

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Nicole Hudson, :
Relator, :
v. : No. 10AP-904
Ohio Public Employees Retirement System, : (REGULAR CALENDAR)
Respondent. :

D E C I S I O N

Rendered on October 18, 2011

Michael A. Malyuk and Scott M. Kollingian, for relator.

Michael DeWine, Attorney General, and *Dennis P. Smith, Jr.*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶1} Nicole Hudson filed this action in mandamus, seeking a writ to compel the Ohio Public Employees Retirement System ("PERS"), to reinstate her disability benefits.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties provided a certified record of proceedings which is contained in eight separate volumes. The parties filed briefs. The magistrate then issued

a magistrate's decision which contains detailed findings of fact and conclusions of law. It is appended hereto. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶3} Counsel for Ms. Hudson has filed objections to the magistrate's decision. Counsel for PERS has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Ms. Hudson has displayed a variety of pain-related behaviors over several years. The most frequent diagnosis has been fibromyalgia, which, by its nature, does not involve objective medical findings. She displays some degenerative disc changes in her neck, but nothing consistent with the extreme pain of which she complains. She also displays symptoms consistent with torticollis, a twisting of the neck resulting from pain, but seems able to relax her neck voluntarily. Another diagnosis has been chronic pain syndrome.

{¶5} In 2007, Ms. Hudson was granted disability subject to her engaging in physical therapy, reporting to PERS quarterly, and being examined annually. The award was not modified after a medical examination in 2008.

{¶6} A medical examination in 2009 was done by Kevin Trangle, M.D., who concluded that disability payments should be discontinued. Dr. Trangle's report was reviewed by Maurice C. Mast, M.D., a medical consultant for PERS, who recommended discontinuation of benefits.

{¶7} A follow-up medical examination by Paul T. Scheatzle, D.O., resulted in another finding that Ms. Hudson was not disabled.

{¶8} This report was also reviewed by medical consultants, who generated a second recommendation that disability benefits be discontinued. Following this second recommendation, the benefits were, in fact, terminated.

{¶9} The magistrate's decision further elaborates the conflicting medical reports and opinions related to Ms. Hudson. With that background, we set forth the specific objections presented by Ms. Hudson's counsel:

1. It was error for the Magistrate to find that "when there is some evidence to support the Board's decision, an abuse of discretion has not been shown" * * * and "the record provides some evidence that supports the Board's decision."

2. The Magistrate erred by finding that "Dr. Trangle's opinion concerning the diagnosis of fibromyalgia does not demonstrate bias on his part."

3. The Magistrate erred by ignoring Relator's argument that Respondent's doctor or doctors are not vocational experts and in any way trained on vocational issues and are not qualified to opine with regard to whether Relator can return to her past work. The Magistrate simply ignored that argument.

4. The Magistrate erred by failing to consider the subjective complaints, recognized by the medical doctors that examined her, that keep her from performing her past work.

5. The Magistrate erred by ignoring all of the Relator's medical providers' notes and opinions concerning the seriousness of her condition.

{¶10} As to the first objection, the magistrate followed the legal standards set forth by the Supreme Court of Ohio and this court.

{¶11} The objection is overruled.

{¶12} As to the second objection, Dr. Trangle expressed the mixed feelings of medical personnel with regard to a condition which has its diagnosis based on subjective complaints and not on objective findings. His report is not biased.

{¶13} The second objection is overruled.

{¶14} Addressing the third objection, physicians make physical findings and report their assessment of the physical capacity of the persons they evaluate. The actual decision as to disability is made at PERS, which is deemed to know what a specific job entails and whether an employee is disabled.

{¶15} The third objection is overruled.

{¶16} The fourth objection assumes that the magistrate failed to consider Ms. Hudson's subjective complaints of pain. The magistrate did consider the reports in the record before us, but does not review them on a clean slate. We are required to give deference to the factual findings and the weighing of evidence of PERS. Some of the reports before us could support a finding of disability. Some clearly do not support such a finding.

