



recommending that this court deny the requested writ because PERS was not required to provide an explanation of its decision and some evidence supported it.

{¶ 3} No objections to the magistrate's decision have been filed. Nevertheless, upon review, we clarify the magistrate's consideration of relator's argument that PERS was required to find that his condition had changed before it could determine that he was no longer entitled to disability benefits. R.C. 145.362 provides for an annual examination of a disability benefit recipient and a report by the examining physician as to "whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled." If PERS concurs in the report, then payment of the benefit will terminate.

{¶ 4} Here, before the magistrate, relator contended that PERS had failed to recognize that his problems had not changed and had failed to accept his physician's findings to that effect. As the magistrate explained, however, PERS was not required to accept the conclusion of relator's physician and could rely, instead, on other medical evidence indicating that relator is no longer incapable of resuming his service. We agree with the magistrate that PERS did not abuse its discretion by doing so.

{¶ 5} Subject to this clarification, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Writ of mandamus denied.*

BRYANT and TYACK, JJ., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Paul H. Garrett,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-1020
	:	
Ohio Public Employees Retirement System	:	(REGULAR CALENDAR)
and Ohio Public Employees Retirement	:	
System Board of Trustees,	:	
	:	
Respondents.	:	

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MAGISTRATE'S DECISION

Rendered on June 28, 2012

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*Teresa Villarreal*, for relator.

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

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IN MANDAMUS

{¶ 6} Relator, Paul H. Garrett, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Public Employees Retirement System ("PERS") and Board of Trustees ("Board") to vacate its decision finding that relator was no longer disabled and ordering the Board to reinstate his disability benefits.

**Findings of Fact:**

{¶ 7} 1. Relator was employed as a traffic paint and sign worker for the city of Columbus.

{¶ 8} 2. At all times relevant to this action, relator was a member of PERS.

{¶ 9} 3. On July 21, 2009, relator completed an application for disability benefits.

{¶ 10} 4. Relator indicated he had tendonitis in his left and right feet and ankles and that he had been diagnosed with "leg gout [and] ankle [osteoarthritis]."

{¶ 11} 5. Relator listed April 13, 2009 as the date on which the medical conditions became permanently disabling.

{¶ 12} 6. Relator submitted a significant amount of medical evidence concerning his condition. Those records begin in 2004, include, but are not limited to, the following:

(a) The May 31, 2004 x-ray of relator's left foot: "No acute osseous abnormality."

(b) The June 10, 2004 MRI of relator's left ankle: "No evidence of tenosynovitis. No tears of the posterior talofibular ligaments are seen. No marrow abnormalities or fluid collections are observed."

(c) The November 10 and December 12, 2006 medical reports of Jeffrey E. Gittins, D.O. In those reports, Dr. Gittins discussed the pain relator was having with his right ankle. Dr. Gittins recommended that he continue with anti-inflammatory medication and that he follow-up with a rheumatologist. Dr. Gittins made the following assessment: "Gout inflammation of the patient's right hallux metatarsophalangeal joint with pain."

(d) Medical records from I. Brian Varney, M.D., covering the time period December 21, 2006 through December 14, 2009. These office notes are, by and large, the same; however, specific comments are made on some. In the March 13, 2007 office note, Dr. Varney indicated: "Gout flared again. Rheumatologist saw him and it showed no crystals." In the July 2, 2007 office note, Dr. Varney stated: "[Patient] states his r-knee is just not getting better." "Right foot again red and swollen, no effusion noted." In the July 5, 2007 office note, Dr. Varney indicated: "Meds don[']t seem to help." "He will need to remain off work until Monday until this process can resolve." In the April 14, 2008 office note, Dr. Varney stated:

[Patient] had pain start at work on Thursday, 4-10-08 in his LLQ area in front and back. Pt does recall feeling a pulling feeling in that area the day before at work when he was lifting equipment. Pt went to urgent care and was told it was a pulled muscle. He was [prescribed] Vicod[i]n and Cyclobenzapr 10mg 1 PO HS for muscle spasms. Pt states he hasn't taken any Vicod[i]n. Pt says the pain comes when he sits certain ways or walks for a while. He wanted to make sure it was really a pulled muscle and not something more serious. Pt states the pain is not as bad if he is still, but when he tried to work, the pain was rather severe.

In the July 28, 2008 office note, Dr. Varney noted: "Left elbow [range of motion] tender with supination and pronation. Very tender with resisted supination."

(e) The February 9, 2007 letter from Jennifer M. Richardson, M.D., diagnosing relator with "Gout," "Atypical presentation of an inflammatory arthritis" "Septic arthritis."

(f) The August 26, 2007 x-ray of relator's thumb indicating that it was normal.

(g) The July 23, 2008 x-ray of relator's left elbow indicating that there was no acute abnormality.

(h) The August 26, 2008 MRI of relator's left elbow which revealed:

[One] Findings compatible with a low grade partial tear of the distal biceps tendon at its radial insertion. There is surrounding edema as expected.

[Two] Trace left elbow joint effusion.

(i) The September 2, 2008, report of Keith A. Hollingsworth, M.D., which provided the following assessment of relator's left elbow: "Left distal biceps tendon, partial tear."

{¶ 13} 7. Relator also filed numerous additional medical records, the dates of which begin in 2009. Those records include:

(a) The April 12, 2009 report of Madhu Mehta, M.D., who opined that relator "appears to have an inflammatory arthritis \* \* \* hyperuricemia, \* \* \* [and] osteoarthritis involving the hands." Dr. Mehta also indicated that relator "will also be staying off work at least for the next 1 month."

(b) The April 15, 2009 x-ray of his right hand which was unremarkable.

(c) The April 15, 2009 x-ray of his chest which was negative for "acute cardiopulmonary process" and "sarcoidosis."

(d) The April 19, 2009 report of Dr. Mehta wherein she noted the following:

Mr. Garrett is not doing any better compared to his last visit a week ago. \* \* \* He continues to have significant fluid in his knee as well as significant pain and swelling in the left ankle. He has been off work and needs another work excuse to last him through May 9, 2009.

(e) The April 27, 2009 report of Dr. Mehta wherein she noted that relator felt slightly better than he did one week ago, that there was significant improvement in the swelling and erythema involving his left foot; however, the pain was still present. Dr. Mehta also indicated that she completed short-term disability paperwork for relator.

(f) The May 17, 2009 report of Dr. Mehta, wherein she stated:

Mr. Garrett appears to have polyarticular gout and osteoarthritis, multiple sites. I think that he is objectively improved though subjectively he denies any improvement. I also advised him to stick to one rheumatologist and it does not matter whom, either his initial rheumatologist, Dr. Richardson, or myself so we can monitor the sequence of events a bit better. \* \* \* He has been given a work excuse to last another six weeks when he comes back for a follow[-]up, that would be July 2, 2009.

(g) The June 27, 2009 report of Dr. Mehta noting that relator felt better than he did one month ago. She indicated that his feet did not hurt him as much and he wanted to go back to work; however, because he did not believe he was capable of lifting 80 pounds, relator indicated that he was going to have a discussion with his employer to see if he could return to an alternative job assignment. Dr. Mehta also recommended a functional capacity evaluation.

(h) The July 28, 2009 x-ray which revealed: "Mild multilevel degenerative disc disease."

{¶ 14} 8. In a letter dated August 10, 2009, relator was advised that PERS' medical advisor had requested an independent medical examination be performed by

Alex D. Minard, M.D. Relator was also instructed that if he had any current test results and/or x-rays that had not been previously submitted he should take them to this examination.

{¶ 15} 9. In a September 15, 2009 report, Dr. Minard noted relator's complaints, provided his physical findings upon examination, noted that he had been provided limited images or testing results, and concluded:

**IMPRESSION:** This gentleman has a history of tendinitis of the foot/ankle and tendinitis of the shoulder. He reports to me a history of severe arthritis in multiple locations, but I have been unable to find any objective evidence, particularly radiographic evidence of such. He is apparently diagnosed with gout and being treated for this.

To the Ohio Public Employees Retirement Board: On 09/19/09 I evaluated Paul Garrett in my office and the findings of this evaluation are as described above. Although this gentleman does have gout and has a tendency toward tendinitis, there is no objective evidence of any condition that would cause a disability lasting up to 12 months. He may have episodes where he would be required to miss a day or two of work, but this certainly does not disable this gentleman from his current position. I have tried to receive all of the records that I can, and as per the above, I am not finding any objective evidence of any more serious disabling conditions. If there are more documents that become available, I would be happy to review those and amend this report.

{¶ 16} 10. In a letter dated November 18, 2009, relator was informed that his disability application had been denied as there was "insufficient objective evidence of permanent disability due to Gout." The letter provided relator with notice that he had the right to file an appeal within 30 days and that he must submit additional objective medical evidence within 45 days from his written notice of intent to appeal.

{¶ 17} 11. Relator did appeal and submitted a Report of Attending Physician for Disability Applicant signed by James C. Johnson, D.O., who listed the following diagnosis: "Degenerative Disc Disease of Spine," "Osteoarthritis" and "Gout" and recommended physical therapy.

{¶ 18} 12. Relator also included the office notes of Dr. Varney from December 21, 2006 through December 14, 2009, which were already identified in findings of fact No. 6.

{¶ 19} 13. On January 13, 2010, the Board approved relator's disability as follows: "GOUT UNSPECIFIED. Approved with Continue Treatment and Annual Medical Examination Requirement 1/20/2010."

{¶ 20} 14. In a letter dated January 14, 2010, relator was informed that his disability application had been granted as follows:

The Ohio PERS medical advisor has reviewed the supplemental medical information and has recommended approval of your disability benefit application to the OPERS Board of Trustees, with the condition that you seek physical medicine and rehabilitation treatment and are re-examined in one year. The board will meet to concur with the medical advisor's recommendation and provide final approval of your application on January 20, 2010. Please accept this letter as **final notice** of the board's action regarding your disability benefit application.

Continued treatment will be reported to Ohio PERS on a quarterly basis. You will be sent a form that your physician specializing in the requested treatment will complete.

{¶ 21} 15. In a letter dated January 29, 2010, relator was notified that the effective date of his disability benefits was September 1, 2009.

{¶ 22} 16. A comprehensive psychological examination was performed by Lee Howard, Ph.D. At the outset of his April 8, 2010 report, Dr. Howard noted the following:

Disabilities Allowed: Overuse injury left ankle; tendonitis left ankle, tendonitis left foot, tendonitis right ankle[.]

Reason for Referral[:] Consideration of a Psychological Claim Allowance[.]

{¶ 23} Dr. Howard noted that relator indicated he had pain in both the right and left ankles on a level of two out of ten and, regarding psychological complaints, Dr. Howard noted:



Current psychological/psychiatric complaints are reported to be depression occurring "just about every day" averaging "8 hours a day" with an onset of "since I got terminated from work 8/09[.]"

{¶ 24} Dr. Howard performed various testing, the results of which demonstrated that relator suffered from both depression and anxiety. Dr. Howard diagnosed him as suffering from "[m]ajor depression with anxiety" and opined that he should be under the care of a psychologist not more than once per week and not less than three weeks for approximately six months.

{¶ 25} 17. Relator was also examined by Gary Alan White, Ph.D. Dr. White examined relator to determine the extent of his psychological disability and the medical necessity and appropriateness of current treatment and/or potential to return to work. In his report dated July 7, 2010, Dr. White opined that relator did suffer from major depression with anxiety and that the symptoms had caused clinically significant distress and impairment in relator's social, occupational, and other important areas of functioning.

{¶ 26} 18. In a letter dated January 3, 2011, relator was informed that an independent medical re-examination was being scheduled and that he should bring to the examination current test results and/or x-rays that had not previously been submitted.

{¶ 27} 19. An independent medical examination was conducted by Kelly Lindsay, M.D. Dr. Lindsay noted the following diagnosis: "Bilateral foot pain and multiple areas of arthritis throughout." Dr. Lindsay identified the medical records reviewed, provided physical findings upon examination, and concluded as follows:

This is a 47-year-old gentleman who has complaints of pain in both feet, both knees, both shoulders, both hands. There is no objective evidence of arthritic changes other than possible gouty arthritis in his ankles. There is no imaging studies that provide support for this arthritic changes elsewhere. Otherwise it is mostly subjective pain and tenderness. His left ankle is a little swollen at this point. He is on Allopurinol.

To Ohio Public Employees Retirement Board, on March 15, 2011 I evaluated Paul Garrett in my office and the findings of the evaluation are described above. Although this gentleman

does have a tendency towards gout I don't find any objective evidence of any condition that would cause him to be off of work for twelve months in a row. So therefore I hereby certify that because of the above described conditions the applicant is not presumed to be physically incapacitated permanent from the performance of duty and should not be entitled to disability benefit. Continued treatment would be beneficial.

{¶ 28} 20. In a letter dated April 20, 2011, relator was informed that his disability benefits were being terminated:

Based upon all the medical information and recommendations, the Ohio PERS medical advisor and the Board concluded that you are no longer considered to be permanently disabled from the performance of duty as a traffic paint & sign worker. Therefore, your disability benefit will be terminated. We will discontinue paying you disability benefits and providing you with health care coverage, effective July 31, 2011. Following the termination of your health care coverage, the OPERS health care department will inform you of available options for continuing your health care coverage.

{¶ 29} 21. Relator was also informed of his right to appeal and opportunity to submit additional medical evidence.

{¶ 30} 22. Relator appealed; however, he did not submit additional medical evidence.

{¶ 31} 23. In a letter dated August 5, 2011, relator was informed that PERS' medical advisor had requested that he submit to an additional examination:

The independent medical examiner will evaluate your condition and render an opinion as to whether or not you are permanently disabled from the duties of your most recent public employment. A disabling condition is considered permanent if it is expected to last for a continuous period of at least 12 months. This opinion is then subject to review by our medical advisor and the Ohio PERS Board of Trustees.

{¶ 32} 24. Relator was examined by Richard H. Clary, M.D. In his August 31, 2011 report, Dr. Clary noted that relator had not worked since he began receiving disability benefits and that he also had an active workers' compensation claim. Dr.

Clary diagnosed relator as suffering from depression and ultimately concluded that his psychiatric condition alone was not work prohibitive and was not a permanent disability. Specifically, Dr. Clary stated:

I reviewed extensive medical records from orthopedic surgeon, Dr. Charles Lowrey. I also reviewed medical records from Dr. Varney. I reviewed reports from Dr. Johnson, Dr. Gittins, and Dr. Mehta. I reviewed medical records from the Columbus Arthritis Center.

I reviewed the results of a thoracic spine x-ray done on 7/28/09 that showed evidence of multi-level [degenerative disc disease].

I reviewed a report from Psychologist Lee Howard dated 4/8/10. Dr. Howard diagnosed major depression with anxiety and indicated a GAF score of 75. This would indicate that the symptoms were mild.

I reviewed a report from Psychologist, Dr. White dated 7/7/10. Dr. White indicated the results of the MMPI-2 were valid, but in my medical opinion, the result of the psychological test were invalid and showed evidence of symptom exaggeration.

During my evaluation, Mr. Garrett had a tendency to exaggerate his memory problems. In my medical opinion, the exaggeration of memory problems correlates with the exaggeration of psychiatric symptoms.

In my medical opinion, his psychiatric condition alone is not work prohibitive and does not cause permanent disability. In my medical opinion, his psychiatric condition does not meet the OPERS criteria for permanent disability. In my medical opinion, his psychiatric condition does not cause any limitations or restrictions in his ability to work.

{¶ 33} 25. In a letter dated October 19, 2011, relator was advised that the Board had reviewed his disability benefit file and recent reports and had concluded that relator was no longer considered to be permanently disabled from the performance of his job.

{¶ 34} 26. Thereafter, relator filed the instant mandamus action in this court.

**Conclusions of Law:**

{¶ 35} In this mandamus action, relator argues that PERS failed to: (1) cite some evidence to support its decision to deny relator disability benefits, and (2) explain the basis of its decision to deny relator continued disability benefits.

{¶ 36} Because PERS is neither required to explain the basis of its decision or cite to the evidence upon which it relies, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 37} 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 disability benefits, mandamus is an appropriate remedy. *Id.*

{¶ 38} 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.*, 82 Ohio St.3d 235 (1998). An abuse of discretion connotes a board decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 220 (1983). 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.

{¶ 39} 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.

{¶ 40} 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.

{¶ 41} In support of his argument, relator references a decision from this court released in 1999. In *State ex rel. Green v. Pub. Emps. Retirement Sys.*, 10th Dist. No. 98AP-567 (June 22, 1999), this court concluded that PERS should be required to identify the evidence upon which it relied and provide an explanation for its decision to deny disability benefits to an applicant. The rationale in that case relied, in part, on former Ohio Adm.Code Section 145-11-02. However, that code provision was later repealed. In re-addressing the issue, in a subsequent case, this court stated:

\* \* \* In *Green*, this court, citing former Ohio Adm.Code 145-11-02, as well as *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245, and *State ex rel. Montague v. Police & Firemen's Disability & Pension Fund* (1992), 78 Ohio App.3d 661, 605 N.E.2d 1009, determined that PERS must specify the basis of its decision in any denial of disability benefits. Pursuant to *Noll*, the Industrial Commission of Ohio is required to set forth the evidence relied upon and provide an explanation for its denial of an application for benefits. In *Montague*, this court applied the rationale underlying *Noll* to decisions of the board of trustees of the Police and Firemen's Disability and Pension Fund. **Former Ohio Adm.Code 145-11-02 provided that the PERS board's denial of a disability benefit shall state its basis of denial and was repealed on January 1, 2003. See 2002-2003 Ohio Monthly Record 1304. The new version of the rule, now codified at Ohio Adm.Code 145-2-23, does not require the PERS board to state the basis for its denial of an application of a disability benefit.**

(*State ex rel. Tindira v. Ohio Police & Fire Pension Fund*, 10th Dist. No. 09AP-1049, 2010-Ohio-5078, ¶ 50. (Emphasis sic.)

{¶ 42} Relator's argument must be rejected because it does not follow the law. PERS is neither required to cite the evidence upon which it relies, nor to provide an explanation when it denies disability benefits to an applicant. Instead, upon review in mandamus, as long as there is "some evidence" in the record which supports PERS'

decision, the decision will not be disturbed. In *State ex rel. Cydrus v. Ohio Pub. Emps. Retirement Sys.*, 10th District No. 09AP-595, 2010-Ohio-1143, ¶ 7-10, this court explained:

Relator's second and third objections contend (1) the magistrate erred in concluding PERS is not required to explain its decision to terminate relator's benefits, and (2) the board violated relator's due process rights in failing to explain why it terminated her benefits.

In *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 767 N.E.2d 719, 2002-Ohio-2219, 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. While this court in *State ex rel. Green v. Pub. Emp. Retirement Sys.* (June 22, 1999), 10th Dist. No. 98AP-567, 1999 WL 410240, decided, based on an administrative provision, that the board should at least state the basis for its decision, the administrative rule since has been changed to eliminate the provision on which *Green* was based. *Hamby v. Ohio Pub. Emp. Retirement Sys.*, 10th Dist. No. 08AP-298, 2008-Ohio-5068. Since no statutory provision requires the board to explain its decision, the magistrate properly concluded that the board was not required to do so. See also *State ex rel. VanCleave v. School Emps. Retirement Sys.*, 120 Ohio St.3d 261, 898 N.E. 2d 33, 2008-Ohio-5377. In light of *Pipoly* and *VanCleave*, the holding in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245, applied to workers' compensation orders and relied on by relator, does not support relator's request for mandamus relief to require the board to explain its decision.

The *VanCleave* court also addressed, in the context of the School Employees Retirement System, relator's due process argument and concluded the statutory process provided adequate due process even though it lacked any requirement that the board explain its decision. *Id.* (stating the court rejected the "claim that due process required that SERS supports denial of her application for disability-retirement benefits by specifically identifying the evidence it relied upon and explaining the reasons for its decision"). Similarly, relator here received adequate due process even though the board did not cite the evidence it relied on or explain its decision.

{¶ 43} Relator's second and third objections are overruled.

{¶ 44} Relator also argues that PERS was required to find that his condition had changed before it could determine that he was no longer entitled to disability benefits. However, just as there is no requirement in the law for PERS to cite the evidence upon which it relies or to explain the reason for its decision, there is no requirement in the law that PERS must find that relator's condition had changed before deciding to terminate disability benefits. Relator had the burden of providing evidence of his continued disability. PERS referred relator for independent medical examinations. Both Drs. Lindsay and Clary opined that relator's conditions did not render him unable to perform his job duties for the next 12 months. Relator has not argued that there is some defect in either of these reports and, inasmuch as the reports consider all the conditions relator alleged caused his disability, these reports do constitute some evidence supporting PERS' decision. And, finally, relator's argument that his attending physicians' opinions should be found more persuasive has been rejected. *See Cydrus*.

{¶ 45} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the Board abused its discretion when it terminated his 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).