

Pena v City of New York
2021 NY Slip Op 32568(U)
December 1, 2021
Supreme Court, New York County
Docket Number: Index No. 152211-2021
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

Fredelinda Pena

INDEX NO. 152211-2021

- v -

MOT. DATE

The City of New York, et. al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for vacatur/annulment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). _____

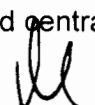
Replying Affidavits NYSCEF DOC No(s). _____

In this proceeding, petitioner Fredelinda Pena (“Pena”) seeks an order pursuant to CPLR Article 78 annulling the determination made by the respondents, the City of New York, Dermot F. Shea, and the Board of Trustees of the New York City Police Pension Fund Article II (together the “respondents”) that denied petitioner’s application for Ordinary Disability Retirement (“ODR”). The respondents have answered the petition and oppose the relief sought. The petition is granted to the extent that the underlying determination is annulled, and petitioner’s application is remanded to the Police Pension Fund’s Board of Trustees for review.

The relevant facts are as follows. Pena began working as a New York City Police Officer on January 10, 2007. Thereafter, she became a member of the Police Pension Fund (“PPF”). On June 22, 2011, Pena was on duty and was assigned to conduct a survey and prepare a Site Conferral Report for the Hilton Hotel in Manhattan. While on assignment, she fell down a flight of stairs. Petitioner contends that this fall caused injuries to her neck and back. As time progressed, petitioner claims that her cervical spine condition worsened. On May 9, 2017, she was placed on restricted duty due to her cervical spine condition. On April 5, 2018, the police commissioner recommended Pena for an ODR disability pension. A survey for Pena was then commenced and she was scheduled to be examined by the NYC PPF’s Article II Medical Board.

This examination took place on October 9, 2018. It included a review of medical documents that Pena submitted, and an exam performed by the Medical Board itself. Pena’s submissions included medical reports and tests from various doctors. She submitted a cervical MRI that was performed upon the recommendation of Dr. Nathaniel Tindel, an orthopedic surgeon. This MRI was performed on August 10, 2017. It demonstrated a straightening of the normal cervical spine lordosis, a narrowing of the disc space heights and anterior degenerative endplate changes at the C5-6 and C6-7 locations. The MRI also revealed disc osteophyte formation and mild canal stenosis with mild bilateral foraminal narrowing at the C5-6 disc, and disc osteophyte formation with superimposed central disc protrusion and

Dated: 12/01/2021



HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

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FIDUCIARY APPOINTMENT REFERENCE

mild canal stenosis with mild left greater than right foraminal narrowing at the C6-7 disc. Pena also submitted an EMG nerve conduction study that was performed by Dr. Artem Kaplan, a neurologist, on August 28, 2017. This EMG revealed a chronic right C7 vertebra radiculopathy. The impression was cervical spondylosis with mild spinal stenosis. Pena tendered a copy of the medical report of Dr. Richard Carlino, a family medicine specialist at Mosholu Medical Group, whom she saw on May 3, 2018. In this report, Dr. Carlino diagnosed Pena with cervicalgia, spondylosis, thecal sac compression, paresthesia, and back and neck pain. He reported that her prognosis for full duty "can possibly improve" and cleared her for limited duty with restrictions to lifting, pushing, pulling, contact and impact. She also submitted the diagnosis of Dr. Michael Murray, an NYPD Department orthopedic surgeon, who she saw on May 18, 2018. Dr. Murray diagnosed Pena with cervical stenosis and lumbar degenerative disc disease with radiculopathy and recommended that she continue to be limited to restricted duty.

After review of the documentation, the Medical Board conducted its own examination of Pena. The Medical Board observed that Pena had a rapid, reciprocal and non-antalgic gait. She walked easily on her heels and toes and performed tandem walking without difficulty. She hopped independently with good balance on both feet. Range of motion of the cervical spine demonstrated 30-degree flexion, 40-degree extension, 40-degree right rotation, 35-degree left rotation and 25-degree tilt bilaterally. Based upon the submissions of Pena and the Medical Board's own observations, the Medical Board issued a report dated October 9, 2018 in which it concluded that Pena's application for ODR should be disapproved. This report was filed with PPF's Board of Trustees ("BOT" or "Board") to assist the Board in deciding whether to grant Pena's ODR application.

The BOT tabled the determination at both the February 13, 2019 and March 13, 2019 meetings. At the April 10, 2019 meeting, the Board remanded the application back to the Medical Board for review of new materials that had been submitted by Pena. The Medical Board convened on June 18, 2019 to consider these new submissions and to write a new report for submission to the BOT. The new submissions included a new cervical spine MRI performed on September 19, 2018. This MRI demonstrated multi-level degenerative changes, straightening of the normal cervical lordosis, degenerative changes with disc space narrowing, disc desiccation and anterior osteophyte formation at the C5-6 and C6-7 vertebral discs and mild degenerative changes in the C3-4 and C4-5 discs. It also demonstrated circumferential disc bulging with associated ossific ridging that was mildly deforming and impinging the thecal sac at the C5-6 disc as well as mild deformity of the spinal cord and mild uncinat spurting with associated foraminal disc protrusion and resultant foraminal narrowing. Pena also submitted an emergency room record dated January 14, 2019 from Mount Sinai Queens which included a history of worsening chronic neck pain with no sign of acute trauma or injury.

Finally, she submitted a series of letters from Dr. David Shein, an orthopedic surgeon, dated October 16, 2018, December 4, 2018, March 12, 2019 and June 11, 2019. The June 11th letter reported the onset of left sided radiculopathic pain extending from the left periscapular region into the left deltoid and down the arm of the finger. Dr. Shein further opined as follows:

This lady is unfit for police work. I think she should be placed on desk duty. She does have a cervical collar and she wears the cervical collar at all times but this is a neck at risk of surgical treatment. This is something I would do from the front of her neck. I demonstrated her pathology to her. She is not working and has not been doing any heavy police work. I think she needs to continue as such. She is not fit for heavy field police work. She is not to pick up anything heavier than a gallon of milk and when she goes on vacations to be careful of her suitcase. Hopefully this will settle down in time but if it does not, I am going to advise surgical intervention for an anterior cervical discectomy and fusion at C5/C6 and C6/C7. I will see her back in the office in one month. The patient is currently working doing light duty. I am advising that she continue as such until further notice.

After review of this new documentation, the Medical Board conducted its second review of Pena. It found that tandem walking was performed rapidly and without difficulty or misstep. It also observed that she stood with feet together and was stable to confrontation of her torso being pushed forward, backward, and side to side. She reported no tenderness upon palpation of the cervical and thoracic area but did complain of tenderness at the T2 vertebra and thoracic paraspinal region. Range of motion of the cervical spine revealed flexion at -5 degrees of neutral, extension to 10 degrees, and rotation right to 25 degrees. She declined to rotate left because she was experiencing pain. She also claimed that she was unable to abduct her left shoulder more than 30 to 40 degrees due to pain. Based upon the prior meeting of the Medical Board, the new submissions of Pena, and the Medical Board's own observations during the second examination, the Medical Board again found that Pena's application for ODR should be disapproved in a report dated June 18, 2019.

After receipt of this new recommendation, the BOT tabled the decision at both the October 15, 2019 and November 11, 2019 meetings. At the December 11, 2019 meeting, the BOT remanded the application back to the Medical Board for a second time to consider additional new documents submitted by Pena. The Medical Board convened on February 11, 2020 to consider the new submissions. These submissions included a report from Dr. Shein dated October 15, 2019 in which Shein reviewed Pena's MRI. Shein stated that there was a reversal in rhythm kyphosis in the cervical spine, a disc prolapse at C5-6 with pressure on the posterior longitudinal ligament, an indent into the thecal sac, and an indent into the spinal cord. Pena also submitted a treating physician summary report from Dr. Shein that was also dated October 15, 2019 in which he diagnosed Pena with a C5-6 disc prolapse causing cervical spondylogenic myelopathy and kyphosis with secondary myofascial pain. Dr. Shein recommended cervical spine left anterior cervical discectomy fusion. Finally, a disc was submitted to the Medical Board which contained an MRI of the cervical spine dated March 5, 2019. The Medical Board reported that it was unable to access any other images on the disc including the more recent MRI of the cervical spine dated September 12, 2019.

