State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 27, 2024 CV-23-0976

In the Matter of JOSEPH MARTINO,
Petitioner,
v MEMORANDUM AND JUDGMENT

THOMAS P. DiNAPOLI, as State Comptroller,
Respondent.

Calendar Date: May 31, 2024

Before: Egan Jr., J.P., Reynolds Fitzgerald, Ceresia, Fisher and Mackey, JJ.

Schwab & Gasparini, PLLC, White Plains (*James A. Resila* of counsel), for petitioner.

Letitia James, *Attorney General*, Albany (*Sean P. Mix* of counsel), for respondent.

Fisher, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent denying petitioner's application for performance of duty disability retirement benefits.

Petitioner, a firefighter, applied for performance of duty disability retirement benefits in June 2015 asserting that he was permanently incapacitated from the performance of his duties as the result of a heart condition. Although petitioner indeed was found to be permanently incapacitated, his application was denied upon the ground that his disability was not the natural and proximate result of an incident sustained in service. Following a hearing and redetermination, including the review of voluminous

medical records, the Hearing Officer upheld the denial, finding that petitioner's disability was not caused by the performance and discharge of his duties as a firefighter. Respondent adopted the Hearing Officer's findings of fact and conclusions of law, prompting petitioner to commence this CPLR article 78 proceeding to challenge respondent's determination.

The New York State and Local Employees' Retirement System concedes that petitioner is permanently incapacitated from the performance of his duties as a firefighter and, further, that the "heart presumption" set forth in Retirement and Social Security Law § 363-a (1) applies. As such, the sole contested issue is whether the Retirement System met its burden of rebutting the statutory presumption, "which, in turn, required the Retirement System to demonstrate – through expert medical proof – that petitioner's cardiac condition was caused by risk factors other than his employment" (*Matter of O'Donoghue v DiNapoli*, 221 AD3d 1229, 1230 [3d Dept 2023]; *see Matter of Park v DiNapoli*, 123 AD3d 1392, 1393 [3d Dept 2014]; *Matter of Ferguson v DiNapoli*, 114 AD3d 1015, 1015 [3d Dept 2014], *lv denied* 23 NY3d 901 [2014]; *Matter of Walters v DiNapoli*, 82 AD3d 1487, 1487-1488 [3d Dept 2011]). Upon our review of the record, we are satisfied that the statutory presumption was rebutted.

With respect to the May 2015 incident, petitioner testified that he arrived at the firehouse for his scheduled shift and, after "go[ing] over the rig and mak[ing] sure everything is where it's supposed to be," he went upstairs to complete his paperwork. Although he initially "was feeling okay," he "started getting a burning sensation in [his] chest" and began "sweating a little bit." A call then came in for "a pan and meat" in an apartment building – meaning that someone had burned their dinner and filled the building with smoke – and petitioner donned his turn-out gear (weighing approximately 70 pounds) and responded to the call. On the way to the call, petitioner testified, the sweating and burning sensation "had subsided," but it returned after exiting the building. During the call, petitioner carried a positive pressure fan up two flights of stairs to help ventilate the structure. When petitioner returned to the ladder truck, his symptoms became "more intense and [his] arm started hurting." Upon returning to the firehouse, petitioner "started feeling worse and worse," prompting his colleagues to call for an ambulance. Subsequent testing revealed that petitioner had suffered a heart attack.

Although petitioner attributes his heart attack to the rigors of firefighting, the record reflects that petitioner has "a markedly positive family history" for coronary artery disease. Notably, petitioner's father had a heart attack in his early 40s, and

petitioner has "multiple first-degree relatives with premature cardiovascular disease." As to petitioner's admitted history of cigarette smoking, petitioner testified that he smoked 10 or 12 cigarettes a day for one year and quit smoking altogether in 2007, but petitioner's medical records indicate that he smoked at least a pack of cigarettes a day for multiple years and suggest that he did not quit smoking until 2015. Prior to his disabling heart attack in May 2015, petitioner experienced "some chest discomfort" while drinking a protein shake in January 2015, prompting an evaluation at a local emergency department. Although the evaluation was "negative" and petitioner was discharged, he experienced two subsequent episodes of "chest burning after exercise," underwent a nuclear stress test, which reportedly showed "a fix basal inferior wall defect without ischemia," and was placed on blood pressure medications.

After examining petitioner in 2017 and reviewing various medical records, including the statement of disability completed by petitioner's cardiologist, the Retirement System's expert concluded that petitioner was permanently disabled from his duties as a firefighter "due to his coronary artery disease and prior [myocardial infarction]," both of which were "related to [petitioner's] cigarette smoking and markedly positive family history for early [coronary artery disease]." Although petitioner faults the Retirement System's expert for failing to expressly exclude his employment as a causative factor (*see e.g. Matter of Walsh v DiNapoli*, 83 AD3d 1278, 1279 [3d Dept 2011]; *Matter of Bryant v Hevesi*, 41 AD3d 930, 932 [3d Dept 2007]), petitioner's argument on this point overlooks the fact that his own cardiologist concluded that petitioner's disabling heart condition did not arise out of his employment. Pointedly, in response to a question on the physician's statement of disability asking whether the subject condition was due to an injury or illness arising out of petitioner's employment, petitioner's cardiologist answered, "[n]o." Taken together, the medical proof is "sufficient to exclude petitioner's employment as a causative factor in the development of his disabling coronary artery disease and, as such, the statutory presumption was effectively rebutted" (*Matter of O'Donoghue v DiNapoli*, 221 AD3d at 1231; *see e.g. Matter of Ashley v DiNapoli*, 97 AD3d 1057, 1058 [3d Dept 2012]; *Matter of Baron v New York State Comptroller*, 84 AD3d 1678, 1679 [3d Dept 2011]; *Matter of Walters v DiNapoli*, 82 AD3d at 1488; *Matter of Marinelli v DiNapoli*, 82 AD3d 1347, 1348 [3d Dept 2011]; *Matter of Rivera v DiNapoli*, 78 AD3d 1295, 1296 [3d Dept 2010]). Accordingly, petitioner's application for performance of duty disability retirement benefits was properly denied.

Egan Jr., J.P., Reynolds Fitzgerald, Ceresia and Mackey, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

Robert D. Mayberger
Clerk of the Court