

**Matter of Cauwels v New York city Tr.**

2013 NY Slip Op 31168(U)

May 28, 2013

Supreme Court, New York County

Docket Number: 400356/13

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
*GAIL CAUWELS,*

Index No. 400356/13

Petitioner,  
For a Judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules

MOTION DATE \_\_\_\_\_

-against-

MOTION SEQ. No. 001

NEW YORK CITY TRANSIT, AN AGENCY OF THE  
METROPOITAN TRANSPORTATION AUTHORITY,

**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).

The following papers, numbered \_\_\_\_\_ were read on this motion

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2, 3

Replying Affidavits 4, 5

CROSS-MOTION: YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/28/13

*Donna M. Mills*

**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
In the Matter of the Application of GAIL  
CAUWELS,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 400356/13

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

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DONNA M. MILLS, J.:

In this special proceeding pursuant to C.P.L.R. Article 78, petitioner Gail  
Cauwels ("Petitioner") seeks to annul, vacate and set aside the determination of  
respondent New York City Transit ("NYCT" or "Respondent" ) which denied her  
application for paratransit services (Access-A-Ride); and an order directing the NYCT to  
grant Petitioner Access-A-Ride services effective as of the date of its filing.

Petitioner is a 48 year old woman with chronic vertigo arthritis, and a history of  
breast cancer. Petitioner first applied for Access-A-Ride services on June 30, 2011. In  
her application, Petitioner claimed that she suffered from unpredictable vertigo.  
Petitioner also indicated that she was currently using the subway and bus for travel and  
that she was registered with the MTA Reduced-Fare MetroCard program. She further  
stated that her disability was permanent and that she sometimes used a cane and also  
the assistance of a friend or family member. In support of her application, Petitioner  
also submitted letters from her doctors, including a letter from her medical doctor at

Sloan-Kettering Cancer Center and her primary physician, indicating that she had recently been diagnosed with cancer, and would be receiving treatments at Sloan Kettering Hospital. As a result of her condition vertigo, the upcoming radiation, and the need for her to travel to her appointments, both doctors recommended that Petitioner be accepted for Access-A-Ride services.

On July 26, 2011, Petitioner appeared for her eligibility assessment at the Access Community Health Center, where she underwent functional testing and an interview. At her assessment, Petitioner indicated to the licensed medical professional, Occupational Therapist Ruth Laube, inter alia, that she had breast cancer and would be starting radiation treatment and she also stated that she had limitations in climbing subway steps and riding escalators.

At the end of her written report, Ms. Laube recommended that Petitioner be granted temporary full eligibility for 12 months just for the treatment of her cancer. The NYCT eligibility staff granted Ms. Cauwels temporary full eligibility for 12 months.

Once Petitioner's temporary eligibility expired around one year later, Petitioner had to reapply to be re-certified for the services, which included coming in for an assessment/interview. On August 8, 2012, Petitioner re-applied for Access-A-Ride services. In her application, Petitioner indicated that the time it took her to get to the nearest transit bus stop or subway station, the frequency of her travels on public transit and her ability to navigate the system depended on her vertigo and how it was affecting her in the moment. She also wrote that she occasionally uses the subway and sometimes has a family member assist her when she travels.

In support of her application, petitioner also submitted two letters from her

doctors, Anthony Jahn, M.D. and Cathy Caron, M.D. recommending that she be approved for Access-A-Ride service based on her condition of vertigo.

On August 16, 2012, Petitioner appeared in person for a functional assessment and evaluation/interview, wherein Licenced Practical Nurse, Jeffrey Bourisquot, evaluated her. At the interview, Mr. Bourisquot noted that Petitioner had chronic episodic vertigo and arthritis and a history of breast cancer. At her functional test, Petitioner was observed to be able to climb bus steps with limitations, walk 2-3 city blocks in 3 minutes, cross a multi-lane intersection in a safe and timely manner, use the fare box, sit with ease, hold onto overhead support rails, use the stop requester and determine destination signs. Mr. Bourisquot recommended temporary full eligibility of Access-A-Ride service for 12 months based on the applicant's condition.

On September 25, 2012, the Transit Authority issued a letter denying Petitioner's eligibility for Access-A-Ride Services. The letter indicated that based on the review of the application, supporting medical documentation and in-person functional assessment, the Transit Authority determined that Petitioner did not show that she was unable to use regular fixed-route bus and subway service. The Transit Authority pointed out that at her functional assessment, she demonstrated that she was able to perform all of the necessary tasks associated with independent travel on fixed-route service, which included, inter alia, walking city blocks, getting on, riding and exiting the bus and subway and exhibiting a functional gait.

Petitioner appealed the denial to the NYCT Appeals Board. Upon reviewing her application, the prior evaluations, and her submitted medical documentation, the

Appeals Board determined that Petitioner had not demonstrated that her medical condition/disability prevented travel on the bus/subway.

Petitioner was notified by letter dated October 24, 2012, that the Board was upholding the decision denying her Access-A-Ride services, since she did not demonstrate that her medical condition/disability prevented her from taking the bus or subway. The letter to Petitioner noted that the medical information submitted provided only general information or a diagnosis and failed to support her claim that her medical condition or disability prevented her from traveling on buses and subways. Further, the letter noted that the functional assessment indicated that the Petitioner was able to walk well without using an assistive device, navigate stairs on the bus, and perform other tasks associated with the use of buses and subways.

In assessing Petitioner's appeal, Dr. Louise Doniyan, M.D. a member of the Appeals Board explained that she carefully reviewed the entire file, including petitioner's 2011 and 2012 applications, her functional assessments, the supporting medical documentation submitted, and that in her professional opinion as a medical doctor, Petitioner, on the whole, could use public transit.

Consequently, Petitioner commended this CPLR Article 78 proceeding seeking such relief as would provide her with round-trip Access-A-Ride transportation to and from her home and her various medical providers.

The Americans with Disabilities Act ("ADA") requires that, for an individual to be considered paratransit eligible, the applicant must be found to be "unable, as a result of a[n] . . . impairment, and without the assistance of another individual . . . , to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable

by individuals with disabilities” (49 CFR § 37.123 [e] [1]). An applicant is ineligible when the applicant’s disabilities do not make the individual “unable” to or “prevent” him from using transportation services available to those without disabilities (see, 49 CFR § 37.123 [e] [3] [1]). An eligibility determination is predicated upon whether an applicant is able to travel on the general public fixed-route system (i.e., subways, buses), and not upon whether an individual has a disability.

Pursuant to the ADA, transit agencies devise the specifics of their individual eligibility processes (see generally, 49 CFR §§ 27, 37). The ADA regulations set only broad requirements that all agencies must incorporate (ibid.).

Respondent NYCT has responsibility for running the day-to-day operations of Access-A-Ride services within the City of New York. NYCT determines which persons with disabilities are eligible for Access-A-Ride services, as required by federal regulations. Eligibility may be with unconditional (full unrestricted use), conditional (partial, restricted use) or denied in all respects. The NYCT uses a two-prong criterion to determine one’s eligibility predicated upon establishing an applicant’s disability and his/her inability to make use of fixed public transportation services.

This is an Article 78 proceeding, and as such, the applicable standard of review is whether the administrative decision was: (1) made in violation of lawful procedure; (2) affected by an error of law; or (3) arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR 7803 [3]). An agency abuses its exercise of discretion if its administrative orders lack a rational basis. “[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by

statute or law" (Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

The court has only a review function and not original jurisdiction to second guess the decision of the administrative agency (Matter of Rocco v Matter of Police Pension Fund, Art. II, 98 AD2d 609 [1<sup>st</sup> Dept 1983]).

Upon such review, this Court is compelled to conclude that the contested determination of the NYCT was not made in violation of lawful procedure, was not affected by error of law and was not arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]).

In this case, the NYCT appeals board acted upon a sound basis in reason and with regard to the facts when it considered the documentary and testimonial record consisting of submissions from Petitioner (applications, medical records, and verbal assertions) and the NYCT (Nurse's assessment). The NYCT confirmed Petitioner's disability as indicated by her application, medical record and testimony, and determined her ineligibility since she performed the tasks necessary for her to utilize the general public fixed route transportation system.


The NYCT Appeals Board appropriately proceeded in a manner consistent with the relevant ADA directives, as the rightful agency responsible for determining the propriety of the complained of eligibility denial.

As a result, Ms. Cauwels's petition must be denied in all respects. However, this decision neither precludes Petitioner from filing a subsequent Access-A-Ride eligibility application with the NYCT from revisiting, upon recertification, the complained of eligibility denial at issue in this proceeding.



Accordingly it is  
ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 5/28/13

ENTER:  
  
J.S.C.

**DONNA M. MILLS, J.S.C.**

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