

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Andrew M. Kolcinko, :
Relator, :
v. : No. 10AP-269
Ohio Police and Fire Pension Fund, : (REGULAR CALENDAR)
Respondent. :

D E C I S I O N

Rendered on April 7, 2011

Marc G. Doumbas, for relator.

Michael DeWine, Attorney General, and *Theodore L. Klecker*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶1} Relator, Andrew M. Kolcinko, filed this original action requesting a writ of mandamus ordering respondent, Ohio Police and Fire Pension Fund, to vacate its order denying relator's application for disability retirement benefits and ordering respondent to grant relator's application.

{¶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 timely filed objections to the magistrate's decision. Respondent filed a memorandum in opposition to relator's objections. Under 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."

{¶4} Relator raises the following two objections:

[1.] RELATOR OBJECTS TO THE MAGISTRATE'S DECISION DUE TO THE FACT THAT DR. SMARTY FAILED TO ARTICULATE WHAT CONSTITUTED A MORE AGGRESSIVE COURSE OF TREATMENT.

[2.] RELATOR OBJECTS TO THE MAGISTRATE'S DECISION DUE TO THE FACT THAT DR. SMARTY'S PROGNOSIS OPINION NOTES THAT RELATOR'S RETIREMENT AND PERSISTENT HEADACHES ARE PLAYING A ROLE IN THE WORSENING OF HIS PSYCHIATRIC CONDITIONS.

{¶5} A relator seeking a writ of mandamus must establish: "'(1) a clear legal right to the relief prayed for, (2) a clear legal duty upon respondent to perform the act requested, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.'" *Kinsey v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, 225, quoting *State ex rel. Consolidated Rail Corp. v. Gorman* (1982), 70 Ohio St.2d 274, 275. In a disability application proceeding, "[a] clear legal right exists where the board abuses its discretion by entering an order which is not supported by 'some evidence.'" *Id.*

{¶6} Respondent's rules, set forth in Ohio Adm.Code 742-3-05, provide that respondent "shall assign a competent and disinterested physician and expert in vocational evaluations to conduct medical examinations for purposes of determining a member's disability, as provided by law, medical impairment and eligibility for disability retirement benefits." Ohio Adm.Code 742-3-05(B)(1). Respondent appointed Dr. Sylvester Smarty to conduct an evaluation of relator. Dr. Smarty's report reflects his assessment that relator was temporarily incapacitated and that recovery could be reasonably expected within a year. Dr. Smarty further indicated his belief that relator would benefit from a more aggressive approach to treatment.

{¶7} In his first objection to the magistrate's decision, relator effectively argues that the magistrate erred in finding that Dr. Smarty's report constituted "some evidence" upon which respondent could rely in denying relator's application because Dr. Smarty failed to articulate the "more aggressive approach to treatment" that would improve relator's condition.

{¶8} Under its rules, respondent must assign a disinterested physician to conduct a "medical examination" of the applicant. Neither Chapter 742 of the Revised Code nor Ohio Adm.Code 742-3-05 provides a separate definition of "examination." The rules of statutory construction provide that, absent a technical or particular meaning, words and phrases shall be construed according to the rules of grammar and common usage. R.C. 1.42. Webster's Dictionary defines "examine" as "to inspect or test for evidence of disease or abnormality." Webster's Third New International Dictionary (G. & C. Merriam Co. 1966). Thus, an examination generally encompasses only an inspection or evaluation of a subject.

{¶9} Adopting relator's position would have the effect of requiring the physician appointed by respondent to articulate a specific course of treatment if he or she believed that the applicant's condition could be improved. This goes well beyond the common understanding of a medical examination, which is required under the statute and rules. We decline to expand the statute or rules to impose such an obligation. Dr. Smarty's role was to examine relator and evaluate his condition. Although Dr. Smarty's report expresses a belief that relator would improve with "more aggressive" treatment, the absence of a detailed treatment plan in Dr. Smarty's examination report does not prevent it from being some evidence upon which respondent could rely in denying relator's application. Accordingly, we overrule relator's first objection to the magistrate's decision.

{¶10} Relator argues in his second objection that the magistrate erred in finding that Dr. Smarty's report constituted "some evidence" upon which respondent could rely in denying relator's application because he stated that relator's psychiatric conditions were worsened by persistent headaches and because other examining physicians found that relator was disabled due to those headaches. In effect, relator argues that Dr. Smarty's conclusion that relator was not permanently disabled must be rejected because other physicians found that relator was permanently disabled. Under a "some evidence" review, "the presence of contrary evidence is immaterial, so long as the 'some evidence' standard has been met." *State ex rel. Am. Standard, Inc. v. Boehler*, 99 Ohio St.3d 39, 2003-Ohio-2457, ¶29. Thus, another physician's assessment that relator is disabled due to persistent headaches does not eliminate Dr. Smarty's report as some evidence in support of respondent's determination.

{¶11} "The 'some evidence' standard reflects the established principle that the [administrative body] is in the best position to determine the weight and credibility of the evidence and disputed facts." *State ex rel. Woolum v. Indus. Comm.*, 10th Dist. No. 02AP-780, 2003-Ohio-3336, ¶4, citing *State ex rel. Pavis v. Gen. Motors Corp., B.O.C. Group* (1992), 65 Ohio St.3d 30, 33. Even where there is evidence tending to demonstrate that an applicant is disabled, we are limited to determining whether there is some evidence supporting the denial of an application. As the magistrate's decision notes, Dr. Smarty's report constitutes some evidence supporting respondent's decision, and, accordingly, we overrule relator's second objection to the magistrate's decision.

{¶12} After an examination of the magistrate's decision and an independent review of the record and relevant law, we conclude that the magistrate has properly determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt it as our own, including the findings of fact and conclusions of law set forth therein. We deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

BROWN and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Andrew M. Kolcinko,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-269
	:	
Ohio Police and Fire Pension Fund,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on November 30, 2010

Marc G. Doumbas, for relator.

Richard Cordray, Attorney General, and *Theodore L. Klecker*, for respondent.

IN MANDAMUS

{¶13} Relator, Andrew M. Kolcinko, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Police and Fire Pension Fund, to vacate its order which denied relator's application for disability retirement and ordering respondent to grant his application.

Findings of Fact:

{¶14} 1. Prior to applying for disability benefits, relator was a police officer for the city of Solon.

{¶15} 2. In January 2008, relator completed and filed his application for disability benefits with respondent. Relator filed supporting medical records and reports from the following physicians: Drs. Topalsky, Kaffen, Harris and McCafferty.

{¶16} 3. Dr. George Topalsky's medical evaluation is dated July 3, 2007. Dr. Topalsky provided the following diagnoses: migraines, uncontrolled hypertension, right knee pain, bilateral shoulder pain, and anxiety. Dr. Topalsky opined that relator's conditions were not likely to improve with surgical intervention or active medical treatment and that his degree of impairment was not likely to change substantially within the next year. Dr. Topalsky also opined that relator's conditions affected his ability to perform his job, assessed a 95 percent whole person impairment and concluded that relator had a condition of disability from which there was no present indication of recovery.

{¶17} 4. Dr. Sheldon Kaffen completed a medical evaluation dated November 28, 2007. Dr. Kaffen noted the following diagnoses: impingement syndrome of the left shoulder; medial epicondylitis right elbow; impingement syndrome right shoulder; torn labrum right shoulder; chronic myofascial pain syndrome cervical; and chronic myofascial pain syndrome lumbar. Dr. Kaffen opined that relator was suffering from a condition of disability from which there was no present indication of recovery. Dr. Kaffen concluded that relator was permanently and totally disabled from his employment as a police officer.

{¶18} 5. Dr. Allan H. Harris completed a medical evaluation dated December 20, 2007. Dr. Harris diagnosed hypertensive cardiovascular disease and cluster headaches.

Dr. Harris assessed a 43 percent whole person impairment and opined that there was no present indication of recovery.

{¶19} 6. Dr. Francis L. McCafferty evaluated relator for his psychological conditions. Dr. McCafferty diagnosed relator with the following: post-traumatic stress disorder, chronic; major depressive disorder, single episode, severe, no psychotic; panic disorder with agoraphobia. According to Dr. McCafferty, these diagnoses were directly caused by the stress of relator's work as a police officer. Dr. McCafferty included his November 27, 2007 report with his evaluation. Dr. McCafferty conducted various psychological testing as part of his evaluation. Dr. McCafferty did note that relator presented with an unusual number of psychological symptoms which caused Dr. McCafferty to consider that relator was exaggerating his present situation and problems.

{¶20} 7. Although relator's application for disability retirement also cites injuries to his left eye, right knee, right elbow, lower back, and left shoulder, he is only challenging respondent's decision as it relates to his allowed psychological impairment.

{¶21} 8. After relator submitted his disability application, respondent assigned various physicians and a vocational expert to conduct examinations for the purpose of determining relator's disability, medical impairment, and eligibility for disability benefits.

{¶22} 9. Dr. Sylvester Smarty evaluated relator on February 27, 2008. Dr. Smarty identified the medical records which he reviewed and took a history from relator. With regard to the mental status examination, Dr. Smarty noted the following:

* * * Mr. Kolcinko's immediate memory was good, demonstrated by his ability to repeat 3/3 objects after I asked him to repeat them after me. However, attempts to evaluate his recent memory were not successful, as he repeatedly attempted to feign cognitive problems. When I asked him to

recall 3/3 objects, he said he could not. When I asked what he ate the previous night, he told me he could not remember. He was able to serially subtract 7 from 100 until I asked him to stop. This demonstrates that he had adequate attention and concentration during the time of the interview. Mr. Kolcinko's fund of knowledge could not be properly assessed because he repeatedly told me that he did not know whatever I asked him questions. He indicated that he did not know who the President of the United States was, nor did he know the governor of Ohio or the Mayor of Solon.

* * *

{¶23} Dr. Smarty diagnosed relator as having major depressive disorder, chronic, moderate, without psychotic features and anxiety disorder, not otherwise specified. Dr. Smarty noted that relator's depressive symptoms appeared to have worsened over the past year as a result of work-related stress and the cluster and migraine headaches which he had been experiencing. Dr. Smarty also noted that relator was experiencing trauma-related anxiety symptoms; however, Dr. Smarty rejected the diagnosis of post traumatic stress disorder ("PTSD") because relator did not endorse the required number of symptoms in all categories. Further, Dr. Smarty noted that relator had been able to function well at his job for several years, in spite of his trauma-related anxiety symptoms. Dr. Smarty did note the following evidence which suggested to him that relator's symptoms were exaggerated:

[One] Dr. McCafferty's psychological testing suggests that Mr. Kolcinko's symptoms are exaggerated.

[Two] Mr. Kolcinko presented a picture of severe cognitive impairment to me during my interview. He would not answer any questions that tested his memory. On the other hand, he had perfect memory for any event that supported his disability claim. Moreover, in Dr. McCafferty's report, there was no indication that he had any significant cognitive impairment.

{¶24} Dr. Smarty opined further that if relator's self-report was taken at face value, he was presently disabled from the performance of his duties as a police officer and his psychiatric disability was directly caused by his employment as a police officer. Ultimately, Dr. Smarty assessed a 15 percent whole person impairment and opined that relator's current prognosis was fair, but that his "prognosis would definitely be improved by a more aggressive approach to his treatment." Dr. Smarty concluded that relator's disability was temporary and that recovery was reasonably expected within one year.

{¶25} 10. A vocational evaluation was prepared by Mark A. Anderson. In his evaluation, dated May 7, 2008, Mr. Anderson determined that relator had several transferable skills which would permit him to find other employment if he was disabled from work as a police officer.

{¶26} 11. Once all the medical and vocational reports were provided, relator's application was assigned to John W. Cunningham, M.D., and to vocational consultant Michael Klein, Ph.D., for review.

{¶27} 12. In his June 5, 2008 report, Dr. Cunningham discussed the medical evidence which he reviewed, stating, in pertinent part:

* * * [B]ecause of the "temporary" impairment opined by Dr. Smarty with no impairments in the "poor" adjustment categories; seven in the "fair" category; seven impairments in the "good"; and four impairments in the "very good" category, with a [Global Assessment of Function] of 65, in my medical opinion, this individual has a 0% whole person permanent and partial impairment in regards to his psychiatric/emotional difficulties. Consequently, this individual has a combined whole person permanent and partial impairment in regards to all aspects of these conditions of 34%. * * *

{¶28} 13. In his vocational report, Dr. Klein opined that relator would be limited to work through the light level of exertion and that his earning capacity loss would be moderate.

{¶29} 14. The disability evaluation panel recommended that relator not be granted disability retirement. The disability committee agreed and denied relator's initial disability application on June 23, 2008.

{¶30} 15. On September 5, 2008, relator filed an appeal.

{¶31} 16. Pursuant to Ohio Adm.Code 4123-3-05(E)(2), relator had 90 days within which to submit additional evidence in support of his appeal. In a letter dated February 23, 2009, relator sought a 90-day extension of time within which to provide additional medical evidence in support of his appeal.

{¶32} 17. Relator submitted the March 13, 2009 report of Eddie E. Myers, Ed.D. Dr. Myers described relator as an individual in extreme distress whose defenses have completely collapsed, indicated that relator tends to exacerbate the problems he faces and feels powerless to resolve them successfully. Dr. Myers described relator as depressed, overly sensitive to criticism, having a strong underlying hostility and a history of interpersonal difficulties and rejections. Dr. Myers diagnosed relator with major depression with paranoid features and concluded as follows:

Sgt. Kolcinko has not been employed by the Solon Police Department since March of 2007, which has intensified both his depression and overall instability. The psychological damage has been extensive and will likely remain, keeping him from ever being able to return to his former calling and occupation. There has been no abatement of symptoms since his separation from employment.

* * *

In my opinion, Solon Police Sergeant Andrew Kolcinko has psychologically become totally and permanently disabled from functioning as a police officer or in any occupation that by reasons of training or experience he might be otherwise qualified. He is not fit for duty and potentially of danger to himself and others.

{¶33} 18. Relator also submitted the March 16, 2009 report of Dr. A. Romeo Craciun, who opined that relator's cluster headaches and migraines rendered him unable to perform his duties as a police officer.

{¶34} 19. Respondent scheduled additional medical evaluations. Dr. W. Kent Soderstrum opined that relator was primarily disabled due to his chronic intractable migraine headaches, bilateral shoulders, right knee and low back and he opined further that the conditions appeared to be permanent.

{¶35} 20. Drs. Phillip Resnick and Edward Poa performed a psychiatric evaluation of relator. In their August 14, 2009 report, Drs. Resnick and Poa identified the medical evidence reviewed and the history taken from relator. Thereafter, Drs. Resnick and Poa concluded that the symptoms of relator's PTSD had resolved within two years of the incident which triggered it, and that he did suffer from major depressive disorder, single episode, and panic disorder without agoraphobia. Drs. Resnick and Poa opined that relator's prognosis was poor, that his psychological conditions resulted in part as a result of his duties as a police officer, and further opined that relator was permanently and totally disabled.

{¶36} 21. Dr. Robert A. Mosley prepared an additional vocational evaluation. Dr. Mosley determined that relator would be able to perform the duties of certain unskilled occupations, but acknowledged that he would experience a significant wage loss.

{¶37} 22. The additional medical evidence was submitted to the board's medical advisor, Manuel Tzagournis, M.D. Following the hearing and after reviewing all the medical records on file, Dr. Tzagournis concluded that relator had a 38 percent whole person impairment but was not permanently incapacitated from the performance of his duties as a police officer. Dr. Tzagournis specifically noted that he found the reports of Drs. Poa, Smarty, and Sanford, to be quite helpful.

{¶38} 23. Following the appeal hearing, vocational consultant Bruce S. Growick, Ph.D., opined that relator would suffer a mild vocational loss.

{¶39} 24. Ultimately, the board decided to deny relator's application for disability benefits.

{¶40} 25. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶41} In this mandamus action, relator argues that Dr. Myers' March 13, 2009 report clearly repudiates Dr. Smarty's February 27, 2008 opinion that relator's psychological disability was temporary and would resolve itself in one year. Because the psychiatric condition continued to exist more than one year after Dr. Smarty examined relator and issued his report, relator argues that he has demonstrated that respondent abused its discretion and asks this court to grant his disability application.

{¶42} The magistrate concludes that relator has not demonstrated that respondent abused its discretion when it denied his disability application.

{¶43} Because the final board decision is not appealable, mandamus is available to correct an abuse of discretion by the board in denying disability retirement benefits. See, generally, *State ex rel. Lecklider v. School Emp. Retirement Sys.*, 104 Ohio St.3d

271, 2004-Ohio-6586, see also *State ex rel. Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio* (1990), 49 Ohio St.3d 224, and *State ex rel. Chime v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio* (1993), 68 Ohio St.3d 17. An abuse of discretion occurs when a decision is unreasonable, arbitrary or unconscionable. *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 112 Ohio St.3d 116, 2006-Ohio-6513.

{¶44} In the present case, relator does not argue that respondent failed to follow its procedures. Relator filed his application for disability retirement and submitted supporting medical documentation. Respondent referred relator to four medical examinations and a vocational evaluation as provided in Ohio Adm.Code 742-3-05(C)(5). One of those physicians was Dr. Smarty whose report relator challenges here. Dr. Smarty concluded that relator was temporarily incapacitated from the performance of his duties as a police officer and on the report of medical evaluation form provided by respondent, Dr. Smarty indicated that "[r]ecovery may reasonably be expected in a period of 1 YEAR."

{¶45} Dr. Smarty discussed Dr. McCafferty's report which relator had submitted in support of his application. Specifically, Dr. Smarty noted the following:

Dr. McCafferty administered some psychological tests to Mr. Kolcinko. He reported that the validity of Mr. Kolcinko's MMPI-2 indicated that there was some exaggeration in the problems presented by Mr. Kolcinko. He noted that Mr. Kolcinko reported "an unusual number of psychological symptoms." The MMPI-2 Law Enforcement Interpretative Report also suggested that Mr. Kolcinko had an unusual number of psychological symptoms. According to Dr. McCafferty, Mr. Kolcinko's Personality Assessment Inventory also showed marked significant elevations across several scales, indicating a broad range of clinical features and

increasing the possibility of multiple diagnoses. Dr. McCafferty wrote, "Given certain response tendencies previously noted, it is possible that the clinical scales may overrepresent or exaggerate the actual degree of psychopathology."

{¶46} Dr. Smarty noted further that Dr. McCafferty diagnosed relator as suffering from "Posttraumatic Stress Disorder, Chronic; Major Depressive Disorder, Single Episode, Severe, Nonpsychotic; and Panic Disorder, With Agoraphobia." In discussing Dr. McCafferty's diagnoses, Dr. Smarty specifically rejected the diagnosis of PTSD because relator did not endorse the required number of symptoms in all categories and was able to function well at his work for several years, despite his trauma-related anxiety symptoms, without any evidence that there was any significant impairment in his functioning as a result of these symptoms. Further, while Dr. Smarty opined that relator's prognosis was only fair, Dr. Smarty opined that relator's "prognosis would definitely be improved by a more aggressive approach to his treatment." Dr. Smarty assessed a 15 percent whole person impairment and noted that relator has a Global Assessment of Function ("GAF") score of 65.

{¶47} With his report, Dr. Smarty completed a form providing his opinion regarding relator's functional capacity. Dr. Smarty indicated as follows with regard to relator's ability to adjust to a job:

	VERY GOOD	GOOD	FAIR	* * *
Follow the work rules.	* * *	(✓)	()	* * *
Relate to co-workers.	* * *	(✓)	()	* * *
Deal with the public.	* * *	()	(✓)	* * *
Use judgment.	* * *	(✓)	()	* * *
Maintain regular attendance.	* * *	(✓)	()	* * *
Interact with supervisor(s).	* * *	()	(✓)	* * *

Deal with work stresses.	* * *	()	(✓)	* * *
Function independently.	* * *	(✓)	()	* * *
Maintain attention/concentration.	* * *	(✓)	()	* * *
Perform at a consistent pace.	* * *	()	(✓)	* * *
Understand and carry out complex job instructions.	* * *	()	(✓)	* * *
Understand and carry out detailed but not complex, job instructions.	* * *	(✓)	()	* * *
Understand and carry out simple job instructions.	(✓)	()	()	* * *

{¶48} With regard to relator's ability to adjust personally and socially, Dr. Smarty indicated:

Maintain personal appearance.	(✓)	()	()	* * *
Behave in an emotionally stable manner.	()	()	(✓)	* * *
Relate predictably in social situations.	()	()	(✓)	* * *
Demonstrate reliability.	(✓)	()	()	* * *

{¶49} According to the chart, the above terms have the following meanings:

Very Good- Ability to function in this area is more than satisfactory.

Good- Ability to function in this area is limited but satisfactory.

Fair- Ability to function in this area is seriously limited, but not precluded.

{¶50} After respondent denied relator's initial application for disability retirement in June 2008, relator filed a notice of appeal in September 2008. Relator sought a 90-day extension of time within which to file additional medical evidence. Thereafter, 13 months

after Dr. Smarty's report, relator filed the March 13, 2009 report of Dr. Myers, which relator specifically asserts invalidates Dr. Smarty's February 2008 opinion. Dr. Myers diagnosed relator as suffering from major depression with paranoid features, assessed a GAF score of 51 and opined that, from a psychological standpoint, relator was totally and permanently disabled from functioning as a police officer. Relator adds that respondent's own medical evaluation, conducted after Dr. Smarty's report, supports his argument.

{¶51} Respondent scheduled relator for additional examinations. Specifically, relator was examined by Drs. Resnick and Poa. Similar to the functional capacity evaluation portion of the report of Dr. Smarty, Drs. Resnick and Poa noted the following with regards to relator's ability to adjust to a job:

	VERY GOOD	GOOD	FAIR	* * *
Follow the work rules.	()	(✓)	()	* * *
Relate to co-workers.	()	(✓)	()	* * *
Deal with the public.	()	(✓)	()	* * *
Use judgment.	(✓)	()	()	* * *
Maintain regular attendance.	(✓)	()	()	* * *
Interact with supervisor(s).	()	(✓)	()	* * *
Deal with work stresses.	()	()	(✓)	* * *
Function independently.	()	(✓)	()	* * *
Maintain attention/concentration.	()	()	(✓)	* * *
Perform at a consistent pace.	()	(✓)	()	* * *
Understand and carry out complex job instructions.	()	()	(✓)	* * *
Understand and carry out detailed but not complex, job instructions.	()	(✓)	()	* * *
Understand and carry out simple job instructions.	(✓)	()	()	* * *

{¶52} Drs. Resnick and Poa also noted the following with regard to relator's ability to adjust personally and socially:

Maintain personal appearance.	(✓)	()	()	* * *
Behave in an emotionally stable manner.	()	(✓)	()	* * *
Relate predictably in social situations.	()	(✓)	()	* * *
Demonstrate reliability.	()	()	(✓)	* * *

{¶53} Further, Drs. Resnick and Poa also assessed a GAF score of 65, just as Dr. Smarty had done. In the attached report, Drs. Resnick and Poa indicated that relator previously met the criteria for PTSD; however, they determined that his symptoms had resolved within two years of that incident. They diagnosed relator as having major depressive disorder, single episode, moderate and panic disorder without agoraphobia. Thereafter, when offering an opinion on relator's current abilities to work, Drs. Resnick and Poa indicated that relator's PTSD symptoms would be likely to be exacerbated if he returned to work as a police officer and they assessed a 12 percent whole person impairment related to the psychiatric symptoms caused by PTSD, major depressive disorder, and panic disorder and opined that relator was permanently disabled.

{¶54} After all the medical evidence was received, the information was reviewed by Drs. Tzagournis and Growick in advance of relator's appeal hearing. In his medical recommendation for appeal hearings, Dr. Tzagournis initially noted that he did not find any of relator's conditions to be disabling; however, Dr. Tzagournis indicated that because the evidence indicates that relator's conditions might be exaggerated at times, he wanted to hear further evidence and ask some questions at the time of the hearing.

Dr. Tzagournis opined that relator had a 38 percent whole person impairment, noted that relator had functioned well, could probably continue to work, and that Dr. Smarty believed that the psychiatric symptoms were temporary.

{¶55} After the hearing, Dr. Tzagournis did not change his opinion and Dr. Growick indicated that relator had a mild impairment to his earning capacity.

{¶56} In order to succeed here, relator must demonstrate that respondent's decision constitutes an abuse of discretion and was not based on some evidence. In making this argument, relator asserts that the medical evidence he submitted in support of his appeal directly contradicts and completely invalidates Dr. Smarty's opinion that his condition was temporary. As stated previously, because he submitted medical evidence that he remained disabled from an evaluation which occurred more than one year following Dr. Smarty's report, and other evidence supported his appeal, relator asserts that Dr. Smarty's medical report no longer constitutes some evidence.

{¶57} Respondent argues that Dr. Smarty's report continues to constitute "some evidence" upon which respondent could properly rely. Specifically, respondent points out that Dr. Smarty specifically indicated that relator's "prognosis would definitely be improved by a more aggressive approach to his treatment." Relator has not presented any evidence concerning his treatment regimen. As such, it is impossible for this court to determine whether or not relator's physicians took a more aggressive approach to his treatment. Reading that statement in combination with Dr. Smarty's opinion that relator's disability was temporary, the magistrate finds that it was not unreasonable for respondent to conclude that Dr. Smarty opined relator's condition would likely resolve within one year *if* relator took a more aggressive approach to his treatment. In any event, although Drs.

Resnick and Poa opined that relator's psychological condition was disabling and, in their opinion, permanent, their report was overall more favorable than Dr. Smarty's report. Their findings were very similar to Dr. Smarty's findings; however, their ultimate conclusion differed. Neither Dr. Myers' report nor the reports of Drs. Resnick and Poa invalidate Dr. Smarty's opinion that a more aggressive course of treatment would likely serve to resolve his condition. Relator has not demonstrated that respondent's decision is unreasonable, arbitrary or unconscionable.

{¶58} Because Dr. Smarty's report continued to constitute some evidence upon which respondent could rely, and because respondent was permitted to accept the findings of Drs. Resnick and Poa and reject their ultimate conclusions, relator has not demonstrated that respondent abused its discretion in denying relator's application for disability retirement. As such, it is this magistrate's decision that 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).