| **Matter of Lidakis v New York City Empls. Retirement Sys.** |
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| 2016 NY Slip Op 32760(U) |
| November 17, 2016 |
| Supreme Court, Kings County |
| Docket Number: 9469/2015 |
| Judge: Ellen M. Spodek |
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**SUPREME COURT OF THE CITY OF NEW YORK**
**COUNTY OF KINGS**

In the Matter of the Application of:

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**EMMANUEL LIDAKIS,**
*Petitioner,*

For a Judgement Pursuant to Article 78 of the New York, Civil Practice Law & Rules,

-against-

**THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,**
Respondents.

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At IAS Part 63 of the Supreme Court of the State of New York, County of Kings, 360 Adams St. Brooklyn, NY on the 17th day of November 2016

**DECISION/ORDER**
Index No. 9469/2015
Present:
Hon. Ellen M. Spodek
Justice, Supreme Court



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Petitioner Emmanuel Lidakis ("Petitioner") files this special action pursuant to Article 78 of the Civil Practice Law and Rules seeking the following relief: (1) pursuant to CPLR §7803, review and annul the action of the New York City Employees' Retirement System ("NYCERS") and the New York City Department of Citywide Administrative Services ("DCAS") (collectively "Respondents") of rescinding Petitioner's Performance of Duty Disability Retirement allowance on April 9, 2015, pursuant to Retirement and Social Security Law ("RSSL") §607-b; and (2) declaring said action to be arbitrary, capricious, unreasonable and unlawful; and (3) directing Respondents to approve Petitioner's Performance of Duty Disability Retirement; or (4) in the alternative, remanding the matter to NYCERS Medical Board ("Medical Board") for further consideration. Respondents oppose Petitioner's actions.

***Background***

Petitioner was appointed to the New York City Fire Department ("FDNY") as an Emergency Medical Technician ("EMT") on November 5, 1999. Petitioner's service as an EMT was satisfactory at all times.

Petitioner suffered three injuries to his knees on three separate occasions between 2003 and 2005. On September 28, 2003, Petitioner sustained an injury to his right knee while he was carrying a patient down stairs. On January 24, 2005, Petitioner sustained injuries to his right and left knees when he slipped on ice while he was getting into a department vehicle. On March 15, 2005, Petitioner sustained an injury to his left knee when a box fell on his knee while he was arranging supplies in the supply room at Highland Hospital.

On February 1, 2005, the Medical Board found Petitioner unfit for duty with a permanent disability of his right knee. The Medical Board based this decision on the fact that Petitioner had undergone a right knee arthroscopy on March 3, 2004 and, in a note from his doctor dated January 28, 2005, he was deemed partially disabled. Petitioner was also prescribed pain medication, complained of occasional buckling of the knee, pain with standing, pain with prolonged sitting and squatting, and used both a knee sleeve and a cane; all of which aided in the Medical Board's decision that he had a permanent disability. The Medical Board's own examination of the Petitioner, prior to its decision, found him to have full active range of motion of the knee with tenderness along the parapateller and medial joint line region. Further, it was found that Petitioner had no effusion, no patellofemoral crepitus, was grossly neurovascularly intact, and had quadriceps strength bilaterally of 4+/5.

On December 13, 2006, as a result of his injuries, Petitioner filed an application for Performance-of-Duty Disability Retirement pursuant to RSSL §607-b, which states:

§607-b. Performance of duty disability retirement.

a. Any member of the New York city employees' retirement system who is employed by the city of New York of by the New York city health and hospital corporation in the position of emergency medical technician or advanced emergency medical technician, as those terms are defined in section thee thousand one of the public health law, who, on or after March seventeenth, nineteen hundred ninety-six, becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties shall be paid a performance of duty disability retirement allowance equal to three-quarters of final average salary, subject to section 13-17 of the administrative code of the city of New York. Any member who has made application or who, after the effective date of the chapter of laws of two thousand four which amended this subdivision, makes application for such performance of duty pension shall be entitled to invoke the medical review procedure provided for in subdivision e of section six hundred five of this article, subject to the terms and conditions set forth in such subdivision.

On February 14, 2007, the Medical Board interviewed and examined Petitioner and ultimately approved his application for Performance-of-Duty Disability Retirement with a diagnosis of "chronic synovitis of the left knee," with the stipulation that Petitioner be re-examined in one year, to see if Petitioner was still disabled.

On April 27, 2007, the NYCERS Board of Trustees ("Board of Trustees") approved Petitioner's Performance-of-Duty Disability Retirement application establishing his retirement date as February 25, 2007. In a letter dated April 13, 2007, Petitioner was notified of the Board of Trustees action.

After his retirement, Petitioner continued to be treated by his physician, Albert Graziosa, M.D., who opined the Petitioner continued to be disabled, that he could neither drive nor walk long distances, and that Petitioner could not partake in "heavy lifting or strenuous type activity."

On March 20, 2008, the Medical Board re-examined Petitioner and after an interview and examination, it found that petitioner was no longer "disabled from performing the duties of an EMT with the FDNY." The Medical board recommended that Petitioner's Retirement benefits

under RSSL §607-b (supra) be discontinued and that his name be placed on a preferential hiring list. By letter dated March 26, 2008, Petitioner was advised of the Medical Board's decision and that the Board of Trustees would move to place his name on a Civil Service Preferred List with the New York City Department of Citywide Administrative Services ("DCAS") at a future meeting.

On May 20, 2008, after the Medical Board evaluation, Petitioner submitted updated MRI reports of both knees dated May 1, 2008, reports from Robert A. Marini, M.D., Petitioner's pain management specialist, and updated reports from Dr. Graziosa. Petitioner requested that the Medical Board reevaluate him based on the new medical evidence. Petitioner was not reexamined by the Medical Board in light of the new evidence.

On March 12, 2009, the Board of Trustees adopted a resolution "certifying to DCAS [his] name for registry as a preferred eligible on an appropriate list of candidates for appointment to a position for which [he is] qualified." The trustees notified Petitioner of the decision by letter dated May 14, 2009. The letter failed to notify the Petitioner of his statutory rights to institute an Article 78 proceeding or invoke medical review procedure pursuant to RSSL §607-b, as had been done in the April 13, 2007 letter.

Petitioner instituted a proceeding under CPLR Article 78 to challenge the respondents' denial of retirement benefits, respondents' placement of Petitioner on DCAS hiring list, and their failure to inform Petitioner of his rights in the Trustees' May 14, 2009 letter. On April 26, 2010, the Honorable Justice Arthur M. Schack remanded the case back to the respondents and directed them to give Petitioner "the option of filing a written request, for the review of the March 12, 2009 determination by the Board of Trustees… that Petitioner … 'is no longer incapacitated and that he

is fit to be restored to duty as an Emergency Medical Technician D,' by a special medical committee, pursuant to RSSL §607-b."

On April 27, 2010, Petitioner was taught how to use hand controls that were placed on his personal vehicle because he could not safely operate his car due to his knee impairments. On or about July 22, 2010, the NYC Department of Transportation issued Petitioner a Special Parking Permit for people with Disabilities after he was examined by a physician employed by the New York City Health and Hospital Corporation.

By letter dated December 28, 2010, Petitioner was notified that on March 12, 2010, the Board of Trustees reviewed his case pursuant to Justice Schack's remand and further stated that his case had been re-finalized and informed him of his right to review by the Special Medical Board Committee, whose decision would be final and by which he would waive his right to institute an Article 78 proceeding to challenge the Trustees' decision.

Petitioner instituted a second Article 78 proceeding to overrule the denial of his application. On May 2, 2012, the Honorable Justice David B. Vaughan remanded the case to the respondents for reconsideration "in light of all of the medical evidence of Petitioner's claim of an ongoing disability."

Through May 2014, Petitioner remained under the care of Dr. Graziosa and continued to qualify for New York City Special Parking Identification. On July 1, 2014 Petitioner was prescribed Ultram ER [tramadol, extended release] for pain relief by his pain management specialist, Dr. Marini.

By a letter dated June 23, 2014, the Respondents contacted Petitioner, acknowledging, for the first time, Justice Vaughan's remand, over two years after the case had been remanded. Petitioner, in response, submitted updated reports from Dr. Graziosa, his July 1, 2014 prescription,

as well as his 2013 Special Parking ID. On July 20, 2014, respondents' set the date for Petitioner's examination with the Medical board for September 4, 2014.

On September 4, 2014, the Medical Board interviewed and examined the Petitioner and reaffirmed their previous position, denying Petitioner's application for Performance of Duty Disability, by finding that he was no longer disabled. On April 9, 2015, the Board of Trustees finalized the denial of Petitioner's application. The respondents informed Petitioner, by letter, that his name would be placed on preferential hiring list by the DCAS.

On April 22, 2015, Petitioner was awarded Social Security Disability Benefits. The decision was based, in part, on an independent medical examination by Ronald E. Kendrick, M.D., conducted on October 31, 2014.

On June 8, 2015, Petitioner's attorney wrote a letter to the Board of Trustees requesting them to reconsider Petitioner's case based on the evidence contained in Dr. Kendrick's examination reports and Petitioner's subsequent Social Security Disability Award. Petitioner's attorney based his request upon NYCERS's rule that provides that members can submit new evidence within sixty days of being notified of a denial by the Board of Trustees.

On June 26, 2015, NYCERS Medical Division sent a letter to Petitioner's attorney in response to his request. The letter stated:

> Please note that the sixty-day rule only applies to certain active members whose applications were denied by the Board of Trustees, offering an opportunity to re-apply for disability requirement if they do not meet the filing requirement. Because [Petitioner] is a retiree, this rule does not apply to him. Therefore, no further action will be taken on the additional information you submitted on June 8, 2015 on behalf of [Petitioner] for his disability retirement.

The NYCERS rule in question is Rule 23(a)(7) and it states:

> (b) An applicant whose request for disability retirement has been denied by the Board of Trustees may renew such application by filing a request in writing renewal until the later of the following dates:
>
> > (i) the last date the applicant would be entitled to file a disability retirement application pursuant to section 3 of Rule 23(a); or

(ii) the sixtieth day following the denial of his or her disability retirement application by the Board of Trustees

Petitioner filed this petition and complaint on July 30, 2015.

***THE PARTIES CONTENTIONS***

**Petitioner**

Petitioner contends that the Court should vacate the decision of the Board of Trustees because it is arbitrary, capricious, and a violation of law. Petitioner argues that the decision was not based on substantive evidence, and places both the Petitioner and the public in danger of the possibility of Petitioner returning to work as an EMT. As such, Petitioner claims that pursuant to CPLR §7803(3), the Court should vacate an agency determination that is made in violation of lawful purpose, is affected by the errors of law, is arbitrary and capricious, or results from an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed. In this case, Petitioner argues that the Board of Trustees decision is arbitrary and capricious, unreasonable, and unlawful.

**Point I**

The Petitioner asserts that Respondents failed to consider any of the medical evidence submitted by Petitioner for the period of March 2008 through December of 2011. Based on the Medical Board's final set of minutes, the Medical Board made reference to their prior review, on March 20, 2008, and then the next medical report they make reference to is Dr. Graziosa's January 12, 2012 report with no mention of any other reports in the time between the two. Petitioner contends that the Medical Board's findings that Petitioner was no longer disabled must fail because they ignored objective evidence and denied the application on the basis of not enough objective evidence. Petitioner also states that this case has been remanded twice before pursuant to CPLR

Article 78. Each time the judge ordered the Respondents to review Petitioner's application for disability retirement in light of the newest evidence he had provided.

**Point II**

Petitioner further contends the Respondents refused to allow Petitioner to submit evidence within sixty days, violating their own rules. Petitioner asserts that he obtained additional, relevant evidence within sixty days following the Respondents' final denial of his application on April 9, 2015, and asked NYCERS to reconsider his application in light of the new evidence, pursuant to NYCERS rules. NYCERS responded to Petitioner's request by stating that while there is a rule that allows submission of additional evidence within sixty days of the Board of Trustees' decision, this rule only applies to active employees and not the Petitioner because he is retired. Petitioner states that NYCERS failed to proffer a copy of their rules in connection with his request because the rules are not publicly available. Petitioner also contends that the nature of the NYCERS rules tend to illustrate that he is entitled to an additional review by submitting evidence within sixty days.

**Point III**

Petitioner claims that the Medical Board's disability finding is not supported by credible evidence. The Medical Board stated in their report of the September 4, 2014 examination of Petitioner that he was able to walk without a cane, able to perform squats and also noted the negative bilateral patella compressions tests, and negative bilateral McMurray's (rotation) tests. Petitioner contends that the Medical Board used these observations as the sole basis of their determination and failed to do any further analysis of previous medical reports or state why they found those previous medical reports unpersuasive. While the Medical Board's minutes from

February 2007, March 2008 and September 2014 reflect differences in the physical examination of the Petitioner, Petitioner contends that the Medical Board fails to explain how it was medically possible for Petitioner's chronic synovitis of the left knee to have improved without intervening surgery or physical rehabilitation.

In the February 2007 minutes of the Medical Board Petitioner was found to be disabled, it was discussed how Petitioner's chronic knee pain negatively affects his ability to perform specific tasks while on the job like operating an ambulance or resuscitating a patient on the ground. Petitioner contends that the Medical Board failed to discuss the specific requirements of the Petitioner's job in neither their March 20, 2008 nor September 4, 2014 minutes. Specifically, Petitioner argues that there are two job requirements that he is unable to fulfill, which have backing within the credible evidence, that the Medical Board failed to consider. First, the Petitioner has been prescribed pain medication throughout this proceeding, the most recent of which is an opioid. The Medical Board makes reference to this prescription in their minutes but, Petitioner contends, they fail to mention that the job requirements for an FDNY EMT specify that an EMT may not "take any medication that causes you to be impaired, or prevent you from performing the described duties," and it is also not mentioned by the Medical Board how the medication Petitioner is prescribed could affect his ability to perform his full duties as an EMT. Second, the Petitioner contends that the Medical Board failed to justify Petitioner's inability to operate any vehicle without hand controls, as shown by the hand controls installed in Petitioner's personal vehicle and the special parking ID he was granted by the City, when it is listed as a specific requirement for the position as an FDNY EMT that the EMT must be able to operate an ambulance – in which the use of hand controls is not an option.

**Respondents**

**Point I**

Respondents contend that the petition should be dismissed as against DCAS due to the fact that there are no allegations against them in the petition or arguments aimed at the acts or omissions of DCAS in Petitioner's memorandum of law. Respondents further state that any challenge to the acts of DCAS, if and when it seeks to reinstate Petitioner to employment as an EMT from the preferred hiring list are premature, and cannot be challenged in this proceeding.

**Point II**

Respondents claim that NYCERS's determination that Petitioner is no longer entitled to disability retirement is supported by credible medical evidence and, therefore, is neither arbitrary nor capricious. Respondents' specifically refer to RSSL §607-b which states that "a member must prove that he is disabled and that his disability is the natural and proximate result of an injury sustained in the performance of his duties and the burden to prove that such incapacity had continued remains with the applicant," (in this case, Petitioner). Respondents contend that the determination of whether the applicant has the injury claimed and whether that injury incapacitates the applicant from the performance of duty is solely for the Medical Board, and that the decision is not arbitrary and capricious as long as it is based in "some credible evidence." Respondents' further contend that the Medical Board not only considered all of the medical evidence provided by the Petitioner but also conducted its own examination of Petitioner.

Respondents' state that the Medical board found, in their September 4, 2014 examination of the Petitioner, that "[T]here was no warmth or swelling of either knee, no atrophy appreciated about either knee, the range of motion was full and the knees were stable on evaluation. There was… no complaint of discomfort during any part of the range of motion of stressing of the knees."

Further, since the most recent MRI was from 2008, six and a half years prior to the third and final examination of the Petitioner by the Medical Board, the Respondents' contend that were no current x-rays or MRI reports provided by the Petitioner showing a serious condition to rebut the Medical Board's findings.

Respondents' argue that Petitioner's claims that the Medical Board did not review his medical records from 2008 and 2009 are both false and not relevant. Respondents' state that the Medical Board reviewed all records it was given but records from five to six and half years earlier were not relevant in determining if the Petitioner was currently disabled (as of September 2014). Respondents' state that the Medical Board more closely reviewed Petitioner's medical documents covering the time period from January 2012 through May 2014. Respondents' contend that it was the Medical Board's own examination, along with all of Petitioner's previous medical documentation, with more recent documents playing a bigger role, that the Medical Board based its determination that the Petitioner was no longer disabled.

Further, Respondents' contend that the Medical Board is entitled to resolve conflicts of medical opinions. While Petitioner's doctor believes that Petitioner is disabled due to a chronic issue in both of his knees, the Medical Board does not believe that the Petitioner is disabled in a way that prevents him from fulfilling duties as an EMT for the FDNY. The Respondents argue that this difference does not make the Medical Board's determination arbitrary and capricious and that, at most, it is a conflict of medical opinion which remains solely within the province of the Medical Board to resolve.

**Point III**

Respondents' contend that the Petitioner is not entitled to submit additional evidence. Respondent's argue that Petitioner's attempt to submit additional evidence, after the Board of

Trustees issued its resolution, so it could be considered by the Medical Board is not allowed by NYCERS's rules. Respondent's argue that "it is clear" that the provision allowing late submission of additional evidence is accorded to certain active members of NYCERS and not to retirees, like the Petitioner. The provision Respondent is referring to is Rule 23(a)(7) stated above.

**Discussion**

In reviewing an agency's determination in a proceeding brought under CPLR Article 78, the Court is to decide, in part, "whether [the] determination was made in lawful violation of lawful procedure, and 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." CPLR §7803(3). The Court's determination in these matters must be justified by substantial evidence in support of the Petitioner's assertions that the decision was arbitrary, capricious, unreasonable and unlawful. The Court gives deference to the administrative agency's determinations as they are uniquely qualified to make decisions specific to their industry. However, where it appears that the administrative agency's determination was not achieved by a rational basis, the Court is not abusing its discretion by reviewing the evidence and concluding that the decision was made in error. *See Matter of Diocese of Rochester v. Planning Bd. Of Town of Brighton*, 1 N.Y.2d 508, 520 (1956).

The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact. See *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231(1974). In order to address the various points of contention between the parties, the Court will evaluate the timeline and procedural process of events that lead up to NYCERS's April 9, 2015 decision to deny Petitioner's application for Performance-of-Duty Disability Retirement. It is undisputed that Petitioner was granted disability

retirement by the Board of Trustees on April 27, 2007 and was subject to reevaluation in one year's time. The Respondents' contend that between April 27, 2007 and March 20, 2008 the Petitioner's condition drastically improved, to the point where he could no longer be classified as disabled. The Medical Board upheld this decision a second time on September 4, 2014.

Respondents argued that several courts have upheld the idea that it is the Medical Board's job to resolve conflicts of medical opinion when it is examining a patient for approval or denial of an application and asked this court to rely on past precedent in deciding on whether its finding that the Petitioner was no longer disabled was arbitrary and capricious.

Simply because the Medical Board reserves the right to resolve conflicts of medical opinion, it does not also have the right to ignore the overwhelming credible evidence that happens to contradict its own findings. Petitioner submitted over a decade's worth of medical reports from his orthopedist, Dr. Graziosa, and pain management specialist, Dr. Marini, all of which held that Petitioner suffers from several issues in both knees that cause him to have trouble with everyday tasks like walking and driving. These reports were submitted to the Medical Board to aid in their decision making for both their 2007 and 2008 examinations of Petitioner. While the reports of Petitioner's long time physicians did not change in their diagnoses that Petitioner was disabled, the Medical Board ultimately decided the opposite from only two evaluations of the Petitioner, with no further MRI or imaging of his knees.

Petitioner provided updated medical reports and evidence to the Medical Board before his 2014 examination, including additional reports from both Dr. Graziosa and Dr. Marini, a notice that he had hand controls installed on his personal vehicle because of his inability to operate a car normally, and a copy of his Special Parking Permit for People with Disabilities that Petitioner was issued by the New York City Department of Transportation ("DOT"). The Medical Board, as it

had done in 2008, found in September 2014 that, against the overwhelming evidence to the contrary, Petitioner was no longer disabled and should be placed on a list to return back to work.

Following Petitioner's 2014 evaluation by the Medical Board and ultimate notice from NYCERS that his application for disability retirement had been denied in April 2015 and that he was to be placed on a preferential list to begin working as an EMT again, Petitioner was deemed eligible for disability benefits by the Social Security Administration ("SSA"). Petitioner attempted to submit SSA's decision as well as the report of the independent physician who examined him on behalf of SSA as additional evidence of his disability which the Medical Board did not review. This cannot be justified.

In addition to all of the medical reports submitted by both parties this Court must also consider the ability of Petitioner to operate effectively as an EMT for the FDNY if his name were to be placed on a preferential list for rehiring as the Board of Trustees recommended be done. The requirements and duties of an EMT include carrying heavy equipment, being able to transport equipment and patients up or down multiple flights of stairs, being able to run/jump/climb/kneel/squat/stand/bend and crawl, sometimes for long periods of time, during calls or while rendering aid to a patient, and being able to navigate and provide care to patients in confined spaces. The requirements and duties also clearly state that an EMT cannot be taking any kind of medication that causes impairment or prevents an EMT from doing the duties described above. In addition an EMT cannot have any mental or physical disability that would prevent him/her from performing patient care, operating vehicles and working as a FDNY EMT in physically taxing situations.

The medical reports submitted by Petitioner's personal physicians state that continuing into 2015 he continued to have trouble walking, causing him to ambulate with a cane. Petitioner also

submitted a prescription for, most recently, an opioid pain killer that he takes which the Medical Board acknowledged in their minutes for each of their examinations of Petitioner. There was also submitted proof that Petitioner can no longer operate a vehicle in its standard condition but instead uses modified hand controls so he does not have to use his legs while driving. Petitioner contends that because of these things he can no longer fulfill his duties as an EMT in any way. Respondents fail to make mention of the issues Petitioner would face if he were to be re-hired by the FDNY, as they had recommended. The Court finds this to be a very significant concern.

***Conclusion***

Pursuant to CPLR §7803(3), a Court is to decide whether a determination was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or and abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." As discussed earlier, the arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact. See *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 356 N.Y.2d 833, 313 N.E.2d 321 (1974). In the current action, the Court finds that NYCERS's decision to deny Petitioner's application for Performance-of-Duty Disability Retirement was arbitrary and capricious. The Court does not make this determination lightly as the standard for vacating an administrative agency's determination is held to a high bar. However, the Court does not believe it is abusing its discretion based on the facts in this case. After oral argument and the foregoing papers, the Court finds that NYCERS's denial was not based on a complete and accurate picture of the facts. In determining that the denial was not justified, the Court focuses directly on the Medical Board and its finding of the Petitioner not to be disabled. The Medical Board examined the Petitioner all of three times, one after a year and then six and a half years later, and made its

own determination that differed greatly from that of the doctors who have been treating Petitioner consistently for over a decade and the doctor who examined him on behalf of the SSA. In addition, the fact that a separate agency (the SSA) also found him disabled is completely telling. The same evidence was presented to the SSA, which concluded Petitioner was disabled. The Court cannot ignore this.

Further, in light of the entirety of the evidence submitted in this case and with the safety of the general public in mind, this Court cannot allow Petitioner to return to duty as a FDNY EMT. An EMT is a trusted member of public service whose duty is to render aid to those in need. Placing Petitioner back into the line of duty would endanger those people who, when asking for the services of an EMT, are at their most vulnerable. This Court cannot, with good conscience, allow the public of New York City to be put in harm's way by allowing Petitioner, who is unable to fully perform the duties required of him because of the conditions he suffers from in both of his knees, to be placed back as an FDNY EMT.

In sum, this Court finds that NYCERS's decision to deny Petitioner disability retirement was arbitrary and capricious and should be reversed. Petitioner's application for disability retirement should be approved.



ENTER,

Ellen M. Spodek,
Justice, Supreme Court