affirmations) _____	48
Memorandum of Law _____	16, 47, 48

After having heard Oral Argument on MAY 3, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Petitioner moves pursuant to Article 78 for an order; Reviewing and annulling the action of respondents herein in denying petitioner a World Trade Center Law disability retirement pursuant to New York Retirement and Social Security Law § 605-b, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and B. Directing and ordering respondents to retire petitioner with a World Trade Center Law disability retirement pursuant to New York Retirement and Social Security Law § 605-b, retroactive to the date of his retirement plus interest; or in the alternative Directing and

ordering the respondents, by way of remand, to review and reconsider the petitioner's application for a World Trade Center Law disability retirement benefit pursuant to New York Retirement and Social Security Law § 605-b. (MS#1). Respondents oppose the same.

Petitioner contends the Medical Board's determination was arbitrary and capricious and does not satisfy the credible evidence standard. Contending Petitioner suffers from well-documented PTSD, panic disorder, and anxiety that are severe and that are connected to the events of September 11, 2001. The Petitioner further contends Petitioner's diagnosis and disability were confirmed by Drs. Weksler, Friedman, Katz, Khan, the Social Security Administration, and the Mount Sinai School of Medicine World Trade Center Psychiatry Program. Petitioner further contends it was arbitrary and capricious for the Medical Board ignore the overwhelming evidence showing that the Petitioner both suffered from PTSD and that he was disabled, in favor of their own doctor who found otherwise on both issues and that the Medical Board has not adequately explained its reasoning, but has simply gone through a pro forma exercise.

Respondent contends The Medical Board's determination that Petitioner was not physically or psychiatrically disabled due to PTSD, anxiety, depression, GERD, Barrett's Esophagus, and rhinosinusitis was based on "some credible evidence," and the Board of Trustees reasonably, rationally and lawfully denied Petitioner's application for Disability Retirement Benefits pursuant to Section 605-b under the WTC law.

Pursuant to CPLR § 7803 "The only questions that may be raised in a proceeding under this article are: ... 3. whether a determination was made in violation of

lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; ...". NY CPLR 7803 (McKinney). The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 NY2d 222, 356 NYS2d 833, 313 NE2d 321: “**Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.**” *Id.* at 231, 356 NYS2d at 839, 313 NE2d at 325. The question, said the Court, is whether the determination has a “rational basis.” *Id.*

It is well settled that the Medical Board is “free to come to any conclusion supported by the medical evidence before it, [but] the board could not disregard” the competent evidence before them.” *Matter of Salvia*, 159 AD3d 583, 584, 70 NYS3d 379 (2d Dep’t 2018); see also *Matter of Agnelli*, 96 AD3d 471 at 472, 945 NYS2d 690 (2d Dep’t 2012) (“The Board has not considered all of the medical evidence or adequately explained its reasoning, but has simply gone through a pro forma exercise . . . .”). In the present case, the medical Board has failed to adequately explain its findings. Specifically, the Medical Board has to address the evidence before them, and this included the decision by the Social Security Administration which found him totally disabled, as well as the findings of the Mount Sinai School of Medicine World Trade Center Psychiatry Program. See *Kiess*, 75 AD3d 417, 906 NYS2d 13 (2d Dep’t 2010); *Matter of Agnelli*, 96 AD3d 471 at 472, 945 NYS2d 690 (2d Dep’t 2012). Courts have consistently found an absence of the required quantum of credible evidence when the denial ‘was premised only on a summary conclusion of no causation and lacked any

factual basis.” See *Matter of Fernandez v. Bd. Of Trustees of N.Y.C Fire Dep’t Pension Fund*, 81 AD3d 950, 952, 917 NYS2d 280 (2d Dep’t 2011). Additionally, the Medical Board’s determination fails to discuss the fact that petitioner revealed he takes the narcotic drug Vicodin three times a day for pain relief and the effects it could impose upon the safety of . . . persons frequenting the City’s roadways.”); see also *Matter of McCann v. N.Y.C. Employees’ Retirement System*, 60 Misc.3d 1224[A], 110 NYS3d 484 (Sup. Ct. Kings County 2018) (“The Board concluded that petitioner is not disabled and thus he can operate a bus, without explaining how petitioner can do so when he is required to take a narcotic-based medicine).

Accordingly, Petitioners request is hereby granted to the extent that this matter is hereby remanded, for the Medical Board to further review and reconsider the Petitioner’s application for a World Trade Center Law disability retirement benefit pursuant to a New York Retirement and Social Security Law § 605-b. Specifically, the Medical Board review and decision must address the effects of the Petitioners medication would have on his ability to perform his job (i.e. drive a Sanitation truck), including the New York City Department of Sanitation policy against the use of benzodiazepines while driving; the Social Security Administration’s finding that the Petitioner is entitled to full disability benefits; and finally the findings of the Mount Sinai School of Medicine World Trade Center Psychiatry Program. (MS#1)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York  
May 3, 2021

ENTER FORTHWITH:



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HON. RICHARD VELASQUEZ