

Matter of Smiley v Whinnery
2021 NY Slip Op 32640(U)
December 13, 2021
Supreme Court, Kings County
Docket Number: Index No. 501895/2021
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 13th day of December, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

In the Matter of the Application of,
GARY SMILEY,
Petitioner,
For a judgment under Article 78 of the
Civil Practice Law and Rules
- against -

Index No.: 501895/2021
Motion Seq. # 1
DECISION & ORDER

MELANIE WHINNERY, as the Executive Director of the NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE BOARDS OF TRUSTEES and THE MEDICAL BOARD of the NEW YORK CITY RETIREMENT SYSTEM,
Respondents.

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Petition, Petition & Exhibits	1
Petitioner's Memo of Law	2
Respondent's Answer to Petition & Exhibits	3
Respondent's Memo of Law	4
Petitioner's Reply Memo of Law	5

Upon the foregoing papers in this CPLR Article 78 proceeding Petitioner, GARY SMILEY (Smiley), seeks a judgment reviewing and annulling the determination of Respondents, MELANIE WHINNERY, as the Executive Director of the NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES and THE MEDICAL BOARD of the NEW YORK CITY RETIREMENT SYSTEM, that denied Petitioner's application for Performance of Duty (POD) disability benefits pursuant to RSSL § 607-b.c.1. (a).

BACKGROUND

Petitioner was employed as a paramedic for the City of New York on September 11, 2001. Mr. Smiley arrived at the World Trade Center (WTC) site before either tower collapsed and began participating in the rescue efforts. However, Petitioner became trapped underneath the rubble when the North Tower fell and was not rescued until several hours later. After Petitioner was found he was taken by ambulance to Long Island College Hospital where he was admitted overnight. Petitioner returned to light duty on or about September 17th and to full duty at the WTC site on October 20, 2001. He was assigned to the recovery operation and as a stand-by paramedic until November 30, 2001. Petitioner's symptoms began while he was working at Ground Zero and during that time he sought treatment for sinus and ear infections.

The record indicates that Smiley presented to the WTC Health Program at Mount Sinai Hospital in October of 2002 and complained of facial pain, sinus congestion, ear pain, throat irritation, cough and chest tightness. The symptoms persisted, increased in severity and by 2007 were accompanied by headaches, facial pressure and dizziness. These newer symptoms also affected his balance, caused motion sickness and required Petitioner to lie down. The record confirms "frequent incidents of random loss of balance and disequilibrium especially with head/eye and body movements..."¹

This is the third time Mr. Smiley has brought a Petition to annul Respondents' denial of his application for disability retirement benefits for injuries received as a result of his work at the WTC site. The conditions reported on the first application included: WTC exposure, extrinsic asthma, chronic sinusitis, chronic rhinitis, prolonged PTSD, GERD, chronic dizziness, chronic

¹ Exhibit "F" annexed to Petition.

headaches, kidney cysts, chronic ear infections, chronic nasal congestion, chronic respiratory infections, pain, weakness, depression, facial and eye pain. While that application was pending the Workers' Compensation Board awarded Petitioner a 45% permanent partial disability on December 26, 2013. The conditions set forth in the award were: reactive airway disease, eye irritation, shortness of breath, sinusitis & PTSD.

NYCERS Medical Board reviewed Petitioner's application for disability retirement benefits on February 4, 2014. At that time the Board concluded that none of Petitioner's reported conditions were severe enough to preclude his work as a paramedic. Smiley's claim for PTSD was referred to a NYCERS consulting psychiatrist. Dr. Robert Reich examined Mr. Smiley and concluded that while the record failed to give adequate details, Petitioner suffered from major depression, mild generalized anxiety and paranoid personality. The Board recommended that the application be denied on March 11, 2014 and stated "that the documentary and clinical evidence fail to substantiate that Gary Smiley is disabled from performing the duties of a Paramedic with the FDNY."²

The Board of Trustees reviewed the Medical Board's report and remanded the application back to consider the additional medical documentation that Petitioner submitted. After their review of documentation from Dr. Altman, an ENT specialist, Dr. Michael Crane, Director of the WTC Health Program at Mount Sinai Hospital, and additional documentation of Petitioner's psychiatric symptoms, the Medical Board reiterated its prior determination but conducted a further interview and examination of Smiley.

² Exhibit "K" annexed to the Petition.

The Medical Board noted that Petitioner had developed nystagmus which can affect balance and coordination. In fact, the record indicates that Petitioner's balance and dizziness symptoms continued to get worse over time. Also newly noted was peripheral vestibular (inner ear) disease which also contributes to dizziness. Although the record reflects that Petitioner had been reporting many of the above symptoms, the Medical Board determined that the medical documentation submitted was insufficient to support that diagnosis and therefore denied the application on December 23, 2014.

Petitioner submitted additional evidence, however, the application was denied again because the Medical Board found none of Smiley's conditions constituted a functional disability that would affect his performance as a paramedic. Again, the Board of Trustees remanded the application back to the Medical Board and on December 8, 2015 the Medical Board interviewed and examined Smiley again but upheld its previous determination. The Board of Trustees adopted the recommendation of the Medical Board and denied Smiley's application on March 11, 2016.

The second Petition for a Judgment pursuant to CPLR Article 78 to review and annul the decision of NYCERS Board of Trustees was brought on July 1, 2016. In a Decision and Order dated January 6, 2017, Hon. Lara Genovesi held that the Medical Board's findings were conclusory at best and unsupported by an articulated medical opinion which did not permit adequate judicial review. At that time the matter was again remanded to the Medical Board for an adequate statement of the factual basis for their findings and a new determination by the Board of Trustees.

After the application was remanded the Medical Board found that the documentary and clinical evidence supported a finding of disability based on a psychiatric condition, not on a physical condition, and at a November 9, 2017 meeting, the Board of Trustees adopted the Medical Board's recommendation and granted Petitioner's Application based on a psychiatric disability (PTSD) only. Mr. Smiley, by Notice of Petition dated February 20, 2018, brought a proceeding to modify the determination of the Board of Trustees and grant his application based upon a physical disability as well. While that Petition was pending the FDNY revised its job description for paramedics. By stipulation dated August 9, 2018, Smiley discontinued that proceeding and the parties agreed to a further review utilizing the revised job description for paramedics.

The new description for paramedics includes but is not limited to: exposure to potentially infectious disease, bending and kneeling to provide care, lifting patients weighing more than 200 pounds and climbing up ten flights of stairs while carrying forty pounds of equipment³. The record is replete with evidence of Mr. Smiley's disequilibrium and dizziness. The Medical Board conducted an interview and examination on December 4, 2018 and concluded again that none of Petitioner's conditions were disabling and recommended that his application for benefits based upon a physical disability be denied.

The Board of Trustees did not adopt the Medical Board's recommendation, but rather permitted Mr. Smiley to submit additional documentation to support his claim. Petitioner sent additional medical documentation to the Medical Board for their review on August 23, 2018, May 29, 2019, June 28, 2019, September 10, 2019, October 1, 2019 and October 17, 2019.

³ Exhibit Q annexed to Petition.

During this process, NYCERS sent notices to Petitioner reflecting that the Medical Board did not believe that any of the documentation warranted further consideration. Sometime after the October 17th submission, the Medical Board recommended that Petitioner's application be denied because Petitioner had no functional impairment that would preclude him from performing his duties as a paramedic. Although the Board of Trustees adopted the Medical Board's determination on October 29, 2019, they stated that they would accept updated medical documentation.

NYCERS sent notice to Petitioner on November 20, 2019 stating that the Medical Board reviewed the new evidence (submitted November 14, 2019) and concluded again that it did not warrant further consideration. The Board of Trustees adopted the findings of the Medical Board but stated again that new medical evidence in further support of Petitioner's application would be accepted through December 23, 2019. The Medical Board issued a report of their findings allegedly based on the newly submitted evidence on February 18, 2020. Again, the Medical Board found that petitioner did not suffer from a functional impairment that would preclude him from performing his duties as a paramedic. The Board of Trustees adopted the Medical Board's findings on November 12, 2020 and advised Petitioner again that his application had been denied on November 30, 2020. Gary Smiley filed the instant Petition to annul the Board of Trustees final determination on January 5, 2021.

The Medical Board Report that forms the basis of the denial upon which this third Petition is based was issued on September 10, 2019 and states that it is an addendum to their prior report dated December 4, 2018. That report referred to evidence submitted with the first petition filed in 2014. The Medical Board recommended that Mr. Smiley's application be denied

in both the report issued in December of 2018 and the last one issued on September 10, 2019. In the 2018 report the Medical Board concluded that Petitioner's chronic sinus disease was not of the severity that would preclude his ability to perform the duties of a paramedic. Utilizing the new paramedic job description, the Medical Board reached the very same conclusion as they had in their prior report and recommended denial of Petitioner's application.

Petitioner's Medical Evidence

As early as May 30, 2014 Petitioner complained that his dizziness was getting worse and that he had a perpetual feeling of foginess and frequent incidents of loss of balance. Dr. Michael Crane, Director of the WTC Health Program at Mt. Sinai saw Petitioner on multiple occasions. On November 13, 2014, he reported that Petitioner was certified by NIOSH (National Institute of Occupational Safety and Health) for WTC-related Dysthymia, Rhino-sinusitis, Asthma and GERD. Dr. Crane further opined, "This constellation of symptoms, including the unpredictable occurrence of disequilibrium clearly compromises Mr. Smiley's ability to perform patient care and transportation of an FDNY EMT.⁴ "At this point, due to the need for frequent absences and the overwhelming nature of his symptoms, he is disabled even for sedentary work. His symptoms appear to be multifactorial in origin but are clearly related to his WTC site exposure."

In the 2018 report the Medical Board merely concludes that Petitioner's sinus disease is not of the severity that would preclude his work as a paramedic. This conclusion was based upon their prior assertion that the only medication Mr. Smiley took at that time for his chronic sinus disease was Rhinocort and saline. The same conclusion was reached as to his asthma with

⁴The record reflects that Petitioner actually worked as a paramedic for the FDNY.

the Medical Board stating he wasn't on any medication for that complaint. However, the record reveals that Mr. Smiley has had to administer as much as eight sinus rinses a day. Some include steroids or antibiotics. Additionally, he was prescribed Flovent, an albuterol inhaler and as a solution for use in a nebulizer. An EPI pen has also been prescribed for a possible asthma emergency. At different times Mr. Smiley has also taken Flonase, a steroidal asthma inhaler, and Allegra for allergies.

The record reveals that Petitioner suffered from no less than eight and sometimes even more, severe sinus infections throughout the year. The following diagnostic tests were performed with positive findings for chronic sinus disease: two CT scans, multiple nasal endoscopies, a table test for postural disequilibrium, VNG and FEV studies:

In fact, Petitioner's rhinosinusitis symptoms became so severe that Functional Endoscopic Sinus Surgery (FESS) was performed on June 26, 2008. Infected sinus tissue was removed and the opening of his sinuses and the inside of his nose was enlarged in an attempt to facilitate better breathing and drainage of the mucous that was constantly getting backed up.

Dr. Fred Lin reported as early as February 19, 2016 that "Mr. Smiley continues to have significant issues related to his sinusitis and chronic inflammation. Persistent thick green secretions as well as facial pain and headaches continue and has been debilitating the patient. In addition, he has worsening vertigo with an abnormal VNG." Dr. Michel Shohet an ENT (Ear, Nose & Throat specialist) evaluated Petitioner on October 30, 2018 and reported that Smiley had nasal congestion, postnasal drainage and purulent nasal drainage, sinus pressure. Smiley's dizziness was accompanied by headaches and nausea and worsened as a result of any movement. Additionally, Dr. Shohet noted there has been progression of Petitioner's

headaches, disequilibrium and sinus symptoms despite using the gentamicin rinses. Petitioner had another FESS procedure on May 21, 2019. At that time a bacterial sinus infection was found.

Dr. Lin reported upon examination on September 18, 2019 that Petitioner had "...brown and green nasal secretions, headaches, facial pain that has not improved and is debilitating... had an episode of imbalance several weeks ago that resulted in a fall and multiple fractures." The second CT scan performed on October 14, 2019 indicated coalescence in the left maxillary sinus, scattered polypoid mucosal thickening in other sinuses, polyposis of left nasal passage with partial obstruction and left ethmoid maxillary sinusitis.

On October 29, 2019, Dr. Shohet examined Petitioner and reported that Mr. Smiley's symptoms of chronic rhinosinusitis with recurring acute exacerbations and vertigo had been progressing. Dr. Shohet also detected residual friability (tissue that tears, sloughs and bleeds more easily when touched) at the caudal septum. Also reported was that thick mucous was draining from Mr. Smiley's left nostril. Dr. Shohet recommended the cessation of any activity that could result in exposure to smoke and other irritants which includes working as a paramedic.

