

**Matter of Johnson v New York City Employees'
Retirement Sys.**

2023 NY Slip Op 32427(U)

June 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 519481/2019

Judge: Katherine A. Levine

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At an IAS Term, Part 92 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of June, 2023.

P R E S E N T:

HON. KATHERINE A. LEVINE,

Justice

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In the Matter of the Application of CHRISTOPHER JOHNSON,

Petitioner,

-against-

Index No.: 519481/2019
DECISION AND ORDER

THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES OF THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE MEDICAL BOARD OF THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, AND THE CITY OF NEW YORK,

Respondents.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-10, 15

Opposing Affidavits (Affirmations) _____

18-77, 83

Affidavits/ Affirmations in Reply _____

78, 81

Other Papers: _____

Petitioner Christopher Johnson ("petitioner" or "Johnson") moves for a judgment, pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"): (1) annulling the action of respondent New York City Employees' Retirement System ("NYCERS" or "respondent"), the Board of Trustees of NYCERS ("Board of Trustees"), the Medical

Board of NYCERS (“Medical Board”), and the City of New York (collectively, “respondents”) in denying the petitioner a performance of duty disability retirement (“disability benefit”) under New York Retirement and Social Security Law (“RSSL”) § 507-c, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; (2) directing and ordering respondents to retire petitioner with a three-quarter disability retirement pension; or in the alternative (3) remanding the matter to respondents to further review petitioner’s application for a disability benefit.

Background and Procedural History

Petitioner was appointed as a Correction Officer with the NYC Department of Correction (“DOC”) on January 17, 2008, and became a member of NYCERS on April 2, 2008. He was subsequently appointed to the position of Captain. On November 13, 2013, petitioner sustained injuries to his right arm and hand as a result of an assault by an inmate. On May 7, 2014, petitioner injured his left hand, wrist, and thumb, while trying to restrain an inmate who assaulted him. Petitioner experienced swelling, pain, loss of strength and motion, weakness, numbness, difficulty grasping and had surgery on his left wrist following these injuries. Additionally, petitioner sustained injuries to his back from a motor vehicle accident on July 31, 2015, which were unrelated to his work as a Correction Officer.

On or about January 14, 2016, petitioner filed an Application for Disability Retirement pursuant to RSSL § 507-c¹ (petitioner’s first application) based upon the injuries he sustained during the aforementioned inmate assaults. On July 5, 2016, the Medical Board reviewed petitioner’s application and all of the medical documentation he submitted and performed a physical examination. The Medical Board determined that the injuries petitioner sustained on November 13, 2013 and May 7, 2014, constituted inmate assaults under RSSL § 507-c. However, the Medical Board referred petitioner to a hand specialist, Dr. Roy Kulick, before making a recommendation regarding his disability application. After reviewing Dr. Kulick’s report, the Medical Board determined “that the documentary and clinical evidence fail[ed] to substantiate that Christopher Johnson is disabled from performing the duties of Correction Captain with the Department of Correction” and recommended that his application be denied. On February 23, 2017, the Board of Trustees adopted the Medical Board’s recommendation and denied petitioner’s application.

¹ RSSL § 507-c provides that “[a]ny member in the uniformed personnel in institutions under the jurisdiction of the New York city department of correction, who becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties by, or as a natural and proximate result of, an act of any incarcerated individual or any person confined in an institution under the jurisdiction of the department of correction . . . shall be paid a performance of duty disability retirement allowance equal to three-quarters of final average salary, subject to the provisions of section 13-176 of the administrative code of the city of New York . . .”

On or about January 9, 2017, petitioner filed a second Application for Disability Retirement, this time pursuant to RSSL §§ 507-a, 507-c, 506 and 507 based on bilateral hand injuries related to his use of force on November 13, 2013 and May 7, 2014, as well as back pain, shoulder pain, bilateral leg pain, feet swelling, neck pain, complex regional pain syndrome, hip bursitis, bilateral carpal tunnel syndrome, and cervical disc injuries. The instant action only challenges the denial of petitioner's application for performance of duty retirement disability pursuant to RSSL § 507-c. Petitioner was interviewed and examined by the Medical Board on July 11, 2017. The Board also reviewed the reports of several of petitioner's treating physicians. The Medical Board determined that petitioner was disabled from performing the duties of Correction Captain due to his cervical spine fusion with residuals resulting from the off-duty motor vehicle accident he was in and that he was not disabled due to his left or right hand, lumbar spine or lower extremities. The Medical Board recommended that petitioner's application under RSSL §§ 507-a and 507-c be denied.

Thereafter, petitioner submitted additional medical records to the Medical Board. He was examined by the Medical Board on May 1, 2018, which revealed a positive Phalens test² on the left side and positive carpal tunnel syndrome on the left side, and that he had a grip strength of 50 pounds in both hands. The Medical Board again determined that petitioner was not disabled from the duties of a Correction Captain due to the condition of either of his hands and recommended that his application for performance of duty disability retirement related to these injuries be denied. On August 28, 2018, the petitioner's attorney submitted a memo to the Board of Trustees noting that the Medical Board's own hand specialist, Dr. Kulick, had found numerous positive findings with regard to petitioner's hand. Specifically, counsel pointed to Dr. Kulick's opinion that he did not "feel that there is a reasonable expectation for recovery warranting re-evaluation. The condition is causally related to the accident of the stated date" (NYSCEF Doc No. 4).

On September 4, 2018, the Medical Board reconsidered the application based on additional documentation submitted by petitioner which was a report from Dr. Bhansali, who had conducted an orthopedic IME evaluation of petitioner on August 22, 2018, related to his Workers' Compensation claim. Dr. Bhansali found no numbness on either the right or the left wrist and recommended continued home exercise for both wrists and over the counter medications. The Medical Board found that this new evidence merely indicates that petitioner had not fully recovered from carpal tunnel release surgery he underwent on January 17, 2018, and that there was a need for additional treatment and recovery and thus this did not demonstrate evidence of permanent disability. Accordingly, the Medical Board reaffirmed its recommendation to deny petitioner's application.

² The Phalens test is used in the diagnosis of carpal tunnel syndrome.

On September 18, 2018, the Medical Board issued an addendum in which it considered the operative report submitted by petitioner related to the right carpal tunnel release surgery performed on January 17, 2018, and found that this documentation does not represent significant new information as the Medical Board was previously aware that petitioner had undergone this surgery. The Medical Board stated that it did not find petitioner to be permanently disabled due to the conditions of either his left or right hand and recommended denial of his application on that basis. The Medical Board noted that it had previously found that petitioner is “disabled from performing the duties of Correction Captain with the Department of Correction due to cervical spine fusion with residuals. This disability is unrelated to the inmate contact incidents of November 13, 2013 and May 7, 2014, and is the result of an unrelated motor vehicle accident that occurred on March 3, 2015.”

Petitioner again submitted additional medical reports which the Medical Board considered on February 5, 2019. The Medical Board found that the records indicated that petitioner presented with subjective complaints of pain without deficits on physical examination, and that there was a lack of objective evidence of disability even by the examination reports from petitioner’s own orthopedist. Thus, the Medical Board reaffirmed its previous recommendation to deny petitioner’s application for performance of disability retirement. On May 9, 2019, the Board of Trustees met to consider petitioner’s application. At the meeting, petitioner’s counsel argued that the Medical Board had not fully considered all of petitioner’s treatment notes and merely focused on his range of motion. He noted that petitioner was performing light duty work after the hand injury and that when he injured his back, he was unable to return to work. However, petitioner’s counsel claimed that petitioner had already been impaired from full duty at that time and had surgeries to both his left and right hands. At the meeting, the Board of Trustees noted that Dr. Kulick did not provide a clear indication of whether or not he believed petitioner was disabled as a result of the impairment to his hands. However, Dr. Joseph Bottner, Medical Advisor to the Board of Trustees and Chairman of the Medical Board, informed the Board of Trustees that the Medical Board acknowledged the impairment noted by Dr. Kulick, but determined that the impairment did not constitute a disability (NYSCEF Doc No. 76). The Board of Trustees noted that the fact that petitioner was placed on light duty did not indicate that he was disabled as he was still being treated for his hand injury and had been scheduled for surgery. Petitioner was notified that on May 9, 2019, the Board of Trustees had adopted the Medical Board’s recommendation and denied his application for disability retirement related to his hand injuries.

By Notice of Petition and Verified Petition dated September 4, 2019, petitioner commenced the instant Article 78 proceeding seeking: to annul the Board of Trustees May 9, 2019 determination; an award of disability retirement under RSSL § 507-c; or that the matter be remanded for reconsideration. On or about March 4, 2020, respondents submitted a verified answer.

In support of his petition, petitioner argues that he is entitled to performance of duty disability retirement benefits under RSSL § 507-c as he sustained disabling injuries to his right and left hand as a result of inmate assaults. He contends that the determination of no disability by the Medical Board and the Board of Trustees was arbitrary, capricious and not based on substantial evidence. Specifically, he contends that the Medical Board's determination was not supported by credible evidence as there was no analysis as to how the limitations that petitioner had with regard to his grip strength and range of motion would affect/limit his ability to perform the duties and job requirements of a Correction Captain, which include physical exertion, the ability to physically restrain inmates and carry heavy objects, all of which require significant hand strength. Petitioner also notes that the Medical Board failed to address the effect that the pain medications he was taking would have on his ability to perform the job duties of a Correction Captain. Finally, petitioner asserts that the Medical Board's statement that there was no objective evidence of disability, just subjective complaints of pain without deficits, grossly mischaracterizes the medical records that were presented to the Medical Board and relies only on those that support their determination of no disability while ignoring evidence to the contrary. Accordingly, petitioner argues that the determination was arbitrary and capricious and that the matter should be remanded.

In opposition, respondents argue that the determination to deny petitioner's application for performance of duty disability retirement, based on its finding that he is not disabled as a result of the injuries to his hands is supported by credible evidence. Respondents contend that the Medical Board thoroughly reviewed all of the agency and medical records submitted related to petitioner's work incidents on November 13, 2013 and May 7, 2014, as well as the medical records from his May 3, 2015 motor vehicle accident in making its determination. Additionally, respondents note that the Medical Board interviewed and examined petitioner on three separate occasions and accepted multiple medical documents to supplement and support his application. In this regard, they contend that the Medical Board's determination is supported by the record including Dr. Bhanusali's August 22, 2018 report which found "a partial moderate 50% temporary disability" and that he was still recovering from the surgery he had on January 17, 2018. Respondents further point to the evaluation reports completed by petitioner's orthopedic surgeon, Dr. Dassa, between January 31, 2018 and January 16, 2019, wherein he noted that petitioner could make a fist, although with pain and that his sensation and motor skills were intact. Finally, respondents point to the last physical examination of petitioner by the Medical Board on May 1, 2018, which revealed no objective evidence of a disabling condition noting that he had full range of motion of his shoulders, elbows and wrists. Thus, respondents argue that its determination was based on substantial evidence and is supported by the record and was not arbitrary or capricious.

Discussion

This court is limited by CPLR article 78 to a review of the record before respondent and to the question of whether its determination was arbitrary and capricious based upon that record. *See, Mtr. of Borenstein v NYCERS*, 88 NY2d 756, 761 (1996); *Mtr. of Boyd v NYCERS*, 202 AD3d 1082, 1083 (2d Dept 2022); *Mtr. of Gray v New York State Div. of Hous. & Community Renewal*, 177 AD3d 738, 740 (2d Dept 2019). An “arbitrary action” is one taken without sound basis in reason and without regard to the facts.” *See, Mtr. of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974). If a rational basis exists for its determination, the decision of the administrative body must be sustained. *See, Pell, supra*, 34 NY2d at 230; *Mtr. of Clark v New York State Div. of Hous. & Community Renewal*, 193 AD3d 726, 727 (2d Dept 2021); *Mtr. of Lucas v Board of Educ. of the E. Ramapo Cent. Sch. Dist.*, 188 AD3d 1065, 1067 (2d Dept 2020). A court cannot substitute its judgment for that of the agency so long as the agency’s decision is rationally based on the record. *Borenstein, supra*, 88 NY2d at 761; *Mtr. of Clarke v Board of Trustees of N. Y. City Fire Dept., Art. 1-B Pension Fund*, 46 AD3d 559, 560 (2d Dept 2007); *Mtr. of Vastola v Board of Trustees of the N. Y. City Fire Dept., Art. 1-B Pension Fund*, 37 AD3d 478, 478 (2d Dept 2007); *Mtr. of Santoro v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 217 AD2d 660, 660 (2d Dept 1995).

The award of performance of duty disability retirement benefits to a NYCERS applicant under RSSL § 507-c is a multi-step process. First, the applicant must demonstrate that his claimed disability was the natural and proximate result of an act of an incarcerated individual. (*see Mtr. of Singleton v New York City Employees' Retirement Sys*, 208 AD3d 882, 882 (2d Dept 2022); *Mtr. of Stevens v DiNapoli*, 155 AD3d 1294, 1294 (3rd Dept 2017) (to qualify for performance of duty disability retirement benefits under RSSL § 507-b (a), which contains identical statutory language to RSSL § 507-c (a), a correction officer must make threshold showing that injuries were the result of “direct interaction with an inmate”); *Mtr. of Naughton v DiNapoli*, 127 AD3d 137, 139 (3rd Dept 2015); *Coleman v Board of Trustees of New York City Fire Dep't, Article 1-B Pension Fund*, 224 AD2d 522, 523 (2d Dept 1996). Next, it is the responsibility of the Medical Board to determine whether a member applying for disability retirement benefits is disabled. Accordingly, the Medical Board must conduct its own examination of the applicant and consider all evidence submitted in support of the claimed disability. Finally, “[i]f the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant's claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board’s recommendation regarding causation.” *Borenstein, supra*, 88 NY2d at 760. *See also, Mtr. of Russell v NYCERS*, 155 AD3d 1046, 1046 (2d Dept 2017).

The “Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence.” (*Borenstein, supra* 88 NY2d at 761). “Substantial evidence” has been construed in disability cases, as requiring some credible evidence. *Mtr. of Singleton v NYCERS*, 208 AD3d 882, 883 [2d Dept 2022]. *See also, Borenstein, supra*, 88 NY2d at 760; *Boyd, supra*, 202 AD3d at 1083; *Mtr. of Gibbs v NYCERS*, 161 AD3d 980, 981 (2d Dept 2018); *Mtr. of Hernandez v NYCERS*, 148 AD3d 706, 707 (2d Dept 2017). “Credible evidence has been described as evidence that proceeds from a credible source, which reasonably tends to support the proposition for which it is offered.” *Id.*; *Mtr. of Sorenson v Cassano*, 117 AD3d 1069, 1070 (2d Dept 2014).

It is within the sole province of the Medical Board to resolve conflicting medical evidence and it is “entitled to credit the analysis of its own doctors over that of the petitioner’s doctor.” *Mtr. of Maxwell v NYCERS*, 210 AD3d 1095, 1096 (2d Dept 2022); *Boyd, supra*, 202 AD3d at 1083; *Mtr. of Bradley v NYCERS*, 193 AD3d 847, 849 (2d Dept. 2021); *Mtr. of Servedio v Lee*, 188 AD3d 891, 893 (2d Dept 2020); *Mtr. of Giuliano v New York Fire Dept. Pension Fund*, 185 AD3d 812, 815 (2d Dept 2020).

Here, the Medical Board has determined that the evidence demonstrates that petitioner’s hand injuries were the result of the two inmate assaults he suffered on November 13, 2013, and May 7, 2014. Additionally, the Medical Board interviewed and examined petitioner on several occasions, referred him to a hand specialist for further specialized evaluation and considered the reports submitted from petitioner’s various treating physicians. In addition, in its report dated February 5, 2019, the Medical Board states that it reviewed the job description for Correction Captain. However, the Medical Board found that based upon its own examinations of petitioner and its review of all of the medical reports submitted, that there was no objective evidence to substantiate that he was permanently disabled from performing the duties of a Correction Captain due to the conditions of his hands. In this regard, the Medical Board found that petitioner demonstrated the appropriate range of motion in both hands and that his complaints of pain were subjective. The Board of Trustees discussed the petitioner’s case at length at its hearing on the matter and ultimately decided to adopt a resolution denying the petitioner’s application for disability retirement benefits.

This court finds that the determination of the Medical Board, which was adopted by the Board of Trustees, was supported by credible evidence, including the Medical Board’s own examinations and interviews of petitioner, its review of the records of petitioner’s treating physicians, as well as the reports of the doctors who performed independent medical examinations. As discussed above, “[t]he resolution of conflicting medical evidence is within the sole province of the Medical Board, and it was entitled to credit the analysis of its own doctors over that of the petitioner’s doctor.” *Maxwell, supra*, 210 AD3d at 1096; *Bradley, supra*, 193 AD3d at 849; *Servedio, supra*, 188 AD3d at 891; *Giuliano, supra*, 185 AD3d at 815. Accordingly, respondents’ determination to

deny the petitioner performance of duty disability retirement benefits pursuant to RSSL §507-c, which was based upon the credible evidence of the Medical Board, was neither irrational, nor arbitrary or capricious. *Boyd, supra*, 202 AD3d at 1083; *Bradley, supra*, 193 AD3d at 849; *Mtr. of Solomonoff v NYCERS*, 188 AD3d 700, 701-702 (2d Dept. 2020); *Mtr. of Vargas v. NYCERS*, 95 AD3d 1345, 1346 (2d Dept 2012); *Mtr. of Imbriale v Bd. of Trustees of New York City Employees' Retirement Sys.*, 29 AD3d 995, 995-96 (2nd Dept 2006).

Conclusion

Based on the foregoing, it is hereby

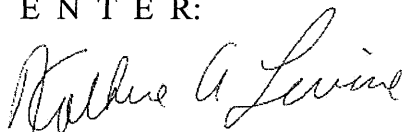
ORDERED that petitioner's application for an order annulling respondents' determination denying his application for a performance of duty disability retirement pursuant to RSSL § 507-c, is DENIED; and it is further

ORDERED that petitioner's request for an award of a RSSL § 507-c performance of duty disability retirement, as a matter of law, is DENIED; and it is further

ORDERED that petitioner's application for an order directing and ordering respondents by way of remand to review the petitioner's application for a performance of duty disability retirement benefit is DENIED.

The foregoing constitutes the decision and order of the court.

E N T E R:



Katherine A. Levine,
Justice, Supreme Court

**HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT**