

Torres v New York City Employees' Retirement Sys.

2023 NY Slip Op 34415(U)

December 4, 2023

Supreme Court, Kings County

Docket Number: Index No. 530625/2022

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 4th day of December, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
ROYCE TORRES,

Petitioner,

Index No: 530625/2022

-against-

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES of the New York City Employees' Retirement System, THE MEDICAL BOARD of the New York City Employees' Retirement System, and THE CITY OF NEW YORK,

DECISION AND ORDER

Respondents.

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The following e-filed papers considered herein:

NYSCEF Doc. Nos.

Notice of Petition/Petition/Memorandum of Law/Exhibits Annexed....	1-10
Answer/Memorandum of Law/Exhibits Annexed.....	15-30
Memorandum of Law in Reply.....	32

In this matter, Petitioner Royce Torres ("Petitioner") moves by petition for an order annulling Respondents the New York City Employees' Retirement System ("NYCERS"), the Board of Trustees of the New York City Employees' Retirement System, the Medical Board of the New York City Employees' Retirement System, and the City of New York's (collectively, "Respondents") order and decision, dated July 15, 2022, denying Petitioner an Accidental Disability Retirement ("ADR") pursuant to New York Retirement and Social Security Law ("RSSL") § 605-b. Petitioner alleges that Respondents' denial of his application for ADR was arbitrary, capricious, and unlawful with respect to the Constitution of the United States and New York statutes and regulations. In opposition, NYSCER argues that the action by Respondents in denying the application for ADR was in all respects lawful and proper and in accord with all applicable statutes and law.

Petitioner joined the New York City Department of Sanitation (“DOS”) as an employee on October 18, 1999. On January 28, 2020, at around 7:25 am, Petitioner alleged that he suffered injuries when he “tripped on a crater size hole on the street right off the sidewalk.” Petitioner alleged that the accident occurred while he was holding a bag of refuse and walking to the back of the DOS truck. This allegedly caused injuries to Petitioner’s neck, lower back, and ribs. Petitioner underwent a cervical fusion on July 29, 2020; however, his cervical spine symptoms did not improve.

On or about January 26, 2021, Petitioner applied for ADR benefits. The NYCERS Medical Board then reviewed this application and determined that Petitioner was unable to perform his DOS duties due to his injuries from the trip and fall on January 28, 2020. However, the NYCERS Medical Board determined that the injuries Petitioner sustained were not accidental in nature. The Medical Board stated that, “Mr. Torres was working his usual route and should have been aware of his surroundings. The hole by his description is very large and should have been visible.”

Petitioner submitted a Memorandum of Law to the Board of Trustees asserting that tripping on a hole in the street was not a normal risk associated with his employment for the DOS, which he asserts is supported by several cases. Nonetheless, the Board of Trustees denied Petitioner’s ADR application and stated that “carrying a garbage bag and having it obscure your vision is an ordinary part of your responsibilities and having uneven or broken pavement on the street of New York I don’t believe is a sudden, unexpected, out of ordinary event.”

In this instant petition, Petitioner argues that his injuries were accidental in nature because he was unaware of the hole in the street and tripped and fell suddenly and unexpectedly. Petitioner also asserts that it was not an inherent part of his employment as a member of the DOS to inspect the streets on which he walked, and that the existence of the hole was totally unrelated to his duties. Petitioner contends that Respondents have failed to award him with ADR, which he is entitled to due to the circumstances of the injuries that he received while working.

In opposition, Respondents assert that their determination that Petitioner’s injuries were not caused by an accident under RSSL § 605-b was supported by substantial evidence. Respondents contest that they accurately concluded that walking into a large and visible hole in the street is not an “unexpected or an out-of-the ordinary mischance” that would meet the criteria of being an accident. Respondents also assert that Petitioner was willfully negligent in failing to see an open and obvious roadway condition.

Respondents do not dispute that Petitioner is physically incapacitated or that Petitioner was injured while on the job.¹ Consequently, the only issue before the Court is whether Respondents properly concluded that Petitioner's injuries were not the result of an accident.

In determining an Article 78 proceeding, the court must consider whether the challenged 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" (CPLR 7803 [3]). Under this standard, courts will review the record to find whether the challenged determination had a rational basis (i.e., whether there was some objective factual basis) (*see Matter of Gorecki v New York State Dep't of Motor Vehicles*, 201 AD3d 802, 803 [2d Dept 2022]). In the context of disability cases, the agency's determination must be founded on "some credible evidence" (*Borenstein v New York City Employees' Ret. Sys.*, 88 NY2d 756, 760 [1996] [internal quotation marks and citations omitted]), which is "not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Meyer v Bd. of Trustees of the New York City Fire Dep't, Article 1-B Pension Fund by Safir*, 90 NY2d 139, 147 [1997] [internal citations omitted]).

For a DOS member to qualify for Accidental Disability Retirement, the member must meet the criteria listed in Section 605-b of Article 15 of the Retirement and Social Security Law. The member must show that they are "physically or mentally incapacitated for the performance of duty as the natural and proximate result of an accident, not caused by his or her own willful negligence, sustained in the performance of such uniformed sanitation service while actually a member of NYCERS" (RSSL § 605-b [b] [1]). The Court of Appeals has defined the term "accident" as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Lichtenstein v Board of Trustees of the Police Pension Fund*, 57 NY2d 1010 [1982] [internal quotation marks and citation omitted]). Though the phrase "willful negligence" is not defined in the Retirement and Social Security Law, it is "generally thought to entail a 'conscious disregard of the consequences of [one's] actions'" (*Rizzo v DiNapoli*, 39 NY3d 991, 1002 [2022], quoting *Robinson v New York State & Loc. Police & Fire Ret. Sys.*, 192 AD2d 951, 952 [3d Dept 1993]). The proper inquiry is whether there was a "precipitating accidental event . . . which was not a risk of the work performed" (*McCambridge v McGuire*, 62 NY2d 563, 568 [1984]).

¹ According to the Medical Board's report dated November 5, 2021, Petitioner is disabled and the fall or "line of duty incident" is the "competent cause" of the disability (NY St Cts Elec Filing [NYSCEF] Doc No. 6).

The Court first addresses Respondents' contention that the hole was not an unexpected precipitating event rising to an accident because it was reasonably anticipated or readily observable. However, to establish that an accident occurred, the petitioner is not required to show that the precipitating accidental event or condition was not readily observable (*Kelly v DiNapoli*, 30 NY3d 674, 685 n 3 [2018]).² In support of their contention, Respondents argue that (a) the fall occurred on Petitioner's usual route, (b) Petitioner lacked awareness of his surroundings and failed to recognize the condition, and (c) encountering a pothole is an inherent risk of working on the streets. With respect to Respondents first and second arguments, the standard is not whether the condition was readily observable (*id.*; see *Como v New York State Comptroller*, 202 AD3d 1427, 1428 [3rd Dept 2022] ["The Hearing Officer's assessment that petitioner 'could have avoided this hazard by merely looking down' misapplies the governing standard"]). Though this fall occurred on his usual route, Petitioner stated that he had never seen the hole before. He further stated that there is almost always a car parked at that specific location. There was no evidence presented to establish that Petitioner knew of the existence of the hole immediately prior to his fall.³ There was also no evidence rebutting Petitioner's testimony that he had never sustained injuries near this route. Thus, the Court finds any arguments as to the location of the fall happening on Petitioner's usual route or that he should have been aware unconvincing and contrary to well-established caselaw. Accordingly, the record establishes that the pothole was a precipitating accidental event.

The Court next addresses Respondents' third argument that tripping over such roadway condition is an inherent risk of the work performed by Petitioner. Multiple courts have found in similar instances that it is not (*see Pratt v Regan*, 68 NY2d 746 [1986] ["Catching a heel on a running board and thus losing balance may be a risk of the work performed [by a firefighter], but coming down hard upon the other foot in a pothole is not"]; *Lanni v N.Y.C. Employees' Retirement System*, 189 AD3d 841 [2d Dept 2020] [fall on a loose and broken sidewalk was an accident]; *Finazzo v Safir*, 273 AD2d 75, 75 [1st Dept 2000] [fall was accidental when petitioner stepped out

² The Court of Appeals declined to address whether a "reasonably anticipated" standard is inconsistent with precedent (*Rizzo v DiNapoli*, 39 NY3d 991, 992 [2022]).

³ Respondents point to yellow paint that was in the vicinity of the hole in support of their argument that the condition was easily observed. The yellow paint is shown in photographs attached to Petitioner's memorandum to the Board of Trustees (NYSCEF Doc No. 4). However, neither Petitioner nor Respondent provided information as to the date the photographs were taken. Moreover, when questioned by the Board of Trustees, Petitioner was not able to recall if the paint was there on the day of his fall. Petitioner further testified that his view was obscured. Thus, the Board's statement that the hazard was "immediately visible due to the yellow paint" is based on conjecture and speculation.

of his car and while walking towards the station house, tripped in a construction hole]; *Crews v New York City Employees' Ret. Sys.*, 79 Misc3d 1238[A] [Sup Ct, Kings County 2023] [sanitation worker's fall on uneven pavement is sudden, unexpected mischance]; *Cuccia v New York City Employees' Ret. Sys.*, 62 Misc 3d 1224[A] [Sup Ct, Kings County 2019] [a sanitation worker's foot getting caught in a crack in the sidewalk was not an expected risk of employment]). This is not a situation where Petitioner was injured by, for example, lifting a heavy bag or trash can or slipping while cleaning a sanitation truck, which the Court of Appeals determined injuries therefrom were sustained while performing routine duties but not resulting from an unexpected event (*McCambridge*, 62 NY2d at 568, citing *Valentin v Bd. of Trustees of the New York City Emps. Ret. Sys.*, 59 NY2d 702 [1983]; *Kehoe v City of New York*, 186 AD2d 376 [1st Dept 1992], *aff'd* 81 NY2d 815 [1993]; *see also Shannon v Bd. of Trustees of New York City Employees' Ret. Sys.*, 92 AD2d 528, 529 [1st Dept 1983] [injuries sustained after picking up heavy garbage can is not an unexpected event], *aff'd* 59 NY2d 852 [1983]; *Chiarotti v New York City Employees' Ret. Sys.*, 58 Misc. 3d 1216[A] [Sup Ct, Kings County 2018] [slipping on a bag or substance emanating from garbage bag is a normal risk of garbage collection]). Therefore, the Court finds that Respondents' determination was not supported by credible evidence.⁴ Instead, the evidence demonstrated that the pothole was a precipitating accidental event, which was not a result of an inherent risk of Petitioner's job.

The Court next addresses Respondents' contention that Petitioner's injury was caused by his own willful negligence in failing to observe an "open and obvious" condition or by his own missteps. First, Respondents failed to cite to any authority to support their contention that a failure to observe or a misstep amounts to willful negligence. Second, this is not an instance where, as in a case cited by Respondents, Petitioner caused the condition to exist or knew of its existence (*Covel v New York State Employees' Ret. Sys.*, 84 AD2d 902 [3rd Dept 1981] [dismissing petition where custodian slipped on oil he applied to the floor earlier and which he knew to be slippery]). The record is devoid of evidence that Petitioner was aware of the hole and purposefully stepped into it (*see Franks v New York State & Local Ret. Sys.*, 47 AD3d 1115 [3rd Dept 2008] [hazard could

⁴ The Court is further unpersuaded by Respondents' argument that Petitioner expressed understanding of the inherent risks of the job, which, in this instance, they contend include encountering a pothole. In support, Respondents cite to Petitioner's testimony about sanitation workers looking over their shoulder while walking to the trucks because they do not want to get hurt. Nonetheless, this testimony in no way refers to conditions on the sidewalk or street itself, but rather traffic.

have been reasonably anticipated where petitioner was aware curb was damaged]). Here, Petitioner testified that he was looking over his shoulder for oncoming traffic and holding a trash bag that obscured his view (*see Cuccia*, 62 Misc 3d 1224[A] [crack is not obvious where worker stated that he did not know about it and was holding a bag that would have likely blocked his view of it]). Third, Petitioner's injury cannot reasonably be the result of a mere misstep where it is undisputed that the hole existed (*see Stancarone v DiNapoli*, 161 AD3d 144, 148 [3rd Dept 2018] ["If the inattention simply led to the person misjudging the depth of a step or curb, that would be synonymous with a misstep"]). The existence of the hazardous condition, which caused Petitioner to fall, is supported by an incident report, medical records and photographs. The cases cited by Respondents are distinguishable (*Starnella v Bratton*, 92 NY2d 836, 839 [1998] [fall down stairs due to misstep, *without more*, is not an accident] [emphasis added]; *Danyi v Bd. of Trustees of New York City Employees' Ret. Sys.*, 176 AD2d 451 [1st Dept 1991] [trip on a curb was not an accident where, in part, there was no contemporaneous mention of a hazardous condition]; *Hallihan v Ward*, 169 AD2d 542 [1st Dept 1991] [no mention of any hazardous condition]). Thus, the Court finds that Respondents' argument that Petitioner was willfully negligent belied by the record.

Accordingly, the Court finds that Respondents' determination that Petitioner's trip and fall was not an accident was arbitrary and capricious in that it lacked a rational basis given the record presented and applicable caselaw. Since the issue of Petitioner's disability and causation have already been determined, the Court finds that Petitioner is entitled to an accident disability pension because his fall was an accident as a matter of law (*see Jones v Bd. of Trustees of New York Fire Dep't Article 1-B Pension Fund*, 123 AD2d 628, 629 [2d Dept 1986]) ("[T]he board of trustees typically has the sole and ultimate power to decide whether an applicant is entitled to an accident disability pension or an ordinary pension[, but there is] judicial authority to direct the board to award accident disability retirement benefits upon a finding that the applicant is entitled thereto as a matter of law").

Thus, it is hereby

ORDERED, that Petitioner's request for an order annulling Respondents' determination denying Petitioner's application for an Accidental Disability Retirement, pursuant to RSSL § 605-b, is GRANTED; and it is further

ORDERED, that Petitioner's request for an order directing and ordering Respondents to retire Petitioner with an Accidental Disability Retirement pension is GRANTED; and it is

ORDERED, that the matter is remanded to Respondents for the limited purpose of determining Petitioner's accident disability benefits.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**