

Matter of Harrison v MTA New York City Tr.
2012 NY Slip Op 32538(U)
September 27, 2012
Sup Ct, NY County
Docket Number: 400913/12
Judge: Alice Schlesinger
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ALICE SCHLESINGER
Justice

PART ~~A~~ PART 16

Index Number : 400913/2012
HARRISON, ROSALYN
vs.
MTA NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *Article 78 petition*
is granted and the matter is remanded for further
processing in accordance with the accompanying
memorandum in decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: SEP 27 2012

Alice Schlesinger
ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of
ROSALYN HARRISON,

Petitioner,

Index No. 400913/12
Motion Seq. No. 001

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

-against-

MTA NEW YORK CITY TRANSIT, an agency of
THE METROPOLITAN TRANSIT AUTHORITY,
STATE OF NEW YORK,

Respondent.

SCHLESINGER, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1412)

In this Article 78 proceeding the petitioner Rosalyn Harrison seeks to annul the December 23, 2011 determination of the respondent MTA New York City Transit (MTA), which denied Ms. Harrison's application for unconditional paratransit (Access-A-Ride) services and found her eligible for services only under certain very limited circumstances. Ms. Harrison also asks the Court to order respondent to immediately certify petitioner's eligibility for unconditional Access-A-Ride services. Respondent has opposed the petition, arguing that the decision has a rational basis in the record and was properly rendered after an informal hearing conducted in accordance with due process of law.

Background Facts

Petitioner Rosalyn Harrison, a resident of Brooklyn, is 67 years old and suffers from a number of physical impairments, including degenerated spinal discs, chronic obstructive pulmonary disorder, arthritis, morbid obesity, edema (swelling in extremities), and poor circulation. She manifests symptoms such as chronic back pain, shortness of breath, weakness on prolonged standing, inability to climb steps, and hypersensitivity to cold weather.

On July 28, 2009, Ms. Harrison was granted conditional eligibility for Access-A-Ride (AAR) services for "extreme cold/inclement weather" during the winter months and for "inter-borough" travel. Upon appeal and after a hearing, her eligibility was expanded to include service for travel "more than 1-2 city blocks" from her location. (See AAR Decision of November 17, 2009, Exh A to Petition). Ms. Harrison used those services until 2011, when she was required to recertify. After an in-person assessment on June 8, 2011, she was granted conditional AAR eligibility only for travel 1-2 city blocks from her location. (See AAR Decision dated July 14, 2011, Exh B to Petition).

As the 2011 services were more limited than those granted in 2009, Ms. Harrison filed an application for additional services in September 2011. (Exh C). She reported there that she was suffering from spinal stenosis, bulging and degenerated discs and arthritis of the spine, asthma, chronic obstructive pulmonary disease, diabetes, edema, and a lack of cartilage in her right knee that allowed the bones to rub together. She further reported that she was unable to board a public transit bus, even when the bus was lowered, because "Climbing steps, even 1 step is very painful ..." Ms. Harrison submitted with her application medical evidence of her condition and physical limitations, which included a September 19, 2011 letter from Dr. Kiril Kiproviski, Ms. Harrison's treating neurologist at the NYU Hospital for Joint Diseases. In the letter, entitled "Letter of Medical Necessity," the doctor stated:

Ms. Harrison is suffering from aggravated lumbar pain and knee pain. She has chronic gait impairment and lumbar spinal stenosis. Due to her medical condition she will need frequent therapy and doctors' visit. It is warranted for her [to] continue to use the Access-A-Ride services to pick her up from her home and return her back home so she can receive appropriate medical care.

Ms. Harrison also submitted with her application a September 27, 2011 letter from her treating physician Dr. Elliott Bondi, the Director of Pulmonary Medicine at The Brookdale University Hospital and Medical Center. Dr. Bondi confirmed in his letter that Ms. Harrison was "unable to walk more than a half-block without marked shortness of breath due to her pulmonary status."

As required, Ms. Harrison also appeared for an interview and functional assessment on September 29, 2011. The report (Exh D) does not clearly state the name of the individual who completed the assessment. Nor does it specify the individual's medical or professional credentials. The examiner did confirm that Ms. Harrison exhibited shortness of breath while walking with a cane and that she had "difficulty walking [and with] steps" and that she exhibited "stiffness in both knees." Significantly, the examiner further confirmed that Ms. Harrison could not climb more than one step to enter the bus, indicating that the "2nd step was too high." Also, Ms. Harrison could not reach the overhead support rail in the bus. Nevertheless, and contrary to the evidence offered by Dr. Bondi that Ms. Harrison was unable to walk more than half a block without marked shortness of breath, and without any explanation as to the testing method used, the examiner found that Ms. Harrison was able to walk 2-3 city blocks in 5 minutes and that she could safely and timely cross a multi-lane intersection. Lacking the necessary equipment, the examiner did not test Ms. Harrison's ability to use a bus lift.

The examiner concluded that Ms. Harrison presented with "asthma, arthritis, spinal stenosis [and] difficulty with walking and steps, SOB [shortness of breath], stiffness in both knees." The recommendation for services was "conditional 1-2 city blocks, stairs restricted." The examiner also recommended services in "extreme cold."

By decision dated October 15, 2011 (Exh E), the MTA determined (similar to its finding in 2009) that Ms. Harrison was eligible for AAR services under the following conditions: "EXTREME COLD, 1 TO 2 CITY BLOCKS." No mention was made of the examiner's finding that Ms. Harrison had difficulty with steps and the recommendation that she be eligible for AAR services when the only available route required climbing stairs [i.e., "stairs restricted"], as in a subway with no elevator at the station. Nor was any of the medical evidence discussed.

Ms. Harrison appealed, and a hearing was scheduled for December 21, 2011 before Diane McFarlane, New York City Transit Eligibility Appeals Director, and Dr. Cassandra Clarke-Belgrave from NYC Transit. Through counsel, Ms. Harrison had filed a Freedom of Information Law request for her records, which were supplied about 1½ hours before the hearing. (Exh G and H). Counsel requested an adjournment of the hearing to review the records, which was denied.

At the hearing, Ms. Harrison testified that she has difficulty walking to the bus stop one block away and that there is no shelter or seating at her stop, which she needed to wait for the bus due to pain upon standing. (Answer, Exh 8). The AAR services that incorporated a bus route were not usable, she explained, because of her difficulty with walking and her inability to climb up the bus steps or reach the overhead rail. Also, extended wait times for some buses made it difficult to schedule medical appointments. This testimony was consistent with the medical evidence and the MTA assessment.

Four pieces of significant medical evidence were also submitted by Ms. Harrison at the hearing. (Petition, Exh I). The first was a "Final Report" prepared for Dr. Kiproviski by two physicians from NYU Imaging based on a radiologic consultation they had completed

on Ms. Harrison on July 22, 2010. The Report confirmed a diagnosis of spinal stenosis with bulging discs and nerve impingement and degenerative spondylolisthesis (displaced vertebrae).

Additionally, Dr. Bondi from Brookdale University Hospital provided an updated letter, dated December 20, 2011. In addition to confirming that Ms. Harrison has "severe chronic obstructive pulmonary disease/emphysema," Dr. Bondi reiterated that Ms. Harrison could not walk more than half a block without difficulty, explaining that:

She is on bronchodilator therapy as well as steroids and is affected by all types of weather conditions, heat, cold, humidity. Even in good weather she is unable to walk more than a half-block without marked shortness of breath. Due to her medical condition her mobility is severely limited in spite of being on maximal therapy.

Additionally, Ms. Harrison submitted a December 20, 2011 letter from her treating general practitioner Dr. Norman Scott, stating that Ms. Harrison's condition "demonstrates the need for Access-A-Ride to her destination and back home." Dr. Scott confirmed Ms. Harrison's asthma, COPD, and "bulging discs in her lumbar spine which shows on her MRI." Additionally, he confirmed "worsening Osteoarthritis of her knees," morbid obesity, bilateral leg edema, and inability to walk a block or climb stairs due to shortness of breath and lower back pain.

The fourth and final piece of medical evidence submitted was an October 25, 2011 letter from Dr. Kirpovski, the treating neurologist, indicating that the lack of transportation services was interfering with Ms. Harrison's treatments. Dr. Kirpovski confirmed that Ms. Harrison is suffering from "aggravated lumbar pain and knee pain [and that she] has chronic gait impairment and lumbar spinal stenosis." He further confirmed that Ms. Harrison is "unable to negotiate stairs and is at high risk of falling."

Despite this compelling evidence justifying expanded services, by decision dated December 23, 2011 (Exh J) the MTA made only a limited amendment to Ms. Harrison's eligibility, allowing AAR services only under the following conditions:

- Service when your only option for travel is by subway and you are unable to go up and down subway stairs
- Service in extreme cold/inclement weather
- Service for distance when the nearest bus stop or subway is more than 1-2 city blocks from your location

No mention was made in the decision of the medical evidence confirming that Ms. Harrison could not walk half a block without marked shortness of breath. No mention was made of the finding by the MTA's own examiner that Ms. Harrison could not climb a second step to board a bus. Indeed, no explanation whatsoever was provided in the decision to support the determination.

Discussion

Preliminarily, petitioner argues that the hearing below was not conducted in accordance with due process of law because Eligibility Appeals Director McFarlane denied counsel's application for an adjournment to review records she had only recently received. The Court is unpersuaded by this argument. The hearing was an informal one not mandated by law, and petitioner has not established that she was prejudiced by the late disclosure of the documents. On the contrary, it appears that Ms. Harrison had participated in the AAR eligibility process several times before, and counsel appeared acquainted with the significant evidence and the issues and equipped to address them.

Quite compelling, however, is Ms. Harrison's assertion that the December 23, 2011 decision, which affirmed as modified the October 15 decision, was arbitrary and capricious

and must be annulled. First, as noted above, the decision includes no discussion of the medical evidence submitted by Ms. Harrison, no details about the methodology used at the MTA's functional assessment nor any indication of the experience and credentials of the individual who completed the assessment, and no findings of fact regarding Ms. Harrison's physical limitations based on a review of the medical evidence. Nor is there any discussion of the role played by Dr. Cassandra Clarke-Belgrave, the physician from NYC Transit who appeared at the hearing without examining Ms. Harrison, and what weight was given to her opinions, as opposed to the opinions of Ms. Harrison's four treating physicians.

Absent such an analysis, this Court cannot find, as the MTA urges, that the respondent's decision was made after a full and fair consideration of all the evidence and is rational. Wholly improper is the MTA's attempt to fill that void by submitting in this proceeding an affidavit from the decision maker Diane McFarlane. The law is well-established that the parties in an Article 78 proceeding are limited to the administrative record and cannot submit new evidence. *Croes Nest Realty, LP v New York State Div. of Housing and Community Renewal*, 92 AD3d 402 (1st Dep't 2012), citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756 (1st Dep't 1982), *aff'd* 58 NY2d 952 (1983).

What is more, on its face, the decision does appear arbitrary and capricious. Citing to 49 CFR 37.123(a)(e)(3), the MTA repeatedly argues that the test for unconditional eligibility is not whether it is "difficult" for Ms. Harrison to use public transportation, but whether instead her impairment-related condition "prevents" her from traveling to a location to board or disembark from public transportation. As petitioner argues, however, the more apt citation is to subdivision (a)(e)(1) of that regulation. That section renders an individual

eligible for AAR services when she is "unable, as the result of a physical ... impairment ... to board, ride or disembark from any vehicle on the system ..."

The medical evidence submitted by Ms. Harrison, along with her own testimony at the hearing, does appear to establish that point. Ms. Harrison herself explained that she is unable to use the public bus system. Even if able to walk to the closest bus stop, once there she is unable to stand and wait more than two minutes for the bus without experiencing severe pain, and there is no seating nor even a shelter to lean against. Contrary to the MTA's conclusion, Ms. Harrison insists that climbing even one step to board a bus is extremely painful. While the MTA nevertheless concluded that Ms. Harrison could climb one step to board a bus, it acknowledged at the hearing that some buses have more than one step, and even the MTA's own examiner agreed that Ms. Harrison is unable to climb a second step. The MTA examiner also found that Ms. Harrison cannot reach the overhead rail on the bus. Thus, even if she could board the bus, she could not ride it unless a seat was available as she cannot stand or reach the rails.

The evidence provided by Ms. Harrison's various treating physicians was consistent with her testimony and supported a conclusion that she is unable to board or ride a public bus. The treating neurologist Dr. Kiproviski detailed Ms. Harrison's "chronic gait impairment" and pain and confirmed that she is "unable to negotiate stairs and is at high risk of falling." Her pulmonologist Dr. Bondi confirmed that Ms. Harrison is "unable to walk more than half a block without marked shortness of breath." Her treating general practitioner Dr. Scott confirmed these conditions and various others that had been confirmed on an MRI and that caused Ms. Harrison to experience severe pain in her legs, knees and back. This pain, Ms. Harrison testified, prevents her from waiting for the bus to arrive, from climbing the steps to board the bus, and from riding the bus.

Respondent limited Ms. Harrison's eligibility for services in a manner that requires her to walk 1-2 blocks, wait at her bus stop standing, and then climb steps to board the bus while hoping for a seat. The decision ignores the credible evidence that she simply cannot perform those functions, and it offers no basis for the decision. This Court declines to itself certify Ms. Harrison's eligibility for unconditional AAR services as requested, but remands the matter to the MTA for further consideration of the evidence and a new, reasoned determination that fully discusses the evidence and provides a rational explanation for any conditions imposed on eligibility.


Accordingly, it is hereby

ADJUDGED that the Article 78 petition is granted and respondent's December 23, 2011 decision limiting petitioner's eligibility for unconditional Access-A-Ride services is annulled; and it is further

ORDERED that this proceeding is remanded to respondent for further processing and a new determination that evaluates the evidence and makes findings of fact consistent with the terms of this decision.

Dated: September 27, 2012

SEP 27 2012



 J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT

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