

**Rivera v Board of Trustees of N.Y. Fire Dept.**

2022 NY Slip Op 32557(U)

July 28, 2022

Supreme Court, New York County

Docket Number: Index No. 156115/2021

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

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JORGE RIVERA,

Plaintiff,

- v -

BOARD OF TRUSTEES OF N.Y. FIRE DEPT.,
SUBCHAPTER II FIRE PENSION FUND, SUBCHAPTER II
MEDICAL BOARD

Defendant.

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INDEX NO. 156115/2021
MOTION DATE 06/27/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Upon the foregoing papers and on-the-record argument, the Court issues the below decision and order.

This court may not substitute its own judgment for that of respondent FDNY Board of Trustees or the FDNY medical board (Matter of Santoro v. Board of Trustees, 217 AD2d 660 [2d Dept 1995]; see also Matter of Borenstein v. New York City Employees' Retirement Sys., 88 NY2d 756 [1996]). However, the board's disability determination must be based on substantial evidence that is, "some credible evidence" (Matter of Borenstein v. New York City Employees' Retirement Sys., 88 NY2d 756 [1996] citing Longo v. City of New York, 178 AD2d

253 [1st Dept 1991] *aff'd* 79 NY2d 1011 [1992]). The FDNY Board of Trustees is permitted to reach a determination contrary to that of the FDNY Medical Board, and need not adhere to the medical board's recommendation of accidental disability, where the FDNY Board of Trustees decision is based on substantial evidence (*Matter of Borenstein*, 88 NY2d 756). However, where the Board of Trustee's determination is not supported by credible evidence or is otherwise arbitrary and capricious, this court is empowered to reverse the board's determination (*id.*).

Here, the Medical Board reviewed records and reports from no fewer than five medical providers treating petitioner over a period of more than two years, including various surgical procedures performed on petitioner (*see* Medical Board Report and Recommendation, NYSCEF Doc. No. 5). The Medical Board's report found a causal link between petitioner's injury and his FDNY training, and thus recommended that petitioner granted an accidental disability retirement (*id.*). The minutes of the FDNY Board of Trustees meeting preceding its vote on whether petitioner was accidentally or ordinarily disabled evince that its determination that an accidental injury did not occur was based, in substantial part, on material *d'hors* the record. There is no evidence, medical or otherwise, supporting a finding other than petitioner was

injured as a result of accidental and sudden dehydration occurring during FDNY training while wearing a moisture proof barrier and thick insulating equipment leading to: compartmental syndrome; surgical intervention; and permanent nerve damage of petitioner's left leg. The Board's finding that petitioner's disability was ordinary and not accidental is not supported by this record.

Accordingly, it is

ORDERED the petition is granted in its entirety, the Respondent Board of Trustee's denial of petitioner's full accidental disability pension is reversed and vacated as arbitrary and capricious and not based on substantial evidence; and it is further

ORDERED that petitioner be awarded the full pension accompanying a finding that petitioner was accidentally disabled as a result of on-the-job training; and it is further

ORDERED that petitioner be awarded attorney's fees for this action in an amount to be determined by a JHO/Referee appointed to hear and determine the issue of appropriate attorney's fees due petitioner; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the “References” link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further


ORDERED that the plaintiff(s)/petitioner(s) shall serve a proposed accounting [pre-hearing memorandum] within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the proposed accounting [pre-hearing memorandum] within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>7/28/2022</u> DATE					 HON. FRANK P. NERVO J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE