

In the  
**Supreme Court of Ohio**

STATE OF OHIO, EX. REL.,	:	Case No. 2021-0395
MICHAEL RAY POWELL, JR.,	:	
	:	On Appeal from the
Appellant,	:	Franklin County Court of Appeals,
	:	Tenth Appellate District
vs.	:	
	:	Court of Appeals Case No. 19-AP-600
OHIO PUBLIC EMPLOYEES	:	
RETIREMENT SYSTEM,	:	
	:	
Appellee.	:	

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**MERIT BRIEF OF APPELLEE,  
OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM**

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## **INTRODUCTION**

The issue in this case is whether there is some evidence to support the decision of the Ohio Public Employees Retirement System Board (“OPERS”) to deny Powell’s application for disability benefits. Powell applied for disability benefits with OPERS. After Powell’s application was filed, he was examined by an independent doctor and his records were reviewed by multiple doctors, all of whom recommended the denial of his request for disability benefits. After review of the entire record, the OPERS Board denied Powell’s application for disability benefits. Powell appealed, and, again, he was evaluated and his medical records were reviewed by doctors who recommended the denial of his request for disability benefits. The OPERS Board denied Powell’s appeal and upheld its prior denial of his disability application. Powell sought a writ of mandamus requiring OPERS to award him disability benefits based on the premise that OPERS should ignore its own statutorily required medical evaluations and evidence. The Tenth District Court of Appeals agreed with OPERS that the reports of Dr. Steiman, Dr. Mankowski, Dr. Mast, and Managed Medical Review Organization (“MMRO”) are some evidence upon which the Board properly relied. Powell’s request for a writ of mandamus was denied by the Tenth District Court of Appeals and should also be denied by this Court.

### **STATEMENT OF THE FACTS AND CASE**

#### **A. Michael Powell’s application for disability benefits and appeal.**

Powell worked as a Highway Technician 3C/M for the Ohio Department of Transportation. Docket #17, Certified Record, at 11, 61 [hereinafter, “CR.”]. He had a surgical discectomy, fusion and anterior plating (neck surgery) on July 10, 2015. (CR. 22-23). Subsequently, Powell fell off a ladder and landed on his head in October of 2015. (CR. 75). Powell was diagnosed with a concussion the next day. (CR. 223). He has alleged he continues to experience symptoms from

that injury. (CR. 224). OPERS received Powell's Disability Benefit Application on January 16, 2018. (CR. 4). Powell submitted medical reports with his application. Powell's own physician, Steven Katz, M.D., listed "[s]ubjective vision disturbance" among the assessments of his exam of Powell. (CR. 51). Powell's physician, W. Jerry Mysiw, M.D., submitted a Report of Physician, which was received by OPERS on January 12, 2018. (CR. 62). In his report, Dr. Mysiw wrote that "Intractable migraine without aura and without status migrainous" was Powell's primary disabling condition. (CR. 68). OPERS received a Report of Employer for Disability Applicant on January 16, 2018. (CR. 57). In this report, Powell's job title was given and the physical demands of his job were described. *Id.*

Managed Medical Review Organization ("MMro"), which OPERS employs to manage its disability claims, scheduled Powell for an Independent Medical Evaluation ("IME") with Gerald Steiman, M.D. (CR. 74). Dr. Steiman completed an IME of Powell on February 28, 2018, which included an examination, a review of Powell's medical records, and a review of his job description. (CR. 75). Dr. Steiman's report is dated March 14, 2018. *Id.* Dr. Steiman stated that Powell indicated he had two types of headaches, migraine headaches and cervicogenic headaches. (CR. 76). Powell stated the migraines occurred one to two times a month and he may have the cervicogenic headaches two to three times a week, which may last several days at a time. *Id.* Dr. Steiman indicated in his report that he was aware of all of Powell's diagnoses as he reviewed them in his report. (CR. 77). He further indicated that Powell presented for the eligible diagnosis of Intractable Migraines without Aura and without status migrainosus. (CR. 78). Dr. Steiman noted that Dr. Katz diagnosed Powell with subjective visual loss. (CR. 77).

Dr. Steiman wrote in the Discussion section of his Report:

It is evident that Mr. Powell's migraines are not intractable as he is on treatment which aborts his migraines within a few minutes. Mr. Powell indicates that

whenever he has a migraine headache, he takes the Lidoderm nasal spray which aborts his symptom complex within a few minutes. As such, his migraine headaches are neither intractable nor provide a significant limitation in his activities of daily living or occupational pursuits.

(CR. 78).

