

## Even When Capricious

# Pension Boards' Power Mightier Than Judges

By MARK TOOR

Two recent cases demonstrate a nasty wrinkle in the disability-pension system: that pension boards can deny such a benefit even when private and public-sector physicians say it's clearly indicated, and can hold to that denial even if a judge grants an appeal by sending the case back to the board for reconsideration, according to one lawyer who handles such cases.

"In my opinion, it creates the possibility of forcing pensioners into endless litigation," the lawyer, Chet Lukaszewski, said in an interview. He added, "Eventually, my clients run out of money. The city never does."

### Can't Force Revision

Denials by pension boards may be appealed to State Supreme Court. If a judge agrees that a board's decision was "arbitrary and capricious"—a legal term meaning the ruling has no reasonable basis—he or she can send the case back to the board and recommend that it change its determination. However, judges cannot order a disability pension on their own or require a board to revise its decision.

"In recent times, I've seen more cases where the systems are simply saying, 'We're not going to change our minds,'" Mr. Lukaszewski said.

The first case involves

Michael Mazziotti, a retired Police Officer who was commended by the NYPD for his actions at the World Trade Center during the 9/11 attack and later sought benefits for post-traumatic stress.

### Took Emotional Toll

Mr. Mazziotti and his partner "evacuated the 20th floor of One World Trade Center and were descending a staircase with evacuees when a second explosion sent debris and soot on them," according to the court decision last May.

"After arriving at the ground floor they went over to Two World Trade Center ...carrying and escorting people out of the building," the decision continued. "They set up a triage area by the Millennium Hotel, and entered Two World Trade Center three more times to assist with the evacuation. The officers were caught in the blast when Two World Trade Center began to fall, and rushed themselves and other evacuees to 20 Vesey Street for refuge, their police car was crushed by the falling towers."

Mr. Mazziotti was granted Social Security disability benefits in 2005 for "major depression, a panic disorder and post-traumatic-stress disorder," the decision said. "The petitioner continues to be under a physician's care, in group and individual therapy and is taking medica-



**CHET LUKASZEWSKI: City can wear down workers.**

tions for his symptoms."

The Police Pension Fund Medical Board examined him four times and all four times rejected both ordinary and accidental disability pensions. Mr. Mazziotti said none of his appearances before the board lasted more than 10 minutes, and cited other errors made by board examiners.

### Didn't Rebut WTC Rule

Manhattan Civil Court Judge Manuel J. Mendez ruled that the pension board had failed to rebut the World Trade Center presumption, which says certain illnesses that develop in first-responders who were at Ground Zero must be attributed to their exposure unless medical evidence proves otherwise. Under that law, the burden of proof is on the pension board, not the retiree.

Judge Mendez said the medical board had not cited such evidence, and had ignored the findings of the So-

cial Security Administration and at least one psychologist treating Mr. Mazziotti. He sent the case back to the board.

Last month, the board again refused to approve a disability pension. In a Jan. 25 decision, Judge Mendez again ruled the action arbitrary and capricious and sent the case back, one more time, to the pension board.

The second case—which has been remanded on appeal but is still awaiting a determination by the New York City Employees' Retirement System—involves Eric Mendez, a Fire Department Emergency Medical Technician who injured his lower back carrying a patient. At the age of 49, Mr. Mendez underwent spinal-fusion surgery, which connects the vertebrae to eliminate motion between them.

NYCERS denied him a disability pension despite reports from his physicians saying that the immobility in his spine kept him from performing the duties of an EMT. Mr. Mendez was granted Social Security disability and Workers' Comp benefits, and the FDNY said he was physically unable to return to work.

Mr. Lukaszewski argued that the denial was not rational, noting in an interview that medical-board physicians had asked his client why he could not work if professional football players could play after having spinal-fusion surgery.

Mr. Lukaszewski said the only way to avoid an endless loop of litigation would be to change the law, but he said that was unlikely. "Not in this economy," he said. "I don't think civil-service pensions are a priority for legislators right now."