Matter of Moore v New York City Empls. Retirement Sys.
2022 NY Slip Op 30310(U)
January 27, 2022
Supreme Court, Kings County
Docket Number: Index No.: 502612/2021
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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In the Matter of the Application of

DAMIEN MOORE,

Petitioner,

– against –

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES of the New York City Employees' Retirement System, THE MEDICAL BOARD of the New York City Employees' Retirement System, and THE CITY OF NEW YORK,

Respondents.

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Index No.: 502612/2021
Motion Seq.: 01

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion.

The following e-filed documents, listed by NYSCEF document number 1-19 and 23-37, were read on this motion seeking a judgment pursuant to Article 78 of the CPLR.

The petitioner, Damien Moore, filed the instant petition seeking the following relief pursuant to Article 78 of the CPLR: 1) review and annulment of the action of the respondents herein in denying the petitioner an accidental disability retirement pursuant to New York Retirement and Social Security Law (RSSL) § 605-b, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and 2) directing and ordering the respondents to retire petitioner with an accidental disability retirement pension; or, in the alternative, 3) directing and ordering the respondents by way of remand to review the petitioner's application for an accidental disability retirement benefit. Furthermore, in the event that the respondents failed to act in accordance with CPLR § 7804(e) in answering the petition, the petitioner seeks an order directing respondents to serve and file: 1) all reports, recommendations, certificates and all other documents submitted to the New York City Employees' Retirement System, in connection with the petitioner's disability retirement pension application herein; and 2) copies of any and all records, reports or notes relating to the petitioner which are on file with the New York City Employees' Retirement System. Notably, at oral argument, counsel for both parties clarified that the issue of whether the petitioner sustained an "accident" is not ripe for judicial review, as the Board of Trustees did not make a determination in this regard, and that the Board's final determination was only with respect to lack of causation. After oral argument and a consideration of the parties' submissions, the petition is dismissed.

Petitioner was appointed as a uniformed member of the New York City Department of Sanitation (DOS) on October 9, 2007 and served continuously as a member of the DOS until he

was retired under an ordinary disability retirement. Petitioner states that he was a member of the Pension Fund at all material times and made all contributions thereto as required by law. Petitioner alleges that on December 21, 2015, he was attaching a snowplow to his sanitation truck and, while exiting the truck, he suddenly and unexpectedly stepped into a pothole in the snowplow area of the garage, causing him to fall and suffer injuries to his right ankle. Petitioner asserts that this was not a usual responsibility of his and that he was unfamiliar with the area of the garage in which he fell. Petitioner states that he went to Jewish Medical Center Emergency Department following the accident and that an X-ray of the right foot revealed moderate hallux valgus deformity and mild soft tissue prominence of bunion deformity. The petitioner states that he was discharged from the facility after being diagnosed with a right ankle sprain. Petitioner also states that he had previously injured his right foot at work when he slipped on snow and ice in 2014. Petitioner refers to an MRI report on his right ankle dated January 30, 2015, in which a stable appearance of proximal Achilles tendinopathy with minimal peritendinitis and insertional tendinopathy in the posterior tibial tendon with tenosynovitis were noted. Petitioner further states that an updated MRI conducted on January 21, 2016 confirmed the existence of these issues. On March 8, 2016, the petitioner underwent an Achilles tendon repair and Achilles tenotomy.

On October 23, 2017, the Petitioner filed an application for disability retirement pursuant to both RSSL § 605 and RSSL § 605-b, in which he indicated that he was disabled because of the Achilles tendon tear that occurred as a result of the December 21, 2015 line of duty injury. *See* NYSCEF Doc. No. 8. The Medical Board reviewed the petitioner's application along with the medical reports submitted in support. In a report dated April 5, 2018, the Medical Board noted that the petitioner stated in his interview that he was stepping down a ladder backwards when he stepped into a hole in the garage floor. *See* NYSCEF Doc. No. 9. According to the Medical Board report, the petitioner stated that he had "no reason to expect the pothole in that area." *Id.* at pg. 4. However, the petitioner further stated that "[h]e has been in the garage for long time," and while he does know that there are holes and defects in the concrete, he was "not aware of this particular one." *Id.* at pgs. 4-5. The Medical Board concluded that the documentary and clinical evidence failed to substantiate the petitioner's contention that he was disabled from performing the duties of a sanitation worker with the DOS.

On October 11, 2018, the Board of Trustees considered the Petitioner's application and adopted the Medical Board's recommendation in denying the Petitioner's applications for disability retirement under RSSL §§ 605 and 605-b. However, the New York City Employees' Retirement System (NYCERS) Board of Trustees also indicated that the Petitioner had an option to re-file for disability retirement if eligible, which he did on December 7, 2018. The petitioner submitted additional evidence in support of this new application, including a report by vocational expert Dr. Andrew Pasternak, who found in a report dated February 27, 2019 that the petitioner is "totally disabled from any work in the local or national economies including even Sedentary Work," and that he would also "be precluded from strenuous work as a Sanitation Driver/Collector." *See* NYSCEF Doc. No. 13.

The Medical Board reviewed the petitioner's new application and set forth its findings in a report dated May 16, 2019. Given this new evidence, the Medical Board changed its prior determination in that it now found that the documentary and clinical evidence substantiated that

Damien Moore is disabled from performing the duties of Sanitation Worker with the DOS. *See* NYSCEF Doc. No. 9. However, the Medical Board further stated that:

> In view of the MRI findings on the study on January 21, 2016, in which no tear of the Achilles tendon was demonstrated, the Medical Board is unable to establish when the tear to the Achilles tendon reported by Dr. [William] Lackey to be found in an area of chronic degeneration might have occurred and therefore, is unable to establish causality. *Id.*

As a result, the Medical Board adhered to its initial determination in denying petitioner's application for disability retirement under provisions of RSSL 605-b (accidental retirement) but approved the application for disability retirement under the provisions of RSSL 605 (ordinary retirement). On October 10, 2019, the Board of Trustees remanded the matter back to the Medical Board for it to consider new evidence with regard to causality and the potential aggravation of a preexisting injury under the standard set forth in *Tobin v Steisel*, 64 NY2d 254 (1985). The Medical Board again reviewed the petitioner's application on December 18, 2019 and considered new evidence from Dr. Howard Baum that the plaintiff suffered from chronic Achilles tendonitis, and concluded, inter alia, that "the MRI of the right ankle of January 21, 2016 did not reveal evidence of an acute injury" and "that the incident of December 21, 2015 did not cause a permanent aggravation of the member's pre-existing condition of Achilles tendonitis." *See* NYSCEF Doc. No. 29. The Board of Trustees then reviewed the Medical Board's updated determination on October 8, 2020 and adopted its recommendation that the petitioner was not entitled to accidental disability benefits, finding that "the incident of December 21st, 2015 was not the natural and proximate cause of the member's disabling condition." *See* NYSCEF Doc. No. 15.

Petitioner argues NYCERS' denial of the application for accidental disability retirement under RSSL § 605-b was arbitrary, capricious, unreasonable, unlawful and contrary to the provisions of the Constitution of the United States and the State of New York statutes, laws, ordinances, rules and regulations applicable in these circumstances. Petitioner contends that the Medical Board's determinations are unsupported by credible evidence. Petitioner further asserts that the Board of Trustees relied upon the assertions of Dr. Joseph Bottner, who petitioner argues was mistaken when he stated at the October 8, 2020 meeting that there was no mention of an Achilles tear in the operative notes. *See* NYSCEF Doc. No. 15.

The respondents oppose the petition, contending that the petitioner has failed to establish that the petitioner's disability was proximately caused by the fall. The respondents also assert that the Medical Board's findings were supported by credible evidence because petitioner's medical records demonstrate a history of chronic medical issues affecting the same leg that petitioner claims was acutely injured, including previous accidents. The respondents also assert that even if the Court were to find that petitioner's disability was the direct and proximate cause of the December 21, 2015 injury, it cannot find that petitioner's injury was the result of an accident, and that this responsibility rests with the Board of Trustees alone. Respondents argue that the petitioner's injury was clearly not the result of an accident because injuries that occur as the result of fulfilling one's regular duties and which entail risks routine to the job are not accidents.