Dr. Steiman answered multiple questions in his report. In response to Question #2, whether in his opinion Powell was permanently disabled, Dr. Steiman wrote:

No, when considering the OPERS definition of permanent disability, Mr. Powell is not permanently disabled for the performance of their own occupation as a public employee, Highway Technician 3C/M. The eligible diagnosis of intractable migraine without aura and without status migrainosus is easily controlled with appropriate medication and do not incapacitate him from performing his own occupation. Mr. Powell indicated he has excellent pain relief within minutes of using the Lidocaine nasal spray.

(CR. 79).

In his response to Question #4, which asked if Powell had a disabling diagnosis, Dr. Steiman wrote, "There is no current disabling diagnosis as Mr. Powell's eligible diagnosis does not meet the OPERS definition of permanent disability." *Id.*

In Question #5 it was asked if there was objective medical evidence to support disability. *Id.* Dr. Steiman wrote in response, "No, there is no objective medical evidence to support disability. Mr. Powell's eligible diagnosis is manifested only by subjective complaints/symptoms and not by objective medical evidence. His subjective complaints are valid and consistent with the eligible diagnosis. There is no evidence of magnification or embellishment." *Id.*

In Question #7, Dr. Steiman was asked to determine if Powell's subjective complaints/symptoms correlated with the objective clinical findings. (CR. 80). Dr. Steiman wrote in response, "No, the observed activities/behavior do not correlate with the objective clinical findings because Mr. Powell's eligible diagnosis is characterized by subjective complaints/symptoms without objective clinical findings. The observed activities/behavior do

correlate with the eligible diagnosis. His subjective complaints are valid and there is no evidence of magnification or embellishment.” *Id.*

In response to Question #9, asking his medical opinion of Powell’s ability or inability to perform his specific job tasks based on the enclosed job description and eligible diagnosis, Dr. Steiman wrote:

No, there is no credible evidence that Mr. Powell is unable to perform the specific job tasks based on the enclosed job description and eligible diagnosis. Mr. Powell’s history, physical exam, and medical record review provide credible evidence that he is capable of performing the requirements of his job activity without limitation or restriction.

*Id.*

Powell submitted additional medical records to OPERS. (CR. 81). OPERS sent Powell a letter in response on April 4, 2019, stating that since Powell already had his exam through MMro, the additional medical records would not be considered in OPERS’ decision. (CR. 190).

MMro sent Dr. Steiman a request that he issue a supplemental report addressing an additional question. (CR. 191). MMro stated that Dr. Mysiw considered claimant’s cervicogenic daily headaches as migraines, and therefore asked Dr. Steiman to consider the cervicogenic headaches as a migraine/headaches for this review. *Id.* MMro asked if based on review of the medical records, his exam, and his medical opinion, whether he found claimant to be permanently disabled from his own occupation. *Id.* Dr. Steiman issued a subsequent letter dated April 4, 2018, wherein he stated: “When considering the diagnosis of cervicogenic headaches and the OPERS definition of permanent disability, Mr. Powell’s history, medical record review, and physical examination provide credible evidence he is not disabled from his occupation as a public employee, Highway Technician 3C/M.” (CR. 192).

MMro conducted a clinical review of all the information in Powell's disability claim file, and recommended Powell's application for disability benefits be denied. (CR. 198). MMro submitted a review, which summarized Powell's medical history. (CR. 194-199). The review stated:

Based on all information provided in the disability claim file, APS submitted by Dr. Mysiw Physical Medicine and Rehabilitation, IME and addendum submitted by Dr. Steiman Neurology and Clinical Escalation Committee recommendations, the claimant is not permanently disabled from his own occupation as a Highway Technician 3C/M for the Transportation District 6. There is no disabling diagnosis. Dr. Steiman states, "No, there is no credible evidence that Mr. Powell is unable to perform the specific job tasks based on the enclosed job description and eligible diagnosis. Mr. Powell's history, physical exam, and medical record review provide credible evidence that he is capable of performing the requirements of his job activity without limitation or restriction."

(CR. 198).

The recommendation from MMro was signed by Jeffrey Dietch, D.O., Medical Director of MMro. (CR. 199). Maurice Mast, M.D., OPERS' medical advisor, recommended that the OPERS Board disapprove Powell's application for disability benefits, based on the medical findings of insufficient objective evidence of permanent disability. (CR. 201). The OPERS Board denied Powell's disability application at its May 16, 2018 meeting, as the Board concluded he was not considered to be permanently disabled from the performance of his duties as a Highway Technician 3C/M. (CR. 206). Powell submitted a timely Disability Benefits Appeal request form. (CR. 209).

MMro scheduled another IME for Powell on behalf of OPERS. (CR. 221). This IME was scheduled with Kenneth Mankowski, D.O., a Board Certified Neurologist. *Id.* Dr. Mankowski conducted his IME of Powell and reviewed his medical records on October 9, 2018. (CR. 223). He answered ten questions in his exam report. In Question #2 it was asked, per the OPERS definition of permanent disability, if Powell was presumably disabled for the performance of his own occupation as an employee, Highway Technician 3C/M, beginning with the disability

application date of November 30, 2017, for a continuous period of at least twelve months. (CR. 227). In response, Dr. Mankowski wrote:

No. Based on the eligible medical conditions of this claim the claimant is not presumed to be permanently disabled from the performance of his job as a Highway Technician 3C/M beginning on the disability application date of 11/30/2017 for a continuous period of at least 12 months. There is simply no credible medical evidence presented to conclude that the claimant is considered permanently disabled as related to the eligible medical conditions of this claim. This conclusion is based on the following:

-Intractable migraines without aura and without status migrainous are episodic and treatable. . . .

-None of the treating physicians, Dr. Steiman, or myself reported or described neurological deficits on examination.

-Post concussive cervicogenic headaches are related to traumatic brain injury of this type and severity does not result in permanent disability that would prevent him from performing his public employee job for a period of 12 months from the 11/30/17 date. Again, these headaches were episodic and treatable and not associated with neurological deficits. In my opinion, this condition was self-limiting and resolved within 3 months of the actual injury. This conclusion is based upon the mechanism of injury, the severity of the injury, subjective symptoms, and the known natural history of this condition. There was no objective evidence of this condition at the time of my examination on October 9, 2018. There has been no credible evidence presented to support the presence of this condition.

(CR. 227-228).

Dr. Mankowski anticipated that Powell's migraine condition would improve over time. (CR. 228). He also wrote, "the condition of post concussive cervicogenic headaches as related to traumatic brain surgery was self-limiting and resolved within 3 months of the initial injury in October 2015. There is no residual pathology. Any ongoing symptoms are unrelated to this condition, which has resolved." *Id.* Dr. Mankowski also wrote that Powell's migraine and cervicogenic headaches were not disabling. (CR. 229).

In his report, Dr. Mankowski indicated that the hydrocodone and muscle relaxants that Powell was taking were not appropriate long-term treatments for his conditions. *Id.* In response

to the inquiry of whether the claimant's subjective complaints/symptoms correlated with Dr. Mankowski's objective clinical findings, Dr. Mankowski wrote, "The claimant's subjective complaints are out of proportion to the objective clinical findings. The subjective visual symptoms are not correlated with any objective findings on examination. I agree with Dr. Katz who described the visual disturbances as subjective." *Id.*

Question #10 in the report asked Dr. Mankowski, "In your medical opinion, please elaborate on the claimant's ability or inability to perform their specific job tasks based on the enclosed job description and eligible diagnosis(es)." (CR. 230). Dr. Mankowski wrote:

In my opinion, the condition of intractable migraines without aura and without status migrainous is episodic and treatable and not associated with any neurological deficits which would preclude him from performing job tasks as described by the enclosed job description. Specifically, the migraines are not associated with any of the following: aura, vision loss, focal neurological deficits, intractable emesis or altered awareness."

(CR. 230).

Finally, Dr. Mankowski stated, "In my opinion, the claimant is not permanently disabled from their public position." (CR. 230).

MMro conducted a clinical review of all information in Powell's disability claim file and recommended the Board uphold its denial of Powell's disability benefit application. (CR. 236-237). (CR. 231). Dr. Deitch signed MMro's report, dated October 30, 2018, which stated:

In review of the information submitted for this claim file, including the recent Attending Physician Statement submitted by Dr. W. Jerry Mysiw, Physical Medicine and Rehabilitation, dated 08/15/2018, as well as the IME report completed by Dr. Kenneth Mankowski, dated 10/09/2018, and the discussion at the Clinical Escalation Committee, the claimant is not considered to be permanently disabled for the performance of his occupation as a Highway Technician 3C/M. According to Dr. Mankowski, dated 10/9/2018, it was noted that: "In my opinion, the condition of intractable migraines without aura and without status migrainous is episodic and treatable and not associated with any neurological deficits which would preclude him from performing job tasks as described by the enclosed job description. Specifically, the migraines are not associated with any of the

following: aura, vision loss, focal neurological deficits, intractable emesis or altered awareness.” Additionally, “The condition of post concussive cervicogenic headaches as related to traumatic brain injury was self-limiting and resolved without residual pathology. When the condition did exist, it was not associated neurological deficits and did not interfere with the claimant’s ability to perform his specific job tasks.”

(CR. 236).

On November 4, 2018, OPERS’ medical advisor, Maurice Mast, M.D., again recommended the OPERS Board uphold its denial of Powell’s disability benefit application, based on the medical findings of insufficient objective evidence of permanent disability. (CR. 239). The OPERS Board upheld the denial of Powell’s disability benefits application at its November 14, 2018 meeting. (CR. 240).

Powell’s attorney submitted a request to re-open Powell’s disability application. While the fax coversheet indicates a date of December 24, 2018, OPERS received the request on January 10, 2019. (CR. 241). OPERS sent Powell a letter dated January 11, 2019, stating that his application for disability benefits was not timely filed. (CR 253). Since the documents OPERS received on January 10, 2019 were submitted after the OPERS Board’s final decision, they were not before the Board when it made its decision. Powell sought a writ of mandamus to compel OPERS to provide him with disability retirement benefits. A Magistrate issued a Decision in favor of OPERS. Powell filed Objections to the Magistrate’s Decision. OPERS filed a Memorandum in Opposition to Relator’s Objections to the Magistrate’s Decision. The Court adopted the Magistrate’s Decision and denied the requested writ of mandamus. Powell appealed the Decision of the Court of Appeals.

## **ARGUMENT**

Powell has a heavy burden of proof to show that OPERS abused its discretion when it denied Powell’s application for disability benefits. Powell’s burden is to provide evidence that is plain, clear, and convincing, showing that he has a clear legal right to a disability retirement, that

OPERS has a clear legal duty to provide a disability retirement, and that he has no adequate remedy at law. See *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967) and *State ex rel. Solomon v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund*, 72 Ohio St.3d 62, 64, 647 N.E.2d 486 (1995).

“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, 807 N.E.2d 353, ¶ 13. When OPERS’ decision is supported by some evidence, there is no abuse of discretion. See *State ex rel. Marchiano v. School Emps. Retirement Sys.*, 121 Ohio St.3d 139, 2009-Ohio-307, 902 N.E.2d 953, ¶¶ 20-21. “Only if the board’s decision is not supported by *any* evidence will mandamus lie.” *State ex rel. Woodman v. Ohio Pub. Emps. Retirement Sys.*, 144 Ohio St. 3d 367, 2015-Ohio-3807, 43 N.E.3d 426, ¶ 17 (emphasis in original).

This Court must review the decision of the 10th District Court of Appeals to determine if the Court of Appeals abused its discretion in denying the writ of mandamus. *State ex rel. Altman-Bates v. Pub. Emps. Retirement Bd.*, 148 Ohio St.3d 21, 2016-Ohio-3100, 68 N.E.3d 747, ¶ 23, citing *State ex rel. Mun. Constr. Equip. Operators’ Labor Council v. Cleveland*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.3d 1040, ¶ 24. The Court of Appeals properly evaluated the standard of review and correctly denied Powell’s request for a writ of mandamus.

**Appellee's Proposition of Law No. 1:**

*Some evidence supports OPERS' decision to deny Powell's application for disability benefits.*

**A. The Reports of Dr. Steiman, Dr. Mankowski, Dr. Mast, and Managed Medical Review Organization are some evidence to support OPERS' determination.**

There is overwhelming evidence to support OPERS' decision. Powell was examined by two different independent physicians, and after these exams were completed, Powell's record was twice reviewed by OPERS' medical consultant, Dr. Mast. All the examining physicians' and medical consultants' reports and recommendations stated unequivocally that Powell was not eligible for disability benefits. The analysis truly stops there – each of these reports and recommendations standing alone constitute some evidence. But, together, they constitute overwhelming evidence to support the Board's decision.

Further, the reports of the independent examining physicians and the medical consultant are the exact reports that statute *requires* the Board to consider. R.C. 145.35(E). In addition to these statutorily required reports, the Board has engaged another consultant, MMro, to conduct additional reviews of each disability applicant's record. On two different occasions, MMro also advised that Powell was not eligible for disability benefits. Ultimately, the Board was presented with at least six instances in which medically trained professionals found that Powell was not eligible for disability benefits pursuant to R.C. 145.35. A closer review of these reports further supports the Board's decision.

Dr. Steiman conducted the initial Independent Physical Examination of Powell and reviewed his records. (CR. 75). After the examination, Dr. Steiman submitted a report, and stated that in his opinion, Powell was not disabled. (CR. 79).

Dr. Steiman wrote in his report:

It is evident that Mr. Powell's migraines are not intractable as he is on treatment which aborts his migraines within a few minutes. Mr. Powell indicates that whenever he has a migraine headache, he takes the Lidoderm nasal spray which aborts his symptom complex within a few minutes. As such, his migraine headaches are neither intractable nor provide a significant limitation in his activities of daily living or occupational pursuits.

(CR. 78).

Dr. Steiman answered multiple questions in his report. In Question #2 in the report he was asked whether, in his opinion, claimant was permanently disabled. (CR. 79). In response, Dr. Steiman wrote:

No, when considering the OPERS definition of permanent disability, Mr. Powell is not permanently disabled for the performance of their own occupation as a public employee, Highway Technician 3C/M. The eligible diagnosis of intractable migraine without aura and without status migrainosus is easily controlled with appropriate medication and do not incapacitate him from performing his own occupation. Mr. Powell indicated he has excellent pain relief within minutes of using the Lidocaine nasal spray.

*Id.*

In Question #4, he was asked whether Powell had a disabling diagnosis? Dr. Steiman wrote, "There is no current disabling diagnosis as Mr. Powell's eligible diagnosis does not meet the OPERS definition of permanent disability." *Id.* In question #5, he was asked if there was objective medical evidence to support disability? *Id.* Dr. Steiman wrote in response, "No, there is no objective medical evidence to support disability. Mr. Powell's eligible diagnosis is manifested only by subjective complaints/symptoms and not by objective medical evidence. His subjective complaints are valid and consistent with the eligible diagnosis. There is no evidence of magnification or embellishment." *Id.* Dr. Steiman wrote that the observed activities/behavior did not correlate with the objective clinical findings. (CR. 80).

In response to Question #9 asking Dr. Steiman's medical opinion of Powell's ability or inability to perform his specific job tasks based on the enclosed job description and eligible diagnosis, Dr. Steiman wrote:

No, there is no credible evidence that Mr. Powell is unable to perform the specific job tasks based on the enclosed job description and eligible diagnosis. Mr. Powell's history, physical exam, and medical record review provide credible evidence that he is capable of performing the requirements of his job activity without limitation or restriction.

*Id.*

In his addendum, Dr. Steiman again wrote, "When considering the diagnosis of cervicogenic headaches and the OPERS definition of permanent disability, Mr. Powell's history, medical record review, and physical examination provide credible evidence he is not disabled from his occupation as a public employee, Highway Technician 3C/M." (CR. 192).

Dr. Steiman's thorough and unequivocal report and addendums are some evidence to support the decision of the OPERS Board to deny Powell's disability benefits application.

Dr. Mankowski's report is more than some evidence to support the OPERS Board's decision to uphold its denial of Powell's disability benefits application. Dr. Mankowski conducted an Independent Physical Examination of Powell and reviewed all of his medical records on October 9, 2018. (CR. 223). Dr. Mankowski wrote in his report, "In my opinion, the claimant is not permanently disabled from their public position." (CR. 230). Dr. Mankowski also answered various questions in his exam report. In Question #2 he was asked if, per the OPERS definition of permanent disability, Powell was presumably disabled for the performance of his own occupation as an employee, Highway Technician 3C/M, beginning with the disability application date of November 30, 2017 for a period of at least twelve months? (CR. 227). In response, Dr. Mankowski wrote:

No. Based on the eligible medical conditions of this claim the claimant is not presumed to be permanently disabled from the performance of his job as a Highway Technician 3C/M beginning on the disability application date of 11/30/2017 for a continuous period of at least 12 months. **There is simply no credible medical evidence presented to conclude that the claimant is considered permanently disabled as related to the eligible medical conditions of this claim. . .**

(CR. 227-228) (emphasis added).

Dr. Mankowski indicated he anticipated that Powell's migraine condition would improve over time. (CR. 228). He also stated, "the condition of post concussive cervicogenic headaches as related to traumatic brain surgery was self-limiting and resolved within 3 months of the initial injury in October 2015. There is no residual pathology. Any ongoing symptoms are unrelated to this condition, which has resolved." *Id.* Dr. Mankowski also wrote that Powell's migraine and cervicogenic headaches were not disabling. (CR. 229).

Question #7 on the report inquired if the claimant's subjective complaints/symptoms correlated with Dr. Mankowski's objective clinical findings. *Id.* Dr. Mankowski wrote, "The claimant's subjective complaints are out of proportion to the objective clinical findings. The subjective visual symptoms are not correlated with any objective findings on examination. I agree with Dr. Katz who described the visual disturbances as subjective. . ." *Id.*

In question #9, Dr. Mankowski was asked, "In your medical opinion, please elaborate on the claimant's ability or inability to perform their specific job tasks based on the enclosed job description and eligible diagnosis(es)?" (CR. 230). Dr. Mankowski wrote:

In my opinion, the condition of intractable migraines without aura and without status migrainous is episodic and treatable and not associated with any neurological deficits which would preclude him from performing job tasks as described by the enclosed job description. Specifically, the migraines are not associated with any of the following: aura, vision loss, focal neurological deficits, intractable emesis or altered awareness."

(CR. 230).

Dr. Mankowski's very thorough and definitive report is some evidence to support the OPERS Board's decision to uphold its denial of Powell's application for disability benefits.

In addition to the examining physicians, either of which constitute "some evidence," file reviews conducted by physicians also are "some evidence" to support the decision. *State ex rel. Wegman v. Ohio Police & Fire Pension Fund*, 2018-Ohio-4243, ¶ 18. "The medical opinion expressed, when drawn from a review of all the evidence, is itself *some* evidence that the board can rely on in reaching a decision." *Id.* (Emphasis *sic.*) Therefore, the file reviews conducted by MMro are also some evidence to support the decision of the OPERS Board to deny Powell's application for a disability benefit. MMro examined the documents in the disability claim file and submitted a review dated April 11, 2018, which stated:

Based on all information provided in the disability claim file, APS submitted by Dr. Mysiw Physical Medicine and Rehabilitation, IME and addendum submitted by Dr. Steiman Neurology and Clinical Escalation Committee recommendations, the claimant is not permanently disabled from his own occupation as a Highway Technician 3C/M for the Transportation District 6. There is no disabling diagnosis.

(CR. 198).

The review from MMro also quoted Dr. Steiman's report. MMro therefore considered all the medical evidence, stated the opinion that Powell was not disabled, and supported this opinion with relevant medical evidence from the file.

After Powell submitted an appeal of the OPERS Board's decision to deny his disability benefits application, MMro again reviewed the medical evidence and submitted a review, which stated:

In review of the information submitted for this claim file, including the recent Attending Physician Statement submitted by Dr. W. Jerry Mysiw, Physical Medicine and Rehabilitation, dated 08/15/2018, as well as the IME report completed by Dr. Kenneth Mankowski, dated 10/09/2018, and the discussion at the Clinical Escalation Committee, the claimant is not considered to be permanently disabled for the performance of his occupation as a Highway Technician 3C/M.

(CR. 236). The review from MMro also quoted Dr. Mankowski's report.

MMro considered all the relevant medical evidence, stated the opinion that Powell was not disabled, and supported this opinion with relevant medical evidence from the file. The reports of MMro are some evidence to support the OPERS Board's decision to deny Powell's application for a disability benefit.

Finally, on two occasions, OPERS medical consultant, Dr. Mast, provided recommendations, as required by statute, that after review of the entire file, Powell did not meet the statutory requirements to be entitled to disability. (CR. 239, 201).

The evidence, including the reports of Dr. Steiman, Dr. Mankowski, Dr. Mast, and Managed Medical Review Organization ("MMRO"), supports OPERS' determination. Because there is some evidence supporting OPERS' determination, OPERS did not abuse its discretion and Powell is not entitled to a writ of mandamus. The Court of Appeals was correct to deny Powell's request for a writ of mandamus.

**B. Powell's arguments that OPERS did not consider the correct medical evidence and that OPERS incorrectly relied upon the reports of its examining physicians are without merit and should be disregarded.**

Powell argues OPERS ignored correct medical evidence and incorrectly relied upon the reports of its examining physicians. Powell's argument that OPERS did not consider the correct evidence is simply inaccurate and has been answered by this Court and other Ohio courts on numerous occasions. The Board considered Powell's entire record, including the reports of all of his physicians. Ohio Adm.Code. 145-2-21. (CR. 206, 240). But Powell's argument fails at its core. Powell is not arguing that the Board did not consider his physician's report. Instead, he seems to be arguing that OPERS *must accept* the conclusions of his physician's report above all other evidence.

The exclusive authority to determine if an OPERS member is disabled from their position of public employment and entitled to receive disability benefits rests with the OPERS Board and the Board's decision is final. See R.C. section 145.35; *State ex rel. Cydrus v. Ohio Pub. Emps. Ret. Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770, ¶ 12. As such, there is no right to appeal. The OPERS Board, not physicians, makes this decision. *State ex rel. Hulls v. State Teachers Ret. Bd. of Ohio*, 113 Ohio St.3d 438, 2007-Ohio-2337, 866 N.E.2d 483, ¶ 26. This Court has ruled that a pension board is “vested with the exclusive authority to evaluate the weight and credibility of the medical evidence in determining a member’s entitlement to disability-retirement benefits.” *State ex rel. Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 111, 2012-Ohio-46, 961 N.E.2d 178, ¶ 7.

Powell’s argument fails in claiming that the reports of examining physicians Drs. Steiman and Mankowski are somehow faulty. To support this argument, Powell recites portions of the reports of the examining physicians and concludes their findings were unreasonable and unsupported. Powell’s unfounded and conclusory statements run contrary to Ohio law. Powell alleges that Dr. Mankowski’s report is unsupported. To the contrary, Dr. Mankowski clearly states his opinion of Powell’s condition and his symptoms, based on the examination he completed and the review of Powell’s file. Powell claims that other medical evidence runs contrary to a statement from Dr. Mankowski’s report. Contrary medical opinions are not enough to reach Relator’s burden in this case. It is well established that a retirement board is not required to accept the views of any particular doctor or doctors, or give greater weight to a member’s treating physicians. See e.g., *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶¶ 24, 26. “Under the appropriate standard of review, the presence of contrary evidence is immaterial if there is evidence in support of the board’s findings of fact.” *State ex rel.*

*Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 111, 2012-Ohio-46, 961 N.E.2d 178, ¶ 9.

Powell also finds fault with Dr. Steiman's report. However, Dr. Steiman considered the two types of headaches experienced by Powell and determined that in his opinion, Powell was not disabled. Powell states that Dr. Steiman did not take Powell's position description into consideration against Powell's symptoms. However, Dr. Steiman read Powell's job description and stated that in his opinion, he was not disabled. In response to Question #9 on his report, which asked his medical opinion of Powell's ability or inability to perform his specific job tasks based on the enclosed job description and eligible diagnosis, Dr. Steiman wrote:

No, there is no credible evidence that Mr. Powell is unable to perform the specific job tasks based on the enclosed job description and eligible diagnosis. Mr. Powell's history, physical exam, and medical record review provide credible evidence that he is capable of performing the requirements of his job activity without limitation or restriction.

(CR. 80). Furthermore, there is a difference between having an illness or health condition and it being disabling. Both Dr. Steiman and Dr. Mankowski indicated that Powell had other health conditions. However, they found that these conditions did not rise to the level of being disabling.

Both reports are consistent in their determinations that there is no evidence to support Powell's claim of permanent disability. Powell's disagreement with these reports is not enough to make them not "some evidence." Dr. Mankowski and Dr. Steiman personally examined Powell and submitted reports that stated their opinions that Powell was not disabled. Their reports are detailed and discuss the findings from the physical exams. The true issue here is that Relator does not agree with Dr. Mankowski and Dr. Steiman and would prefer the Court only accept the conclusions of his doctor. But, as this Court has made clear, contradictory evidence does not mean there is not some evidence supporting OPERS' decision. See *State ex rel. Am. Std., Inc. v. Boehler*,

99 Ohio St.3d 39, 2003-Ohio-2457, 788 N.E.2d 1053, ¶ 29. Furthermore, the examining physicians' reports were reviewed on four occasions (including twice by the statutorily required medical consultant) and on each occasion the reports were accepted and consistent recommendations were given.

Considering the reports does not raise an issue of unfair prejudice, confusion of the issues, or misleading of the jury. In his argument, Powell makes analogies to a "judge" and "jury", but these comparisons are not accurate. There is no danger of misleading a jury here, as there is no jury deciding this matter, and as noted above, these reports were given a thorough review by other doctors and found credible. Further, Powell refers to ERISA cases to bolster his position, but governmental retirement systems, such as OPERS, are not subject to ERISA. *See Erb v. Erb*, 75 Ohio St.3d 18, 20, 661 N.E.2d 175 (1996).

Powell also raises a new argument that just because someone is qualified as an expert does not mean that their reports are admissible evidence, and references federal cases that state an expert opinion must be more than a conclusory assertion about legal issues. This argument, which was raised for the first time in Powell's appellate brief, was never before the lower court in any fashion. Accordingly, the lower court could commit no error with respect to this issue because the lower court was under no obligation to consider it and, in fact, did not consider the new assertions. As such, a claim that was never considered cannot be a reversible error. In addition, a party may not ordinarily present an argument on appeal that it failed to raise below. *State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, 145 N.E.3d 278, ¶ 10. Even if the claim was brought in a timely manner, it should be disregarded. The issue of admissibility of expert evidence is not at issue here and Powell is presenting the wrong standard. The standard in this case, as is well established and described previously in detail, is the "some evidence" standard- whether the OPERS board's

decision was supported by some evidence. Powell’s reference to federal cases concerning whether an expert’s opinion is admissible, which do not concern state of Ohio pension matters, is not on point and should be disregarded. Furthermore, the reports of the independent examining doctors are detailed. Both Dr. Steiman and Dr. Mankowski completed physical exams of Powell, did not find him to be disabled, and submitted lengthy, detailed reports discussing their analysis and findings. There is more than some evidence to support the decision of the OPERS Board.

**C. OPERS did not violate a fiduciary duty to Powell.**

Powell misstates OPERS’ fiduciary duty to Powell. OPERS does have a defined statutory duty to Powell, per R.C. 145.11(A). This statute states “[t]he board and other fiduciaries shall discharge their duties with respect to the funds solely in the interest of the participants and beneficiaries . . . .”. OPERS’ duty is defined by statute and the corresponding administrative rules and it applies to individuals and the Plans as a whole. OPERS has at all times acted according to statute and administrative rule in this matter. OPERS did not violate its duty to administer Powell’s pension plan for his benefit. OPERS properly considered his disability benefit application in accordance with the retirement system’s statutory authority. Powell has not shown that OPERS violated its fiduciary duty towards him.

**D. Powell’s argument concerning the Rules of Evidence is meritless.**

Powell argues that Dr. Steiman and Dr. Mankowski’s reports should not have been considered because the reports do not meet the standard for admissibility under the Evid.R. 403(A). This argument that the doctor’s reports should be excluded because of unfair prejudice, confusion of the issues, or misleading the jury was raised for the first time in Powell’s reply brief in the Court of Appeals and therefore should not be considered by this Court. *See State ex rel. Grounds v. Hocking County Bd. of Elections*, 117 Ohio St. 3d 116, 2008-Ohio-566, 881 N.E.2d 1252, ¶ 24 (In

a mandamus action, “[b]ecause [Relator] did not raise this claim in his complaint or initial merit brief, we need not address the argument.”). As the lower court stated in its decision, “Relator has cited no authority for his proposition that the rules of evidence are applicable to determinations undertaken by the board pursuant to R.C. 145.35, nor was this court able to find any such authority.” (Decision at ¶ 8). Just as the lower court rejected in toto Powell’s argument, we ask this Court to reject the argument as well.

Even if this claim was brought in a timely matter, the Court should reject this argument. The rules of evidence do not apply to OPERS. The constitutional authority under which the rules of evidence were promulgated extends only to “rules governing practice and procedure in all courts of the state.” Section 5(B), Article 4, Ohio Constitution. *See Board of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St. 3d 415, 417, 1996-Ohio-282, 659 N.E.2d 1223. OPERS is an instrumentality of the state. *Fair v. School Emps. Retirement Sys. of Ohio*, 44 Ohio App. 2d 115, 119, 335 N.E. 2d 868 (10<sup>th</sup> Dist.1975). Evid.R. 101(A) does not mention instrumentalities of the state as forums to which the Rules of Evidence apply. The rules of evidence may guide OPERS in conducting its hearings, but OPERS need not comply with Evid.R. 403(A).

All other objections aside, the Court should still reject this argument. Dr. Mankowski and Dr. Steiman are both board-certified in neurology and their reports are probative of the question at issue, whether the OPERS Board’s decision to deny Powell’s disability application was supported by some evidence. The reports of the independent examining physicians are the exact reports that statute requires the OPERS Board to consider. R.C. 145.35(E).

**E. Powell’s argument that independent medical examiners are inherently biased is baseless.**

Powell's new argument that independent examiners are inherently biased was raised for the first time in Powell's appellate brief. This argument was never before the lower court in any fashion. As was previously stated, a party may not ordinarily present an argument on appeal that it failed to raise below. *State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, 145 N.E.3d 278, ¶ 10. Since Powell is raising this issue for the first time on appeal, it should be disregarded by the Court.

Even if this claim was brought in a timely manner, this argument should be rejected. Powell argues that independent doctors are inherently biased towards the benefits plans, and the some evidence standard should be replaced by a more probing standard of these reports. First, as was described earlier in the brief, the some evidence standard is well established in case law. *See State ex rel. Marchiano v. School Emps. Ret. Sys.*, 121 Ohio St.3d 139, 2009-Ohio-307, 902 N.E.2d 953, ¶¶ 20-21. Per R.C. 145.35, OPERS has the exclusive authority to determine if an OPERS member is disabled from their position of public employment and entitled to receive disability benefits. Second, Powell's argument is not supported by the data. Very few applications for OPERS disability benefits are denied. This can be seen by viewing the 2020 Annual Disability Report that OPERS prepared pursuant to R.C. 145.351, which is available online at <http://www.orsc.org/Assets/Reports/1431.pdf>. Per the Disability Report, in 2020, there were 734 disability applications and 32 were denied, or just over 4%. The rest of the applications were either granted (734), cancelled (252), or in process (232). Therefore, the vast majority of OPERS disability applications are granted. To suggest independent doctors are biased and doing a disservice to OPERS members, as Powell suggests, is clearly not supported by the actual data. Powell has raised the argument that independent doctors are inherently biased for the first time on

appeal. Therefore, it should be disregarded. Even if the Court does consider this issue, it should be dismissed by the Court.

### CONCLUSION

Powell has no clear right to a writ because there is “some evidence” supporting OPERS’ decision. Therefore, the OPERS Board did not abuse its discretion when it denied Powell’s application for disability benefits. The Ohio Public Employees Retirement System asks this Court to affirm the decision of the Court of Appeals and to deny Powell’s request for a writ of mandamus.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served via email this 3rd day of June, 2021 upon the following:

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