



decision which is appended to this decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

*Writ of mandamus denied.*

SADLER and TYACK, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Fred DeLuca, Jr.,	:	
Relator,	:	
v.	:	No. 09AP-1095
Ohio Public Employee[s] Retirement System,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on October 29, 2010

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*Robert J. Rohrbaugh, II*, for relator.

*Richard Cordray*, Attorney General, and *Hilary R. Damaser*,  
for respondent.

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IN MANDAMUS

{¶4} In this original action, relator, Fred DeLuca, Jr., requests a writ of mandamus ordering the Ohio Public Employees Retirement Board ("PERB"), pursuant to Ohio Adm.Code 145-2-23, to consider his untimely filing of additional medical evidence as an appeal of the termination of his disability benefit.

Findings of Fact:

{¶5} 1. On March 5, 2003, relator was injured in a motor vehicle accident in the course of his employment as a deputy with the Mahoning County Sheriff's Department. Pursuant to that employment, relator is a member of respondent the Ohio Public Employees Retirement System ("OPERS").

{¶6} 2. On January 21, 2004, following an independent medical examination, PERB granted relator's disability application "with the condition that [he] seek physical medicine rehabilitation treatment and [is] re-examined in one year."

{¶7} 3. On July 19, 2005, upon the request of OPERS, relator was examined by Cybele A. Wassef, M.D., who practices in the area of physical medicine and rehabilitation. In her report, Dr. Wassef wrote:

#### IMPRESSION

1. Lumbar disc herniation at L5-S1.
2. Left lower lumbar radiculopathy; however, the exact radicular distribution could not be assessed clinically accurately due to the patient's emotional overlay.
3. Depression.
4. Postural deficits and overweight.
5. Chronic pain syndrome with emotional overlay, with four positive Waddell tests.

#### DISCUSSION AND RECOMMENDATIONS

Having taken the history from the patient, reviewed his medical records, and examined him, it is my medical opinion, with reasonable degree of medical certainty, that the patient, Fred Deluca, Jr., is **Permanently and Totally Disabled** from performing his job as a deputy sheriff for Mahoning County, due to the physical demands of the job, and his emotional status.

I will recommend for him to participate in a chronic pain rehabilitation program, where his physical and emotional needs will be addressed, followed by a back rehabilitation program including aquatics.

(Emphasis sic.)

{¶8} 4. On December 16, 2005, at the request of OPERS, relator was examined by Moshe S. Torem, M.D., who practices in the areas of psychiatry and neurology. In his nine-page report, Dr. Torem concluded:

(VI) DIAGNOSES

- Major depressive disorder single episode severe without psychotic features
- Pain disorder associated with both psychological factors and general medical condition (307.89)
- Lumbar disc herniation at L5 to S1 level
- Lower lumbar radiculopathy
- Osteoarthritis
- Obesity

(VII) MEDICAL-EXPERT OPINION

Based on the data delineated from the documents provided by OPERS as well as the data obtained from a comprehensive interview, a thorough in-depth medical-psychiatric mental status examination, as well as the administration and interpretation of the Zung Scales for anxiety and depression, it is my medical-expert opinion with a reasonable degree of certainty that the disability applicant Mr. Fred L. Deluca Jr. is currently suffering from a medical and psychiatric disorder which makes him physically and mentally incapacitated for the performance of duty at his job as deputy sheriff at Mahoning County Sheriff's Department. In addition, it is my medical-expert opinion with a reasonable degree of certainty that his condition is chronic and will last for a period of longer than 12 months and therefore his disability is presumed to be permanent. However, it is

strongly recommended that following the resolution of his court case regarding the accident that took place in March of 2003 he should be intensely engaged in a treatment program [sic] for people with chronic pain focused on improving his ability to function better with the activities of daily living as well as alleviating the symptoms of depression. He should continue in psychiatric treatment with his current psychiatrist however it is recommended that his visits should increase in frequency to at least once every three to four weeks. It is recommended that he be reexamined within 12 months following the final resolution of his civil court case with the insurance company of the driver who's vehicle injured him in March of 2003.

{¶9} 5. On June 21, 2006, following a review of Dr. Torem's report, PERB approved the continuation of the disability benefits "with the condition that [he] seek psychiatric treatment and [is] re-examined in a year."

{¶10} 6. On June 26, 2007, at the request of OPERS, relator was examined by Anil Choudary Nalluri, M.D., who practices in the areas of psychiatry and neurology. In his six-page report, Dr. Nalluri concludes:

Based solely on his psychiatric condition, the examinee is not able to return to his previous employment as a deputy sheriff for Mahoning County. His functional limitations due to the 296.23 Major Depressive Disorder, Single Episode, Severe Without Psychotic Features; 300.00 Anxiety Disorder NOS; and 307.89 Pain Disorder Associated With Both Psychological Factors and a General Medical Condition, are marked. The conditions all were allowed by the Ohio BWC. He experiences depressed mood, nervousness, irritability, anhedonia (i.e., loss of interest in activities), social withdrawal, decreased memory and concentration, and an inability to cope with stressors effectively, all of which would affect his ability to perform the essential duties of his position.

A disability is presumed to be permanent if it is expected to last for a continuous period of not less than 12 months. Mr. DeLuca's psychiatric condition will persist for at least the

next 12 months. Mental health treatment should continue at the current rate for supportive and maintenance purposes.

Based on the job description, his former position is a dangerous one that requires complete concentration, reactivity, and social interaction. His current mental impairments would present a risk to himself and others. He had served in this position for about 13 years. He was unable to work following a 3/5/03 work injury and subsequent physical and psychiatric limitations.

Law enforcement is generally seen as one of the most dangerous, stressful, and health-threatening occupations, as officers are at risk of physical injury, accidents, homicide, and psychological stressors. Research indicates that unique job stress, exposure to violence and death, and substance abuse are some of the various factors that make police officers a potential psychological risk for problems in occupational functioning.

My diagnosis and opinion are based upon, with a reasonable medical probability, my 28 years of clinical experience as a medical doctor and specialist in Psychiatry. I have also relied on the DSM-IV-TR, 2000, and AMA guide, Fifth Edition, November 2000. In my professional opinion, there is no substantial evidence that Mr. DeLuca is consciously exaggerating his psychiatric symptoms. \* \* \*

{¶11} 7. On October 17, 2007, following a review of Dr. Nalluri's report, PERB approved the continuation of disability benefits "with the condition that [he] continue psychiatric treatment and [is] re-examined in a year."

{¶12} 8. On November 12, 2008, upon the request of OPERS, relator was examined by psychiatrist Bharat J. Shah, M.D. In his two-page report, Dr. Shah concludes:

**IMPRESSION:**

Axis I. Major depression, in remission.  
Axis II. Deferred.  
Axis III. History of back injury.  
Axis IV. History of injury.

Axis V. GAF of 65.

Question to be addressed:

Based on objective findings of your examination, does your diagnosis permanently disable this individual from performing his job as a/an Sheriff?

Based on the objective findings of my examination, Mr. Deluca Jr. came across pleasant with appropriate affect. He is able to sleep well. He does not have any major change in his appetite. He does not have any suicidal or homicidal thoughts, plans, or intentions. He shows interest in watching news, weather channel, and election news. He visits family and talks to them on the phone. He goes to stores. He goes to church and he was able to concentrate during the interview. From my evaluation, Mr. Deluca Jr. is not permanently disabled.

{¶13} 9. Apparently, on December 17, 2008, Dr. Shah's report was reviewed by OPERS's medical advisor Dr. Andrew Smith. On an OPERS form captioned "Inter-Departmental Communication," Dr. Smith marked a box aside the preprinted words "Terminate DR Status." Thereunder, in his own hand, Dr. Smith wrote: "IEO Depression severe enough to prevent return to described job position." (In this action, counsel for OPERS asserts that "IEO" should be read as "IOE" and that "IOE" means "insufficient objective evidence.") (Respondent's brief at 4.)

{¶14} 10. On December 20, 2008, OPERS's medical advisor Maurice C. Mast, M.D., wrote:

I have reviewed the results of the recent examination(s) performed on the above-named member.

Based on the findings presented there is insufficient objective evidence of permanent disability due to major depression.

Accordingly, I have recommended to the retirement board that the disability benefit be terminated.

{¶15} 11. By letter dated January 20, 2009, OPERS informed relator that his disability benefit will be terminated. The letter also informed relator of his appeal rights:

The Ohio PERS Board of Trustees reviewed your disability file and recent reports of medical re-examination at the January 20, 2009 meeting.

Based upon all the medical information and recommendations, the Ohio PERS medical advisor and the board concluded that you are no longer considered to be permanently disabled from the performance of duty as a Deputy Sheriff/Law Enforcement Officer. Specifically, there is insufficient objective evidence of permanent disability due to major depression. Therefore, your disability benefit will be terminated. \* \* \*

You have a right to appeal the board's termination of your disability benefit. If you wish to appeal this action, you may supply additional objective medical evidence, at your expense, to us as the basis of your appeal. In order to file an appeal you must:

1. File a written notice of your intent to appeal the board's termination. Your notice stating you wish to appeal and will supply additional objective medical evidence must be received no later than 30 days from the date of this letter.
2. Submit the additional objective medical evidence no later than 45 days from your written notice of intent. A licensed physician trained in the field of medicine covering the illness or injury for which the disability is claimed must submit this medical evidence. The physician(s) should submit a **current, complete and comprehensive report** on his/her own letterhead to us for review. The cost of such examinations and reports are your responsibility and cannot be paid by us. After you have submitted your additional medical evidence, it will be reviewed and you will be notified of the board's action on your appeal, which may include the request for you to undergo an additional independent medical examination with a physician selected by OPERS. If your appeal is granted and your disability benefit is ultimately reinstated, benefits will be resumed at the point of the original termination. You may also submit a written request for an extension to allow additional time to present your additional objective medical evidence (physician reports). However, this request must be

made within the first 45-day period after you file your notice of intent to appeal. You may be granted only one additional 45-day period to submit your medical evidence.

If you do not file your notice or medical evidence within the time allowed, the board's action will be final and any future application for a disability benefit must be submitted with supporting medical evidence of progression of the disabling condition or evidence of new disabling condition(s). \* \* \*

(Emphasis sic.)

{¶16} 12. The aforementioned OPERS letter dated January 20, 2009 was addressed to relator.

{¶17} 13. On February 13, 2009, OPERS received a letter dated February 12, 2009 from a "David Lynn Jones" written on the letterhead of "Disability Assistance, Inc.," which is stated to be "Assisting Individuals in Securing Disability Pensions[,] Police / Fire – P.E.R.S. – S.E.R.S. – S.T.R.S." The Jones letter states:

As the representative for Mr. Fred L. DeLuca Jr., in his disability pension appeal issue with your firm [sic], at this time we are filing our notice to appeal the board's termination of Mr. DeLuca's disability benefits. Additional information will be forwarded to your firm [sic] within 45 days of your receipt of this notice. Enclosed you will find an Authorization for Release of Account Information form, designating myself as Mr. Fred L. DeLuca Jr.'s representative.

{¶18} 14. By letter dated February 23, 2009, OPERS informed Jones:

We received your intent to appeal the OPERS Board of Trustees' termination of Mr. Deluca's disability benefits. You will need to submit a current and complete medical report from his attending physician supporting his disability by March 30, 2009.

Once the additional medical evidence has been received, our medical advisor will review it. You will be notified of the action on the appeal, which may include the request for him to undergo an additional independent medical evaluation with an Ohio PERS-appointed examiner.

{¶19} 15. On March 31, 2009, OPERS received by facsimile transmission medical reports from two physicians who had recently examined relator. Received by OPERS was a three-page report from Sheldon Kaffen, M.D., dated March 23, 2009, and a 17-page report from Francis L. McCafferty, M.D., dated March 25, 2009.

{¶20} 16. In his report, Dr. Kaffen concluded:

Mr. DeLuca was seen for an Independent Medical Evaluation on 7/19/05 with complaints of low back pain with radiation into the left lower extremity with numbness and weakness. On examination, there was tenderness and limitation of motion of the lumbosacral spine. There was muscle weakness of the left foot and ankle. The neurological examination, as described, was within normal limits.

#### ASSESSMENT:

The above findings indicate a diagnosis of herniated intervertebral lumbar disc at L5-S1 on the left; degenerative disc disease of the lumbar spine.

#### CONCLUSION:

It is my medical opinion based on the history, physical examination and review of medical documentation that Mr. DeLuca is permanently and totally disabled from his line of employment as a Deputy Sheriff.

{¶21} 17. In his report, Dr. McCafferty concluded:

#### SUMMARY

The patient is a 49-year-old married white male who had been functioning adequately as a deputy sheriff until his industrial injury of 3/5/03. Since that time, and as a direct result of the industrial injury, the patient has developed a Major Depressive Disorder, Single Episode, Severe, Without Psychotic Features; and a Post Traumatic Stress Disorder, Chronic. The patient's symptoms had initially lessened with his therapy from a psychiatrist and psychologist, but have recently been exacerbated when he was taken off disability by the Ohio Public Employees Retirement System. The patient experienced intense exacerbation of his symptoms

which is not unusual. There is no evidence of malingering. It is noted that the patient does have suicidal and homicidal potential and would be unable to function if he were to return to the stress of police work as a deputy sheriff.

\* \* \*

The prognosis for the patient's Major Depressive Disorder, Single Episode, Severe, Non Psychotic; and Post Traumatic Stress Disorder, Chronic, appears to be guarded. He has had these conditions since 2003, and while there was initial lessening of symptoms, his symptoms have returned in the last month to a severe level. He continues to have suicidal/homicidal thinking that goes back to 2003.

On 3/16/09 Mr. Fred L. Deluca was examined by me, and the result of this examination is given in this report. I hereby certify that because of the above described conditions of Major Depressive Disorder, Single Episode, Severe, Non Psychotic; and Post Traumatic Stress Disorder Chronic, as well as his chronic pain and physical limitations, that he is mentally and physically incapacitated for the performance of duty and should be granted a disability retirement. His condition will last for a period of not less than 12 months, and probably indefinitely.

{¶22} 18. By letter dated April 6, 2009, OPERS informed relator:

We received your intent to appeal the OPERS Board of Trustees' termination of your disability benefits. You were required to submit a current and complete medical report from your attending physician supporting your disability by March 30, 2009.

The reports from Dr. Sheldon Kaffen MD and Dr. Francis McCafferty MD, which were submitted by your representative David L. Jones, were received on March 31, 2009. These reports were not received within the required time frame. The board's decision to terminate your disability benefit is final.

{¶23} The April 6, 2009 letter is unsigned, but indicates that it was issued by "Ohio PERS."

{¶24} 19. The record contains a letter to OPERS dated April 22, 2009 from relator's counsel:

Please be advised that I represent Mr. Fred DeLuca. As I understand it, Mr. DeLuca employed an individual known as David Lynn Jones for the specific purpose of assisting him in his PERS appeal process. Your office notified Mr. Jones that said appeal was received and that additional information would need to be filed on or before March 3, [sic] 2009. According to your letter of April 6, 2009, said information was received by your office on March 31, 2009. For this reason Mr. DeLuca's appeal was denied without further ability for review.

As you can understand Mr. DeLuca is beside himself. Through no fault of his own, other than employing an incompetent representative, he has lost his ability to put forth information that in his opinion would have caused the continuance of his PERS benefits. Accordingly, considering that the information requested was but one day delayed and his ineffective representation, please reconsider your decision to not hear his appeal.

{¶25} 20. The record does not contain an OPERS response to counsel's April 22, 2009 letter.

{¶26} 21. On November 23, 2009, relator, Fred DeLuca, Jr., filed this mandamus action.

Conclusions of Law:

{¶27} The sole issue is whether respondent violated its own rule, i.e., Ohio Adm.Code 145-2-23 when it apparently considered its January 20, 2009 termination decision to be final following relator's failure to timely file additional medical evidence within the 45 day period set forth by Ohio Adm.Code 145-2-23(B)(3)(e).

{¶28} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶29} R.C. 145.35(C) provides: "Application for a disability benefit may be made by a member, by a person acting in the member's behalf, or by the member's employer."

{¶30} R.C. 145.35(F) provides: "The public employees retirement board shall adopt rules requiring a disability benefit recipient, as a condition of continuing to receive a disability benefit, to agree in writing to obtain any medical treatment recommended by the board's physician and submit medical reports regarding the treatment."

{¶31} R.C. 145.362 provides:

The public employees retirement board shall require any disability benefit recipient to undergo an annual medical examination, except that the board may waive the medical examination if the board's physician or physicians certify that the recipient's disability is ongoing. \* \* \*

On completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. If the board concurs in the report that the disability benefit recipient is no longer incapable, the payment of the disability benefit shall be terminated not later than three months after the date of the board's concurrence or upon employment as a public employee. \* \* \*

{¶32} Supplementing the statute, Ohio Adm.Code 145-2-23 captioned "Disability appeals" provides:

(A) This rule applies when the public employees retirement board either denies an application for a disability benefit filed pursuant to section 145.35 of the Revised Code or terminates a disability benefit pursuant to section 145.362 of the Revised Code.

(B)

(1) After the retirement board has either denied an application for, or terminated, a disability benefit, the member shall be notified in writing of such action.

(2) The notice shall be sent by regular mail.

(3) The notice shall include the following information:

(a) The retirement board's denial or termination of the disability benefit.

(b) The member's right to file a written notice of intent to provide additional objective medical evidence. Such notice of intent must be received by the retirement board no later than thirty days from the date of the notice of denial or termination.

(c) Failure of a member to submit a notice of intent to provide additional medical evidence shall make the retirement board's action final as to such application or benefit.

(d) Such additional evidence shall be current medical evidence documented by a licensed physician specially trained in the field of medicine covering the illness or injury for which the disability is claimed and such evidence has not been considered previously by the retirement board. Such additional medical evidence shall be presented in writing by the member and shall constitute an appeal of the denial or termination.

(e) Failure to provide the additional medical evidence within forty-five days of the member's notice of intent to provide such evidence shall make the retirement board's action final to such application or benefit unless an extension for submission of such evidence has been requested and granted within the forty-five days. Only one extension, not to exceed forty-five days, may be granted by the retirement board's staff.

(f) All medical costs of physicians selected by the member and incident to the appeal shall be at the expense of the member.

(C)

(1) After submission of any additional medical evidence as described in paragraph (B)(3)(d) of this rule, all evidence shall be reviewed by the retirement board's medical consultant(s) who shall recommend action for concurrence by the board.

(2) If the board concurs with a recommendation for approval of the appeal, disability benefits shall be paid from the date that was established when the original application for a disability benefit was filed. If a recommendation for termination of a disability benefit was appealed and the appeal is approved by the board, the payments shall be resumed from the date of termination. The member shall be notified by regular mail of the board's decision.

(3) If the board concurs with a recommendation for denial of the appeal, the member shall be notified by regular mail of the board's decision and such decision shall be final.

(4) Any subsequent applications for a disability benefit filed after a denial of an appeal shall be submitted with medical evidence supporting progression of the disabling condition or evidence of a new disabling condition. If two years have elapsed since the date the member's contributing service terminated, no subsequent application shall be accepted.

{¶33} Analysis begins with the observation that Ohio Adm.Code 145-2-23(B)(3)(d) provides that it is the additional medical evidence that "shall constitute an appeal of the denial or termination." Thus, under the rule, it is not the "written notice of intent to provide additional objective medical evidence" that is deemed to "constitute an appeal of the denial or termination."

{¶34} The next paragraph of the rule, Ohio Adm.Code 145-2-23(B)(3)(e) then provides:

Failure to provide the additional medical evidence within forty-five days of the member's notice of intent to provide such evidence shall make the retirement board's action final to such application or benefit unless an extension for

submission of such evidence has been requested and granted within the forty-five days. \* \* \*

{¶35} It should be observed that Ohio Adm.Code 145-2-23(B)(3)(e) provides that a failure to provide the additional medical evidence within the 45 day period "*shall* make the retirement board's action final." (Emphasis added.)

{¶36} The retirement board, under the rule, is given discretion to grant an extension when such extension "has been requested and granted within the forty-five days."

{¶37} Apparently, OPERS interprets its rule as allowing it no discretion to grant an extension where the request is not made within the 45 day period following the filing of the notice of intent.

{¶38} Here, it is arguable that, by letter dated April 22, 2009, relator's new counsel did request the one day extension of time needed to deem the March 31, 2009 submission of the medical reports as being timely to perfect the appeal. While respondent did not respond to the April 22, 2009 request from relator's new counsel, presumably, respondent has treated the April 22, 2009 request as moot under the rule, i.e., that respondent has no discretion under the rule to grant an extension of even one day when the request for such extension is not made within the 45 day period.

{¶39} This court must accord PERB due deference to its reasonable interpretation of its statutes and administrative rules. *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 151, 2007-Ohio-3760, citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289, 2001-Ohio-190; see,

also, *State ex rel. Gill v. School Emps. Retirement Sys. of Ohio*, 121 Ohio St.3d 567, 572, 2009-Ohio-1358.

{¶40} When PERB is accorded due deference in its interpretation of Ohio Adm.Code 145-2-23, it must be concluded that PERB has not violated its rule by treating its January 20, 2009 termination decision as final.

{¶41} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

s/s Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

#### NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).