One of the only questions that may be raised in a proceeding under Article 78 is "whether a determination was made in violation of lawful procedure" or "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." CPLR § 7803(3). Furthermore, RSSL § 605-B sets forth the criteria for members of NYCERS to qualify for accidental disability retirement, stating as follows:

> A New York city uniformed sanitation member who… is determined by NYCERS to be physically or mentally incapacitated for the performance of duty as the natural and proximate result of an accident, not caused by his or her own willful negligence, sustained in the performance of such uniformed sanitation service while actually a member of NYCERS shall be retired for accidental disability.

An applicant seeking disability retirement has the burden of establishing that the disability is causally related to a line-of-duty accident. *See Halloran v. NYC Employees' Retirement Sys.*, 172 AD3d 715 (2d Dept 2019). In determining whether there is a causal connection, a court must first determine whether some credible evidence exists to support the findings of the agency denying the application. *Id.* If there was any credible evidence of lack of causation, the Board of Trustees' determination must stand. *See Giuliano v New York Fire Dept. Pension Fund*, 185 AD3d 812 (2d Dept 2020). Credible evidence consists of evidence "from a credible source and reasonably tends to support the proposition for which it is offered." *Id.* at 814.

Moreover, a line-of-duty accident is considered the proximate cause of a disability if the accident "either precipitated the development of a latent condition or aggravated a preexisting condition...Where the medical evidence with respect to causation is equivocal, the burden has not been sustained." *See Matter of Kmiotek v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 232 AD2d 640, 640-641 (2d Dept 1996); *see also Halloran*, 172 AD3d at 716. "[T]he courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." *See Giuliano*, 185 AD3d at 814, *quoting Matter of Santoro v Board of Trustees of N.Y. City Fire Dept. Art. 1-B Pension Fund*, 217 AD2d 660, 660 (2d Dept 1995) (internal quotation marks omitted).

Based upon the record, the Board of Trustees considered all of the medical evidence submitted by the petitioner concerning the petitioner's medical condition, which included the alleged injuries to the petitioner's right leg, as well as the Medical Board's interviews and physical examination of the petitioner. Additionally, in making its recommendation to the Board of Trustees, the record clearly indicates that the Medical Board considered the MRI reports taken both before and after the December 21, 2015 incident. The Medical Board noted that the MRI performed in January 2015 resulted in a diagnosis of proximal Achilles tendinopathy and peretendinitis, which was the same diagnosis the petitioner received from the MRI performed in January 2016, just after the incident in question, and that no tears were visible on either MRI. The Board of Trustees then adopted the Medical Board's finding after remand, noting that the Medical Board "concluded that the medical evidence does not support a finding of causality either by aggravation under the Tobin v. Steisel standard or just as a standalone cause of the member's disabling condition." Based on its review of the medical reports and its interviews and

examinations of the petitioner, it was within the Medical Board's discretion to make a recommendation to the Board of Trustees, which was ultimately adopted, that the disability of the right leg was not proximately caused by the incident. *See Matter of Kmiotek v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 232 AD2d 640.

Here, the determination of the Medical Board and the Board of Trustees in denying the petitioner's application for accidental disability retirement as the result of an injury to his right leg was based on credible evidence. In making their determinations, the Medical Board and Board of Trustees considered, inter alia, the evidence submitted by the petitioner, his answers to their questioning, and relevant case law. The Board of Trustees' conclusion that causality of the petitioner's injuries could not be established was neither arbitrary nor capricious. "[W]here, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Flacke v Onondaga Landfill Sys*., 69 NY2d 355, 355-356 (1987). Under these circumstances, since the reviewing court may only disturb the final award by finding causation established as a matter of law, the determination must stand if "there was any credible evidence of lack of causation before the Board of Trustees." *See Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 (1997).

Furthermore, that branch of the petition seeking, inter alia, certain records, reports, recommendations, and minutes of each Board of Trustees meeting in connection with the petitioner's disability retirement application is denied. The respondents represent that it has complied with its obligation under CPLR § 7804(e) and filed with the Court the entire administrative record considered by the agency, Medical Board and Board of Trustees in rendering its decision, which are attached to the respondents' submissions as exhibits.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the petitioner's application to annul the respondents' determination pursuant to Article 78 is DENIED in its entirety, and the proceeding is dismissed.

This constitutes the decision and order of the Court.

Dated: January 27, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.