SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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RICHARD YARUSSO,

Petitioner,

- v -

KEECHANT SEWELL, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE II, NEW YORK CITY POLICE DEPARTMENT, THE CITY OF NEW YORK

Respondents.

INDEX NO. 151578/2023

MOTION DATE 07/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 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, 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 were read on this motion to/for ARTICLE 78.

The petition to reverse respondents' determination denying petitioner's application for accident disability retirement ("ADR") benefits is denied.

Background

This Article 78 proceeding arises out of a claim for ADR after petitioner, a retired police officer, was diagnosed with “severe and profound sensorineural hearing loss” in his left ear; petitioner alleges that his hearing loss was as a result of standing too close to a speaker while he worked a concert detail.

In August 2009, petitioner was assigned to work security detail for a concert at Wingate Field. Petitioner stood by a speaker for hours with no hearing protection and experienced tinnitus (ear ringing) the following morning. Petitioner sought medical attention approximately 4-5 days

after the concert but did not inform his doctors about the concert. He was diagnosed with "idiopathic sudden deafness in that ear"[1] (NYSCEF Doc. No. 1 at 4).

More than six months after the concert, in April 2010, petitioner submitted a line of duty injury report and claimed the Wingate concert was the cause of his condition. The NYPD Medical Division denied that request based on petitioner's doctor's findings that the injury was idiopathic (spontaneous with no known cause) (NYSCEF Doc. No. 19). It concluded that these findings lacked information about the concert. The Medical Board approved petitioner for Ordinary Disability Retirement ("ODR") (*id*. at 4).

Petitioner insisted that he was entitled to ADR. In 2011, petitioner submitted an application for ADR. On July 27, 2011, the Medical Board noted that petitioner's injury was disapproved for line of duty designation and deferred his application until his hearing loss was declared a line of duty injury. In a separate report, also dated July 27, 2011, the Medical Board noted that petitioner's injury was related to a prior illness that predated the concert (NYSCEF Doc. No. 54 at 2). The Medical Board again approved ODR and declared the final diagnosis as idiopathic sudden deafness of the left ear (*id*.). During this time, petitioner's treating physician testified that he had no knowledge of the concert; he based his findings on what petitioner told him (in other words, petitioner had not mentioned the concert to his doctor when he went for treatment). Petitioner was placed on restrictive duty and eventually retired in December of 2011 with ODR.

For various reasons not relevant here, petitioner's case lingered until 2022, at which time the Board of Trustees remanded the petitioner's ADR case to the Medical Board for further deliberation (NYSCEF Doc. No. 56 Board Trans. 6:8-14).

[1] Spontaneous deafness with no known cause.

In May 2022, the Medical Board found no evidence of a causal relationship between the concert and petitioner's deafness, citing that none of petitioner's doctors' notes demonstrated that the concert was to blame. In a written transcript discussing petitioner's application, the Board of Trustees further found that even if the concert was the catalyst for petitioner's hearing loss, the event was not an "accident" for purposes of ADR (NYSCEF Doc. No. 59).

Petitioner now seeks a determination that the Board's decision was arbitrary and capricious because the decision was based on a conclusion that the event was not an "accident" for purposes of granting ADR. Petitioner argues the definition of "accident" should not focus on the petitioner's job assignment at the time but the precipitating cause of the injury itself. Petitioner claims the injury was of an unexpected nature because he had no expectation that the volume of the noise would be of a decibel level that it could cause permanent injury. Moreover, countless members of NYPD have been assigned concert detail over the years and were never provided with hearing protection, suggesting that this type of injury is unexpected.

In opposition, respondents argue that the Medical Board's conclusion that petitioner was not disabled as the result of an accident is supported by credible evidence as there were no documents created from the day of the accident and no notes from a medical professional determining the concert as the cause. Nevertheless, respondents contend that petitioner's exposure to loud music, even if it is the cause of his injury, while patrolling an outdoor concert is not an unexpected intervening event that would warrant an award of ADR benefits. Respondents maintain that the facts of petitioner's injury do not suggest his disability was the result of a sudden impact that renders the injury an accident.

In reply, petitioner contends that no one working security detail at the concert received hearing protection, suggesting that the risk of hearing loss was not an expected risk at the concert. Petitioner asserts that his exposure to noise was a singular event that was an unexpected occurrence and insists that petitioner has presented medical and scientific support of the fact that this exposure led to his hearing loss. Moreover, petitioner argues that his assignment at the concert was not a regular or common assignment.

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]).

"[I]n order to obtain accident disability retirement, a petitioner's injury must be the result of a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact," (*Carr v Ward*, 119 AD2d 163, 165, 506 NYS2d 338 [1st Dept 1986] [internal quotations and citations omitted]). An injury will not be considered an accident if it "was a risk inherent in petitioner's regular duties," (*Murphy v Bratton*, 225 AD2d 411, 411, 640 NYS2d 17 [1st Dept 1996] [internal quotations and citations omitted]).

The transcript of the recent Board of Trustees' meeting demonstrates that the Board assumed, for purposes of the vote, that petitioner's injury was likely caused by the loudspeakers at the concert (NYSCEF Doc. No. 59 Board Trans. 7:21-3). So, even assuming that the loud music at the concert caused the injury, the question is whether this injury can be considered an accident.

Petitioner presents a series of instances in which officers suffered sudden accidents, focusing on the spontaneity of petitioner's hearing loss (*see Carr v Ward*, 119 AD2d 163, 506 NYS2d 338 [1st Dept 1986] [finding that a female officer's injury in her assigned boxing training was an accident because she dodged a punch and fell after sudden sexual harassment and her fall was not the result of activity solely undertaken in the performance of regular duties]; *Pratt v Regan*, 68 NY2d 746, 506 NYS2d 328 [1986] [holding that a firefighter catching his heel on a running board, losing balance, and falling into a pothole was a sudden and unexpected event]; *Matter of Gakhal v Kelly*, 135 AD3d 406, 21 NYS3d 875 [1st Dept 2016] [awarding ADR after petitioner was injured when she lost control of a scooter on the first day of training and the unexpected acceleration was considered sudden and out of the ordinary]).

Generally, requests for ADR involving injuries related to hearing loss are determined based on the length of exposure to the cause of the injury or whether such cause was a regular part of an officer's duties (*see Matter of Cardone v Codd*, 59 NY2d 700, 463 NYS2d 438 [1983], *affg* 91 AD2d 909, 458 NYS2d 878 [1st Dept 1983] [finding that petitioner's hearing loss was the result of repeated exposure to loud noise at a firing range and did not qualify as a sudden and unexpected accident for purposes of ADR]; *Hambel v Regan*, 78 NY2d 1092, 578 NYS2d 871 [1991], *affg* 174 AD2d 891, 571 NYS2d 355 [3rd Dept 1991] [denying ADR after an officer suffered hearing loss from standing 60 feet away from a fire siren because part of his usual duties

included reporting to the fire station at least two times a week and the sounding of the siren was not out of the ordinary or unexpected]; *Murphy v Bratton*, 225 AD2d 411, 640 NYS2d 17 [1st Dept 1996] [finding that petitioner's hearing loss from shooting at a firing range was the result of participating in her routine duties and thus was not an accident]).

At the Board of Trustees executive session, there was a discussion about another NYPD officer who received ADR because he lost hearing from loud noise at a concert (NYSCEF Doc. No. 36). However, that officer was working at a Rolling Stones concert when, suddenly, there was a small fire under the stage and the officer left his post to investigate under the stage. While that officer was still under the stage, in a relatively enclosed area, the Rolling Stones took the stage and pyrotechnics were set off. That is, this officer lost hearing due to being in an enclosed space when there was an unexpected pyrotechnic explosion. As observed by a representative from the Mayor's Office on the Board "we do not feel that this accident was sudden, unexpected, out of [the] ordinary for a police officer working a concert" (*id*. at 74).

The Court finds this formulation to be rational and denies the petition. If an accident is defined as a "sudden, fortuitous mischance," then patrolling a concert for six hours is not a sudden event (*see Hoehl v Kelly*, 4AD3d 228, 772 NYS2d 65 [1st Dept 2004] [finding that hearing loss sustained over a long period of time did not constitute a sudden and unexpected event]).

Put another way, there was no "sudden, fortuitous mischance" at the Wingate concert to trigger ADR. Nothing unexpected happened at that concert; petitioner claimed he simply worked at a loud concert and experienced hearing loss. While petitioner's injury itself was sudden and unexpected, no one expects to suffer an injury. In order to get ADR, something at that concert had to be a "sudden, fortuitous mischance".

Furthermore, as an officer with the NYPD, it is not outside of the ordinary to have to work concert detail on occasion, and patrolling large, crowded venues with loud noises is not outside the scope of an officer's duties. The fact that he had not been given a similar assignment before does not entitle him to ADR.

Petitioner also argues that the failure to provide hearing protection shows that the injury was not expected. This argument is rejected for two reasons. First, it is circuitous – if they did not give protection, then they did not expect any hearing loss. But if they gave protection, then they did not expect hearing loss either, due to the protection. Either way, they did not expect hearing loss and the protection is not the issue.

Summary

In an Article 78 challenging an agency decision, the petitioner has a high burden of showing that the agency's decision was arbitrary and capricious. Even if the Court would not make the same decision as the agency, the Court must defer to the agency unless the decision is arbitrary and capricious.

The Court finds that the agency's decision was not arbitrary and capricious. Even assuming that the petitioner's unfortunate hearing loss was due to that concert, which was not his routine work assignment and for which he was not provided any ear protection, the Board of Trustees considered and determined that nothing unexpected happened at that concert to trigger ADR. The Board considered and rationally distinguished petitioner's hearing loss from another concert-related hearing loss; petitioner was at a loud concert outdoors while the other officer was trapped under a stage when explosions suddenly went off. There is nothing in the record to indicate that the Board acted irrationally or failed to consider all the facts. Rather, the Board explained why it determined that petitioner's circumstances do not qualify him for ADR.

Accordingly, it is hereby

ADJUDGED that the application is denied and the petition is dismissed, without costs and disbursements to respondent.

9/8/2023
DATE

ARLENE P. BLUTH, J.S.C.

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