

Matter of DePietro v Whinnery
2022 NY Slip Op 31606(U)
May 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 508587/2021
Judge: Karen B. Rothenberg
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(b) directing and ordering the respondents to retire her with a disability retirement allowance under the World Trade Center Disability Law, retroactive to her initial disability retirement application of March 1, 2013; and

(c) ordering respondents to pay for costs and reasonable attorneys' fees.

Additionally, petitioner seeks an order pursuant to CPLR §2307(a) directing respondents herein to serve and file upon the date hereof:

(a) all reports, recommendations, certificates and all other documents submitted to or reviewed by the NYCERS Medical Board and Board of Trustees in connection with petitioner's performance-of-duty disability retirement application herein, including, but not limited to, any job description documents referenced or relied upon in determining whether petitioner is disabled from the performance of the essential functions of her former title;

(b) copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon petitioner's accident disability retirement application;

(c) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Pension Fund and/or the FDNY Bureau of Health Services, including authorizations for treatment and sick history reports; and

(d) a copy of the Rules governing NYCERS disability retirement procedure.

In June 2000, DePietro began her employment with the New York City Fire Department [FDNY] as an Emergency Medical Technician [EMT]. On September 11, 2001, and for several days thereafter, DePietro was involved in the rescue, recovery and clean-up operations at the World Trade Center site. DePietro claims that as a result of her work at the World Trade Center, she developed chronic upper-respiratory illness, asthma, gastroesophageal reflux disease, migraines, as well as mental health problems, including PTSD.

In August 2019, DePietro applied for World Trade Center accidental disability retirement benefits¹. The disabling conditions complained of included chronic sinusitis, asthma, PTSD, gastroesophageal reflux disease, chronic rhinitis, chronic cough, migraines, sinus infection, difficulty breathing, wheezing, and stomach distress. The application was denied upon a finding by the Medical Board, as ratified by the Board of Trustees, that petitioner was not disabled from

¹ DePietro previously filed for disability retirement benefits pursuant to NY State Retirement and Social Security Law § 607-b due to a job-related shoulder injury that occurred on November 14, 2002. NYCERS denied DePietro's application finding that she failed to substantiate that she was disabled from performing her duties as an EMT. As a result of her shoulder injury DePietro requested a reasonable accommodation and was assigned to light duty beginning in approximately 2004 until her service retirement in 2020.

performing her duties as an EMT as a result of the various physical and psychiatric conditions she alleges developed as a result of her work at the World Trade Center in 2001.

The Medical Board's report with respect to DePietro's physical concluded as follows:

"The Medical Board finds the clinical and documentary evidence failed to substantiate that Judi DePietro is disabled due to chronic sinusitis, chronic rhinitis, chronic cough, migraines, asthma or gastroesophageal reflux disease.

The Medical Board notes that she finds benefits from acid reflux medications. With regards to rhinitis and sinusitis, she has had recent surgery for her nasal septum and to shrink the inferior turbinates. The CT scan in 2018 did not show any sinus disease. She has not had a complicated postop course as per Dr. Fred Lin's notes. With regards to asthma, there is reference to a normal pulmonary function study on record and reports of controlled asthma. With regards to her complaints, she may have not reached maximum medical improvement as there are more treatment options to help improve her condition if necessary. We note submaximal treatment. With regards to migraines, her description of headaches is not consistent with migraines and there are treatment options available to her to help improve her condition if necessary. She has not been evaluated by a neurologist for this complaint. The Medical Board does not find her disabled due to a chronic cough based on the record.

With regards to her psychiatric claim, the Medical Board requests that she submit all psychiatric records and specifically recent records from Licensed Social Worker, Catherine Putkowski-0' Brien as well as psychiatrist, Dr. Shalenberg.

Once available, these records are to be forwarded to a NYCERS' consulting psychiatrist for evaluation of PTSD."

NYCERS' consulting psychiatrist, James Lynch M.D., in a report dated August 7, 2020, opined as follows:

"Based on my examination of Mrs. DePietro and a review of her medical records submitted by the NYCERS Medical Board, it is my opinion Mrs. DePietro has encountered significant psychological stress and has recently sought psychiatric care, as well as psychotherapeutic intervention. However, I am aware Mrs. DePietro was able to work in a RA status since her shoulder injuries occurred many years ago. In fact, in her previous applications for disability due to her shoulder injuries, there are no mentions of her psychological impairments. It is therefore, my assumption Mrs. DePietro, would not have been considered disabled on psychological grounds until very recently.

With her recent significant onset of symptoms and a possible response using both medications and psychotherapy, I would not find Mrs. DePietro to be disabled and certainly not on a permanent basis due to her psychological injuries. I would hope and expect that she will continue receiving psychological care to maintain her mental health in a stable way. I conclude by finding that Judi DePietro does not meet the grounds for World Trade Center Accidental Disability Retirement on Psychological grounds, as I do not find that she has a permanent Psychological Disorder, and certainly not one that could be linked in a clear way to her service as an EMT for the FDNY. Rather, it appears Mrs. DePietro was able to function in a Reasonable Accommodation Assignment without significant distress for many years."

In its addendum to the original report dated September 1, 2020, the Medical Board, in addressing DePietro's psychological claims, concluded as follows:

“The Medical Board is in agreement with the consultation of James Lynch, M.D., NYCERS' psychiatric consultant. The Medical Board does find that her complaints are relatively recent and she has not reached maximum medical improvement at this time with regards to her ongoing treatment for posttraumatic stress disorder.

Therefore, the Medical Board recommends denial of Judi DePietro's application for Disability Retirement under the provisions of Section 607-b (c) pursuant to the World Trade Center Law Presumption.”

In a CPLR Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious (*see Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756 [1996]). In this context, the Medical Board's disability determination will not be disturbed if it is supported by “some credible evidence” (*see Matter of Drummond v New York City Employees' Retirement Sys.*, 98 AD3d 1116 [2d Dept 2012]). “Credible evidence" means "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered ... and... it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). It is “solely within the province of the Medical Board to resolve any conflicts in the medical evidence and medical reports presented to it” (*Matter of Schlesinger v New York City Employees*, 101 AD3d 736, 737 [2d Dept 2012]).

Upon review of the papers submitted herewith, this court finds that the recommendation of the Medical Board, which was adopted by the Board of Trustees, finding that DePietro was not physically or psychologically disabled from performing her duties as an EMT, is supported by some credible evidence and is not arbitrary, capricious or irrational (*see Meyer v. Bd. of Trs. of the N.Y. City Fire Dep't*, 90 NY2d 139 [1997]). The respondent's submissions demonstrate that the Medical Board considered all the medical evidence submitted by DePietro, specified the nature of the complaints made by DePietro during her interviews, detailed the results of its own physical and psychological examinations of her and clearly stated the reasons for its recommendations. Although DePietro's treating physicians and psychiatrists may have offered conclusions that differed from that of the Medical Board, the resolution of such conflicts is solely within the province of the Medical Board (*see Matter of Zamelsky v. New York City Employees' Retirement Sys.*, 55 AD3d 844 [2d Dept 2008]). The court cannot weigh the medical evidence and substitute its own judgment for that of the Medical Board (*see Matter of Vastola v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 37 AD3d 478 [2d Dept 2007]).

Further, contrary to DePietro's contention, there is no requirement that the Medical Board take into account her full job duties of an FDNY EMT in rendering a disability determination as

she had been on light-duty assignment since at least 2004 due to her unrelated shoulder injury (*cf. Guillo v new York City Employees' Retirement System*, 39 Misc.3d 1208(A) [Sup Ct Kings County 2013]; *see also Cook v New York State Comptroller*, 135 AD3d 1117 [3d Dept 2016]).

In view of the foregoing, the court finds that the Medical Board's determination finding DiPietro was not disabled from performing her job duties as an EMT is supported by credible evidence. Thus, the instant petition is denied and dismissed.

This constitutes the decision/order of the court.

Dated: May 9, 2022

Enter,



Karen B. Rothenberg; J.S.C.