

Velez v Shea
2022 NY Slip Op 32267(U)
July 13, 2022
Supreme Court, New York County
Docket Number: Index No. 156023/2020
Judge: Laurence Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X

TOMAS VELEZ,

Plaintiff,

- v -

DERMOT SHEA, THE BOARD OF TRUSTEES OF THE
POLICE PENSION FUND, ARTICLE II, THE CITY OF NEW
YORK

Defendant.

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INDEX NO. 156023/2020

MOTION DATE 03/25/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55
were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

The following reads on an Article 78 Verified Petition to annul the action of Respondents in denying Petitioner a line of duty accident disability retirement, per Administrative Code 13-252, and declaring said action as arbitrary and capricious; and to direct Respondents to retire Petitioner with a line of duty accident disability retirement.

Petitioner was a New York Police Officer from 1995 to approximately 2015. Dermot Shea is Commissioner of the New York City Police Department and Chairman of the Board of Trustees of the Article II Police Pension Fund. The New York City Police Pension Fund is administered by the Board of Trustees per Title 13 of the New York City Administrative Code 13-200.

In an article 78 proceeding, the Court's review is limited to determining "whether a determination was made in violation of lawful procedure, 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” (see CPLR 7803(3); *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 230-31 [1974]).

Per the Verified Petition,

“Petitioner was at all material times hereinafter mentioned a Tier II member of the Pension Fund. Pension fund members are entitled to different types of pensions based upon the nature of a particular disability or type of retirement. A service retirement pension is based upon the member’s years of service. An ordinary disability retirement pension is based upon a member being disabled for reasons other than an accident and is calculated by the member’s years of service. An accidental disability retirement pension is distinguishable from, and superior to both a service retirement pension and an ordinary disability retirement pension. An accidental disability retirement pension is based upon a line of duty disabling injury and its payment calculated upon three-quarters of a member’s final average salary. An accidental disability retirement pension is virtually triple tax free. Under General Municipal Law 207-k, the ‘Heart Bill,’ a member disabled by a myocardial infarction or other disease of the heart is benefited by a dual evidentiary presumption of accident and causality in his or her favor. It specifically provides: (1) that the disabling disease of the heart is construed as an accident; and (2) that the disability was incurred in the performance and discharge of duty. On January 25, 2015, Petitioner reported to the Emergency Department at St. Luke’s Cornwell Hospital with complaints of severe left sided chest pain with radiation to this left arm, neck and jaw. Petitioner was admitted, underwent cardiac catheterization, diagnosed as having suffered a myocardial infarction. Petitioner subsequently filed an application for Accidental Disability Retirement under the Heart Bill, which was denied. The action of respondent in denying the application of petitioner for an LOD accident disability pension is arbitrary, capricious, unreasonable” (see NYSCEF Doc. No. 1 Pars. 12 – 18, 27).

Petitioner’s Memorandum of law states, “The Administrative Code provides that the determination of physical incapacity for duty shall be made by the Medical Board, and its determination on disability is binding on the Board of Trustees (see *Matter of Borenstein v. New York City Employees’ Ret. Sys.*, 88 N.Y.2d 756 [1996]). Under Administrative Code 13-252, once a member has established a disability resulting from heart disease, including myocardial

infarction, the Medical Board bears the burden of developing a factual record and proffering competent medical evidence to rebut the Heart Bill presumption. Respondents noted that Petitioner's disabling myocardial infarction was the consequence of coronary artery ectasia, which is characterized by an abnormally enlarged coronary artery. This condition has multiple known causes, including autoimmune and infectious conditions that were explicitly ruled out by Petitioner's treating specialist, Harsimran S. Singh, M.D., M.Sc. However, Dr. Singh noted that most cases of coronary ectasia are the consequence of atherosclerotic disease (i.e. hypertension), which does qualify under the Heart Bill" (see NYSCEF Doc. No. 10 P. 6 – 8).

Respondents' Answer affirms, "On February 6, 2015, petitioner filed an application for Accident Disability Retirement ("ADR") stating that he was diagnosed with a 'serious heart condition' which left him 'unable to perform full police duty.' On March 13, 2015, the Medical Board considered petitioner's application for ADR. [T]he Medical Board found that petitioner experienced no cardiac symptoms until his heart attack in January 2015. Additionally, the Medical Board found that petitioner's '[c]ardiac catheterization showed markedly ectatic abnormal coronary arteries involving all three branches.' The Medical Board further noted that '[t]here was no obstructive coronary artery disease' and '[t]here [was] no finding of coronary atherosclerosis or hypertensive heart disease.' Accordingly, the Medical Board recommended approval of the Police Commissioner's application for [Ordinary Disability Retirement] and disapproval of petitioner's application for ADR. The Medical Board concluded that petitioner's final diagnoses was "Ectasia of the Coronary Arteries with Evidence of Episode of Myocardial Ischemia and Anticoagulation Therapy" (see NYSCEF Doc. No. 19 Pars. 13, 15, 17).

Respondent exhibits the Medical Board's March 13, 2015 Examination (see NYSCEF Doc. No. 23). There were various remands to the Medical Board, and what appears to be a final

determination, the Medical Board decided, “your retirement status remains as Service Disability Retirement” (see NYSCEF Doc. No. 35). Petitioner filed a Verified Petition on or about November 29, 2017, where Petitioner’s application was remanded to the Medical Board (see NYSCEF Doc. No. 17).

Per the Verified Answer, “[o]n May 24, 2019, the Medical Board again considered Petitioner’s ADR application. [T]he Medical Board reviewed a letter from Petitioner’s treating cardiologist, Dr. Singh dated July 13, 2017. The Medical Board thoroughly reviewed the new medical evidence submitted by Petitioner. Indeed, the Medical Board noted that the evidence submitted by Dr. Singh ‘gives a list of common causes of coronary artery aneurysms which are atherosclerosis and various other conditions’ indicating that the cause of petitioner’s disabling condition may not be from a qualifying condition under the Heart Bill. (emphasis in original). Ex. 19 at ¶ 7. The Medical Board further noted that the evidence submitted by Dr. Singh ‘does not identify atherosclerosis as the cause of the very severe [] coronary artery aneurysms in this case.’ *Id.* at ¶ 7. The Medical Board went further and stated that ‘[a]s Dr. Singh himself mentioned, coronary atherosclerosis is very common in the western world. Therefore, it would not be unexpected to occasionally find the presence of coronary atherosclerosis together with coronary ectasia. It is merely the coexistence of a common condition,’ and the mere ‘presence of atherosclerosis in a patient with coronary artery ectasia does not prove that coronary atherosclerosis caused it.’ *Id.* The Medical Board deferred its final decision on petitioner’s ADR application ‘in order for the Medical Board to have an opportunity to review the coronary angiography and to further examine the literature regarding the relationship between atherosclerosis and coronary artery aneurysms.’ *Id.* at ¶ 10.” (see NSYCEF Doc. No. 19 Pars. 35 – 37).

Respondents submit a letter from the Medical Board Police Pension Fund Article II describing Dr. Singh's findings (see NYSCEF Doc. No. 38 Par. 7).

There was another Medical Board report on June 7, 2019 (see NYSCEF Doc. No. 40), and August 9, 2019 (see NYSCEF Doc. No. 42). There was a Board of Trustees Meeting on November 13, 2019 (see NYSCEF Doc. No. 43), on December 11, 2019 (see NYSCEF Doc. No. 44), and the February 12, 2020 meeting with a Final Determination (see NYSCEF Doc. No. 45). "At its February 12, 2020 meeting, the Board of Trustees voted six-to-six on whether to grant petitioner ADR. A six-to-six vote results in the award of an ODR pension, and the denial of an application for ADR. By Verified Petition filed on August 3, 2020, petitioner commenced the instant Article 78 proceeding challenging respondents' determination denying him ADR benefits and ordering respondents to retire petitioner with a line of duty disability retirement allowance pursuant to Administrative Code 13-252 and New York General Municipal Law 207-k" (see NYSCEF Doc. No. 19 Par. 45 – 46).

Respondents Verified Answer states, "the Board of Trustees' determination adopting the Medical Board's decision is supported by credible medical evidence and is thus not arbitrary or capricious or an abuse of discretion. The Medical Board evaluated petitioner's ADR application on seven separate occasions. On all seven occasions the Medical Board consistently and unanimously concluded that while petitioner was disabled from performing the duties of a New York City police officer, there was no evidence that his disabling heart condition – coronary artery ectasia – was caused by coronary artery disease, hypertensive heart disease or coronary atherosclerosis qualifying him for ADR under the Heart Bill" (see NYSCEF Doc. No. 19 Par. 47 – 48).

The purpose of the Heart Bill is not to grant ADR benefits to every police officer who develops a disabling heart condition, but to specifically grant ADR benefits only to those whose heart condition was caused by occupational stress. The Court of Appeals in *Uniform Firefighters Association, Local 94, IAFF, AFL-CIO, et. al.* ruled, “[a]s noted, the theory behind the bill, as outlined by its proponents, is not only that heart conditions are an occupational hazard for police officers and firemen, but also that this is a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as a result of the continuous stress and strain of the job” (see *Uniform Firefighters Association, Local 94, IAFF, AFL-CIO, et. al. v. Augustus A. Beekman*, 52 N.Y.2d 463, 471 [1981]).

Where “the Medical Board has eliminated the possibility that the [disabling heart condition] was stress related or job related, the Heart Bill presumption is rebutted” (see *Gumbrecht v. McGuire*, 117 A.D.2d 531, 533 [1st Dept. 1986]). The “Medical Board’s expert opinion explaining the basis for its opinion constitute[s] competent evidence sufficient to rebut [a] statutory presumption of service-related disability” (see *Meyer v. Bd. of Trustees*, 90 N.Y.2d 139 [1997]).

An action is considered arbitrary and capricious when it is made without “sound basis in reason and is generally taken without regard to the facts” (see *Pell v. Bd. of Educ.*, 34 N.Y.2d 231 [1974]). “The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body” (see *Hughes v. Doherty*, 5 N.Y.3d 100 [2005]).

The Board of Trustees met seven (7) times and reviewed multiple sets of data, expert opinions, and imaging reports. Through the reports submitted by the Board of Trustees, the Final

Determination that Petitioner was not entitled to ADR benefits was based on a sound review of the facts presented and has a rational basis for their findings.

When “the court finds that the [agency] determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (see *Greene v. City of New York*, 2013 N.Y. Slip Op. 30381[U] at *7 [Sup. Ct. N.Y. 2013]).

ORDERED that the Petition to annul the action of Respondents in denying Petitioner a line of duty accident disability retirement, per Administrative Code 13-252, and declaring said action as arbitrary and capricious; and to direct Respondents to retire Petitioner with a line of duty accident disability retirement are DENIED in their entirety.

<u>7/13/2022</u>			
DATE		LAURENCE LOVE, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE

