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. 158040/2024

MOTION SEQ. NO. 001

In the Matter of the Application of
BARBIE J. TORRES,
Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law & Rules,

- against -

EDWARD A CABAN, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund, Article II,
Respondents.

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DECISION + ORDER ON PETITION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3-12, 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

were read on this motion to/for **ARTICLE 78**.

According to the petition (NYSCEF Doc. No. 1), petitioner, retired Sergeant Barbie J. Torres, worked as a New York Police Department (NYPD) police officer from July 1, 2003 until October 2, 2023. The petition asserts that petitioner passed all physical and mental examinations before her appointment to NYPD and that her performance over the years was "exemplary" (*id.*, ¶ 5). Further, throughout her tenure, petitioner participated in and made contributions to Article II, Police Pension Fund (the, "PPF"), thus entitling her to retirement benefits.

Things changed for petitioner on December 14, 2021, when she was exposed to the COVID-19 virus ("COVID") while on the job. Petitioner reported sick on December 21, 2021, and she tested positive for COVID the following day. Six months later, on June 24, 2022, petitioner presented to Jacobi Medical Center in the Bronx, New York, with left flank pain. When an ultrasound proved negative for kidney stones, the hospital discharged her and instructed her to take naproxen for pain. As the pain did not subside, petitioner went to White Plains Hospital ("White Plains") the following day. There, she underwent a chest X-ray, which showed a left pleural effusion and a possible partial lung collapse; an MRI, which indicated that there was a large cystic mass; and a CT-scan, which revealed "a low-density lesion within the left lower lobe region" (NYSCEF Doc. No. 4, *25-26).[1] Based on these findings, petitioner underwent a surgical procedure on July 18, 2022, the purpose of which was to remove and better identify the mass. The cyst was benign, but the pathology study revealed that petitioner suffered from "[a]cute and organizing pleuritis" (*id.*, *306).

[1] The page numbers are the NYSCEF page numbers rather than the page numbers in the report, as the pages in the medical records are not consecutively numbered.

On June 29, 2022, prior to her surgery, petitioner applied for a line-of-duty ("LOD") injury designation from NYPD that related to her original COVID diagnosis (NYSCEF Doc. No. 22). Sergeant Rafael A. Jiminez submitted a witness statement in support of her application and petitioner's supervisor also supported the application (*id.*, *3). Petitioner received the requested designation. Around August 18, 2022, after her surgery and follow-up treatment, she sought to amend her LOD designation so as to include the cyst in her lungs and her pleural effusion (NYSCEF Doc. No. 38). This application was denied. Although the clinic surgeon, Dr. Francis Adams, did not resolve the question of whether a causal connection existed, he concluded that "I do not have sufficient medical documentation to say this cyst was caused by COVID" (*id.*, *7; *see* NYSCEF Doc. No. 39 [doctor's office reports, stating that etiology was "unclear"]). Petitioner appealed the denial of the LOD amendment request, and on January 23, 2023, NYPD approved the request (NYSCEF Doc. No. 29).

According to the petition, petitioner's condition limited her ability to perform the essential functions of her job (NYSCEF Doc. No. 1, ¶ 17). Eventually, her illness became disabling. Therefore, on March 15, 2023, petitioner applied for accidental disability retirement ("ADR") benefits (NYSCEF Doc. No. 26). Additionally, the NYPD District Surgeon submitted a Recommendation for Survey ("Recommendation"), which sought an examination by the PPF Medical Board (the, "medical board") and a report indicating "whether . . . [petitioner's] disability . . . is of such character as to render said member physically or mentally incapacitated for the performance of police duty" (NYSCEF Doc. No. 27). The Recommendation stated that the medical board "shall also and at the same time ascertain, report and certify the cause, nature and extent of such disability" (*id.*). Thus, the petition explains, the Recommendation allowed for a finding that petitioner's disability qualified her for either ADR benefits, which provides a primarily tax-free pension equal to 75% of the officer's salary when the disability is the result of a work-related accident or cause (*see* Administrative Code of the City of New York ["Administrative Code"] § 13-252), or ordinary disability retirement benefits ("ODR"), which provide a taxable pension equal to 50% of the officer's salary (NYSCEF Doc. No. 1, ¶ 17).[2]

The first step of petitioner's ADR determination was the review by the medical board. On information and belief, the petition asserts that the medical board reviewed petitioner's extensive medical treatment records (NYSCEF Doc. No. 4) and her application for ADR benefits (NYSCEF Doc. No. 26). Additionally, the medical board interviewed and examined petitioner. On June 23, 2023, the medical board approved petitioner for ADR benefits and denied her for ODR benefits (NYSCEF Doc. No. 8). As part of its determination, it noted that after her surgery, petitioner followed up post-surgery on July 25, 2022; that NYPD surgeon Dr. Francis Adams treated her for ongoing lung issues on September 13, 2022 and October 25, 2022; that she presented to White Plains Hospital on December 7, 2022 with dizziness and vertigo, and she underwent an "a nonspecific T wave abnormality, and abnormal ECG [electrocardiography]" (*id.*, ¶ 14); and that on February 23, 2023, a chest CT revealed "interval postoperative changes and a left pleural cystic mass resection with a small residual pleural effusion, a determinate nodule enlargement on the right thyroid gland" (*id.*, ¶ 15) and "[i]t was recommended she get further characterization with thyroid ultrasound" (*id.*). The medical board further noted that, according to petitioner, her treating doctors at Mount Sinai Hospital had concluded that her

[2] Respondent incorrectly suggests that the Recommendation was for an ODR determination only (*see* NYSCEF Doc. No. 21 [Answer], ¶ 17).

illness was due to her 2021 COVID infection. Its diagnosis was that petitioner suffered from "Post COVID Inflammation of Lung Leading to Surgery with Other Prolonged COVID Symptoms of Fatigue and Dyspnea. The competent causal factor is the line of duty injury of December 14, 2021" (*id.*, ¶ 19).

The second step of the ADR determination was consideration of the medical board's decision by respondent The Board of Trustees of the PPF (the, "Board"). On March 13, 2023, the Board tabled the matter. At the time, Mr. Philip Dukes, an attorney at the New York City Commissioner of Finance, stated that the New York City members of the Board "[did] not believe that the member established that this contact on the date in question was the competent causal factor of *his* infection and that unless that is established, COVID would not be an available reason for the disability" (NYSCEF Doc. No. 12, p 43 lines 12-17 [emphasis supplied]). Moreover, he noted that the City did not characterize COVID as an "accident" within the meaning of the Administrative Law, that there was "a disagreement between the Chief Surgeon here and [petitioner's] doctor about whether the cyst . . . was caused by COVID," and that petitioner made conflicting statements regarding her smoking history (*id.*, p 43).[3] Subsequently, the Board tabled petitioner's application on March 27, 2024 and April 10, 2024. On April 10, 2024, Damien Laugher, a City Commissioner of Finance, noted that the Chief Surgeon initially found that petitioner's condition was not the result of COVID, and that although petitioner claimed that her doctor found a causal connection, there was no evidence in the record that substantiated her statement (NYSCEF Doc. No. 33, p 6 line 22 – p 7 line 2).

The Board finally considered petitioner's application on May 2, 2024 (NYSCEF Doc. No. 34 [heavily redacted]). Mr. Dukes noted, in support of the rejection of the application, that although the Board had received new information, he found it unpersuasive (*id.*, *6). It appears that when petitioner retired on service before the May 2 vote, she withdrew any existing request for ODR benefits (*see* NYSCEF Doc. 11; NYSCEF Doc. No. 34, p 6 lines 21-23). By letter on that date, Kevin Hollaran, the executive director of the PPF, wrote to petitioner and informed her that the Board had voted 6-6 on her application and, pursuant to its rules, this resulted in a denial of her application (NYSCEF Doc. No. 11).

On August 30, 2024, Sergeant Torres filed this petition, naming both the Board and Edward A. Caban, in his capacity as Police Commissioner of the City of New York and Chairman of the Board, as respondents. Petitioner states that the Trustees who voted against ADR benefits made a "purely arbitrary and capricious" decision (NYSCEF Doc. No. 18, *9) in that they ignored the medical evidence and provided no credible support for their votes. For one thing, she states that Mr. Dukes' invocation of a medical justification for denial is not credible because he is not a physician. For another, she states that one of the Board's primary reasons for denial – the inconsistency in her statements about her smoking history – is not credible because "the single contrary notation . . . was made in error by petitioner's medical treatment provider" (*id.*, *5). Thirdly, petitioner cites to the medical board's determination that her permanent disability was COVID-related, which it based on medical evidence.

[3] Petitioner's record consistently reflects her position that she was never a smoker, except for the contradictory statement that she had been a light smoker several years ago, smoking four cigarettes per week, but had quit 2.8 years earlier (*see* NYSCEF Doc. No. 41, *16).

Additionally, petitioner points to *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund* (90 NY2d 139, 145 [1997] [*Meyer*]), in which the Court of Appeals affirmed the denial of ADR benefits because the medical board had determined "that there was no causal relationship between the disabling condition and the service-related injuries." Petitioner states *Meyer* stands for the proposition that a Board, such as the one at hand, should give deference to the medical board's determination. Here, where the medical board recommended that petitioner receive ADR benefits, there was no credible evidence that justified a decision contrary to that of the medical board. Petitioner also cites *Matter of Salvia v Batton* (159 AD3d 583 [1st Dept 2018]) and *Matter of Boder v O'Neill* (170 AD3d 528 [1st Dept 2019]) in support of her position that the lapse in time between her COVID diagnosis and the onset of her disabling condition is not determinative.

Petitioner also contends that COVID is a qualifying accident within the meaning of the Administrative Law, and that the medical board's decision recommending her for ADR benefits supports her position. Petitioner describes the pandemic as "a once-in-a-lifetime event" and she contends that, as such, ADR benefits are appropriate under the applicable guidelines (NYSCEF Doc. No. 18, *10). The petition asserts that the Board promulgated guidelines that created a presumption for COVID-related claims, and it suggests that the Board awarded ADR benefits in six other cases in reliance on these guidelines (NYSCEF Doc. No. 1, ¶ 30). Further, as the Board granted ADR benefits in these other cases, petitioner posits that it may be reviewing COVID-related ADR applications inconsistently. Petitioner contends that respondents must provide her with the records of the other six cases so that she can determine whether the decision at hand is consistent or inconsistent with the rulings in the other cases.

As relief, the petition seeks an order that annuls the Board's decision as arbitrary and capricious and either directs the Board to award petitioner ADR retirement benefits or remands the matter to the Board for further consideration (NYSCEF Doc. No. 1, *12, ¶ 1 ["Wherefore" clause]). Additionally, she seeks the following discovery:

> A. A copy of the NYPD's COVID-19 ADR Policy.
> B. Redacted Board of Trustees' transcripts for each of the six (6) previous cases that were approved for ADR, as referred to . . . in . . . Exhibit J, the Trustees' July 20, 2023, minutes.
> C. Redacted Medical Board's minutes for each of the six (6) COVID-19 cases that were approved for ADR . . . .
> D. All reports, recommendations, certificates and all other documents submitted to or reviewed by the [Board] in connection with petitioner's accident disability retirement application herein, including . . . any job description documents referenced or relied upon in determining whether petitioner is disabled from the performance of the essential functions and duties of a police officer.
> E. Copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered,

discussed, or acted upon petitioner's PC accident disability retirement application.

F. Copies of [the] medical records, reports or notes relating to petitioner which are on file with the PPF and/or the NYPD Medical Division . . . .

G. Copies of the NYPD Medical Division's Requests for Authorization (NYPD Form 89A) and Authorizations (NYPD Form 89B) and a Statement of the Paid Medical Bills for all treatment of petitioner's service-incurred injuries or illnesses.

H. A copy of petitioner's NYPD Sick History Report and Duty Status Report.

I. A copy of the NYPD Finest Message Disability Pension Board notification of the Board of Trustees final action.

J. A copy of the Article II Police Fund Rules governing the disability retirement procedure, and K. A copy of the NYPD Police Surgeons' Manual (*id.*, *12-13, ¶ 2).

Respondents filed an answer to the petition around February 24, 2025 (NYSCEF Doc. No. 21). They note that "Article 78 of the CPLR provides only for a very limited judicial review of matters that are within an agency's discretionary power," and that a court must uphold the agency decision unless the determination violates lawful procedure, centers on an error of law, or is arbitrary and capricious, or constitutes an abuse of discretion (*id.*, ¶ 108). Respondents cite *Matter of Peckham v Calogero* (12 NY3d 424, 431 [2017] [*Peckham*] [concerning review of a DHCR determination]), which emphasizes that the court applies an extremely deferential standard of review and affirms the order as long as there is a rational basis.

Further, respondents underscore that, under the statutory scheme that applies here, a member of the NYPD who is incapacitated from service only receives ADR benefits only if the incapacitation is the natural and proximate cause of an LOD injury (*id.*, ¶ 109, citing Administrative Code of the City of New York ["Administrative Code"] § 13-252). Respondents state that when the Board denies ADR benefits as the result of a tie vote, courts deny Article 78 applications unless there is no credible evidence that supports the Board's determination regarding causation. In their memo of law (NYSCEF Doc. No. 42, quoting *Matter of Stavropoulos v Bratton* (148 AD3d 449, 450 [1st Dept 2017] [*Stavropoulos*]), they note that "the 'applicant for ADR has the burden to show' that an accidental injury sustained in the performance of their duties 'caused the disabling condition.'"

According to respondents, their review relies on credible evidence regarding causation and therefore denial of the petition is appropriate. First, they set forth their primary contention, which is that the Board rationally concluded that petitioner's LOD COVID injury did not constitute an accident for which ADR benefits are awardable. More specifically, they argue that COVID is not an "accident" for the purposes of Administrative Code § 13-252. They point out that *Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II* (57 NY2d 1010, 1012 [1982] [*Lichtenstein*] [internal quotation marks and citation omitted]) "adopt[ed] the commonsense definition of [accident as] a sudden, fortuitous

mischance, unexpected, out of the ordinary, and injurious in impact." Here, although petitioner contracted COVID at work, it was not "an unexpected event outside the scope of her employment" (*id.*, ¶ 116). Respondents contend that petitioner has not alleged that her COVID infection resulted from the requisite "fortuitous mishap" (NYSCEF Doc. No. 21, ¶ 115). They state that although her bout with COVID qualified her for LOD benefits, this is not dispositive, as not every line of duty injury constitutes an "accident" as the courts have defined it.

In further support of this position, respondents cite *Matter of Kelly v DiNapoli* (30 NY3d 674 [2018] [*Kelly*]). In *Kelly*, the Court of Appeals considered two cases in which the Board had denied ADR benefits to officers. In one case, Officer James J. Kelly sustained shoulder and neck injuries when he rescued individuals trapped under a pile of debris after Hurricane Sandy. Although the Fire Department had more sophisticated equipment that could have helped in the endeavor, no help was forthcoming for at least two hours because of "the extreme conditions created by the hurricane" (*id.* at 678). In the other case, Pat Sica, a firefighter, was exposed to toxic cleaning chemicals when he performed cardiopulmonary resuscitation on an individual who had collapsed inside of a grocery store freezer. The Court of Appeals, relying on precedent, upheld the appellate court decisions that had denied ADR benefits to Kelly and Sica. Specifically, it stated that "an injury-causing event is accidental when it is sudden, unexpected and not a risk of the work performed, but the 'focus[ ]' of the determination must be on 'the precipitating cause of injury,' rather than on 'the petitioner's job assignment'" (*id.* at 682, quoting *Matter of McCambridge v McGuire*, 62 NY2d 563, 565 [1984] [*McCambridge*]). The Court concluded that the incidents in question occurred while Kelly and Sica were performing their duties. Even sudden and fortuitous accidents were not qualifying if the risk was inherent in the individual's duties (*Kelly*, 30 NY2d at 683). Respondents contend that in the case at hand, *Kelly* mandates denial of ADR benefits.

Respondents further rely on *Matter of Gray v Kerik* (15 AD3d 275, 275 [1st Dept 2005] [*Gray*]) for their position that petitioner's LOD injury was not an accident for the purposes of the Administrative Code. In *Gray*, the First Department affirmed a trial court decision which upheld the board's decision to deny ADR benefits to an officer whose knee "snapped" when he stepped out of his police car to direct traffic. The court concluded that the petitioner's act of stepping out of his car did not, by itself, constitute an accident for the purposes of the Administrative Code (*id.*). According to respondents, the proceeding at hand "mirrors *Gray* in every relevant respect" because here, petitioner has neither claimed nor demonstrated that her lung condition is the result of "some fortuitous mischance outside the scope of her ordinary employment duties" (NYSCEF Doc. No. 42, *10).

According to respondents, the petition essentially asks this court to judicially override the Board's interpretation of the law and enact a presumption that if an officer contracts COVID while in the line of duty, he or she has the right to ADR benefits. They cite *Stavropoulos* for the proposition that only the legislature can create such a presumption (148 AD3d at 455-456). Further, they contend that the existing legislation does not suggest that the legislature intends for a presumption to apply here. For example, they note that the legislature enacted a presumption for officers who suffered specified injuries following their work at the World Trade Center site in the aftermath of the September 11, 2001 terrorist attack (citing Administrative Code § 13-

252.1[a][1]). In the years since the onset of the COVID pandemic, however, the Administrative Law has not been amended to create a presumption here.

In support of this position, respondents also rely on *Matter of Holness v Teachers' Retirement Sys. of the City of N.Y.* (2024 NY Slip Op 33254 [U] [Sup Ct, NY County 2023] [*Holness*]), which upheld the denial of ADR benefits under the Retirement and Social Security Law to a teacher who allegedly sustained disabling injuries after she contracted COVID at work. The court relied on the principle that "an applicant for accidental disability retirement benefits . . . bears the burden of demonstrating that [her] disability arose out of an accident as defined by the . . . Law . . . " (*id.* at *7 [internal quotation marks and citation omitted]). The court reasoned that "the Legislature has not enacted any law that treats the onset of a COVID-19 infection differently than, or distinct from, any other communicable viral, bacterial, or fungal disease" and, moreover, that when "the Legislature amended the . . . Law with respect to . . . pension benefits, by defining a COVID-19 death as 'accidental' for the purpose of entitlement to 'accidental death' benefits (see Retirement and Social Security Law § 607-i), it did not do the same with respect to ADR benefits" (*id.* at *8). Respondents argue that the same principle requires an affirmance of the Board's decision here.

Respondents also argue that the six cases in which it awarded ADR benefits due to COVID-related disabilities are relevant here. It points to *Matter of Rivera v Shea* (211 AD3d 594, 595 [1st Dept 2022] [*Rivera*]), in which the First Department found that the Board's denial of ADR benefits was not irrational simply because, in a similar case, the Board had granted such benefits. The court stated that it was not clear whether the two cases were factually identical "and, in any event, the Board of Trustees may correct a prior erroneous interpretation of the law where appropriate" (*id.*). For the purposes of an Article 78 review, moreover, respondents note that only the record that was before the Board when it rendered its decision is appropriate for consideration. Further, they state that there were no written guidelines that created an ADR presumption in COVID cases. Instead, as the petition acknowledged, petitioner relied on a "proposed Outline for a COVID-19 ADR Policy" (NYSCEF Doc. No. 1, ¶ 21). According to respondents, the Board did not adopt or in any way endorse the proposal. For all these reasons, respondents argue that the Board's decision was rational.

In the event that the court decides otherwise, however, respondents turn to their second argument. Here, they argue that the Board's decision was rational in light of the credible medical evidence before it. Respondents refer to "opinions from NYPD medical experts and information about Petitioner's smoking history" in support of the Board's conclusion (*id.*, ¶ 120). They also emphasize that the Board had no obligation to adopt the Medical Board's determination on the issue of causation. Respondents state that if the court rejects their position, the court should grant the alternate relief petitioner requests and remand the matter to the Board for further consideration in light of the court's decision.

In addition, they argue that petitioner's request for documents is excessive. They agree that petitioner has the right to a copy of the administrative record for her case. However, they state that the exhibits they have filed along with their answer constitutes the entire record and satisfies their obligation.[4] As for documents relating to six allegedly similar cases in which the

[4] This includes items D-I in petitioner's request for documents (*see* NYSCEF Doc. No. 1, *12-13, ¶ 1).

Board granted ADR benefits, the Board notes that courts limit their review to the record that was before the agency. They note that, in *Matter of Feliciano v Caban* (Sup Ct, NY County, July 15, 2024, Engoron, J., Index No. 151251/2024 [NYSCEF Doc. No. 43] [*Feliciano*]), the court rejected the petitioner's argument that the six previous Board decisions had precedential value. Therefore, respondents challenge this portion of petitioner's request.

In her reply memorandum, petitioner argues that respondents misconstrue her argument. Although her exposure to COVID occurred in the performance of her routine duties, she contends that her COVID infection "was an accidental injurious event" (NYSCEF Doc. No. 44). She further rejects respondents' position that she did not raise this argument in her petition and supporting papers. She cites *McCambridge*, which stressed that courts may overturn the Board's opinion when it is based on "an erroneous legal standard of accidental injury." The *McCambridge* court held that accidents "sustained in the line of duty," which do not entitle a police officer to ADR benefits, are different from injuries the applicant sustained while performing his or her normal duties but that involved "a precipitating accidental event . . . which was not a risk of the work performed" (*id.*). According to petitioner, COVID was not a normal risk of her work and the Board erred in concluding otherwise.

Additionally, petitioner challenges respondents' position that she asks the court to adopt a presumption in favor of ADR benefits when an officer develops COVID-related illnesses. She again notes that six other officers were granted ADR benefits, and she states that the determination in her case is inconsistent with these other decisions. According to petitioner, this alleged inconsistency renders the decision in her case arbitrary. She also disputes respondents' position that she cannot rely on the other cases because the circumstances may have been different. Instead, she notes that at the Board's consideration of another officer for this statement (NYSCEF Doc. No. 12 [name redacted]), Mr. Nicholas Cifuni, an attorney for the pertinent police unions, indicated that in these cases, the Board "went with . . . the standard of more likely than not" (*id.*, p 76 lines 17-18). This, petitioner contends, establishes "that the cases that were approved were materially indistinguishable . . ." and that there is "no credible basis upon which to believe" otherwise (NYSCEF Doc. No. 44, *6). She reiterates her request for production of the files for those six cases, and she suggests that the court "draw a negative inference" because respondents' are not willing to provide the discovery (*id.*, *7).

Petitioner next argues that, contrary to respondents' position, this court need not defer to the agency's interpretation of the applicable administrative code. Instead, she quotes *Matter of Board of Educ. Of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.* (75 NY2d 660, 666 [1990] [*Board of Educ.*]), which states that "where the issue is one of statutory interpretation, dependent on discerning legislative intent, judicial review is not so restricted, as statutory construction is the function of the courts, not PERB."[5] Here, petitioner argues that under *Board of Educ.*, the interpretation of the word accident is appropriate for judicial rather than agency review. Finally, petitioner reiterates her position that because the medical board knew about petitioner's past as a smoker and still found a causal connection

[5] PERB protects the rights of public and private employees, and, among other things, provides mediation and interest arbitration to resolve disputes, and reviews allegations by unions and individual members regarding unfair labor practices.

between her disabling condition and COVID, the board exceeded its authority when it reached a different conclusion.

"The denial of ADR by the Board of Trustees based on a tie vote, as here, can only be set aside on judicial review if the court concludes that the applicant is entitled to the increased benefits as a matter of law based on the record because the disability was the natural and proximate result of a service-related accident" (*Matter of Trujillo v Shea*, 224 AD3d 636, 636 [1st Dept 2024] [*Trujillo*]; see *Meyer*, 90 NY2d at 145). In the context of an Article 78 challenge to a rejection of ADR benefits, the court sustains the Board's conclusion "'unless it lacks rational basis, or is arbitrary or capricious'" (*Matter of Cortes v O'Neill*, 61 Misc 3d 553, 562 [Sup Ct, NY County 2018] [*Cortes*], quoting *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). Further, where the decision is rational, the court cannot substitute its judgment for that of the agency, even if it might have reached a different conclusion (*Matter of Athanassious v Kelly*, 32 Misc 3d 1221 [A], 2011 NY Slip Op 51384 [U], *3 [Sup Ct, NY County 2011]).

As the March 13, 2024 transcript indicates, the crux of the Board's decision in this matter was that, in the case at hand, COVID is not an accident as contemplated by the Administrative Code because petitioner contracted the virus during the normal course of her employment (*see* NYSCEF Doc. No. 32, p 7 lines 6-9). Since *Lichtenstein*, courts have defined "accident" as "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (57 NY2d at 1012). Even where the petitioner has sustained an LOD injury, the injury is not necessarily an accident that entitles her or him to ADR benefits (*Trujillo*, 224 AD3d at 636). If the risk is one that is "inherent in one's job," it is not "an 'accident for the purposes of ADR benefits" (*Matter of Bodenmiller v DiNapoli*, 43 NY3d 43, 46 [2024]). The petitioner bears the burden of showing that her or his disabling injuries are the result of a service-related accident (*Matter of Pastalove v Kelly*, 120 AD3d 419, 420 [1st Dept 2014] [*Pastalove*]).

Although the medical board's decision that petitioner is disabled established the fact of her disability, petitioner did not demonstrate conclusively that her injuries resulted from a service-related accident. Instead, respondents rationally reached a contrary conclusion that is consistent with cases that uphold the denial of COVID-related ADR requests. *Holness*, to which respondents cite, rejected the petitioner's challenge to the Board's conclusion that the contraction of COVID is not an accident within the meaning of the statute.[6] In *Holness*, the medical board concluded that the petitioner contracted COVID at work, the Teachers' Retirement System [TRS] rationally determined that, as the medical board concluded, "even if workplace exposure caused the petitioner to contract COVID-19 – a coronavirus not totally dissimilar to the virus that causes the common cold – it was contracted while performing the normal duties of a teacher, with no unexpected or unforeseen workplace occurrences contributing to the infection" (*Holness*, 2024 NY Slip Op 33254 [U], at *8). Here, too, petitioner was at work performing her usual duties.

The more recent decision in *Matter of Shaffee v Caban* (2025 NY Slip Op 32443 [U] [Sup Ct, NY County 2025] [*Shaffee*]) also supports the Board's conclusion here. In *Shaffee*, the

[6] Although *Feliciano* upheld the Board's decision on the ground that it had a rational basis for its conclusion that the petitioner had not established that she contracted COVID at work, and thus is distinguishable on this issue.

petitioner allegedly contracted COVID while on duty as a police officer. The Board denied ADR benefits despite the medical board's recommendation that it approve the petitioner's application. The court reiterated that it is for the Board to determine the issue of causation. Moreover, the Board rejected two arguments that petitioner raises in the case at hand – specifically, that it should rely on proposed guidelines that included a presumption that COVID-related conditions were eligible for ADR benefits; and that in several other cases, the Board granted ADR benefits where the disabling conditions were the result of job-related COVID exposure (*Shaffee*, 2025 NY Slip Op 32443 [U], at *3-4). Accordingly, relying on the record and on caselaw, the court found that the Board's conclusion "that her disabling condition was attributable to, or resulted from, an accident in her city-service *and/or that she failed to establish an accident within the meaning of the applicable retirement statutes*" was rational (*id.* at *4 [emphasis added]).

As respondents stress, although the onset of the pandemic commenced almost five years ago, there is no law that creates a COVID presumption in the circumstances at hand. As *Holness* put it, through its silence, the Legislature has not "treat[ed] the onset of a COVID-19 infection differently than, or distinct from, any other communicable viral, bacterial, or fungal disease" for the purpose of ADR benefits (2024 NY Slip Op 33254 [U], at *8). By contrast, the *Holness* Court pointed out, the Legislature amended the Retirement and Social Security Law with respect to public employee pension benefits, by defining a COVID-19 death as 'accidental' for the purpose of entitlement to 'accidental death' benefits," thus evincing a clear intent that was not present in the situation before the court (*id.*, quoting Retirement and Social Security Law § 363 [a][1]). Respondents add that a proposal before the State Assembly that would have established a presumption for the purposes of ADR benefits (2022 NY Assembly Bill A10239) did not make it out of committee and therefore, there was no full floor vote (NYSCEF Doc. No. 42, *12 n 2).

Further, as respondents state, there also are laws that create such presumptions in other circumstances. First, New York City's General Municipal Law § 207-p creates the presumption that a police officer or fire department employee is entitled to ADR benefits if she or he contracts HIV in the performance of her or his duties. Second, General Municipal Law § 207-k states that police or fire department workers who develop heart conditions, including strokes, are presumed to have incurred the disabling condition in the performance of their duties for the purposes of both the workers' compensation law and the labor law. Third, under Administrative Code § 13-252.1(1)(a), there is a rebuttable presumption that "any condition or impairment of health is caused by a qualifying World Trade Center condition . . . it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident."[7]

Collectively, and in light of both the COVID presumption that exists for death benefits and the failure to pass a similar law for COVID-related illnesses, the court concludes that the Board acted rationally when it did not extend an ADR presumption to petitioner. Petitioner's arguments to the contrary are not persuasive. Her argument that the Board was bound by the medical board's decision regarding causation is inconsistent with longstanding caselaw (see, e.g., *Matter of Picciurro v Board of Trustees of N.Y. City Police Pension Fund, Article II*, 46 AD3d 346, 348 [1st Dept 2007]; *Cortes*, 61 Misc 3d at 562). Her position that the agency's

[7] For similar reasons, petitioner's reliance on a proposed guideline that respondents never adopted does not create a presumption here (see *Shaffee*, 2025 NY Slip Op 32443 [U], at *7-8).

interpretation of the statute should not be afforded deference fails for a few reasons. First, it is raised for the first time in petitioner's reply memorandum (see *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 436 [1st Dept 2015]). Second, even if the court considered the argument, it would reject it because 1) the agency's interpretation of matters within its expertise is entitled to deference, and 2) the agency's decision is consistent with, and shows the Board's awareness of, the definition of "accident" that courts have established over the years.

In support of her argument that the Board acted irrationally and inconsistently with its own standards, petitioner heavily relies on the fact that in six other cases the Board granted ADR benefits where the applicants suffered from COVID-related illnesses. This argument is unpersuasive, however, "as judicial review is limited to the facts and record adduced before the agency" in the matter at hand (*Matter of Benjamin v Department of Hous. Preserv. & Dev. of the City of N.Y.*, 187 AD3d 433, 434 [1st Dept 2020]).[8] As the court found in *Shaffee*, it is not clear that the cases were sufficiently similar to the one before this court (2025 NY Slip Op 32443 [U], at *9). Even were they essentially similar, the existence of the other cases does not show "that the Board Trustees' prior approval of other ADR applications involving COVID-19 . . . created a position/policy or administrative precedent to be followed for consistent results" (*id.*; *see Rivera*, 211 AD3d at 595). Moreover, "it cannot be disputed that these prior determinations would not be dispositive or binding as to petitioner's case, so long as the Board provided a rational explanation behind [its current] determination" (*Shaffee*, 2025 NY Slip Op 32443 [U], at *9). Finally on this point, the Board has the discretion to change its position if it concludes its prior interpretation of the law was erroneous (*Matter of Hanson v Shea*, 214 AD3d 413, 414 [1st Dept 2023]). For these reasons, the court also denies petitioner's discovery demands to the extent that they relate to the six other cases.

In light of the above, the court need not reach the issue of whether the Board rationally concluded that petitioner did not show a sufficient causal connection to justify an award of ADR benefits. However, the court notes, without deciding, given the Board's reliance on the fact that one of the reviewing doctors found that the etiology of petitioner's disabling condition was unclear; and the lack of evidentiary or documentary support for petitioner's contention that her doctors found a causal connection between her bout with COVID and her disabling condition, same provided sufficient reason for the Board to reject the medical board's conclusion.

As the *Shaffee* Court stated:

> "While petitioner's belief that the traditional analysis does not adequately consider the unique circumstances of widespread COVID-19 infection resulting in a worldwide pandemic is understandable and of valid concern, such a concern is one that must be addressed by the Legislature on the first instance. Therefore, absent such a formally adopted or governing presumptive law, it was not arbitrary or capricious for the Board of Trustees to evaluate ADR applications alleging disability as a

[8] For this reason, also, the court does not consider the transcript excerpt from a redacted copy of the July 20, 2023 meeting of the Board, which did not concern petitioner's application and was not before the Board in the matter at hand.

> result of a COVID-19 infection using the traditional ADR analysis" (2025 NY Slip Op 32443 [U], at *9; see also *Matter of Rizzo v DiNapoli* (39 NY3d 991, 992-993 [2022]).

Thus, although the court is not unmindful that the petitioner was compelled to work during the height of the pandemic, habitually risking exposure to COVID, and while petitioner demonstrates a record of longstanding service with the NYPD, this "is not a sufficient basis upon which [the Court] can substitute its own judgment for that of respondents" (*Matter of Pastrana v New York City Fire Pension Fund*, 2024 NY Slip Op 30468 [U] [Sup Ct, NY County 2024]). The court has considered all of the parties' arguments, even those not explicitly addressed in this order. Accordingly, for the reasons above, it is

ORDERED that the petition is denied, and the matter is dismissed; and it is further

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

This constitutes the decision and order of this court.

September 8, 2025

HON. VERNA L. SAUNDERS, JSC

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