

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Andrew S. Clark,	:	
Relator,	:	
v.	:	No. 14AP-874
Ohio Police & Fire Pension Fund	:	(REGULAR CALENDAR)
and Board of Trustees, Ohio Police &	:	
Fire Pension Fund,	:	
Respondents.	:	

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D E C I S I O N

Rendered on January 5, 2016

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

*Michael DeWine, Attorney General, and John J. Danish, for*  
respondents.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, Andrew S. Clark, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Police & Fire Pension Fund ("OP&F"), to vacate its decision to deny relator's application for disability benefits and to order OP&F to find that he is entitled to disability benefits.

{¶ 2} This court referred the matter to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and

recommended that this court grant relator's request for a writ of mandamus, order OP&F to vacate its decision denying relator's disability application, and order OP&F to reconsider relator's application in a manner consistent with this court's decision. Both OP&F and relator have filed objections to the magistrate's decision.

{¶ 3} We will address relator's objection first. Relator argues in his objection that the magistrate should have recommended a full writ pursuant to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994), based upon the record that was before OP&F, instead of returning the matter to OP&F to permit Dr. Joel Steinberg to issue an addendum after reviewing the additional medical evidence relator submitted on appeal of the board's original denial of his application. In his objection, relator asserts:

The administrative appellate process affords OP&F the opportunity to obtain addendum reports from OP&F's initial examining physicians and vocational evaluator, but not a new addendum from its file[-]reviewing physician. Ohio Adm.Code 742-3-05(E)(3). Joel S. Steinberg, M.D., was a file-reviewing physician who provided an opinion on March 6, 2013 that neither Clark's psychological nor physical condition was disabling \* \* \*. Allowing OP&F an opportunity to obtain an addendum report from Dr. Steinberg is an action not provided for in the appellate process.

(Emphasis sic.) OP&F's interpretation of Ohio Adm.Code 742-3-05(E)(3), as espoused at oral argument but not addressed in its objections or memorandum contra relator's objections, is that, although OP&F may permit a file reviewing physician to review additional supporting materials and issue an addendum upon appeal, there is no clear duty to legally require OP&F to allow such; thus, mandamus should not have been granted on this basis.

{¶ 4} Ohio Adm.Code 742-3-05 provides, in pertinent part:

(E) Appeal of initial determination.

\* \* \*

(2) Within sixty days of filing of the notice of appeal, the aggrieved member shall file with OP&F all materials which he or she desires to submit in support of the appeal, including doctors' reports, statements, memoranda, etc.

(3) Upon receipt of the supporting materials, OP&F shall schedule the member for an appointment with an expert in vocational evaluations if a vocational evaluation was not done as part of the initial determination of disability. For all appeals of the board's initial determination of disability, OP&F shall provide the supporting materials submitted by the member to the expert in vocational evaluations and the physician for consideration and both the vocational evaluator and physical [sic] shall submit to the board an addendum to their original reports.

{¶ 5} In the present case, both parties now take different positions on this issue as their prior positions no longer serve their better interests. The parties have taken positions in their objections and/or oral arguments that are inconsistent with the positions they argued in their briefs before the magistrate in mandamus. Although relator now urges in its objection that Ohio Adm.Code 742-3-05(E)(3) does not permit a file reviewing physician, like Dr. Steinberg, to review additional evidence submitted on appeal and issue an addendum report, in his brief before the magistrate, he argued the exact opposite:

OP&F did not obtain an addendum from Joel S. Steinberg, M.D., the sole medical physician who opposed Clark's disability retirement claim.

The only medical evidence opposing Clark's application due to physical conditions is the pre-appeal report of Joel S. Steinberg, M.D.

OP&F's apparent reliance upon Dr. Steinberg's [pre-appeal] report obviates the appellate process set forth in Ohio Adm.Code 742-3-05(E)(2). \* \* \* OP&F abuses its discretion by disregarding the new additional evidence and failing to obtain an addendum report from the physician who provided a pre-appeal report. In this case, OP&F abused its discretion by negating the purpose of Ohio Adm.Code 742-3-05(E)(2), which is presumably to allow OP&F's medical advisors the opportunity to comment upon and respond to the new evidence provided by the member. Clark has effectively been denied the opportunity of due process because OP&F did not follow the appellate rules enunciated by the Ohio Legislature in Ohio Adm.Code 742-3-05(E)(2) and obtain an addendum report from the sole medical physician who opposed Clark's claim.

Relator reiterated his stance in his reply brief:

More importantly, OP&F has failed to explain why it is not an abuse of discretion for it to not obtain a new addendum from Dr. Steinberg after Clark submitted additional medical evidence upon appeal and after Dr. Jewell issued an addendum report on October 10, 2013 in which Dr. Jewell reiterated his opinion that Clark was permanently disabled from the job of a police officer.

(Emphasis sic.)

{¶ 6} Similarly, although at oral argument on the objections OP&F asserted that there is no clear legal duty for it to require Dr. Steinberg to issue an addendum based upon additional supporting evidence submitted on appeal, in its brief before the magistrate, OP&F explained its procedure on appeal:

When OP&F receives the materials in support of the appeal, it provides those materials to the non-voting expert members of the Disability Evaluation Panel who are to provide the Board of Trustees of OP&F an addendum to their original reports.

\* \* \*

Dr. Joel Steinberg [was] a physician and non-voting member of the Disability Evaluation Panel \* \* \*.

OP&F failed to require Dr. Steinberg to provide an addendum to his original report.

{¶ 7} As the magistrate did, we agree with the positions the parties endorsed in their original briefs in mandamus. Ohio Adm.Code 742-3-05(E)(3) requires OP&F to provide the additional evidence submitted by the claimant on appeal to "the physician," and the physician must submit to the board an addendum to the original report. Neither party presents any analysis, much less authority, to support their respective contentions that not all physicians should be included in the mandatory addendum requirements under Ohio Adm.Code 742-3-05(E)(3). Although "physician" in (E)(3) is not specifically defined, there is nothing in Ohio Adm.Code 742-3-05 to suggest that the definition should be limited by the type of examination or function the physician performed in the OP&F disability proceedings. Therefore, we agree with the magistrate that the matter should be returned to OP&F to require Dr. Steinberg to consider the additional supporting material and issue an addendum addressing the additional material. OP&F should not consider a

physician's report that was based upon less than all of the available evidence before it on appeal.

{¶ 8} Accordingly, after an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's and OP&F's objections, we overrule the objections and adopt the magistrate's findings of fact and conclusions of law. We grant relator's request for a writ of mandamus, order OP&F to vacate its decision denying relator's disability application, and order OP&F to reconsider relator's application in a manner consistent with this court's decision.

*Objections overruled;  
writ of mandamus granted.*

HORTON, J., concurs.  
DORRIAN, P.J., concurs separately.

DORRIAN, P.J., concurring separately.

{¶ 9} I concur with the majority given OP&F's explanation of its procedure on appeal, which is noted by the majority at ¶ 6. Although Ohio Adm.Code 742-3-05(E)(3) on its face does not define "physician," OP&F's interpretation of the rule, as reflected in the explanation of its procedure, creates the clear legal duty required in a mandamus action.

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## APPENDIX

### IN THE COURT OF APPEALS OF OHIO

#### TENTH APPELLATE DISTRICT

State of Ohio ex rel. Andrew S. Clark,	:	
Relator,	:	
v.	:	No. 14AP-874
Ohio Police & Fire Pension Fund	:	(REGULAR CALENDAR)
and Board of Trustees, Ohio Police &	:	
Fire Pension Fund,	:	
Respondents.	:	

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#### MAGISTRATE'S DECISION

Rendered on April 27, 2015

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

*Michael DeWine, Attorney General, and John J. Danish, for respondents.*

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#### IN MANDAMUS

{¶ 10} Relator, Andrew S. Clark, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Police & Fire Pension Fund ("OP & F"), to vacate its decision to deny relator's application for disability benefits and ask this court to order OP & F to grant him a 22 percent service-connected disability retirement.

#### Findings of Fact:

{¶ 11} 1. Relator began full-time employment with the city of Dayton as a police officer on February 13, 1997. During his tenure as a police officer, relator witnessed many

disturbing and traumatic events, including the shooting and death of his partner, and has struggled with alcoholism, and post-traumatic stress disorder ("PTSD").

{¶ 12} 2. Relator also suffered an on-duty injury on September 28, 2009 when a tree trunk fell off a fence line and struck him in the groin. Relator suffered a groin strain, a torn labrum of the left hip, and a left inguinal hernia. Relator underwent hernia surgery and continues to suffer chronic pain in the area despite the fact that there is no objective medical evidence to substantiate the cause of that pain.

{¶ 13} 3. In December 2012, relator applied for a disability retirement with OP & F. In support of his application, relator listed the following disabling conditions:

- (1) Psychological: Posttraumatic Stress Disorder —
  - a. Date of Onset: 2000

\* \* \*

- (2) Psychological: Depressive Disorder NOS
  - a. Date of Onset: 2007

\* \* \*

- (3) Left Inguinal Ne[u]ropathy
  - a. Date of Injury: 9/28/09

\* \* \*

- (4) Left Hip: Chondromalacia — Grade II
  - a. Date of Onset: 8/19/2010

{¶ 14} 4. In support of his application, relator submitted the August 2, 2012 report of Mervet K. Saleh, M.D. Dr. Saleh listed the following diagnoses: "left inguinal neuropathy, left hip chondromalacia grade II, depression and anxiety, history of alcohol abuse" and assessed a 48 percent whole person impairment.

{¶ 15} Dr. Saleh certified that relator had a condition of disability from which there was no present indication of recovery. In his report, Dr. Saleh noted the following:

The patient's chief complaint is groin pain. On a pain intensity scale of zero to ten, with zero being no pain and ten the worst, he states that his pain is as intense as 2-10. He describes his pain as constant, dull, achy and throbbing/pounding. He also complains of pain in his abdomen, which is as intense as 2-10. The characteristics of

this pain are constant, sharp, stabbing and excruciating. He also complains of pain in his back, which is as intense as 2-10. The characteristics of this pain are constant, sharp and achy. He also complains of pain in his left hip, which is as intense as 2-6. The characteristics of this pain are daily, achy, cramping and squeezing/pressure-like. He complains of radiation of pain from his groin into his abdomen and from his back into his hip. He experiences numbness and tingling sensations associated with his pain in his left hip and thigh after continued use. He states that his pain has increased with time. He denies any pain free intervals. His pain is worse midday. His pain increases in intensity as the day progresses. His pain is aggravated and made worse with straining, sitting, standing, walking, lifting, bending forward and walking up/down stairs (20).

\* \* \*

Current limitations include that he is only able to sit for 30 minutes, stand for 20 minutes or walk for 15 minutes, after which he experiences severe pain. He does have difficulty with lifting and doing repetitive activities. He is able to care for himself.

{¶ 16} In his physical findings, Dr. Saleh noted that relator's abdomen was soft with tenderness in the inguinal region, but negative for mass, guarding or rebound. Dr. Saleh concluded his report with the following statements:

Based on the subjective and objective findings, it is my opinion with probable degree of scientific and medical certainty that Mr. Andrew Clark is permanently and totally disabled and cannot hold gainful employment as a police officer. I have reviewed his job descriptions and it was determined that the patient is unable to work in the environment of a police officer, which is a highly physically and mentally demanding job. Most important, he will not be able to chase down anyone or if he got into some type of fight with a criminal, he would be compromised. He is unable to protect innocent citizens as well as compromising himself. He is in chronic pain constantly that is causing his disability. Several treatment modalities have been tried and have not been able to alleviate his pain and discomfort. His condition is permanent and is not likely to improve in the future.



{¶ 17} 5. Relator also submitted the August 9, 2012 report of Dong S. Moon, M.D. In his report, Dr. Moon diagnosed PTSD and depressive disorder NOS. Dr. Moon explained:

Post Traumatic Stress Disorder: avoids social interaction at work, street where the shooting occurred, being around people, avoids going to Dayton, police cars, is hyper vigilant, poor sleep with nightmares. He is fearful to be the first responder to [a] call. Depressive Disorder: socially withdrawn, lack of energy or motivation, neglects [illegible].

{¶ 18} Dr. Moon concluded that relator had a condition of disability for which there was no present indication of recovery.

{¶ 19} 6. OP & F referred relator to Gregory M. Jewell, M.D., for an evaluation. In his January 23, 2013 report, Dr. Jewell noted that relator complained of daily pain in the left inguinal region radiating to his left testicle, around the iliac area, and to the left lower back, that he limits his activities due to pain, and that he had increased pain with prolonged sitting, heavy lifting and certain movements. Palpation and examination for hernia was not performed because Dr. Jewell did not want to cause relator any discomfort; however, Dr. Jewell noted that multiple examinations in the past failed to reveal any structural abnormality, recurrent hernia or other masses. Assessing an 11 percent whole person impairment, Dr. Jewell stated:

For his medical conditions, he describes a history of injury and has a video depicting movement of a tree trunk or large branch with sudden shift of the branch and him being struck in the left inguinal region. He has had considerable evaluation and treatment including a left hernia repair, lumbar MRI, MRI and MR arthrogram of the left hip, and numerous consultations including one or two general surgeons, a urologist, one or two orthopedists, a neurologist, and pain management. These specialists have all indicated that there are no structural lesions present including no abnormality such as a recurrent hernia, testicular abnormality, or any other lesion identified. His MR arthrogram of the left hip described a possible subtle superior labral tear and mild chondromalacia but the evaluating orthopedist did not think this explained his symptoms. He has had two inguinal nerve blocks without relief of symptoms. During today's evaluation, it is obvious that he has a chronic pain disorder associated with this. He describes increasing pain with any activity. It is impossible to

state how his depression or anxiety is contributing to his limitations, but given the current evaluation and records, it is doubtful that he could function as a police officer with his current symptoms. Therefore, I would consider him incapacitated for performance of duties due to chronic left ilioinguinal pain. His hypertension is not disabling and he does not describe other medical conditions which would limit his activity as a police officer.

\* \* \*

It is impossible to provide limitations of activity or restrictions based on objective evidence given that his complaints of the left ilioinguinal region are purely subjective with no findings by any examiner of structural abnormality. He describes himself as self-limiting his activity but I cannot provide limitations on an objective medical basis given the lack of documented findings by other examiners or during my examination today. There are no limitations or restrictions of activities for his diagnosis of high blood pressure.

{¶ 20} Dr. Jewell did conclude that relator had a permanent condition of disability from which there was no present indication of recovery.

{¶ 21} 7. OP & F also had relator examined by Richard H. Clary, M.D. In his January 31, 2013 report, Dr. Clary noted depression, NOS, anxiety, NOS, and alcohol abuse, assessed an eight percent whole person impairment, and opined that relator was not incapacitated for the performance of his duties as a police officer. Dr. Clary opined that relator's main problem was his alcohol abuse.

{¶ 22} 8. A vocational evaluation was performed by Mark A. Pinti. In his February 17, 2013 report, Mr. Pinti concluded that relator would be capable of a wide range of unskilled work at medium, light, and sedentary levels of exertion, stating:

Mr. Clark is unable to perform the duties and functions of a Police Officer. He does not retain transferable skills to other work. Mr. Clark feels that his pain symptoms prevent him from performing any work at this time. Dr. Saleh and Dr. Moon opined that Mr. Clark is disabled from performance of his duties as a Police Officer, but do not offer specific residual functional capacity estimates.

Taking into account Dr. Jewell's residual functional capacity estimate, as well as including non-exertional limitations of

avoiding stressful situations, dealing with people, making judgments and directing or influencing others, it is my opinion that Mr. Clark would be capable of a wide range of unskilled work at the medium, light and sedentary levels of exertion.

{¶ 23} 9. On March 6, 2013, OP & F physician Joel Steinberg, M.D., issued a report that relator was not disabled finding an 11 percent non-disabling physical condition and 10 percent non-disabling psychiatric condition. Dr. Steinberg recommended that relator's disability application be denied.

{¶ 24} 10. In a letter dated March 27, 2013, relator was notified that OP & F's Board of Trustees ("the board") had found that he was not disabled and informed him of his appeal rights.

{¶ 25} 11. Relator appealed and submitted a substantial amount of additional medical evidence in support of his application. OP & F asked Dr. Jewell and Mr. Pinti to review the additional information and both opined that their review of the additional information did not change their opinions.

{¶ 26} 12. OP & F's medical advisor Manuel Tzagournis, M.D., was asked to review the medical information in relator's file. He opined that relator's left inguinal neuropathy was a disabling duty-related condition and recommended that a 22 percent impairment existed. Dr. Tzagournis recommended that disability be granted.

{¶ 27} 13. Despite the additional medical evidence and Dr. Tzagournis's recommendation in a letter dated June 25, 2014, relator was notified that the board had voted to deny his application.

{¶ 28} 14. Thereafter, relator filed the instant mandamus action in this court.

#### Conclusions of Law:

{¶ 29} For the reasons that follow, it is this magistrate's decision that this court should issue a writ of mandamus.

{¶ 30} To obtain a writ of mandamus, relator must establish: (1) a clear legal right for the relief requested, (2) a clear legal duty upon 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 (1990). Because the final decision of the OP & F board 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. A clear legal right to the relief in mandamus exists where the board abuses its discretion by entering an order which is not supported by some evidence. *Kinsey* at 225.

{¶ 31} In the present case, relator asserts that OP & F abused its discretion when it denied his application for disability benefits. Specifically, relator asserts that, after the original denial of his application, he submitted additional medical evidence as required by Ohio Adm.Code Sections 742-3-05(E)(1) and (2). OP & F did not have this additional medical evidence reviewed by all the physicians who previously examined relator and/or the medical evidence submitted in support of his application. Specifically, upon submission of his additional medical evidence, OP & F obtained addendum reports from Drs. Clary and Jewell, and an addendum from Mr. Pinti. Dr. Clary's previous opinion that the psychological conditions were not work prohibitive remained unchanged. Dr. Jewell's opinion that the physical conditions disabled relator from working as a police officer remained unchanged. Mr. Pinti's conclusion that relator would not be capable of performing his job as a police officer also remained unchanged.

{¶ 32} OP & F medical advisor Dr. Tzagournis attended the hearing, reviewed all the medical evidence, and determined that relator's inguinal neuropathy/pain was both disabling and duty-related.

{¶ 33} OP & F did not supply Dr. Steinberg with copies of the additional medical evidence which relator submitted following the board's original denial of his application. Dr. Steinberg was the sole medical physician who opposed relator's disability application. As such, relator asserts that the board lacked some evidence upon which it could deny his application.

{¶ 34} In response to relator's argument, OP & F points to a portion of Dr. Jewell's report and asserts that it supports the board's determination. Specifically, OP & F points to the following sentences from Dr. Jewell's report:

It is impossible to provide limitations of activity or restrictions based on objective evidence given that his complaints of the left ilioinguinal region are purely subjective with no findings by any examiner of structural abnormality. He describes himself as self-limiting his activity but I cannot provide limitations on an objective medical

basis given the lack of documented findings by other examiners or during my examination today. There are no limitations or restrictions of activities for his diagnosis of high blood pressure.

{¶ 35} OP & F asserts that this paragraph supports Dr. Steinberg's conclusion and, as such, constitutes some evidence upon which the board relied. However, the magistrate notes that this paragraph in Dr. Jewell's report contradicts another paragraph in his report. Under the discussion portion of his report, Dr. Jewell stated:

For his medical conditions, he describes a history of injury and has a video depicting movement of a tree trunk or large branch with sudden shift of the branch and him being struck in the left inguinal region. He has had considerable evaluation and treatment including a left hernia repair, lumbar MRI, MRI and MR arthrogram of the left hip, and numerous consultations including one or two general surgeons, a urologist, one or two orthopedists, a neurologist, and pain management. These specialists have all indicated that there are no structural lesions present including no abnormality such as a recurrent hernia, testicular abnormality, or any other lesion identified. His MR arthrogram of the left hip described a possible subtle superior labral tear and mild chondromalacia but the evaluating orthopedist did not think this explained his symptoms. He has had two inguinal nerve blocks without relief of symptoms. During today's evaluation, it is obvious that he has a chronic pain disorder associated with this. He describes increasing pain with any activity. It is impossible to state how his depression or anxiety is contributing to his limitations, but given the current evaluation and records, it is doubtful that he could function as a police officer with his current symptoms. **Therefore, I would consider him incapacitated for performance of duties due to chronic left ilioinguinal pain.** His hypertension is not disabling and he does not describe other medical conditions which would limit his activity as a police officer.

(Emphasis added.)

{¶ 36} To the extent that OP & F asserts Dr. Jewell's concluding paragraph as supports denial of relator's disability application, the magistrate finds that, in light of the earlier paragraph, Dr. Jewell's report is contradictory. He cannot, on the one hand, assert that relator cannot return to his duties as a police officer while, on the other hand, assert

that he cannot provide limitations on relator's ability to perform work. As such, the magistrate cannot agree with OP & F's assertion that Dr. Jewell's report, standing alone, supports its denial of relator's application.

{¶ 37} After relator submitted his additional medical evidence, it was incumbent upon OP & F to have that medical evidence reviewed by the physicians who originally offered opinions concerning relator's disability. Dr. Steinberg's original opinion that relator's condition was not disabling, without an addendum wherein he addresses the additional medical evidence relator submitted, cannot constitute some evidence upon which the board can rely. As such, the magistrate finds that the decision denying relator's disability application is not supported by some evidence and constitutes an abuse of discretion. Although relator asks this court to grant his disability application, the magistrate recommends that the matter be returned to the OP & F board.

{¶ 38} Accordingly, it is this magistrate's decision that this court grant relator's request for a writ of mandamus, order OP & F to vacate its decision denying relator's disability application, and order OP & F to reconsider his application in a manner consistent with this court's decision.

/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).