

Barnabee v New York City Fire Pension Fund
2023 NY Slip Op 31135(U)
April 10, 2023
Supreme Court, New York County
Docket Number: Index No. 154756/2021
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 154756/2021

KEVIN BARNABEE,
Petitioner,

MOTION SEQ. NO. 001

- v -

THE NEW YORK CITY FIRE PENSION FUND, THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE PENSION FUND, DANIEL A. NIGRO, COMMISSIONER OF THE FIRE DEPARTMENT OF THE CITY OF NEW YORK AND CHAIRMAN OF THE AFORESAID BOARD, and THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 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, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for

ARTICLE 78

Petitioner KEVIN BARNABEE, a firefighter with the New York City Fire Department (“FDNY”) from 2003 until his retirement under an ordinary disability retirement, commenced this Article 78 proceeding against respondents THE NEW YORK CITY FIRE PENSION FUND (“Fire Pension Fund”) — the pension fund for the City’s firefighter and fire officers; THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE PENSION FUND (“Board of Trustees”) — comprised of City and Union representatives, who review and vote on whether a member is entitled to a disability retirement pension; DANIEL A. NIGRO — the former Commissioner of the FDNY and Chairman of the Board of Trustees of the Fire Pension Fund; and THE CITY OF NEW YORK, seeking an order (1) annulling the determination made by respondents denying petitioner a pension of three quarters of his salary as required by New York City Administrative Code § 13-353; (2) directing and ordering respondents to retire petitioner with a line of duty accident disability retirement allowance retroactive to the date of his retirement, plus interest; (3) directing and ordering respondents, by way of remand, to review petitioner’s application for a line of duty accidental disability retirement benefit; and (4) directing respondents to comply with CPLR 7804(e) in answering the petition. (NYSCEF Doc. No. 1, *petition*).

The salient facts of this proceeding are as follows. Petitioner reported that, on August 20, 2018, while standing on a fire escape after responding to a fire emergency at a 3-story building, a large piece of wood struck his helmet and shoulder, causing him to fall to his knees and injure his left hip. (NYSCEF Doc. No. 2, *member injury report*). On August 25, 2018, petitioner was examined by the FDNY Bureau of Health Services, which noted “marked pain in hip with difficulty walking.” (NYSCEF Doc. No. 3, *examination reports*). Petitioner underwent an MRI on August 27, 2018, which made the following findings:

“Mild degenerative changes are present in the left hip with superficial cartilage loss involving less than 50% the cartilage thickness. A small associated subchondral cyst is present in the lateral aspect of the left acetabulum. There is no evidence for fractures or avascular necrosis. Degenerative disease is present in the lower lumbar spine. The sacroiliac joints are unremarkable. Overall, the bone marrow signal is age-appropriate. Bony proliferation is present on the anterolateral aspect of the femoral head/neck junction. No acetabular retroversion is identified.” (NYSCEF Doc. No. 4, *MRIs*).

Petitioner was evaluated by Dr. William Long, M.D., an orthopedic surgeon, who noted petitioner had “a positive Stinchfield. He has got pain with flexion and internal rotation. He has a little bit less internal rotation on this side, limited more by pain than his contralateral side. He has got pain with circumduction of the hip. He is nontender over the greater trochanter. He has got intact abduction strength. He is walking with a mild antalgic gait.” After conservative treatment for petitioner’s injuries failed, he underwent a left hip arthroscopy in November 2018. The operative report noted that the intraoperative findings were consistent with left hip labral tear, paralabral cyst, left hip posttraumatic degenerative joint disease, and impingement. (NYSCEF Doc. No. 5, *medical reports from Dr. Long*).

On April 7, 2019, petitioner underwent another MRI of the left hip, which revealed the following: 1) Interval progression of the nondisplaced labral tear now involving the anterior superior posterior superior labrum; 2) Nodular synovitis with associated small area of partial tearing in the capsular insertion on the acetabulum; 3) Aspherical femoral head with elevated alpha angle which can be seen in setting of femoral acetabular impingement. (NYSCEF Doc. No. 4, *MRIs*).

In June 2019, petitioner treated with Dr. Michael J. Angel, M.D., who indicated that petitioner’s injury to his left hip arose out of the August 20, 2018 work-related injury. Dr. Angel also noted that petitioner had recurrent tearing of the left hip labrum, even after his November 2018 surgery (NYSCEF Doc. No. 6, *orthopedic associate of Manhasset*).

In September 2019, after a conducting a physical exam and reviewing petitioner’s records, the FDNY Medical Committee determined that petitioner was unfit for firefighting duties (NYSCEF Doc. No. 7, *FDNY medical committee*).

In February 2020, the Medical Board for the Fire Pension Fund evaluated petitioner’s application for benefits. The Medical Board, after a review of the medical records, interview and examination of petitioner, determined that petitioner was permanently disabled due to his left hip. It determined that “[h]is left hip disability is causally related to Chronic Degenerative Joint Disease evidenced by CAM lesion and calcified paralabral cyst.” It therefore recommended that petitioner be granted an ordinary retirement for his fire commissioner’s application for his left hip (NYSCEF Doc. No. 8, *medical board’s recommendation*).

On March 10, 2020, Dr. Long submitted a letter indicating the following:

“[Petitioner] is under my professional care for his left hip pain and instability. He was first consulted for his left hip pain in September 2018. He is a FDNY firefighter and sustained a left hip injury at work on August 20, 2018 which resulted in a labral tear. His labral tear is

not due to chronic degenerative joint disease. [Petitioner] has had no symptoms of hip pain prior to his injury. It is certainly within the standard of care and is clearly associated with traumatic injury that the patient describes.” (NYSCEF Doc. No. 5).

Given Dr. Long’s report, the Medical Board reconsidered petitioner’s case on June 3, 2020. However, the Medical Board adhered to its prior determination, stating, in part:

“Nowhere in the medical records or in the remanded records, including the letter from Dr. William Long, is there any evidence of acute injury sustained while on duty that led to his disability. There is overwhelming evidence in the records that this member had a congenital deformity with degenerative changes that led to his FAI, and damage to his joint. We therefore have no new medical records that would lead us to modify our recommendation.” (NYSCEF Doc. No. 8, *Medical Board’s recommendation*).

In November 2020, petitioner’s counsel submitted a memorandum of law in support of accidental disability, arguing that the Medical Board did not properly consider the aggravation of what it called “Chronic Degenerative Joint Disease” and that petitioner is entitled to ADR benefits due to the 2018 accident causing traumatic and permanent injury to his left hip (NYSCEF Doc. No. 9, *memorandum to board of trustees*). In a letter dated January 27, 2021, the New York City Fire Pension Fund informed the petitioner of the denial of his application. (NYSCEF Doc. No. 10, *denial letter*).

Now, by memorandum of law, petitioner argues that his disability was caused by an aggravation of an asymptomatic condition in his left hip which, based on the standard pronounced in *Tobin v Steisel*, 64 NY2d 254 (1985) and its progeny, establishes his entitlement to an Accidental Disability retirement benefit under Administrative Code § 13-353. According to petitioner, respondents failed to apply the appropriate standard when denying petitioner’s application for ADR benefits and its failure to do so was arbitrary and capricious. Petitioner also contends that, because of their finding on causation, respondents never addressed the issue of whether the August 20, 2018, injuries were caused by an “accident” as used in the pension statute to be a “sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.” Petitioner maintains that the Board of Trustees abdicated their responsibility to properly review whether the Medical Board’s determination was supported by an articulated, rational, and fact-based medical opinion, ignoring the overwhelming medical evidence that petitioner’s latent and asymptomatic degenerative/congenital conditions in the left hip were precipitated by the August 20, 2018, accidental injury. Furthermore, petitioner argues that it was a sudden, out of the ordinary and a fortuitous mischance that he was struck by the large piece of wood that caused him to become permanently disabled. (NYSCEF Doc. No. 12, *memorandum of law in support*).

Respondents interposed an answer in this proceeding (NYSCEF Doc. No. 19, *verified answer*). By memorandum of law, respondents argue that petitioner’s medical documentation, along with the Medical Board’s interview and examination of petitioner, support the Medical Board’s conclusion that petitioner’s disability was not causally related to the August 20, 2018 incident. The Medical Board found that petitioner was disabled as a result Chronic Degenerative

Joint Disease evidenced by a CAM lesion¹ and a calcified paralabral cyst. This determination, claim respondents, was based on “some credible evidence” in the record and, thus, should not be disturbed. Respondents argue that “the presence of the para-labral cyst formation on [p]etitioner’s left hip on the August 27, 2018 MRI . . . ‘denotes chronicity of disease,’ indicating that the congenital deformity and degenerative changes were present before the injury.” Respondents reiterate that, “[b]ased on this evidence, the Medical Board concluded ‘that the disability was causally related to the congenital deformity and the chronic degenerative joint disease, and it was not exacerbated by the injury that occurred on 8/20/18.’” (NYSCEF Doc. No. 45, *memorandum of law in opposition*).

“A firefighter is entitled to accidental disability retirement when a medical examination and investigation shows that he or she is ‘physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service.’” (*Meyer v Bd. of Trustees of the NY City Fire Dept.*, 90 NY2d 139, 144 [1997], quoting Administrative Code § 13-353). That said, the award of accidental disability retirement benefits is a two-step process. First, the Medical Board must determine whether the applicant is in fact physically or mentally incapacitated for the performance of city-service. If the Medical Board finds that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was the natural and proximate result of an accidental injury.” (*Matter of Baranowski v Kelly*, 27 Misc 3d 1235[A] [Sup Ct, NY County 2010], citing *Borenstein v NY City Emples. Retirement Sys.*, 88 NY2d 756, 760-761 [1996].) “In an article 78 proceeding challenging the disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious.” (*Borenstein v NY City Emples. Retirement Sys.*, 88 NY2d 756, 761 [1996]; see *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 351 [1983]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974].)

