

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

| | | |
|--|---|--------------------|
| State of Ohio ex rel. Anthony V. Bell, | : | |
| Relator, | : | |
| v. | : | No. 11AP-628 |
| Ohio Police & Fire Pension Fund | : | (REGULAR CALENDAR) |
| and Board of Trustees, Ohio Police | : | |
| & Fire Pension Fund, | : | |
| Respondents. | : | |

D E C I S I O N

Rendered on December 27, 2012

Charles Zamora Co., L.P.A., and Charles Zamora, for relator.

Michael DeWine, Attorney General, and Jennifer S. M. Croskey, for respondents.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Anthony V. Bell, requests a writ of mandamus ordering respondent, Ohio Police and Fire Pension Fund ("OP & F") and its board of trustees ("the board"), to vacate its award of disability benefits under R.C. 742.38(D)(4) and to enter an award of disability benefits under R.C. 742.38(D)(2).

I. BACKGROUND

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) 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 hereto. The magistrate concluded that the board did not abuse its discretion by ordering a second psychological examination and did not abuse its discretion by finding that the disability was not incurred as a result of the performance of relator's official duties as a firefighter. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

II. DISCUSSION

{¶ 3} Relator has filed objections to the magistrate's decision. He does not object to the magistrate's findings of fact, and upon an independent review of the record, we adopt them as our own. Relator presents the following objections to the magistrate's conclusions of law:

[I.] The Magistrate Erred In Failing To Find OP&F Had Abused Its Discretion In Ordering A Second Psychological Examination With Richard Clary, M.D.

[II.] The Magistrate Erred In Failing To Find OP&F Abused Its Discretion In Rejecting The Opinion Of Manuel Tzagournis, M.D., Who Provided An Updated Opinion Following Relator's Oral Testimony At Hearing.

[III.] The Magistrate Erred In Failing To Find OP&F Abused Its Discretion In Awarding A Non-Service Connected Disability Retirement Under R.C. 742.38(D)(4) Instead Of R.C. 742.38(D)(2).

{¶ 4} To obtain a writ of mandamus, the relator must establish (1) a clear legal right to the requested relief, (2) a clear legal duty upon the respondent to perform the requested act, and (3) no plain and adequate remedy in the ordinary course of law. *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225 (1990). "Because the final OP & F board decision is not appealable, mandamus is available to correct an abuse of discretion by the board in denying disability benefits." *State ex rel. Tindira v. Ohio Police & Fire Pension Fund*, 130 Ohio St.3d 62, 2011-Ohio-4677, ¶ 28. "A clear legal right to the requested relief in mandamus exists 'where the board abuses its discretion by entering an order which is not supported by "some evidence." ' " *State ex rel. Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 111, 2012-Ohio-46, ¶ 2, quoting *Kinsey* at 225.

A. First Objection

{¶ 5} Relator's first objection challenges the board's decision to order a psychological examination with Richard Clary, M.D. Because OP & F had already obtained reports from Forensic Psychiatrist Sherif Soliman, M.D., Steve Sanford, M.D., and Vocational Evaluator Robert Mosley, Ph.D., relator claims it was unnecessary for the board to order an additional examination with Dr. Clary without sufficient explanation. This objection simply reargues the contentions that were presented to, and sufficiently addressed by, the magistrate and does not raise any new issues. *See State ex rel. Phillips v. Indus. Comm.*, 10th Dist. No. 11AP-829, 2012-Ohio-5148, ¶ 3. Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate correctly found that the board did not abuse its discretion in ordering the additional examination. Accordingly, relator's first objection is overruled.

B. Second and Third Objections

{¶ 6} Relator's second and third objections to the magistrate's decision present several challenges to the board's decision denying his request for on-duty partial disability benefits under R.C. 742.38(D)(2) and instead awarding off-duty disability benefits under R.C. 742.38(D)(4). Because these objections are interrelated, we will address them together for ease of discussion.

{¶ 7} R.C. 742.38(D)(2) authorizes an award of partial disability benefits where the disability was "the result of the performance of the member's official duties as a member of a police or fire department." In contrast, R.C. 742.38(D)(4) authorizes disability benefits in circumstances where the disability was "not caused or induced by the actual performance of the member's official duties." The definitions of "on-duty" and "off-duty" are set forth in Ohio Adm.Code 742-3-05(A)(4) and (5). Pursuant to Ohio Adm.Code 742-3-05(A)(5), a disability is generally presumed to be "off-duty": "Unless the illness or injury meets the presumption criteria outlined in division (A) of section 742.38 of the Revised Code or competent and credible evidence is submitted to OP&F, a disability condition is presumed to be the result of an off-duty illness or injury."

{¶ 8} Relator claims that the board abused its discretion by rejecting the revised recommendation of the board's medical advisor Manuel Tzagournis, M.D., issued after

the April 26, 2011 appeal hearing. Dr. Tzagournis, who had twice found relator's disability to be "off-duty" based on the medical reports of Drs. Clary, Sanford, and Soliman, changed his determination to "on-duty" based on testimony presented at the April 26, 2011 appeal hearing. Relator argues that Dr. Tzagournis' revised recommendation left the board without sufficient evidence to support a denial of on-duty disability benefits under R.C. 742.38(D)(2). We disagree.

{¶ 9} "Under R.C. 742.38 and Ohio Adm.Code 742-3-05, the OP & F board is vested with the exclusive authority to evaluate the weight and credibility of the medical evidence in determining a member's entitlement to disability-retirement benefits." *Kolcinko* at ¶ 7. The board and the Disability Evaluation Panel ("DEP") must consider "all competent evidence" and must "rely upon the medical opinions of the DEP physicians and OP&F's medical advisor, who have given due consideration of medical and other evidence presented to OP&F." Ohio Adm.Code 742-3-05(B)(4) and (6).

{¶ 10} While Dr. Tzagournis revised his recommendation to on-duty, the record reveals contrary evidence indicating that relator's disability was not related to his official duties. For instance, in the DEP recommendation form completed in January 2010, Alton J. Ball, M.D., the DEP physician, certified relator's disability to be "off-duty" based on his review of relator's medical file. (R. 53.) Dr. Ball explained that his finding was primarily based on the evidence of "symptom exaggeration" identified in Dr. Clary's psychological evaluation, which Dr. Ball verified. (R. 55.) Additionally, Dr. Clary determined that relator's "psychiatric problems started about the time that he began abusing alcohol starting in either 2000 or 2001." (R. 69.) As the magistrate noted, this finding could be reasonably interpreted to identify a non-duty-related cause for relator's disability. This conclusion is strengthened by statements from one of relator's evaluating psychologists, James L. Helmuth, Ph.D., who opined that relator "never developed the coping skills he needed to deal with his own life and problems effectively and so was not well suited to coping with the stress of Firefighter and Paramedic work." (R. 159.)

{¶ 11} Given this evidence, the board was not required to accept the revised recommendation of Dr. Tzagournis. "Under the appropriate standard of review, the presence of contrary evidence is immaterial if there is evidence in support of the board's findings of fact." *Kolcinko* at ¶ 9. Although Dr. Tzagournis found relator's disability to be

duty related, he did so based on relator's own hearing testimony, which the board also heard and was free to reject. Accordingly, we find no abuse of discretion in the board's decision denying disability benefits under R.C. 742.38(D)(2) because the decision was supported by some evidence in the record.

{¶ 12} Relator also disputes the magistrate's statement that, despite relator's repeated reference to the partial disability award in R.C. 742.38(D)(2) in his complaint for mandamus and subsequent briefing, relator actually sought a writ ordering an award of permanent and total disability under R.C. 742.38(D)(1). We disagree with the magistrate's characterization. The record reveals that relator sought partial disability benefits under R.C. 742.38(D)(2), not (D)(1), and that the board denied that request. According to the findings of fact from the April 26, 2011 appeal hearing, Dr. Tzagournis recommended a grant of disability under "(D)(2)" (presumably referring to R.C. 742.38(D)(2)), and the board denied "[a] motion to this effect." (R. 4.) Because relator's complaint and briefing in this court repeatedly challenge the board's refusal to award benefits under R.C. 742.38(D)(2), we reject that portion of the magistrate's decision characterizing relator's request as one for disability benefits under R.C. 742.38(D)(1).

{¶ 13} This correction does not, however, change the outcome of this case. The board properly characterized relator's request as one under R.C. 742.38(D)(2) rather than (D)(1) and, as stated above, the denial of relator's request was supported by some evidence indicating that the disability did not result from the performance of his official duties as a firefighter. Regardless, an award under either R.C. 742.38(D)(1) or (D)(2) requires proof that the disability was the "result of the performance of the member's official duties." R.C. 742.38(D)(1); (D)(2). Although the magistrate referenced the incorrect subsection, we find that the magistrate was correct in finding some evidence that relator's disability did not result from his official duties.

{¶ 14} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find that, with the correction noted above, the magistrate has properly determined the pertinent facts and applied the appropriate law in concluding that some evidence supported OP & F's determination that relator's disability did not result from the performance of his official duties. Accordingly, relator's second and third objections are overruled with the correction noted above.

III. CONCLUSION

{¶ 15} In summary, we overrule relator's objections and, with the correction noted above, adopt as modified the magistrate's decision finding no abuse of discretion in OP & F's decision denying disability retirement benefits. Accordingly, relator's request for a writ of mandamus is denied.

*Objections overruled;
writ of mandamus denied.*

FRENCH, J., concurs.
TYACK, J., concurs in judgment only.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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| Respondents. | : | |

MAGISTRATE'S DECISION

Rendered on July 23, 2012

Charles Zamora Co., L.P.A., and Charles Zamora, for relator.

Michael DeWine, Attorney General, and Jennifer S. M. Croskey, for respondents.

IN MANDAMUS

{¶ 16} In this original action, relator, Anthony V. Bell, requests a writ of mandamus ordering respondent Ohio Police and Fire Pension Fund ("OP&F") and its board of trustees ("the board") to vacate its award of disability benefits under R.C. 742.38(D)(4) and to enter an award of disability benefits under R.C. 742.38(D)(1) which

requires a finding that relator has incurred the disability as the result of the performance of duty as a firefighter/paramedic.

Findings of Fact:

{¶ 17} 1. In June 1997, relator began full-time employment as a firefighter/paramedic with the city of Kent and, consequently, he became a member of OP&F.

{¶ 18} 2. In July 2008, relator was hospitalized five days at Saint Thomas Hospital. The hospital discharge summary states that relator "had been quite depressed with prominent suicidal thoughts and tendencies." The summary, prepared by Massood R. Babai, M.D., lists the final diagnosis:

[One] Major depression, recurrent, moderate to severe with some obsessive compulsive component.

[Two] alcohol dependence and abuse.

{¶ 19} 3. In June 2009, relator filed with OP&F a disability benefits application on a form provided by OP&F.

{¶ 20} 4. On July 6, 2009, at his own request, relator was examined by orthopedic surgeon Sheldon Kaffen, M.D. In his four-page narrative report, Dr. Kaffen states:

HISTORY:

Mr. Bell sustained an injury to his right shoulder in the course of his work duties as a Firefighter/Paramedic in 2001. On that date he was lifting a patient on a stretcher down a flight of stairs when he experienced the onset of pain in the right shoulder. He was seen by his personal physician and referred to an orthopedic surgeon. X-rays and MRI were obtained, the results of which he is unable to relate. The claimant underwent resection of the lateral end of the right clavicle in May, 1999. Post-operatively he was referred for physical therapy.

The claimant had a subsequent injury to his left shoulder and underwent similar surgery in September, 1999. Again, he underwent a program of out-patient physical therapy. Mr. Bell sustained another injury in the course of his work duties in 2005. On that date he was lifting an obese patient when he experienced the onset of low back pain. He was seen by his personal physician who treated him with prescription of

medication. X-rays were not obtained. There was no subsequent treatment except for the prescription of medication.

Mr. Bell has also been experiencing pain in the right knee for a period of approximately five years. He stated that there was an injury to his right knee which occurred while moving a patient from the ambulance. He indicated that, in doing so, he struck his right knee. He had no formal treatment for this injury however he used over the counter medication.

COMPLAINTS:

On the day of this interview Mr. Bell indicates that he has persistent low back pain aggravated by bending and lifting activities as well as prolonged weight bearing and climbing. The pain is constant and is rated a level 7 on a maximum severity scale of 10.

The claimant notes intermittent swelling and discomfort in his right knee on prolonged weight bearing activities and with squatting and kneeling. He has no instability or giving way. The claimant continues to experience pain in the superior aspect of both shoulders with motion and with lifting activities with either or both upper extremities. He notes limitation of motion bilaterally.

* * *

ASSESSMENT:

Based on the history and physical examination it is my medical opinion that Mr. Bell is permanently and totally disabled from his line of employment as a Firefighter/-Paramedic due to the above orthopedic conditions.

{¶ 21} 5. Earlier, on June 18, 2009, at his own request, relator was examined by psychologist James L. Helmuth, Ph.D. In his four-page narrative report, dated July 10, 2009, Dr. Helmuth states:

Interview Report:

Mr. Bell was fully cooperative with the clinical interviews and the psychological testing. He was on time, conducted himself in an appropriate manner and was dressed

appropriately. It appears his memories are intact as he was able to give basic timetables of events in his life. His affect was very flat and his mood depressed. He seemed to have little energy and a strong sense of hopelessness.

It is my judgement that Mr. Bell never developed the coping skills he needed to deal with his own life and problems effectively and so was not well suited to coping with the stress of Firefighter and Paramedic work. Right from the start of his work, Mr. Bell reports that he was bothered by seeing dead babies, suicides, teen deaths and body dismemberment. However, he tried to cope as best he could so he could support himself and his family.

As time went on, Mr. Bell became increasingly depressed and irritable and withdrew socially. He did seek psychological and psychiatric help through the E.A.P. of his employer. He also went to Portage Path Mental Health Center for some sessions. The psychiatrist there prescribed lithium, Serouquel and Effexor. These made him sleep but he felt very groggy the next day. Even with these medications, he would sometimes have nightmares of the traumas he encountered as a first responder. He continues to use these medications but they neede [sic] reviewed.

When he was frustrated with the side effects of the psychiatric medications, Mr. Bell began using and abusing alcohol. He reports that there is no history of alcoholism on either side of his biological family. He also reports that he had no problems with alcohol abuse or other drug abuse until six years ago when he could no longer cope with the [post traumatic stress disorder] symptoms and depression. Clearly he began using alcohol as a crutch to help him cope but of course his use only made his problems worse. When he could not afford his medications, he also would use huge amounts of [over the counter] Benydryl to get to sleep. He would use before going into work and would be impaired while working.

Mr. Bell increasingly felt more guilt and shame for using alcohol and being impaired while trying to work. He said, "I wouldn't want my mother or relative to have someone like me be their paramedic if they had an emergency". He felt a lot of relief when he finally resigned a year ago. Before resigning he was very suicidal and was admitted to St.

Thomas Hospital for observation and medication management.

Mr. Bell has never gone to A.A. He is very nervous around other people and groups and also has shame issues about his use. His family doctor has prescribed Antabuse for him and he finds as long as he takes that he does not drink. Except for one two day slip-up, he has not used alcohol since last September.

Mr. Bell is totally disabled from work as a fireman now and in the foreseeable future. He is also disabled from all employment at this time. He is in need of coordinated chemical dependency, psychological and psychiatric treatments.

Diagnoses (D.S.M. IV):

**Axis I: 309.81 Posttraumatic Stress Disorder
 303.90 Alcohol Dependence, in Partial
 Remission
 296.23 Major Depressive Disorder,
 Single Episode with Melancholic
 Features, Severe Without Psychotic
 Features**

Axis II: 799.90 Diagnosis Deferred on Axis II

Axis III: Defer to Physician

**Axis IV: Problems with occupation, Problems
 with primary support group**

Axis V: GAF = 40, current GAF =40, highest

{¶ 22} 6. On July 7, 2009, at his own request, relator was interviewed and tested by psychologist Beal D. Lowe, Ph.D., who conducted a vocational assessment. In his four-page narrative report dated July 18, 2009, Dr. Lowe states:

DIAGNOSTIC IMPRESSIONS

**AXIS I: Major Depressive Disorder, single episode,
 severe (296.23)
 Post Traumatic Stress Disorder (309.81)**

Alcohol Dependence in early, full remission
(303.90)
Sedative Dependence, early full remission
(304.10)

AXIS II: Deferred

AXIS III: See Medical Reports

AXIS IV: Problems with Primary Support Group;
Occupational Problems; Economic Problems

AXIS V: Current GAF = 50
Highest GAF last 12 months = 50

DISCUSSION/CONCLUSIONS

This assessment finds Mr. Bell to be permanently disabled from employment as a Firefighter/Paramedic as a result of the psychological conditions diagnosed here and as a result of physical limitations reported by Dr. Kaffen.

Given the severity of the psychological conditions diagnosed here and the unlikelihood that he will ever become sufficiently stable to function reliably consistently under the stresses involved in his usual occupation, it is reasonable to find him to be permanently disabled for that employment.

This assessment finds Mr. Bell to be temporarily disabled, for at least 12 months, from all employment as a result of the psychological conditions diagnosed here. Mr. Bell is in need of intense treatment for chemical and alcohol dependence, PTSD and depression. It is reasonable to anticipate that he has potential to be employed again in some lower stress occupation once he has received successful treatment for these conditions.

{¶ 23} 7. On September 21, 2009, at the request of OP&F, relator was examined by Steve Sanford, M.D. In his five-page narrative report, Dr. Sanford opines:

In my opinion, Mr. Bell is considered incapacitated as a fire fighter as a result of his chronic lower back pain, which is likely a combination of myofascial and facet syndrome. Though he has not had much in the way of work-up, his symptoms are chronic and it is unlikely that he would have substantial change in the future. He has had occasional

episodes of his back pain causing him to drop a patient. His back, in combination with his residual bilateral shoulder impingement, would preclude him from safely and effectively performing key physically demanding duties of a fire fighter that may involve lifting and carrying patients while in turn out gear, pulling heavy charged hose, performing overhead tear out work, getting in and out of a fire vehicle.

{¶ 24} 8. On September 29, 2009, at the request of OP&F, relator was examined by psychiatrist Sherif Soliman, M.D. In his 11-page narrative report dated October 12, 2009, Dr. Soliman states:

It is my opinion, with reasonable medical certainty, that Mr. Bell is disabled from performing his duties as a firefighter and paramedic due to his depression and PTSD. Mr. Bell [is] not disabled by Alcohol Dependence since this condition is in remission.

* * *

It is my opinion, with reasonable medical certainty, that Mr. Bell's depression, PTSD, and Alcohol Dependence were all caused by his employment as a firefighter and paramedic. The following evidence supports this opinion:

[One] Mr. Bell's PTSD developed in response to on duty traumatic experiences.

a. Mr. Bell has experienced nightmares and intrusive thoughts about dramatic experiences he witnessed on duty.

b. Mr. Bell has no history of being a victim of abuse or experiencing other significant traumas separate from his employment as a firefighter and paramedic.

[Two] Mr. Bell's depression developed after he became "overwhelmed" by the traumatic events he witnessed as a firefighter and paramedic.

[Three] Mr. Bell started drinking excessively in order to cope with the anxiety he was feeling from his job. He has no prior personal or family history of alcoholism. Furthermore, since he retired, he has been abstinent from alcohol for one year.

[Four] Although Mr. Bell now has other stressors such as marital discord and financial concerns, none of these were present when his symptoms started.

* * *

It is my opinion, with reasonable medical certainty, that Mr. Bell has a poor prognosis for recovering from PTSD and Major Depressive Disorder. His depression and PTSD have worsened in spite of the fact that he has received psychotherapy for six to seven months and has been taking antidepressant medication for approximately seven years. In addition, he has been psychiatrically hospitalized, has been under the care of two psychiatrists, and has had the benefit of a supportive family. Mr. Bell's Alcohol Dependence has been in remission for one year.

In summary, it is my opinion, with reasonable medical certainty, that Mr. Bell is disabled from performing his duties as a firefighter and paramedic due to symptoms of depression and PTSD. It is my opinion that Mr. Bell's depression, PTSD, and Alcohol Dependence were caused by his employment as a firefighter/paramedic. It is my opinion that Mr. Bell has a Whole Person Impairment of 57.5% from depression and PTSD and that he has a poor prognosis for recovering from depression and PTSD.

{¶ 25} 9. On October 20, 2009, at the request of OP&F, relator was interviewed for a vocational assessment by Robert A. Mosley, Ph.D. Dr. Mosley also reviewed the medical reports of record. In his seven-page narrative report, Dr. Mosley opines:

On the basis of this examination and review of the available medical records, I make the following judgment concerning the loss of earnings capacity:

Mr. Bell is 43 years old with a total of eleven (11) years of work experience in the firefighting industry. It appears that Mr. Bell is limited to sedentary work activity with a sit stand option based on Dr. Sheldon Kaffen's, M. D. report dated 07/06/09; thus Mr. Bell would not be able to perform the job duties of a Firefighter/Paramedic, which is classified as very heavy work.

It appears that psychologically Mr. Bell is unable to perform the job duties of a Firefighter/Paramedic or any occupation in the local or national labor market.

* * *

Based on these estimates Mr. Bell could not perform the job duties of a Firefighter/Paramedic from a psychological point of view. Based on the psychological estimates reported above, there would be **no occupations that he can perform in the local or national labor markets for which his skills would otherwise transfer to.** Furthermore, there would be **no unskilled occupations** he could perform given these functional estimates.

[Mr.] Bell would have a substantial wage loss, as it appears that there are no occupations he can perform because of his mental conditions and the associated functional capabilities estimates as reported by Mr. Bell and the mental health professionals.

(Emphasis sic.)

{¶ 26} 10. Ohio Adm.Code 742-3-05(A)(12) provides for a disability evaluation panel ("DEP") which is established by the board to make written recommendations to the board on pending disability applications. The DEP is comprised of three voting members and at least two non-voting members. The three voting members are also members of the board. The non-voting members are comprised of expert physicians and an expert in vocational evaluations.

{¶ 27} 11. On November 4, 2009, DEP panelist Alton J. Ball, M.D., issued a two-page narrative report. In his report, Dr. Ball discusses the medical reports of Drs. Soliman and Sanford who examined for OP&F. Dr. Ball concludes:

Final [whole person impairment] is 72%. Based on my reasoning above, I did not assign physical limitations. Based on his psychiatric impairments, their chronic nature and resistance to treatment, he is permanently not capable of performing firefighter work safely and effectively.

{¶ 28} 12. Also on November 4, 2009, Dr. Ball completed an OP&F form captioned "Disability Evaluation Panel Recommendation." On the form, Dr. Ball indicated by his

mark: "The member is permanently incapacitated for the performance of duties." On the form, Dr. Ball also indicated by his mark that the disability is "on-duty," rather than "off-duty." (Emphasis omitted.)

{¶ 29} 13. On November 6, 2009, DEP panelist and vocational consultant Michael A. Klein, Ph.D., issued a two-page narrative report in which he concludes:

It appears to me that between the psychological and physical limitations of the two DEP evaluators, Earnings Capacity Loss would be at least in the severe range. The physical RFC would appear to be somewhere between sedentary and a very small amount of light. Dr. Soliman's psychiatric evaluation appears to be a severe limitation and therefore, pending a difference from DEP panel physicians, it would appear that Earnings Capacity Loss is severe.

{¶ 30} 14. On November 11, 2009, Dr. Klein completed an OP&F form captioned "Vocational Recommendation for Disability Evaluation Panel (DEP) Hearing." On the form, Dr. Klein indicated by his mark that relator's "Degree of Earnings Capacity Damage" is "severe."

{¶ 31} 15. On November 16, 2009, DEP Chairman Lawrence G. Petrick, Jr., wrote:

The Disability Committee recommends Mr. Bell have a psychological reexamination by an OP&F appointed psychiatrist before a decision is reached regarding his initial disability application.

(Emphasis omitted.)

{¶ 32} 16. On December 14, 2009, pursuant to the DEP recommendation, relator was examined by psychiatrist Richard H. Clary, M.D. Thereafter, Dr. Clary issued a five-page narrative report dated January 4, 2010, stating:

DIAGNOSIS-DSM IV

Axis I. Depression, NOS, 311. Anxiety, NOS, 300.00.
 Alcohol abuse in remission. Possible PTSD.

Axis II. None.

Axis III. Hypercholesterol and past history of
 hypertension. He complains of daily pain in the
 lower back, right knee, and both shoulders as
 the result of work injuries.

SUMMARY AND CONCLUSIONS

I reviewed a report from Dr. Kaffen dated 6/19/09. Dr. Kaffen is an orthopedic surgeon and diagnosed chronic lower back pain and myofascial pain syndrome. He also diagnosed osteoarthritis of the right knee and both AC joints and recommended disability retirement.

I reviewed a report from Psychologist Dr. Helmuth dated 7/10/09. Psychological testing with the MMPI-2 showed evidence of symptom exaggeration and a history of alcohol and substance abuse. Dr. Helmuth diagnosed major depression, PTSD, and alcohol dependence.

I reviewed a report from Psychologist Beal Lowe dated 7/20/09. The psychologist indicates that Mr. Bell was arrested for domestic violence about 1 year ago and was sent to anger management treatment. Dr. Lowe diagnosed major depression and alcohol abuse. Dr. Lowe indicated a past history of abusing alcohol, Benadryl, and benzodiazepines.

I reviewed a report from Psychiatrist Dr. Soliman dated 12/15/09. The psychiatrist indicates that Mr. Bell began abusing alcohol on a daily basis starting in 2001. A mental status exam showed that his memory was intact and there was no evidence of psychosis. The psychiatrist diagnosed major depression, PTSD, and alcohol abuse in remission.

During my evaluation, Mr. Bell showed evidence of symptom exaggeration during the mental status exam when I tried to evaluate his short term memory. Psychological testing also showed evidence of symptom exaggeration.

In my medical opinion, the onset of Mr. Bell's psychiatric problems started about the time that he began abusing alcohol starting in either 2000 or 2001. Mr. Bell indicates that he stopped using alcohol in August of 2008. He is currently treating with a psychiatrist and a psychologist.

In my medical opinion, Mr. Bell is unable to perform the duties of a police officer and should be considered for disability retirement. In my medical opinion, his psychiatric condition causes a 20 percent impairment of the whole person based on the AMA Guides 4th Edition. In my medical opinion, Mr. Bell should continue treating with his psychiatrist and psychologist and be re-evaluated in 1 year.

{¶ 33} 17. On January 4, 2010, Dr. Clary completed an OP&F form captioned "Report of Medical Evaluation." On the form, Dr. Clary indicated by his mark: "The member has a condition of disability from which there is no present indication of recovery."

{¶ 34} 18. In a two-page narrative report dated January 27, 2010, DEP panelist Dr. Ball reviewed Dr. Clary's report and stated:

Dr. Clary performed the Fund appointed mental health [independent medical examination] on 12/14/09. Based on history, physical examination, mental status exam and a Personality Assessment Inventory (PAI) that was performed on 12/14/09 - a copy of which is in the file records - Dr. Clary identified anxiety NOS, depression, NOS, some symptoms of PTSD and alcohol abuse in remission since 2008. Dr. Clary felt that Firefighter Bell exaggerated especially short term memory capabilities. Dr. Clary also quoted the PAI as showing evidence of symptom exaggeration. My review of this report verifies this. There is history of four psychiatric hospitalizations, employee assistance program care in 2002 for work stress and two overnight stays in mental health centers for suicidal ideation. He sees a psychiatrist regularly taking Antabuse, Trazodone, Seroquel, Lithium, Lexapro and Effexor and spends most of his time in his bedroom. He was arrested for domestic violence in 2008 and charges were later dropped to disorderly conduct. Dr. Clary assigned seven "fair"/three "poor" occupational adjustments, one "good", one "fair", one "poor" performance adjustments and four "fair" personal/social adjustments on the standard functional capacity estimates form. Dr. Clary assigned GAF 60 and 20% [whole person impairment] and opined that Firefighter Bell was permanently disabled for firefighter work. Dr. Clary did not specifically express an opinion about whether these conditions were duty related. Dr. Solimon [sic] had identified work stressors and experiences as playing a causative role in his mental health [independent medical examination] report of 10/12/09. I checked that the mental health impairments were "off duty" on the two-page standard DEP form primarily because of concerns about symptom exaggeration identified in Dr. Clary's evaluation and in the PAI. However, I would like to discuss the issue of duty relatedness of the mental health impairments at the February 23, 2009 DEP Meeting.

Final [whole person impairment] is 45%. The mental health impairments are disabling and meet waiver criteria as the primary disabling condition of at least five years duration.

{¶ 35} 19. On January 27, 2010, on an OP&F form captioned "Disability Evaluation Panel Recommendation," Dr. Ball indicated by his mark: "The member is permanently incapacitated for the performance of duties."

{¶ 36} Also on the form, Dr. Ball indicated by his mark that the disability is "off-duty." (Emphasis omitted.) That is, "the member is permanently disabled due to the off-duty injuries."

{¶ 37} 20. On February 23, 2010, vocational consultant Dr. Klein stated that the degree of earnings capacity damage is "moderate," based upon review of Dr. Clary's report.

{¶ 38} 21. Also on February 23, 2010, DEP Chairman Mr. Petrick wrote:

Based on the Disability Evaluation Panel Recommendation of Dr. Ball, dated February 23, 2010, and the Vocational Recommendation for the Disability Evaluation Panel of Dr. Klein, dated February 23, 2010, the Disability Committee recommends the following grant to the Board of Trustees and finds that such disability prevents the member from performing his/her official duties and impairs the members' earnings capacity. Grant recommended (D)(4) Max.

{¶ 39} 22. By letter dated February 24, 2010, OP&F informed relator:

BOARD ACTION: By action of the Board of Trustees, you have been granted maximum off-duty disability retirement pursuant to Division (D)(4) of Section 742.38 of the Ohio Revised Code.

In reaching its decision, the Board relied upon the entire record that includes your personal history file and medical evidence obtained in conjunction with your application for disability benefits. The Board finds that your disability was not caused or induced by the actual performance of your official duties.

BENEFIT: The annual benefit is limited by law to 60% and is based on the average of your three years of highest earnings.

* * *

RIGHT OF APPEAL: If you are dissatisfied with the Board's decision, you may appeal by filing a written notice of appeal with OP&F in the form provided by OP&F within **ninety days** from the date you receive this letter.

Upon filing the notice of appeal, you have an additional ninety days to submit all materials in support of your appeal. A Notice of Disability Appeal form outlining the appeal procedure is enclosed for your use and consideration. Should you decide to appeal the grant, you may still receive a benefit based on the Board's current grant provided that you have terminated employment.

(Emphasis sic.)

{¶ 40} 23. Pursuant to Ohio Adm.Code 742-3-05(E), relator timely appealed the initial determination of the board that awarded a disability benefit under R.C. 742.38(D)(4) but denied a benefit under R.C. 742.38(D)(1).

{¶ 41} 24. On July 29, 2010, Dr. Helmuth issued an addendum to his July 10, 2009 report. The addendum states:

Before preparing this addendum, I reviewed the Psychiatric Evaluation of Dr. Sherif Soliman, M.D. who diagnosed Mr. Bell as having Major Depressive Disorder, Chronic, Severe Without Psychotic Features; PTSD, Chronic; Alcohol Dependence, In Full Sustained Remission. He assigned him a GAF score of "45" and opined that he has a 57.5% whole person impairment and that Mr. Bell's conditions were caused by his employment as a firefighter/paramedic.

I also reviewed the Psychiatric Evaluation of Dr. Clary who opined that Mr. Bell's psychiatric problems started only after he began abusing alcohol. I disagree with Dr. Clary's conclusion because the record is clear that he first started having PTSD symptoms and clinical depression and turned to alcohol to help himself cope with his anxieties and depression. Dr. Clary indicates that Mr. Bell is disabled from being a policeman. Mr. Bell never was a policeman and his mental problems are related to his work as a firefighter/-paramedic.

I reviewed the Vocational Evaluation of Dr. Robert Mosley, M.D. who concluded regarding Mr. Bell that "there are no

occupations he can perform because of his mental condition." I agree with that conclusion.

I reviewed the Portage Path Behavioral Health Intake and follow up notes. These show that he has had some success in maintaining sobriety with the use of Campral but also that he continues to have depression and florid PTSD symptoms and cannot work.

My review of these reports and my recent clinical interview lead me to conclude that my original diagnoses made on 7/10/09 and the GAF score are correct. Mr. Anthony Bell is disabled from all employment now and in the foreseeable future. Mr. Bell needs weekly counseling and treatment for PTSD, Depression and Alcoholism as well as psychiatric medication management. His PTSD and Depression were directly work related and predated his problem with alcohol dependence.

{¶ 42} 25. On August 25, 2010, Dr. Clary wrote:

I reviewed a report from Psychologist Dr. Helmuth dated 7/29/10. Dr. Helmuth diagnosed PTSD, alcohol dependence in partial remission, and major depressive disorder. He recommended long term disability with a 72 percent whole person impairment.

I also reviewed another report from Dr. Helmuth, which was an addendum dated 7/29/10. Dr. Helmuth indicated that Mr. Bell was disabled from all employment at this time and that he needed weekly treatment for PTSD, depression, and alcoholism. Dr. Helmuth indicated that the PTSD and depression were work related and predated his problems with alcohol dependence.

Accepting the objective medical findings in the file, my opinion has not changed as stated in my previous report dated 1/4/10.

{¶ 43} 26. On August 25, 2010, Dr. Mosley wrote:

It is my opinion with a reasonable degree of vocational certainty that based on my review and consideration of the additional Psychological Report of James L. Helmuth, Ph.D. dated 07/29/10 my opinion would not change from my previous report dated 10/21/09.

{¶ 44} 27. Relator's administrative appeal was scheduled for hearing before the board on December 21, 2010.

{¶ 45} 28. Pursuant to Ohio Adm.Code 742-3-05(A)(11), the board's chairman appoints a medical advisor to advise the board during its deliberations of appeals of decisions relating to disability applications.

{¶ 46} 29. On December 9, 2010, OP&F Medical Advisor Manuel Tzagournis, M.D., completed an OP&F form captioned "Medical Recommendation for Appeal Hearings." On the form, Dr. Tzagournis wrote:

Percentage of Whole Person Impairment (Combined Value):
47%

Remarks: This individual has relatively mild hypertension, but does has [sic] psychiatric conditions which are disabling. He has several musculoskeletal impairments, however, functionally these are not disabling for fire fighting activities.

{¶ 47} By his mark, Dr. Tzagournis indicated that relator "is **permanently incapacitated** for the performance of duties * * * for the positions of * * * fire fighter." (Emphasis sic.)

{¶ 48} On the form, Dr. Tzagournis marked the "OFF-DUTY" box which indicates: "The alleged disability was **not** caused or induced by the member's employment." (Emphasis sic.) In the space provided, Dr. Tzagournis explained:

Explanation: The various reports differ to some extent as to the role of the [sic] his occupation in aggravating or causing the psychiatric conditions. I believe the evidence overall is not persuasive for an on-duty etiology despite the condition being permanent and disabling.

{¶ 49} Dr. Tzagournis further wrote:

Other: The evidence is adequate to reach a judgment in my opinion. I particularly relied on the reports of Drs. Clary, Sanford, and Soliman.

{¶ 50} 30. At relator's request, the hearing scheduled for December 21, 2010 was postponed.

{¶ 51} 31. The hearing before the board on relator's appeal was scheduled for April 26, 2011.

{¶ 52} 32. On April 13, 2011, Dr. Tzagournis again completed an OP&F form captioned "Medical Recommendation for Appeal Hearings." Dr. Tzagournis' completion of the April 13, 2011 form is essentially identical to his completion of the December 9, 2010 form.

{¶ 53} 33. On April 26, 2011, relator's administrative appeal was heard by the board. Relator appeared at the hearing with counsel and he testified. Dr. Tzagournis attended the hearing and heard relator's testimony.

{¶ 54} 34. Following the April 26, 2011 hearing, Dr. Tzagournis completed an OP&F form which asks the medical advisor to make comments following the appeal hearing. The form asks the medical advisor for comments regarding "Revised determination (if any) of the duty-relatedness of the member's disabling conditions." In the space provided, Dr. Tzagournis wrote: "[O]n basis of testimony the [post traumatic stress syndrome] is changed to on duty."

{¶ 55} 35. On April 27, 2011, on a five-to-four vote, the board determined that the initial award shall remain unchanged.

{¶ 56} 36. On July 22, 2011, relator, Anthony V. Bell, filed this mandamus action.

Conclusions of Law:

{¶ 57} Two issues are presented: (1) whether OP&F abused its discretion by ordering a second psychiatric examination which was obtained from Dr. Clary, and (2) whether the December 9, 2010 and April 13, 2011 reports of the board's medical advisor, Dr. Tzagournis, provided the board with some evidence that the disability was not incurred as a result of the performance of duty as a firefighter/paramedic.

{¶ 58} The magistrate finds: (1) OP&F did not abuse its discretion by ordering a second psychiatric examination which was obtained from Dr. Clary, and (2) the December 9, 2010 and April 13, 2011 reports of Dr. Tzagournis provided the board with some evidence that the disability was not incurred as a result of the performance of duty as a firefighter/paramedic.

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

{¶ 60} R.C. 742.38(B) provides for the application of a disability benefit by an OP&F member.

{¶ 61} R.C. 742.38(C) provides that the board shall adopt rules establishing objective criteria under which the board shall make disability determinations.

{¶ 62} R.C. 742.38(D) provides:

(1) As used in division (D)(1) of this section:

(a) "Totally disabled" means a member of the fund is unable to perform the duties of any gainful occupation for which the member is reasonably fitted by training, experience, and accomplishments. Absolute helplessness is not a prerequisite of being totally disabled.

(b) "Permanently disabled" means a condition of disability from which there is no present indication of recovery.

A member of the fund who is permanently and totally disabled as the result of the performance of the member's official duties as a member of a police or fire department shall be paid annual disability benefits in accordance with division (A) of section 742.39 of the Revised Code.

(2) A member of the fund who is partially disabled as the result of the performance of the member's official duties as a member of a police or fire department shall, if the disability prevents the member from performing those duties and impairs the member's earning capacity, receive annual disability benefits in accordance with division (B) of section 742.39 of the Revised Code.

* * *

(4) A member of the fund who has completed five or more years of active service in a police or fire department and has incurred a disability not caused or induced by the actual performance of the member's official duties as a member of the department, or by the member's own negligence, shall if the disability prevents the member from performing those duties and impairs the member's earning capacity, receive

annual disability benefits in accordance with division (C) of section 742.39 of the Revised Code.

{¶ 63} R.C. 742.39 provides:

(A) A member of the Ohio police and fire pension fund determined to be eligible for a disability benefit under division (D)(1) of section 742.38 of the Revised Code shall be paid annual disability benefits, payable in twelve monthly installments, in an amount equal to seventy-two per cent of the member's average annual salary.

(B) A member of the fund determined to be eligible for a disability benefit under division (D)(2) of section 742.38 of the Revised Code shall be paid annual disability benefits, payable in twelve monthly installments. * * * The board may increase or decrease the benefit whenever the board determines that the impairment of the member's earning capacity warrants an increase or decrease based on the standards adopted under division (C) of section 742.38 of the Revised Code applicable to the determination, but in no event shall the benefit exceed sixty per cent of the member's average annual salary.

* * *

(C) A member of the fund determined to be eligible for a disability benefit under division (D)(4) of section 742.38 of the Revised Code shall be paid annual disability benefits, payable in twelve monthly installments, in an amount to be fixed by the board. The board may increase or decrease the benefits whenever the board determines that the impairment of the member's earning capacity warrants an increase or decrease based on the standards adopted under division (C) of section 742.38 of the Revised Code applicable to the determination, but in no event shall a benefit paid to the member exceed sixty per cent of the member's average annual salary.

{¶ 64} Preliminary, the magistrate notes that relator mistakenly and repeatedly cites R.C. 742.38(D)(2) relating to a member who is partially disabled as a result of the performance of the member's official duties when it is R.C. 742.38(D)(1) that provides for an award to a member who is "permanently and totally disabled as the result of the

performance of the member's official duties." Moreover, in their brief, respondents do not acknowledge the error, but repeatedly refer to a claim for partial disability.

{¶ 65} It is clear to this magistrate that relator seeks a writ ordering respondents to award a disability benefit under R.C. 742.38(D)(1). The record fails to support the proposition that relator ever administratively sought a benefit for partial disability.

{¶ 66} Because the final decision of the board rendered April 27, 2011 is not appealable to a court, mandamus review is available to correct an alleged abuse of discretion by respondents. *State ex rel. Tindira v. Police & Fire Pension Fund*, 130 Ohio St.3d 62, 2011-Ohio-4677, ¶ 28. Because no statute imposes a duty upon the board to state the basis for its decision denying an application for a disability benefit, this court cannot create that duty. *Id.* at ¶ 31.

{¶ 67} Turning to the first issue, Ohio Adm.Code 742-3-05 is captioned "Disability benefits procedure."

{¶ 68} Thereunder, Ohio Adm.Code 742-3-05(B) provides:

(4) The consideration of a member's application shall be limited to the disabling condition(s) listed in the application if supporting medical documentation is provided to OP&F or disclosed by the examination of the physician(s) selected by OP&F. The DEP and the board shall consider and base its findings and recommendations on all competent evidence made available to it, including medical testimony, opinions, statements, and medical reports submitted by the member's employer * * *.

(5) One of the physician non-voting members of the DEP and one of the non-voting members of the DEP who is an expert in vocational evaluations shall submit to the board's disability committee or DEP a written recommendation on each application evaluated followed by a report incorporating a summary of findings, as outlined in the DEP operating guidelines, which is approved by the board of trustees, along with their medical opinion as to whether or not the disabling condition results from an on-duty illness or injury and is waivable under the DEP operating guidelines for the DEP physicians and the vocational evaluation from the DEP vocational expert.

{¶ 69} Ohio Adm.Code 742-3-05(C) provides:

(5) OP&F shall schedule the member covered by the pending disability benefit application for examination by at least one medical examiner and one expert in vocational evaluations designated by OP&F, unless it is medically inadvisable to do so.

* * *

(6) When all the necessary medical reports and records have been received by OP&F, including those reports required or requested under paragraphs (C)(3) and (C)(4) of this rule, OP&F shall schedule such application for review and consideration by the DEP, who shall make a written recommendation to the board based upon the criteria set forth in paragraph (B) of this rule. The board, based on the written recommendation of the DEP, will then consider the application and make an initial determination of disability.

{¶ 70} Following the filing of the disability benefit application at issue, relator was examined on September 29, 2009 at the request of OP&F by Dr. Soliman. As earlier noted, in his 11-page narrative report, Dr. Soliman opined that relator's "depression, PTSD, and Alcohol Dependence were caused by his employment as a firefighter/-paramedic."

{¶ 71} As earlier noted, on November 4, 2009, DEP panelist Dr. Ball issued a two-page report, and he completed an OP&F form on which he indicated by his mark that the disability is "on-duty" rather than "off-duty." (Emphasis omitted.)

{¶ 72} As earlier noted, on November 16, 2009, DEP Chairman Mr. Petrick wrote that the DEP recommends another psychiatric examination. Dr. Clary was chosen to perform the second psychiatric examination for OP&F.

{¶ 73} As relator correctly points out, the DEP chairman did not give a reason for the second psychiatric examination and the record fails to clearly identify the reason for the second psychiatric examination.

{¶ 74} Here, respondents endeavor to provide a justification for the second psychiatric examination by pointing out that psychological testing was not administered by Dr. Soliman. (Respondent's brief, at 11.) Respondents further point out that Dr. Clary administered the Personality Assessment Inventory (PAI) which showed symptom exaggeration.

{¶ 75} Respondents' offer of a justification is an after-the-fact one. Respondents offer no real justification for the DEP's decision to seek a second psychiatric examination.

{¶ 76} Relator points to no statute or administrative rule that prohibits a second psychiatric examination or that requires an explanation from the DEP as to why a second psychiatric examination is recommended. Under these circumstances, the record before this court fails to show that the DEP abused its discretion in recommending the second psychiatric examination.

{¶ 77} The second issue is whether the December 9, 2010 and April 13, 2011 reports of the board's medical advisor, Dr. Tzagournis, provided the board with some evidence that the disability was not incurred as a result of the performance of duty as a firefighter/paramedic.

{¶ 78} In both reports, Dr. Tzagournis states that he "particularly relied on the reports of Drs. Clary, Sanford, and Soliman."

{¶ 79} In his January 4, 2010 report, Dr. Clary lists four conditions for Axis I: "Depression, NOS, 311. Anxiety, NOS, 300.00. Alcohol abuse in remission. Possible PTSD." Later in his report, Dr. Clary states:

In my medical opinion, the onset of Mr. Bell's psychiatric problems started about the time that he began abusing alcohol starting in either 2000 or 2001. Mr. Bell indicates that he stopped using alcohol in August of 2008. He is currently treating with a psychiatrist and a psychologist.

{¶ 80} Contrary to what relator suggests here, the above-quoted paragraph of Dr. Clary's report can be fairly construed to mean that Dr. Clary found that relator's alcohol abuse in large part contributed to his psychiatric problems and thus, the disability is not service connected. Apparently, Dr. Clary did not view the alcohol abuse as work related.

{¶ 81} In his October 12, 2009 psychiatric report, Dr. Soliman opines that relator's "depression, PTSD, and Alcohol Dependence were caused by his employment as a firefighter/paramedic."

{¶ 82} Apparently, Dr. Tzagournis placed more reliance upon Dr. Clary's report than on Dr. Soliman's report. Obviously, Dr. Soliman's conclusion that the alcohol dependence was work related was rejected by Dr. Tzagournis.

{¶ 83} That Dr. Tzagournis changed his opinion following the April 26, 2011 hearing does not require the board to reject Dr. Tzagournis' reports. The board members also heard relator's hearing testimony. It was within the discretion of each board member to weigh the testimony.

{¶ 84} 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).