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The Alter Ego Article Doctrine in New York

By Edward P. Yankelunas

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Chet Lukaszewski formed Chet Lukaszewski, P.C. in 2008. The firm's primary areas of practice are New York City and State municipal disability pensions, as well as Social Security Disability claims and personal injury matters. Prior to opening his law firm, Mr. Lukaszewski worked for a premier disability pension and Social Security Disability firm throughout law school. After being admitted to the bar in 2001, he concentrated exclusively on personal injury work for several years, before returning to disability pension law, eventually becoming the lead litigator in one of the top firms practicing in said area at the time. Now, he is recognized as one of the leading disability pension law experts in New York.

Disability Determinations, Judicial Authority and CPLR Article 78

Part I

By Chet Lukaszewski

The Issue

Under the current interpretation by the courts of the judicial authority possessed by judges in Article 78 proceedings, under N.Y. Civil Practice Law and Rules Article 78 (CPLR), municipal retirement systems and pension funds have the ability to continually deny sick and injured civil servants disability retirement pensions, for years on end, possibly in perpetuity, by continually finding an applicant not to be disabled, even if the finding is repeatedly deemed to be unlawful by the courts. This is because the courts have held that New York state judges do not possess the power in an Article 78 proceeding to find a disability where a pension agency's medical board has not, and have established that a judge can only remand for reconsideration an application found to be improperly denied.

This interpretation has created a gap in judicial authority that allows for lengthy and costly denial cycles to which injured municipal workers can fall victim through no fault of their own, and can result in their not obtaining a pension to which they are entitled, where the courts are powerless to bring about an equitable resolution. Specifically, injured workers can be denied a disability pension based upon a finding that they are not disabled. They can then bring a court challenge, and if they are successful therein and secure a judicial remand of their application to their pension agency, the pension agency is free to again deny the application, leaving another court challenge as the only recourse.

A fair and rational consideration of the issue, and the relevant laws, leads to the conclusion that this gap in judicial authority is without sound basis in reason or in law, and should be closed, in the interest of protecting the rights of New York's civil service workers, and to prevent any agency from being immune from the courts' powers of equitable relief. In light of the language of CPLR Article 78, and the power of judges to find disability in comparable proceedings like Social Security Disability and Workers' Compensation matters, there appears to be no justification to prohibit state court judges from finding

a disability to exist in Article 78 proceedings involving disability pensions for municipal workers. In the interest of substantial justice, the Legislature should clarify or amend CPLR Article 78 as to this issue, or the courts should revisit and revise their position on the issue.

Civil Service Disability Pensions

Civil service employees, such as police officers, firefighters, sanitation workers, teachers, highway repairers, train mechanics, and hundreds of other professions where one's employer is a government entity, elect to enter said professions knowing they will face earnings limitations and the strict guidelines and restrictions that accompany city, state, and other municipal employment. These employees accept these parameters, in large part, based upon the pension benefits and protections that such jobs offer, including a disability retirement pension should they become incapable of performing the full-duty requirements of their job title prior to retirement. Disability pensions vary based upon job title and pension tier, and not all municipal employees are eligible for the same benefits and protections, but most are eligible for some form of a disability retirement pension after performing 10 years of service. High attrition positions, like police and fire personnel, are generally afforded more lucrative pension benefits, compared to less dangerous, "non-uniformed" occupations. Some jobs offer greater disability pension benefits for disabilities that result from line-of-duty injuries, including most uniformed job titles such as EMTs and corrections officers.

Certainly, not all applicants for disability pensions are deserving of the same, and thus many are properly denied benefits. Moreover, many deserving applicants are approved without issue. However, the courts regularly find application denials to be unlawful, evidencing that not all deserving disability pension applicants are approved by their pension agencies. The question that is most perplexing is, why not allow a judge in an Article 78 proceeding to determine that a worker has in fact demonstrated he or she is permanently disabled from performing the full-duty requirements of the worker's job title? Said power would seemingly be in keeping with the language of CPLR Article 78, and in line with the authority possessed by judges in analogous disability determinations, and would prevent the deny-court challenge-remand cycle. If workers want to challenge a disability pension denial judicially, the only legal recourse is an Article 78 proceeding. Workers taking this route usually must retain private counsel, if they are financially able, as normally it is not a legal issue that municipal unions or union law firms assist with. Alternatively, a financially strapped worker could try to bring the proceeding pro se, but this is a daunting task for all the usual reasons, made additionally difficult by the 120-day statute of limitations that applies in these cases. The court costs associated with an Article 78 proceeding are several hundred dollars at a minimum, based upon Index number and RJI (request for judicial intervention) fees, and normally run over $1,000 when all costs, such as copying, printing, binding, and process service, are tallied. Firms that handle these cases on a regular basis normally charge between $5,000 and $10,000 per "Article 78." Sadly, some disabled workers cannot afford an attorney and are incapable of proceeding pro se, based on their injuries, lack of intellectual and legal abilities, or both. As a result, they either do not challenge their pension denials or have to stop challenging them. These workers never obtain the disability retirement pension that they ought to have received.

Judicial Relief Through Article 78

An Article 78 proceeding is the form of judicial relief one is limited to when challenging the determination of an administrative board or body,[1] such as a retirement system or pension fund. It is deemed to be a "Special Proceeding," where, generally, a judge evaluates the decision at issue based only upon the administrative record that was before the determining entity, as well as the legal arguments set forth by the parties. In the case of a disability pension denial, the administrative record, which is the case's evidentiary record, is generally purely documentary, comprised primarily of relevant medical records and the pension agency's medical board's written denial(s). Agency medical boards generally comprise three physicians. There is no legal requirement that any of those doctors are specialists in the area of medicine upon which the application is based, and much of the time they are not.[2] Usually in an Article 78 proceeding there are no witnesses or trial. Judges are provided the power, under CPLR 7804, to hold a trial to resolve a specific point of fact that is unclear from the record; however, this very rarely occurs. A disability pension Article 78 proceeding is normally comprised of a petition, an answer, memorandums of law from both parties, and a reply memorandum by the petitioner. In some cases, an oral argument is presented, where only the attorneys (or a pro se litigant) appear before the judge, but there is no legal requirement for this. All evidence and arguments are limited to the facts and evidence that were before the determining body, and nothing new can be added during the Article 78 proceeding. For example, if a worker was claiming a disabling cardiac condition but was denied the pension based upon a no-disability finding, and thereafter suffered a heart attack, the heart attack could not be introduced into the case, because it would be outside the administrative record, as it was not before the pension agency when its decision was rendered. Judgments in Article 78 cases are normally set forth in written decisions and orders that are handed down several months after the submission of all papers to the court or after an oral argument, if one is held.

When the determination being challenged in an Article 78 proceeding is the denial of a disability pension

application based upon a finding of "no disability," the Court of Appeals has established that the only relief that can be sought is for the denial to be reversed, and for the application to be remanded to the pension agency for re-evaluation.[3] Judges cannot find a disability for full duty to exist, regardless of how overwhelming they feel the facts and evidence may be. This limitation seems to be in contrast with the fact that in a disability pension Article 78 proceeding where the issue is the cause of a recognized disability, the court does have the power to award the pension.[4]

For example: A pension agency's medical board found that a nurse was disabled due to a neck condition, but ultimately concluded that the condition was the result of a congenital anomaly as opposed to a line-of-duty accident, and denied the application. In this case, the court would have the power to award the pension, because it has the power to determine "causation" when a disability has been found. Specifically, the law states that the court may set aside a pension denial when it can "conclude as a matter of law" that the disability was the natural and proximate result of a service-related accident, and award the pension sought.[5]

Legal fees are rarely awarded to a successful litigant in a disability pension case. One would have to show bad faith, a very high burden that is not reached by the factors that are generally the basis for a court's overturning of a pension denial. Reversals and remands in disability pension cases are usually based upon a court finding that evidence has seemingly not been properly considered, key facts have been disregarded, a medical board's conclusion appears to be irrational, or a determination has not been adequately explained.

When analyzing this topic, something that must be considered is that prospective litigants are injured municipal workers who may no longer be capable of working, so the money needed to pursue a case is often not readily available. Such workers have often run out of sick time and can even be "off payroll," and thus without income. Many have even been terminated under the provisions of the N.Y. Civil Service Law, which allows for a municipal employee who is medically incapable of returning to work, generally for one year, to be terminated.[6] However, said termination does not entitle the employee to a disability pension, as the pension agency is a separate entity from the employer, and pension agencies are not bound by the medical decisions of any other institution, such as city or state doctors who determine employment capability (i.e., full duty, light duty, sick leave), or New York State Workers' Compensation doctors and judges, or even the Social Security Administration (SSA), and its Administrative Law Judges (ALJ).

Even if all of those entities find a worker to be disabled, the pension agency can determine whether that person is fit for full duty. Regularly, municipal workers are approved for Social Security Disability (SSD) benefits by a SSA ALJ, where the standard is whether one is disabled for any job in the national economy;[7] yet they are denied disability pensions based upon a finding by their pension agency that they are not permanently disabled for their former job title. A municipal pension fund or retirement system will generally be represented in an Article 78 proceeding by city or state attorneys, such as the New York City Corporation Counsel's Office or the State Attorney General's Office. Time and litigation funding are not issues for pension agencies. Because a judge will not have the power to find disability and award the pension sought, the cycle of litigation could go on forever, but it causes almost no harm or prejudice to a pension agency.

A Few Cases

The NYPD Officer and 9/11

An example of this legal gap and the litigation cycle it creates can be seen in the case of former NYPD officer Michael Mazziotti, a hero who saved hundreds of lives on September 11, 2001. Mazziotti, who was emotionally and psychologically scarred as a result of 9/11, was found not to be disabled for police work and was denied a disability pension. Mazziotti had to endure the time and expense of bringing two Article 78 proceedings, both of which he was successful in.

The specific facts of Mazziotti's case should be considered in evaluating the disability pension legal gap. Officer Mazziotti was in 1 World Trade Center on September 11, 2001, when the first plane hit Tower 2. He and his partner evacuated the 20th through 29th floors and were descending an interior staircase when the second plane hit Tower 1 and sent debris and soot down through the stairwell, which shook as a result of the impact and explosion. The two officers then provided aid to the injured on the ground floor and escorted civilians from the building to a triage that they helped set up in the Millennium Hotel. Mazziotti then entered 2 World Trade Center three times to assist in evacuation efforts and narrowly escaped the building's collapse. His police car was crushed by the falling towers. Mazziotti was caught up in the soot and debris cloud while he rushed with 20 evacuees to a refuge on Vesey Street. All told, he spent almost 200 hours at the World Trade Center site doing rescue, recovery and cleanup work. Mazziotti received commendations for his heroism on 9/11, in addition to the numerous awards and citations he received during his 32-year career in law enforcement.

After retiring in 2002, he began showing signs of post-traumatic stress disorder (PTSD) and other psychological problems, for which he first sought treatment in 2003; he began consistent treatment in 2005. In support of his 9/11-WTC disability pension application, filed in September 2006, under the "WTC Presumption Law," the only disability pension for which one can apply for in retirement, Mazziotti submitted an abundance of evidence from a number of doctors with whom he had long-standing treatment relationships. Among the

evidence were numerous psychological diagnostic tests that demonstrated his PTSD, as well as major depression and panic disorder. He also submitted his SSD benefits approval, which was based on his 9/11-WTC psychological disorders. Nevertheless, the pension fund's medical board found him not disabled for full-duty police work on four separate occasions during the four-year application process, and ultimately denied the application in March 2010. Full-duty police work requires responding to emergency and disaster situations, handling and operating a firearm in emergency situations, viewing and investigating crimes and occurrences such as murders, rapes, and other violent situations involving harm as well as death, the ability to quickly process and retain information, the capability to make life and death decisions while under extraordinary pressure, and an almost limitless array of other mentally and emotionally demanding tasks.

The court in *Mazziotti v. Kelly*[8] found that the pension fund had ignored extensive credible evidence and had offered no explanation or reasoning for its denial; the court concluded that the denial did not reflect that all relevant facts and evidence were considered. The court did the only thing it had the power to do – remand the matter to the pension fund for a legally sufficient review in keeping with its decision. However, on remand, Mazziotti was once again denied based upon a no-disability finding. Thereafter, in 2013 in *Mazziotti v. Kelly*,[9] the court found, again, that the fund's denial was arbitrary and capricious and was not based on substantial credible evidence, and concluded once again that extensive credible evidence had been ignored and that no explanation or reasoning for the denial had been set forth. Again, the court did the only thing it had the power to do and remanded the matter to the fund. Finally, in September 2013, despite no new evidence, the fund acknowledged that Mazziotti was disabled for police work due to his 9/11-WTC psychological issues. However, the fund awarded the pension as of that date, and not retroactive to the date of the application, or even the first denial, which was deemed to be unlawful in March 2010, or the second denial, which was deemed to be unlawful in January 2012.

Mazziotti brought an Article 78 proceeding challenging the refusal to award his pension retroactively, arguing that the eventual disability finding was, essentially, based upon the exact evidence present throughout the application process, and which in fact was present before and after the second court remand, following which his pension was finally approved. But the court ruled against him in 2014 in *Mazziotti v. Kelly*,[10] in large part based on the rule that prohibits a judge from finding disability where a medical board has not.

Consider the fact that the pension fund had the power to continue to deny Mazziotti for the rest of his life, and the courts would have been powerless to prevent it. Consider that for seven years Mazziotti was forced to undergo the financial burden of fighting for his disability pension, while being retired on a much less valuable service retirement pension. He easily could have become financially unable to continue the fight. Also, despite the fact that the courts showed him to be in the right, he will never recoup his attorney fees and litigation costs. Consider also the grim realities that he could have passed away during the years he was fighting for his pension or, worse yet, could have been consumed by the stress of the denials and the monetary strain, been overcome by his PTSD and taken his own life. It seems that the inequities and hardships that Mazziotti faced could have been drastically reduced, if not nearly avoided altogether, had the court the power to find him to be disabled.

> The only relief that can be sought is for the denial to be reversed, and for the application to be remanded to the pension agency for re-evaluation.

Paramedic's Fight for Disability Pension

In *Mendez v. New York City Employees' Retirement System*,[11] the court reversed a no-disability finding and disability pension denial by the retirement system, and remanded the application to the system. In this case, the petitioner, Eric Mendez, a paramedic for the Fire Department City of New York (FDNY), underwent spinal fusion surgery in his lower back as a result of a line-of-duty injury, sustained while lifting a stretcher into an ambulance. Full paramedic duty includes entering and exiting ambulances at a rapid pace; ascending and descending stairs in emergency situations while carrying equipment weighing more than 40 pounds; transporting patients on a stretcher (usually down one or more flights of stairs) who might weigh 300 or more pounds; kneeling to administer medical treatment; bending over patients for various purposes, including intubation and administering CPR; restraining individuals who are emotionally disturbed or experiencing spasms or seizures; and many more physically demanding tasks.

Mendez's doctors advocated to their fullest as to his inability to perform full emergency medical services (EMS) duty based on his condition and the surgery, citing factors such as pain, limited range of motion, and the risk for re-injury. However, on judicial remand, Mendez was

again found by the retirement system not to be disabled. He could not afford to bring a second court challenge.

Mendez had informed the system's medical board of his post-injury and post-surgical symptoms and limitations, including being caused such great pain by the simple act of lifting a cooler at a backyard barbecue that he was forced to go to the emergency room. The system was made aware that upon information and belief, no other EMT or paramedic had ever been hired and/or assigned to full "field" duty having undergone a lumbar fusion. The FDNY's doctors deemed Mendez to be permanently disabled for full EMS duty, and he was terminated for a medical inability to return to work. He was found by multiple wholly independent New York State Workers' Compensation Medical Examiners to have a disability that precluded his lifting of more than 40 pounds. He was even found to be unfit for any job in the national economy due to his spinal condition, and was thereby approved by the SSA for SSD. Yet the retirement system found him not to be permanently disabled for full duty.[12]

Multiple Surgeries – Still Not 'Disabled'

In *Schmoll v. Kelly*,[13] the court reversed a no-disability finding and disability pension denial by the NYPD's pension fund and remanded the application to the fund. In that case, the petitioner, Officer Helmut Schmoll, suffered an October 2008 line-of-duty right knee injury, which led to two surgeries, as well as numerous injections, and resulted in his suffering from permanent osteoarthritis, crepitus, patellar chondromalacia, patellofemoral crunch, synovial effusion, and atrophy, as was demonstrated by MRIs and physical clinical testing, including a positive McMurray's and Apley's grind test.

Schmoll suffered from pain, and strength and range-of-motion loss and limitations, as well as buckling issues, and will likely require a total knee replacement in the near future. He also developed residual left knee issues as a result of overcompensation, which will also require surgery. His condition resulted in his being kept on restricted duty by NYPD doctors for the final five years of his career. Full-duty police work entails chasing down and apprehending criminals, using hand-to-hand combat, subduing emotionally disturbed individuals, carrying weighty equipment as well as injured persons, climbing fences, breaking down doors, and a limitless array of other physically demanding tasks.

Nevertheless, the pension fund's medical board repeatedly found Schmoll's right knee to be essentially problem-free and saw no disability for full duty. It is noteworthy that during the application process, Schmoll required a second knee surgery, despite suffering no re-injury and working only on light duty, just six months after a no disability finding by the medical board. However, on judicial remand, Schmoll was again found not to be disabled by the pension fund, and, if he can afford to, will likely have no other choice but to re-enter the "no-disability" litigation cycle.[14]

Conclusion

Action by the New York State Legislature or courts is needed at this time in regard to this issue. The Legislature should clarify or amend CPLR Article 78 as to the issue, or the courts must revisit and revise their current position. The gap in judicial authority that exists under CPLR Article 78 in civil service disability pension matters, which prohibits New York judges from finding a disability to exist, must be closed. Part II of this article will continue the discussion, focusing on the law. ■

1. CPLR art. 78 (7801–7806).
2. *Christian v. N.Y. City Emps.' Ret. Sys.*, 83 A.D.2d 507 (1st Dep't 1981).
3. *Borenstein v. N.Y. City Emps.' Ret. Sys.*, 88 N.Y.2d 756 (1996).
4. *Meyer v. Bd. of Trustees*, 90 N.Y.2d 139 (1997).
5. *Canfora v. Bd. of Trustees*, 60 N.Y.2d 347 (1983).
6. N.Y. Civil Service Law § 71.
7. 42 U.S.C. §§ 401–433; 20 C.F.R. § 404.1520.
8. Index No. 108795/10 (Sup. Ct., N.Y. Co. May 2, 2011).
9. Index No. 102285/12 (Sup. Ct., N.Y. Co. Jan. 25, 2013).
10. Index No. 101666/13 (Sup. Ct., N.Y. Co. May 1, 2014).
11. Civil Index No. 11735/12 (Sup. Ct., Kings Co. Jan. 16, 2013).
12. As of the writing of this article, Mendez has selected a process known as Final Medical Review which is offered by the New York City Employees' Retirement System, but not by all municipal pension agencies, whereby his case will be considered by three new doctors employed by the retirement system who will render a final determination that cannot be judicially challenged, as one forfeits said right by selecting this process. (Information published with Mendez's consent.)
13. Index No. 101124/13 (Sup. Ct., N.Y. Co. May 30, 2014).
14. As of the writing of this article, Officer Schmoll's case had not yet again been denied in final by the Police Pension Fund but seemingly will be in the near future. (Information published with Schmoll's consent.).

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