

Olsen v Board of Trustees of N.Y. Fire Dept.

2023 NY Slip Op 31559(U)

May 9, 2023

Supreme Court, New York County

Docket Number: Index No. 159322/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 14

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FIREFIGHTER ROBERT J. OLSEN, Petitioner, - v - BOARD OF TRUSTEES OF N.Y. FIRE DEPT, SUBCHAPTER II FIRE PENSION FUND, SUBCHAPTER II MEDICAL BOARD Respondents.	<table border="0"> <tr> <td>INDEX NO.</td> <td><u>159322/2022</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>04/21/2023</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001</u></td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	<u>159322/2022</u>	MOTION DATE	<u>04/21/2023</u>	MOTION SEQ. NO.	<u>001</u>
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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 were read on this motion to/for ARTICLE 78.

Petitioner’s Article 78 petition is denied and this proceeding is dismissed.

Background

Petitioner is a retired firefighter who was denied World Trade Center (“WTC”) injury benefits. Although he was eventually granted Accident Disability Retirement benefits (“ADR”)¹ due to a back injury. Petitioner still claims he is entitled to WTC ADR benefits.

Petitioner participated in the 9/11 WTC recovery effort and, as a result, alleges that he developed asthma and amyotrophic lateral sclerosis (“ALS”) from various toxins and debris around the WTC site. Petitioner was diagnosed with ALS in January 2022 and submitted an Application for Disability Retirement specifying his asthma and ALS as the qualifying conditions for his disability. In February 2022, the Fire Pension Fund Medical Board reviewed

¹ ADR benefits are payable to workers who suffer an accident or injury in the line of duty resulting in a person’s disability or incapacitation that precludes them from working.

petitioner's medical records and conducted an interview of petitioner, ultimately voting to recommend that petitioner be retired with Ordinary Disability Retirement ("ODR").

One month later, the Medical Board reconsidered petitioner's case with respect to his asthma condition, saw a deterioration in his health which they attributed to his progressive ALS, but again concluded there was no evidence of asthma and again recommended ODR.

In June, 2022, petitioner again reapplied for ADR benefits, this time pursuant to a 2019 lumbar spine injury; this time, also noting the advanced deterioration in petitioner's health since the last interview a few months earlier, the Medical Board granted petitioner ADR benefits based on his back injury. But he was still denied ADR under the WTC provisions; the Medical Board found no evidence of asthma (concluding that his breathing difficulties were due to his ALS) and ALS was not linked to WTC activity. The Board of Trustees, the final reviewing body, assessed petitioner's case at the end of June 2022 and ultimately adopted the Medical Board's recommendations: petitioner was granted ADR based on his back injury.

Petitioner commenced this proceeding claiming the Board of Trustee's determination, based upon the recommendation of the Medical Board, was arbitrary and capricious. Petitioner contends the evidence presented clearly demonstrates that he is disabled due to asthma and ALS, and the Medical Board declined to cite credible evidence in its denial of WTC benefits. Petitioner asserts the decisions by the Medical Board are conclusory and argues the court has found in favor of ALS patients for the WTC presumption in the past.

In opposition, respondents argue the petition should be dismissed. Respondents contend that if the Board of Trustee's determination is supported by some credible evidence, the determination must be sustained by the Court. Respondents argue the final determination was based on an extensive and detailed review of petitioner's medical records, and there was no

evidence supporting petitioner's position that his ALS diagnosis was related to exposure at the WTC site. Respondents maintain the determination was rational and reasonable.

Discussion

In an Article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

"Applying for ADR involves a two step process. Initially, the pension fund's Medical Board conducts a physical examination, interviews the applicant, and reviews the submitted evidence, before submitting a recommendation to the Board of Trustees. In the second step, the Board of Trustees votes to either grant or deny ADR benefits" (*Stavropoulos v Bratton*, 148 AD3d 449, 450, 50 NYS3d 2 [1st Dept 2017]).

"A claimant filing for ADR benefits ordinarily has the burden of proving causation in an administrative proceeding. But as part of the legislature's response to the World Trade Center tragedy, a new statute was enacted creating a presumption in favor of ADR benefits for police officers who performed rescue, recovery or cleanup operations at specified locations. . . . Under the WTC presumption, the pension fund bears the initial burden of proving that a claimant's qualifying condition was not caused by the hazards encountered at the WTC site" (*Bitchatchi v*

Board of Trustees of New York City Police Dept. Pension Fund, 20 NY3d 268, 276, 958 NYS2d 680 [2012]). “[A] pension fund could rebut the presumption by ‘competent evidence.’ Under this carefully calibrated framework, we believe that the competent evidence contemplated by the WTC presumption may be equated with the well-established credible evidence standard, provided that the pension fund bears the burden of coming forward with affirmative evidence to disprove causation.... In other words, unlike the typical application for disability benefits, a pension fund cannot deny ADR benefits by relying solely on the absence of evidence tying the disability to the exposure” (*id.* at 281-82).

Petitioner submitted an application for WTC benefits claiming two ailments as a result of exposure to toxins at the WTC site: ALS and asthma. Contrary to petitioner’s claims, ALS is not an enumerated qualifying condition (*see* Retirement and Social Security Law [RSS] § 2[36][c]; *Matter of Hanson v Shea*, 214 AD3d 413, 185 NYS3d 52 [1st Dept 2023] [finding the lower court erred in granting a WTC benefit presumption for ALS]). Thus, petitioner cannot rely on his ALS diagnosis to receive the WTC benefit presumption. That leaves the claim of asthma.

Pursuant to RSS § 2(36)(c), asthma is a qualifying condition entitling an applicant to the WTC benefit presumption. This means that once the applicant shows he or she has asthma and it is disabling, then the burden is on the Medical Board to rebut the presumption that the asthma was the result of exposure at the WTC site. Here, petitioner presented evidence of asthmatic symptoms, but did not establish that he was diagnosed with asthma. Petitioner showed that he had asthmatic bronchitis in 2010 via an imaging report, but the report warned of its reliability due to “poor session quality,” (NYSCEF Doc. No. 21 at 25). Petitioner had no records indicating that he ever visited a pulmonary doctor for asthma, he admitted to the Medical Board that he “does not remember the last time he actually used [an] inhaler,” and he was not using medication

for asthma (NYSCEF Doc. No 22 at 3). Although he does have breathing difficulties now, the Medical Board attributed that to his advancing ALS, not from a claim of longstanding asthma. Therefore, because petitioner never proved he had asthma, no presumption attached and the decision to deny ADR benefits based on claimed WTC asthma was rational.

Although petitioner is correct that there is a presumption of causation for qualifying conditions, the fact is that, here, petitioner did not demonstrate that he suffered from a qualifying condition. He didn't prove he had asthma and ALS is not qualified under the statute.

No one, not the Medical Board nor the Court, denies that petitioner is suffering from horrible medical issues. But the Court is satisfied that respondents' conclusion—that petitioner's ALS diagnosis is not related to WTC exposure and there is no evidence of an asthma diagnosis—is rational.

Accordingly, it is hereby

ORDERED that the petition is denied and this proceeding is dismissed.

5/9/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE