

**Matter of Markowski v New York City Empls.
Retirement Sys.**

2017 NY Slip Op 31930(U)

February 14, 2017

Supreme Court, Kings County

Docket Number: 282/16

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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In the Matter of the Application of
MICHAEL MARKOWSKI,

Petitioner,

Index # 282/16

For a Judgment under Article 78 of the Civil Practice
Law and Rules,

-against-

THE NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM,

Respondent.
-----X

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FILED

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this
Notice of Motion for Summary Judgment submitted on October 3, 2016.

Papers	Numbered
Notice of Petition and Verified Petition.....	1&2 [Exh. B-Q]
Verified Answer.....	3
Order to Show Cause and Affidavits.....	
Answering Affidavits.....	
Replying Memorandum of Law.....	6
Supplemental Affidavits.....	
Exhibits (Admn. Record from Respondent - Exhibits 1 -27]	7
Other [Memoranda of Law].....	4 & 5

Upon the foregoing cited papers, careful review of the papers and opposition
thereto, the court finds as follows:

The Petitioner, Michael Markowski commenced this proceeding pursuant to CPLR
Article 78 to review a determination of the Board of Trustees of the New York City
Employees' Retirement System, hereinafter "NYCERS," which denied the petitioner's
application for accidental disability retirement pursuant to the World Trade Center
Disability Law; Retirement and Social Security Laws §607-b.c.1. Petitioner requests the
following relief: a judgment annulling the determination of the Respondent, NYCERS, and

declaring the action to be arbitrary, capricious, unreasonable and unlawful; an order directing respondents to retire petitioner with a disability retirement allowance under the World Trade Center Disability Law; or in the alternative, remanding the matter to the respondents for an appropriate review. In addition, petitioner requests an order pursuant to CPLR §2307(a), directing respondents to serve and file all reports, recommendation, certificates and all other documents submitted to NYCERS in connection with petitioner's disability retirement application; copies of the minutes of each meeting of said Board of Trustees considered by, discussed and or acted upon by the Board concerning the petitioner's retirement application; and copies of any and all medical records, reports or notes relating to petitioner which are on file with NYCERS.

HISTORY

Petitioner was appointed an emergency medical technician, hereinafter "EMT" with the New York City Health and Hospitals Corporation on April 20, 1993 and has been employed as an EMT until his retirement. During his employment as an EMT petitioner has been a member of the NYCERS Pension Fund, and as a member made any and all contributions as required by law, pursuant to Code §13-104. Petitioner was one of the first responders to the World Trade Center disaster on September 11, 2001, whereby he assisted in the rescue, recovery and cleanup operations. Prior to 9/11, in 1999 the petitioner received intermittent treatment with the New York City Fire Department, hereinafter "FDNY," Counseling Service Unit, "CSU." Thereafter, on October 3, 2003 in his Initial Evaluation form, the clinician recorded that the petitioner was "Presenting Problem: WTC Traumatic Grief - friends on the job were killed...assigned to the morgue 3 days immediately after 9/11/01." The Petitioner sought intermittent treatment from the FDNY-CSU until 2014. While still working as an EMT, petitioner while responding to a call was assaulted and bitten by an emotionally disturbed patient on April 11, 2013 and assaulted on May 12, 2013. After May 25, 2013 the FDNY Bureau of Health Services never cleared petitioner to return to full duty, on psychiatric grounds. In June 2013, petitioner was admitted to Zucker Hillside Hospital and an assessment of his condition included increased depression; oversleeping, lack of energy; profound anhedonia and hopelessness and thoughts of suicide. Thereafter, on January 22, 2014, petitioner filed an application for Performance-of-Duty Disability Retirement, pursuant to RSSL §607-b, and for Disability Retirement under the World Trade Center Disability Law, pursuant to RSSL §607-b.c.1.(a), whereby he indicated on the application that his severe psychological conditions prevent him from performing the duties as an EMT.

On March 18, 2014, petitioner was examined by the NYCERS Medical Board in connection with his application for Performance of Disability Retirement and Disability Retirement under the World Trade Center Disability Law. After the Board conducted its interview of petitioner, and reviewed the medical records submitted on behalf petitioner, the decision was deferred until Dr. Aaron Patterson, the independent medical doctor for the Medical Board, had a chance to review the petitioner's hospitalization of June 2013. In addition, the Board requested additional psychiatric treatment records from Dr. Kevin Kelly, who was petitioner's treating doctor since 2005, in order for Dr. Patterson to review and opine on causation. An additional report written by Dr. Patterson on April 10, 2014, opined that the petitioner's condition was not casually related to the World Trade Center Disaster, nor were petitioner's symptoms casually related to any work related problem, and found that petitioner's condition was consistent with Malingering, and his degree of manipulation made it difficult to ascertain if there was an underlying psychiatric problem, therefore finding insufficient evidence to substantiate psychiatric disability.

Based upon Dr. Patterson's medical opinion, the Board denied petitioner's application stating that the documentary and clinical evidence failed to substantiate that petitioner is disabled from performing the duties of an EMT. Thereafter, petitioner appealed and was examined by the Medical Board, who reviewed the report of Dr. Gerz who concluded that there was a reasonable chance of lessening of petitioner's symptoms with appropriate treatment. In 2015, the Board of Trustees adopted the Board's recommendations and denied petitioner's application. On November 25, 2015, the FDNY CSU sent a letter to the New York State Workers' Compensation Board indicating that petitioner is permanently disabled as a result of a Line of Duty Injury, and that petitioner has been receiving SSDI since December 2013. As a result, petitioner has been removed from the FDNY payroll without salary or benefits.

Discussion

RSSL § 607-b which governs performance of duty disability retirement for NYCERS members states:

- a. Any member of the New York City employees' retirement system who is employed by the City of New York or 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 three 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 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 the 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.

RSSL § 607-b.c.1 (a) which governs performance of duty disability retirement for NYCERS members who worked in the World Trade Center rescue, recovery, or clean up operations, provides as follows:

1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of this chapter, 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 not caused by such member's own willful negligence, unless the contrary be proved by competent evidence.

In the case at bar, the Petitioner applied under the two sections above for disability retirement which was denied by the Board of Trustees.

The Retirement and Social Security Law § 2.36 defines terms used in the World Trade Center Disability Law as follows:

36. (a) "Qualifying World Trade Center condition" shall mean a qualifying condition or impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a qualifying period, as those terms are defined below, provided the following conditions have been met: (i) such member, or eligible beneficiary in the case of the member's death, must have filed a written and sworn statement with the member's retirement system on a form provided by such system indicating the underlying dates and locations of employment not later than September eleventh, two thousand ten; and (ii) such member has either successfully passed a physical examination for entry into public service, or authorized release of all relevant medical records, if the member did not undergo a physical examination for entry into public service; and (ii) there is no evidence of the qualifying condition or impairment of health that formed the basis for the disability in such physical examination for entry into public service or in the relevant medical records, prior to September eleventh, two thousand one.

(b) "Qualifying condition or impairment of health" shall mean a qualifying physical condition, or a qualifying psychological condition, or both, except that for any member identified in paragraph (vi) of paragraph (e) of this subdivision, it shall only mean a qualifying psychological condition.

(d) "Qualifying psychological condition" shall mean one or more of the following: (i) diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions; or (ii) new onset diseases resulting from exposure as such diseases occur in the future including chronic psychological disease.

There is no dispute that petitioner meets the requirement that he must have participated in operations at the World Trade Center. Therefore, the petitioner has established the requisite time spent at the World Trade Center, and the causal relationship is presumed as set forth in the statute. The burden then shifts to the FDNY to prove that the qualified injury was not caused by the hazards encountered at the WTC site. See, Matter of Bichatchi v. Board of Trustees of New York City Police Dept., Pension Fund, et. al., 20 N.Y.3d 268, 958 N.Y.S.2d 680 [2012]. Both post traumatic stress disorder and depression are qualifying conditions under the Retirement and Social Security Law § 2.36, and if the petitioner spent the requisite time at the WTC, the law presumes that these qualifying conditions are the result of the work performed. The respondent, however, argues that the Medical Board's determination was that the petitioner is not disabled, and therefore, inasmuch as petitioner cannot prove mental incapacity, the presumption otherwise afforded by the World Trade Center Law does not apply in this case.

While this Court agrees with the Board of Trustees, that its decision should be given deference, as well as the fact that the findings of other agencies are not binding upon the Medical Board, the opinions and findings by the Medical Board, as adopted by the Board of Trustees must be supported by facts and explained in a detailed report which sets forth the basis for the Board's conclusion. The evidence must be substantial, credible, relevant and reasonably adequate to support the facts and conclusions. Matter of Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756, 650 N.Y.S.2d 614 [1996]. Respondent argues that the findings of non-disability are supported by the findings of two independent doctors, who opine that petitioner's characteristics are consistent with malingering, (opinion of Dr. Patterson), and that there was a reasonable chance of lessening of petitioner's symptoms with appropriate treatment which was concluded by Dr. Gerz. In addition, respondent argues that the doctors' conclusions do not support a finding a disability which would prevent petitioner from performing the duties of an EMT with the FDNY. Respondent states that the doctors' reports are based on a thorough and deliberate review of petitioner's medical records, hospitalization records from 2014, and after speaking with and interviewing the petitioner.

Although there are conflicting findings and reports, petitioner has submitted significant medical records which detail his psychological condition before and after his rescue efforts at Ground Zero. This court does not substitute its judgment for that of the Medical Board. However, the court does not find the respondent's findings to be based on facts which support its finding of petitioner not being permanently disabled, so as to prevent petitioner from performing his work as an EMT. The opinions and findings of the two independent doctors are not supported by credible evidence, nor rational. For instance, the initial report of Dr. Patterson indicates on page 5 (Exhibit 7 to the Administrative Record), that there is sufficient evidence to substantiate a psychiatric disability that prevents petitioner from currently performing his duties as an EMT; severity of his Endorsed Posttraumatic Stress Disorder, and recommendation that Mr. Markowski not return to any duty that would expose his active symptoms of Posttraumatic Stress Disorder. The report also indicated that petitioner should be considered permanently disabled from working in areas that would expose him to traumatic events/situations given the severity of his condition and the limited response to treatment. The second report, (Exh. 14 to the Administrative Record), after receiving additional medical information from petitioner's doctors, indicated a different finding. Dr. Patterson opined upon further review, that it was difficult to ascertain if there was an underlying psychiatric problem, therefore finding insufficient evidence to substantiate psychiatric disability due to petitioner's malingering and degree of manipulation. He states that misrepresentation of information from petitioner regarding work related incidents, such as having been bitten, may have impacted his condition. He further states that petitioner's symptoms are highly externalized/environmentally sensitive.

However, absent from the report, is any discussion or explanation of the findings of petitioner's doctors' diagnosis of PTSD, and Major Depressive Disorder. Although additional medical information was requested of petitioner concerning his medical treatment while under the care of Dr. Kelly, none of the findings were addressed by Dr. Patterson. There is no detailed explanation as to the petitioner's ongoing thoughts of suicidal ideation, sleeplessness, increased depression and hopelessness. Nor do any of the reports attempt to explain in detail why the evidence submitted and reviewed independently by Dr. Patterson and Dr. Gerz is being discounted as not valid, and why the evidence they rely upon are more persuasive, nor do they give an explanation as to why the opinions and diagnoses that are not relied upon are incorrect. See, *Matter of D'Avolio v. Nigoro*, 2016 WL 331925 (2nd Dept., 2016), N.Y. Slip Op. 62495(U)(*appeal withdrawn*); Sup. Ct., Index # 17849/14 (7/20/15), citing, *Matter of Quinn v. Cassano*, 29 Misc.3d 1203(A)(Sup.Ct., Kings Co., 2010). Furthermore, when looking through the voluminous Administrative Record which mainly consists of the medical history of petitioner, the report of Dr. Gerz fails to address an addendum by Dr. Georgiou dated 6/9/14 which states petitioner continues to experience

flashbacks and nightmares in addition to multiple depressive related symptoms. Based upon the foregoing, the court finds that the Board's finding that no permanent disability exists is not based on medical certainty or supported by medical findings, and therefore must be deemed irrational. See, Matter of Stock v. Board of Trustees, 38 A.D.3d 562 [2007]; Matter of Guillo v. NYCERS, 39 Misc.3d 1208(A) (Sup. Ct. Kings Co., 2013).

The Board's determination was taken without regard to the facts and lacks a sound basis, and is therefore arbitrary and capricious. The findings were not based upon "an articulated medical opinion" constituting credible and rational evidence. Petitioner's medical history before and after 9/11 was replete with findings for major depressive disorder, and PTSD which were not explained and addressed as to why insufficient proof exists to deem petitioner permanently disabled.

Accordingly, it is hereby ORDERED, that petitioner's application pursuant to Article 78 is granted, and the determination of the New York City Employees' Retirement System, is annulled as arbitrary and capricious, and it is further,

ORDERED, that petitioner is granted ADR pension benefits.

The relief requested by the petitioner directing respondents to serve and file all reports, recommendation, certificates and all other documents submitted to NYCERS, etc., is deemed moot, inasmuch as any and all records appear to have been annexed to the Administrative Record and served upon petitioner's attorney who has not, in reply, stated otherwise.

This constitutes the Order of this Court.

Dated: Brooklyn, New York
February 14, 2017



LISA S. OTTLEY, A.J.S.C.
HON. LISA S. OTTLEY


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