

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Lelani Guthrie, :
Relator, :
v. : No. 10AP-689
Ohio Public Employees Retirement System, : (REGULAR CALENDAR)
Respondent. :

D E C I S I O N

Rendered on December 20, 2011

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

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

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Lelani Guthrie, commenced this original action requesting a writ of mandamus ordering respondent, Ohio Public Employees Retirement System ("PERS"),¹ to reverse its December 16, 2009 decision terminating relator's disability benefits as of March 31, 2010, to pay all disability benefits due and owing since March 31, 2010, and to reinstate those benefits, into the future, in accordance with all appropriate regulations.

¹ As the magistrate clarified in a footnote on the first page of her decision, the Ohio Public Employees Retirement System Board ("board") actually terminated relator's disability benefits (Magistrate's Decision, ¶18.)

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

{¶3} Relator has timely filed two objections to the magistrate's decision:

1. IT WAS ERROR FOR THE MAGISTRATE TO RELY SOLELY ON DR. ASSEFF'S REPORT OF 7/23/2009 (FINDING NUMBER 24 ON PAGE 6 AND DISCUSSION ON PAGES 10 AND 11) INDICATING THAT RELATOR COULD RETURN TO WORK.

2. THE MAGISTRATE [ERRED] IN PLACING TOTAL RELIANCE ON DR. ASSEFF'S AND DR. MAST'S OPINIONS (PAGE 11 OF THE DECISION) IN VIEW OF ALL THE EVIDENCE TO THE CONTRARY AND CONSIDERING THE FACT THAT DR. ASSEFF DID NOT HAVE ANY OF THE RELATOR'S RECORDS AND REPORTS FROM DR. TONY KING (ENDOCRINOLOGIST) OR THE AFFIDAVIT TRANSCRIPT OF RELATOR DESCRIBING ALL OF HER SYMPTOMS AND PROBLEMS.

{¶4} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."

{¶5} "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. Hudson v. Ohio Pub. Emp. Retirement Sys.*, 10th Dist. No. 10AP-904, 2011-Ohio-5362, ¶64. See also *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." *Hudson* at ¶64.

{¶6} A relator seeking a writ of mandamus must establish: "[1] a clear legal right to the relief requested, [2] that PERS has a clear legal duty to provide the requested relief, and [3] that relator has no plain and adequate remedy in the ordinary course of the law." *Id.* at ¶65. Further, "[t]o be entitled to the requested writ of mandamus, relator must establish that the board abused its discretion by denying her request for disability benefits." *Id.* See also *State ex rel. Mallory v. Pub. Emp. Retirement Bd.*, 82 Ohio St.3d 235, 1998-Ohio-380. An abuse of discretion connotes a board decision that is unreasonable, arbitrary or unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 220. However, "[w]hen there is some evidence to support the board's decision, an abuse of discretion has not been shown." *Hudson* at ¶65. "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." *Id.*

{¶7} In her first objection, relator argues that the magistrate erred in solely relying upon Dr. Asseff's July 23, 2009 report in finding some evidence to support PERS's decision to terminate relator's disability benefits. (Objections to Magistrate's Decision, 1.) According to Dr. Asseff's July 23, 2009 report, relator was examined for Graves Disease with ocular myopathy and exophthalmos in order to determine whether she was permanently disabled from her most recently held public position as Secretary II and its essential functions. (See Dr. Carl F. Asseff's July 23, 2009 report, 1.) In support of her argument, relator contends that there is no evidence that her employer would accept Dr. Asseff's recommended accommodation that relator wear computer glasses in order to do

her secretarial/data entry work. (Objections, 1.) In response, PERS maintains that the magistrate correctly found some evidence supporting its decision to terminate relator's disability benefits because: (1) the magistrate actually found that Drs. Asseff and Mast's opinions constituted some evidence, and (2) relator failed to explain why the magistrate erred in relying upon Dr. Asseff's medical report. (Memorandum in Opposition, 3.)

{¶8} "R.C. 145.362 generally requires a person receiving disability benefits to undergo an annual medical examination, and it further requires the physician or physicians to report and certify to the board 'whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled.' " *State ex rel. Cydrus v. Pub. Emp. Retirement Sys.*, 10th Dist. No. 09AP-595, 2010-Ohio-1143, ¶5, quoting R.C. 145.362. Further, "[i]f the physician reports that the recipient no longer is incapable, and the board finds the evidence persuasive, then 'the payment of the disability benefits shall be terminated.' " *Id.*

{¶9} In the present matter, Dr. Asseff re-examined relator with regard to her Graves Disease with ocular myopathy and exophthalmos. In his report, Dr. Asseff indicated that he reviewed the following material: (1) the report of Dr. Howard Siegel, (2) the description of duties of Secretary II, and (3) the reports of Novus Clinic. (See Dr. Asseff's July 23, 2009 report, 1.) Further, Dr. Asseff examined relator, finding:

[Relator] has multiple complaints, none of which are disabling. The elevated eye pressure is pseudo-glaucoma, created by the retraction of the inferior recti muscles. Glare is from her multiple scars in the corneas from the radial keratotomies. The proptosis is not causing any ocular or visual issues.

Lubrication during the day is not being done and there is no evidence that she is using computer glasses (Sola Access) to give her best focus both for reading and the computer key

board and screen. This is a glass for people of this age group and job function and not a special glass for her corneal and thyroid issues. Her current glasses appear to be inadequate for that function. The effects of her marked astigmatism combined with the corneal scars would be markedly reduced and should be able to perform the duties of Secretary II work requirements.

(See Dr. Asseff's July 23, 2009 report, 2.) Based upon the review of relator's medical records, as well as the physical examination, Dr. Asseff opined that "the job requirements can be satisfied and the disability is not presumed to be permanent." (See Dr. Asseff's July 23, 2009 report, 2.)

{¶10} Further, Dr. Mast reviewed the results of relator's recent examinations and, in a letter dated December 16, 2009, stated "[b]ased on the findings presented there is insufficient objective evidence of permanent disability due to Exophthalmos [sic]; myopathy. Accordingly, I have recommended to the retirement board that the disability benefit be terminated." (See Dr. Maurice C. Mast's Dec. 16, 2009 letter.)

{¶11} As noted above, relator contends that the magistrate erred in solely relying upon Dr. Asseff's July 23, 2009 report indicating that relator could return to work and recommending that relator use computer glasses as an accommodation in order to allow her to do her job as a secretarial/data entry type worker. In response, we note first that the magistrate relied upon both Drs. Asseff and Mast's opinions as some evidence supporting the board's decision to terminate relator's disability benefits. (Magistrate's Decision, ¶63.) Second, we note that relator fails to set forth any legal basis as to why the magistrate could not properly rely upon Dr. Asseff's July 23, 2009 report as some evidence supporting the board's decision to terminate relator's disability benefits. Therefore, because Dr. Asseff's July 23, 2009 report constitutes some evidence

supporting the board's decision to terminate relator's disability benefits, relator's first objection is overruled.

{¶12} In her second objection, relator argues that the magistrate erred in placing total reliance upon Drs. Asseff and Mast's opinions in light of all the contradictory evidence. (Objections, 2.) In addition, relator argues that Dr. Asseff did not have her records and reports from Dr. King or relator's March 12, 2010 transcription of a taped interview describing all of her symptoms and problems. (Objections, 2.) In support of this argument, relator attaches the medical reports of Drs. Johnson, King and Asseff, along with a copy of R.C. 145.362. However, relator fails to present any further discussion regarding these medical reports or R.C. 145.362. Further, relator once again contends that there is no evidentiary basis to assume that Dr. Asseff's recommended accommodation would solve relator's problems. (Objections, 2.) In response, PERS contends that, "[a]t its core, [relator's] second objection is a request that this Court reweigh all the medical evidence and come to its own decision independent of [PERS's] findings." (Memorandum in Opposition, 4.) We agree.

{¶13} It is well-settled that "in mandamus, the court does not reweigh the evidence." *State ex rel. Thomas v. Pub. Emp. Retirement Sys.*, 10th Dist. No. 03AP-137, 2004-Ohio-1403, ¶10. "Only the board may determine the weight of the evidence." *Id.* at ¶11. Here, as noted in a decision dated December 16, 2009, the PERS medical advisor and board concluded that, upon review of relator's disability file and recent reports of medical re-examination, "there is insufficient objective evidence of permanent disability due to Exophthaomos [sic]; myopathy." (See board's Dec. 16, 2009 Decision, 1.) Further, the magistrate found that the record provides some evidence supporting the

board's decision to terminate relator's disability benefits because the medical reports of Drs. Asseff and Mast meet the requirements of R.C. 145.362 "by examining relator and determining whether her present condition would make her incapable of performing her job duties." (See Magistrate's Decision, ¶63.)

{¶14} The record indicates that "[b]ased upon *all the medical information and recommendations*, the Ohio PERS medical advisor and the board concluded that [relator is] no longer considered to be permanently disabled from the performance of duty as Secretary." (Emphasis added.) (See board's Dec. 16, 2009 Decision, 1; see also board's June 16, 2010 Decision, 1.) As such, prior to making its decision to terminate relator's disability benefits, and to uphold its previous action terminating relator's disability benefits, the board had in its possession relator's records and reports from Dr. King and relator's transcribed interview from March 12, 2010, wherein relator describes all of her symptoms and problems. (See Certified Record of Proceedings, Volume 1 of 5, records and reports from Dr. King and her associates, 57-61, 63-74, 82-84; Volume 2 of 5, 93-98, 116, 117-19, 121, 129-31; Volume 3 of 5, 175-79; Volume 4 of 5, 223-25; and taped interview of Lelani Guthrie, March 12, 2010, Volume 5 of 5, 252.)

{¶15} In addition, the record indicates that the magistrate correctly found that the medical reports of Drs. Asseff and Mast meet the requirements of R.C. 145.362, in that "the physician or physicians shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled." See R.C. 145.362. Here, Dr. Asseff's report states that, based upon a review of medical records provided and a physical examination, relator's "job requirements can be satisfied and the disability is not

presumed to be permanent." (See Dr. Asseff's July 23, 2009 report, 2.) Also, Dr. Mast's report recommends that relator's disability benefits terminate because "there is insufficient objective evidence of permanent disability due to Exophthalmos [sic]; myopathy." (See Dr. Mast's Dec. 16, 2009 letter.) As such, both Drs. Asseff and Mast's reports certify to the board that relator is no longer physically incapable of resuming her duties as Secretary II.

{¶16} Therefore, because the board based its decision to terminate relator's disability benefits upon all the medical information and recommendations, including Dr. King's records and reports, and because this court will not reweigh the evidence, relator's second objection is overruled.

{¶17} Following an independent review of the record, we find that the magistrate has properly determined the facts and applied the appropriate legal standards. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we deny relator's requested writ of mandamus.

Objections overruled; writ denied.

BROWN and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Lelani Guthrie,	:	
	:	
Relator,	:	
v.	:	No. 10AP-689
Ohio Public Employees Retirement System,	:	(REGULAR CALENDAR)
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on June 29, 2011

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

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

IN MANDAMUS

{¶18} Relator, Lelani Guthrie, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Public Employees Retirement System ("PERS"),² to vacate its decision which terminated her disability benefits and ordering PERS to reinstate those benefits.

Findings of Fact:

²Although relator names PERS, it is the Ohio Public Employees Retirement Board ("board") that actually terminated her disability benefits.

{¶19} 1. Relator was employed as a Secretary II for the City of Akron Police Department and was a member of PERS.

{¶20} 2. On September 24, 2007, relator filed an application for disability benefits. Several medical reports dated prior to the application were submitted to PERS.

{¶21} 3. On March 16, 2006, Toni M. King, M.D., of Endocrine Associates, Inc., examined relator and determined she had "hyperthyroidism."

{¶22} 4. Relator saw Dr. King for several follow-up exams, on April 19, May 4, May 12, June 1, and June 7, 2006. The notes indicate hyperthyroidism and Graves disease.

{¶23} 5. On August 30, 2006, relator applied for leave pursuant to the Family Medical Leave Act because her Graves disease was affecting her eyes and "intermittently causing extreme light sensitivity." On the application, the health care provider indicated that the condition was chronic and intermittent and described the condition as "most likely a lifetime condition which will cause unknown periods of incapacity."

{¶24} 6. Relator applied for leave pursuant to the Family Medical Leave Act two additional times, on September 8 and December 8, 2006.

{¶25} 7. A return to work form was completed by James L. Johnston, Jr., D.O., on August 31, 2006, indicating that relator had been off work from August 15 through September 4, 2006, but could return to work on September 5, 2005.³

{¶26} 8. Relator was seen at Endocrine Associates, Inc., again on September 6, September 14, October 16, and November 15, 2006; March 14, and August 23, 2007 for hyperthyroidism and/or Graves disease.

{¶27} 9. In a letter to the Akron Police Department dated May 29, 2007, Dr. Johnston recommended that relator be provided with a low light screen for her computer to help with an acute exacerbation of dry eyes secondary to thyroid disease.

{¶28} 10. On August 17, 2007, Dr. Johnston wrote a letter regarding relator's condition. In it he wrote, as follows:

Lelani Guthrie was initially seen on 6/22/06 for a series of complaints including dryness, redness, blurry vision, and pain that had been occurring for the previous 6 months. Complicating this dry eye syndrome, is a previous history of Radial Keratotomy refractive eye surgery and Graves Disease, both of which may contribute to her symptoms. Various treatment modalities have been utilized for her ongoing dry eye care including punctal occlusion, supplemental artificial tears, Restasis prescription eye drops, topical liquigel eye drops for PM use, and oral Omega 3 Fatty Acids. In addition, a variety of work space strategies have been implemented in an attempt to alleviate her symptoms with little success.

I have no doubt that she has difficulty completing her computer tasks since, per Lelani, it involves a full day of reading at a computer screen which aggravates her dry eye condition. Her condition will most likely be chronic and intermittent in nature, making continuous computer use difficult for her. Other work assignments that do not involve as much continuous and direct light exposure may be a more realistic option for Lelani. I would much rather see Lelani reassigned within her place of employment rather than resorting to early retirement from disability.

{¶29} 11. On September 12, 2007, relator applied for disability benefits.

{¶30} 12. As part of the disability application, relator submitted the report of Dr. Johnston, who examined her on September 5, 2007. In his report, Dr. Johnston completed the diagnoses as "Photophobia, Dry Eye Syndrome, Thyroid Eye Disease."

³The form indicated a return to work date as 2005, however it must have been a typographical error since the time off work was in 2006.

Symptoms listed included, "Light Sensitivity, Blurred Vision, Headache." The treatment was listed as "Artificial Tears, Omega 3 Fatty Acids, Punctal Occlusion, New Glasses Prescription, Liquigel Nighttime Lubricant, Restasis." The Prognosis is "Poor-despite the above efforts, symptoms still persist." Dr. Johnston indicated that relator was permanently disabled as of June 15, 2007 and that her condition was chronic "requiring chronic long term management."

{¶31} 13. Pursuant to R.C. 145.35, PERS required relator to be examined by Canton Ophthalmology Associates, Inc.

{¶32} 14. A report was submitted to PERS, dated November 1, 2007, in which the doctor concluded that: "[Patient] has normal visual acuity with glasses. However loses [sic] acuity and contrast depending on lighting etc." The doctor did not find relator permanently disabled, but recommended continued treatment.⁴

{¶33} 15. On December 19, 2007, James R. Moore, M.D., wrote to PERS and indicated that he had reviewed the results of the examinations and believed there was insufficient objective evidence of permanent disability due to glaucoma and/or vision loss and recommended that disability benefits be denied.

{¶34} 16. Relator's disability application was denied at the December 19, 2007 board meeting.

{¶35} 17. Relator appealed the decision on January 18, 2008.

{¶36} 18. In support of her appeal, relator submitted further medical evidence. Jeffrey L. Congeni, M.D., wrote an addendum to his report on February 18, 2008 in which he stated, as follows:

This patient could be considered disabled due to poor contrast sensitivity status post RK surgery. This is a common problem with RK patients. Therefore, before a permanent disposition is rendered on Mrs. Guthrie, contrast and glare testing should be performed.

{¶37} 19. Additionally, relator submitted another report from Dr. King dated March 13, 2008. The report indicated that relator is "Tired/cold all the time. Still having trouble with eyes, and diet has not [changed] but gaining weight."

{¶38} 20. Dr. Johnston wrote a letter dated March 22, 2008 that summarized his opinion. He stated, as follows:

My opinion regarding Lelani's complaint of having extreme difficulties working on a computer for extended hours at work due to aggravation of her eye conditions is that there is enough clinical evidence to support such a claim. Dry Eye Syndrome is a common condition, but not everyone has an underlying thyroid condition that causes changes in eyelid position and local inflammation that cause shortened tear evaporation times and decreased tear production, respectively. I have written requests in the past to simply have Lelani reassigned to a different job within their system so that they would not have to lose a valuable employee. Obviously those requests have not been honored.

{¶39} 21. Relator also submitted an affidavit from her husband in which he described her condition.

{¶40} 22. Howard S. Siegel, M.D., performed an independent medical examination on May 16, 2008. He generated a report on May 19, 2008 which resulted in his opinion, as follows:

Mr. [sic] Guthrie has had since 2006, by history, Graves Disease with ocular muscle myopathy and exophthalmos. Although the vision as tested is reasonably good, the ocular motility problems and easy fatiguing of the ocular muscles

⁴The doctor's signature is illegible but from the record, it is gleaned, the report is likely from Jeffrey L. Congeni, Jr., M.D.

account for her symptoms of pain, tearing and blurred vision after one hour. The net result of this is that her visual functioning is impaired and her productivity is diminished.

Unless there is significant employer accommodation to a much reduced work efficiency, Ms. Guthrie must be considered to be permanently disabled for performance of her job as described.

{¶41} 23. The PERS medical advisor reviewed the supplemental medical information and recommended approval of relator's disability benefit application, with the condition of a re-examination in one year. The board met to provide final approval on June 18, 2008.

{¶42} 24. Relator was re-examined on July 23, 2009 by Carl F. Asseff, M.D., J.D. Dr. Asseff concluded, as follows:

Lelani Guthrie has multiple complaints, none of which are disabling. The elevated eye pressure is pseudo-glaucoma, created by the retraction of the inferior recti muscles. Glare is from her multiple scars in the corneas from the radial keratotomies. The proptosis is not causing any ocular or visual issues.

Lubrication during the day is not being done and there is no evidence that she is using computer glasses (Sola Access) to give her best focus both for reading and for the computer key board and screen. This is a glass for people of this age group and job function and not a special glass for her corneal and thyroid issues. Her current glasses appear to be inadequate for that function. The effects of her marked astigmatism combined with the corneal scars would be markedly reduced and should be able to perform the duties of Secretary II work requirements.

Conclusion:

After review of the medial [sic] records provided as well as the physical examination of Lelani M. Guthrie, it is my opinion the job requirements can be satisfied and the disability is not presumed to be permanent.

{¶43} 25. Maurice C. Mast, M.D., a medical consultant for PERS, reviewed the results of the recent examinations of relator and determined there was insufficient objective evidence of permanent disability due to Exophthalmos; myopathy. Thus, in a letter dated December 16, 2009, he recommended to the board that disability benefits be terminated.

{¶44} 26. At the December 16, 2009 meeting, the board determined there was insufficient evidence of permanent disability due to Exophthalmos; myopathy, and terminated her disability benefit.

{¶45} 27. Relator appealed the board's decision on January 6, 2010.

{¶46} 28. In support of her appeal, relator submitted a transcript of a taped interview of herself describing her medical conditions.

{¶47} 29. Relator also submitted a psychological evaluation by Harold S. Schaus, Jr., M.S., DAPA. Dr. Schaus submitted a report dated March 19, 2010 after he interviewed relator on March 18, 2010 in his office. He summarized his findings, as follows:

{¶48} * * * Mrs. Lelani Guthrie shows signs of a [sic] some depression and concerns about health problems. She is not trying to look bad, but instead, is trying to look better than she actually feels. She is a credible woman who comes from an unstable background, which she has managed to overcome in large part. Her marital and work history are stable.

{¶49} 30. Relator also submitted a letter from Dr. King dated March 25, 2010, in which he described relator's history and symptoms, as follows:

Lelani Guthrie has been under my care for Grave's Disease since March, 2006. Grave's Disease is an autoimmune

thyroid disorder. Antibodies are formed by the immune system that attack both the thyroid and the eyes. The antibodies attack the tissues and muscles about the eyes which can cause eye protrusion and then pressure on the optic nerve. Lelalani [sic] was treated with radioactive iodine therapy which can in some cases worsen the eye disease. Ms. Guthrie's thyroid function has been stabilized with medication, however the eye disease can continue to worsen even when the thyroid issues have been resolved. Ms. Guthrie will continue to need ophthalmologic care for her eyes over time.

{¶50} 31. PERS referred relator to Rajnikant Kothari, M.D., for an independent medical examination and psychiatric evaluation. Dr. Kothari wrote a letter, dated May 10, 2010, expressing his findings. In the letter, Dr. Kothari wrote, as follows:

Impression: Grave's Disease with Secondary Eye Problems
History of Major Depressive Disorder, Recurrent

Recommendation: Patient does not have any psychiatric diagnosis at this time. I have no recommendation about her being disabled, from a psychiatric point of view.

(Emphasis omitted.)

{¶51} 32. After reviewing the disability file and recent reports of medical re-examinations, at the June 16, 2010 meeting, the board concluded that relator was not considered permanently disabled. The letter sent to relator provides in part: "This decision is based in part on the fact that there is insufficient objective evidence of permanent disability due to depressive disorder not elsewhere classified. On the basis of this information, the board upheld its previous action to discontinue your disability benefits."

{¶52} 33. Thereafter, relator filed the instant mandamus action in this court on July 19, 2010.

Conclusions of Law:

{¶53} 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 exophthalmos; myopathy or depressive disorder.

{¶54} It is this magistrate's decision that the evidence supports 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.

{¶55} 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.*

{¶56} 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.

{¶57} 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 incapable of performing their job duties by a disabling condition, the payment of disability benefits shall be terminated.

{¶58} 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.

{¶59} The evidence before the board in this case consisted of Dr. Asseff's report from July 23, 2009. Dr. Asseff reviewed Dr. Siegel's report, the description of the duties of the job of Secretary II, and reports from the Novus Clinic. Dr. Asseff examined relator and concluded that she could perform the job requirements and was not permanently disabled. Dr. Mast reviewed the evidence in the record and recommended to the board that it terminate relator's disability benefits.

{¶60} On appeal, relator submitted the report of Dr. Schaus who determined that relator was credible and gave his opinion as to whether she was permanently disabled. The board then sent relator for an independent medical examination by Dr. Kothari, who had no recommendation about relator being disabled from a psychiatric point of view.

{¶61} Relator argues that her disability is not about depression but, rather, her serious eye problems and Dr. Schaus' report was only submitted to demonstrate that she was credible. Thus, relator argues that the board should give great weight to her affidavit transcript where she describes her problems and states that her disability is no different than when her benefits were granted.

{¶62} Relator contends that Dr. Asseff's report should be rejected because it did not consider all relevant evidence, it does not address her Graves disease, it conflicts with the opinions of Dr. Siegel and it cites no improvement in her condition.⁵ Dr. Asseff did examine relator, and his report acknowledged her Graves disease as part of her medical history. The board doctors are the ones charged with reviewing 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. Pub. Emp. Retirement Sys.*, 10th Dist. No. 09AP-595, 2010-Ohio-1143.

{¶63} By examining relator and determining whether her present condition would make her incapable of performing her job duties, Drs. Asseff and Mast's opinions meet the requirements of R.C. 145.362. The record provides some evidence that supports the

board's decision. *State ex rel. Schaengold v. Pub. Emp. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760, ¶19.

{¶64} Relator also argues that the board erred in finding that the board only considered evidence related to her psychological condition and her disability was based upon her eye condition. However, the board initially terminated her benefits due to insufficient evidence of permanent disability due to Exophthalmos; myopathy. It was only after relator appealed that decision that the board then determined that her benefits would be terminated "based in part on the fact that there is insufficient objective evidence of permanent disability due to depressive disorder." Thus, the decision was based upon a finding of insufficient evidence of both Exophthalmos; myopathy and depressive disorder. Not merely depressive disorder as relator argues.

{¶65} Finding that there was sufficient evidence to support the board's finding that there was insufficient evidence of permanent disability due to Exophthalmos; myopathy and depressive disorder, the magistrate finds that the board did not abuse its discretion in terminating relator's benefits and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

⁵Relator also spends a large portion of her argument regarding a Clinical Practice review that was stricken from the record by this magistrate in a November 8, 2010 entry.

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).