

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. ) Case No. 07-1175  
MICHELE GREIN, )  
)  
Appellant-Relator, )  
)  
vs. )  
)  
THE OHIO STATE HIGHWAY PATROL ) On Appeal from the Court of Appeals  
RETIREMENT SYSTEM ) Tenth Appellate District  
) Franklin County Ohio  
)  
Appellee-Respondent. )  
  
Court of Appeals  
Case No. 06 AP 506

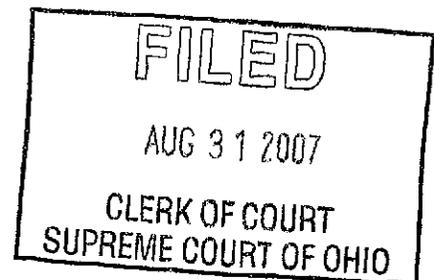
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**MERIT BRIEF OF APPELLANT-RELATOR MICHELLE GREIN**

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## FACTS

This action is a Mandamus action brought by Appellant-Relator, Michele Grein (hereinafter "Grein") relating to the decision of Appellee-Respondent, Ohio State Highway Patrol Retirement System (hereinafter "Retirement Board") to deny Grein a disability retirement. Grein was involuntarily separated from work by the Ohio State Highway Patrol because it was determined that she is unable to perform the essential functions of her job. (A.R.: pp. 209, 239).<sup>1</sup> Grein has not been allowed to return to her work with the Highway Patrol because of her disabling conditions. (A.R.: p. 239). Despite the fact that she was involuntarily disabled, however, the Retirement Board has refused to grant Grein a disability pension. (A.R.: p.p. 37, 38, 240, 252 and 255).

Grein originally applied for disability retirement on May 5, 2003. (A.R.: pp. 3-8). The medical documentation she submitted related solely to physical injuries she had as a result of a number of automobile accidents which occurred in September of 2002 while Grein was on duty. (A.R.: pp. 3-8). This original application was denied on July 24, 2003. (A.R.: p. 252).

On October 15, 2003, Grein submitted a second application for disability. (A.R.: pp. 10-35). In addition to the physical injuries Grein submitted, she also raised certain emotional and psychological problems which she was suffering as a result of the accident. (A.R.: pp. 230-231). The second application was denied on January 22, 2004 and reconsideration was denied on February 26, 2004. (A.R.: pp. 38, 252).

On November 21, 2003, after Grein had submitted her second application for disability and before the Retirement Board's rejection of that application, Grein was involuntarily separated from employment with the Ohio State Highway Patrol based on the Highway Patrol's determination that

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<sup>1</sup> References to the appropriate page of the Administrative Record will be made as follows: (A.R.: p. \_\_\_).

Grein suffered from a permanent disability that left her unable to perform her duties as a patrolwoman. (A.R.: pp. 209, 239). Despite the fact that Grein had been involuntarily separated from her job with the State Highway Patrol because of her disability, the Retirement Board nonetheless denied her disability benefits. (A.R.: p. 38).

Grein also sought workers' compensation benefits as a result of the injuries she sustained in the September, 2002 automobile accident. On July 29, 2005, Grein's counsel forwarded copies of reports of Dr. Robert G. Kaplan and Dr. Steven Kantor which the Industrial Commission relied on in determining that Grein suffered from post-traumatic stress disorder. (A.R.: pp. 250-251). Grein's counsel asked that the Retirement Board reconsider its determination that Grein was not entitled to a disability pension based on the Industrial Commission decision. (A.R.: pp. 250-251). On July 27, 2005, the Retirement Board wrote to Grein's counsel indicating that they would not reconsider the application. (A.R.: p. 252).

The workers' compensation case continued to proceed, and on March 10, 2006, Grein's counsel again wrote to the Retirement Board to advise them that on February 4, 2006, the Industrial Commission determined that Grein was entitled to temporary total disability benefits retroactive to April 19, 2004. (A.R.: pp. 253-254). Again, the Retirement Board refused to reconsider its determination that Grein was not entitled to disability benefits. (A.R.: p. 255). This action was then commenced.

### **ARGUMENT AND LAW**

In order for Grein to prevail with respect to her Petition for Writ of Mandamus, she must establish the existence of three elements: (1) that she has a clear legal right to the relief prayed for; (2) that the Retirement Board is under a clear legal duty to perform the act requested; and (3) that the

Relator has no plan and adequate remedy in the ordinary course of law. State, ex rel. Greene v. Enright (1992), 63 Ohio St.3d 729, 731, 590 N.E.2d 1257, 1259. The facts submitted and the proof produced must be plain, clear and convincing before a court is justified in granting a Writ of Mandamus. State ex rel. Pressley v. Industrial Commission (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 631, 647.

In the case at bar, Grein applied for disability retirement from the Retirement Board pursuant to Ohio Revised Code §5505.18. The Ohio Supreme court has determined that Mandamus is an appropriate remedy by which to seek relief from the Retirement Board's refusal to grant disability benefits because Ohio Revised Code §5505.18 does not provide an appeal from the Board's determinations concerning applications for disability retirement benefits. State ex rel. Moss v. Ohio State Highway Patrol Retirement System (2002), 97 Ohio St.3d 198, 200, 777 N.E.2d 259, 260. Accordingly, the only issue in this case is whether or not the Retirement Board abused its discretion in denying Grein her disability benefits. See State ex rel. Moss, 97 Ohio St.3d at 200, 777 N.E.2d at 260 quoting State ex rel. Pipoly v. State Teachers' Retirement System (2002), 95 Ohio St.3d 327, 767 N.E.2d 719 for the proposition that "Mandamus is an appropriate remedy where no statutory right of appeal is available to correct an abuse of discretion by the administrative body."

Ohio Revised Code §5505.18(A) provides as follows with respect to a member of the State Highway Patrol Retirement System's entitlement to a disability retirement:

- (A) Upon the application of a member of the State Highway Patrol Retirement System... a member who becomes totally and permanently incapacitated for duty in the employ of the State Highway Patrol may be retired by the Board.

The Board is required to "consider the written medical or psychological report, opinions, statements and other competent evidence in making its determination." Ohio Revised Code §5505.18(A). As

part of the October 15, 2003 application, Grein submitted the report of Betsy DeChant, LISW, BCD who wrote as follows with respect to the effect that the on-duty automobile accident had on Grein:

Ms. [Grein] was strained as she recounted the circumstances of the accident, becoming increasingly agitated and anxious as she did so. Ms. [Grein] noted that, since the accident, she had increasing difficulty driving, often becoming anxious whenever she got into a car. At times she had to force herself to stay in the car, or would avoid driving entirely due to the physical and emotional stress of doing so.

(A.R.: p.72).<sup>2</sup> Ms. DeChant made a ultimate diagnosis that Grein was suffering from post-traumatic stress disorder with depressive features related to severe psychosocial life stresses as a direct result of the life-threatening accident of September, 2002 and the subsequent and permanent lifestyle changes which followed. (A.R.: p. 72).

Prior to the Retirement Board making its decision with respect to Grein's petition for disability pension, Grein was involuntarily separated from employment with the Ohio State Highway Patrol pursuant to Ohio Administrative Code §123:1-33-02, which provides as follows:

- (B) When an appointing authority has received the results of a medical or psychological examination and initially determines that an employee is incapable of performing the essential job duties of the employee's assigned position due to a disabling illness, injury or condition, the appointing authority shall institute pre-separation proceedings.

The Ohio State Highway Patrol in November of 2003 utilized this procedure to separate Grein from employment with the State Highway Patrol. (A.R.: p. 239). Despite knowing this, however, the Retirement Board denied Grein's application for a disability pension. (A.R.: p. 241).

In order to be entitled to a disability retirement, the Retirement Board is required to determine "whether the member is totally incapacitated for duty in the employ of the Patrol." Ohio Revised Code §5505.18(A)(1). This is virtually identical to the standard for determining whether a Trooper

should be involuntarily separated from employment with the Highway Patrol under Ohio Administrative Code §123:1-33-02(B), which provides that an employee can be involuntarily separated from employment if that “employee is incapable of performing the essential job duties of the employee’s assigned position due to a disabling illness, injury, or condition.”

The fundamental principles of fairness and due process require that these two standards be read in conjunction with each other. Grein should not be put in the position where she is told she is no longer allowed to continue with her employment because she is disabled, but, at the same time, be refused pension benefits as a result of that disability. Grein did not choose to be separated from employment with the Highway Patrol. However, once the Highway Patrol determined that she was disabled and no longer capable of performing the functions of her job, it follows that she should likewise be disabled for purposes of receiving her disability retirement. Any other ruling denies Grein any income. By failing to apply the same standard to determining Grein’s eligibility for a disability pension as the Highway Patrol applied to involuntarily separating her from employment, the Retirement Board abused its discretion.

Moreover, the Board’s refusal to reconsider its determination in light of the overwhelming evidence that Grein was disabled is a further abuse of its discretion. It is not only Grein’s physicians who were taking the position that she was disabled, it was a number of disinterested doctors and State agencies. As highlighted above, the Ohio Highway Patrol had determined that Grein was incapable of performing the functions of her job and therefore involuntarily separated her from employment. (A.R.: pp. 209, 239). In addition, an independent medical examiner appointed by the State of Ohio in connection with Grein’s workers’ compensation case, Dr. Steven Kantor,

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<sup>2</sup> The report of Betsy DeChant refers to Grein by her maiden name, Michele Depto. Grein was married during the course of these proceedings, so records refer to her as both Michele Depto,

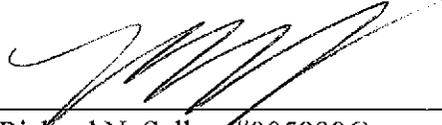
determined that Grein had post-traumatic stress disorder which was related to her automobile accident. Dr. Kantor diagnosed Grein as having chronic post-traumatic stress disorder. (A.R.: p. 98). He found that she “experiences intense psychological distress when she is exposed to things that resemble an aspect of the traumatic event.” (A.R.: p. 98). He found that she had become “hyper-vigilant, has difficulty concentrating and becomes startled or panicky when she is traveling on the road.” (A.R.: p. 98). These are clearly not traits that would enable an Ohio State Highway Patrolman to perform the essential functions of their job.

It is particularly important to note that Grein’s own physician, Dr. Kaplan, determined that the disabling effects of Grein’s post-traumatic stress disorder would “become moderate to severe, particularly when she is exposed to situations that are similar to those surrounding the motor vehicle accident of 9/27/02.” The accident which gave rise to the post-traumatic stress disorder involved an accident while Grein was pulling over another car with her emergency lights activated on the side of the Ohio Turnpike. (A.R.: p. 105, 211). Obviously, Grein could not avoid this situation were she to return to the employ of the Highway Patrol. (A.R.: pp. 202-206). This was recognized by the Highway Patrol when it involuntarily separated her from her employment. (A.R.: pp. 209, 239). It was likewise recognized by the Industrial Commission, when it determined that Grein was entitled to temporary total disability based on the reports of Dr. Kantor and Dr. Kaplan. (A.R.: pp. 254-255).

Grein has been put between a rock and a hard place. On the one hand, the Ohio State Highway Patrol is refusing to allow her to return to work because they made a determination that she was incapable of performing the essential job duties of her assigned position. On the other hand, the Retirement Board is denying her disability pension benefits, based on their determination that she is capable of returning to work. The State of Ohio cannot have it both ways. Once a determination has

been made that Grein is incapable of performing the essential duties of her position in accordance with Ohio Administrative Code §123:1-33-02(B), the Retirement Board should have a corresponding legal duty to provide her with the disability benefits which logically follow from that determination.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2007, a copy of this Merit Brief was sent by ordinary U.S. mail to counsel for Appellee-Respondent Ohio Highway Patrol Retirement System as follows:

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# APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.  
MICHELE GREIN,

Appellant-Relator,

vs.

THE OHIO STATE HIGHWAY PATROL  
RETIREMENT SYSTEM

Appellee-Respondent.

07-1175

On Appeal from the Franklin County Court  
of Appeals Tenth Appellate District

Court of Appeals  
Case No. 06 AP 506

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**NOTICE OF APPEAL OF APPELLANT-RELATOR MICHELLE GREIN**

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**FILED**  
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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Michele Grien, :

Relator, :

v. :

No. 06AP-506

The Ohio State Highway Patrol Retirement System, :

(REGULAR CALENDAR)

Respondent. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on May 15, 2007, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

*Judith L. French*  
\_\_\_\_\_  
Judge Judith L. French

*Peggy Bryant*  
\_\_\_\_\_  
Judge Peggy Bryant

*William A. Klatt*  
\_\_\_\_\_  
Judge William A. Klatt

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED  
COURT OF  
FRANKLIN COUNTY  
2007 MAY 15 PM 12:15  
CLERK OF COURTS

State of Ohio ex rel. Michele Grien, :

Relator, :

v. :

No. 06AP-506

The Ohio State Highway Patrol  
Retirement System, :

(REGULAR CALENDAR)

Respondent. :

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D E C I S I O N

Rendered on May 15, 2007

---

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for relator.

*Marc Dann, Attorney General, and Michael D. Allen,* for  
respondent.

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ON OBJECTIONS TO THE MAGISTRATE'S DECISION  
IN MANDAMUS

FRENCH, J.

{¶1} Relator, Michele Grien, filed this original action requesting that this court issue a writ of mandamus ordering respondent, The Ohio State Highway Patrol Retirement System ("OSHPRS"), to vacate its decision, which denied relator a disability pension, and ordering the board of OSHPRS to grant relator a disability retirement.

{¶2} The court referred this matter to a magistrate 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, recommending that this court deny the requested writ. (Attached as Appendix A.) No party has objected to the magistrate's findings of fact, and we adopt them as our own. Nevertheless, we reiterate here those facts relevant to our decision.

{¶3} Between 1997 and September 2002, relator was involved in four automobile accidents, two of which occurred while on duty as a trooper with the Ohio State Highway Patrol ("OSHP"). As a result of physical injuries she suffered in these accidents, relator applied to the board of OSHPRS for disability retirement in May 2003; the board denied relator's application in July 2003.

{¶4} Relator again applied to the OSHPRS board for disability retirement in October 2003, and included both physical and psychological injuries as the basis for her application; the board denied relator's application in January 2004. In the meantime, however, the Ohio Department of Public Safety ("ODPS") had held a hearing to determine whether relator should be involuntarily separated from her employment. Effective December 13, 2003, relator was separated from her employment as a trooper based on medical evidence that she was unable to perform her duties. Relator thereafter asked the OSHPRS board to reconsider its denial of disability retirement, but the board denied her request.

{¶5} In February 2006, the Industrial Commission of Ohio awarded relator temporary total disability compensation retroactive to April 2004, based on medical evidence that relator suffered from post-traumatic stress disorder.

{¶6} After being informed that she could not file a new application for disability retirement because she is no longer a member of the OSHPRS, relator filed this original action. In it, relator has asked this court to grant a writ ordering the OSHPRS board to grant her request for disability retirement. As noted, the magistrate recommended denial of the requested writ. Specifically, the magistrate found that the board did not abuse its discretion in denying relator's second application for disability retirement, despite the decision by ODPS that relator was unable to perform her duties.

{¶7} Relator filed objections to the magistrate's decision. In them, she argues that the magistrate erred in determining that the board's denial of both her application and request for reconsideration was in accordance with law and was not an abuse of discretion. In her view, once ODPS determined that relator "is incapable of performing the essential duties of her position[.]" the OSHPRS board "should have a corresponding legal duty to provide her with the disability benefits which logically follow from" the ODPS determination.

{¶8} In order to be entitled to the requested writ of mandamus, relator had to establish a clear legal right to disability retirement, a corresponding clear legal duty on the part of OSHPRS and its board to award disability retirement, and the absence of a plain and adequate remedy in the ordinary course of law. *State ex rel. Moss v. Ohio State Hwy. Patrol Retirement Sys.*, 97 Ohio St.3d 198, 2002-Ohio-5806, at ¶5. Before the magistrate, OSHPRS conceded that relator had no other remedy to obtain her relief. Thus, we consider relator's rights to disability retirement and the board's corresponding duties.

{¶9} R.C. Chapter 5505 creates and defines the OSHPRS and provides for mandatory membership in the system for all OSHP employees. See R.C. 5505.02. R.C. 5505.04(A)(1) vests the authority for "[t]he general administration and management of" the OSHPRS in the OSHPRS board. Among its duties is the determination of a member's eligibility for disability retirement. R.C. 5505.18(A) provides:

Upon the application of a member of the [OSHPRS] \* \* \* a member who becomes totally and permanently incapacitated for duty in the employ of the state highway patrol may be retired by the board.

The medical or psychological examination of a member who has applied for disability retirement shall be conducted by a competent health-care professional or professionals appointed by the board. The health-care professional or professionals shall file a written report with the board containing the following information:

- (1) Whether the member is totally incapacitated for duty in the employ of the patrol;
- (2) Whether the incapacity is expected to be permanent;
- (3) The cause of the member's incapacity.

The board shall determine whether the member qualifies for disability retirement and its decision shall be final. The board shall consider the written medical or psychological report, opinions, statements, and other competent evidence in making its determination. \* \* \*

{¶10} This statutory authorization leaves no doubt that the OSHPRS board holds discretion to determine whether a member is "totally and permanently incapacitated" and, therefore, entitled to disability retirement, based on the medical evidence presented. Here, the medical evidence before the board included reports and evidence from numerous health care professionals, including Claire V. Wolfe, M.D., and

Richard H. Clary, M.D., who concluded that relator's injuries did not preclude her eventual return to duty. Thus, the board had some evidence upon which to base its denial of disability retirement, and relator has no clear legal right to a contrary determination.

{¶11} Nevertheless, relator points to her involuntary disability separation by her employer, ODPS. That separation, relator argues, should entitle her to disability retirement. We disagree.

{¶12} The director of ODPS has the power to order terminations of employment, R.C. 5502.011(C)(5), and administrative rules prescribe the applicable procedures and parameters. Former Ohio Adm.Code 123:1-33-02 (now, effective October 29, 2006, Ohio Adm.Code 123:1-30-01) provided, in pertinent part:

(B) When an appointing authority has received the results of a medical or psychological examination and initially determines that an employee is incapable of performing the essential job duties of the employee's assigned position due to a disabling illness, injury, or condition, the appointing authority shall institute pre-separation proceedings. \* \* \*

(C) \* \* \* If the appointing authority determines, after weighing the testimony presented and the evidence admitted at the pre-separation hearing, that the employee is unable to perform his or her essential job duties, then the appointing authority shall issue an involuntary disability separation order.

{¶13} Our record contains the involuntary disability separation order terminating relator's employment. Presumably, the director of ODPS, as the appointing authority, issued this order following a determination "after weighing the testimony presented and the evidence admitted at the pre-separation hearing," that relator was "unable to perform \* \* \* her essential job duties[.]" See, id.

{¶14} Nothing in this statutory and regulatory scheme compels entitlement to disability retirement following an involuntary disability separation. In order to grant disability retirement, the OSHPRS board must determine whether a member is "totally and permanently incapacitated." This language reflects a legislative intent "to limit such retirement to persons who are unable to perform their duties. Use of the limiting term 'totally' in R.C. 5505.18(A) ('totally and permanently incapacitated') indicates that the legislature intended that anything less than total incapacity for duty would not qualify an applicant for retirement pursuant to R.C. 5505.18." 1990 Ohio Atty.Gen.Ops. No. 2, at 10.

{¶15} In contrast, in order to issue an involuntary disability separation order, ODPS must determine whether "the employee is unable to perform his or her essential job duties[.]" Such a determination could arise from a finding that an employee is temporarily unable to perform his or her essential duties, but may be eligible for reinstatement under Ohio Adm.Code 123:1-30-04 upon a full recovery. That outcome appears particularly likely where, as here, there exists medical evidence that an employee's injuries are temporary and do not preclude an eventual return to work.

{¶16} In short, ODPS need not determine whether a member's injuries are permanently or totally incapacitating before ordering a disability separation, nor could a disability separation order necessarily be interpreted as such a determination. Thus, in the context of relator's request for mandamus, the ODPS involuntary separation order creates no legal right to disability retirement.

{¶17} Moreover, any contrary holding would conflict with the decision of the Ohio Supreme Court in *Fair v. School Emp. Retirement Sys.* (1978), 53 Ohio St.2d 118. In

*Fair*, a county board of education disqualified a school bus driver and state employees retirement system ("SERS") member from his job based on a state board of education regulation that precluded persons with diabetes from being school bus drivers. The driver applied to SERS for disability retirement benefits. SERS found that the driver was not disabled and denied the application. The trial court and this court ruled in favor of the driver.

{¶18} On appeal, the Supreme Court reversed. The court held that the driver was not entitled to retirement benefits because the state board's regulation was not controlling on SERS's determination of whether a member was entitled to disability retirement. The court stated:

To hold that regulations promulgated by the state board pursuant to R.C. 3327.10(A) are binding on the [SERS] would not only lack a statutory base, but also would place the determination of eligibility for disability retirement within the province of an agency having no responsibilities whatsoever for the administration and control of the retirement funds. Such a result clearly does not comport with the scheme created by the General Assembly which established a separate and independent agency to oversee and manage the school employees retirement funds under R.C. Chapter 3309.

The question as to whether appellee *Fair* should receive a certificate as a school bus driver is subject to those rules and regulations promulgated by the State Board of Education. The question as to whether appellee is entitled to disability retirement is subject to the determination of the retirement board acting under the provisions of R.C. 3309.39. In each instance, the agency involved is required to make an independent decision regarding which diseases or physical impairments constitute disabilities, and to take action accordingly.

Id. at 121. See, also, *State ex rel. Schwaben v. School Emp. Retirement Sys.* (1996), 76 Ohio St.3d 280 (relying on *Fair* to affirm SERS's denial of disability retirement to employee disqualified as school bus driver).

{¶19} These same principles apply here: the question whether relator is unable to perform the essential duties of her job is subject to determination by ODPS; the question whether relator is permanently and totally incapacitated for duty and, therefore, entitled to disability retirement, is subject to determination by the OSHPRS board. In each instance, the agency involved must make an independent decision regarding relator's injuries and disabilities and take action accordingly. Thus, the OSHPRS board does not have a legal duty to grant disability retirement to relator, and we overrule relator's objections.

{¶20} In summary, based on an independent review of the evidence, we adopt the magistrate's findings of fact and conclusions of law as our own, except that we modify the magistrate's conclusions of law to include the above discussion. Accordingly, we deny the requested writ of mandamus.

*Objections overruled,  
writ of mandamus denied.*

BRYANT and KLATT, JJ., concur.

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Findings of Fact:

{¶22} 1. Relator has been involved in four automobile accidents since 1997. The first two accidents occurred when she was off duty and the second two accidents occurred when she was on duty.

{¶23} 2. Both of relator's on-duty accidents occurred in September 2002 and, as a result, relator sustained injuries to her neck, back, shoulder, hips, ribs and hand.

{¶24} 3. Relator filed her first application for disability retirement in May 2003. Relator's application was supported by medical documentation related solely to physical injuries which she had sustained as a result of the September 2002 accidents.

{¶25} 4. On July 24, 2003, OSHPRS's board denied relator's application.

{¶26} 5. In October 2003, relator submitted a second application for disability retirement. Relator submitted medical documentation related to both the physical injuries she had sustained, as well as certain emotional and psychological problems from which she was suffering as a direct result of the accident. Specifically, Paul J. Pagano, M.D., completed a Medical Appraisal of Job Capacity form wherein he indicated that relator could not return to work without any restrictions; however, he concluded that she could return to part-time work (up to six hours per day) as of August 11, 2003, provided that she was restricted to sitting, standing and walking for no more than two hours each. Furthermore, Dr. Pagano stated that relator could lift or carry up to ten pounds frequently, and up to 20 pounds occasionally, but that she could not lift over 20 pounds. He indicated that relator could bend, twist/turn, reach below knee, push/pull, squat/kneel occasionally and that she could stand, walk and sit frequently.

Dr. Pagano further noted that the restrictions were permanent. In a report dated August 11, 2003, Dr. Pagano stated as follows:

\* \* \* Statistically as a Workers' Compensation patient there is a low probability she will ever return to her current position. I do feel her restrictions that I gave her today are permanent.

{¶27} Relator also submitted medical evidence from Betsy A. DeChant, M.S.W., who has seen relator for her psychological conditions. In her November 2, 2003 report, Ms. DeChant diagnosed relator as suffering from post-traumatic stress disorder ("PTSD") with depressive features, and opined that it was a direct result of her September 2002 accidents.

{¶28} 6. Relator was referred to Claire V. Wolfe, M.D., for an examination. In her June 10, 2003 report, Dr. Wolfe opined as follows:

\* \* \* The cervical MRI has been normal, the upper extremity neurologic exam has been normal, and the clinical examination is quite suggestive of myofascial pain syndrome. The other thing supporting generalized myofascial pain/-fibromyalgia is the history already, at the age of 29, of multiple surgeries for various orthopedic problems, for which there are relatively mild objective abnormalities, as well as the laparoscopic surgeries for abdominal pain, the trouble sleeping, and the diagnosis of mitral valve prolapse.

With respect to the low back, I would point out that Dr. Pagano's notes themselves speak to the fact that most individuals with this mild set of abnormalities usually get better. The patient has no disc herniation. She has no neurologic deficits. She has had shoulder surgery that, by the orthopedist's own opinion, should in 95% or more of the cases completely resolve the problem.

I do not find anything at the time of this examination in this individual that would preclude eventual return to duty as a State Highway Patrol Officer on a physical basis. She should be recovered with her physical therapy to her shoulder and back by September 2003, less than 12 months from onset.

{¶29} 7. Relator was referred to Richard H. Clary, M.D., for a psychological evaluation. In his November 10, 2003 report, Dr. Clary opined that relator had an adjustment disorder with mixed features of anxiety and depression and concluded as follows:

Ms. [Grien] has some intermittent anxiety and depression related to her conflict with the highway patrol over her disability claim. She has been released to only work light duty but she said there is no permanent light duty. The last report from Dr. Pagano did not indicate that she was permanently disabled. She is going to have another evaluation by Dr. Claire Wolfe later this month to re-evaluate her back pain to determine whether she has a permanent lower back disability. I did not find evidence for PTSD.

In my medical opinion, Ms. [Grien] has mild symptoms of anxiety and depression but these are not work prohibitive and do not cause long term disability.

{¶30} 8. In November 2003, the Ohio Department of Public Safety held a hearing pursuant to Ohio Adm.Code 123:1-33-02(B), to determine whether relator should be involuntarily separated from her employment. Effective December 13, 2003, relator was involuntarily separated from her employment based upon the medical opinion of Dr. Pagano who indicated that relator was unable to perform her duties as a patrol woman, but that she could perform a sedentary job.

{¶31} 9. At its January 22, 2004 meeting, OSHPRS's board voted to disapprove relator's application for disability retirement.

{¶32} 10. Relator requested reconsideration which was denied by the board.

{¶33} 11. In February 2006, the Industrial Commission of Ohio awarded relator temporary total disability compensation retroactive to April 19, 2004, based upon the psychological condition of PTSD.

{¶34} 12. As of March 2006, relator was informed that she cannot file a new application for disability retirement as she is no longer a member of OSHPRS.

{¶35} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶36} In this mandamus action, relator essentially makes two arguments. First, relator contends that OSHPRS's board abused its discretion when it denied her second application for disability retirement. Second, relator points out that the Ohio Department of Public Safety, as her employer, has determined that she cannot return to her work as a State Highway Patrol Officer based upon her treating physician's report while OSHPRS's board has determined, ostensibly based upon the reports of Drs. Wolfe and Clary, that relator is capable of returning to her former duties. Relator contends that it is incongruous for these two entities to examine the same medical evidence and reach two entirely different conclusions.

{¶37} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶38} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶39} R.C. 5505.18 pertains to disability benefits requested from OSHPRS. R.C. 5505.18(A) provides, in pertinent part, as follows:

Upon the application of a member of the state highway patrol retirement system \* \* \*, a member who becomes totally and

permanently incapacitated for duty in the employ of the state highway patrol may be retired by the board.

The medical or psychological examination of a member who has applied for disability retirement shall be conducted by a competent health-care professional or professionals appointed by the board. The health-care professional or professionals shall file a written report with the board containing the following information:

- (1) Whether the member is totally incapacitated for duty in the employ of the patrol;
- (2) Whether the incapacity is expected to be permanent;
- (3) The cause of the member's incapacity.

The board shall determine whether the member qualifies for disability retirement and its decision shall be final. The board shall consider the written medical or psychological report, opinions, statements, and other competent evidence in making its determination. \* \* \*

{¶40} In her first argument, relator contends that the board did not consider the written medical and psychological evidence which she submitted. Relator cannot prove this argument. Upon review of the record, the magistrate notes that there was some evidence in the record, from Drs. Wolfe and Clary, indicating that relator was capable of returning to her employment both from a physical standpoint as well as a psychological standpoint. The board was not required to accept the opinion of relator's physicians that she was unable to return to her employment. As long as there is some evidence in the record supporting the board's ultimate decision, this court cannot grant relator's request for a writ of mandamus.

{¶41} Her second argument is that the Ohio Department of Public Safety, as her employer, and OSHPRS's board cannot reach two entirely different conclusions as to

her ability to work based upon a review of the exact same evidence. Relator argues that these two different findings prove an abuse of discretion.

{¶42} While the magistrate can certainly understand relator's frustration, that does not mean that she is entitled to a writ of mandamus to compel the OSHPRS's board to reach the same conclusion that the Ohio Department of Public Safety reached. These are two separate bodies who are not bound to accept the conclusions reached by the other. Furthermore, the board is likewise not required to accept the determination from the Industrial Commission of Ohio who found that relator was entitled to temporary total disability compensation based upon the psychological condition of PTSD. While the outcome certainly appears unfair, there simply is no relief in mandamus to which relator is entitled to compel the OSHPRS's board to grant her a disability retirement.

{¶43} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that OSHPRS abused its discretion in denying her disability retirement application and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

## **123:1-33-02 Application for disability leave benefits.**

(A) Filing an application. The employee, a member of the employee's family, or a representative of the employee, may file an application for disability leave benefits with the employee's appointing authority. The application shall be filed on a form designated by the director and shall be filed, completed in its entirety, with the appointing authority within twenty days of the last day the employee worked. An application is not completed in its entirety until the disabling illness, injury, or condition for which the employee is requesting disability leave benefits occurs. Where extenuating circumstances prevent an employee from filing an application for disability leave benefits within the required time frame, a written statement explaining such extenuating circumstances must be filed within a reasonable time after the twenty-day time period has expired. Appropriate extenuating circumstances shall be accepted as an extension of the time limit to file an application for disability benefits. The appointing authority shall, within five days of receipt of the application, forward the application and the recommendation of the appointing authority to the director.

Any employee who is given disability leave separation under the provisions of rule 123:1-30-02 or rule 123:1-30-03 of the Administrative Code and who is eligible to receive disability leave benefits under the provisions of Chapter 123:1-33 of the Administrative Code may apply for disability leave benefits within twenty calendar days after the date the employee is given a disability separation. The approval of a claim for disability leave benefits shall be governed by the provisions of Chapter 123:1-33 of the Administrative Code.

(B) Documentation. In addition to the application, it shall be the employee's responsibility to provide written documentation to substantiate the cause, nature, and extent of the disabling illness, injury, or condition for which the employee is requesting disability leave benefits. A medical examination report shall be required prior to the granting of disability leave benefits and the employee shall be responsible for the cost of obtaining such report. If deemed necessary, the director or designee may order a medical examination conducted by a physician. The employee may request that the physician be mutually agreed to by the state and the employee's attending physician to resolve conflicting issues. The specialty of the physician conducting the examination will be based upon the employee's diagnosed condition, but for an application for disability benefits based on a diagnosis of a mental disorder, including but not limited to, psychosis, mood disorders, and anxiety, must be confirmed by a licensed mental health provider. The cost of such examination shall be paid from the disability fund.

(C) Notification of initial disability decision by the director. The employee shall be notified in writing of the disability determination within forty-five days of receipt of the application by the director or designee and shall also be advised of the right of appeal pursuant to rule 123:1-33-04 of the Administrative Code.

If a determination can not be made within forty-five days of receipt of the application, then the director or designee shall notify the employee of the delay.

(D) Notification of requirement to file for disability retirement benefits. Employees eligible to apply for disability retirement benefits shall be notified by the director or designee in writing of the requirement to file for disability retirement benefits in order to receive continued disability leave benefits. Upon notification, employees shall submit an application to a state employees' retirement system, comply with all retirement system requirements, and submit all information required by the retirement system

for disability retirement benefits.

(E) Submission of additional information. If the employee disagrees with the determination regarding the employee's request for disability leave benefits, the employee may submit additional information to the appointing authority.

Such information must be submitted within twenty days from the date of notification of the determination or within twenty days from the ending date of approved disability benefits, whichever is later. The appointing authority shall, within five days of receipt of such additional information, forward it to the director. Where extenuating circumstances prevent an employee from providing additional information within the required time frame, a written statement explaining such extenuating circumstances must be filed within a reasonable time after the twenty-day time period has expired. Appropriate extenuating circumstances shall be accepted as an extension of the time limit to provide additional information. By exercising the right to submit additional information, the employee does not waive his or her right to appeal the determination pursuant to rule 123:1-33-04 of the Administrative Code. The appeal must still be filed within thirty days of the original notification of the denial.

(F) Address change. An employee receiving disability leave benefits shall be responsible for keeping a current address on file with the appointing authority.

Replaces: part 123:1-33-13

Effective: 10/29/2006

R.C. 119.032 review dates: 10/29/2011

Promulgated Under: 119.03

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Prior Effective Dates: 3/29/82, 1/7/83, 10/24/83, 4/5/84 (Emer.), 7/18/84 (Emer.), 9/10/84, 10/29/95, 11/10/96, 7/1/97, 6/18/00

## **5505.18 Disability retirement.**

As used in this section, "member" does not include state highway patrol cadets attending training schools pursuant to section 5503.05 of the Revised Code.

(A) Upon the application of a member of the state highway patrol retirement system, a person acting on behalf of a member, or the superintendent of the state highway patrol on behalf of a member, a member who becomes totally and permanently incapacitated for duty in the employ of the state highway patrol may be retired by the board.

The medical or psychological examination of a member who has applied for disability retirement shall be conducted by a competent health-care professional or professionals appointed by the board. The health-care professional or professionals shall file a written report with the board containing the following information:

- (1) Whether the member is totally incapacitated for duty in the employ of the patrol;
- (2) Whether the incapacity is expected to be permanent;
- (3) The cause of the member's incapacity.

The board shall determine whether the member qualifies for disability retirement and its decision shall be final. The board shall consider the written medical or psychological report, opinions, statements, and other competent evidence in making its determination. If the incapacity is a result of heart disease or any cardiovascular disease of a chronic nature, which disease or any evidence of which was not revealed by the physical examination passed by the member on entry into the patrol, the member is presumed to have incurred the disease in the line of duty as a member of the patrol, unless the contrary is shown by competent evidence.

(B)(1) Except as provided under division (A) of section 5505.58 of the Revised Code, a member whose retirement on account of disability incurred in the line of duty shall receive the applicable pension provided for in section 5505.17 of the Revised Code, except that if the member has less than twenty-five years of contributing service, the member's service credit shall be deemed to be twenty-five years for the purpose of this provision. In no case shall the member's disability pension be less than sixty-one and one-quarter per cent or exceed the lesser of seventy-nine and one-quarter per cent of the member's final average salary or the limit established by section 415 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 415, as amended.

(2) Except as provided under division (B) of section 5505.58 of the Revised Code, a member whose retirement on account of disability incurred not in the line of duty shall receive the applicable pension provided for in section 5505.17 of the Revised Code, except that if the member has less than twenty years of contributing service, the member's service credit shall be deemed to be twenty years for the purpose of this provision. In no case shall the member's disability pension exceed the lesser of seventy-nine and one-quarter per cent of the member's final average salary or the limit established by section 415 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 415, as amended.

(C) The state highway patrol retirement board shall adopt rules requiring a disability pension recipient,

as a condition of continuing to receive a disability pension, to agree in writing to obtain any medical or psychological treatment recommended by the board's health-care professional and submit medical or psychological reports regarding the treatment. If the board determines that a disability pension recipient is not obtaining the medical or psychological treatment or the board does not receive a required medical or psychological report, the disability pension shall be suspended until the treatment is obtained, the report is received by the board, or the board's health-care professional certifies that the treatment is no longer helpful or advisable. Should the recipient's failure to obtain treatment or submit a medical or psychological report continue for one year, the recipient's right to the disability benefit shall be terminated as of the effective date of the original suspension.

(D) A member placed on a disability pension who has not attained the age of sixty years shall be subject to an annual medical or psychological re-examination by health-care professionals appointed by the board, except that the board may waive the re-examination if the board's health-care professionals certify that the member's disability is ongoing. If any member placed on a disability pension refuses to submit to a medical or psychological re-examination, the member's disability pension shall be suspended until the member withdraws the refusal. If the refusal continues for one year, all the member's rights under and to the disability pension shall be terminated as of the effective date of the original suspension.

(E) Each recipient of a disability pension who has not attained the age of sixty years shall file with the board an annual statement of earnings, current medical or psychological information on the recipient's condition, and any other information required in rules adopted by the board. The board may waive the requirement that a disability benefit recipient file an annual statement of earnings or current medical or psychological information if the board's health-care professional certifies that the recipient's disability is ongoing.

The board shall annually examine the information submitted by the recipient. If a recipient refuses to file the statement or information, the disability pension shall be suspended until the statement and information are filed. If the refusal continues for one year, the right to the pension shall be terminated as of the effective date of the original suspension.

(F)(1) Except as provided in division (F)(2) of this section, a retirant who has been on disability pension, and who has been physically or psychologically examined and found no longer incapable of performing the retirant's duties, shall be restored to the rank the retirant held at the time the retirant was pensioned and all previous rights shall be restored, including the retirant's civil service status, and the disability pension shall terminate. Upon return to employment in the patrol, the retirant shall again become a contributing member of the retirement system, the total service at the time of the retirant's retirement shall be restored to the retirant's credit, and the retirant shall be given service credit for the period the retirant was in receipt of a disability pension. The provisions of division (F)(1) of this section shall be retroactive to September 5, 1941.

(2) The state highway patrol is not required to take action under division (F)(1) of this section if the retirant was dismissed or resigned in lieu of dismissal for dishonesty, misfeasance, malfeasance, or conviction of a felony.

(G) The board may adopt rules to carry out this section, including rules that specify the types of health-care professionals the board may appoint for the purpose of this section.

Effective Date: 03-24-2003; 06-15-2006