In the Medical Board's exam, it noted that Pena had an appointment to undergo cervical spine left anterior cervical discectomy fusion on November 30, 2020. During the examination, Pena stated that she experiences chronic pain at the base of her neck and along the left side of her neck. She stated that she was experiencing a numb sensation down her arm and an occasional tingling sensation in her left hand. She alleged that the radiation of pain increases with flexion of the head, but that she uses Biofreeze to relieve the pain to good effect. Upon physical examination, the Medical Board noted a reciprocal and non-antalgic gait, that heel-to-toe walking was accomplished easily, and that tandem walking was unimpaired. Palpation of the cervical spine caused Pena to withdraw and she complained of tenderness to minimal palpation of the occipit and left paraspinal area. She demonstrated a cervical range of motion of 0 degrees flexion, 40 degrees of extension, 20 degrees of right rotation and 5 degrees of left rotation. She reported that she qualified with her Department firearms a few weeks ago by firing using only her right hand. The Medical Board found inconsistencies between many of the symptoms that she experienced during the examination and those that she discussed with Dr. Shein on February 4, 2020. The Medical Board also explained that it did not find the imaging study or its findings on the physical examination to be consistent with the diagnosis of cervical myelopathy. Accordingly, for the third time, the Medical Board submitted a report dated February 11, 2020 in which it found that Pena's application for ODR should be disapproved.

Following receipt of the 2020 report, the BOT convened on July 8, 2020. At this meeting, the BOT adopted the Medical Board's report and denied Pena's ODR application. Minutes from the BOT's July 8, 2020 meeting have been provided to the court with all but seven lines redacted. The unredacted lines read as follows:

Police Officer Alejandro: 4S/4
The Medical Board reaffirms
disapproval of ordinary disability for
POLICE OFFICER FREDELINDA PENA, after
examination at the direction of Police

Commissioner for ordinary.
So moved.

This Article 78 petition ensued, wherein petitioner seeks: 1) to annul the BOT's 7/8/20 determination pursuant to CPLR § 7803(3) because the BOT was arbitrary and capricious and acted in violation of lawful procedure; 2) to remand the issue to be re-examined by a lawfully constituted Medical Board; 3) to compel the Medical Board to address its recommendation of the essential job functions of a NYC Police Officer, and how Pena is able to perform these essential job functions; and 4) to award costs and reasonable attorney's fees pursuant to Public Officers Law Article 7 § 107(2).

Respondents contend that the petition fails to state a cause of action under Article 78 of the CPLR. They also argue that that the petitioner failed to demonstrate that she was "physically or mentally incapacitated for the performance of duty and ought to retire." Respondents further assert that the determination of the PPF BOT is appropriate because it is based in credible medical evidence, because it is lawful and proper with all applicable laws and regulations and because it is within the discretion of the Medical Board to make such a determination. Finally, respondents maintain that petitioner has no basis to seek costs and reasonable attorney's fees.

Discussion

The court will first consider Pena's request to annul the BOT determination pursuant to CPLR § 7803(3). Pena argues that the BOT acted in an arbitrary and capricious fashion and in violation of lawful procedure.

ODR is available to an NYPD officer when a medical examination demonstrates that the officer is physically or mentally incapacitated from the performance of duty and ought to be retired (NYC Admin Code 13-251; *Matter of Jefferson v. Kelly*, 829 NYS2d 418 [Sup. Ct. New York County 2006]). Such a determination is made by the BOT upon recommendation of a Medical Board (NYC Admin Code 13-251).

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi-judicial* hearings required by statute or law" (*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 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

When an agency fails to consider credible, material evidence submitted by a petitioner, a court may deem that the agency's actions were without foundation in law or fact and therefore, arbitrary and capricious (see *Cusick v. Kerik*, 305 AD2d 247 [1st Dept 2003]; *Matter of Ahrendt v. McGuire*, 82 Ad2d 787 [1981]). This is true when the evidence that the Medical Board failed to consider has the potential to affect the Board's determination (see *Cusick v. Kerik*, 305 AD2d 247 [1st Dept 2003] [stating that a Medical Board acted in an arbitrary and capricious manner when it determined that an officer was responsible for his own injury when he collapsed on duty because he poorly managed his diabetes even though the Board failed to review and confront evidence that demonstrated that the officer was in control of his diabetes prior to the incident]). Additionally, a determination will be considered arbitrary and capricious if the agency fails to follow its own rules and regulations (*Frick v. Bahou*, 56 NY2d 777 [1982]).

Pena makes substantive and procedural arguments that the Board's determination was arbitrary and capricious, which the court considers in turn.

Substantive challenges

The petitioner argues that the determination of the BOT is arbitrary and capricious for three substantive reasons: 1) because the Medical Board reviewed an MRI that did not belong to the petitioner; 2) because the Medical Board reviewed a medical record that it admitted it did not possess; and 3) because the Medical Board failed to consider or discuss certain forms of evidence that Pena had submitted for review.

Petitioner first argues that the determination made by the BOT was arbitrary and capricious because it relied on the recommendation of the Medical Board which reviewed an MRI that did not belong to the petitioner. In support of this assertion, Pena submitted the Medical Board's 2020 report in which it considered an MRI dated March 5, 2019. Petitioner also submitted an affidavit, dated June 21, 2021, in which she asserts that she did not undergo an MRI for her cervical spine on any day in March 2019, that the March 5, 2019, MRI did not belong to her, and that the Medical Board therefore considered someone else's MRI in reaching its recommendation. The petitioner asserts that this MRI was material to the Medical Board's decision because in the respondents' memorandum of law, they wrote that "the Medical Board does not indicate that the...[review of the MRI images that did not belong to Petitioner] was the sole [100%] basis for reaching its determination." To support this assertion, the petitioner cites a factually and procedurally distinguishable case and has otherwise failed to present any evidence to support this assertion. Indeed, petitioner has failed to show that the Board referenced the March 5, 2019 MRI in its 2020 report and has failed to make any successful argument that the details of that MRI were influential in the Medical Board's ultimate decision-making process. Ultimately, the petitioner has failed to show that the omission of this MRI would change the Medical Board's decision in any way. Therefore, this argument is rejected.

Pena next argues that the BOT's determination was arbitrary and capricious because the Medical Board reviewed a medical record that it claimed it did not possess. Petitioner points to the Medical Board's 2020 report which indicated in paragraph six that the Medical Board considered the results of a September 12, 2019 MRI. The Medical Board summarized the findings of said MRI. However, in paragraph nine of the 2020 report, the Medical Board stated:

The Medical Board is in possession of a disc which contains the study of the MRI of the cervical spine dated March 5, 2019. The Medical Board was unable to access images other than the scout film on this study. The Medical Board is not in possession of a disc of the more recent MRI of the cervical spine dated September 12, 2019.

Next, Pena points to paragraph thirteen of the 2020 report in which the Medical Board stated that it "does not find the imaging study or its findings on today's physical examination to be consistent with a diagnosis of cervical myelopathy as made by Dr. Shein." Pena argues that the "imaging study" referenced is the September 12, 2019 MRI, and that the Medical Board cannot make such a statement without review of that MRI. She claims that the recommendation was therefore made without sound basis in reason and without regard to the facts because it did not consider all of the submitted evidence.

However, the Medical Board's assertion that it did not possess the September 12, 2019 MRI is likely a scrivener's error, since the Medical Board summarized the results of that MRI in its report. Assuming *arguendo* that the Medical Board was not in possession of the September 12, 2019 MRI, the petitioner has failed to argue that the Medical Board's consideration of this issue would materially change its recommendation. Petitioner attempts to qualify this section of the Medical Board's report as specifically focusing on how the Medical Board's reading of the September 12, 2019 MRI differs from Dr. Shein's reading of the same MRI. Yet, in paragraph thirteen of the 2020 report, the Medical Board "finds marked inconsistencies in the reported complaints made by the officer today and the history as record-

ed by her treating physician Dr. Shein on February 4, 2020. Today she complained of a radiculopathic pattern of pain, of balance problems and of urinary problems. Dr. Shein's report specifically reported that she denied these symptoms." This section of the 2020 report more broadly calls into question the dependability of Pena's assertions and the evidence that she submitted.

In addition, the court cannot assess whether the MRI would have any material effect on the Board's recommendation because Pena did not submit the September 12, 2019 MRI to the court, nor did she make any claims about what that MRI demonstrated. The court is therefore unable to evaluate whether that MRI introduces any new information that the Board failed to consider. Therefore, there is no evidence that a lack of consideration of the September 12, 2019 MRI had any material effect on the Medical Board's decision and this argument is rejected.

Pena also argues that the BOT's determination was arbitrary and capricious because it relied on the recommendation of the Medical Board which failed to consider or discuss certain forms of evidence that she had submitted for review. This evidence includes (1) a letter from Dr. Nathaniel L. Tindel, dated September 6, 2017; (2) a letter from Dr. David Shein, dated January 18, 2018; (3) a report from NYPD Neurologist, dated December 12, 2017; (4) an EMG report dated August 28, 2017; (5) a letter from Dr. Shein dated October 16, 2018; (6) a letter from Dr. Shein dated December 4, 2018; and (7) a letter from Dr. Shein dated March 12, 2019.

It is a Medical Board's duty to examine the evidence available to it and to adequately explain its reasoning (*Ling Lin v O'Neill*, 2019 NY Slip Op 33785[U] (Sup Ct, NY County 2019)). The petitioner argues that the Medical Board failed to do that here. To support this assertion, the petitioner submitted the NYPD form that listed the records submitted to the Medical Board and the 2018 Medical Board report. This NYPD form lists the various evidence that Pena submitted on her own behalf for the Medical Board's 2018 meeting. The NYPD form includes the letter from Dr. Nathaniel L. Tindel, dated September 6, 2017, the letter from Dr. David Shein, dated January 18, 2018, the report from NYPD Neurologist, dated December 12, 2017, and the EMG report dated August 28, 2017. Pena points out that these submissions were given to the Medical Board, but that the Medical Board did not discuss them in its 2018 report. She argues that the Board's failure to mention these pieces of evidence in the report demonstrates that the evidence was not considered. Similarly, Pena argues that the Board did not consider the three Dr. Shein letters because they were not discussed explicitly in the 2020 Medical report. The petitioner particularly points to the December 4, 2018 Dr. Shein letter in which the doctor states that Pena is "100% disabled and should stop working to allow her neck symptoms to settle down and we will review again in one month." Pena argues that such a lack of consideration of all evidence available would lead the Medical Board to make a decision that is without full regard to the facts, and therefore that is arbitrary and capricious.

However, there is no evidence that the Medical Board failed to consider any these pieces of evidence in reaching its recommendation. Nor has petitioner shown that this failure to explicitly discuss evidence from 2017 and 2018 establishes that the Medical Board failed to adequately explain its reasoning. Moreover, the Board indicated in the 2020 report that it considered letters from Dr. Shein dated October 16, 2018, December 4, 2018, and March 12, 2019. The Board only explicitly discusses the fourth Dr. Shein letter, dated July 11, 2019, but this does not mean that the other three letters were not considered. The assertion that the earlier letters from Dr. Shein would have led the Medical Board to reach a different result is speculative and conclusory. The petitioner particularly points to the December 4, 2018 Dr. Shein letter's assertion that Pena was "100% disabled and should stop working..." However, the assertion that Pena should stop working temporarily is supplanted by Dr. Shein's June 11, 2019 letter, wherein he opines that petitioner should continue to work light duty until further notice. Many of the assertions that Pena points to in these earlier letters are rendered obsolete by Dr. Shein's later recommendations. In fact, none of these evidentiary submissions introduce any new diagnoses or concerns that are not considered in other evidentiary submissions that are explicitly discussed by the Medical Board. Therefore, this argument also fails.

Procedural challenges

Procedurally, Pena argues that the BOT's determination was arbitrary and capricious and affected by an error of law for four reasons: 1) because the Medical Board was not lawfully constituted on any of the days that Pena was examined; 2) because the BOT did not deny her ODR application through a resolution; 3) because if the BOT did deny the ODR application through resolution, it violated the Freedom of Information Law by not recording the vote; and 4) because the BOT was also improperly constituted.

First, Pena argues that the determination of the BOT was arbitrary and capricious and was affected by an error of law because the Medical Board was not lawfully constituted on any of the days that Pena was examined. Petitioner claims that the Medical Board was not lawfully constituted because the PPF's Medical Board was paid by the NYPD despite the fact that the NYPD and the PPF are two separate NYC agencies. In support of this assertion, Pena points to an affidavit from retired NYPD Lieutenant Victor Leandry and to NYC Administrative Code § 13-216(e)(5)(ii). In the affidavit, Leandry states that "The NYPD hires the physicians who are assigned to the Police Pension Fund's Article II Medical Board, as independent contractors. The NYPD paid these physicians \$190 per hour for the independent contractor's services on the Medical Board..." NYC Administrative Code § 13-216(e)(5) states that the PPF "shall be considered an entity separate from the city of New York police department" and that the PPF "shall constitute an agency..." Petitioner also argues that "it is well known that the NYPD provides these physicians with office space, furniture, and directly supervises them." She argues that this effectively biases the Medical Board and thus asserts that she was never examined by a lawfully constituted PPF Medical Board because the NYPD essentially "took control" of the Medical board through its payments.

However, petitioner does not provide any proof of her assertion that the NYPD provides Medical Board physicians with office space, furniture, and directly supervises them. Pena also fails to cite to any regulation that prevents the NYPD from paying the physicians that constitute the PPF's Medical Board. She claims that such payment biases the Medical Board but does not point to any case law or regulations that would support this assertion. Pena asks the court to make a declaration of administrative impropriety based off unsupported statements without any evidence. Otherwise, petitioner's claims about the Medical Board are based on mere speculation. Accordingly, this argument is rejected.

Next, the court considers petitioner's argument that the BOT's determination was arbitrary and capricious and was affected by an error of law because the BOT did not deny the ODR application through a resolution. NYC Administrative Code § 13-216(b) states that "every act of the BOT shall be by resolution which shall be adopted only by a vote of at least seven-twelfths of the whole number of votes authorized to be cast by all of the members of such board". Therefore, a vote must take place for any determination to be passed by the BOT. The meeting minutes for the 7/8/20 BOT meeting indicates that no such vote took place. While respondents generally deny the allegations, they do not assert that a vote took place and did not submit any evidence to demonstrate that such a vote occurred. Rather, the respondents merely state that the BOT acted based upon "well established procedure."

There is no evidence that the BOT held a vote as necessitated by NYC Admin Code §13-216[b]. Therefore, the BOT acted arbitrarily and capriciously when it failed to follow its own regulatory procedure when it determined that Pena's ODR application should be denied. Accordingly, the petition is granted to the extent that petitioner's ODR application is remanded to the BOT for reconsideration and a proper vote.

Since the court finds that the BOT failed to deny the ODR application through a resolution, petitioner's assertion that BOT violated the Freedom of Information Law by not recording the vote is moot. Similarly, the court declines to consider the petitioner's remaining argument that the BOT's determina-

tion was arbitrary, capricious and affected by an error of law because the BOT was improperly constituted as moot.

Remaining issues

The court will next consider the petitioner's request to remand the issue to be re-examined by a lawfully constituted Medical Board. As discussed *supra*, Pena has failed to successfully argue that the Medical Board that examined her was not lawfully constituted. For this reason, the part of the petition that requests that the issue be remanded to be re-examined by a lawfully constituted Medical Board is denied.

Next, petitioner asks the court to compel the Medical Board to address the essential job functions of a NYC Police Officer, and how Pena can perform these essential job functions in its determination. Pena argues that the Medical Board must explain how she is able to hold a gun, walk a beat, etc. with her medical condition. Assuming *arguendo* that the case should be remanded to the Medical Board, petitioner's argument fails.

On an ODR application pursuant to NYC Admin Code 13-251, the Medical Board need not demonstrate that the applicant can perform every single skill that may be required of a police officer. It only needs to demonstrate that the applicant is not physically or mentally incapacitated for the performance of general duty. In questions that relate to the administration's expertise, the statutory interpretation of that administration will be given great weight and judicial deference, so long as it is not unreasonable, irrational or inconsistent with the statutory language and legislative intent (*Matter of Toys "R" Us v. Silva*, 89 NY2d 411 [1996]). In this case, the City of New York and the PPF have administrative expertise on what duties are necessary to serve as a full-time police officer for the NYPD. Additionally, the NYPD has a *de facto* policy allowing for continued full-time employment by officers unable to perform patrol duties, and many officers are allowed to continue desk work after suffering an off-duty disability when they are unable to perform patrol duties (see *Price v. City of New York*, 2006 WL 1738225 [NY Southern Dist. 2006]). Therefore, the Medical Board need not determine that Pena is able to hold a gun, walk a beat, or tackle a perpetrator in order to determine that she is capable of continued work as a full-time employee of the NYPD. For these reasons, the branch of the petition that requests that the court compel the Medical Board to address the essential job functions of a NYC Police Officer, and how Pena can perform these essential job functions in its determination is denied as well.

Finally, the petitioner asks the court to award costs and reasonable attorney's fees pursuant to Public Officers Law Article 7 § 107(2). Public Officers Law Article 7 § 107 states that "(1) Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief... (2) In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party." Here, the petitioner commenced this proceeding against the public bodies of the City of New York and the PPF pursuant to article seventy-eight of the civil practice law and rules. The petitioner was successful in annulling the determination of the PPF BOT. Therefore, it is within the court's discretion to award costs and reasonable attorney fees.

BOT's determination was annulled because of the BOT failure to follow its own procedure. Respondents have offered no justification for this failure. The court finds that costs and reasonable attorney fees are appropriate here. Therefore, plaintiff is entitled to recover these items. However, a hearing is unnecessary where plaintiff can show on papers what its costs and expenses were, and plaintiff's counsel can establish the reasonableness of the attorney's fees sought through an affirmation of services and the underlying legal bills and/or timesheets. Therefore, this branch of the petition is denied without prejudice to renewal within 90 days. Petitioner's failure to renew within the time provided will be deemed an unreasonable failure to prosecute and this branch of petitioner's claims will be deemed abandoned for unreasonable failure to prosecute pursuant to CPLR § 3216.

Conclusion

In accordance herewith, it is hereby

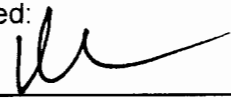
ORDERED that the Police Pension Fund Board of Trustees' determination which denied Officer Fredelinda Pena's application for Ordinary Disability Retirement is hereby annulled; and it is further

ORDERED that the Officer Fredelinda Pena's application for Ordinary Disability Retirement is remanded to the Police Pension Fund's Board of Trustees for further review in compliance with NYC Admin Code § 13-216; and it is further

ORDERED that the branch of the petition seeking attorney's fees, costs and expenses is denied without prejudice to renew upon papers within 90 days or that branch of petitioner's claims will be deemed abandoned for unreasonable failure to prosecute pursuant to CPLR § 3216.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/01/2021
New York, New York

So Ordered: 
Hon. Lynn R. Kotler, J.S.C.