

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Robert G. Marmaduke, II,	:	
Relator,	:	
v.	:	No. 14AP-489
Ohio Police & Fire Pension Fund	:	(REGULAR CALENDAR)
and Board of Trustees of the	:	
Ohio Police & Fire Pension Fund,	:	
Respondents.	:	

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D E C I S I O N

Rendered on June 23, 2015

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*Paul M. Friedman and Michael P. O'Malley, for relator.*

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

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

{¶ 1} Relator Robert G. Marmaduke, II brings this original action requesting a writ of mandamus ordering respondents, the Ohio Police & Fire Pension Fund ("OP & F") and its board of trustees, to vacate OP & F's order awarding Marmaduke permanent partial disability compensation and enter an order awarding permanent total disability compensation.

{¶ 2} Pursuant to Civ.R 53(C) and Loc.R 13(M) of the Tenth Appellate District, we referred this matter to a magistrate who has now rendered a decision that includes findings of fact and conclusions of law and is appended hereto. The magistrate concludes that the board did not abuse its discretion when granting only permanent partial disability compensation and recommends that this court deny the requested writ of

mandamus. Marmaduke filed objections to the magistrate's decision, alleging error both in the findings of fact and conclusions of law, and the matter is now before the court for our independent review. Also before the court is an April 9, 2015 motion by non-party The City of Akron to file supplemental affidavits requested by Marmaduke. That motion is denied. Marmaduke did not submit the proposed materials earlier for proper consideration by the board or the magistrate and we will not admit them at this stage of the proceedings.

### **I. Background**

{¶ 3} Because Marmaduke's objections call into question some of the factual conclusions in the magistrate's decision, we will briefly reiterate the principal facts and procedural history of the matter. During the course of his duties as a captain with the city of Akron Fire Department, Marmaduke suffered a cerebral hemorrhage on January 28, 2009. He underwent hospitalization, rehabilitation therapy, and eventually surgery in June 2009 to correct an underlying arterial venous malformation. The medical evidence in the record largely agrees that as a result of this cerebral hemorrhage Marmaduke suffers from a permanent loss of visual field in his left eye, some loss of use of his left arm, and some changes in cognitive function, memory, and personality.

{¶ 4} More so than his medical history, Marmaduke's work history in the period between the initial occurrence in January 2009 and his eventual application for benefits constituted a disputed question of fact. Some aspects of the record indicate that Marmaduke returned to work in his former position as a fire captain, but Marmaduke contends that he participated only in a transitional work program to accommodate his disabilities.

{¶ 5} Based on his medical conditions, Marmaduke filed his disability benefit application with OP & F on April 30, 2012. OP & F's disability evaluation panel, the first step in the disability award process, determined that Marmaduke was partly and permanently disabled due to the cerebral hemorrhage, the underlying arterial venous malformation, and resulting conditions. The panel concluded, however, that of the conditions devolving from Marmaduke's cerebral hemorrhage, the visual field defect alone was not duty-related. The panel recommended awarding Marmaduke a maximum permanent and partial disability retirement of 60.18 percent, pursuant to R.C.

742.38(D)(2), based upon his years of service. The board accepted the panel's recommendation.

{¶ 6} Marmaduke appealed to the board, pursuant to Ohio Adm.Code 742-3-05(E), seeking a revised determination, asserting that the visual field defect and other conditions supported a finding that Marmaduke was permanently and totally disabled and should receive compensation in the amount of 72 percent of his final average salary pursuant to R.C. 742.39 and 742.38(D)(1).

{¶ 7} The board's medical expert, Manuel Tzagournis, M.D., stated in his recommendation to the board on appeal that he largely agreed with the recommendation of the disability evaluation panel but recommended one change, that the diagnosed condition of "depression-visual field defect" be considered duty-related. (Medical Recommendation for Appeal Hearings, 1.) Dr. Tzagournis continued to recommend, however, that the visual field defect, although duty-related, was not disabling, and did not include the effects of this condition when calculating whole-person impairment and disability for purposes of determining the amount and basis of compensation. After consideration of the additional materials submitted on appeal, the board voted to maintain the prior award of maximum permanent and partial disability retirement. The board's findings of fact on appeal adopt Dr. Tzagournis' recommendations and include a determination that Marmaduke's allowed disability is duty-related, but that the visual field defect is not included in the allowed disability.

{¶ 8} Marmaduke then filed this mandamus action. 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.'" *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225 (1990).

## **II. Discussion**

{¶ 9} Our review of the evidence in mandamus, however, is deferential to the board's presumed expertise. "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." *State ex rel. Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 111, 2012-Ohio-46, ¶ 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.'" *State ex rel. Bell v. Ohio Police & Fire Pension Fund*, 10th Dist. No. 11AP-628, 2012-Ohio-6153, ¶ 9, quoting Ohio Adm.Code 742-3-05(B)(4) and (6). "Under the appropriate standard of review [in mandamus], the presence of contrary evidence is immaterial if there is evidence in support of the board's findings of fact." *Kolcinko* at ¶ 9.

{¶ 10} Marmaduke seeks benefits under R.C. 742.38(D)(1), which provides as follows: "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." " ' "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,' " and " ' "[p]ermanently disabled" means a condition of disability from which there is no present indication of recovery.' " *Kolcinko* at ¶ 3, quoting R.C. 742.38(D)(1)(a) and (b).

{¶ 11} The magistrate's decision reviews the medical evidence considered by the board. The magistrate concludes that Marmaduke has not shown that he has a clear right to permanent total disability retirement or that OP & F has a clear legal duty to grant permanent total disability retirement. The magistrate finds incorrect the board's determination that Marmaduke's field of vision defect was not a duty-related injury. The magistrate further concludes, however, that the non-duty-related determination was "immaterial to whether or not [Marmaduke] is granted permanent and total disability retirement." (Magistrate's Decision, ¶ 59.)

{¶ 12} The magistrate then concludes that the board did not abuse its discretion by determining that Marmaduke's visual field deficit is not disabling. The magistrate finds that there was some evidence (based on statements contained in doctor reports) that Marmaduke had returned to his former position of employment after the 2009 cerebral hemorrhage and that the board could rely on this as evidence that Marmaduke was not permanently and totally disabled. The magistrate also relies, in addition to the cited

medical evidence, on the city of Akron's job duty description for Marmaduke's position as a fire captain. While acknowledging the conflicting medical evidence presented by Marmaduke's treating physicians regarding his fitness for work, the magistrate notes that the commission was entitled to rely on controverted medical evidence and had the discretion to resolve conflicts in medical opinions.

{¶ 13} Marmaduke's objections assert that the magistrate made certain clearly erroneous findings of fact, that the magistrate failed to fully consider certain elements of the stipulated evidence, and that the magistrate applied an incorrect standard in assessing the board's conclusion that Marmaduke was not permanently and totally disabled.

{¶ 14} Marmaduke points to two general areas of inaccuracy of fact in the magistrate's decision. First, Marmaduke points out that the magistrate's decision at paragraphs 38 and 41 gives internally conflicting assessments of whether the board considered the visual field defect to be duty-related. The magistrate concludes inaccurately that the board determined the injury was not duty-related. We acknowledge this inaccuracy in the magistrate's decision, which respondent does not dispute. In its final review of the matter, the board clearly accepted that Marmaduke's visual field deficit was a duty-related condition. The resulting discussion in the magistrate's report regarding the duty-related nature of the visual field defect is therefore unnecessary and will not be adopted by the court.

{¶ 15} Secondly, Marmaduke points out that the magistrate incorrectly stated that Marmaduke was working for the city of Akron at the time he filed the present disability application. Even in light of the conflicting evidence regarding Marmaduke's post-injury work record, it is clear that Marmaduke worked for the city no later than November 2011 and filed his current application for benefits some six months later in April 2012. Again, the inaccuracy is conceded by respondents, and again it is without impact on the ultimate resolution of this mandamus action.

{¶ 16} These misstatements by the magistrate aside, the crux of the present case is Dr. Tzagournis' recommendation to the board that Marmaduke's visual field defect was not disabling. The board considered the balance of the medical evidence and concluded that it was not, particularly based on Marmaduke's return to work at his former position after his injury and before his ultimate retirement. The board reviewed the relevant job description and concluded that the fire captain position included administrative and

teaching duties and did not call for Marmaduke to drive emergency vehicles. While Marmaduke did present medical opinions that he was unfit to drive emergency equipment due to his impaired vision, the board was not required, as Marmaduke asserts, to manufacture a different set of job requirements of a more restrictive nature. The board was entitled to rely on the actual job requirements implemented by Marmaduke's current employer, in accordance with Ohio Adm.Code 742-3-05(B)(2): "[I]n evaluating a member's disability, \* \* \* the [disability evaluation panel] and the board will use the official duties provided by the employer."

{¶ 17} We also find that the magistrate correctly found in her conclusions of law that the board applied the proper standard to assess Marmaduke's disability. R.C. 742.38(D) requires the board to find that an applicant is "unable to perform the duties of any gainful occupation for which the member is reasonably fitted by training, experience, and accomplishments." The evidence before the board and the magistrate included competent evidence that Marmaduke returned to work following his injury, and the board was entitled to rely on this to support the conclusion that he was capable of performing the duties for which he was trained. Although the evidence in the case reflected some disagreement on the nature of Marmaduke's post-injury duties, this does not demonstrate that OP & F abused its discretion. There was some evidence based on the statements in the medical reports that Marmaduke had returned to work. *Kolcinko*.

### **III. Conclusion**

{¶ 18} Because we find that there is some evidence in the record that Marmaduke was able to perform his duties despite his disabling duty-related conditions, the board did not abuse its discretion in determining that he was not entitled to permanent and total disability rather than permanent partial disability as awarded. We accordingly adopt the magistrate's decision and recommendations with the exceptions outlined above, and deny the requested writ of mandamus.

*Motion to supplement the record denied;  
writ denied.*

TYACK and DORRIAN, JJ., concur.

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**APPENDIX**

## IN THE COURT OF APPEALS OF OHIO

## TENTH APPELLATE DISTRICT

State ex rel. Robert G. Marmaduke, II,	:	
Relator,	:	
v.	:	No. 14AP-489
Ohio Police & Fire Pension Fund	:	(REGULAR CALENDAR)
and Board of Trustees of the	:	
Ohio Police & Fire Pension Fund,	:	
Respondents.	:	

## MAGISTRATE'S DECISION

Rendered on January 29, 2015

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*Paul M. Friedman and Michael P. O'Malley, for relator.*

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

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## IN MANDAMUS

{¶ 19} Relator, Robert G. Marmaduke, II, has filed this original action requesting that this court issue a writ of mandamus ordering respondents Ohio Police & Fire Pension Fund ("OP & F") and the Board of Trustees of the Ohio Police & Pension Fire Fund ("the board"), to vacate their decision awarding him a permanent partial disability retirement based on a finding that he had returned to his former position of employment, and ordering respondents to find that he is entitled to a permanent total disability retirement because his visual field deficit was duty related, and that he had not returned to his former position of employment.

Findings of Fact:

{¶ 20} 1. Relator was hired as a firefighter for the city of Akron, Ohio, on May 9, 1988.

{¶ 21} 2. Relator's history with the fire department included work as a medic, a fire inspector, a promotion to lieutenant, and a promotion to captain in 2006.

{¶ 22} 3. On January 28, 2009, while at work, relator was shoveling snow and began to experience extreme right-sided head pain. In his August 7, 2012 report, Gregory M. Jewell, M.D., explains:

Robert Marmaduke is a 60-year-old Akron firefighter referred for disability evaluation. He states he was working full duty with no restrictions until January 28, 2009. On that date he was shoveling snow at work and had sudden onset of right eye pain and headache. He vomited twice and was seen in the emergency room where a CT scan identified a right temporal lobe intracerebral hemorrhage with an 8mm midline shift. Angiogram was negative for aneurysm or arteriovenous malformation. He remained stable and did not require surgical intervention. He had a visual field defect in the left visual field and reportedly had decreased coordination, dexterity, and problems with fine motor skills in the left hand. He was admitted to an inpatient rehabilitation facility. He improved and had a follow-up MRI on May 1, 2009 which identified a superficial and/or dural arteriovenous fistula in the posterior right temporal lobe but no acute hemorrhage. He was further evaluated and on June 15, 2009 he underwent surgery for clipping of the right occipital-to-Labbe dural arteriovenous fistula.

{¶ 23} 4. On April 30, 2012, relator signed a disability benefit application indicating that he was terminated on November 2, 2011 and the following conditions rendered him unable to perform his duties as a captain:

Cognitive & visual field deficits, Depression  
Intracerebral Hemorrhage  
Right temporal-occipital lobe encephalomalacia  
Post surgical resection of right dural AVF  
Auditory Hallucinations  
Simple Focal Motor Seizures

{¶ 24} 5. Relator attached the April 17, 2012 report of his treating physician Anthony A. Hayek, D.O., who stated:



Mr. Marmaduke suffered a right temporal intracerebral hemorrhage dating back to January 28, 2009 resulting in cognitive deficits requiring intensive inpatient rehabilitation therapies. He was also diagnosed with a right occipital arteriovenous malformation and underwent surgical resection in June of 2009, leaving him with a left visual field deficit. He underwent aggressive therapies for his vision and was followed by Dr. James Bates. He did return to light duty for the Fire Department. He was able to drive standard vehicles but was unable to drive emergency response vehicles (lights and sirens). After continued testing of his vision and no documented improvement or change, he was deemed at maximum medical improvement in April of 2011.

\* \* \*

I have reviewed his job description and the DOL Police Officer and Fire Fighter Occupational Characteristics. It is my medical opinion that the patient is unable to perform these duties based on his medical conditions following his intracerebral hemorrhage and arteriovenous malformation, which has left him residual cognitive/memory impairments as well as left visual field deficits.

Therefore, as I have reviewed the Fire Fighter Occupational Characteristics that was forwarded to me, he is unable to perform these job descriptions as described. It is my recommendation within a reasonable degree of medical certainty, that the patient is unable to perform his job description as a Fire Fighter due to his underlying deficits including cognitive impairments with difficulty with his memory, difficulty with focus, and multitasking as well as his ongoing visual deficits, which are now at Maximum Medical Improvement.

{¶ 25} 6. In his August 7, 2012 report, Dr. Jewell briefly discussed relator's work and alleged disabling condition, stating:

Mr. Marmaduke and the medical records describe an intracranial bleed secondary to an arteriovenous malformation for which he underwent surgery. As a result he had loss of a portion of his visual field to the left, had mild neurological deficit of the left upper limb, probable equilibrium changes, and some cognitive, memory, and personality changes. He later underwent craniotomy for arteriovenous malformation and then has had what appeared to be two seizures for which he is now using

medication. Because of his intracranial bleed with seizure disorder and altered visual fields, it is my opinion he is not capable of returning to work as a firefighter. He is not allowed to drive emergency vehicles and there is concern regarding his visual field, seizure disorder, and equilibrium such that he would not [be] able to safely perform the job functions particularly at heights on compromised lighting. It should be noted that at the fire department he was performing administrative and teaching type duties when he returned to work from his intracranial bleed and he was not performing the job functions [of] firefighter I as a responding line firefighter.

He has several other conditions which are not disabling including mild asthma, hypertension, diabetes mellitus type II, and sleep apnea. These conditions were present for years while he was working as a firefighter and are not of such severity to preclude his working as a firefighter.

{¶ 26} Ultimately, Dr. Jewell opined that relator had a 49 percent whole person impairment, but deferred to the ophthalmologist for the determination of the impairment regarding relator's visual field deficit.

{¶ 27} 7. Alice T. Epitropoulos, M.D., examined relator to determine his visual field deficit. In her September 12, 2012 report, Dr. Epitropoulos determined that relator's visual field loss resulted in a 39 percent loss of the whole person, stating:

Visual field testing demonstrated a left homonymous wedge scotoma encroaching on his central vision. This is most likely why he has difficulty reading and driving. The field loss has resulted in a 41% loss of the visual system and 39% loss of the whole person.

{¶ 28} 8. Joel Steinberg, M.D., reviewed all the evidence and, after noting that Dr. Epitropoulos had opined that the visual field deficit was permanently disabling, Dr. Steinberg disagreed pointing to the fact that relator had returned to work following his injury and subsequent surgery.

{¶ 29} 9. According to the September 18, 2012 vocational report of Robert A. Mosley, Ph.D., relator's duties as a fire captain included:

His duties as a Fire Captain consisted of directing activities of a municipal fire department including directing training of personnel and administering laws and regulations affecting the department. He evaluated fire prevention and fire

control policies by keeping abreast of new methods and conducting studies of departmental operations. He served as Commanding Officer at multiple-alarm fires, supervised firefighters engaged in operation and maintenance of fire stations and equipment, coordinated mutual fire protection plans with surrounding municipalities, surveyed buildings, grounds, and equipment to estimate needs of department and prepare departmental budget, conferred with officials and community groups and conducted public relations campaigns to present need for changes in laws and policies and to encourage fire prevention. He may have investigated causes of fires and inspected buildings for fire hazards.

{¶ 30} 10. John Finch, Ph.D., authored a vocational recommendation, stating:

Vocational Capacities: Vocational Evaluation of member by Mr. Mosley on 9/18/12 says he is limited to sedentary to light work both at the semi-skilled and unskilled level. He based his analysis on the limitations on all the medi[c]al report[s] in the file, including examinations by Drs. Jewell, Beaman, and Epitropoulos. The member is not receiving any income from Akron City as he as terminated on 11/22/11 [sic] from the Transitional Work program.

Summary: Dr. Jewell places him at a range of sedentary to medium strength work with no indication of recovery. Dr. Hayek reports problems with focus and multitasking. Dr. Beaman gives a GAF of 65 with mild impairment. Dr. Epitropoulos limits member to tasks that require good field of vision and depth perception. The vocational evaluation by Mr. Mosley finds him capable of sedentary and light semi-skilled and unskilled positions. In summary, the physical, mental, and vocational limitations tend to suggest a mild to moderate loss of earning capacity. Further discussion by the panel is appropriate. An estimate of earning capacity loss is deferred at this time.

{¶ 31} 11. The Disability Evaluation Panel ("panel") determined that relator was permanently and partially disabled due to the arterial venus malformation with hemorrhage, which was determined to be duty related, but concluded that other conditions, including the visual field deficit, were not disabling conditions and were not duty related. The panel recommended awarding relator a maximum permanent and partial disability retirement under R.C. 742.38(D)(2).

{¶ 32} 12. In a letter dated November 14, 2012, the board notified relator of its findings and its conclusion that he was capable of engaging in other gainful employment:

By action of the Board of Trustees, you have been granted disability retirement at 60% of the average of your three years of highest earnings pursuant to Division (D)(2) of Section 742.38 of the Ohio Revised Code. However, by virtue of the fact that you have more than 25 years of service, this grant by law will be based on your years of service credit and is approximately 60.18%. Of course, the Board could reduce the partial disability benefit if you become employed as a police officer or firefighter, as the case may be.

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. Based upon the medical evidence, and considering your training, experience and accomplishments, the Board finds that you are capable of engaging in other gainful employment.

{¶ 33} 13. Relator appealed arguing that the visual field deficit was duty related, stating:

The condition is duty related because it had its origin and developed as a direct result of the damage to the visual fibers caused by the intracerebral hemorrhage sustained while I was shoveling snow at work on 1-28-09. It is permanent and disabling according to competent medical professionals.

{¶ 34} 14. Relator submitted additional medical documentation with his appeal, including the February 12, 2009 file review performed by Gary W. Routson, M.D., who concluded:

Based on my review of medical documentation and consideration of the history of the industrial injury, and based on reasonable degree of medical probability, I believe that the [Injured Worker] has suffered from an intraparenchymal hemorrhage as a result of shoveling at work. I believe this to be a direct result from the industrial accident and not pre-existing to the industrial accident.

{¶ 35} 15. Relator also attached reports from Carlos A. de Carvalho, M.D. and David E. Ericksen, M.D., and they opined that the intraparenchymal hemorrhage was a direct result of the industrial injury.

{¶ 36} 16. Both Drs. Jewell and Epitropoulos were asked to prepare addendum reports. Dr. Jewell reviewed the additional evidence and, in his May 25, 2013 report, stated that his opinion had not changed:

Initially I had stated that his visual field loss was related to his intracerebral hemorrhage that occurred while he was shoveling snow at the fire department on January 28, 2009. It appears his issue is whether the visual field deficit is duty related. I have already provided my opinion and that remains unchanged based on review of my record.

Dr. Epitropoulos provided in her May 27, 2013 addendum:

I received a request for an appeal on Mr. Marmaduke regarding his visual field defect. He stated in his "notice of disability appeal" that the condition was duty related because it had its origin and developed as a direct result of damage to the visual fibers caused by the intracerebral hemorrhage sustained while he was shoveling snow at work on 01/28/09, and that it is permanent and disabling according to his previous evaluations. As stated in my original report, this is a permanent condition for which there is no present indication of recovery. This does not change the percentage of impairment of the whole person (39%). Therefore, there is no change in the original report.

{¶ 37} 17. On appeal, OP & F's medical advisor Manuel Tzagournis, M.D., opined that the following diagnoses were duty-related:

- (a) AV malformation/cerebral hemorrhage/seizures
- (b) Cognitive/memory disorders
- (c) Mood abnormality, secondary to hemorrhage

\* \* \*

- (g) Depression- visual field defect

{¶ 38} Dr. Tzagournis opined that (a), (b), and (c) were disabling and duty-related, but that (g) was neither disabling nor duty-related. It appears from his recommendation that Dr. Tzagournis was of the opinion that relator was permanently incapacitated from the performance of his duties based on the consequences resulted

from the hemorrhage, which Dr. Tzagournis also opined was duty-related since he was on duty exerting himself at the time of the onset of symptoms. Dr. Tzagournis also remarked:

The above comments are consistent with the DEP recommendations, but there are some questions remaining including those of Dr. Steinberg which could clarify the overall disabilities after hearing the comments of the applicant and responses to questions by me and others.

{¶ 39} 18. After reviewing the evidence relator submitted with his appeal, the board decided not to change its original determination.

{¶ 40} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 41} For the reasons that follow, it is the magistrate's decision, although the visual field deficit certainly appears to have occurred as a result of the intracerebral hemorrhage and should be considered a duty-related condition, the magistrate finds that the board did not abuse its discretion when it determined that relator was not permanently and totally disabled as a result of the visual field deficit.

{¶ 42} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 43} Relator must show by plain, clear, and convincing evidence that he has a clear legal right to PTD retirement, that OP & F has a clear legal duty to grant him PTD retirement rather than a permanent partial disability retirement, and that he has no adequate remedy at law. *See State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967) and *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 64 (1995). A clear legal right exists where the board abuses its discretion by entering an order which is not supported by some evidence. *See Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224 (1990).

{¶ 44} "Mandamus is an 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, ¶ 14. 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. See, *generally*, *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 112 Ohio St.3d 116, 2006-Ohio-6513, ¶ 10, " 'An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable.' " *Id.*, quoting *State ex rel. Stiles v. School Emps. Retirement Sys.*, 102 Ohio St.3d 156, 2004-Ohio-2140, ¶ 13.

{¶ 45} "In mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus." *State ex rel. Lecklider v. School Emps. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, ¶ 23. Public-employee pension systems and their boards have no duty to state the basis for their decision denying disability benefits when no statute or duly adopted administrative rule requires it. See, *generally*, *Pipoly*, ¶ 18; *Lecklider*, ¶ 23.

{¶ 46} Under R.C. 742.38 and Ohio Adm.Code 742-3-05, the 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. The board is permitted to accept the findings of doctors and yet reject their conclusions. Under the appropriate standard of review, the presence of contrary evidence is immaterial if there is evidence in support of the board's findings. See *State ex rel. Spohn v. Indus. Comm.*, 115 Ohio St.3d 329, 2007-Ohio-5027.

{¶ 47} In challenging the board's determination, relator argues that his visual field deficit is duty related and that the board abused its discretion when it determined that it was not. Relator also contends that the board abused its discretion by finding that he was not permanently and totally disabled based on the visual field deficit and, in support of that argument, he states that he never returned to his former position of employment.

{¶ 48} Disability determinations are governed by R.C. 742.38, which provides:

(C) For purposes of determining under division (D) of this section whether a member of the fund is disabled, the board shall adopt rules establishing objective criteria under which the board shall make the determination. The rules shall include standards that provide for all of the following:

(1) Evaluating a member's illness or injury on which an application for disability benefits is based;

(2) Defining the occupational duties of a police officer or firefighter;

(3) Providing for the board to assign competent and disinterested physicians and vocational evaluators to conduct examinations of a member;

(4) Requiring a written report for each disability application that includes a summary of findings, medical opinions, including an opinion on whether the illness or injury upon which the member's application for disability benefits is based was caused or induced by the actual performance of the member's official duties, and any recommendations or comments based on the medical opinions;

(5) Providing for the board to consider the member's potential for retraining or reemployment.

(D) This division does not apply to members of the fund who have elected to receive benefits and pensions in accordance with division (A) or (B) of section 742.37 of the Revised Code or from a police relief and pension fund or a firemen's relief and pension fund in accordance with the rules of that fund in force on April 1, 1947.

(1) As used in this division:

(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. In determining whether a member of the fund is permanently and totally disabled, the board shall consider standards



adopted under division (C) of this section applicable to the determination.

(2) A member of the fund who is permanently and 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. In determining whether a member of the fund is permanently and partially disabled, the board shall consider standards adopted under division (C) of this section applicable to the determination.

{¶ 49} In order for relator to have been found totally disabled under R.C. 742.38(D)(1), the board would have had to find that relator was "unable to perform the duties of any gainful occupation for which [the] member is reasonably fitted by training, experience, and accomplishments." The board did not find that he was totally disabled. Instead, the board found that he was partially disabled under R.C. 742.38(D)(2). The magistrate finds that the board did not abuse its discretion when it found that relator was not totally disabled.

{¶ 50} First, there is some evidence that relator had returned to his former position of employment and, as a result, was not permanently and totally disabled.

{¶ 51} Relator was employed as a fire captain at the time of his injury. According to the job description, a fire captain must be able to perform the following duties:

**DEFINITION**

This is supervisory, firefighting, emergency medical services, training, arson investigation, rescue, salvage and fire prevention work.

An employee in this class commands a battalion of fire companies: directs the maintenance and operation of fire stations: the inspection, testing, and maintenance of company apparatus and equipment; and directs all work of the companies in emergency operations until relieved by a superior officer.

Acts in accordance with established procedures, standards, and rigid training; however, conditions of emergency and hazard require instant decisions and employee is held responsible for personal judgment and discipline.

### CHARACTERISTIC WORK

Supervises multi-company activities at fires, automobile accidents, haz/mat [sic], and other emergencies and is responsible for the safety, training and preparedness of all subordinate personnel. Organizes and directs rescue, life saving, property protection, building ventilation, and firefighting activities. Directs the use of rescue breathing equipment, fire hose lines, forcible entry and ventilation tools and techniques, smoke ejectors, sprinkler systems, standpipes, fire pumps, fire hydrants, foam generating equipment, communications equipment, emergency and auxiliary power equipment, and other disaster control and first aid equipment. May serve as incident safety officer at emergencies. Plans, coordinates, administers and participates in a variety of on-going training programs. Inspects salvage and overhaul operations. Directs the maintenance, housekeeping and operation of fire stations. Organizes work schedules, assigns maintenance duty, and evaluates operations to improve the efficiency of companies. Inspects personnel, apparatus, equipment, property and records of all companies and corrects defects and deficiencies. Inspects battalion for street conditions, proper functioning of hydrants, availability of water and other conditions that could affect firefighting operations and prepares pre-fire plans for target hazards. Approves and prepares a wide variety of reports. May serve in an administrative capacity to the Fire Chief, Fire Deputy Chief or Fire District Chief. Performs related work as required.

{¶ 52} To the extent that relator contends that he never returned to his former position of employment, relator relies primarily on the May 20, 2011 report of his treating physician Dr. Hayek and the April 16, 2013 report of James H. Bates, M.D.

{¶ 53} First, in his May 20, 2011 report, Dr. Hayek stated:

[Patient] has applied for disability as he is unable to return to his previous job without restrictions.

Patient is at MMI. No change is expected [with] vision loss which prevents him from driving in Emergency Mode (lights [and] sirens) which prevents him from returning to his previous job description without restrictions.

{¶ 54} In his April 16, 2013 report, Dr. Bates stated: "Mr. Marmaduke never returned to full duty as a firefighter due to permanent disability."

{¶ 55} Relator also points to some documents indicating that he was involved in a transitional work program at the time he was terminated. As noted in the findings of fact, relator filed a grievance and was reinstated with back pay. Relator continued to work for approximately six months and then retired. To the extent that he may have been reinstated under a transitional work program, there is no evidence in the record concerning any restrictions. In any event, it is clear that relator was working for the City of Akron at the time he retired and filed his application.

{¶ 56} A review of the record reveals that there is other evidence that relator did return to his former position of employment. Specifically, the August 3, 2012 report of Jason Beaman, D.O., provides:

He said he initially went back to work in November 2009 at four hours a day. This was gradually increased to 40 hours a week. On November 22, 2010 [sic], Mr. Marmaduke was brought into a meeting where he was terminated because he could not perform the duties as a Captain. This is confirmed in the "Closure of Transitional Work Case" letter attached to Mr. Marmaduke's disability application. In this letter, Mr. Marmaduke is informed that because his medical restrictions remained "unchanged," his transitional work assignment would be terminated. Mr. Marmaduke said that he felt as if he was targeted by the fire chief whom he felt did not like him. After being terminated, Mr. Marmaduke filed a grievance, which took 6 months but was successful. He was reinstated and provided back pay, which he still has not received. Mr. Marmaduke went back to work in May 2011 where he continued to work until he retired in November of 2011.

{¶ 57} Also, in his August 7, 2012 report, Dr. Jewell stated:

He recovered from surgery and returned to work light duty performing administrative and teaching duties. In January 2010 he returned to work regular duty which was teaching and administrative type duties for the Akron fire department.

{¶ 58} Unfortunately, there are no records from the city of Akron Fire Department, which would indicate clearly whether or not relator did return to his usual work duties. The transitional work documents appear to have been filed with the Industrial Commission of Ohio and, as noted, are incomplete. Further, the magistrate notes that Drs. Epitropoulos, Hayek, and Jewell noted that because of the visual field

deficit, relator cannot drive emergency equipment. A review of the job description provided for fire captain provides no references to driving emergency equipment. As such, there is some evidence in the record to support either conclusion. The magistrate finds that the board did not abuse its discretion when it determined that relator was not permanently and totally disabled because he had returned to work before he retired. That constitutes some evidence that he was still able to work as a fire captain or perform another occupation which he was otherwise fitted despite any deficit from the visual field deficit.

{¶ 59} Turning to relator's argument that the board abused its discretion when it determined that his visual field deficit was not an on duty injury, the magistrate agrees with relator's argument. However, the resolution of the issue, whether or not the injury occurred while he was on duty, is immaterial to whether or not he is granted permanent and total disability retirement. Although the magistrate concludes that it should be considered an on duty injury, relator has not demonstrated that he is in any way prejudiced by the board's findings. Nothing in R.C. 742.38 distinguishes between an on duty and an off duty condition. As such, the magistrate does not see a reason to grant a writ of mandamus to change a determination that has no bearing on relator's situation. Because there is no benefit to be gained and because the magistrate is cognizant that the board is the body vested with such determinations and it would be inappropriate for the magistrate to substitute her decision for that of the board, the magistrate finds that relator is not entitled to a writ of mandamus to change this designation. There is some evidence to support the board's finding that relator is capable of engaging in other "gainful occupation for which [the] member is reasonably fitted by training, experience, and accomplishment."

{¶ 60} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the board abused its discretion when it granted him permanent partial disability and not permanent total disability retirement, and this court should deny his request for a writ of mandamus.

/S/ MAGISTRATE  
STEPHANIE BISCA

**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).