

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

2023 NY Slip Op 33292(U)

September 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 513492/2022

Judge: Robin S. Garson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 75

PRESENT: Hon. Robin S. Garson, Justice

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In the Matter of the Application of

DANIELLE MYERS,

Petitioner,

ORDER

Motion Seq. 1

-against-

Index No.: 513492/2022

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 papers were read on this motion by Petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules.

	<u>Papers Numbered</u>
Petition	#1-19 (Exhibits A-P)
Answer	#25-50 (Exhibits A-X)
Reply Memorandum	#51-52

Upon the foregoing papers and after hearing oral argument, it is,

ORDERED that Petitioner's CPLR article 78 Petition is granted to the extent that the decision of the New York City Employees' Retirement System ("NYCERS") denying Petitioner disability retirement benefits is annulled and this matter is remitted to NYCERS for a new determination consistent with this Order.

In a CPLR Article 78 proceeding challenging a disability determination, the findings of the Medical Board will be sustained unless it lacks a rational basis, or is arbitrary or capricious.

See Borenstein v. N.Y.C. Employees' Retirement System, 88 N.Y.2d 756, 760 (1996).

In determining whether the member is incapacitated from the duties of their job, the member's application goes through a two-step disability application process. First, the Medical Board examines the member and determines whether they are physically or mentally incapacitated for duty. Matter of Borenstein v. N.Y.C. Employees' Retirement System, 88 N.Y.2d 756, 760 (1996). If they are found to be disabled, the Medical Board makes a recommendation to the Board of Trustees whether the disability was the result of an accident or an incident. Id. In the second step, the Board of Trustees reviews the Medical Board's recommendation. Id. While the Board of Trustees is bound by the finding of disability, they must make their own evaluation as to the Medical Board's recommendation regarding causation of disability. Id.

The Board of Trustees is entitled to rely on the Medical Board's recommendation, even when faced with conflicting evidence, as long as it is based on some credible evidence. See Bailey v. Kelly, 11 A.D.3d 208, 208 (1st Dep't 2004); Bevers v. N.Y.C. Employees' Retirement System, 179 A.D.2d 489, 490 (1st Dep't 1992). However, a pension fund's Board of Trustees has a duty to scrutinize a Medical Board's actions and findings, and not simply adopt a deficient denial. See Brady v. City of New York, 22 N.Y.2d 601, 605-607 (1968); Pamlanye v. McGuire, 111 A.D.2d 721, 723 (1st Dep't 1985).

It is well settled that the Medical Board is "free to come to any conclusion supported by the medical evidence before it, [but] the board could not disregard" the competent evidence before them." Matter of Salvia v. Bratton, 159 A.D.3d 583, 584 (1st Dep't 2018); see also Matter of Agnelli v. Bratton, 96 A.D.3d 471, 472 (1st Dep't 2012) ("The Board has not considered all of the medical evidence or adequately explained its reasoning, but has simply gone through pro forma exercises....). "Courts have found an absence of the required quantum of credible

evidence when the denial ‘was premised only on a summary conclusion of no causation and lacked any factual basis.’” Matter of Fernandez v. Bd. Of Trustees of N.Y.C Fire Dep’t Pension Fund, 81 A.D.3d 950, 952 (2d Dep’t 2011) (*quoting* Matter of Meyer v. Bd. Of Trustees of N.Y.C. Fire Dep’t Pension Fund, 90 N.Y.2d 139, 147 (1997)). The Medical Board and Board of Trustees must provide an “articulated, rational, and fact-based medical opinion.” Id.

Here, the Court finds that the decision of NYCERS to deny Petitioner’s Accidental Disability Retirement benefits is arbitrary and capricious on several grounds.

Petitioner’s application was remanded previously, wherein the Court indicated that NYCERS failed to articulate rationally how Petitioner is able to perform all of her duties as a sanitation worker with her shoulder injuries. The job duties of a sanitation worker are strenuous and require frequent lifting and carrying of very heavy bags and other items in all types of weather conditions. Respondents’ failed to comply with the prior order of the Court.

On December 17, 2014, Petitioner underwent a right shoulder arthroscopic repair of the superior labrum anterior and posterior tear superiorly. (Petitioner’s Exhibit G at 9-11). Petitioner was undergoing physical therapy from March of 2015 through October of 2016. (Petitioner’s Exhibit I). These physical therapy records confirm that Petitioner had pain and weakness in her right shoulder, and that Petitioner could not sustain gains achieved in therapy sessions for more than several hours. (Exhibit I at 9). They also state that Petitioner is “unable to perform activities over shoulder level due to weakness and shoulder instability.” (Petitioner’s Exhibit I at 8).

On June 22, 2015, Petitioner’s surgeon Dr. Dov Berkowitz, indicated that Petitioner “would have difficulty returning to the heavy lifting requirements of a sanitation worker due to complications with her right shoulder.” (Petitioner’s Exhibit G at 16).

On February 26, 2016, Petitioner was seen by Dr. Daniel W. Wilen, M.D. (Petitioner's Exhibit I). In his report, Dr. Wilen stated that Petitioner is disabled, that she has a clicking sensation in the right shoulder, that she has decreased range of motion in the right shoulder, tenderness on palpation of the right shoulder, and decreased strength. The physicians findings are supported by the objective findings in the April 11, 2016 MRI to the right shoulder. (Petitioner's Exhibit I at 1-2). The MRI revealed that even post-surgery, Petitioner had continued significant anatomical abnormalities.

The Medical Board's own examinations also suggest significant limitation. In her March 21, 2019 examination by the Medical Board, it was found that Petitioner had decreased forward flexion to 130 degrees, which is 50 degrees less than normal. (Petitioner's Exhibit O at 6). The Medical Board found that she had decreased internal rotation on the right, and that "she is unable to tolerate passive range of motion with the arm abducted at 90 degrees and external rotation to 70 degrees with internal rotation of the arm 10 degrees producing the complaint of muscle cramping." Id.

The Medical Board had a consulting radiologist review Petitioner's post-surgical MRI and the consulting radiologist confirmed an impression that noted tendinosis of the distal supraspinatus tendon, intrasubstance degenerative change in the superior labrum, degenerative changes in the osseous glenoid, mild AC joint arthrosis, and fluid in the subacromial bursa. (Petitioner's Exhibit O at 13).

The Medical Board also incorrectly indicated that Petitioner had no atrophy in her right arm, when their findings suggest exactly the opposite. On August 8, 2016, the Medical Board noted that Petitioner had biceps circumference of 10.5" on the right, and on March 21, 2019, the Medical Board noted a biceps circumference of 9.5" on the right demonstrating a nearly 10%

loss of muscle mass in the biceps in that timeframe. (Petitioner's Exhibit J at 13; Petitioner's Exhibit O at 6). These same reports show only 1/8" difference in the left biceps circumference in that same timeframe. Id.

The Medical Board failed to explain how Petitioner could lift furniture, and lift hundreds of heavy large black trash bags on a daily basis with her impairments. The Medical Board's summary conclusion which failed to address this issue as they were instructed to do by Justice Wooten's prior Decision and Order, establishes that their determination lacked the support of credible evidence and was arbitrary and capricious.

Second, NYCERS' summary conclusion that petitioner's injury was not caused by an accident is also arbitrary and capricious. On May 20, 2013, petitioner was getting out of her sanitation truck, when she stepped in a pothole, which caused her to twist her ankle and fall hard on her right shoulder.

New York Courts have defined an accident as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." Lichtenstein v. Bd. of Trs. Of the Police Pension Fund of the Police Dep't of the City of New York, 57 N.Y.2d 1010, 1012 (1982).

The facts of this case are nearly identical to Matter of Pratt v. Regan, 68 NY2d 746 (1986). In that Court of Appeals case, a Rochester fireman was injured when he exited a fire truck at normal speed, wearing approved safety shoes, and caught his right heel on the running board, lost his balance, and came down on his left leg in a pothole. The Court of Appeals indicated that "catching a heel on a running board and thus losing balance may be a risk of the work performed, but coming down hard upon the other foot in a pothole is not. Thus, it was a sudden, unexpected event. The Comptroller's determination should, therefore, be annulled." Id. at 747-748; see also Lanni v. N.Y.C. Employees' Retirement System, 189 A.D.3d 841 (2020)

(Sanitation supervisor's trip and fall on loose and broken sidewalk is not a risk of his ordinary employment duties).

Finally, the Medical Board indicated that Petitioner's May 20, 2013 injuries were not the natural and proximate cause of her right shoulder surgery. The Medical Board's conclusions regarding this issue are also arbitrary and capricious as it relied upon conjecture and speculation. The Medical Board indicated that a consulting radiologist who reviewed a July 3, 2013 MRI of the right shoulder nearly seven years after it was taken noted that there was no indication that Petitioner suffered from a SLAP labral tear. (Petitioner's Exhibit O at 10). This consulting radiologist incorrectly read the MRI as if Petitioner had already undergone a right shoulder arthroscopy, when Petitioner's surgery occurred more than one year later.

However, the original radiologist that reviewed the MRI indicated that there was a suspected SLAP labral tear because of a signal abnormality beneath the superior labral segment. (Petitioner's Exhibit E at 65). Dr. Berkowitz also noted that Petitioner had a positive O'Brien's test which is indicative of a potential SLAP tear. Petitioner's right shoulder arthroscopy confirmed the suspected SLAP labral tear and a posterior labral tear. (Petitioner's Exhibit G at 10). The Medical Board failed to offer any other causal link for Petitioner's shoulder tears and the resultant surgery, when the logical sensible culprit for the tears and surgery was the May 20, 2013 injuries.

The credible evidence standard is not satisfied when the Medical Board and Board of Trustees determination is based upon conjecture and unsupported suspicion. Matter of Stavropoulos v. Bratton, 148 A.D.3d 449, 452 (1st Dep't 2017). The Medical Board's conclusion on this issue resorted to relying upon conjecture and unsupported suspicion regarding

the SLAP tear and the surgery that was necessitated by Petitioner’s May 20, 2013 injuries, and thus lacked the support of credible evidence. As such, it is hereby:

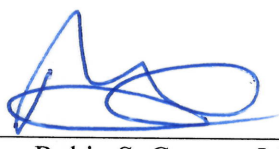
ORDERED and ADJUDGED that upon remand the Medical Board review, analyze, and explain how Petitioner can perform the rigorous job duties of a sanitation worker in light of the deficits in her right shoulder. Specifically, the Medical Board must explain how an individual with tendinosis, degenerative changes, and other findings as confirmed in her post-surgical MRI could perform the heavy and physically rigorous job duties of a sanitation worker; and it is further

ORDERED and ADJUDGED that Petitioner’s injuries are nearly identical to the firefighter in Pratt. Accordingly, upon remand NYCERS is to compare Petitioner’s injury to that of the firefighter in Pratt, and specifically provide citation to cases if they find that Petitioner’s injuries were not accidental; and it is further

ORDERED and ADJUDGED that the Medical Board review, discuss, and provide a detailed explanation as to why Petitioner’s MRI that showed a suspected SLAP labral tear because of a signal abnormality beneath the superior labral segment, which was later confirmed during the surgery, did not establish a causal link. If the Medical Board still determines that Petitioner’s May 20, 2013 injuries was not the natural and proximate result of Petitioner’s right shoulder arthroscopy, they are to provide another causal link as opposed to continued reliance on conjecture and speculation.

This constitutes the Order of the Court.

ENTER:

9.22.23 

Hon. Robin S. Garson, J.S.C.

HON. ROBIN S. GARSON
A.J.S.C.