

Lamar v Nigro

2022 NY Slip Op 32197(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 151535/2022

Judge: Arlene Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

DAVID J. LAMAR,

Petitioner,

- v -

DANIEL NIGRO, THE BOARD OF TRUSTEES OF THE
NEW YORK CITY FIRE DEPARTMENT, ARTICLE I-B
PENSION FUND, PETER NEUMANN, DAMIAN MARTINO,
LAWRENCE SCHARER

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for

ARTICLE 78

**DECISION + ORDER ON
MOTION**

The petition to reverse respondents' determination denying petitioner's application for accident disability retirement ("ADR") benefits is granted and he is entitled to benefits retroactive to his date of retirement.

Background

Petitioner began working as a firefighter for respondents in October 1995 and retired in August 2021. He alleges that prior to his appointment with the FDNY, he passed the physical and mental examinations. Petitioner insists that during his service for the FDNY he sustained line-of-duty injuries to both knees, yet he continued to work as a firefighter until his last line-of-duty injury on March 8, 2018.

Petitioner details the seven incidents in which he injured his knees while on the job. He claims that he did not return to active-duty work after the March 8, 2018 incident. Petitioner

observes that the FDNY's Bureau of Health Services eventually found him unfit for fire duty on April 15, 2019. He points to their letter, which noted that on March 8, 2018 "while working at a fire on the fire floor in a cluttered dwelling, his left foot plunged through the burnt floor, he lost his balance, his right leg slipped on debris, he crashed into a wall, and he noted pain in his bilateral knees. MRI of the left knee March 2018 revealed medial meniscus tear, displaced lateral meniscus tear, prior PCL injury, prior MCL injury with scar formation, patellofemoral chondromalacia, patellar tendinitis, ACL degeneration and arthritis of the medial compartment" (NSYCEF Doc. No. 14 at 1). Petitioner later had knee replacements in both knees in 2018. The letter observed that a physical examination of petitioner was completed on April 15, 2019 and that he had a permanent partial disability (*id.* at 2).

Petitioner applied for ADR in May 2019 and the Medical Board awarded him only ordinary disability retirement ("ODR"). The Medical Board insisted that petitioner's knee issues were related to "Chronic Degenerative Joint Disease." Petitioner acknowledges that rather than retiring with ODR, he received a reasonable accommodation and continued to work for the FDNY with a light duty assignment.

In January 2020, the Board of Trustees remanded petitioner's ADR application to the Medical Board for reconsideration, including consideration of an affidavit from a fellow firefighter who described the March 2018 incident and witnessed petitioner's left leg falling through a weakened section of the burned-away floor.

In March 2020, the Medical Board once again reaffirmed its prior recommendation that petitioner receive only ODR. The Board of Trustees once again recommended reconsideration of petitioner's ADR application in December 2020 and the Medical Board, again, reaffirmed its ODR recommendation.

Petitioner argues that he is entitled to ADR and that the Medical Board's denial of his application was not based upon credible evidence. He emphasizes that prior to his first line-of-duty injury in 2002, he passed all FDNY's tests and never had any medical history with respect to his knees.

In opposition, respondents maintain that petitioner's knee issues were caused by a chronic degenerative joint disease and not the seven line-of-duty injuries. They insist that this Court should deny the petition because the Medical Board conducted a thorough review of petitioner's medical history before denying his application. Respondents insist that all they have to show is some credible evidence supports the Medical Board's conclusion and that they have satisfied that standard.

Respondents argue that medical examination of petitioner's knees showed severe osteoarthritis and that a 2002 examination showed early degenerative changes. They emphasize that the Medical Board's 2021 report noted that there was no medical evidence that the March 8, 2018 injury aggravated an underlying condition with respect to his knees.

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 issue in this case is straightforward: whether petitioner’s knee injuries were caused by his line of duty incidents or whether they were solely the result of a degenerative condition. There is no dispute that petitioner is permanently disabled from performing full firefighter duties because of the condition of his knees. The initial Medical Board observed that petitioner “had an injury in 2002, which was previously described, and returned to work after 90 days of physical therapy following surgery” (NYSCEF Doc. No. 15 at 2). Petitioner claims that this injury was caused when he fell to the floor because of debris while responding to a fire (NYSCEF Doc. No. 4). In the 2002 incident, petitioner was taken to a hospital by ambulance (*id.*).

The Medical Board admitted that petitioner “had other injuries in 2008, 2010 and 2014, for which he took no days off; 2015 he had a twisting injury to his knee, took 35 days off and then returned to full duty. In January 2018, he fell down some stairs and took no days off” (NYSCEF Doc. No. 15 at 2). The report noted that petitioner underwent surgery after the March

2018 incident including, “bilateral Total Knee Arthroplasties” followed by physical therapy and was later found to be unfit for duty because of the surgery (*id.*). The Medical Board concluded that petitioner was permanently disabled because of his knees but found that his knee issues were due to a Chronic Degenerative Joint Disease instead of the March 2018 incident (*id.* at 3).

Petitioner’s colleague then submitted an affidavit in which he claims he saw that petitioner’s “left leg went through a weakened section of burned away flooring and it appeared that his left knee buckled. Firefighter Lamar lost his footing and fell forward into the wall where he took a few moments to regain his balance . . . Upon exiting the building, [petitioner] was walking with a noticeable limp and complaining of knee pain” (NYSCEF Doc. No. 16).

Nevertheless, the Medical Board concluded in March 2020 that petitioner had degenerative joint disease first found in 2002 and denied his ADR application (NYSCEF Doc. No. 17). Petitioner’s doctor disagrees and insists that the injuries to both of petitioner’s knees were posttraumatic conditions rather than the result of a degenerative condition (NYSCEF Doc. No. 18 at 3). Dr. Alexiades claims that petitioner’s “osteoarthritis in the right knee is causally related to his line of duty injuries of 2002 and 2015 as well as exacerbation in 2018. The left knee clearly had osteoarthritic changes prior to his 2018 line of duty injury but was asymptomatic” (*id.*). He added that “[petitioner’s] left knee is causally related to his line of duty injury in 2018” (*id.*). In spite of this conclusion, the Medical Board rejected Dr. Alexiades’ conclusions and found that petitioner’s knee condition was from his degenerative condition (NYSCEF Doc. No. 19).

The Court finds that the Medical Board’s conclusion was completely irrational and awards petitioner ADR benefits. As an initial matter, the Medical Board did not sufficiently grapple with the undisputed facts in this case. Specifically, petitioner passed all the required

FDNY tests when he started working as a firefighter in 1995 and did not have any history of knee issues. The Medical Board claims, without citing any convincing evidence, that petitioner's degenerative knee condition was discovered in 2002 only after he had a line-of-duty injury that resulted in surgery. In other words, the Medical Board's position is that it somehow can completely ignore the fact that petitioner needed knee surgery in 2002 because of a line-of-duty injury when considering whether petitioner is entitled to ADR.

Of course, the Court recognizes that years pass and knees can get worse due to degenerative conditions and that it may be difficult to discern whether a knee ailment is a result of a degenerative condition or the result of a specific trauma (or multiple traumas). However, the Court of Appeals expressly addressed this point in *Matter of Tobin v Steisel* (64 NY2d 254, 485 NYS2d 730 [1985]). The Court found that "an accident exacerbated an underlying condition, thereby rendering the employee disabled, would be sufficient, if accepted" to entitle an applicant to ADR benefits (*id.* at 259). And so even if petitioner had a degenerative condition, the undisputed facts show that his condition was not so bad that it rendered him incapable of fulfilling his duties as a firefighter and that the 2018 incident – when he fell partially through a floor while fighting a fire- exacerbated the condition and rendered him disabled. Under *Tobin*, petitioner is clearly entitled to ADR benefits.

The Medical Board expressly attempted to distinguish petitioner's situation from the *Tobin* case when it cited the case and concluded that "there is no medical evidence that the injury dated 3/8/18 aggravated an underlying condition of the member's bilateral knees" (NYSCEF Doc. No. 19 at 3). That conclusion is preposterous; he was fit to report to work that day but needed a knee replacement after that day's injury. The Medical Board cannot have it both ways; it cannot claim that petitioner has a degenerative condition dating back to 2002 but that a serious

injury in 2018 did not aggravate his knee condition, an incident that led to petitioner get knee replacement surgery.

Summary

Despite the Medical Board’s attempts to minimize the 2018 injury, or the numerous knee injuries that petitioner suffered while on the job, the fact is that the Medical Board’s offered a conclusory determination that petitioner’s injury was solely degenerative. That conflicts not only with the opinion offered by petitioner’s doctor but with the doctor’s report from the FDNY’s Deputy Chief Medical Officer (NYSCEF Doc. No. 14). Dr. Hurwitz’s diagnosis of petitioner on April 15, 2019 was “Status post bilateral total knee replacement 10/30/2018 for *post traumatic knee injuries*” and petitioner “has a partial permanent disability. He is unfit for fire duty” (*id.* [emphasis added]). While the Court recognizes that neither of these opinions are binding on the Medical Board, the Medical Board’s conclusions did not adequately explain why it ignored these opinions, including the opinion of other FDNY medical personnel.

Accordingly, it is hereby

ORDERED that the petition is granted to the extent that petitioner is entitled to accident disability retirement benefits retroactive to the date of his retirement and the Clerk shall enter judgment accordingly in favor of petitioner and against respondents along with costs and disbursements upon presentation of proper papers therefor.

7/11/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
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