

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties filed a certified record and merit briefs. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In the decision, the magistrate recommended that this court deny relator's request for a writ.

{¶3} Relator has filed timely objections to the magistrate's decision. Respondents have filed a memorandum in support of the magistrate's decision. The matter is therefore before this court for a full, independent review.

{¶4} In its objections, relator essentially presents the same substantive arguments previously raised before and addressed by the magistrate. Specifically, relator first argues that the magistrate erred in refusing to require respondents to expressly state and explain the basis for their decision. We reject this argument and instead follow the well-reasoned analysis set forth in the appended decision.

{¶5} In its next objection, relator argues that the magistrate erred by refusing to consider whether he was entitled to receive partial disability benefits in accordance with R.C. 742.38(D)(4), which provides:

A member of the fund who has completed five or more years of active service in a police or fire department and has incurred a disability not caused or induced by the actual performance of the member's official duties as a member of the department, or by the member's own negligence, shall if the disability prevents the member from performing those duties and impairs the member's earning capacity receive annual disability benefits in accordance with division (C) of section 742.39 of the Revised Code.

Ohio Adm.Code 742-3-05 sets forth definitions that apply to R.C. 742.38 and defines "[p]artial disability" as "a condition of disability with respect to which the board finds the

applicant is prevented from performing the member's official police or fire duties and [the] member's earnings capacity is impaired." Ohio Adm.Code 742-3-05(A)(8). Ohio Adm.Code 742-3-05 defines "[p]ermanent disability" as, inter alia, a condition with "no present indication of recovery[.]"

{¶6} Relator fails to offer any proposed statutory construction of R.C. 742.38(D)(4). However, in recognition of the vulnerability of his position, relator provides: "The only conceivable basis for the denial of benefits to the relator, was the allegation, that his disability was 'temporary.' " (Objections, at 6.) The temporary nature of relator's disability, however, was more than merely an allegation. Indeed, the record contains ample evidence demonstrating that relator's conditions would improve with treatment and the passage of time. Therefore, the evidence indicates that relator would undergo some degree of recovery. Thus, aside from the issue of whether it was total or partial, the evidence supports the finding that relator's disability was temporary and was not permanent.

{¶7} In the appended decision, the magistrate upheld the denial of disability benefits based, in part, upon the temporary nature of relator's disability. To accept relator's position regarding the issue of partial disability benefits would require this court to recognize and impose a duty upon respondents to grant temporary partial disability benefits. However, as the appended decision clearly sets forth, for purposes of mandamus actions, "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 Emp. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, citing *State ex rel. Woods v. Oak*

Hill Community Med. Ctr., Inc. (2001), 91 Ohio St.3d 459, 461. As such, we refuse to impose a duty upon respondents to recognize temporary partial disability benefits under R.C. 742.38(D)(4) because the legislature has not expressly provided for such.

{¶8} After an examination of the magistrate's decision, as well as an independent review of the record and relevant law, we conclude that the magistrate has sufficiently discussed and determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt it as our own, including the findings of fact and conclusions of law set forth therein. As a result, we deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

TYACK, P.J., and BRYANT, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas J. Tindira, :

Relator, :

v. : No. 09AP-1049

Ohio Police & Fire Pension Fund and : (REGULAR CALENDAR)

Board of Trustees of the Ohio Police & Fire Pension Fund, :

Respondents. :

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

Rendered on June 1, 2010

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

Richard Cordray, Attorney General, and Dennis P. Smith Jr., for respondents.

IN MANDAMUS

{¶9} Relator, Thomas J. Tindira, has filed this original action requesting a writ of mandamus ordering respondents, Ohio Police & Fire Pension Fund ("OP&F") and Board of Trustees of the Ohio Police & Fire Pension Fund ("Board") to grant him an award of permanent total disability or, in the alternative, address and award him partial disability.

Findings of Fact:

{¶10} 1. Relator was employed as a police officer for the city of Cleveland and subsequently the city of Lakewood from approximately April 1996 through April 2008. During this time, relator contributed to the OP&F disability fund.

{¶11} 2. In November 2007, relator filed his application for disability benefits with respondents. Relator identified his disabling conditions as post-traumatic stress disorder ("PTSD"), somatization disorder, anxiety disorder, and major depression. His application also lists an injury to his lower abdomen and other miscellaneous physical ailments.

{¶12} 3. Relator submitted the September 20, 2007 report of his treating physician, Timothy Fetterman, M.D., who diagnosed relator with PTSD, anxiety and depression, and stated that those conditions limit relator's ability to work, interact with others, and to sleep. Dr. Fetterman opined that it was unlikely that relator would return to duty as a policeman and that he could not work. Dr. Fetterman certified that relator was suffering from a condition from which there is no present indication of recovery.

{¶13} 4. Relator submitted the October 3, 2007 report of Eddie E. Myers, Ed.D., an Ohio licensed psychologist. Dr. Myers identified the onset of relator's psychological difficulties as follows:

Lakewood Police Detective Thomas Tindira, a thirty-nine year old white male, joined the Cleveland Police Department in April of 1996 after completing the Cleveland Police Academy program. He joined the Lakewood Police Department in January of 1997. He was moved to the Detective Division on January 1, 2007. He demonstrated an extreme dedication to the job, reporting that he did not take a single day off from the job because of illness until he ran into a major crisis that led to his being placed on administrative leave in May of 2007.

Approximately four years previously, a magazine marketing director from the community joined him in a series of ride alongs as she familiarized herself with what it meant to be a police officer. Following that series, Detective Tindira began

dating this young woman and a close relationship developed. Detective Tindira describes this relationship as the most amazing relationship he had ever experienced in his life. They shared many common interests over the next four years and he had decided that he wished to make her his wife, seeing her as the future mother of his children. Tom had been in several relationships over his period as an adult, but had not chosen to marry anyone. Unfortunately, in this case, he had failed to communicate with his girl friend the depths and intensity of his emotions, and in October of 2006, she called him and told him their relationship was over. She had an affair with a fellow she had met at work. She later expressed concern for Tom, but let him know it was over. Tom reports that as he listened *on the telephone, he felt an enormous shock go through his system* and he developed numerous physical symptoms of trauma. His performance at work began to suffer as he found himself unable to work at the high level of efficiency he once produced. He was referred by his Chief to be evaluated for fitness for duty, and was placed on administrative leave in May of 2007 when the Chief found Tom to be emotionally a wreck and of potential danger to either himself or others.

Since that brutal break up, Detective Tindira has been unable to function normally. He has been unable to sleep and has reported numerous physical problems, such as a severe gastro-intestinal pain that remains intense and constant. More recently, he has reported feeling as if there were a tumor on the side of his neck, making it very difficult for him to swallow. He frequently describes the electric shock he felt in his brain when he got the disturbing news of her affair. *He feels that his brain was damaged by the intense flashes of pain.* Only recently has he been able to identify the deep rage he has felt and the difficulty he has had in controlling the impulse to do harm to his former girl friend and her current lover. Both the girl and the broken relationship are the center of his obsessions. He has tried to regain his emotional balance since that time, but has not been successful in moving from his position of being a victim to a devastating event. As a part of therapy, he has tried to resume interest in golfing, a sport he once enjoyed. He finds no *pleasure in any activity that he engages in.* He has dated several other girls since the break up, but reports being unable to perform sexually with even the most attractive and willing partners. He cannot understand how his former girl friend could have done such a thing to him and why he has been unable to

move on. Unable to sleep, with his sex life destroyed, and a collection of increasingly painful physical symptoms, he reports that he feels like he has become the victim of a train wreck.

(Emphasis sic.) Dr. Myers diagnosed relator with major depression with psychotic features, anxiety disorder, and somatization disorder, opined that his functional capacity had been severely impaired and that he was totally and permanently disabled from functioning as a police officer or in any other occupation that by reason of his experience or training he might otherwise be qualified. In completing his report of medical evaluation on forms provided by respondents, Dr. Myers opined that relator had a 40 percent whole person impairment due to his psychological conditions.

{¶14} 5. OP&F obtained independent medical evaluations for the claimed conditions and a vocational evaluation. Sylvester Smarty, M.D., evaluated relator on January 16, 2008. After identifying the records reviewed, Dr. Smarty indicated the information that relator provided him during the interview. With regards to relator's psychiatric conditions, Dr. Smarty diagnosed major depressive disorder, single episode, moderate, without psychiatric features, and explained:

This diagnosis is supported by Mr. Tindira's report that following the breakup with his girlfriend last October, he developed depressive symptoms. His depressive symptoms were characterized by intense rage, anger, poor sleep, appetite disturbance, lack of motivation, loss of interest, and suicidal thoughts. The specifier *Single Episode* is used because there is no indication that Mr. Tindira suffered any major depressive episode prior to his current episode. The specifier *Moderate* is used because he did not endorse all the 9 possible symptoms of a major depressive episode. The specifier *Without Psychotic Features* is used because he did not endorse any psychotic features that are related to his depressive symptoms.

(Emphasis sic.) He also diagnosed anxiety disorder, not otherwise specified and explained:

This diagnosis is supported by Mr. Tindira's report that following knowledge that his girlfriend had been seeing another man, he developed anxiety symptoms characterized by a burning sensation in his chest and his abdomen, as well as his inability to relax.

Dr. Smarty rejected the diagnosis of PTSD because relator did not report experiencing any traumatic event involving actual or threatened death to anyone prior to the onset of his anxiety symptom. Further, he noted that relator did not endorse all the other required symptoms of post-traumatic stress disorder. Dr. Smarty also rejected the diagnosis of somatization disorder because he found no indication that relator was expressing his symptoms in any other way other than symptoms consistent with anxiety and depression. Thereafter, Dr. Smarty opined that, with reasonable medical certainty, relator was not presently disabled from the performance of his duties as a police officer by his psychiatric conditions. Dr. Smarty explained:

1. Mr. Tindira's psychiatric symptoms did not cause significant impairment in his ability to function effectively as a police officer prior to him being placed on administrative leave due to possible threats that he had made towards his ex-girlfriend.
 - a) Mr. Tindira told me that he remained punctual at work and never missed a day of work prior to being placed on administrative leave.
 - b) Although Mr. Tindira suggested that his work had suffered, there was no objective evidence that he had actually been performing his job at a lower level than he previously did prior to being placed on administrative leave. Rather, he was placed on administrative leave only because there was a suspicion that he might have been responsible for damaging his ex-girlfriend's tires and because he had

been suspected of transmitting threatening e-mails to his ex-girlfriend through the police computer.

2. Although Mr. Tindira has experienced increased anxiety and anger, most of this is directed specifically towards his ex-girlfriend and not towards other people in the community. This suggests that he is less likely to act out on others.
3. Mr. Tindira's anxiety and depressive symptoms are not currently causing significant impairment in other areas of his life. He is able to fulfill his activities of daily living adequately. He continues to interact appropriately with his friends, and he is able to concentrate enough to carry out the activities that are required for day-to-day living. This suggests that should he return back to work he should be able to function effectively despite his symptoms.

Lastly, Dr. Smarty opined that relator's psychiatric symptoms were neither caused directly by his employment as a police officer nor were they aggravated by his job as a police officer. He assessed a four percent whole person impairment and concluded:

Given that Mr. Tindira has never had any psychiatric problems prior to breaking up with his girlfriend, it is my opinion, with reasonable medical certainty, that the prognosis for his psychiatric conditions is good. However, his prognosis is dependent on whether he receives adequate treatment for his conditions. His treatment should involve psychotherapy to help him deal with the psychic injury that he suffered by the breakup and to help him move forward and reestablish new relationships.

In summary, it is my opinion, with reasonable medical certainty, that Mr. Tindira is presently NOT disabled from the performance of the duties of a police officer by his psychiatric symptoms. * * * I consider the prognosis for his psychiatric conditions to be good.

(Emphasis sic.)

{¶15} 6. A vocational evaluation was prepared by Paul T. Kijewski, CRC, LPC, CVE, CDMS, and Michael J. Bryan, CRC, LPC, CVE, CDMS, on February 12, 2008.

Ultimately, they concluded:

In conclusion, we find that Mr. Tindira is not capable of performing the duties of police officer at the present time due to his emotional difficulties. However, we see his condition as temporary. His mental health may improve with ongoing therapy and medication, which he is currently receiving. In a sense, he does have transferable skills and vocational options. However, all of these jobs have wage levels of considerably less than he has earned as a police officer and detective for the Lakewood Police Department.

{¶16} 7. Pursuant to Ohio Adm.Code 742-3-05(B), OP&F presented the information to its expert Disability Evaluation Panel ("DEP"). The case was assigned to Joel Steinberg, M.D., and vocational expert, Michael Klein, Ph.D., for additional independent reviews. Following their reviews of the evidence presented, both Drs. Steinberg and Klein concluded that relator was not incapacitated for the performance of his duties as a police officer and recommended that relator's disability application be denied.

{¶17} 8. In a letter dated March 26, 2008, relator was informed of the Board's decision and his appeal rights:

BOARD ACTION: By action of the Board of Trustees, your application for disability benefits was disapproved. In reaching its decision, the Board relied upon the entire record which 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 not disabled.

RIGHT OF APPEAL: If you are dissatisfied with the Board's decision, you may appeal by filing a written notice of appeal

with OP&F in the form provided by OP&F within **ninety days** from the date you receive this letter.

(Emphasis sic.)

{¶18} 9. Relator appeal and challenged the assessment of his psychological impairment. In support, relator submitted additional reports from Dr. Fetterman, dated April 24 and May 15, 2008 respectively, again opining that, in his opinion, relator is unable to work as a police officer. In his May 15, 2008 report, Dr. Fetterman provided the following additional information:

* * * During one visit, Tom advised me that he was feeling in a fight or flight mode all the time with an increase tendency and reaction to being startled to any type of sudden loud notice, such as the telephone ringing or even a knock on his door. He also mentioned that he has had flashbacks that [are] usually cause[d] by reminders of his own traumatic breakup that he never saw coming. He even mentioned without [sic] having nightmares about a regrettable abortion that he and his ex-girlfriend had in the beginning of the relationship. He always has images of the pictures of the pregnancy ultrasound in his head. It appears *he has had some guilt associated with this abortion*. Tom states that he met his ex-girlfriend at work and even finds his heart racing just being at work because of all of the reminders he has had there. To me it seems like Tom was definitely suffering from chronic generalized anxiety, depression and PTSD. * * *

(Emphasis sic.)

{¶19} 10. Relator also submitted reports from Francis L. McCafferty, M.D. In his March 29, 2008 report, Dr. McCafferty opined that relator suffered from a condition of disability from which there was no present indication of recovery, that further medical evaluation of his condition is unlikely to be cost effective; however, he noted further that relator was in need of continued psychotherapy and medication management to prevent

further deterioration. In an April 2, 2008 report, Dr. McCafferty noted the results of psychological testing:

Psychological testing was obtained. A Beck Anxiety Inventory revealed a score of 40 indicative of a severe level of anxiety. A Beck Depression Inventory-PC revealed a score of 17 indicative of a severe level of depression.

Dr. McCafferty also discussed the results from the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2") from March 7, 2008. Ultimately, Dr. McCafferty concluded:

Mr. Thomas Tindira has been totally devastated by his rejection by a woman that he had met while working as a police officer for the City of Lakewood. He has totally decompensated and may require ECT and other more intrusive forms of treatment. He is currently being seen in psychotherapy and medication management and has shown a very slight improvement.

He has extreme impairment in his personality functioning. His GAF is 21 to 30. He is seriously impaired in his activities of daily living, social functioning, memory and concentration, and adaptation.

I would recommend that Mr. Tindira be evaluated by a psychiatrist for the Ohio Police & Fire Pension Fund who has a knowledge of police work, what this entails, and how a disability such as Mr. Tindira's affects functioning as a police officer.

{¶20} 11. The material was forwarded to Dr. Smarty and Messrs. Kijewski and Bryan. Supplemental reports were prepared.

{¶21} 12. In his August 5, 2008 addendum, Dr. Smarty summarized the additional evidence submitted for his review and opined that there was no compelling reason for him to change his opinion regarding relator's psychiatric diagnosis. Dr. Smarty reiterated his reasons for disagreeing with many of Dr. McCafferty's diagnoses. Dr.

Smarty did determine that relator's whole person impairment should be increased from 5 to 20 percent. Regarding relator's ability to function as a police officer, Dr. Smarty stated:

I wish to change my opinion regarding the impact of Mr. Tindira's psychiatric symptoms on his ability to function as a police officer. If the degree of impairment described by Drs. McCafferty and Fetterman are taken at face value, then it is my opinion with reasonable medical certainty that Mr. Tindira's psychiatric symptoms at the present time will interfere with his ability to function effective[ly] as a police officer. * * *

Thereafter, Dr. Smarty concluded:

Finally, I disagree with Dr. McCafferty's opinion that Mr. Tindira is permanently disabled from his work as a police officer. * * * Generally, it would be expected that his symptoms will improve with treatment (especially psychotherapy) and the passage of time. As such, he should be reevaluated in 1 year to determine whether he remains impaired by his psychiatric conditions.

{¶22} 13. An addendum to the original vocational report was prepared August 6, 2008, and signed by Mr. Kijewski. After identifying the new information reviewed, Mr. Kijewski opined:

* * * It is now my finding that Mr. Tindira is permanently incapacitated from performing the duties of police officer due to his emotional difficulties.

In the original report, it was concluded that the skills which Mr. Tindira had acquired would transfer well into jobs of dispatcher for private security and alarm companies, customer service representative, courier and information clerk. It was found that while those jobs were not appropriate at the time of the report, they could be with appropriate therapy and medication. Again, in light of Dr. McCafferty's report, it appears that he has made no significant improvements with intensive psychotherapy and medication. It is now highly doubtful that his emotional state will improve to the point where these occupations will be feasible for vocational goals.

{¶23} 14. All the above evidence, as well as other evidence, was submitted to Manuel Tzagournis, M.D., the Board's medical advisor, and Bruce S. Growick, Ph.D., OP&F's expert vocational consultant, for a final review in preparation for relator's appeal hearing. In his September 23, 2008 report, Dr. Tzagournis determined that relator had a seven percent whole person impairment and stated:

This individual has a depression that is likely to be reversible, however it has incapacitated him on a temporary basis to the extent that he has been on several psychiatric medications, was hospitalized once in the past, and has provided new medical evidence of the difficulties he has had. Although he has disk disease it is mild and he did not complain as he was being examined by Police and Fire physicians.

Thereafter, Dr. Tzagournis concluded that relator was temporarily incapacitated as follows:

The member is temporarily incapacitated for the performance of duties as a police officer. The depression is relatively severe but is likely to be temporary and treatable. In reviewing the records carefully of the various examining professionals, recovery may reasonably be expected in a period of one year.

Lastly, Dr. Tzagournis concluded that relator's disability was not caused by nor induced by his employment, finding that:

The alleged disability was *not* caused or induced by the member's employment.

* * * There is not sufficient evidence in the records to declare that the disabilities were caused by the member's employment. Accordingly, the designation should be off duty.

(Emphasis sic.)

{¶24} 15. Following his evaluation, Dr. Growick indicated that he had previously found that relator had a minimal wage loss; however, he increased that assessment to mild.

{¶25} 16. Relator's appeal was heard on September 23, 2008. The Board issued its findings of fact and disability grant on appeal indicating that, following the hearing, the Board found that relator was temporarily disabled and found that relator's alleged disability was not caused or induced by his employment. Thereafter, the Board denied his request for permanent total compensation and identified the evidence relied upon.

This award is based on the determinations in the *Medical Recommendation for Appeal Hearings* of Dr. Tzagournis, dated September 17, 2008, the *Vocational Recommendation for Appeal Hearing* of Dr. Growick, dated September 23, 2008, and the other evidence noted below:

F.L. McCafferty, M.D.	09-22-08	Letter and three articles
T. Tindira	09-17-08	Article
K. Fischer	N/A	Letter
M.L. Wintrick	N/A	Letter
N/A	11-23-07	Newspaper article
N/A	07-13-07	Newspaper article

Finding that relator's disability was temporary, the Board denied him his request for disability benefits because those benefits can only be rewarded for permanently disabling conditions.

{¶26} 17. Relator filed a second application for disability benefits; however, his application was administratively denied because he had resigned from service and was no longer eligible to apply for disability benefits according to OP&F's governing provisions.

{¶27} 18. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶28} Relator raises the following two issues: (1) the Board abused its discretion by failing to state the basis for its denial of relator's disability benefits, and (2) the Board abused its discretion when it denied his application for disability benefits.

{¶29} In response, respondents argue: (1) the Board is not required to state the reasons why relator's disability benefits were denied, and (2) because the Board determined that his disability was not work related and was temporary, relator was not entitled to an award of disability benefits.

{¶30} The magistrate finds: (1) the Board is not required to state the basis for the denial of an award of disability benefits because there is no statutory or regulatory requirement that the board do so, and (2) the Board did not abuse its discretion when it denied relator disability benefits.

{¶31} The magistrate finds that some legal history is necessary here for a thorough analysis of the first issue.

{¶32} In *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 484, the Supreme Court of Ohio discussed deficiencies in orders granting or denying benefits from the Industrial Commission of Ohio and stated:

* * * [T]his court will no longer search the commission's file for "some evidence" to support an order of the commission not otherwise specified as a basis for its decision.

The court identified two reasons for ordering the commission to specify the basis for its decision. First and foremost, the court stated:

* * * [T]he duty to so specify the basis for its decisions is imposed upon the commission by statute. R.C. 4123.515 directs a district hearing officer to "* * * present his decision with reasons therefor * * *." Similar duties are imposed upon regional boards of review and the commission by R.C. 4123.518. See, also, R.C. 4121.36(B).

Id. As a secondary reason, the court noted that:

* * * [A] decision of a district hearing officer, a regional board of review, or the commission which specifically sets forth the basis for the decision will enable this court, as well as the Court of Appeals for Franklin County, to readily discern the specific grounds relied upon and whether the record supports such a finding when a party to the proceeding initiates an action for a writ of mandamus. * * *

Id.

{¶33} Several years later, in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, syllabus, the Supreme Court of Ohio held:

In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision.

{¶34} Later that same year, this court released its decision in *State ex rel. Kidd v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund* (1991), 66 Ohio App.3d 647, and extended the applicability of *Mitchell* and *Noll* to disability determinations by the Board. In that case, Robert Kidd had been a police officer since 1972. During his tenure, Kidd suffered hearing loss, which did not prevent him from performing his duties as a police officer. In 1983, Kidd suffered a heart attack and in February 1988 ruptured his bicep tendon while playing racquetball. Kidd continued his employment as a police officer throughout these injuries.

{¶35} In February 1989, Kidd filed a disability retirement application with OP&F and listed the following disabling conditions: coronary artery disease; acute myocardial infarction; hearing loss-sensorineural and ruptured bicep tendon.

{¶36} In April 1989, after responding to a robbery call, Kidd was taken to the hospital for coronary problems and was admitted into the intensive care unit. Kidd did not return to work following this incident and notified the Board of that fact. Later that month, Kidd was informed that the board had granted him maximum partial disability retirement. Kidd appealed and, following that appeal, was notified that " '[t]he Board of Trustees, after a careful review of the medical evidence, decided not to change its original grant.' " *Id.* at 649.

{¶37} Thereafter, Kidd filed a mandamus action in this court. Citing from *Mitchell* and *Noll*, this court stated:

This court finds that, although these two holdings apply to the Industrial Commission, their principles are equally applicable to the decisions of the Fund's board. The issues upon which the Fund's board and the Industrial Commission determine the right of an individual to receive benefits and the extent to which the benefits will be given are similar and the standard of review of their decisions on review in mandamus are the same: an abuse of discretion. Thus, a meaningful review of the board's decisions can be accomplished only if the board prepares orders which specifically state the evidence that has been relied on and contain the reasoning explaining its decision. Accordingly, the Fund's board is required to state both the reasons for its decision and the evidence relied upon and to give an explanation of the reasoning behind its decision.

Kidd at 651-52.

{¶38} In *Kidd*, this court *only cited the second reason* given by the Supreme Court in *Mitchell*, wherein the court stated:

* * * [A] decision of a district hearing officer, a regional board of review, or the commission which specifically sets forth the basis for the decision will enable this court, as well as the Court of Appeals for Franklin County, to readily discern the specific grounds relied upon and whether the record supports

such a finding when a party to the proceeding initiates an action for a writ of mandamus. * * *

Mitchell at 484. This court *did not consider* whether or not there were any *statutory or regulatory requirements* which applied to OP&F and required that the Board explain its decisions.

{¶39} A year later in *State ex rel. Montague v. Police & Firemen's Disability & Pension Fund* (1992), 78 Ohio App.3d 661, 663, Officer Ted M. Montague filed an application for disability retirement and was notified that the board "granted relator not permanent total disability benefits but, instead, 'maximum partial disability retirement pursuant to Division (C)(3) of Section 742.37 of the Revised Code.'" Montague appealed; however, the board decided not to change its original determination and Montague began receiving partial disability retirement payments.

{¶40} Montague filed a mandamus action in this court seeking to set aside the board's order, which granted him partial disability retirement and denied him permanent total disability retirement.

{¶41} This court began with reference to R.C. 742.01(F), which defined "total disability" as follows:

"* * * [I]nability to perform the duties of any gainful occupation for which the member of the fund is reasonably fitted by training, experience, and accomplishments, provided that absolute helplessness is not a prerequisite of total disability."

Id. at 665. After noting that there is no definition of "partial disability" this court noted that there was no dispute that Montague's disability was not permanent nor was there any dispute that Montague's disability was a result of the performance of his official duties and

that it prevented him from returning to those duties. In granting Montague a writ of mandamus, this court stated:

Unfortunately, the evidence before us and the decision of respondent board of trustees are not sufficient to permit a determination of the more fundamental merit issue. The decision of respondent's board failed completely to adhere to any fundamental predicate giving rise to an explanation of either the basis for the decision, the evidence relied upon, or the reasoning utilized in reaching the decision. In *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, 551 N.E.2d 989, syllabus, the Supreme Court held that:

"In determining whether a person is totally disabled for purposes of the Police and Firemen's Disability and Pension Fund of Ohio, the board of trustees of the fund cannot rely upon general statements made by doctors either in a written report or in preprinted forms supplied by the board, which state that a member can engage in 'some' type of gainful employment. The board must state that it considered the member's training, experience, and accomplishments in determining whether he can engage in other gainful employment."

* * * In *Kinsey*, the Supreme Court found to the effect that the standards for a board decision granting or denying a permanent total disability application are essentially governed by the same rules as applied to decisions of the Industrial Commission. Accordingly, the abuse of discretion or "some evidence" rule is applicable. As in *Kinsey*, this court is unable to find that the record contains "some evidence" to support the board's determination that *Kinsey* is not "totally disabled," as defined in R.C. 742.01(F). Rather, as stated in the opinion in *Kinsey*, *id.* at 227, 551 N.E.2d at 993:

"R.C. 742.01(F) specifically states that a member need not be absolutely helpless in order to qualify for total disability. It also requires that the gainful occupations available to the claimant are those that are reasonably suitable to the claimant because of his training, experience, and accomplishments. Thus, determining that appellant is qualified to do some kind of work, such as sedentary or nonstressful work, does not necessarily mean that he is not totally disabled for purposes

of the Fund. Instead, in order to determine that appellant is not 'totally disabled' within the meaning of R.C. 742.01(F), there must be 'some evidence' in the record that the gainful occupation he can engage in, after his disability, is an occupation for which he is reasonably fitted by way of training, experience, and accomplishments."

Id. at 666-67.

{¶42} This court continued to apply the law it had pronounced in *Kidd* in *State ex rel. Rainey v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund of Ohio* (Sept. 16, 1997), 10th Dist. No. 97APD02-215, and *State ex rel. Perrin v. Bd. of Trustees for the Police & Firemen's Disability & Pension Fund* (July 25, 2000), 10th Dist. No. 99AP-545 (memorandum decision).

{¶43} Between this court's reaffirmance of its holding in *Kidd*, *Rainey*, and *Perrin*, this court had occasion to determine whether decisions from the Public Employees Retirement System ("PERS") needed to contain the rationale for granting or denying an application in *State ex rel. Green v. Pub. Emps. Retirement Sys. of Ohio* (June 22, 1999), 10th Dist. No. 98AP-567. In that case, Larry L. Green, Sr., had applied for disability retirement with PERS. That application was denied and Green filed a mandamus action in this court.

{¶44} This court referenced its decisions in *Kidd* and *Montague* and determined that PERS was likewise required to explain the reasons for denying an application. However, at that time, this court noted that the regulations required such an explanation. Specifically, this court stated:

* * * [T]his court finds no reason not to apply the reasoning of *Noll* and *Montague* to the decisions of PERS, especially given the applicable rules. **Ohio Adm.Code 145-11-02 specifies that the board's denial of a disability benefit shall state "its basis of denial."** Cf. *Mitchell*, supra, at 483 (stating that

"we will, when necessary * * * grant a writ of mandamus directing the commission to specify the *basis of its decision*" [emphasis added].

(Emphasis added.) As noted, Ohio Adm.Code 145-11-02 required that PERS state the basis of its denial.

{¶45} In 2004, the Supreme Court of Ohio issued its decision in *State ex rel. Lecklider v. School Emp. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, and determined that the School Employees Retirement System ("SERS") was not required to state the basis of its denial of disability benefits. In that case, Diane Z. Lecklider, had been employed as a head cook for Greenville City Schools. In March 2002, Lecklider applied to SERS for disability retirement benefits and presented appropriate medical documentation. Ultimately, the medical advisory committee reviewed the application and evidence and concluded that Lecklider was not permanently disabled from performing her duties as a head cook and recommended that her application be denied. SERS agreed with the committee's recommendation and denied Lecklider's application for disability retirement benefits. Lecklider appealed and submitted additional medical evidence; however, SERS upheld its original decision denying her application for disability retirement benefits.

{¶46} Lecklider filed a complaint in this court seeking a writ of mandamus to compel SERS to find that she was entitled to disability retirement benefits or, in the alternative, to compel SERS to hold a hearing in which she could personally appear to present evidence and cross-examine witnesses. This court denied the writ and Lecklider appealed to the Supreme Court.

{¶47} In her appeal before the Supreme Court, Lecklider asserted that SERS had a duty to specifically state the evidence it relied upon and explain the reasons for its decision to deny her application for disability benefits. The court rejected her assertion and stated:

Lecklider next asserts that SERS had a duty to specifically state the evidence it relied upon and explain the reasons for its decision to deny her application for disability retirement benefits.

We reject Lecklider's assertion. 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. Woods v. Oak Hill Community Med. Ctr., Inc.* (2001), 91 Ohio St.3d 459, 461, 746 N.E.2d 1108. " **'[N]othing in the statute or regulations suggests that the SERS retirement board or the members of its medical advisory board must issue a decision [stating the basis for its denial].'** " *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶ 20, quoting *State ex rel. Copeland v. School. Emp. Retirement Sys.* (Aug. 5, 1999), Franklin App. No. 98AP-1173, 1999 WL 56929, appeal dismissed based on mootness (2000), 88 Ohio St.3d 1507, 728 N.E.2d 1.

Id. at 274-75. (Emphasis added.)

{¶48} Following the decision in *Lecklider*, another case involving PERS was brought before this court. In *Hamby v. Pub. Emps. Retirement Sys.*, 10th Dist. No. 08AP-298, 2008-Ohio-5068, Ray B. Hamby was appealing from a judgment of the Franklin County Court of Common Pleas denying his request for a writ of mandamus ordering PERS to vacate its decision denying Hamby permanent disability retirement benefits and ordering PERS to issue a decision granting those benefits.

{¶49} This court set forth the issue as follows:

The issue becomes whether PERS abused its discretion in denying appellant's application for permanent disability retirement benefits. In *Kinsey v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund* (1990), 49 Ohio St.3d 224, 226, 551 N.E.2d 989, the Supreme Court of Ohio held that mandamus relief must be denied when there is "some evidence" to support the retirement system's decision. Thus, when there is "some evidence" to support the decision, the retirement system has not abused its discretion. See *id.* This standard applies to PERS decisions. See [*State ex rel. Schaengold v. Ohio Pub. Emp. Retirement Sys.*, 114 Ohio St.3d 147].

Id. at ¶14.

{¶50} Hamby argued that this court's decision in *Green* required PERS to set forth in writing the rationale for its decisions. Essentially, Hamby was arguing that, in a mandamus proceeding, a court cannot review the administrative record to search for evidence that might support PERS's decision when PERS fails to specifically identify that evidence as a basis for its decision.

{¶51} On the other hand, PERS argued that Hamby's reliance on *Green* was misplaced and this court agreed. Because the state legislature had repealed that portion of the Ohio Administrative Code that required PERS to state the basis for its denial, this court stated:

* * * In *Green*, this court, citing former Ohio Adm.Code 145-11-02, as well as *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245, and *State ex rel. Montague v. Police & Firemen's Disability & Pension Fund* (1992), 78 Ohio App.3d 661, 605 N.E.2d 1009, determined that PERS must specify the basis of its decision in any denial of disability benefits. Pursuant to *Noll*, the Industrial Commission of Ohio is required to set forth the evidence relied upon and provide an explanation for its denial of an application for benefits. In *Montague*, this court applied the rationale underlying *Noll* to decisions of the board of trustees of the Police and Firemen's Disability and Pension Fund. **Former Ohio Adm.Code 145-11-02 provided that the PERS board's denial of a**

disability benefit shall state its basis of denial and was repealed on January 1, 2003. See 2002-2003 Ohio Monthly Record 1304. The new version of the rule, now codified at Ohio Adm.Code 145-2-23, does not require the PERS board to state the basis for its denial of an application of a disability benefit.

Id. at 17. (Emphasis added.)

{¶52} Hamby continued to argue that the language in former Ohio Adm.Code 145-11-02 had only provided an ancillary basis for this court's decision in *Green*, and that the absence of a statutory or regulatory requirement did not affect the continued applicability of this court's reasoning supporting its decision in *Green*. However, citing *Lecklider*, this court found that the holding of *Green* could no longer support such a conclusion in the absence of a statute or regulation indicating that PERS must issue a decision stating the basis for the denial. This court went on to state:

* * * 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. * * * **"[N]othing in the statute or regulations suggests that the SERS retirement board or the members of its medical advisory board must issue a decision [stating the basis for its denial]."**

Id. at ¶ 23, 819 N.E.2d 289. See, also, *State ex rel. Smith v. School Employees Retirement Sys.*, Franklin App. No. 06AP-987, 2007-Ohio-3996, at ¶ 27 (stating that "[n]o matter how desirable it would be to have SERS identify the evidence it relies upon and provide a brief explanation when it denies disability retirement benefits, the statutes and rules which apply to SERS do not require that SERS state the basis for its denial of disability retirement.")

Id. at ¶18. (Emphasis added.)

{¶53} Returning now to the case currently before this court in mandamus, OP&F argues, for the first time in this court, that this court should not apply the line of cases

following this court's decision in *Kidd*, because there is no statutory or regulatory requirement that the Board explain the reasons for denying a member disability benefits.

{¶54} Respondents are correct. When this court issued its decision in *Kidd* and the cases which followed, this court never addressed the issue the Board raises here: whether there is any statutory or regulatory requirement that the Board explain the reasons for denying a member disability benefits. As will be hereinafter demonstrated, there is no such requirement. As such, pursuant to the Supreme Court's reasoning in *Lecklider*, provided there is some evidence in the record to support the Board's decision, the Board is not required to explain its reasoning.

{¶55} R.C. 742.38 provides for the filing of applications for disability benefits and the standards to be applied. R.C. 742.38(D) provides the definitions for "totally disabled" and "permanently disabled." R.C. 742.38(D)(4) provides that, "[i]n determining whether a member of the fund is disabled, the board shall consider standards adopted under division (C) of this section applicable to the determination." With regards to notification, R.C. 742.38(D)(5) provides in part: "The board shall notify a member of its final action awarding a disability benefit to the member within thirty days of the final action. The notice shall be sent by certified mail, return receipt requested."

{¶56} Ohio Adm.Code 742-3-05 supplements R.C. 742.38 and provides for the determination on an initial application at Ohio Adm.Code 742-3-05(C) as follows:

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

application and make an initial determination of disability. The board may:

- (a) Grant a disability benefit;
- (b) Deny disability benefits; or
- (c) Postpone determination, pending an additional examination, or the submission of additional fact.

* * *

(8) The member covered by the pending disability retirement application shall be notified of the board's initial determination of disability within thirty days after the board's final action and such notice shall be sent by certified mail, return receipt requested. The member covered by the pending disability retirement application shall be advised of his or her right to:

- (a) Accept the benefit grant;
- (b) Waive the benefits and continue working; or
- (c) Appeal the initial determination of the board.

Regarding notice following an applicant's appeal, Ohio Adm.Code 742-3-05(E) provides:

(4) Following the hearing on appeal, the board may choose to:

- (a) Affirm the original determination of disability;
- (b) Modify the original determination of disability; or
- (c) Postpone a decision pending additional examinations or documentation. The board's decision on appeal shall be the final determination of the initial disability application.

(5) The applicant shall be advised of the board's action within thirty days after the board's final determination of disability and such notice shall be sent by certified mail, return receipt requested. The member covered by the disability appeal shall be advised of the member's right to:

- (a) Accept the benefit granted;
- (b) Waive the benefit and continue working; or

(c) File a mandamus action.

{¶57} As above indicated, there is nothing in either the Ohio Revised Code or the Ohio Administrative Code that requires the Board to explain the basis of its denial of an applicant's award of disability benefits and relator is not entitled to a writ of mandamus ordering the Board to do so.

{¶58} The question which remains, however, is whether the Board abused its discretion when it denied relator's application for disability benefits. The magistrate finds that the Board did not abuse its discretion.

{¶59} In the September 23, 2008 determination on relator's appeal, relator was notified that the Board found that he was temporarily disabled; however, the Board also found that the alleged disability was not caused or induced by his employment. Thereafter, the Board denied relator's application for disability benefits and indicated that that determination was specifically based on the reports of Drs. Tzagournis and Growick. After reviewing the evidence presented, Dr. Tzagournis concluded that relator's depression appeared to be severe enough that he was not capable of working as a police officer; however, he concluded that relator's disability was temporary and that he would recover gradually over the next year. Dr. Growick determined that the effect of relator's allowed conditions on his wage loss from a vocational standpoint was mild.

{¶60} Relator further challenges the report of Dr. Tzagournis in two respects: (1) he only considered relator's depressive condition and not the other conditions diagnosed by Drs. Fetterman, Myers, and McCafferty, and (2) his report is a one-page pre-printed form and should not be given the same weight as the other evidence. As such, relator asserts that there is no evidence to support the Board's decision.

{¶61} This magistrate disagrees: (1) Dr. Tzagournis obviously agreed with Dr. Smarty's determination that only the depressive condition existed, and (2) there is no requirement regarding the length of a doctor's report—this simply is not an issue. Further, both Drs. Tzagournis and Smarty concluded that relator's disability was temporary.

{¶62} In his reply brief, relator argues that the Board should have granted him disability benefit, even if the Board relied on medical evidence finding that his disability was temporary, because R.C. 742.4(C)(3) and Ohio Adm.Code 742-3-05(H) and 742-3-10(A) provide safeguards to ensure that a recipient is not paid benefits for life. Specifically, R.C. 742.40(C)(3) provides that the Board may require a disability recipient to submit to medical examinations at any time the Board considers necessary to determine if the recipient's disability remains ongoing. However, this only applies after benefits are awarded to determine whether those benefits should continue. The recipient must first qualify for and be awarded benefits before any of these provisions apply. The Board did not award relator benefits; therefore, these provisions do not apply.

{¶63} While relator argues that the overwhelming majority of the evidence presented established that he was entitled to disability benefits, there is some evidence in the record upon which the Board's decision could be based, and, as such, relator has not demonstrated the Board abused its discretion.

{¶64} Based on the foregoing, the magistrate finds that the Board of Trustees of the Ohio Police & Fire Pension Fund is not required to explain the reasons for its denial of a member's application for disability benefits contrary to this court's earlier decision in *Kidd* and the cases which followed. Further, the magistrate finds that there is some evidence in the record upon which the Board of Trustees of the Ohio Police & Fire

Pension Fund relied and relator has not demonstrated that the Board abused its discretion when it denied his application for disability benefits. As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).