ANALYSIS

The law is well settled that The Medical Board's determination must be supported by substantial evidence, which must be credible, relevant evidence reasonably adequate to support a fact or conclusion. *Jennings v. New York State Off. of Mental Health, 90 N.Y.2d 227, 239 (1997)*. Credible evidence is evidence from a reliable source, which must reasonably tend to support the fact or conclusion for which the evidence is offered. *Bitchatchi v. Board of*

Trustees of the N.Y. City Police Dept. Pension Fund, Art. II, 20 N.Y.3d 268, 281 (2012). Further, the support for the Medical Board's recommendation cannot be conjecture, unsupported suspicion nor simply a conclusion itself. The Court of Appeals has defined credible, in this context, as "[A]n articulated, rational, and fact-based medical opinion." *Meyer v Board of Trustees of NYC FDNY, Art.1-B Pension Fund, 90 N.Y.2d 139, 147-148 (1997)*.

The Medical Board's findings are no more detailed than they were when Hon. Lara Genovesi found the Medical Board's report to be conclusory at best and unsupported by an articulated medical opinion in 2017. The Board repeatedly found that Petitioner has no functional impairment despite confirmed reports that he cannot be exposed to smoke or other irritants, often has to lie down for hours at a time due to headaches and dizziness and is required to administer no less than three to four sinus rinses per day as well as two or three inhalers and possibly the nebulizer. Clearly, the standard as set forth above has not been met.

The reports upon which Respondents' denials are based fail to set forth any facts supporting the conclusion that Petitioner does not have a functional impairment. No less than four doctors confirmed Petitioner's debilitating severe and debilitating sinusitis accompanied by headaches and dizziness. Moreover, Dr. Shohet, Dr. Lin, Dr. Crane and all treating doctors have opined that Mr. Smiley cannot perform the duties of a paramedic. No reason is given why these opinions are ignored. A determination of the Pension Fund Medical Board is not rational "... where the medical issues presented by the applicant are not adequately addressed by the Medical Board or where the medical findings do not sustain the determination of the Medical Board." Moreover, The Pension Fund Medical Board is obligated to explain its determination

and provide some basis for judicial review. *Matter of Quinn v Cassano, 29 Misc 3d 1203(A) (Kings County, Sup Ct 2010)*.

The law is well settled that the Medical Board cannot cherry pick the evidence it chooses to rely on. *Daly v Nigro, 65 Misc. 3d 1206(A) (Sup Ct, Kings County, 2019)*. However, in the case at bar they have utilized only pieces of Petitioner's medical documentation and ignored the rest. The reports fail to address the objective positive findings contained in the diagnostic studies. They did not address any of the opinions that certified Petitioner as 100% disabled. These reports clearly do not meet the requirement as set forth by the Court of Appeals that the Medical Board must explain why the evidence it discounts is not valid and why the evidence it relies upon is more persuasive. *Meyer v Board of Trustees, supra at 144-145*.

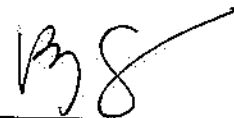
The Board also concludes that Petitioner's dizziness is caused by peripheral vestibular lesion and not his severe debilitating sinusitis. The Medical Board failed to set forth facts upon which this opinion was based and it is therefore, inadequate. *Id. at 152*. Their finding is clearly conclusory and amounts to nothing more than mere conjecture. *Matter of Bitchatchi v Bd. of Trustees, supra at 268*. The Board of Trustees erred by accepting, without any independent review or explanation, the Medical Board's determination regarding Petitioner's disability. No explanation was provided as to why the incontrovertible reports submitted by petitioner were ignored. No credible conflicting evidence was offered in support of the Medical Board's recommendation of denial. *Daly v Nigro, supra*.

The law is clear that a Medical Board's determination adopted by the Board of Trustees cannot be overturned unless it is arbitrary and capricious. *Boyer v NYCERS, 41 Misc3d 987 (S. Ct., NY County, 2013)*. "... the Medical Board must do more than simply identify reports

and tests and state its conclusion; it must address the evidence before it and explain why the evidence it discounts is not valid, and why the evidence it relies upon is more persuasive, explaining why the opinions and diagnoses that are not relied upon are incorrect." *Matter of Quinn, supra at 1203(A)*. The Board's determination, if not based upon a medical certainty or supported by the medical findings, will be deemed irrational. *Matter of Stack v Board of Trustees, 38 AD3d 562, 563 (2d Dept, 2007)*. Moreover, the Board's recommendations ignored the submitted medical records and are, therefore, deemed arbitrary. *Borenstein v NYCERS, 88 NY2d 756, 760-761 (1996)*.

Accordingly, the Petition is granted in its entirety and the denial by Respondents dated November 30, 2020 of Mr. Smiley's application for physical disability retirement benefits is hereby annulled. This is the Decision and Order of the Court.

ENTER,



LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN