[Cite as *State ex rel. Cydrus v. Ohio Pub. Emps. Retirement Sys.*, 2010-Ohio-1143.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Patricia D. Cydrus,	:	
Relator,	:	
v.	:	No. 09AP-595
Ohio Public Employees Retirement System and Ohio Public Employees Retirement System Board of Trustees,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 23, 2010

Charles Zamora Co., LPA, and *Charles Zamora,* for relator.

Richard Cordray, Attorney General, *Keith A. McCarthy* and *Hilary R. Damaser,* for respondents.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Patricia D. Cydrus, commenced this original action requesting a writ of mandamus that orders respondent Ohio Public Employees Retirement Board of Trustees ("board") to vacate its decision terminating her disability benefits and to find she remains unable to perform her job duties and is entitled to continuing disability benefits.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In her decision, the magistrate concluded (1) the report of Dr. Gerald Steiman constitutes new objective evidence on which the board could rely; (2) because the board is not required to identify the evidence on which it relies and is not required to provide a brief explanation when it denies benefits, the board's failure to reference relator's evidence does not indicate the board ignored it; and (3) the board was not required to consider additional medical evidence relator supplied outside the deadline the rules and code established. Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Relator filed objections to the magistrate's conclusions of law:

> A. The Magistrate Erred By Concluding Dr. Steiman's Report Constitutes New, Objective Medical Evidence, Even Though The Report Provided No New Information Upon Which PERS Could Rely.
>
> B. Relator's Right To Be Given An Explanation As To Why PERS Terminated Her Benefits Is Required By The United States Constitution and the Constitution Of The State Of Ohio.
>
> C. The Magistrate Erred In Stating That PERS Is Not Required To Provide An Explanation As To Why It Terminated The Relator's Disability Benefits.
>
> D. The Magistrate Erred By Failing To Consider The Additional Medical Evidence That Cydrus Provided to PERS.

III. First Objection

{¶4} Relator first contends the report of Dr. Steiman is not new, objective medical evidence on which the board could rely to deny relator's continuing disability benefits. Relator asserts Dr. Steiman's report provided the board with no new medical information or any explanation of what changed to warrant terminating the disability benefits relator had been receiving for years.

{¶5} R.C. 145.362 generally requires a person receiving disability benefits to undergo an annual medical examination, and it further requires the physician or physicians to 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 physician reports that the recipient no longer is incapable, and the board finds the evidence persuasive, then "the payment of the disability benefits shall be terminated * * *." R.C. 145.362.

{¶6} Here, as the magistrate noted, Dr. Steiman conducted a physical examination and reviewed the medical evidence in the record. Based on both, he concluded relator no longer is disabled. The board agreed with his report and accordingly terminated relator's benefits. Relator's first objection is overruled.

IV. Second and Third Objections

{¶7} Relator's second and third objections contend (1) the magistrate erred in concluding PERS is not required to explain its decision to terminate relator's benefits, and (2) the board violated relator's due process rights in failing to explain why it terminated her benefits.

{¶8} In *State ex rel. Pipoly v. State Teachers Retirement Sys.,* 95 Ohio St.3d 327, 2002-Ohio-2219, the Supreme Court of Ohio refused to impose, in the absence of a statutory duty, any requirement that the decision to deny benefits be explained. While this court in *State ex rel. Green v. Pub. Emp. Retirement Sys.* (June 22 1999), 10th Dist. No. 98AP-567, decided, based on an administrative provision, that the board should at least state the basis for its decision, the administrative rule since has been changed to eliminate the provision on which *Green* was based. *Hamby v. Ohio Pub. Emp. Retirement Sys.*, 10th Dist. No. 08AP-298, 2008-Ohio-5068. Since no statutory provision requires the board to explain its decision, the magistrate properly concluded that the board was not required to do so. See also *State ex rel. VanCleave v. School Emps. Retirement Sys.,* 120 Ohio St.3d 261, 2008-Ohio-5377. In light of *Pipoly* and *VanCleave,* the holding in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, applied to workers' compensation orders and relied on by relator, does not support relator's request for mandamus relief to require the board to explain its decision.

{¶9} The *VanCleave* court also addressed, in the context of the School Employees Retirement System, relator's due process argument and concluded the statutory process provided adequate due process even though it lacked any requirement that the board explain its decision. Id. (stating the court rejected the "claim that due process required that SERS supports denial of her application for disability-retirement benefits by specifically identifying the evidence it relied upon and explaining the reasons for its decision"). Similarly, relator here received adequate due process even though the board did not cite the evidence it relied on or explain its decision.

{¶10} Relator's second and third objections are overruled.

V. Fourth Objection

{¶11} In her last objection, relator contends the magistrate erred in failing to consider the additional medical evidence relator provided to the board. In particular, relator points to a physician's report and new MRIs "showing that her condition was actually *worsening*." (Emphasis sic.)

{¶12} According to the chronology of record, relator was informed by letter dated November 28, 2008 that the board concluded she no longer was considered permanently disabled. The letter advised her of her appeal rights, including the need to (1) file a written notice of intent to appeal within 30 days of the date of the letter and (2) submit additional objective medical evidence no later than 45 days from the date of the written notice of intent. In a December 3, 2008 letter, relator advised of her intent to appeal; on December 8 she was notified that her intent to appeal was received and that additional evidence was to be filed by January 17, 2009. A November 25, 2008 report of Jennifer E. Sylvester, M.D., was filed on January 12, 2009.

{¶13} A January 20, 2009 letter from Dr. Mast informed relator her appeal was reviewed with the result that she was not considered permanently disabled from performing her duties as an executive secretary. After Drs. Vogelstein and Lowe saw relator, relator's counsel, by letter dated April 14, 2009, requested that the board reconsider the decision to terminate relator's disability benefits. A letter of April 24, 2009 advised relator's attorney the decision was final.

{¶14} Initially, relator notes Dr. Mast's January 20, 2009 report cited "no new evidence" that would support granting relator's appeal. Relator contends the statement suggests Dr. Mast failed to review her physician's report and MRIs. As the board notes,

however, Dr. Mast stated in his report that he "reviewed recent examinations and found there to be no new evidence." In so stating, Dr. Mast simply reflected his conclusion that the additional evidence relator submitted presented nothing different than the medical evidence relator previously submitted, and thus it did not change the board's decision to terminate her benefits. As to the MRIs relator relies on, the magistrate properly concluded that the lack of a time-stamp on the MRIs indicates they were not filed with the board. While relator attaches an affidavit to her objections averring that she submitted the October 2008 MRI report on January 12, 2009, evidence submitted to this court cannot be considered in determining whether the board abused its discretion. Accordingly, relator's fourth objection is overruled.

{¶15} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

KLATT and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Patricia D. Cydrus,	:	
Relator,	:	
v.	:	No. 09AP-595
Ohio Public Employees Retirement System and Ohio Public Employees Retirement System Board of Trustees,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on November 25, 2009

Charles Zamora Co., LPA, and *Charles Zamora*, for relator.

Richard Cordray, Attorney General, *Keith A. McCarthy* and *Hilary R. Damaser*, for respondents.

IN MANDAMUS

{¶16} Relator, Patricia D. Cydrus, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Public Employees Retirement Board ("the board") to vacate its decision which terminated her disability retirement

benefits and ordering the board to find that she remains unable to perform her job duties and is entitled to continuing disability benefits.

Findings of Fact:

{¶17} 1. Relator was employed by the Ohio Department of Youth Services as an executive secretary.

{¶18} 2. In 1996, relator was involved in an automobile accident. Following the accident, relator suffered chronic headaches for several years.

{¶19} 3. In December 2000, relator underwent an MRI which revealed an "A Chiari I malformation."

{¶20} 4. In his July 22, 2002 report, relator's treating physician, Lawrence P. Frick, M.D., defined "A Chiari I malformation" as a "congenital malformation of the base of the skull which allows a portion of the brain to herniate through the skull base which then applies pressure on that part of the brain as well as obstructs the normal flow of cerebrospinal fluid."

{¶21} 5. Relator had surgery; however, she continued to have severe headaches.

{¶22} 6. Relator left her position as an executive secretary and, in November 2002, relator submitted an application for disability benefits under the Public Employees Retirement System of Ohio ("PERS") alleging that she was incapacitated from the performance of her duties because of severe muscle spasms, headaches, and Chiari malformation symptoms which are continuous, require medications, and result in poor balance and sensitivity to light.

{¶23} 7. Relator's application was supported by the November 14, 2002 report of Dr. Frick, wherein he stated, in pertinent part:

> As of today's date, 11-14-02, I think her condition is permanently disabling in that she has not responded to all therapy so far and it has been almost one year since her surgery.
>
> * * *
>
> Her prognosis for full recovery is quite guarded given the duration of her pain. We do continue to try to find modalities that will improve her situation, but prognosis for her to return to work is poor to guarded.
>
> * * *
>
> I don't foresee the patient returning to duty of any type for some time, if ever.
>
> In my opinion, Patricia Cydrus is incapacitated permanently and should receive disability benefit[s] for her disability.

{¶24} 8. Relator was seen by Leslie A. Friedman, M.D., on January 2, 2003. Dr. Friedman provided a history of relator's medical treatment, identified the medical records reviewed, and provided physical findings upon examination. In the discussion portion of the report, Dr. Friedman noted:

> In summary, Patricia Cydrus indicates involvement in an auto accident where she developed headaches. She was subsequently diagnosed with Chiari malformation and underwent a suboccipital decompression. Headaches which were nearly intractable before the operation became intractable after the operation from a historical standpoint. At this point in time, the objective examination is normal.

{¶25} Thereafter, Dr. Friedman offered the following opinion:

> I have reviewed Patricia Cydrus' examination, history, submitted medical records and current complaints. My opinions are based upon a reasonable degree of medical probability. Sufficient time was utilized to arrive at the following conclusions.

> In my opinion, Ms. Cydrus is not presumed to be physically incapacitated permanently from the performance of duty and should not be entitled to a disability benefit. While I realize Ms. Cydrus is having frequent severe headaches, I would be optimistic that the distractions of the work place [sic], as well as the known psychosocial benefit of an occupation would prove to be quite beneficial.

{¶26} 9. In a letter dated February 19, 2003, relator was informed that the PERS medical consultant and the board agreed that she was not permanently disabled from performing her job duties as an executive secretary. Relator was also informed that she had the right to appeal within 30 days and that she could submit additional objective medical evidence no later than 45 days from her written notice of her intent to appeal.

{¶27} 10. In a letter dated March 14, 2003, relator informed the board of her intent to appeal the denial of her disability retirement. Relator's appeal was supported by the March 26, 2003 report of Dr. Frick, wherein he stated:

> The main point of contention regarding her ability to work seems to be the severity of her headaches and whether these are truly incapacitating. As you can see from the records from my office that you already have, she has been to our office several times with these headaches. When she has the headaches[,] they are quite severe and incapacitating. She can sometimes barely walk down the hall and to the examination without the assistance of her husband. She can certainly not fulfill her role as an executive secretary while having one of these severe headaches. The most severe headache[s] seemed to happen about on[c]e or twice a week and she would be unable to perform her duties very frequently. Even during times when she does not have the most severe headaches she does have quite a bit of pain and unfortunately has still required use of narcotics and Diazepam on a regular basis which also make her somewhat groggy and can potentially cloud her judgment. For this reason, she has not driven her car since her surgery. She tells me that occasionally that as part of her job she has to drive documents and other items from one building to another and therefore would be unable to perform that part

> of her job. She would of course also be unable to get back and forth from her home to her work place [sic] as well.
> Dr. Freedman's [sic] assessment is that the work place [sic] would be a distraction and might actually improve her headaches. I agree with him that some patients do tend to improve once they get back into a normal routine. My concern with Patricia's case is that the severity of her headaches are such that I just don't think that is possible.
>
> I find her to be a very motivated patient. She is still trying to pursue all means possible to improve her headaches and I think that she is well motivated to be able to return to work. I just don't think it is possible with the severity of the headaches at this time.

{¶28} 11. The board requested that relator undergo another examination by Kathy Chang, M.D. In her May 8, 2003 report, Dr. Chang concluded:

> Based on my examination of Ms. Cydrus, she certainly does not have any physical limitations. However, given her history of difficulties dealing with her headache and her being on extensive list of narcotics and pain medication and muscle relaxants, I feel that she needs more pain management to help with her headaches. I believe that these headaches are quite debilitating in the emotional and psychological point of view. It certainly prevents her from performing her job, even though she has no "physical limitations" in her physical examination. So, until they find a modality that better treats her headaches, I feel that she would be better served not working in her job at this present time.

{¶29} 12. Thereafter, in a letter dated June 18, 2003, relator was informed that, after reviewing the supplemental medical information, the board approved her disability retirement application with the condition of a re-examination in one year.

{¶30} 13. The office notes from Dr. Frick from July 2003 through July 2004 indicate that relator continued to have severe headaches. Dr. Frick prescribed Topamax and, when she presented with severe headaches, he gave her an injection of Demerol. Apparently, relator had another MRI which showed that the mass in relator's trapezius

had not grown in over 18 months. Biopsies of the mass were inconclusive. Relator also continued having left shoulder pain and began using Percocet. On occasion, relator used Valium, but only for the most severe of her headaches. Relator was also given Diclofenac for her headaches without much success. Dr. Frick noted that, apparently, Geoffrey A. Eubank, M.D., had started relator on Amitriptyline; however, she did not improve.

{¶31} 14. In a September 20, 2004 report to Dr. Frick, Laura Popelar, R.N., C.N.P., noted that relator had discontinued the Amitriptyline and had begun treating with Depakote. At this time, relator was offered different alternatives, including "Depacon infusions" for acute flare-ups, trigger point injections, occipital nerve blocks, and Botox injections. It was noted that her neurological examination failed to reveal any abnormalities, but that she continued to have decreased range of motion of the cervical spine and her trapezius muscles were tender to palpation bilaterally.

{¶32} 15. Relator was referred for an examination by Mazen K. Eldadah, M.D. In his September 23, 2004 report, Dr. Eldadah recommended that relator should be seen by both a psychiatrist and a pain management specialist in order to consider the effect of the excessive use of narcotics and analgesics for her headaches. Dr. Eldadah noted that relator's neurological exam was within normal limits and he opined that relator was not incapacitated and not entitled to a disability benefit.

{¶33} 16. Relator submitted a letter dated September 30, 2004, giving her opinion of why Dr. Eldadah's report was not credible. Relator stated that Dr. Eldadah's exam was cursory, short, that he did not know what medications she was taking, and argued that he

improperly challenged her physician's use of narcotics and analgesics to treat her condition.

{¶34} 17. In a letter dated October 20, 2004, relator was informed that the board had approved the continuation of her disability allowance with the condition of a re-examination in one year.

{¶35} 18. Relator continued to see Dr. Frick, and his office notes from November 11, 2004 through August 23, 2005 indicate that relator continued to present with neck pains and frequent headaches which were often severe. Dr. Frick routinely gave her injections of Demerol. Relator reported that she was taking between two and four Percocet per day. In December 2004, relator slipped and fell down her basement stairs and hurt her shoulder. An MRI revealed a rotator cuff tear.

{¶36} 19. In another letter from Lauren Popelar dated January 13, 2005, it was noted that Depakote had helped relator's headaches and they were less severe than they had been. Unfortunately, relator was experiencing some cognitive dysfunction and tiredness while on the medication. It was noted that relator's neurological examination failed to reveal any abnormalities, but that she did have decreased range of motion of her cervical spine.

{¶37} 20. Lauren Popelar saw relator again and, in an April 13, 2005 report to Dr. Frick, she noted that relator had seen Dr. Frick less frequently over the past year, and that she continued to struggle with muscle tightness and stiffness in her neck. She discussed the use of a sequential stimulator; however, elected not to utilize that option. Relator's neurological examination again failed to reveal any abnormalities. Relator

remained on the same pain regimen, began using an electrical stimulator, and considered herbal supplements and Botox injections.

{¶38} 21. Relator was seen again by Dr. Eubank and, in his August 4, 2005 report, he opined that her frequent use of pain medication was likely contributing to rebound headaches and that relator should cut back on her usage if she wanted good relief.

{¶39} 22. In November 2005, relator was referred to the Medical Resource Group, Inc., for an examination.

{¶40} 23. Relator was again seen by Dr. Eldadah who authored a report dated December 7, 2005. Dr. Eldadah concluded:

> As mentioned above, this patient has chronic daily headaches. She is status post suboccipital decompression for chairi malformation. I think this patient needs to continue her medication for the chronic daily headaches and she needs to work with her neurologist to control these headaches. Also, I think part of her headaches could be attributed to the use of the narcotics and the pain medication. The patient is not disabled at this point in time.

{¶41} 24. On January 14, 2006, relator authored another letter complaining about Dr. Eldadah and again indicated that his examination was cursory and that he failed to consider any of the information she told him.

{¶42} 25. Relator was referred for another independent medical examination which was performed by Marc W. Whitsett, M.D. In his February 22, 2006 report, Dr. Whitsett noted relator's history, current complaints, and his physical findings upon examination. He noted that, as a result of her severe, constant and unremitting headaches, she had developed depression and needed to be evaluated by a psychiatrist.

He concluded that, as a result of her headaches, she was permanently and totally disabled from her occupational activities as an executive secretary.

{¶43} 26. In a letter dated April 19, 2006, relator was informed that the board approved the continuation of her disability allowance with the condition of a re-examination in one year.

{¶44} 27. Relator continued to see Dr. Frick, and his notes from May 3, 2006 through March 23, 2007 are in the record. Relator continued to have headache pain, as well as chronic hypertension and hyperlipidemia. Relator continued to take Percocet, Depakote, Amitriptyline, and Topamax. There is no indication that relator needed any Demerol injections during this time period. Relator also complained of right ear and chest pain. The most recent MRI showed that the mass in relator's trapezius had grown just slightly. Dr. Frick essentially noted that her headaches remained unchanged. In December 2006, Dr. Frick specifically discussed the cause of relator's rebound headaches and told her that she needed to reduce the amount of Percocet she was using.

{¶45} 28. Relator was seen again by Dr. Eubank and, in his October 5, 2006 report, he noted that her headaches had not improved, she was sometimes taking six Percocet a day, and he asked her to reduce her Depakote. Dr. Eubank indicated that he was running out of treatment options for her headaches and would try her on a prescription of Lyrica.

{¶46} 29. In April 2007, the board referred relator to Sharda K. Bobba, M.D., a specialist in psychiatry and neurology. Following her examination, Dr. Bobba authored a report in which she concluded:

> Based upon the psychiatric evaluation and her nature of the complaints, I do agree with Mar[c] Whitsett, M.D[.] that patient is disabled to work at her previous job. I am quite concerned about her numerous medications that she is on and I do agree with Dr. Whitsett's recommendations. Patient would benefit if she is also under psychiatric care to evaluate further regarding the dosages of the Depakote and Topomax [sic] (which seems to help with her mood stabilization despite given for headaches) and antidepressant medications.

{¶47} 30. In a letter dated June 20, 2007, relator was informed that the board had approved the continuation of her disability benefits with the condition of a re-examination in one year.

{¶48} 31. Relator continued to see Dr. Frick and his office notes from June 1, 2007 through June 5, 2008 are in the record. During this time, relator continued to have chronic headaches and began experiencing restless leg syndrome. Relator continued on her medications, including Percocet. During this time period, Dr. Frick did give relator injections of Demerol and in June 2008 he gave her an injection of Depo-Medrol and continued her on the Medrol dose pack.

{¶49} 32. Lauren Popelar saw relator again and in her June 26, 2007 report, she noted that, along with her chronic headaches and neck pain, relator was now having pain in both of her hands that she associates with Dupuytren's nodules. It was also noted that relator had some pain in her abdomen and chest and that she had begun taking Pepcid. Relator's neurological examination failed to reveal any abnormalities with the exception of some slight difficulty with finger to nose maneuvers on the right.

{¶50} 33. Relator was seen again by Dr. Eubank and in his December 19, 2007 report he noted that relator was still having severe headaches. He indicated that a trial of

steroids did not help, so relator began taking Keppra which also did not help. Dr. Eubank suggested another trial of Lyrica and Botox injections.

{¶51} 34. An MRI of relator's brain was performed on June 11, 2008 at Adena Health System in Chillicothe, Ohio. That study provided:

> FINDINGS:
>
> Please note that this study is limited by motion degradation.
>
> The cerebellar tonsils project approximately 9.7 mm inferior to the foramen magnum. This contributes to "crowding" of the foramen magnum.
>
> * * *
>
> IMPRESSION:
>
> [One] There is inferior cerebellar tonsillar ectopia which is also known at the Chiari I malformation. This apparently is a known entity to the patient.
>
> [Two] No acute ischemic change is identified.

{¶52} It was also noted that there were no comparisons available. Unfortunately, this document does not bear a file stamp from PERS and apparently was not available for review.

{¶53} 35. In June 2008, the board referred relator to psychiatrist Richard H. Clary, M.D. In his July 30, 2008 report, Dr. Clary noted that relator reported problems with depression for the past six years; however, she had never been hospitalized for psychiatric problems and had been taking Zoloft for approximately six years. Dr. Clary conducted a mental status examination and ultimately concluded that she was receiving appropriate treatment for her chronic pain and medical problems as well as for her

depression and, in his opinion, her depression alone was not work prohibitive and did not cause long term disability.

{¶54} 36. In August 2008, the board referred relator to neurologist Gerald S. Steiman, M.D. Dr. Steiman examined relator and wrote a report dated September 7, 2008. Dr. Steiman noted relator's history as well as the medical records he reviewed. Thereafter, Dr. Steiman noted that while relator had tenderness through the paraspinal, lateral neck and trapezius muscles, there was no evidence of muscle guarding. Further, he noted that there was no evidence of a painful, tender, or trigger point in the occipital, low cervical trapezius or supraspinatus regions. Spurling's signs were negative bilaterally and relator had 30 to 35 degrees of forward flexion, 25 to 30 degrees of extension, 20 to 25 degrees of right and left lateral bending, and 30 to 35 degrees of rotation to either side. Thereafter, Dr. Steiman concluded:

> Ms. Cydrus presents with a history of recurrent and ongoing headaches beginning in the mid 1990's. In 2000[,] an MRI of the brain revealed an Arnold Chiari malformation and Ms. Cydrus underwent surgery in 2002. Thereafter, she has continued to have headaches that are described as constant and severe. As a result of her headaches she is unable to participate in activities. Ms. Cydrus is currently on numerous medications for her headaches. She recalls being told by Dr. Benzel, her neurosurgeon, that should she ever fall down the stairs or be involved in an accident she will absolutely need to have neck surgery with insertion of a cadaver shelf to the base of her brain.
>
> * * * Ms. Cydrus' history, medical record review and physical exam provides credible evidence that she is not permanently disabled for the performance of her position as a public employee.
>
> Ms. Cydrus does have a history of an Arnold Chiari Malformation S/P surgery. Her only manifestations are subjective headaches. Although her headaches are painful,

> the subjective nature of her headaches would indicate they are not work prohibitive and do not create an impairment which would preclude her ability to return to her prior job activity.

{¶55} 37. An MRI was taken at Riverside Methodist Hospital on October 6, 2008 and revealed the following:

> The cerebellar tonsils extend through the foramen magnum approximately 14 mm. Mild compression of the cerebellar tonsils. The cervicomedullary junction is normal in appearance.
>
> The ventricles, suici and basilar cisterns are otherwise normal in appearance. No intra-axial mass or enhancement abnormality. No evidence restricted diffusion. Good flow void is seen within major vessels. The orbital apices and the infratemporal fossa are normal. The patient is status post resection of the posterior ring C1[.]
>
> * * *
>
> [One] Chiari malformation. The cerebellar tonsils extend 14 mm below the foramen magnum.
>
> [Two] No evidence of hydrocephalus.

According to the report, no comparison was made with previous MRIs. Further, this MRI report does not bear a file stamp from PERS and was not available for review. Further, there is no explanation why MRIs were taken June 11, 2008 and again October 6, 2008 and, it is also noted that the studies were performed differently. The June MRI was diffusion weighted imaging and the October MRI was diffusion imaging with and without contrast.

{¶56} 38. By letter dated November 13, 2008, relator was informed that, based upon all the medical information and recommendations, the board had concluded that she was no longer considered to be permanently disabled from the performance of her duties

as an executive secretary. Specifically, she was notified that there was insufficient objective medical evidence of permanent disability due to chronic daily headaches, and her disability benefits would be terminated. Relator was also informed of her appeal rights, specifically:

> * * * In order to file an appeal you must:
>
> [One] 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.
>
> [Two] 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. * * * 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[.] * * * 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). An application must be submitted within two years of terminating public service. Any application received after the two years has expired, cannot be accepted.

(Emphasis sic.)

{¶57} 39. A November 25, 2008 report was submitted by Jennifer E. Sylvester, M.D., who had been treating relator for most of 2008 since Dr. Frick left the practice. Dr. Sylvester reiterated that relator continued to suffer from severe headaches which have caused narcotic dependency in order to sustain normal functioning during even part of a day. She indicated that there are many days when relator is nonfunctional, must sleep in a darkened room in order to maintain some control of her pain, and cannot drive. Dr. Sylvester referenced documentation, presumably the June 11 and October 6, 2008 MRIs, indicating that the protrusion had progressed. Dr. Sylvester outlined the treatment attempts, as well as their failures. She noted that, in her professional opinion, relator had been permanently disabled since 2002 and she not only has chronic pain that requires narcotic treatment, but she is unable to drive on most days and has difficulty even ambulating without an unsteady gait.

{¶58} 40. In a letter dated December 3, 2008, relator gave notice of her intent to appeal the termination of her disability benefits as well as any reliance on the report of Dr. Steiman.

{¶59} 41. On December 8, 2008, relator was notified that her intent to appeal had been received and advised her:

> * * * You will need to submit a current and complete medical report from your attending physician supporting your disability by January 17, 2009.
>
> Once your additional medical evidence has been received, our medical advisor will review it. You will be notified of the action on your appeal, which may include the request for you to undergo an additional independent medical evaluation[.] * * *

{¶60} 42. Relator submitted a January 11, 2009 letter appealing the report of Dr. Steiman. According to relator, his review was cursory, he berated the physicians and treatments which relator had been receiving for years, failed to listen to anything she said, and requested his report be overturned and that she never be required to see him again.

{¶61} 43. In a letter dated January 20, 2009, relator was informed that her appeal had been considered and that, based upon all the medical information and recommendations, she was not considered permanently disabled from the performance of her duty as an executive secretary, and that there was insufficient objective evidence of permanent disability due to "[n]o additional new information." Relator was informed that the board was upholding its previous decision to discontinue her benefits and that the decision regarding her appeal was final.

{¶62} 44. Relator was examined by Seth H. Vogelstein, D.O., on February 17, 2009. Dr. Vogelstein noted relator's history as well as the medical records he reviewed, provided his physical findings upon examination, and concluded that she was unable to perform her former duties as an executive secretary.

{¶63} 45. Beal D. Lowe, Ph.D., prepared a vocational psychological evaluation after seeing relator on February 24, 2009. In his March 7, 2009 report, Dr. Lowe concluded that relator suffered from major depressive disorder as well as pain disorder associated with both psychological factors and a general medical condition. He opined that relator continued to be totally disabled and unable to perform her usual duties as an executive secretary. He also noted that Dr. Clary had diagnosed dysthymia and that he noted a current GAF (Global Assessment of Functioning) score of 70. According to Dr. Lowe, that finding was consistent with the results of Dr. Lowe's administration of the Beck

Depression Inventory which asked relator to describe her symptoms prior to the onset of her recent distress. Dr. Lowe concluded:

> In light of her continuing headaches and the diagnosed pain disorder and depression, this examination finds Ms. Cydrus to lack any capacity to adapt to the workplace stress which she would experience if she were to attempt to return to perform her usual, demanding occupation. An attempt to return to such work would only increase her headaches and related limitations. This assessment finds her to be permanently and totally disabled from any return to her usual employment.

{¶64} 46. In a letter dated April 14, 2009, relator, through her attorney, requested that the board reconsider the termination of her disability retirement based on the new reports of Drs. Vogelstein and Lowe.

{¶65} 47. In a letter dated April 24, 2009, relator's attorney was informed that the January 20, 2009 board decision finding that she was no longer permanently disabled from her last public position was final:

> Patricia Cydrus was terminated from disability at the November 13, 2008 Board meeting (copy of that letter is enclosed). Ms[.] Cydrus appealed the Board's decision and an acknowledgement letter was sent to her on December 8, 2008 (copy of that letter is enclosed). Once all medical information was received in our office[,] Ms[.] Cydrus' file was reviewed by the Board on January 20, 2009, the Board upheld the previous decision in finding Ms[.] Cydrus no longer permanently disabled from her last public position. As stated in that letter[,] the decision regarding the appeal is final (copy of that letter is enclosed).
>
> 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. Ms[.] Cydrus['] final date compensated was June 28, 2003.

{¶66} 48. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶67} For the reasons that follow, it is this magistrate's conclusion that relator's request for a writ of mandamus should be denied.

{¶68} Mandamus is the appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body. *State ex rel. Pipoly v. State Teachers Retirement Sys.,* 95 Ohio St.3d 327, 2002-Ohio-2219. Because there is no statutory appeal from the board's determination that relator is not entitled to continued disability benefits, mandamus is an appropriate remedy. See, for example, *State ex rel. Davis v. Pub. Emps. Retirement Bd*., 120 Ohio St.3d 386, 2008-Ohio-6254. An abuse of discretion exists when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys*., 114 Ohio St.3d 147, 2007-Ohio-3760. When there is "some evidence" to support the decision, the retirement system has not abused its discretion. Id.

{¶69} Pursuant to R.C. Chapter 145, disability benefits are payable when it is determined that the member is mentally or physically incapacitated from the performance of duty by a disabling condition either permanent or presumed to be permanent. A disability is presumed to be permanent if it is expected to last for a continuous period of not less than 12 months following the filing of the application. Pursuant to R.C. 145.362, the board shall require any recipient of disability benefits to undergo an annual medical examination to determine whether or not the disability is ongoing. If, based upon medical evidence, the board concludes that the disability benefit recipient is no longer incapable of

performing their job duties by a disabling condition, the payment of disability benefits shall be terminated. See R.C. 145.362.

{¶70} An appeal process is specifically provided and outlined in Ohio Adm.Code 145-2-23 as follows:

> (A) This rule applies when the public employees retirement board either denies an application for a disability benefit * * * or terminates a disability benefit[.] * * *
>
> (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.
>
> * * *
>
> (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. * * *
>
> * * *
>
> (C)
>
> (1) After submission of any additional medical evidence * * *, all evidence shall be reviewed by the retirement board's medical consultant(s) who shall recommend action for concurrence by the board.
> * * *
>
> (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.

{¶71} In the present case, following relator's initial application for disability benefits in 2002, the board denied the request. Relator followed the appeal process and submitted additional objective medical evidence. Thereafter, the board, in essence, reversed its denial and granted relator disability retirement benefits conditioned on her submitting to a yearly re-examination.

{¶72} The board sent relator for annual examinations and continued to find that she was entitled to continue receiving disability retirement benefits for the next several years.

{¶73} In 2008, relator was notified that she would be re-examined by Drs. Clary and Steiman. Dr. Clary opined that relator's depression alone was not work prohibitive and did not cause long term disability. Following his review of the medical records and his physical examination, Dr. Steiman concluded that there was no credible evidence that

relator was permanently disabled from the performance of her position as an executive secretary. He concluded that the subjective nature of her headaches indicated that they were not work prohibitive and do not create an impairment precluding her from returning to her prior job activities.

{¶74} As with the board's original denial, relator began the appeals process. Relator submitted a letter criticizing Dr. Steiman and his examination and urging the board to remove his report from evidentiary consideration. Relator also submitted a report from her treating physician, Dr. Sylvester, reiterating the statements already contained in other reports and office notes. Although Dr. Sylvester noted that imaging studies revealed that relator's protrusion had increased, neither MRI was filed with PERS. Apparently, the board did not consider this report (more than 9/10 of which contained no additional or new evidence) sufficient documentation to reverse its denial. The board upheld its original determination to terminate her disability retirement benefits and notified her of that decision.

{¶75} Several months later, and outside the applicable deadline for submitting additional objective medical evidence, relator filed a request for reconsideration and attached additional medical reports from Drs. Vogelstein and Lowe. The board denied relator's request for reconsideration and relator brought this mandamus action in this court.

{¶76} In the present case, the board followed the Ohio Revised Code and Ohio Administrative Code provisions. The board sent relator for yearly medical examinations and, based upon those reports, the board notified relator that her disability retirement benefits would be terminated. Relator did appeal; however, as stated in the findings of

fact, aside from Dr. Sylvester's report, relator failed to produce any additional new objective medical evidence, neither MRI nor new doctors' reports, for the board's consideration. Thereafter, the board denied her appeal and affirmed its earlier decision to terminate her retirement benefits. The above actions comply with the requirements of the law.

{¶77} Relator argues that Dr. Steiman's report is invalid and cannot constitute some evidence upon which the board could rely. Relator argues further that the board ignored evidence of her ongoing disability and progression and, lastly, the board should have considered the additional evidence she submitted in April. This magistrate disagrees.

{¶78} Relator first argues that Dr. Steiman's report does not constitute new objective evidence. This magistrate disagrees. While relator contends that Dr. Steiman's examination was cursory and that he was rude, a review of his report indicates that he conducted a physical examination and reviewed the medical evidence in the record. Based upon his examination and review of the medical evidence, Dr. Steiman concluded that relator was no longer disabled. Further, the fact that he noted her headaches were subjective is not a reason to remove his report from evidentiary consideration. Relator also argues that Dr. Steiman's report does not constitute additional objective medical evidence presumably because he did not document any specific findings. The magistrate disagrees. Dr. Steiman did make objective findings, reviewed the medical evidence and opined that she was not disabled. Contrary to relator's assertions, Dr. Steiman's report does constitute some evidence upon which the board could rely.

{¶79} Relator also contends that the board ignored her timely submitted additional evidence. Relator contends that Dr. Frick's office notes demonstrate that over the years her condition had not improved. Relator is correct that Dr. Frick's office notes constitute some evidence upon which the board could rely; however, relator is incorrect to argue that the board was required to give Dr. Frick's office notes greater weight than the other evidence in the record. Relator also contends that Dr. Sylvester's November 25, 2008 letter constitutes sufficient objective medical evidence that her condition had progressed. As such, relator argues that the board should have relied on it and continued her on disability.

{¶80} In her report, Dr. Sylvester apparently referenced the June and October MRIs which were not filed with PERS. Whether or not this one-sentence reference constitutes new objective medical evidence need not be answered here. The board doctors are the ones charged with reviewing the evidence and assessing the weight and credibility given to that evidence. The board is not required to identify the evidence upon which it relies and is not required to provide a brief explanation when it denies disability retirement benefits because the statutes and rules which apply do not require that the board state the basis of its denial of disability retirement.

{¶81} Further, relator is incorrect to argue that the board was required to consider the additional medical evidence she supplied outside the deadline established by the rules and code. Relator failed to timely file additional objective medical evidence with her appeal after the board notified her of its decision to terminate her disability retirement benefits. Because she missed the deadline, the board made its decision without her

additional evidence and the fact that the board did so does not constitute an abuse of discretion.

{¶82} Over the years, evidence was presented both supporting and contrary to ongoing disability. The board was cognizant of this evidence and ultimately concluded that relator was not entitled to ongoing disability compensation.

{¶83} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the board abused its discretion in deciding to terminate her disability retirement benefits and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).