SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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ASHLEY MCMIKLE,

Petitioner,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, TEACHERS RETIREMENT SYSTEM OF THE CITY OF NEW YORK

Respondent.

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INDEX NO. 150697/2022

MOTION DATE 06/09/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for ARTICLE 78

The petition to reverse respondents' decision denying her Accident Disability Retirement ("ADR") benefits is denied.

Background

Petitioner worked for respondents, first as a substitute teacher starting in 1993 and then as a full-time teacher starting in 1996. She explains that in 2011, she became an "attendance teacher" which required her to travel to students' homes. During one such visit on January 10, 2014, petitioner claims that she slipped and fell on black ice. She claims she fell hard on her buttocks and left hand. Petitioner claims that she is now permanently disabled and can no longer perform her duties as an attendance teacher. She contends that she suffers from numerous ailments as a result of this accident and cannot perform the most mundane activities of daily life.

Petitioner applied for ADR benefits in May 2019 and respondents denied her request. Petitioner then commenced an Article 78 proceeding to challenge that decision and the justice assigned to the proceeding remanded the proceeding back to respondents for "reconsideration of the application after a comprehensive orthopedic and or neurologic exam of Petitioner" (NYSCEF Doc. No. 33).

The Medical Board reconsidered petitioner's condition and observed that at the time of the initial assessment, "the Medical Board concluded that the member [petitioner] did not sustain a career-ending disabling injury. The basis of that decision was that there were no objective findings on physical examination to substantiate permanent disability" (NYSCEF Doc. No. 30 at 48). The Medical Board detailed the records it reviewed, including reports from petitioner's neurologist (*id*. at 49). The report observed that the ER physician who treated petitioner on the day of her accident "documented that the member was in 'no apparent distress' regarding her general appearance. It was also noted by the ER physician that the member had mild tenderness to palpation at the bilateral lumbar spine. There was, however, no evidence of erythema, ecchymosis, or tenderness to palpation to the cervical or thoracic spine" (*id*.). According to these records, petitioner was in good condition when she was discharged and there were no x-rays, CT scans or MRIs performed (*id*. at 50).

After conducting another physical examination, the Medical Board concluded that "there is a lack of objective evidence to substantiate that the member sustained a disabling career-ending injury as a consequence of the slip-and-fall she sustained on January 10th, 2014. There are multiple medical reports that indicate that the member's slip-and-fall was completely non-disabling and certainly not permanent" (*id*. at 55).

"The Medical Board fails to understand member's current subjective complaints and limited use of all of her extremities, and are not corroborated by multiple other evaluating and treating physicians. Furthermore, Medical Board notes that the member's current subject complaints of total body sensory loss from her head down to her toes has no possible anatomical basis based on her clinical examination, MRIs, as well as nerve testing" (*id*. at 56).

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]).

"Ordinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require 'some credible evidence'" (*Borenstein v New York City Employees'*

Retirement Sys., 88 NY2d 756, 760-61, 650 NYS2d 614 [1996] [internal quotations and citations omitted]).

The Court denies the petition. The fact is that the Medical Board closely scrutinized the documentation provided to it and conducted its own physical examination of petitioner before denying her application. Simply put, the Medical Board did not find that petitioner suffered from a career-ending disability. It decided not to credit petitioner's subjective complaints and observed that petitioner's "gait is normal, member [is] able to walk on heels and toes, normal strength, and normal function is both hands. The evaluating physician also went on to indicate that the member has no problems with personal care, is able to cook, clean, and do laundry" (NYSCEF Doc. No. 30 at 55).

The examination provided additional bases for the Medical Board to deny her application. It observed that petitioner "indicated during the physical examination that [she] was unable to raise her arms above her head, but could not clearly explain in detail how she was able to dress herself independently that day to come to the evaluation. She noted marked give-way weakness on individual muscle testing, but again with inspection demonstrated full functional use of all extremities" (*id*. at 54).

Petitioner's argument in reply that she was awarded social security disability benefits is of no moment. Respondents were entitled to do their own evaluation of petitioner's condition and they did not credit her complaints. Petitioner's efforts to characterize the 2021 physical examination by respondents as "cursory" is not a basis for this Court to grant her ADR benefits.

Accordingly, it is hereby

ORDERED that the petition to reverse respondents' decision denying petitioner ADR benefits 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.

6/10/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE