

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH **PART** **12M**

Justice

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ALFRED SHWE,

Petitioner,

- v -

JESSICA S TISCH, THE BOARD OF TRUSTEES OF THE
NEW YORK CITY POLICE PENSION FUND, ARTICLE II

Respondent.

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INDEX NO. 152835/2025

MOTION DATE 03/03/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38

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

BACKGROUND

Petitioner is a former police officer in the New York City Police Department (“NYPD”). On October 22, 2020, while on duty as a police officer with the NYPD, Petitioner responded to a radio call regarding an emotionally disturbed armed male in the Bronx. Upon Petitioner’s arrival on the scene, and as Petitioner approached him, the armed male pointed a gun at Petitioner. Petitioner then opened fire on the suspect.

In a subsequent interview with the independent Article II Medical Board,¹ Petitioner stated that at the time of the accident, he believed that he would die from the suspect shooting him (Article II Medical Board Examination of Petitioner dated October 31, 2023, NYSCEF Doc.

¹ The Article II Medical Board evaluates applicants for disability retirement, and makes a recommendation to the Board of Trustees as to whether accident disability retirement, or ordinary disability retirement should be granted to the applicant.

No. 13 at 3). In a report from Forensic Psychologist Dr. Marc Janoson,² Petitioner stated that he mistakenly thought that his return fire killed the suspect (Dr. Janoson Psychological Evaluation of Petitioner dated September 15, 2022, NYSCEF Doc. No. 8 at 2). Neither was true. The suspect did not shoot Petitioner, and Petitioner's shooting did not cause the suspect to be killed. Nonetheless, following this incident, Petitioner was diagnosed with post-traumatic stress disorder ("PTSD") by both his own treating medical health professional (Dr. Samuel A. Kolander, Letter dated March 20, 2022, NYSCEF Doc. No. 7), and the NYPD's Psychological Evaluation Section (Dr. Vanja Radoncic, Evaluation dated May 19, 2023, NYSCEF Doc. No.10). Following Petitioner's examination by the independent Article II Medical Board, the Board confirmed that the cause of Petitioner's PTSD was the above shooting incident (Article II Medical Board Examination of Petitioner dated October 31, 2023, NYSCEF Doc. No. 13).

The Article II Medical Board recommended approval of Petitioner's application for Accident Disability Retirement ("ADR") as opposed to Ordinary Disability Retirement ("ODR"). Petitioner states that following the Article II Medical Board's recommendation, the NYPD Medical Division submitted an application³ on Petitioner's behalf to the Board of Trustees of the New York City Police Pension Fund ("Board of Trustees") in order to determine if Petitioner should be retired with ADR benefits. The application also included an application for ODR benefits, in the event that Petitioner's disability was not determined to be the result of an "accident," a requirement for being granted ADR.

² Petitioner was referred to Dr. Janoson by his attorneys in order to "ascertain [Petitioner's] current Emotional and Psychodynamic Status" (Dr. Janoson Psychological Evaluation of Petitioner dated September 15, 2022, NYSCEF Doc. No. 8 at 6).

³ The application is submitted by a NYPD Surgeon or NYPD official on behalf of a police officer.

Petitioner's ADR and ODR applications were considered by the Board of Trustees. The Board of Trustees is composed of 12 voting members: six City representatives, including the Police Commissioner, the Mayor's representative, the Comptroller, and the Commissioner of the Department of Finance; and six Police Union representatives from various labor unions representing the uniformed members of the NYPD.

Petitioner's ADR application was denied in a 6-6 tie vote between members of the Board of Trustees. When the Board of Trustees' vote results in a tie, the determination is a denial of ADR (*City of New York v Schoeck*, 294 NY 559 [1945]). In addition, "[u]nless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident, the decision of the board of trustees denying accidental disability benefits as a consequence of a tie vote must stand" (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y. Article II*, 60 NY2d 347, 352 [1983]).

Given the tie vote, the final determination of the Board of Trustees was that Petitioner's disability was not the result of an "accident" as required for granting ADR, but was instead the result of the normal duties of a NYPD officer. Following that determination, Petitioner filed this Petition under Article 78, arguing that the decision of the Board of Trustees was arbitrary, capricious, unreasonable, and unlawful.

LEGAL STANDARD

Under the Administrative Code § 13-252, ADR is granted if "medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of willful

negligence on the part of such member.” The Court of Appeals has held that an accident for these purposes is a “sudden, fortuitous mischance, out of the ordinary and injurious in impact” (*Matter of Lichtenstein v Board of Trustees of the Police Pension Fund of Police Dept. of the City of New York*, 57 NY2d 1010, 1012 [1982] quoting *Johnson Corp v Indemnity Ins. Co. of North Amer.*, 6 AD2d 97, 100 [1st Dept 1958]). Moreover, the First Department has held that “injuries sustained while performing routine duties but not resulting from unexpected events ... are not accidental, [while] those sustained by a precipitating accidental event... which was not a risk of the work performed” are accidental (*Matter of Carr v Ward*, 119 AD2d 163, 165 [1st Dept 1986] quoting *Matter of McCambridge v McGuire*, 62 NY2d 563, 568 [1984] [internal quotations omitted]).

Administrative Code 13-353 states,

If [a medical examination of a member in city-service for accident disability benefits] shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of willful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

A medical board’s recommendation as to whether ADR or ODR should be granted is not binding upon the Board of Trustees. However, the decision of the Board of Trustees must be “rational and not an abuse of discretion or contrary to the law” (*Smith v City of New York, Fire Dept, Board of Trustees*, 208 AD3d 1335, 1337-38 [2d Dept 2022]). As a court of concurrent jurisdiction in this county recently held, when a medical board recommends ADR, and the Board of Trustees denies ADR by tie vote,

“The ultimate question before this Court is whether the administrative record contains any credible evidence supporting the determination by the Trustees, after a tie vote, that petitioner failed to meet his burden of proving his disability was the natural and proximate result of [a service-related accident]”

(*Mullane v Caban*, 2025 NY Slip Op 34166[U] at 2 [Sup Ct, NY County 2025, J. Moyne]; *see also Canfora v Board of Trustees of Police Pension Fund of Police Dept of City of New York*, 60 NY2d 347, 352 [1983]).

Judicial review of an administrative determination is limited to whether the determination was made “in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion...” CPLR § 7803(3). In *Matter of Pell v Board of Educ.* (34 NY2d 222, 231 [1974]), the Court of Appeals held that an action is “arbitrary and capricious” when it is “...without sound basis in reason and is generally taken without regard to the facts.” If the Court finds that the determination is supported by a rational basis, it must sustain the determination (*id.*) Further, CPLR § 7803 allows judicial review only to “the final determination or order of the state review officer.”

DISCUSSION

Petitioner’s ADR benefits were denied on the basis that the interaction between Petitioner and the armed suspect was determined not to be an accident, but “an inherent risk of the job [of NYPD officer]” (Respondent’s Opposition, NYSCEF doc. No. 35 at 11). However, Petitioner posits that the independent Article II Medical Board found that Petitioner’s PTSD was caused by the shooting on October 22, 2020, and recommended that Petitioner be granted ADR benefits (Article II Medical Board Examination Minutes, NYSCEF Doc. No. 13 at ¶ 15). Specifically, the Article II Medical Board minutes read,

Based on the review of the history, the medical records, the medical evidence submitted, the clinical findings, the symptomology and today’s examination, *the Article II Medical Board recommends approval of the Police Commissioner’s application for Accident Disability Retirement* and disapproval of the Police Commissioner’s application for Ordinary Disability Retirement. The final diagnosis is Post Traumatic Stress Disorder. The competent causal factor is the line of duty injury of October 22, 2020 (*id.* [emphasis added]).

Petitioner points out, and Defendant does not dispute, that in the Board of Trustees' split vote, the six Union Trustee votes (who are police officers themselves) voted unanimously in favor of Petitioner's ADR application, while the six City Trustee votes (who are not police officers) unanimously voted against Petitioner's ADR (Board of Trustees' Meeting Minutes dated September 10, 2024 and November 13, 2024, NYSCEF Doc. Nos. 14 and 16).

Petitioner disputes the Board of Trustees' finding that his PTSD was not the result of an "accident," and argues that it is illogical for the Board of Trustees to find that a shooting is not an "accident." Petitioner cites to *Matter of Carr v Ward*,⁴ in which the First Department stated in dicta that,

It would logically follow from this interpretation that accident disability benefits would have to be denied a police officer disabled in the line of duty as a result of a shot fired by an armed robber. It is extremely doubtful that the Administrative Code is sensibly applied when it results in a denial of disability benefits to police officers disabled in the discharge of the most hazardous aspects of their duties on the view that these are not unexpected consequences of routine duties...

(119 AD2d 163, 169 [1st Dept 1986] *concurring op of Sandler, J.*).⁵

Petitioner acknowledges that prior to arriving on the scene, he was alerted that the suspect was brandishing a black firearm and attempting to exit the residence through the rear (Petitioner's Injury Report, NYSCEF Doc. No. 3). However, Petitioner argues that he should be granted ADR benefits because the firing of his gun at the assailant was the most hazardous part of his job, and an unexpected consequence or disability, PTSD, occurred as a result.

⁴ The First Department ultimately reversed the Trial Court's dismissal of an Article 78 Petition, remanding the determination of whether ADR benefits should be granted back to the Board of Trustees (119 AD2d 162, 167 [1st Dept 1986]).

⁵ Although the injury in *Carr* was not a gunshot wound suffered by the officer, this Court adopts Judge Sandler's reasoning in his concurrence with the majority.

Petitioner reported to the Article II Medical Board that in addition to thinking that he was killed after being fired upon and returning fire, he “broke down crying” after the shooting (Article II Medical Board Examination Minutes, NYSCEF Doc. No. 13 at ¶ 12). He stated that since the shooting, he does not feel safe to return to work and is “upset” by the thought of firing, or even possessing a police firearm (*id.* at ¶ 13). Petitioner also reported having “nightmares about twice a week” (*id.*).

Respondents assert that the shooting and its impact on Petitioner does not rise to the standard of an “accident” as defined by the law. Respondents cite to the Third Department decision of *Matter of Sammon v DiNapoli*, 216 AD3d 1335 (3d Dept 2023) to support the general conclusion that a shooting is not an accident, but Petitioner points out that *Sammon*, a decision by the Third Judicial Department, is inapplicable because the disability benefits structure for police officers there is different from that of the NYPD, as in the instant matter.

Respondents also cite to other cases where ADR benefits were denied based on the petitioner’s own error, the disability-causing event’s foreseeability, or when a petitioner had knowledge of the precipitating event before it occurred, but each of these cases is distinguishable from the instant matter, and they do not involve police officers acting in the line of duty (*see, e.g., Starnella v Bratton*, 92 NY2d 836, 838 [1998] [finding that a slip and fall on wet pavement is not an accident because it is not “sudden and unexpected”]; *Kehoe v City of New York*, 186 AD3d 376 [1st Dept 1992] [finding that an injury from cleaning a hopper on a sanitation truck is not an accident because cleaning a hopper is a routine part of petitioner’s duties and not “sudden and unexpected”]; *Kenny v DiNapoli*, 11 NY3d 873, 875 [2008] [finding that slipping and falling on a wet ramp, knowing that the ramp was wet, was not an accident because it was not unexpected]).

Petitioner here only fired his gun *after* the suspect “pointed [a] black firearm toward [him]” (Petitioner’s Incident Report, NYSCEF Doc. No. 3), and the Article II Medical Board recommended approval of Petitioner’s ADR benefits application specifically because his PTSD was the result of a line of duty accident (Article II Medical Board Minutes, NYSCEF Doc. No. 13).

The minutes of the Board of Trustees’ meeting reveal that in determining Petitioner’s ADR application, the Board only considered Petitioner’s mistaken belief that he killed the suspect. The majority of the Board of Trustees’ discussion of the facts was given by Mr. Laugher, New York City Commissioner of Finance, who stated that Petitioner’s PTSD diagnosis resulted from “[Petitioner] thinking that he shot a perpetrator when it turns out he did not and he knew he did not within minutes” (Board of Trustees’ Minutes, NYSCEF Doc. No. 32 at 50:21-24). There was no substantive discussion as to whether Petitioner’s disability was the result of an “accident,” and no substantive discussion of Petitioner’s doctors’ submissions. Indeed, the only mention of the Article II Medical Board and its recommendation is “[the Article II] Medical Board recommends approval of accident disability” (Board of Trustees’ Minutes, NYSCEF Doc. No 16 at 5). None of the Article II Medical Board’s specific findings are discussed (*id.*). Rather, the Board of Trustees’ meeting minutes show, astonishingly, that they agreed to a “6/6 [tie] of the ADR [vote]” to “trigger an Article 78 [proceeding]” based upon the proposal of Petitioner’s counsel, Mr. Goldberg (*id.* at 51:14-20).

The Court finds that in light of all of the evidence presented, including that the Board of Trustees seems to have agreed to intentionally tie the vote to avoid making a reasoned final determination, the Board of Trustees’ action in denying Petitioner’s ADR benefits was arbitrary and capricious. The Board of Trustees’ action was “...without sound basis in reason and [was]

generally taken without regard to the facts” (*Pell*, 34 NY2d at 231). The Board of Trustees’ meeting minutes are devoid of credible evidence that support its decision, as the minutes merely state, “it is our position that this [Petitioner’s mistaken belief that he killed the suspect] does not qualify as an accident” (Board of Trustees’ Minutes, NYSCEF Doc. No. 32 at 50:25-51:1-2). There is no further, substantive discussion of Petitioner’s case. Instead, the Board of Trustees proposed “6/6ing the ADR [application]” at the request of Petitioner’s counsel, Mr. Goldberg (*id.* at 51:14-20).

Applying the court’s analysis in *Mullane* (2025 NY Slip Op 34166[U] at 2), *supra*, that “[t]he ultimate question before this Court is whether the administrative record contains any credible evidence supporting the determination by the Trustees, after a tie vote, that petitioner failed to meet his burden of proving his disability was the natural and proximate result of [a service-related accident],” the Court finds that the Board of Trustees’ decision to deny Petitioner’s ADR benefits is not supported by credible evidence. The Board of Trustees merely proposed a tie rather than have a reasoned, substantive discussion of Petitioner’s case as they are obligated to do. As such, the Board of Trustees never determined that Petitioner failed to meet his burden in demonstrating that his PTSD is the result of an “accident.”

In light of the Court’s findings that the Board of Trustees’ decision to deny Petitioner’s ADR application was arbitrary and capricious, and that the Board of Trustees failed to determine whether Petitioner met his burden in demonstrating that his PTSD was the result of an accident, the Court grants the Petition. The Board of Trustees’ decision to deny Petitioner’s ADR benefits is annulled and the matter is remanded for further consideration based on this Court’s analysis and decision.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Petition is granted to the extent of annulling the determination of the Board of Trustees denying Petitioner's application for ADR and remanding the matter for further consideration based on the Court's analysis and decision; and it is further

ORDERED that within 30 days of the entry of this order, Petitioner shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF; and it is further

ORDERED that Petitioner shall, within ten days of the date of this decision and order, serve a copy, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

<u>7/9/2026</u>			
DATE		LESLIE A. STROTH, 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