

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Steve Castle,	:	
Relator-Appellant,	:	
v.	:	No. 15AP-845 (C.P.C. No. 14CV-7812)
State Teachers Retirement System,	:	(ACCELERATED CALENDAR)
Respondent-Appellee.	:	

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D E C I S I O N

Rendered on March 24, 2016

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**On brief:** *Jones Law Group, LLC, Eric A. Jones, and Dustin R. Garris*, for appellant. **Argued:** *Eric A. Jones*

**On brief:** *Michael DeWine, Attorney General, John J. Danish, and Mary Therese Bridge*, for appellee. **Argued:** *John J. Danish*

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Relator-appellant, Steve Castle ("Castle"), appeals from the August 14, 2015 decision and judgment of the Franklin County Court of Common Pleas to deny a writ of mandamus. Castle had been receiving disability retirement benefits from the State Teachers Retirement System ("STRS"), and they were subsequently terminated. He sought a writ of mandamus to compel respondent-appellee, State Teachers Retirement System Board of Ohio ("STRB"), to reinstate his disability benefits. For the reasons that follow, we reverse the judgment of the trial court.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

{¶ 2} Castle was employed as the Past Immediate Superintendent of the New Albany Plain Local Schools on June 20, 2011, when he was injured as a result of a motor vehicle accident. As a member of STRS, he applied for disability retirement benefits on

August 31, 2011. In his initial disability benefit application, Castle reported he sustained internal bodily injuries including: chest, sides, back, and arms; internal brain injury from severe concussion; external head wound and scarring; and post traumatic stress, anxiety and depression. In a letter to STRB dated August 25, 2011, and attached to his application, he wrote:

I ask that you please consider providing me disability benefits due to a serious accident that occurred on June 20, 2011. I was driving a Ford Edge and was struck at an intersection by an individual who ran a red light. She caved in my passenger side, spun me around and forced me into another vehicle which then caved in my driver side passenger area of my vehicle. My Ford Edge was totaled in the accident as was the Dodge Durango that she was driving.

I was transported to Riverside Methodist Hospital with severe trauma and remained in the hospital for a two day period. My injuries included a large head wound which required several stitches, a serious concussion, and internal injuries to my upper extremities.

I have been in therapy since the accident and remain on several medications to help treat pain, inflammation, anxiety, and stomach ailments. I am entering my second month of physical therapy to help treat deep internal pain surrounding my ribs, sternum, side, back, and shoulder. This therapy is scheduled to continue as an important part of the recovery process. I am now entering cognitive therapy due to my post brain injury. Very little progress has been made over the past two months with the after effects of my concussion and as I [sic] result my doctor has recommended that I begin cognitive therapy treatment. This recovery is expected to take up to 12 months as I work through memory loss, lack of concentration, light headedness, and dizziness. I am also due to begin psychological therapy to work through post traumatic stress and anxiety.

I resigned from my previous position effective July 31, 2011 with every intention to find a new position and get started on August 1, 2011. This unexpected accident prevented that from happening and I am now not receiving any pay or able to gain my STRS service credit which is critically important to my expected retirement in 2015. I have also had to purchase COBRA insurance to maintain health and dental insurance.

My doctor and I are confident that this recovery process resulting from the accident will not require permanent disability. That being said, it is evident that the treatment and recovery process will take several more months. Therefore, I am making this request of disability benefit assistance at this time and ask that you please give it careful consideration.

I have submitted all of the required documents for your review. Please let me know if you need anything else at this time. Thank you.

Steve Castle

(Aug. 25, 2011 Disability Benefit Request Letter)

{¶ 3} Castle's attending physician, Sreeharei Cherukuri, M.D., a doctor of internal medicine, initially submitted an application dated August 25, 2011, stating that Castle was incapacitated for the performance of duty and that the disability is not considered to be permanent. Apparently, this was unacceptable to STRB despite Ohio law that provides that members who are unable to perform their duties for at least 12 months from receipt of their completed application because of a physical or mental condition may apply for disability benefits. R.C. 3307.62(C). Dr. Cherukuri then submitted a second report and recommendation dated September 14, 2011, stating that the disability was considered to be permanent.

{¶ 4} Richard H. Clary, M.D., a psychiatrist, reviewed records and conducted a 90-minute psychiatric evaluation of Castle on October 14, 2011 at the request of Earl N. Metz, M.D., the chair of the Medical Review Board ("MRB"). Dr. Clary diagnosed Castle with depression, anxiety, and cognitive disorder as the result of post concussion syndrome. He also noted injuries to the ribs, chest, and left shoulder as a result of the motor vehicle accident. He concluded as follows:

I reviewed medical records from Riverside Hospital as well as records from Millhoun Clinic. Some medical records indicate a diagnosis of PTSD but I did not find evidence of PTSD during my evaluation.

Mr. Castle has a history of "anxiety and stress" and has been taking Lexapro for at least 10 years. In my medical opinion, his symptoms have gotten worse since the accident on

6/20/11. He continues to have some cognitive problems as the result of the post concussion syndrome.

In my medical opinion, Mr. Castle is receiving appropriate treatment for his injuries. In my medical opinion, he is unable to perform the duties of a school superintendent and should be considered for disability retirement.

(Certified Record of Proceedings, Report of Richard H. Clary, M.D., 85.)

{¶ 5} Notwithstanding this recommendation, in October of 2011, the MRB requested a delay of Castle's case until they received the results of neuropsychiatric testing scheduled for December of 2011.

{¶ 6} Philip Whatley, PhD., a neuropsychologist, dictated a report summarizing five hours of neuropsychological testing on December 7, 2011, and an additional three hours of neuropsychological testing conducted on December 30, 2011.

{¶ 7} He indicated that Castle complained of dizziness, headaches, balance problems, concentration problems, memory problems, vision problems, numbness/tingling problems, sleeping, and depression. Castle was given a large battery of tests. According to Whatley, Castle performed well below expectations on most neuropsychological measures. Whatley attributed Castle's sub par performance on certain tests to someone who "is experiencing severe emotional duress which likely adversely affected his performances on neuropsychological tests." (Certified Record of Proceedings, Report of Philip Whatley, PhD., 96.) Whatley further stated:

Unfortunately, Dr. Castle should strongly consider permanent disability and retirement at this time. His findings are entirely consistent with a severe Post-Concussive syndrome and Post Traumatic Stress Disorder. Although it is likely that his poor performances were adversely affected by emotional factors, he may also be demonstrating evidence of organic changes as well.

(Certified Record of Proceedings, Report of Philip Whatley, PhD., 96.)

{¶ 8} Whatley recommended the following:

1. The patient should immediately apply for long-term disability/retirement.

2. The patient should strongly consider individual and couples psychotherapy with a focus of reducing his symptoms of posttraumatic stress disorder.
3. The patient should strongly consider cognitive rehabilitation with the goals of improving attention, concentration and processing speed.
4. The patient may need to be in chronic pain management program. He should certainly follow up with Dr. Anderson. He may require the services of a pain specialist as well.
5. The patient may benefit from antidepressant medication.
6. The patient may benefit from stimulant medication designed to improve attention and concentration. However, I respectfully defer decisions regarding all pharmacological interventions to Dr. Anderson.
7. Dr. Castle should consider neuropsychological re-evaluation in approximately one year in order to ascertain if his cognitive and emotional functioning has improved.

(Certified Record of Proceedings, Report of Philip Whatley, PhD., 97.)

{¶ 9} Dr. Kevin J. Anderson, Castle's primary care physician, submitted a report dated January 13, 2012, documenting several follow-up visits over a period of time, with the latest visit being on January 5, 2012. With respect to Castle's post concussion syndrome, Dr. Anderson stated in pertinent part:

I had a long discussion with steve. I find the neuropsych testing to be very significant as it elucidated a very significant degree of impaired cognitive functioning. was very blunt with him and told him he may improve over time and he may not. he has exhausted the benefit of his original therapy which is geared more to acute brain injury and speech issues. will see if we can find him therapy geared more toward treating what is now more chronic brain injury. I spent 45 minutes with steve today. in my opinion he is totally and permanently disabled. he clearly cannot return to a position that requires high executive functioning, quick and reasonable decision making and multitasking. again, his impairment was quite dramatically quantitated with his neuropsych testing performance.

(Sic passim.) (Certified Record of Proceedings, Report of Kevin J. Anderson, M.D., 102.)

{¶ 10} On January 21, 2012, Robert A. Bornstein, Ph.D., a professor of psychiatry, neurology, and psychology, reviewed documents regarding Castle's disability application, including Dr. Whatley's report. Dr. Bornstein opined:

In my opinion Mr. Castle's performance is not consistent with the apparent severity of his injury as documented in the medical record. The results of the neuropsychological examination demonstrate deficits that are also inconsistent with the apparent severity of injury. Dr. Whatley comments that the extent of Mr. Castle's emotional distress likely affected his neuropsychological performance. In view of this, and the lack of information about Mr. Castle's performance on measures of symptom validity, in my opinion the conclusions of the neuropsychological evaluation are premature [sic]. Dr. Whatley also recommends that Mr. Castle consider permanent disability which in my opinion is also pre-mature [sic] because the examination was conducted only six months following the injury and therefore still within the period during which recovery can occur. Furthermore his psychiatric symptoms were not being treated at the time of the examination.

(Certified Record of Proceedings, Report of Robert A. Bornstein, Ph.D., 114-15.)

{¶ 11} On May 3, 2012, treating physician Kevin J. Anderson, M.D., wrote to the MRB and stated in pertinent part as follows:

I have been Mr. Castle's primary care physician for over five years, and thus I knew him well prior to his accident. In summary, there has been a significant change, in my opinion, in his cognitive abilities. I have referred him to see a psychiatrist, primarily because your board has recommended this. However, I am not of the opinion that depression is playing a major role in his cognitive disability at this point. While I certainly hope he continues to improve, it is my strong recommendation that he cannot function at the cognitive level required to resume work activity at his previous level. As you know, he was a school superintendent, requiring the ability to multitask and handle everything from budgetary to employment to educational decisions. Again, clearly he is unable to sustain the required cognitive capabilities to return to that role at this time. While I understand the need for the Board to do their due diligence, it is my strong opinion that Mr. Castle is permanently

disabled as a result of his accident. It is also my strong opinion that he is needlessly being put through additional financial stresses as a result of the Board's indecision regarding his legitimate application for disability benefits.

(Certified Record of Proceedings, Report of Kevin J. Anderson, M.D., 116-17.)

{¶ 12} Psychiatrist Richard Clary, M.D., who had previously found Castle to be disabled, re-evaluated Castle on May 23, 2012 using a 70-minute psychiatric evaluation and a review of records from Drs. Whatley and Anderson. In a report dated May 29, 2012, Dr. Clary stated:

I did not find evidence of depression or PTSD during this current evaluation.

In my medical opinion, Mr. Castle continues to have cognitive problems as a result of the head injury.

In my medical opinion, Mr. Castle is receiving appropriate treatment for his injuries. In my medical opinion, he is unable to perform the duties of a school superintendent and should be considered for disability retirement.

(Certified Record of Proceedings, Report of Richard H. Clary, M.D., 137.)

{¶ 13} On July 7, 2012, Robert Bornstein, Ph.D., issued another report summarizing his review of documents received from Dr. Earl N. Metz of the MRB. Dr. Bornstein stated in pertinent part:

On the MMPI [Minnesota Multiphasic Personality Inventory 2], the pattern of responses indicated an open response to test items. There was no evidence of symptom exaggeration. He denied symptoms of depression, but reported difficulty thinking and concentrating, mild anxiety, and concerns about his health.

These results indicate that he performed within normal limits on most measures of higher cognitive function including reasoning, concept formation and learning and memory. There were some slight declines in performance in comparison to his evaluation in December 2011, but his performance was still in the average range. The decline in performance is inconsistent with the natural recovery from concussion. His reported symptoms are greater than would be expected in relation to the apparent severity of injury, and

are inconsistent with the objective findings. There were indications that he may not have put forth his best effort. There were some scattered areas of performance that were lower than expected, but in view of his performance on measures of effort it is not possible to conclude that these are reliable indications of cognitive impairment.

(Certified Record of Proceedings, Report of Robert A. Bornstein, Ph.D., 151-52.)

{¶ 14} On July 10, 2012, Kevin Anderson, M.D., summarized another follow-up office visit on July 6, 2012, as follows:

steve continues to struggle with daily headaches, diminished cognition brain fatigue. he is drinking more coffee which he feels helps him to function a little better. trial ritalin not helpful. he does have follow up with Dr. Rosenthal. note no therapies recommended. as noted did get another neuropsych eval but those results not noted. at this time in my opinion, steve has not progressed significantly since our last visit. my opinion as to whether he can return to his previous functional level in the near future has not changed. I believe his dysfunction is severe and he cant return to his previous level of employment. he notes he is being challenged financially as he has not heard any decision from STRS regarding disability. he notes his application is now 9 months old.

(Sic passim.) (Certified Record of Proceedings, Report of Kevin J. Anderson, M.D., 156.)

{¶ 15} On July 30, 2012, Psychiatrist Richard Clary, M.D., reviewed Castle's file and changed his opinion. "Accepting the objective medical findings in the file, I have changed my opinion as stated in my report dated 5/29/12. In my medical opinion, Mr. Castle is not considered to be permanently disabled and should not be retired. In my medical opinion, the anxiety disorder, NOS [not otherwise specified], is not work prohibitive." (Certified Record of Proceedings, Report of Richard H. Clary, M.D., 162.)

{¶ 16} On August 12, 2012, Jeffery Hutzler, M.D., a psychiatrist and member of the MRB, reported that he had reviewed the file of Castle. It was Dr. Hutzler's "recommendation that Steve D. Castle is not considered to be permanently or presumed to be permanently incapacitated for the performance of duty and that he should not be retired." (Certified Record of Proceedings, Report of Jeffrey Hutzler, M.D., 167.)



{¶ 17} On August 18, 2012, Stephen Pariser, M.D., a professor of psychiatry and member of the MRB, reviewed the Castle file and reported that he supported the professional opinions of Drs. Bornstein and Clary that Mr. Castle is not permanently disabled and should not be retired.

{¶ 18} On August 28, 2012, Steven R. Schneir, M.D., wrote to Castle summarizing an evaluation and review of certain records. Dr. Schneir stated in pertinent part:

I do believe that you have a General Anxiety Disorder, history of Depressive Disorder NOS, the aforementioned Adjustment Disorder and the previously diagnosed Post Concussion Syndrome. At the present time and based on the fact that it has been somewhat over a year since the injury, I do not believe that there will be substantial improvement in the cognitive problems in the near future. I also concur with Dr. Anderson, that you will not be able to effectively return to employment in anywhere near the capacity that you had when you were superintendent of the New Albany Schools.

(Certified Record of Proceedings, Report of Steven R. Schneir, M.D., 179.)

{¶ 19} On September 7, 2012, Albert Kollbash, Jr., M.D., Associate Professor of Medicine and a member of the MRB, conducted a file review and opined that "there is not substantial objective evidence to indicate work prohibitive cognitive dysfunction and that the member is not incapacitated for the performance of his occupation." (Certified Record of Proceedings, Report of Albert Kollbash, Jr., M.D., 174.)

{¶ 20} On September 11, 2012, Earl N. Metz, M.D., Chair of the MRB, wrote to Castle that the MRB concurred with the opinions of Drs. Jefferey Hutzler, Stephen Pariser, and Albert Kollbash, Jr., and recommended that disability benefits be denied.

{¶ 21} On September 20, 2012, the STRB denied Castle's application for disability benefits.

{¶ 22} On November 15, 2012, Castle's attorney requested that STRS consider additional medical evidence, to wit, a neuropsychological report dated October 22, 2012 and a report of a Millhoun Clinic office visit with Dr. Anderson on October 5, 2012.

{¶ 23} Dr. Stephen W. Halmi, Psy.D., submitted a lengthy report based on a neuropsychological evaluation conducted on October 22, 2012. Dr. Halmi opined that Castle:

[I]s suffering from cognitive impairment, as well as significant psychological problems, as a result of the 6-20-11 automobile accident. Based on my evaluation, I opine that he is suffering from Cognitive Disorder NOS and PTSD.

Unlike Dr. Borenstein [sic], I opine there is not evidence that Dr. Castle is exaggerating symptomatology. For example, Dr. Castle appeared to be open and forthcoming during my evaluation. He did not over endorse psychopathology. He specifically denied feeling depressed. As he has reported to other examiners, he reported experiencing symptoms of concentration problems, memory difficulties, difficulties with organization, perseverance, and pace, and symptoms of PTSD. My psychology aide, who administered the neuropsychological testing, opined that Dr. Castle put forth a valid effort. In fact, he scored in the average range on many of the measures administered to him. I opine that if someone was attempting to appear cognitively impaired, they would attempt to not score within the average range. Moreover, there was no evidence that he was exaggerating symptomatology based on other objective measures, including the MMPI-2-RF and the DAPS, which have validity scales. If Dr. Castle was attempting to exaggerate symptomatology, he would likely be exaggerating symptomatology on the MMPI-2-RF and the DAPS, which was not the case. In summary, I opine the results of my evaluation are valid and reliable.

I also opine that Dr. Castle is not capable of returning to work as a school superintendent. His cognitive impairment is significant. Although he maintains some cognitive abilities, he also has many cognitive deficits (see "Record Review" and "Test Results" for details). In addition, I opine that Dr. Castle's cognitive limitations are not likely to improve despite continued treatment. Any improvement that he was going to make with regard to his cognitive limitations would have occurred by now.

In summary, I concur with Dr. Whatley that Dr. Castle should be considered permanently and totally disabled from working as a school superintendent and should be medically retired.

(Certified Record of Proceedings, Report of Stephen W. Halmi, Psy.D., 208.)

{¶ 24} On November 27, 2012, Dr. Bornstein reviewed the additional medical evidence and a letter from Dr. Earl N. Metz, Chair of the MRB. The letter from Dr. Metz is not included in the record. Dr. Bornstein stated that "[t]he new information does not add substantially to my opinion about this case, and therefore based on this new information, my opinion is unchanged." (Certified Record of Proceedings, Report of Robert A. Bornstein, Ph.D., 220.)

{¶ 25} Dr. Hutzler re-reviewed the file and wrote a report dated December 10, 2012. Dr. Hutzler stated: "After reviewing these documents it continues to be my clear recommendation that Dr. Steve D. Castle is not considered to be permanently or presumed to be permanently incapacitated for the performance of duty and that he should not be retired." (Certified Record of Proceedings, Report of Jeffrey C. Hutzler, M.D., 223.)

{¶ 26} Dr. Pariser also reviewed the additional evidence and in a letter dated December 11, 2012, stated: "I support Drs. Bornstein and Clary's professional opinions that Mr. Castle is not disabled at this time. However, given the complexity of this case, it may be worthwhile to review this case with the STRS Medical Review Board." (Certified Record of Proceedings, Report of Stephen F. Pariser, M.D., 226.)

{¶ 27} Dr. Kollbash, Jr., also reviewed the additional medical evidence and wrote to Dr. Metz on December 28, 2012. Dr. Kollbash, Jr., stated:

There is a significant difference of opinion with respect to the interpretation of the results of the neuropsychological testing including whether or not the applicant has exaggerated his symptoms and whether or not the degree of any cognitive impairment would limit the member's ability to function as a school superintendent. Because of the differing opinions of the many professionals who have been involved, I would like to discuss this case with members of the Medical Review Board of the STRS prior to making a final recommendation concerning disability benefits for this member."

(Certified Record of Proceedings, Report of Albert J. Kollbash, Jr., M.D., 229.)

{¶ 28} At a January 14, 2013 Special Conference of the MRB, the MRB members present reviewed the case and personally interviewed Castle, who attended the meeting.

The MRB members unanimously agreed that Castle was not considered or presumed to be permanently incapacitated for the performance of duty and should not be retired.

{¶ 29} The following month, Castle and his attorney personally appeared at a hearing before the members of the Disability Review Panel on February 13, 2013. Following the hearing, the members of the Disability Review Panel recommended to the STRB that the denial of Castle's application be rescinded and that Castle be re-examined in six months. The STRB then granted Castle disability payments with an effective date back to October 1, 2011.

{¶ 30} Approximately six months later, Dr. Kevin Anderson submitted an attending physician's report dated August 25, 2013, in which Dr. Anderson reiterated that "he continues to have significant deficits in terms of concentration speech memory. He still has daily severe headaches and has ongoing neuralgia around his laceration of the right temple. I was very pleased to hear that he finally was improved for his disability. I did advocate that this is the appropriate decision. He unfortunately lacks the cognitive stamina to wear a full-time job as a school superintendent." (Certified Record of Proceedings, Report of Kevin J. Anderson, M.D., 243.)

{¶ 31} On September 18, 2013, STRS requested that Joel Steinberg, M.D., a psychiatrist, re-examine Castle for continuation of permanent disability. Dr. Steinberg conducted a comprehensive psychiatric evaluation, including testing and reviewed the file. On October 18, 2013 he submitted a lengthy 40 plus page report to Dr. Metz in which Dr. Steinberg certified that "because of the disability as reported, it is **not determinable** that Dr. Castle is **incapable of resuming regular full-time service** similar to that from which he retired and that disability benefits should be determined based on the facts in this report." (Emphasis sic.) (Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 292.)

{¶ 32} Dr. Steinberg stated:

Whether or not he is disabled for his job as a superintendent by the history of concussion/postconcussion syndrome/mild TBI or not, it is not something that can be determined based on the studies carried out here in my office because of evidence of lack of full effort. All that can be stated is that I am unable to identify the presence of deficits because the findings can be fully explained on the basis of lack of effort.

(Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 292.)

{¶ 33} Dr. Steinberg also noted:

Mr. Castle failed both of the Green's symptom validity tests. Some of these tests 9-year old children with mental retardation can pass. This poor effort on the symptom validity test suggests that little or no credibility can be placed on the other tests that were administered concurrently and raises significant doubts about the credibility of the history that he offered.

(Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 280.)

{¶ 34} However, under the subheading of "Validity of Test Results" Dr. Steinberg noted, "[t]he scores for these indicators fall in the normal range, suggesting that **the respondent answered in a reasonably forthright manner and did not attempt to present an unrealistic or inaccurate impression that was either more negative or more positive than the clinical picture would warrant.**" (Emphasis sic.) (Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 283.) Similarly, on the "Assessment of Depression Inventory," "his score of 11 suggested that there was no evidence of feigning detected by this instrument." (Emphasis sic.) (Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 286.) On the malingering screening sector, he responded with a positive answer to zero out of five questions.

{¶ 35} In summary, Dr. Steinberg stated: "**because of the evidence of lack of full effort, I am not able to conclude that Dr. Castle is impaired by some sort of organic brain problem** that that would prevent him from performing his duties as a superintendent." (Emphasis sic.) (Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 291.)

{¶ 36} Drs. Hutzler, Pariser, and Kollbash, Jr., then reviewed Dr. Steinberg's evaluation. Dr. Hutzler recommended on October 28, 2013 that "Castle is not considered to be or presumed to be incapacitated for the performance of duty and that he should not be retired. It may be helpful to hold a Special Conference of the Medical Review Board to finalize our conclusions." (Certified Record of Proceedings, Report of Jeffrey C. Hutzler, M.D., 300.) Dr. Pariser suggested because of Dr. Steinberg's report stating that Castle's disability status was not determinable, "that this case be discussed in a Special Conference

Session of the STRS Medical Review Board." (Certified Record of Proceedings, Report of Stephen F. Pariser, M.D., 302.) Dr. Kollbash, Jr., stated that "it continues to be my opinion that the member is not incapacitated for the performance of his duties and that the disability benefit be terminated." (Certified Record of Proceedings, Report of Albert J. Kollbash, Jr., M.D., 304.)

{¶ 37} In a Special Conference of the MRB on November 18, 2013, it was the unanimous opinion of the MRB that Castle was not considered or presumed to be incapacitated for the performance of duty and that the disability benefit should be terminated.

{¶ 38} At a meeting on February 20, 2014, the STRB terminated Castle's disability benefits.

{¶ 39} Castle requested the opportunity to make a personal appearance in front of the Disability Review Panel and to submit additional evidence. On April 7, 2014, he submitted an independent forensic psychiatric examination completed by Anil Choudary Nalluri, M.D., a psychiatrist, who opined that Castle was suffering from chronic PTSD, Generalized Anxiety Disorder, and Personality Changes Due to Another Medical Condition, and that he was disabled.

{¶ 40} Dr. Steinberg reviewed the report of Dr. Nalluri and did not change his opinion.

{¶ 41} On April 30, 2014, Earl N. Metz, M.D., Chair of the MRB, wrote a memo to the file reviewing the latest developments regarding the Castle case. Dr. Metz characterized Dr. Steinberg's report in the following way: "[Dr. Steinberg] concluded that Dr. Castle's testing was so inconsistent, and so characteristic of the results of someone trying to manipulate the outcome, that he was unable to make a decision regarding the member's competence." (Certified Record of Proceedings, Report of Earl N. Metz, M.D., 321.) Accordingly, Dr. Metz wrote that the MRB continues to recommend termination of disability benefits.

{¶ 42} On May 14, 2014, Castle and his attorney appeared at an appeal hearing before the members of the Disability Review Panel. The Panel recommended that the termination of benefits be affirmed, and on May 15, 2014, STRB affirmed the prior decision to terminate Castle's disability benefits.

{¶ 43} Castle then filed a petition for a writ of mandamus in the Franklin County Court of Common Pleas. The trial court recognized that the ultimate issue of termination of benefits was non-determinable on Dr. Steinberg's part. (Trial Court Judgment, 4.) However, the trial court then looked back to the entire body of evidence in the record and determined that there existed some evidence in the record that supported a finding of denial of benefits to Castle. The trial court then denied the writ, and this appeal followed.

## II. STANDARD OF REVIEW

{¶ 44} "The determination of whether a retirement-system member is entitled to the continued receipt of disability-retirement benefits is within the exclusive authority of the retirement board, R.C. 3307.64, and there is no appeal from the retirement board's final decision terminating these benefits." *State ex rel. Morgan v. State Teachers Retirement Bd.*, 121 Ohio St.3d 324, 2009-Ohio-591, ¶ 20, citing *State ex rel. Hulls v. State Teachers Retirement Bd.*, 113 Ohio St.3d 438, 2007-Ohio-2337, ¶ 26.

{¶ 45} "Because the decision is not appealable, mandamus is available to correct an abuse of discretion committed by the retirement board in making its decision." *Id.*, citing *State ex rel. Ackerman v. State Teachers Retirement Bd.*, 117 Ohio St.3d 268, 2008-Ohio-863, ¶ 16. "An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable." *State ex rel. Stiles v. School Emps. Retirement Sys.*, 102 Ohio St.3d 156, 2004-Ohio-2140, ¶ 13.

{¶ 46} A relator seeking a writ of mandamus must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Riddell v. State Teachers Retirement Bd.*, 10th Dist. No. 13AP-660, 2014-Ohio-1646, ¶ 20, citing *State ex rel. Bertaux v. State Teachers Retirement Sys. Bd.*, 10th Dist. No. 11AP-504, 2012-Ohio-5900, ¶ 6.

{¶ 47} "Generally, a clear legal right exists where an administrative agency abuses its discretion by entering an order not supported by any evidence on the record; however, when the record contains some evidence to support a board's decision, there has been no abuse of discretion, and mandamus will not lie." *State ex rel. Riddell* at ¶ 20. Thus, the board abuses its discretion, and a clear right to mandamus exists, if it enters an order that is not supported by some evidence. *State ex rel. Nese v. State Teachers Retirement Bd. of*

*Ohio*, 136 Ohio St.3d 103, 2013-Ohio-777, ¶ 26; *State ex rel. Schaengold v. Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760, ¶ 19.

### III. ASSIGNMENT OF ERROR

{¶ 48} On appeal, Castle assigns the following as error:

The trial court erred in finding that the State Teachers Retirement System Board of Ohio did not abuse its discretion in terminating Steve Castle's disability retirement benefits.

### IV. ANALYSIS

{¶ 49} Castle argues the trial court erred in denying his petition for a writ of mandamus because STRB abused its discretion in terminating his disability retirement benefits. Castle contends that the report of Dr. Joel Steinberg is uncertain or equivocal, does not make a disability determination, and cannot be relied upon as some evidence to support terminating disability benefits. Castle further argues that older reports in the record opining that Castle is not disabled were discounted by STRB when it originally granted disability, and therefore cannot now be considered as some evidence to terminate disability benefits.

{¶ 50} Members of STRS who are unable to perform their duties for at least 12 months from receipt of their completed application because of a physical or mental condition may apply for disability benefits. R.C. 3307.62(C). Once an application is submitted, an independent medical examiner will evaluate the applicant and prepare a report for the STRB. R.C. 3307.62(C). If the independent medical examiner determines the applicant is mentally or physically incapacitated for the performance of duty by a disabling condition, either permanent or presumed to be permanent for 12 continuous months following the filing of an application and the STRB agrees, the STRB will grant the application for disability benefits. Ohio Adm.Code 3307:1-7-02(A)(3); R.C. 3307.62(F). "Simply put, the statute requires the independent physician to determine whether the applicant is mentally or physically incapacitated for work by a disabling condition for 12 continuous months after filing the application." *State ex rel. Menz v. State Teachers Retirement Bd.*, 144 Ohio St.3d 26, 2015-Ohio-2337, ¶ 20.



{¶ 51} Termination of disability benefits is governed by a different standard than that for an initial determination of disability. In order to terminate benefits, there must be an examination and certification that the recipient is no longer disabled. R.C. 3307.48(B) provides in relevant part as follows:

The state teachers retirement board shall require any disability benefit recipient to submit to an annual medical examination by a physician selected by the board, except that the board may forgo the medical examination if the board's physician determines that the recipient's disability is ongoing or may require additional examinations if the board's physician determines that additional information should be obtained. \* \* \* After the examination, the examiner shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. If the board concurs in a report by the examining physician that the disability benefit recipient is no longer incapable, the board shall order termination of payment of a disability benefit not later than the following thirty-first day of August or upon employment as a teacher prior thereto. The board shall provide notice to the recipient of the board's order. At the request of the recipient, a hearing on the order shall be conducted in accordance with procedures established by the board.

{¶ 52} The determination of whether a member is entitled to the continued receipt of disability retirement benefits is within the exclusive authority of the retirement board, but the determination must be based on a medical examination and pertinent medical evidence. *State ex rel. Hulls* at ¶ 26; *State ex rel. Ackerman* at ¶ 23.

{¶ 53} The termination statute indicates that there must be new evidence in the record that a recipient is no longer physically and mentally disabled in order to terminate a disability benefit. Terminating a recipient's benefits in the absence of such evidence would constitute an abuse of discretion.

{¶ 54} The issue then, is whether Dr. Steinberg's report constitutes some evidence upon which STRB could have relied in terminating Castle's disability retirement benefits. The Supreme Court of Ohio has held that the "some evidence" standard used in workers' compensation cases applies equally to disability determinations of the STRB. *State ex rel.*

*Rolston v. State Teachers Retirement Bd. of Ohio*, 10th Dist. No. 13AP-209, 2013-Ohio-4158, ¶ 13, citing *State ex rel. Nese* at ¶ 26.

{¶ 55} In the context of workers' compensation cases, equivocal medical opinions are not evidence and lack probative value. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.* Review of medical reports under the *Eberhardt* standard has been undertaken by the Supreme Court of Ohio and by this court in mandamus cases involving state retirement systems. *State ex rel. Marchiano v. School Emps. Retirement Sys.*, 10th Dist. No. 07AP-486, 2008-Ohio-2798, ¶ 34; *State ex rel. Riddle* at ¶ 22; *State ex rel. Worthy v. Ohio State Highway Patrol Retirement Sys.*, 10th Dist. No. 07AP-507, 2008-Ohio-2462, ¶ 74.

{¶ 56} The Supreme Court of Ohio has held that a board is generally permitted to accept a doctor's findings without accepting his conclusion. *State ex rel. Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 11, 2012-Ohio-46, ¶ 9. However, in this case, the findings of the Steinberg report are equivocal.

{¶ 57} Although Dr. Steinberg found "evidence of lack of full effort," his report also indicated there was evidence that Castle **"answered in a reasonably forthright manner and did not attempt to present an unrealistic or inaccurate impression that was either more negative or more positive than the clinical picture would warrant."** (Emphasis sic.) (Certified Record of Proceedings, Report of Joel S. Steinberg, M.D., 292; 283.) The Steinberg report also stated that there was no evidence of feigning on the "Assessment of Depression Inventory" or the malingering screening sector. Thus, the report is equivocal at best. Not only are the findings equivocal, the conclusion is as well. The fact that the Steinberg report does not come to an ultimate conclusion is, by definition, uncertain and equivocal.

{¶ 58} Dr. Steinberg's report is uncertain, and he even stated so when he says Castle's disability status was undeterminable. Moreover, instead of recognizing the report as the uncertain, equivocal report that it was Dr. Metz, the chair of the MRB, wrote that the Steinberg report concluded that Castle's testing was "characteristic of the results of someone trying to manipulate the outcome," and he recommended termination of

benefits on that basis. (Certified Record of Proceedings, Report of Earl N. Metz, M.D., 321.)

{¶ 59} The trial court stated that Dr. Steinberg's report was of little probative value in that it "is what it is, to wit, that due to a perceived lack of genuine effort on relator's part in taking the psychological tests, the ultimate issue was 'non-determinable' on the doctor's part." (Trial Court Judgment, 4.) The trial court then went on to hold that even in the total absence of Dr. Steinberg's report, there existed in the record some probative evidence fully supporting a finding of denial of disability benefits. (Trial Court Judgment, 4.)

{¶ 60} In doing so, the trial court impermissibly relied upon medical reports that STRB had earlier found unpersuasive.

{¶ 61} In *State ex rel. Zamora v. Industrial Comm.*, 45 Ohio St.3d 17 (1989), the Supreme Court of Ohio prohibited the Industrial Commission from relying on a medical report that the commission had earlier found unpersuasive. In *Zamora*, the claimant simultaneously applied to have an additional psychiatric allowance and to have himself declared permanently totally disabled. The claimant was examined by various specialists, including Dr. Kogut, who stated the claimant's depression preceded his industrial injury and that the contribution of the industrial injury to the depression was minimal. The commission allowed the psychiatric condition and, in so doing, implicitly rejected Kogut's report. However, 10 months later, the commission denied the application for PTD based partially on Dr. Kogut's report. The Supreme Court of Ohio stated, "it would be inconsistent to permit the commission to reject the Kogut report at one level, for whatever reason, and rely on it at another." *Id.* at 19. Thus, under *Zamora* the rejection of earlier reports that Castle was not disabled was sufficient to remove them from further evidentiary consideration. Accord, *State ex rel. Jeep Corp. v. Indus. Comm.*, 64 Ohio St.3d 378, 381 (1992).

{¶ 62} In like manner, it would be inconsistent for the STRB to reject earlier reports at the disability determination phase that Castle was not disabled, only to turn around and rely on those same reports for purposes of termination. STRB argues in its brief that the earlier reports constitute some evidence to support termination. We disagree, both on the basis of *Zamora* as well as the different statutory standards that

exist for granting disability and terminating disability. The trial court erred in relying on those earlier reports as some evidence that Castle was no longer disabled.

{¶ 63} Accordingly, we conclude that the STRB abused its discretion in terminating Castle's benefits when the only evidence the STRB relied upon was an equivocal report. Dr. Steinberg did not opine that Castle was no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. Instead, he stated that it was not determinable whether Castle was incapable of resuming regular full-time service. This was not some evidence to support termination. Further, the trial court erred as a matter of law when it denied the writ based on evidence in the record that had previously been discounted by the STRB when it initially granted disability retirement benefits to Castle. Since Dr. Steinberg's report does not constitute evidence that Castle is no longer physically and mentally incapable of resuming the service from which he was found disabled, and since the older discredited reports do not constitute such evidence either, the only evidence remaining in the record pertinent to termination of benefits is the August 25, 2013 report of Dr. Kevin Anderson who opined that Castle continues to be disabled, and the April 7, 2014 independent forensic psychiatric examination of Dr. Nalluri, who also opined that Castle was disabled.

## **V. CONCLUSION**

{¶ 64} Based on the foregoing, we sustain the assignment of error, reverse the judgment of the trial court, and remand the matter to the court of common pleas to grant the writ. We note that R.C. 3307.64 permits multiple examinations to determine continued entitlement to disability retirement benefits. *State ex rel. Hulls* at ¶ 40; *State ex rel. Ackerman* at ¶ 29. Nothing in this decision is to be construed as interfering with the exclusive authority of STRB to make future determinations of whether Castle is entitled to the continued receipt of disability retirement benefits.

*Judgment reversed; case remanded.*

DORRIAN, P.J. and BRUNNER, J., concur.

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