{¶17} The fourth objection is overruled.

{¶18} As to the fifth objection, the magistrate's decision did not ignore anything presented for review. However, the magistrate's decision does reflect the appropriate deference to the fact finding of PERS.

{¶19} The fifth objection is overruled.

{¶20} All five objections having been overruled, we adopt the findings of fact and conclusions of law contained in the magistrate's decision.

{¶21} As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

FRENCH and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Nicole Hudson,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-904
	:	
Ohio Public Employees Retirement System,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on July 29, 2011

Michael A. Malyuk and Scott M. Kolligian, for relator.

Michael DeWine, Attorney General, and Dennis P. Smith, Jr., for respondent.

IN MANDAMUS

{¶22} Relator, Nicole Hudson, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Public Employees

Retirement System ("PERS"),¹ to vacate its decision which terminated her disability benefits and ordering PERS to reinstate those benefits.

Findings of Fact:

{¶23} 1. Relator was employed as an Administrative Assistant to Legal Counsel for the Ohio Department of Job and Family Services in Summit County and was a member of PERS.

{¶24} 2. Relator filed an application for disability benefits on August 15, 2006 and listed her disabling conditions as:

Severe neck, back and arm pain. Severe leg and hip pain. Constant muscle pain and spasms. Cannot sit at a desk or computer for more than a few minutes. Many days I am unable to do anything due to severe pain cause by fibromyalgia. I am unable to hold my neck [and] head up for a long period of time. I have severe nerve pain in my neck, arm [and] legs. Severe fatigue and migraines.

{¶25} 3. Dr. Roger S. McMillen submitted a "Report of Attending Physician for Disability Applicant," dated August 1, 2006. The diagnosis included fibromyalgia, cervical discopathy, thoracic nerve root lesion with spasms.

{¶26} 4. On August 16, 2006, PERS informed relator that a "Report of Attending Physician" cannot be certified by a chiropractor.

{¶27} 5. Relator submitted additional medical evidence in support of her application including a report by Thomas E. Herbener, M.D., of an examination conducted on October 1, 2004 from the Akron General Medical Center Emergency Room. Relator was complaining of neck pain and wearing a neck collar. Dr. Herbener

¹Although relator names PERS, it is the Ohio Public Employees Retirement Board ("board") that actually terminated her disability benefits.

did not identify a definite fracture or dislocation, but recommended either a CT scan or flexion-extension view for further evaluation.

{¶28} 6. Relator treated with Laura N. Seitzinger, M.S., P.T., at the PT Center for Sports Medicine & Family Physical Therapy for physical therapy during March and April 2006.

{¶29} 7. On April 7, 2006, relator had an MRI of the spine conducted at Akron General Medical Center and Gerald F. Hulvat, M.D., found no evidence of disc herniation or neural foraminal stenosis at C2-C3 or C3-C4. Dr. Hulvat noted:

At C5-C6, there is central and left paracentral disc bulging with effacement of the anterior subarachnoid space but no obvious spinal cord compression. The neural foramina are widely patent. At C6-C7, there is central and left paracentral disc bulging with no * * * spinal cord compression or significant subarachnoid space narrowing. The neural foramina are widely patent.

IMPRESSION: Degenerative disc changes C5-C6 and C6-C7 as described above.

{¶30} 8. Relator's physical therapy continued through May 2006.

{¶31} 9. On August 2, 2006, relator was examined by Bina Mehta, M.D., who diagnosed her with "[c]ervical degenerative disk disease, fibromyalgia and limb pain."

{¶32} 10. On September 20, 2006, relator was seen by Deborah A. Reed, M.D., for her headaches. Dr. Reed's impression was, as follows:

- [One] Migraine without aura.
- [Two] Torticollis.
- [Three] Reflex sympathetic dystrophy.
- [Four] Multiple sclerosis.

{¶33} 11. An independent medical examination pursuant to R.C. 145.35 was conducted by Daniel J. Mazanec, M.D., on September 29, 2006. Dr. Mazanec concluded as follows:

In summary, Nicole Hudson is a 35-year-old paralegal with generalized pain focused in the cervical and upper back region. There are no objective findings. She should be capable of at least light sedentary work. In my opinion, Nicole Hudson is not physically or mentally incapacitated permanently for the performance of duty and should not be entitled to a disability benefit.

{¶34} 12. James R. Moore, M.D., a medical advisor for PERS, reviewed the medical documentation which had been submitted. He found "insufficient objective evidence of permanent disability due to chronic neck pain," and recommended to the board that disability benefits be denied.

{¶35} 13. In a letter dated October 18, 2006, the board notified relator that her disability application was being denied based upon "insufficient objective evidence of permanent disability due to chronic neck pain."

{¶36} 14. Relator appealed the denial of disability benefits and indicated that the board considered the incorrect diagnosis as the basis of her disability application. The board denied her application on the basis of chronic neck pain but relator indicated in her appeal letter that the disabling conditions are fibromyalgia and torticollis.

{¶37} 15. As part of her appeal, relator submitted letters from Drs. Mehta, Reed, and A. William Kedia, M.D., indicating she is unable to perform her job.

{¶38} 16. Relator was examined by Howard D. Shapiro, M.D., for another independent medical examination on December 29, 2006. Dr. Shapiro concluded that relator was not disabled and reported, as follows:

With her symptoms being primarily subjective and with very little objective evidence of a disease process, I do not see at this point that we are in fact dealing with a cause of a permanent and total disability. She is presently undergoing treatment and perhaps her treatment program will be successful. In any case, I would not consider her to be permanently and totally disabled from participating in her work. Perhaps a different employment program might be more suited to her problems.

{¶39} 17. Dr. Moore reviewed the results of the additional evidence and found "insufficient objective evidence of permanent disability due to torticollis and fibromyalgia," and recommended that disability benefits be denied.

{¶40} 18. In a letter dated January 17, 2007, the board noted that relator's "disability application and your attending physician report claim that you are permanently disabled due to torticollis and fibromyalgia." Thereafter, the board discussed Dr. Shapiro's examination and report. The board concluded that relator was not permanently disabled from performing her job duties and upheld its previous decision to deny her application.

{¶41} 19. Relator again appealed the board's decision.

{¶42} 20. In support of her appeal, relator submitted the results of a January 23, 2007 MRI which showed mild degenerative changes at the C4-C5, C5-C6 and C6-C7 levels with mild disc bulging at the C5-C6 level and mild mass effect on the anterior cord, but no cord edema.

{¶43} 21. Relator also submitted the report of Ali Shakir, M.D., who examined her on January 31, 2007 and concluded she had "unspecified myalgia and myositis."

The doctor continued:

Though MRI of the cervical spine demonstrated presence of disk bulges at three levels, her presentation appears to be more consistent with diffuse myofascial pain rather than radicular pain secondary to disk degeneration and nerve irritation. It is unlikely that cervical ESI will provide any benefit and they are likely to temporarily aggravate her pain. Given the diffuse nature of her pain, I highly doubt that any invasive treatment localized at a specific cervical level will address her pain.

{¶44} 22. Relator also submitted a letter from Dr. Mehta, dated March 5, 2007, indicating that relator suffers from cervical spondylosis and cervical disk bulge, torticollis and myofascial pain and she is unable to maintain gainful employment because of the pain.

{¶45} 23. Relator was examined by Jeffrey D. Sanderson, M.D., for another independent medical examination on March 30, 2007. Dr. Sanderson concluded that relator was disabled and reported, as follows:

It is my opinion that Ms. Hudson is very functionally impaired as a result of her torticollis, myofascial pain syndrome. Additionally, she does have objective findings of cervical degenerative joint/degenerative disc disease. She clearly has torticollis and significantly increased tonicity throughout her neck, trapezius, shoulder girdle. Her job as an administrative assistant/paralegal requires up to eight hours a day of data entry as well as filing, carrying charts and filing into cabinets. This would clearly be very difficult for her to do at this time. I would estimate that the functional limitations would be six months to a year in duration. I would recommend revisiting her abilities if she has any improvements with further medical and therapy treatment.

* * *

{¶46} 24. Relator was examined by Mark J. Pellegrino, M.D., on April 17, 2007, on referral from Dr. Mehta. Dr. Pellegrino's impression was, as follows:

[One] Persistent whiplash associated disorder including cervical facet dysfunction and cervical segmental dysfunction. 2. Associated cervical dystonia due to above. 3. Post-traumatic fibromyalgia syndrome with associated chronic pain syndrome and central pain.

{¶47} 25. In a letter dated April 18, 2007, PERS informed relator that she would be granted disability benefits, with the conditions that she seek physical medicine rehabilitation treatment and report to PERS on a quarterly basis, and is re-examined in one year.

{¶48} 26. Relator accepted those benefits.

{¶49} 27. Relator's re-examination was conducted by Joseph A. Cerimele, D.O., on April 29, 2008. Dr. Cerimele's impression was, as follows:

[One] Chronic pain syndrome.
[Two] History of fibromyalgia.
[Three] Cervical degenerative disc disease and cervical disc bulge.

Dr. Cerimele determined that relator was incapable of performing her activity, but recommended evaluation for return to activity once pain is under control.

{¶50} 28. In a letter dated July 10, 2008, relator was informed that the PERS medical advisor recommended continuation of her disability benefits.

{¶51} 29. According to the stipulation of evidence, relator continued to submit the required quarterly treatment and evaluation forms completed by Dr. Pellegrino.

{¶52} 30. Kevin Trangle, M.D., conducted relator's next re-examination on September 17, 2009. Dr. Trangle's assessment included the following:

Based upon review of the history and physical examination, medical records and all enclosed documentation, the following opinion is offered with a reasonable degree of medical certainty.

The only real abnormality Ms. Hudson had on examination was the fact that she appears to have voluntary contraction of the right shoulder muscles in the neck area. She is able to relax this when asked to so do and she will do so for a few moments at a time. There are no signs of disuse atrophy on the right hand and upper extremity. The muscle mass is normal. The neurological examination including sensation and reflexes are all within normal limits on the right upper extremity. There are no signs of any skin abnormalities, atrophic changes, discoloration, abnormalities, and hair or nail abnormalities. There is no swelling or edema seen.

It was noted in the past that she had MRI scans on two occasions of her neck, which were unremarkable and showed only bulges and no nerve root compression, no neuroforaminal compromise or central canal stenosis. She has never had an EMG/NCV study or any other study to show objective abnormality.

In short, her complaints are really subjective in nature accompanied with voluntary contracture of the right shoulder muscle girdle. She, however, on relaxation appears to be able to so do and increase her range of motion when asked to do so slowly. This would be some evidence against chronic or permanent contractures.

In my opinion, this individual appears to have a great deal of subjective pain, but there is no objective evidence to indicate objective disease that would merit disability award in this particular instance.

As such, based upon the above rationale, in my opinion Ms. Hudson has been examined by me and she is not considered physically permanently incapacitated and should not be entitled to disability benefits.

{¶53} 31. Maurice C. Mast, M.D., a medical consultant for PERS, reviewed the medical evidence and, in a letter dated January 20, 2010, recommended that the board terminate relator's disability benefits based on finding that there is insufficient objective evidence of permanent disability due to sprain of neck.

{¶54} 32. In a letter dated January 20, 2010, relator was informed that the board had concluded that she was no longer permanently disabled and her disability benefits would terminate effective April 30, 2010.

{¶55} 33. Relator appealed the board's January 20, 2010 decision.

{¶56} 34. Relator submitted additional medical evidence in support of her appeal, including reports by Dr. Pellegrino who had determined her physical problems were chronic and permanent impairments and that she was unable to perform even sedentary work for at least a year, and even indefinitely.

{¶57} 35. Relator submitted a transcript of an interview during which she explained her conditions of fibromyalgia, torticollis, irritable bowel syndrome, migraine headaches, and sleeping problems.

{¶58} 36. Paul T. Scheatzle, D.O., conducted an independent medical examination. Dr. Scheatzle found that relator was not disabled. In his report, dated June 2, 2010, his impression was, as follows:

Ms. Hudson is a 39-year-old female with fibromyalgia and central pain syndrome with chronic pain with a history of cervicothoracic sprain/strain injury with myofascial pain of the neck and upper back, as well as cervical facet syndrome.

Further history of C5-6 disc bulge, history of depression.

Job description reviewed for legal counsel for Department of Job and Family Services.
To the Public Employee's Retirement Board,

On 06/02/2010 Ms. Hudson was examined by me and results of this examination are given in this report. I hereby certify that because of the above described positions, the applicant is not presumed to be physically incapacitated permanently for the performance of duty and should not be entitled to disability effect.

{¶59} 37. PERS medical consultants, A. Smith² and Dr. Mast, found that the record contained insufficient objective evidence of permanent disability due to "myalgia and myositis unspecified" and recommended that the board terminate relator's disability benefits.

{¶60} 38. In a letter dated July 21, 2010, relator was notified that her disability benefits were being terminated for the following reasons:

Based upon all the medical information and recommendations, the Ohio PERS medical advisors and the board concluded that you are not considered to be permanently disabled from the performance of duty as an Administrative Assistant. This decision is based in part on the fact that there is insufficient objective evidence of permanent disability due to myalgia and myositis unspecified. On the basis of this information, the board upheld its previous action to discontinue your disability benefits. * * *

{¶61} 39. Thereafter, relator filed the instant mandamus action in this court.

² In relator's complaint, she indicates that "consultative physicians" failed to consider the combined effects of all her conditions. However, inasmuch as "A. Smith" is not identified anywhere in the stipulation of evidence by the designation of "Dr." or "M.D.," the magistrate has chosen not to identify him by the designation of "Dr." Because Dr. Mast is specifically identified by the designation of "M.D." in the stipulation of evidence, the magistrate has identified him as such.

Conclusions of Law:

{¶62} Relator contends that the board abused its discretion by determining that she was no longer permanently disabled based on the finding that there was insufficient objective evidence of permanent disability due to "myalgia and myositis unspecified."

{¶63} It is this magistrate's decision that there is some evidence supporting PERS' decision that relator was no longer permanently disabled and this court should not disturb the board's determination and should deny relator's request for a writ of mandamus.

{¶64} Mandamus is the appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by an administrative body. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219. Because there is no statutory appeal from the board's determination that relator is not entitled to continued disability benefits, mandamus is an appropriate remedy. *Id.*

{¶65} In order to prevail on her complaint, relator must demonstrate that she has a clear legal right to the relief requested, that PERS has a clear legal duty to provide the requested relief, and that relator has no plain and adequate remedy in the ordinary course of the law. To be entitled to the requested writ of mandamus, relator must establish that the board abused its discretion by denying her request for disability benefits. *State ex rel. Mallory v. Pub. Emp. Retirement Bd.* (1998), 82 Ohio St.3d 235. An abuse of discretion connotes a board decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 220. When there is some evidence to support the board's decision, an abuse of discretion has not been

shown. *Id.* Further, in *Pipoly*, the Supreme Court of Ohio refused to impose, in the absence of a statutory duty, any requirement that the decision to deny benefits be explained.

{¶66} Pursuant to R.C. Chapter 145, disability benefits are payable when it is determined that the member is mentally or physically incapacitated from the performance of duty by a disabling condition either permanent or presumed to be permanent. A disability is presumed to be permanent if it is expected to last for a continuous period of not less than 12 months following the filing of the application. Pursuant to R.C. 145.362, the board shall require any recipient of disability benefits to undergo an annual medical examination to determine whether or not the disability is ongoing. If, based upon medical evidence, the board concludes that the disability benefit recipient is no longer capable of performing the job duties because of a disabling condition, the payment of disability benefits shall be terminated.

{¶67} Ohio Adm.Code 145-2-21(A)(1) defines "disability" as the "presumed permanent mental or physical incapacity for the performance of a member's present duty or similar service that is the result of a disabling condition that has occurred or has increased since an individual became a member." The physician who conducts the medical examination considers whether the member's present condition renders the member incapable of performing their job duties as a result of the disabling condition.

{¶68} The most recent evidence before the board in this case consisted of Dr. Trangle's September 28, 2009 report and Dr. Scheatzle's June 2, 2010 report. Dr. Trangle examined relator on September 17, 2009 and concluded that she could perform

the job requirements and was not permanently disabled. Dr. Scheatzle examined relator and also determined that she was not physically incapacitated permanently and should not be entitled to disability benefits. Both A. Smith and Dr. Mast reviewed the medical evidence and recommended to the board that it terminate relator's disability benefits based on finding that there is insufficient objective evidence of permanent disability.

{¶69} Relator argues that the board failed to recognize that relator's medical problems had not changed since her disability benefits had been granted and failed to accept relator's physician's findings. By examining relator and determining whether her present condition would make her incapable of performing her job duties, Drs. Trangle and Scheatzle's opinions meet the requirements of R.C. 145.362. The evidence was also reviewed by A. Smith and Dr. Mast. The board doctors are the ones charged with reviewing the evidence and assessing the weight and credibility given to that evidence. The board is not required to identify the evidence upon which it relies and is not required to provide a brief explanation when it denies disability benefits because the statutes and rules which apply do not require that the board state the basis of its denial of disability retirement. *State ex rel. Cydrus v. Ohio Pub. Emp. Retirement Sys.*, 10th Dist. No. 09AP-595, 2010-Ohio-1143. The record provides some evidence that supports the board's decision. *State ex rel. Schaengold v. Ohio Pub. Emp. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760, ¶19.

{¶70} At page 16 of her brief, relator argues that, if we compare the findings of Dr. Sanderson with the findings of Dr. Trangle, we can see that there has been no change in her condition. For the reasons that follow, this magistrate disagrees.

{¶71} In his March 30, 2007 report, Dr. Sanderson noted the following objective findings upon examination: "She does forward spinal flexion to 75°, extension to 10°."

{¶72} In the remainder of his report concerning his physical examination, Dr. Sanderson noted:

* * * She does have obvious discomfort throughout the exam and became very labile at the end but otherwise gave forth excellent effort with only minimal pain magnification symptoms. She holds her neck in a rigid posture slightly with a little left axial rotation short of neutral. Gait is slowed, adequate stride length. She can rise on her toe and heels with little trepidation to ambulate. * * * She had extremely limited cervical range of motion, hardly any flexion, extension, or axial rotation. Her cervical paraspinals are extremely taut. She has both trapezius and sternocleidomastoid hypertonicity. Her paraspinals become less tender and tight distal to T10. She has multiple tender points throughout her trapezius region, rhomboid, AC and subacromial regions, bilateral elbows, bilateral greater trochanters, and anterior chest wall. Cranial nerve function is within functional limits. * * * Muscle stretch reflexes are 1+ at the bilateral upper limbs, symmetric[.] * * * Sensation to light touch is currently intact throughout. Strength exam reveals 4-/5 at the bilateral shoulders with abduction limited due to neck pain; elbow flexion and extension 4/5, wrist flexion and extension 4-/5, fifth digit abduction 4-/5 bilaterally; grasp 4/5, first and fifth digit opposition 4/5. Bilateral hip flexion strength 4+/5; knee extension and knee flexion; plantar flexion[.] * * *

{¶73} By comparison, in his September 28, 2009 report, Dr. Trangle noted the following objective findings upon examination:

Examination of the cervical spine shows her to have contracting of her right shoulder girdle muscles. She,

however, is able to relax when asked to do so. Range of motion of the cervical spine shows right and left lateral flexion to 10 degrees and 15 degrees respectively, right and left lateral rotation to 70 degrees and 50 degrees respectively. Backward extension is 30 degrees and forward flexion is 50 degrees.

Examination of the shoulders on the left shows 150 degrees of flexion, 60 degrees of extension, 80 degrees of internal rotation, 70 degrees of external rotation, 170 degrees of abduction, and 20 degrees of adduction. This is normal.

On the right shoulder she has 120 degrees of flexion, 60 degrees of extension, 60 degrees of internal rotation, 70 degrees of external rotation, 135 degrees of abduction and 20 degrees of adduction.

Thoracolumbar range of motion shows right and left lateral flexion to 30 degrees and 24 degrees respectively, right and left lateral rotation to 20 degrees. Backward extension is 5 degrees and forward flexion 30 degrees.

{¶74} In the remainder of his report concerning his physical findings, Dr. Trangle noted:

Her neurological examination is basically completely normal. Cranial nerves II-XII are normal. Measurement of both arms shows no signs of atrophy. Circumferences are symmetric right and left upper and lower extremities. Sensation to the right and left hands, upper extremities as well as lower extremities appears to be normal.

Grip strength was fairly symmetric in both hands.

Reflexes are brisk and normal in both upper and lower extremities.

Babinski's are downgoing. Straight leg raise is negative at 90 degrees. Hoffmann's is negative.

Her gait is normal. She can heel walk, toe walk, heel-to-toe walk and tandem walk.

Of note on examination, the most problematic area for her and where she complained of pain and discomfort is the right neck area; she was contracting her right shoulder during the examination.

{¶75} Because Dr. Sanderson's report does not include objective physical findings, a comparison of these reports does not establish that there has been no change in relator's condition.

{¶76} Furthermore, Dr. Scheatzle also conducted an independent medical examination of relator after she submitted additional medical evidence following Dr. Trangle's examination and the board's January 20, 2010 letter terminating her benefits. In his June 20, 2010 report, Dr. Scheatzle provided the following physical findings upon examination:

Provocative testing reveals negative Spurling for cervical radiculopathy. Negative straight leg raising and figure-of-4 testing of the low back. Negative shoulder impingement signs.

Range of motion testing reveals guarding of the cervical paracervical muscles with extension to 30 degrees, flexion 40 degrees, sidebending 30 degrees, rotation 40 degrees. In the dorsal lumbar spine flexion to 80 degrees, extension 20 degrees, sidebending 20 degrees. Evaluation of the extremities reveals no polyarthritic changes. No heat, redness, swelling, effusion, or infection. No trophic changes of the skin. Distal pulses are 2/4. Extremities are warm.

In the remainder of his report, Dr. Scheatzle stated:

* * * No pain behaviors. * * * Normal cervical and lumbar lordosis and thoracic kyphosis with no scoliosis. On palpations he has significant guarding of the low cervical and upper thoracic paraspinal muscles and guarding of her middle trapezius with multiple trigger points. She has further has fullness and tenderness in the suboccipital region bilaterally. Fibromyalgia tender points positive across the

sternal junction, suboccipital region, trapezius, supraspinatus, extensor forearm, pretibial region, greater trochantor, and gluteal regions.

Neurologically cranial nerves II-XII grossly intact. No focal neurologic signs, muscle tremor, or atrophy. Muscle strength is 5/5 in the upper and lower extremities. Muscle stretch reflexes are 2/4 biceps, triceps, brachioradialis, and Achilles and light touch sensation intact in all dermatomes.

Dr. Scheatzle also concluded that relator was not disabled.

{¶77} Relator also argues that Dr. Trangle was biased and his report was deficient as authority to terminate relator's disability benefits. Relator argues that a report Dr. Trangle wrote for another claimant for disability benefits clearly demonstrates his bias regarding fibromyalgia and chronic fatigue syndrome. (See Motion to Supplement the Record, Dec. 16, 2010, Dr. Trangle's Report, 1/18/2010.)

{¶78} There is disagreement in the medical community concerning the diagnoses of both fibromyalgia and chronic fatigue syndrome. In *State ex rel. Morgan v. State Teachers Retirement Bd. of Ohio*, 121 Ohio St.3d 324, 2009-Ohio-591, Sharon A. Morgan submitted medical evidence from Leonard H. Calabrese, D.O., diagnosing Morgan as suffering from both severe chronic fatigue syndrome and fibromyalgia and opining that she was unable to perform her job duties. In his report, Dr. Calabrese acknowledged that the symptoms of chronic fatigue syndrome cannot be objectively validated. Claire V. Wolfe, M.D., had examined Morgan and noted that in spite of the diagnoses, she had no objective abnormalities. Dr. Wolfe noted further that Morgan's subjective symptoms far outweighed any objective evidence. Morgan's disability was terminated.

{¶79} Ultimately, Morgan's case reached the Supreme Court of Ohio which upheld the board's decision to terminate her disability. Morgan had argued that it was an abuse of discretion for the board to rely on the reports of Dr. Wolfe. The court disagreed with Morgan's argument that Dr. Wolfe had ignored her diagnoses because there was no objective evidence. In response, the court stated, at ¶23-24:

As we recently held, even for medical conditions with symptoms that are often unsupported by objective medical evidence, "subjective complaints are not conclusive of disability, and objective medical evidence is still relevant to a determination of the severity of the condition." *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio St.3d 261, 2008-Ohio-5377, 898 N.E.2d 33, ¶ 47; see also *Vance v. Commr. of Social Sec.* (C.A.6, 2008), 260 Fed.Appx. 801, 806, quoting *Arnett v. Commr. of Social Sec.* (C.A.6, 2003), 76 Fed.Appx. 713, 716 (" 'If there is [objective medical evidence of an underlying medical condition], the examination focuses on 1) whether objective medical evidence confirms the severity of the alleged pain arising from the condition, or 2) whether the objectively established medical condition is of such a severity that it can reasonably be expected to produce the disabling pain' ").

More specifically, courts have held that "[w]hile the diagnoses of chronic fatigue syndrome and fibromyalgia may not lend themselves to objective clinical findings, the physical limitations imposed by the symptoms of such illnesses do lend themselves to objective analysis." (Emphasis added.) *Rose*, 268 Fed.Appx. at 453, quoting *Boardman v. Prudential Ins. Co. of Am.* (C.A.1, 2003), 337 F.3d 9, 17, fn. 5. In both *Rose* and *Boardman*, courts upheld the termination of long-term disability benefits when the claimants' medical records failed to indicate limitations, based on objective findings, that would preclude them from performing suitable work. Therefore, Dr. Wolfe could properly consider the lack of objective medical evidence of physical limitations caused by the symptoms of Morgan's chronic fatigue syndrome and fibromyalgia to support her conclusion that Morgan is not disabled.

{¶80} Dr. Trangle's opinion concerning the diagnosis of fibromyalgia does not demonstrate bias on his part.

{¶81} The board had before it the reports of Drs. Trangle and Scheatzle and the reviews by A. Smith and Dr. Mast. These reports constitute some evidence upon which the board could rely, and the board's order should not be disturbed.

{¶82} Thus, the board had evidence that relator was not currently incapable of performing her job. Finding that there was some evidence to support the board's finding, the magistrate finds that the board did not abuse its discretion in terminating relator's disability benefits and 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).