As relevant to this issue, the Court of Appeals in *Tobin v Steisel* held that:

“The causation rule both in tort law and under the worker’s compensation statute is that an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury. Moreover, although there is no accident disability retirement case squarely applying that rule, it has been assumed in a number of disability cases that evidence establishing that an accident exacerbated an underlying condition, thereby rendering the employee disabled, would be sufficient, if accepted.” (64 NY2d at 259.)

Here, this court finds that the denial of ADR benefits to petitioner was supported by credible evidence and, thus, not arbitrary and capricious (see *Matter of Russell v NY City Fire Pension Fund*, 192 AD3d 442 [1st Dept 2021]; *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]; *Matter of Dominguez v O’Neill*, 179 AD3d 574, 575 [1st Dept 2020].) The determination that petitioner’s disability was not the proximate result from the alleged incident is based upon credible medical evidence, including the MRI showing the

¹ Respondents state that “[a] CAM lesion is the formation of extra bone on the head of the femur (ball) resulting in a ‘bump’. This extra bone can cause pain as it impinges with the acetabulum (socket) with joint movement. A Cam lesion is commonly seen in conditions such as Femoro-Acetabular Impingement (FAI) and in some cases can lead to labral tears.” (NYSCEF Doc. No. 8 n 2, *memorandum of law*).

presence of para-labral cyst formation on petitioner’s left hip, which denoted “chronicity of disease,” and revealed that the congenital deformity and degenerative changes were present before the injury, and the Medical Board’s assessment that there was not an acute injury. (See *Matter of Russell v NY City Fire Pension Fund*, 192 AD3d 442 [1st Dept 2021], “the finding that petitioner’s disabling hip condition is causally related to a preexisting degenerative condition, rather than his fall while in the performance of his duties, is based upon credible medical evidence, including an MRI taken nine days after the accident which revealed the presence of paralabral cysts, indicative of a chronic degenerative disease, not an acute injury.”) The denial was also based on the Medical Board’s interview and examination of petitioner. Furthermore, the fact that petitioner did not exhibit symptoms prior to the alleged accident is not dispositive to a finding of causation. (*Meyer v Bd. of Trustees of the NY City Fire Dept.*, 90 NY2d 139, 146 [1997] [“although factors such as . . . the absence of a prior medical history of the disabling condition may be relevant to the issue of causation, the case law demonstrates that none of these factors is dispositive and a denial of accidental disability benefits may be upheld despite their existence”].) This court finds no reason to disturb respondents’ determination that petitioner failed to establish as a matter of law that his asymptomatic preexisting degenerative disease was exacerbated by the accident, as he claimed. (See *Matter of Russell v NY City Fire Pension Fund*, 192 AD3d at 443; *Meyer*, 90 NY2d at 145, citing *see Meyer*, 90 NY2d at 145; *Rochford v Safir*, 277 AD2d 65, 65 [1st Dept 2000].)

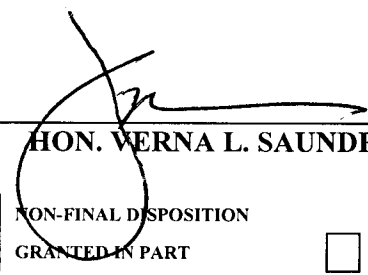
Notwithstanding Dr. Long’s opinion that the August 20, 2018, incident caused petitioner’s labral tear and was not due to chronic degenerative joint disease, especially since petitioner did not present symptoms of hip pain prior to his injury, this court notes that “[a]ny conflict in the medical evidence regarding the cause of the disability is within the sole province of the Medical Board to resolve.” (*Matter of Russell v NY City Fire Pension Fund*, 192 AD3d 442, 443 [1st Dept 2021], citing *Matter of Higgins v Kelly*, 84 AD3d 520 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012].) Accordingly, respondent’s denial of petitioner’s accident disability retirement benefits was not arbitrary and capricious and may not be judicially disturbed. (see *Meyer v Bd. of Trustees*, 90 NY2d 139, 145 [1997]; *Riddick v Bd. of Trustees of the NY City Police Pension Fund*, 304 AD2d 377, 377 [1st Dept 2003]; *Reid v Kelly*, 235 AD2d 361, 361 [1st Dept 1997].) All other arguments have been considered and are either without merit or need not be addressed given the findings above. Based on the foregoing, it is hereby

ORDERED that petitioner’s application is denied and dismissed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

April 10, 2023


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER