Matter of Jackson v New York City Empls. Retirement Sys.
2023 NY Slip Op 33075(U)
September 6, 2023
Supreme Court, Kings County
Docket Number: Index No. 509505/2020
Judge: Patria Frias-Colón
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 25
HON. PATRIA FRIAS-COLÓN, J.S.C.

----------X

In the Matter of the Application of Dennis Jackson,

PETITIONER,

Index # 509505/2020
Calendar # 13
Motion Sequence # 1

For a judgment under Article 78 of the Civil Practice Law and Rules,

-against-

DECISION AND ORDER

The New York City Employees' Retirement System,

RESPONDENT.

----------X

Recitation as required by CPLR §§ 2219 of Papers consider on Review of Motion:

Papers	**NYSCEF Document #s:**
Petitioner's Article 78, Exhibits, Memorandum of Law and Appendix…….....	1-29, 35-38
Respondent's Answer, Exhibits and Memorandum of Law in Opposition……..…	44-61
Petitioner's Reply Memorandum and Appendix…….……..……	62-63

Upon the foregoing cited papers and after oral argument on March 8, 2023, the Decision and Order on Petitioner's Article 78 (CPLR § 7804[a]), is as follows:

Petitioner was employed by the New York City Department of Sanitation ("DSNY") until he was separated medically from his position pursuant to Civil Service Law § 73. Petitioner had his Uniformed Sanitation three quarter Accidental Disability Retirement ("ADR") application denied by Respondent New York City Employees' Retirement System ("NYCERS"). Petitioner now seeks annulment of Respondent's denial and declaration that it was arbitrary, capricious, unreasonable, and unlawful. Petitioner wants Respondent to allow him an ADR pension retroactive to his last day on the New York City payroll. In the alternative, Petitioner requests the matter be remanded to Respondent for an appropriate review by a newly composed NYCERS Medical Review Board ("the Medical Board"). In addition, Petitioner seeks, pursuant to CPLR § 2307(a), an Order requiring Respondent to provide all documentation, including the minutes of Medical Board and NYCERS Board of Trustees' ("Board of Trustees") meetings.

For the following reasons, the petition is GRANTED to the extent of annulling the determination of the NYCERS Board of Trustees that denied Petitioner's ADR benefits and remanding the matter for further consideration of proffered medical evidence. The branch of the petition seeking the award of the ADR pension or review by a "newly composed" Medical Review Board, and all other requested relief is DENIED without prejudice.

PROCEDURAL HISTORY

By verified petition filed on June 8, 2020, Petitioner sought relief from Respondent's denial of his pension application. Petitioner was appointed a sanitation worker with DSNY in July 2000 and enrolled in NYCERS the same year. *See* NYSCEF Doc. # 1 at paragraphs 3-4; NYSCEF Doc. # 44 at paragraph 12. On or about March 29, 2017, Petitioner sustained line of duty injuries after being assaulted with brass knuckles while collecting garbage, requiring him to be transported by ambulance to Jamaica Hospital. *See* Doc. # 1 at paras 6-15; Doc # 44 at para 13. The medical records indicate he suffered abrasions to his scalp, ear and face as well as a sustained a shoulder strain. *See* Doc. # 1 at 11-12. Petitioner was released the next day after having received CT scans, x-rays, a tetanus shot and pain medication. *See id.*

After the assault, Petitioner received additional diagnosis and treatment for his shoulder, received psychotherapy and medication for emotional trauma. *See id.* at 16-17. One doctor diagnosed Petitioner as having suffered head trauma, concussion, post-concussion syndrome with cognitive dysfunction, cervical spine derangement and myelopathy, thoracic spine sprain and strain, lumbosacral spine derangement with myofascitis, lumbar radiculopathy, shoulder derangement with tendinitis anxiety, depression, and posttraumatic stress disorder. *See id.* at 17. The doctor prescribed ibuprofen, flexeril, cervical traction for home use, lumbar support, and recommended additional testing and physical therapy. *See id.* A brain MRI showed abnormalities including a right-sided hemispheric infarct. *See id.* at 19. In the subsequent months, Petitioner had additional psychological testing where he was diagnosed with levels of psychological distress. *See id.* at 20-27. Petitioner also underwent additional diagnosis and testing of his right shoulder, followed by arthroscopic surgery. *See id.* at 28-29.

In a November 2, 2017 letter, Petitioner was notified by the Case Management Unit of the DSNY Medical Division that the DSNY Medical Review Board was going to submit applications on his behalf for Accident (RSSL[1] § 605-b)/Ordinary (RSSL § 605) Disability. *See id.* at 33. On or about November 9, 2017, Petitioner submitted to NYCERS a Uniformed Sanitation Three Quarter Accidental Disability pension application pursuant to RSSL § 605-b. *See id.* at 34; Doc # 44 at para 14. His ADR application was supplemented several days later by a NYCERS' Physician's Report of Disability prepared by Petitioner's psychiatrist. *See* Doc. # 1 at 35.

On or about March 22, 2018, Petitioner submitted to a NYCERS Independent Medical Examination ("IME") where he was examined by psychiatrist Dr. Bruce H. David who wrote a report and concluded that Petitioner was "psychiatrically disabled from performing his former duties as a Sanitation Worker due to Post-Traumatic Stress Disorder ("PTSD"), which was caused by the [assault]…[but] he has a reasonable expectation of recovery within a year with continued treatment, which could be enhanced by an increase in his dose of Zoloft[2]…." *See id.* at 38; Doc #

[1]Retirement and Social Security Law ("RSSL").
[2]Zoloft (brand name), also known generically as Sertraline, is an oral medication used to treat depression, panic attacks and PTSD. *See* https://www.mayoclinic.org/drugs-supplements/sertaline-oral-route/descriptions. Possible side-

54 at pages 6, 9. On June 11, 2018, Petitioner was interviewed and examined by the Medical Board, which also reviewed records, including reports by two of Petitioner's psychiatrists and his social worker, an MRI of Petitioner's brain and shoulder, and a report by his orthopedic surgeon. *See id.* at 23, 39; NYSCEF Doc. # 44 at 17-18.

The Medical Board deferred Petitioner's disability application, finding that Petitioner "has not reached maximum medical improvement and there is a good chance he may further improve within a year's time. The Medical Board elects to defer its recommendation in order for Dennis Jackson to completely recover from recent right shoulder surgery." *See* NYSCEF Doc. # 1 at 39.

On or about November 15, 2018, Petitioner was re-interviewed and re-examined by the Medical Board, which also reviewed additional reports from his social worker and orthopedic surgeon. *See id.* at 40; NYSCEF Doc. # 44 at 23. After examining Petitioner, the Medical Board denied his application, concluding there was no asymmetry between the right and left shoulders and that "documentary and clinical evidence fail to substantiate that Dennis Jackson is disabled from performing the duties of Sanitation Worker….The Medical Board notes significant discrepancies in the range of motion of the right shoulder between the exam today [95 degrees]…and that reported from [Petitioner's orthopedic surgeon] in August [140 degrees]…." *See* NYSCEF Doc. # 1 at 40; Doc. # 44 at 26; Doc # 61 at 12.

By letters dated November 27, 2018 and February 1, 2019, Petitioner was informed of the Medical Board's denial of his application for disability retirement. *See* NYSCEF Doc. # 44 at 27. In a January 11, 2019 letter, Petitioner was notified of his termination from DSNY because of his absence from work and inability to perform his duties for more than one year. *See* NYSCEF Doc. # 1 at 41.

In a letter dated February 22, 2019, Petitioner's attorney requested that the Medical Board reconsider its denial because it did not reference Petitioner's psychological trauma nor considered updated medical records from Petitioner's treating psychiatrist and therapist. *See id.* at 42-43 NYSCEF Doc. # 44 at 29. The NYCERS Board of Trustees subsequently referred Petitioner's application back to the Medical Board for reconsideration given said additional information. *See* NYSCEF Doc. # 44 at 28, 30-31. As a result, NYCERS Medical Board re-interviewed Petitioner in the presence of his attorney and a NYCERS employee. *See id*. at 34. Around May of 2019, Petitioner again submitted for an IME evaluation by psychiatrist Dr. David who reported that:

> "[i]nconsistencies in [Petitioner's] treatment record are concerning and do not support significant psychiatric impairment. His treatment providers made no changes to his medications over the past year and continue to prescribe sub-optimal dosing….Also, recommended Prolonged Exposure Therapy has not been provided….[Petitioner] doesn't describe severe anxiety or depression….[H]is

effects of the medication include, but are not limited to, lack of energy, confusion, and aggressive reactions. *See* https://www.mayoclinic.org/drugs-supplements/sertaline-oral-route/descriptions.

> presentation today was consistent with someone attempting to exaggerate his distress….[S]ignificant cognitive impairment, as reported by his treatment providers, has not been observed during either of our two meetings. In sum, the evidence does not support a finding of psychiatric disability."

See id. at 32-33; NYSCEF Doc. # 1 at 45.

On July 23, 2019, the NYSCERS Medical Board affirmed its prior denial of Petitioner's disability application. *See* NYSCEF Doc. # 1 at 46; Doc. # 44 at 35-36. In a November 4, 2019 letter Petitioner's counsel requested NYSCERS remand Petitioner's case to the Medical Board based on additional documentation now being provided, including: an October 19, 2019 social worker's report concluding that Petitioner suffers from PTSD, an October 16, 2019 shoulder MRI report, and a November 1, 2019 orthopedic surgeon's report. *See* NYSCEF Doc. # 1 at 47-48. On January 9, 2020, the NYSCERS Board of Trustees adopted the last recommendation of the NYSCERS Medical Board and denied Petitioner's RSSL § 605-b disability application. *See id.* at 49; Doc. # 44 at 39.

POSITION OF THE PARTIES

Petitioner argues that NYSCERS' denial of his pension application was based on "arbitrary, capricious and irrational decisions of the NYSCERS Medical Board and their psychiatric independent medical examiner." *See* NYSCEF Doc. # 35 at page 4. Petitioner cites several cases to show that NYSCERS' "custom and practice" was to send its members to independent psychiatric examiners who found that the members were disabled "but refuse to grant disability benefits based solely on their own conjecture that the members' condition will improve". *Matter of Abramowitz v. The New York City Employees' Retirement System,* Index No. 22/2018 (Supreme Court, Kings County, Feb. 14, 2019, Ottley, J.); *Matter of D'Avolio v. Nigro*, Kings Index No. 17849/2014 [New York Law Journal {"NYLJ"}, Aug. 13, 2015] [Sup. Ct., Kings County, July 20, 2015, Baily-Schiffman, J.), *appeal withdrawn*, 2016 N.Y. App. Div. LEXIS 8924, 2016 NY Slip Op 62495[U]; and *Matter of LaBella v. the New York City Employees' Retirement System*, Kings Civ. Index No. 473/2019 [Supreme Court, Kings County, Feb. 19, 2020, Rivera, J.).[3] *See id.*

In *Matter of LaBella*, the Kings County Supreme Court found it improper for NYCERS Medical Board to deny a disability application based upon the IME doctor's "unsubstantiated" "conjecture" that "there is a reasonable expectation that with adequate treatment [applicant] would be able to return to full duty within one year." *See* NYSCEF Doc. # 35 at 4. In *Matter of D'Avolio*, the Court rejected as conjecture the prognosis of the IME physician that the member's condition would improve after retirement, finding that "[t]he Board's findings herein are not based upon 'an

[3]This case is pending in the Appellate Division, Second Department, under Docket No. 2020-07794.

articulated medical opinion' constituting credible, rational evidence." *See* NYSCEF Doc. # 35 at 8, citing Kings Index No. 17849/2014.

In *Matter of Markowski v. New York City Empls. Retirement Sys*, 2017 N.Y. Misc. LEXIS 3437, 2017 NY Slip Op 031930(U), the Court rejected the IME physician's finding that "there was a reasonable chance of lessening of petitioner's symptoms with appropriate treatment", holding "that the Board's finding that no permanent disability exists is not based on medical certainty or supported by medical findings, and therefore must be deemed irrational." *See* NYSCEF Doc. # 35 at 8 (quoting 2017 NY Slip Op 031930 [citing *Matter of Stack v. Board of Trustees of the N.Y. City Fire Dept., Art. 1-B Pension Fund*, 38 A.D.3d 562 {2nd Dep't 2007} and *Matter of Guillo v. NYCERS*, 39 Misc.3d 1208{A}{Sup. Ct. Kings Co., 2013}]). *Matter of Meyer v. Board*, 90 N.Y.2d 139, 147 (1997) found an IME's treatment recommendations not "credible evidence" and that it was impermissibly presented to NYCERS in the course of its pension determination. *See* NYSCEF Doc. # 35 at 6.

With respect to Petitioner's shoulder injury, Petitioner avers the IME's range of motion testing was inadequate and therefore the IME's conclusion that Petitioner's shoulder injury was not disabling should be rejected. *See id.* at 10. Petitioner supports his claim by noting that it was the DSNY that removed him from duty and filed his disability application, and that his treating orthopedist determined his injury would permanently prevent him from resuming his job-duties as a sanitation worker. *See id.* at 11. *Matter of Rodriguez v. Board*, 3 A.D.3d 501 (2nd Dep't 2004), *Matter of Lidakis v. NYCERS* (2017 NY Slip Op 32760), and *Matter of Abramowitz v. NYCERS* (Kings Index No. 22/2018 [decided Feb. 14, 2019]) all found NYCERS' pension denial was not supported by the medical evidence and was therefore "irrational" and should not be sustained. *See* NYSCEF Doc. # 35 at 12-13. *Matter of St. Louis v. NYCERS* (2010 NY Slip Op 50426) and *Matter of Giullo v. NYCERS* (2013 NY Slip Op 50539) courts remanded the cases for *de novo* review by a different NYCERS Medical Review Board. *See* NYSCEF Doc. # 35 at 14.

Respondent argues the verified petition fails to allege facts sufficient to state a cause of action under Article 78 of the CPLR, namely that he failed to show he is physically or mentally incapacitated from performing his job requiring dismissal of the petition. *See* NYSCEF Doc. # 44 at 42-44. Respondent avers NYSCER's denial of Petitioner's disability application was not arbitrary or capricious and was thoroughly vetted through repeated and comprehensive examinations of Petitioner and review of multiple medical and psychological reports. For example, "the Medical Board observed that the range of motion was not markedly different between his allegedly injured and non-injured shoulder, and that Petitioner was able to manage his pain with an occasional Advil." *See* NYSCEF Doc. # 44 at 24; Doc. # 61 at page 2. The Medical Board's conclusion was based on credible evidence as opposed to unsubstantiated conjecture and therefore lawful and must be upheld, citing, e.g., *Borenstein v. New York City Employees' Ret. Sys.*, 88 N.Y.2d 756, 760 (1996). *See* NYSCEF Doc. # 61; *see also* Doc. # 44 at 47. Under these circumstances, NYCERS Board of Trustees was bound by the Medical Board's conclusion to deny Petitioner's application. *See* NYSCEF Doc. # 44 at 46-48.

DISCUSSION

RSSL § 605-b(4) (*Accidental Disability Retirement for New York City Uniformed Sanitation Members*) "provides for an annual retirement allowance that is an "amount equal to three-quarters of the member's final average salary" (the ADR). In relevant part, it states that if a member "is determined by NYCERS to be physically or mentally incapacitated for the performance of duty as the natural and proximate result of an accident…sustained in the performance of such uniformed sanitation service…shall be retired for accidental disability." In contrast, RSSL § 605 provides for disability retirement in cases that do not involve an "accident", i.e., Ordinary Disability Retirement ("ODR"); a member who is found to qualify for ODR benefits is entitled to a retirement allowance that is equal to the greater of "(i) one-third of his final average salary; or (ii) one-sixtieth of his final average salary multiplied by the number of years of his credited service."

While the procedure for applying for and securing a disability pension as a result of incapacitation incurred in the course of performing one's duties as a sanitation worker would first involve evaluation and recommendation by the DSNY Medical Review Board, it is solely the NYCERS Medical Board's determination as to the eligibility on medical grounds for disability retirement that is binding on NYCERS Board of Trustees. *See Borenstein v. New York City Employees' Ret. Sys.*, 88 N.Y.2d at 760; *see also Matter of Maxwell v. New York City Employees' Retirement Sys.,* 210 A.D.3d 1095, 1095 (2nd Dep't 2022). A finding of disability by an agency's medical clinic or by another agency is not binding on the NYCERS Medical Board. *See, Drummond v. New York City Employees' Retirement Sys.*, 98 A.D.3d 1116, 1118 (2nd Dep't 2012) (finding of Workers' Compensation Board and Social Security Administration was not binding on Medical Board); *Zamora v. New York City Employees' Retirement Sys.*, 39 Misc. 3d 1202(A) (N.Y. Sup. Ct. Kings Cty., Feb. 6, 2013) (the Medical Board, which "performed its own examinations of petitioner and reviewed all of the evidence before it was not required to adopt the conclusions of another agency" or "to even consider such evidence").

Borenstein involved an assistant warden employed by the New York City Corrections Department ("DOC") who fell at work and suffered injuries to her neck, shoulder, back, hand and wrist. *See* 88 N.Y.2d at 758. Immediate medical evaluation as well as a follow-up medical consultation two weeks later revealed a hand-sprain, neck discomfort but full range of motion and a possible concussion. *See id*. Two months later the plaintiff's doctor diagnosed post-concussion syndrome and cervical and lumbosacral sprains. *See id*. Seven months after the accident, the DOC applied for disability benefits on behalf of the plaintiff, who had been on sick leave since her injury. *See id.* at 759. During her examination by doctors from the NYCERS Medical Board, plaintiff complained of ailments stemming from the accident and while the doctors found some cervical motion limitation, they could not confirm other claimed injuries. *See id.* As the NYCERS Medical Board concluded that plaintiff's complaints did not substantiate her disability claim, it recommended to the NYCERS Board of Trustees that she be denied disability benefits. *See id.* Plaintiff then submitted written opinions from her own doctors contradicting the Medical Board's

findings. *See id.* The NYCERS Medical Board reconsidered her application for ADR following a determination from a Workers' Compensation Board doctor that plaintiff was partially disabled, along with additional medical opinions; re-interviewed and re-examined her. *See id.* It again recommended denial of accidental disability retirement and the NYCERS Board of Trustees agreed and denied her ADR application, notwithstanding the Social Security Administration's approval. *See id.* at 760.

After the Supreme Court denied plaintiff's Article 78 proceeding, the Appellate Division First Department reversed and granted the accidental disability pension. Subsequently, the Court of Appeals reversed the First Department and dismissed the petition. *See id.* In *Borenstein*, the Court of Appeals noted that the process of securing an accidental disability retirement pension involved two steps. First a determination by the NYCERS Medical Board, which must find that applicant is physically or mentally incapacitated for performing city service and whether such disability is a natural and proximate result of an accidental injury received in such city service. *See id.; Matter of Smith v. City of New York*, 208 A.D.3d 1335, 1336-1337 (2nd Dep't 2022) (if the three-physician member pension fund Medical Board concludes that the applicant is disabled, it must then determine whether the disability is a natural and proximate result of an accidental injury). If the Medical Board certifies that the applicant is not medically disabled for duty, the NYCERS Board of Trustees must accept that determination and must deny the claim. *See Borenstein, 88 N.Y.2d at 760.* Second, even if the Medical Board certifies the disability, i.e., the applicant does meet the first threshold, while bound by the Medical Board's finding of disability, the NYCERS Board of Trustees must still "make its own evaluation as to the Medical Board's recommendation regarding causation". *Id.; Matter of Smith v. City of New York*, 208 A.D.3d at 1337.[4]

Borenstein further holds that, upon a challenge to Medical Board's disability determination, the Board's finding will be sustained unless it lacks a rational basis or is arbitrary or capricious; its determination will not be disturbed if it is based on substantial evidence, which the Court of Appeals construed to mean "some credible evidence." *Id.*; *see Matter of Bitchatchi v. Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 N.Y. 3d 268, 281

[4]*Matter of Smith v. City of New York* involved a firefighter that alleged physical and sexual assault by two fellow firefighters. *See* 208 A.D.3d at 1335. Petitioner was subsequently diagnosed with PTSD and the Fire Commissioner approved the submission of a disability retirement. *See id.* The Medical Board recommended that petitioner received the ADR benefits but the Board of Trustee, while agreeing that the petitioner was disabled, denied the ADR and granted an ordinary disability retirement ("ODR"), holding that the disability was not the "result of a service-related accident". *See id. at 1336*. The Supreme Court denied the CPLR article 78 petition and dismissed the proceeding, that was affirmed by the Appellate Division. The Appellate Division found that the denial was not arbitrary and capricious as the "Trustees' determination that the injuries caused by the assault did not result from an accident is rational and not an abuse of discretion or contrary to the law." *Id.* at 1337-1338. The Appellate Division noted that "[a]n 'accident' for public pension purposes occurs 'when a City employee is injured as a result of 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact'" *Id.*(cites omitted). While the injuries alleged from the physical assault in *Smith* and the instant matter are analogous, the instant case rests on the question whether Petitioner is permanently disabled, rather than whether the brass-knuckles assault on Petitioner could be considered an "accident".

(2012); *Maxwell v. New York City Employees' Retirement Sys.*, 210 A.D.3d 1095, 1095 (2nd Dep't 2022)*Matter of Maxwell v. New York City Employees' Retirement Sys.*, 210 A.D.3d 1095, 1095 (2nd Dep't 2022); *Matter of Solomonoff v. New York City Employees' Retirement Sys.*, 188 A.D.3d 700, 701 (2nd Dep't 2020); *Matter of Boyd v. New York City Employees' Retirement Sys.*, 202 A.D.3d 1082, 1083 (2nd Dep't 2022); *see also Matter of Meyer v. Bd. Of Trs. of the New York City Fire Dep't, Article 1-B Pension Fund*, 90 N.Y.2d 139, 147, *rearg. den.*, 90 N.Y. 936 (1997) (defining credible evidence as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered"). But while it is undisputed that a pension board of trustees is entitled to rely upon on a report and recommendation of a pension medical board denying an ADR, "the proceedings should disclose the reason for the denial, and the determination must be set forth in such manner as to permit adequate judicial review." *Matter of Fernandez v. Bd. Of Trs. of N.Y. Fire Dept. Pension Fund, Subchapter 2*, 81 A.D.3d 950, 952 (2nd Dep't 2011); *Matter of D'Avolio* NYLJ at 4. Accordingly, when courts are required to ascertain whether a denial is supported by credible evidence, it looks at the report prepared in support of the denial to see whether the determination is detailed and factual, i.e., supported by articulated, rational and fact-based medical opinion, or whether it is merely a summary conclusion. *See Matter of Meyer*, 90 N.Y.2d at 147-148; *see, e.g., Matter of Bitchatchi*, 20 N.Y.3d at 282 (medical board's reference to "clinical data" in support of its determination was insufficient as it omitted the actual data from its report); *Matter of Fernandez*, 81 A.D.3d at 952 (medical board's explanation was conclusory and thus insufficient in finding that firefighter's drowning did not appear to be a consequence of exposure to toxins at World Trade Center ["WTC"] as it did not address petitioner's evidence that his toxin exposure led to his heart condition which in turn caused him to drown).

In the instant matter, this Court must decide whether the NYCERS Medical Board's finding that Petitioner is not physically or psychologically disabled from performing the duties of a sanitation worker is based on credible evidence and is neither arbitrary nor capricious. As the Court itself is not a medical professional, it is constrained in its conclusions to determining whether the Medical Board adhered to that standard, and not whether it agrees with the Board's ultimate conclusion. *Cf. Matter of Maxwell*, 210 A.D.3d at 1095 (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 petitioner's doctor); *Matter of Boyd*, 202 A.D.3d at 1083 (reversing Supreme Court's annulment of pension denial for corrections officer as Board of Trustees did not ignore alternative causes of disability and was entitled to credit instead the Medical Board's finding that diabetes caused the disability as opposed to a work-related injury); *Matter of Solomonoff*, 188 A.D.3d at 701; *Crews v. New York City Emples. Ret. Sys.*, 2023 N.Y. Misc. LEXIS (Kings County Sup. Ct., July 26, 2023, Frias-Colón, J.). Accordingly, since the Court cannot substitute its judgment for the Medical Board's judgment, this Court's determination is primarily process-driven; i.e., it is based on the Court's determination as to whether the Medical Board's report included an evaluation of the available medical evidence and an explanation of its conclusion, or whether the Board's report was conclusory, speculative, ignored the medical records or just listed the reports it reviewed in making its determination or even contradicted the reports it reviewed.

Aside from the reports it had already received, as authorized by NYCERS Rule 23(a)(4)(b), the Medical Board here took an additional step. It sent Petitioner for an IME with a psychiatrist who concluded that Petitioner, while disabled from performing his job at the time of the March 22, 2018 IME, had a "reasonable expectation of recovery within a year with continued treatment", with the recommendation of a higher Zoloft dosage. *See, e.g.*, NYSCEF Doc. # 17 (April 16, 2018 Report from Bruce H. David, D.O., J.D.). Three months later the Medical Board interviewed and examined Petitioner, reviewed Petitioner's doctors' reports and MRIs of his brain and shoulder. At that time, the Medical Board did not recommend denial of the pension but deferred its decision in part to see how Petitioner would recover following his right shoulder surgery.

In November 2018, the Medical Board again examined and interviewed Petitioner and reviewed additional reports submitted by his social worker and orthopedist. With respect to Petitioner's shoulder, the Board reported that range of motion to his right shoulder improved since its condition was last reported by Petitioner's orthopedist in August of 2018 to the extent it healed sufficiently for him to resume his sanitation duties. Petitioner's claim that his shoulder examination by his orthopedist, who used a goniometer to measure his range of motion (*see, e.g.*, NYSCEF Doc. # 1, at 18) should carry more weight than the Medical Board's conclusion based on its examinations has some merit (*cf. Fiorucci-Melosevich v. Harris*, 166 A.D.3d 581, 581 [2nd Dep't 2018] [one party tested spine with goniometer whereas opposing party did not specify what "objective test" it used]), but it is not conclusive to the Court because the Medical Board's shoulder examinations of Petitioner were more recent than the one performed by Petitioner's own orthopedist.

To the extent that Petitioner disagrees with the Medical Board's determination, asserting that "NYSCERS is in the custom and practice of sending members to their cabal of pseudo-independent psychiatric examiners"[5] it does not warrant the conclusion that this Court should reject out-of-hand the NYSCERS' IME doctors' findings and reflexively reverse Board determinations and award ADR pensions or order "newly comprised" Medical Boards for *de novo* review. Rather, the cases are examples where the reports recommending against a pension award were so flawed and legally inadequate that the Courts had to annul the pension denials.

In *Matter of D'Avolio*, which involved a WTC first-responder, Justice Baily-Schiffman noted that New York City enacted a statute creating a presumption in favor of providing ADR benefits to that specific class of individuals, i.e., the causal relationship between the injury, disease or condition and Ground Zero was presumed. *See Matter of D'Avolio* NYLJ at 4 (citing N.Y. Admin. Code §§ 13-352, 13-353). There, Justice Baily-Schiffman noted that the causation presumption would be inapplicable if the FDNY's Pension Fund Medical Board found applicant was not permanently disabled and further that the Board of Trustees was entitled to rely on the Medical Board's recommendation and that such recommendation would be upheld if the determination was "explained in a detailed, fact-based report…." *See id*. Justice Baily-Schiffman rejected the medical board's report because it was so inaccurate in claiming the applicant presented

[5] NYSCEF Doc. # 35 at page 4.

no evidence he sought treatment for PTSD, panic attacks and anxiety prior to his application for disability benefits, which FDNY's own records contradicted that conclusion. *See id*. Justice Baily-Schiffman also took issue with the fact that more than one-third of the report "merely" listed the documents reviewed, and further, rather than explaining why it discounted certain evidence and found other evidence persuasive, did not cite, much less attempt to rebut, any of the petitioner's medical records as well as FDNY medical records indicating that petitioner's PTSD had not abated. *See id*. at 4-5. Judge Baily-Schiffman also found that the medical board improperly relied on speculation when it concluded that petitioner was not permanently disabled because the Board was optimistic that petitioner would improve after he left the FDNY and moved from New York City. *See id*. at 5-6. citing an accumulation of errors in the report, including when petitioner began counseling sessions, number of negative job evaluations he received and his academic level, the court concluded that it was so insufficient that it resulted in the Board of Trustees taking action "without regards to the facts" and that the only appropriate action to be taken was to annul the denial of the line-of-duty ADR pension benefits and award them retroactively. *See id*. at 6. Contrary to the instant Petitioner's argument, Justice Baily-Schiffman did not go so far as to suggest that NYSCERS IME personnel were biased or incompetent or that any pension denial by a medical board should be viewed skeptically, much less rejected automatically.

In *LaBella v. NYCERS*, Justice Francois Rivera annulled the denial of the petitioner's application for WTC disability retirement benefits, holding that the reports of two IME physicians were conclusory and internally inconsistent with each other; their "conclusions that he somehow can be rendered able to work with a year of treatment to have no foundation [or] no basis". *See* NYSCEF Doc. # 36; Decision and Hearing Transcript at 41. In finding that the Medical Board's conclusion was arbitrary and capricious, the Court noted that aside from not stating what records an IME doctor had reviewed, Medical Board's report also wrote there was a cure for plaintiff's condition without any indication whether plaintiff declined the treatment. *See* NYSCEF Doc. # 36, Transcript at 28 and 40.

In *Abramowitz v. NYCERS*, (NYSCEF Doc # 38), after examining the ADR pension applicant and reviewing his doctor's reports, the Court held that the FDNY's Medical Board's determination was arbitrary and capricious and had to be reversed because the IMEs "fail[ed] to address the totality of medical issues in that there is only discussion of the upper respiratory issues" especially "where more than a single cause of a disabling condition conceivably exists". *See id.* There, the Medical Board determined that petitioner's role as a WTC first-responder and his subsequent ailments, including pulmonary, sinus, acid-reflux and depression, did not render him disabled from performing his EMT duties and that his respiratory problems were primarily caused by weight gain (citing *Abramowitz* decision at page 6). Further, that Court found the FDNY not only failed to rebut applicant's claims of disabling conditions, but its chief medical officer (who was not on the Medical Board) found applicant to be disabled permanently as "unfit for EMS

activities". The Court concluded the Medical Board failed to explain its conclusion in a "detailed" report, as required by *Borenstein*. *See id*.[6]

In *Matter of Fernandez*, where a firefighter at a family picnic drowned in shallow water five years after 9/11 and his estate filed a petition seeking an award of WTC-related accidental death benefits, the FDNY Board of Trustees, without court-intervention, did remit the accidental death-benefit application back to the medical board *twice* to consider additional evidence presented by the petitioner. See 81 A.D.3d at 951. While the Second Department does not appear to be questioning the efforts made by the medical board to review petitioner's evidence, it took issue with its report which stated "only that it had reviewed the additional evidence and 'unanimously agree[d] that our previous recommendation [to deny the accidental death benefits application] remain unchanged'…. without providing any additional explanation." *See id*. While the Second Department found that the explanation provided by the medical board was insufficient and reversed the trial court's denial of petitioner's challenge to the FDNY Board of Trustees' determination, it did not go so far as to order that petitioner be awarded WTC-related accidental death benefits and instead ordered that the board's determination be annulled and remitted the matter to the medical board for further consideration of the evidence presented by petitioner in order to make "a recommendation to the [board], followed by a new determination by the [trustees]." 81 A.D.3d at 950, 952-953.

Petitioner seeks the alternative relief of a remand for "an appropriate review by a newly composed" Medical Review Board. Such remand "determinations…have been…[made] where the medical evidence did not sustain the determination, the record did not reveal a rational evaluation of the medical evidence, or where the basis of a determination was not adequately articulated." *Matter of Quinn*, 29 Misc. 3d 1203[A], 2010 NY Slip Op 51678[U], 13-14 (citing *Matter of Stack v. Board of Trustees*, 38 A.D.3d 562); *see also Abramowitz v. N.Y. City Emples. Ret. Sys.*, 2016 NYLJ LEXIS 4870 (annulling Board of Trustees' denial and remanding for further consideration of all proffered medical evidence); *cf. Crews v. New York City Emples. Ret. Sys.*, 2023 N.Y. Misc. LEXIS 3951 (remand for further review by medical board and pension denial annulled where denial was not based on substantial evidence as it was not supported by adequate proof that injury was not an "accident"). While the Medical Board is entitled to resolve conflicts

[6] *Abramowitz v. NYCERS* was initially reviewed in the Supreme Court several years prior (*see Abramowitz v. N.Y. City Emples. Ret. Sys*., 2016 NYLJ LEXIS 4870 [Graham, J.]). Justice Graham noted that after the FDNY's chief medical officer found plaintiff to be permanently unfit for EMS activities due to WTC-caused ailments, plaintiff applied for a tax-free, three-quarter disability pension, he submitted to a NYCERS Medical Board interview and exam, after which they deferred its final recommendation. *See* 2016 NYLJ LEXIS 4870 at 2. Justice Graham noted the Medical Board's conclusion that plaintiff's WTC-related asthma was not disabling and secondary to his weight gain of 57 pounds therefor recommending denial of plaintiff's ADR to the Board of Trustees. Justice Graham acknowledged that at plaintiff's request, the Medical Board conducted multiple examinations and reviews of plaintiff's medical records and made several additional findings while adhering to its first determination, e.g., that plaintiff's psoriasis could have been better controlled via a different medication. *See id*. at 3-5. Notwithstanding the Medical Board's multiple reviews of the application, plaintiff's petition was granted, the Board of Trustees denial was annulled, and the application was remanded back to the Medical Board, because it was unclear whether the Board reviewed all the medical evidence. *See id*. at 6-7.

in the medical evidence and rely on its own physical examinations of the applicant, "fairness demands that all available relevant evidence medical evidence be considered by the medical board and the board of trustees before petitioner's claim to accidental disability retirement may properly be rejected." *Matter of Kiess v. Kelly*, 75 A.D.3d 416, 417 (1st Dep't 2010) (further remand ordered by court when medical board, following remand from Board of Trustees to consider new evidence, failed to include in its new report its findings and explanations about the significance, if any, of the new evidence).

Based upon the record in this case, it is unclear whether the Medical Board actually considered all of the medical evidence. Further, the Medical Board did not articulate adequately how Petitioner could perform the physical duties of a sanitation worker given the limitations of his range of motion that its own physical examinations revealed. At the same time, while NYCERS Medical Board can provide an updated evaluation of petitioner's current range of motion to his shoulder and a medical conclusion as to what level of shoulder impairment would not be disabling, if Petitioner fails to provide additional records beyond his orthopedic surgeon's report from August 2018 that support the level of impairment claimed by him in 2018, that will factor into the Court's subsequent review.

The Medical Board also failed to explain how Petitioner would be able to perform all of his duties if his anti-depressant or anti-anxiety medication dosage was increased, and there appears to be a speculative aspect to Dr. David's determination, especially if potential side-effects of an increased dosage are not considered. As such, the Medical Board's final determination is not in "such form as to permit adequate judicial review. *See Matter of Fernandez,* 81 A.D.3d at 952; *Perkins v. Board of Trustees of the New York Fire Department Article 1-B Pension Fund*, 59 A.D.2d 696, 697 (1st Dep't 1977). An agency's failure "to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review." *Montauk Improv., Inc. v Proccacino*, 41 N.Y.2d 913, 914 (1977); *see also Matter of Cohen v. New York State & Local Employees' Retirement Sys.*, 81 A.D.3d 1156, 1157-1158 (2nd Dep't 2011) (hearing officer's failure to address issue in opinion prevented court from confirming that the opinion was rational); *cf. Stone Landing Corp. v. Bd. Of Appeals*, 5 A.D.3d 496, 497-498 (2nd Dep't 2004). Accordingly, the Court finds that the matter should be remanded for a *de novo* review by the Medical Board followed by the requisite determination by the Board of Trustees. *See Samadjopoulos*, 104 A.D.3d 551, 553 (1st Dep't 2013) (it was arbitrary and capricious where respondents admitted petitioner suffered from several qualifying conditions but failed to point to any medical evidence to rebut the conclusion that the conditions are disabling).

For the following reasons, the petition is GRANTED to the extent of annulling the determination of the Board of Trustees denying Petitioner's application for ADR benefits and remanding the matter for further consideration in light of all the proffered medical evidence. However, the Court DENIES the remainder of Petitioner's application, including the branch of the petition seeking review by a "newly composed" Medical Review Board. Petitioner does provide case law to support this application nor that the IME physicians relied upon or the Medical Board

itself should be disqualified from reconsidering Petitioner's application. The cases cited *supra* did not require a "newly composed" medical board be created but merely required that a new review be done by the medical board. *See, e.g., Matter of Fernandez*, 81 A.D.3d at 953; *Crews v. New York City Emples. Ret. Sys.*, 2023 N.Y. Misc. LEXIS; *Abramowitz v. N.Y. City Emples. Ret. Sys.*, 2016 NYLJ LEXIS 4870.

The portion of the Petition demanding documents from Respondent pursuant to CPLR § 2307(a) is likewise denied, with leave to renew, if necessary, after Respondent's new evaluation of Petitioner's application. Respondent asserts that it provided Petitioner with all medical records, and NYSCEF does reflect the inclusion of NYCER medical reports, Medical Board minutes and correspondence. *See, e.g.*, NYSCEF Doc. #s 17-20, 23, 49 and 51-59.

A copy of this Decision and Order with Notice Of Entry shall be served by Plaintiff upon Defendant within (30) days of its entry.

This constitutes the Decision and Order of this Court.

Date: September 6, 2023
Brooklyn, New York

Hon. Patria Frias-Colón, J.S.C.