

Matter of Tepedino v Board of Trustees of N.Y. Fire Dept.

2022 NY Slip Op 31810(U)

June 7, 2022

Supreme Court, New York County

Docket Number: Index No. 453304/2021

Judge: Arlene Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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In the matter of
FIREFIGHTER FRANK P. TEPEDINO,

Petitioner,

INDEX NO. 453304/2021

MOTION DATE 06/02/2022

MOTION SEQ. NO. 001

- v -

BOARD OF TRUSTEES OF N.Y. FIRE DEPT.,
SUBCHAPTER II FIRE PENSION FUND, SUBCHAPTER II
MEDICAL BOARD

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-58
were read on this motion to/for ARTICLE 78.

The petition to reverse and annul a decision by respondents denying petitioner’s
application for a World Trade Center (“WTC”) pension is denied.

Background

Petitioner worked for the New York Fire Department for over 13 years and assisted in the
World Trade Center search and rescue efforts in the aftermath of the September 11, 2001 attacks.
He insists he was exposed to contaminants as part of this work and, as a result, suffers from a
number of ailments that rendered him disabled including sleep apnea, asthma, sinusitis, GERD
and reactive airway dysfunction syndrome.

Petitioner was awarded a non-WTC disability pension in 2015 related to a wrist injury
but has been repeatedly denied a WTC disability pension by respondents. Petitioner points out
that the relevant law includes a presumption that firefighters who participated in the WTC rescue

were exposed to various contaminants and are entitled to receive a WTC disability pension if they exhibit certain ailments, including the ones from which petitioner allegedly suffers.

Petitioner takes issue with the findings of the Medical Board that denied his WTC pension. He claims they failed to properly account for his positive Methacholine test results (a test related to his asthma diagnosis) and that the Medical Board improperly ignored various pulmonary tests which demonstrate his disability.

In opposition, respondents point out that petitioner retired in October 2015 with Accident Disability Retirement (“ADR”) benefits arising out of a right hand and wrist injury and in 2017 applied to be re-classified to ADR under the WTC Disability Law. The application was denied and petitioner re-applied in 2019, and his request was denied again. Respondents emphasize that any conflict between the conclusions of the Medical Board and the applicant’s treating physician is within the sole discretion of the Medical Board to reconcile.

They point out that the Medical Board reviewed pulmonary function testing on petitioner that showed normal results and that a February 2018 Methacholine challenge test did not produce clinically significant results. Respondents also noted that petitioner’s lungs were clear during an October 2019 examination. They argue that petitioner’s self-reported symptoms of chest tightness and wheezing do not compel the Court to reject the Medical Board’s conclusions.

In reply, petitioner reiterates that he is entitled to a presumption of causation because he exhibits qualifying conditions that entitle him to WTC disability benefits. He claims he submitted extensive documentation showing that he has asthma. Petitioner focuses on the fact that the methacholine test result shows he could not be appointed a firefighter today, a requirement to find him disabled and therefore entitled to the benefits he seeks. He insists he

submitted evidence that directly contradicts the conclusions reached by the Medical Board and that it was arbitrary and capricious for his application to be rejected.

Discussion

In an article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

“Applying for ADR involves a two step process. Initially, the pension fund’s Medical Board conducts a physical examination, interviews the applicant, and reviews the submitted evidence, before submitting a recommendation to the Board of Trustees. In the second step, the Board of Trustees votes to either grant or deny ADR benefits” (*Stavropoulos v Bratton*, 148 AD3d 449, 450, 50 NYS3d 2 [1st Dept 2017]).

“A claimant filing for ADR benefits ordinarily has the burden of proving causation in an administrative proceeding. But as part of the legislature’s response to the World Trade Center tragedy, a new statute was enacted creating a presumption in favor of ADR benefits for police officers who performed rescue, recovery or cleanup operations at specified locations. . . . Under the WTC presumption, the pension fund bears the initial burden of proving that a claimant’s qualifying condition was not caused by the hazards encountered at the WTC site” (*Bitchatchi v Board of Trustees of New York City Police Dept. Pension Fund*, 20 NY3d 268, 276, 958 NYS2d

680 [2012]). “[A] pension fund could rebut the presumption by ‘competent evidence.’ Under this carefully calibrated framework, we believe that the competent evidence contemplated by the WTC presumption may be equated with the well-established credible evidence standard, provided that the pension fund bears the burden of coming forward with affirmative evidence to disprove causation. . . . In other words, unlike the typical application for disability benefits, a pension fund cannot deny ADR benefits by relying solely on the absence of evidence tying the disability to the exposure” (*id.* at 281-82).

In October 2015, respondents awarded petitioner ADR related to his hand and wrist injury (NYSCEF Doc. No. 31). Petitioner then applied for reclassification for WTC benefits in July 2017 (NYSCEF Doc. No. 32). The Medical Board observed that spirometry tests dated March 9, 2009 and July 12, 2011 were normal while additional tests performed on July 9, 2012 and June 24, 2013 were “borderline normal” (NYSCEF Doc. No. 33 at 1).

The Medical Board concluded that “On examination, inspection of the interior chambers of the nose was normal. Inspection of the throat was normal. Auscultation of the lungs revealed normal breath sounds with good air entry bilaterally. There were no weezes [sic]. No clubbing, cyanosis or edema noted of the extremities” (*id.* at 3).

It concluded that:

“Based on our review of the medical records, interview and examination of the member, it is the unanimous opinion of the Subchapter 2 Medical Board, that FF Frank Tepedino is not permanently disabled due to reactive airways dysfunction and sinusitis. We note that he has had normal pulmonary function as well as Methacholine challenge studies without significant bronchoprovocation. We note that he does not find the benefit from using respiratory medications and we note a normal lung examination today. With regards to the sinuses, we don't find significant disease by history and we note that he has not had a CT scan or seen an ENT physician for an evaluation” (*id.*).

Petitioner then submitted an addendum to his application in March 2018 (NYSCEF Doc. No. 34) and the Board of Trustees remanded his application for reconsideration (NYSCEF Doc. No. 35). The Medical Board, once again, denied petitioner's application for WTC-reclassification, first for GERD (NYSCEF Doc. No. 36) and then for asthma, reactive airways disease and sinus disease (NYSCEF Doc. No. 37). The Medical Board insisted that petitioner was not permanently disabled and reaffirmed its previous decision (NYSCEF Doc. No. 37 at 2). The Board of Trustees then affirmed that conclusion (NYSCEF Doc. No. 38).

Petitioner then submitted another application for WTC-reclassification based on his asthma in August 2019 (NYSCEF Doc. No. 39). The Medical Board concluded that petitioner's "examination today is also normal and . . . we continue to feel that there is no evidence of disability and reaffirm our previous decision that this WTC-Reclassification application for asthma be denied" (NYSCEF Doc. No. 40 at 2). After receiving a report from one of petitioner's doctors, the Board of Trustees remanded the application for additional review (NYSCEF Doc. No. 41).

However, the Medical Board once again reaffirmed its view that petitioner is not disabled (NYSCEF Doc. No. 42). It observed that the letter from petitioner's doctor did "not add any objective information with regards to respiratory disability for FF Frank Tepedino. If anything, it reports a new pulmonary function study to show a normal FENO of 17. . . . The new records provide us no objective evidence of respiratory disability at this time" (*id.* at 1). The Board of Trustees subsequently affirmed the decision (NYSCEF Doc. No. 43).

The Court finds these decisions to be rational and sees no basis to reverse the conclusions drawn by respondents. The record before this Court shows that respondents carefully considered petitioner's multiple applications and even remanded petitioner's requests before ultimately


concluding that petitioner is not disabled and therefore not entitled to WTC benefits. Although petitioner is correct that there is a presumption of causation for qualifying conditions, the fact is that, here, respondents concluded that petitioner does not suffer from a qualifying condition. And it is not this Court’s role to do its own evaluation of the evidence and make its own assessment of petitioner’s purported ailments.

Simply put, it was rational for respondents to conclude that petitioner did not suffer from a condition that rendered him disabled and therefore entitled to WTC benefits by pointing to examinations that repeatedly showed that his lungs were clear, there were no signs of wheezing and no signs of respiratory distress. His spirometry and lung function tests demonstrated that he has normal lung function, including pulmonary lung function tests performed by petitioner’s doctor in January 2020 (NYSCEF Doc. No. 42 at 5). The Medical Board also found that his other purported ailments did not render him disabled.

The Court does not discount that petitioner may be suffering from various medical issues but the Court is satisfied that respondents’ conclusion, that petitioner is not disabled due to breathing issues, is rational.

Accordingly, it is hereby

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

<u>6/7/2022</u>					
DATE			ARLENE BLUTH, J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

453304/2021 TEPEDINO, FRANK P. vs. BOARD OF TRUSTEES OF N.Y. FIRE DEPT. ET AL
Motion No. 001