

[Cite as *State ex rel. Kelly v. Teachers Retirement Sys. of Ohio*, 2012-Ohio-4613.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robyn Kelly,	:	
Relator,	:	
v.	:	No. 11AP-527
State Teachers Retirement	:	(REGULAR CALENDAR)
System of Ohio,	:	
Respondent.	:	
	:	

D E C I S I O N

Rendered on October 4, 2012

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

Michael DeWine, Attorney General, and Allan K. Showalter, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Robyn Kelly ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, State Teachers Retirement System of Ohio ("STRS"), to vacate its decision terminating her disability benefit pursuant to R.C. 3307.64 and to enter a decision reinstating that benefit.

{¶ 2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a

decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny relator's request for a writ of mandamus.

{¶ 3} No objections have been filed concerning the magistrate's findings of fact, and we adopt them as our own. As detailed in the magistrate's decision, relator filed a disability benefit application in December 2008, and STRS granted the application, effective April 2009. The STRS board ("board") terminated the benefit in January 2011; the board affirmed that termination in May 2011.

{¶ 4} Before the magistrate, relator argued the following (as interpreted by the magistrate): (1) STRS abused its discretion by failing to have the STRS examining physicians review the additional evidence relator submitted in April 2011, in support of her appeal from the board's January 2011 decision; and (2) the STRS examining physicians did not have sufficient knowledge of relator's employment duties such that they could render competent opinions on her capacity to return to work. The magistrate rejected those arguments and recommended that we deny the requested writ.

{¶ 5} In her objections to the magistrate's conclusions of law, relator raises the same two issues, as follows:

OBJECTION NO. 1: The Magistrate erred in finding that the Respondent did not abuse its discretion by failing to have the STRS examining physicians (i.e., Drs. Mease and Mabee) review the additional evidence Relator submitted on April 13, 2011, in support of her appeal of the January 13, 2011 decision to terminate her disability benefits.

OBJECTION NO. 2: The Magistrate erred in determining that STRS examining physicians (i.e., Mease and Mabee) had sufficient knowledge of the duties of Relator's employment with the New London Schools such that they could render competent opinions as to Relator's capacity for return to work.

{¶ 6} As to the first objection, we begin, as did the magistrate, with Ohio Adm.Code 3307:1-7-05(B)(5)(c), which states that the purpose of the appeal hearing is to allow a recipient to present information "based on additional objective and pertinent medical evidence not previously considered by the independent medical examiner or the medical review board." Upon review of the record and the information provided by the

recipient, the board may direct further examination or testing and may return a record to the medical review board. Ohio Adm.Code 3307:1-7-05(B)(5)(e). Once the board is satisfied that the record is complete, and it concludes its deliberations, the board may affirm, disaffirm or modify the prior decision. Ohio Adm.Code 3307:1-7-05(B)(5)(f).

{¶ 7} As the magistrate concluded, there is nothing in the administrative rules indicating that the independent medical examiners who submitted reports prior to the January 2011 decision were required to review the additional evidence submitted by relator in support of her appeal from that decision. As contemplated by the rules, relator submitted additional information; it was thoroughly reviewed and considered, along with all other evidence in the record, before the board reached its decision. Under these circumstances, we agree with the magistrate's conclusion that relator has not shown a clear legal right to the additional review she requests. Therefore, we overrule her first objection.

{¶ 8} In her second objection, relator contends that the magistrate erred by determining that the examining physicians had sufficient knowledge of her job duties. In reaching his decision, the magistrate relied on opinions involving medical reports submitted to the Industrial Commission of Ohio. While these opinions may be helpful to our review here, we clarify that they do not bind us in this context. *See State ex rel. Stiles v. School Emps. Retirement Sys.*, 102 Ohio St.3d 156, 2004-Ohio-2140, ¶ 18 (stating that, "unlike the Industrial Commission's duty in determining permanent total disability, or the Social Security Administration's duty in determining Social Security disability, the duty of [the State Teachers Retirement System] in determining disability retirement is more limited"). Instead, we turn to statutes and opinions relating to the powers and responsibilities of STRS and similar bodies in making disability determinations.

{¶ 9} R.C. 3307.64 requires STRS to require a disability benefit recipient to submit to an annual medical examination by a physician selected by the board. Following the examination, that physician must "report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled." R.C. 3307.64.

While relator questions the qualification of a physician—who may have an imperfect understanding of a recipient's job duties—to render an opinion about whether a recipient can return to her former job, we note that it is the board, not a physician, that ultimately makes that decision. *See* R.C. 3307.62(F) (regarding initial determinations of disability) and R.C. 3307.64 (regarding termination decisions). The board itself consists of 11 members, five of whom are current STRS members and two of whom are former members. *See* R.C. 3307.05. The board is deemed to know what a teaching job entails and whether the recipient is disabled from it. *See State ex rel. Hudson v. Ohio Pub. Emps. Retirement Sys.*, 10th Dist. No. 10AP-904, 2011-Ohio-5362, ¶ 14 ("The actual decision as to disability is made at [the Public Employees Retirement System], which is deemed to know what a specific job entails and whether an employee is disabled.").

{¶ 10} Here, relator challenges the reports of the physicians chosen by the board, Elizabeth Mease, M.D., and Christopher Mabee, M.D., and contends that their reports reflect insufficient knowledge of the physical requirements of her prior position as an intervention specialist. While each report could have provided more detail about relator's job duties, neither report indicates a misunderstanding of the physical requirements of the position. Moreover, in addition to these and multiple other medical reports, the record before the board contained significant evidence concerning the physical demands of relator's position, including detailed descriptions of the position by another intervention specialist in relator's former school district, the special needs coordinator in that district, and relator herself. After reviewing the entire record, the board unanimously affirmed its prior decision to terminate relator's disability benefit. We decline to reweigh the evidence, and we overrule relator's second objection.

{¶ 11} In conclusion, having conducted an independent review of this matter, we overrule relator's objections. Subject to the clarification we noted above, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. Accordingly, we deny the requested writ.

*Objections overruled;
writ of mandamus denied.*

KLATT and DORRIAN, JJ., concur.



A P P E N D I X

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robyn Kelly,	:	
Relator,	:	
v.	:	No. 11AP-527
State Teachers Retirement System of Ohio,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

MAGISTRATE'S DECISION

Rendered on June 15, 2012

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

Michael DeWine, Attorney General, and Catherine J. Calko, for respondent.

IN MANDAMUS

{¶ 12} In this original action, relator, Robyn Kelly, requests a writ of mandamus ordering respondent, State Teachers Retirement System of Ohio ("STRS"), to vacate its decision terminating a disability benefit pursuant to R.C. 3307.64, and to enter a decision reinstating the disability benefit.

Findings of Fact:

{¶ 13} 1. In December 2008, relator filed a disability benefit application on a form provided by STRS. According to her application, she had been employed as an "intervention specialist" with the New London Local Schools in Huron County, Ohio.

{¶ 14} 2. Under the "Medical Information" section of the application, the form asks the applicant to state the nature of the physical/mental disability. In the space provided, relator wrote:

Fatigue/exhaustion caused by nonalcoholic steatohepatitis;
(NASH) with cirrhosis; hypothyroidism and fibromyalgia.
These are also complications from clinical depression[.]

{¶ 15} 3. STRS requires that a disability benefit applicant have her attending physician complete an "Attending Physician's Report" on a form provided by STRS.

{¶ 16} 4. On December 9, 2008, Arthur J. McCullough, M.D., who specializes in gastroenterology and hepatology, certified on an "Attending Physician's Report" that relator is "incapacitated for the performance of duty and that the disability [is] considered to be permanent."

{¶ 17} The "Attending Physician's Report" asks the physician to give a diagnosis. In response, Dr. McCullough wrote:

(1) Biopsied confirmed cirrhosis due to fatty liver[;]
(2) metabolic syndrome[;] (3) heterozygote (compound) for
hemochromatosis [and] (4) fibromyalgia.

The attending physician is also asked to list major symptoms. In response, Dr. McCullough wrote:

(1) severe fatigue
(2) muscle loss
(3) fluid retention

For the prognosis, Dr. McCullough wrote:

(1) Short Term >fatigue, weakness and [illegible]
(2) Long Term (3-4 yrs) hepatic decompensation
[and] slight risk of liver cancer.

{¶ 18} 5. STRS requires that a disability benefit applicant have their employer complete a "Report by Employer" on a form provided by STRS. On November 20, 2008, relator's elementary school principal certified a description of relator's job duties. Writing in her own hand, the principal wrote:

Classroom instruction for students with all levels of physical, cognitive and behavior disabilities, writing special education plans (IEP's)[,] student supervision, lesson planning, professional development, collaboration with peers.

{¶ 19} On the report, the principal further indicated that relator had been absent due to personal illness for eight days during the current school year and that she had been absent for 17.75 days due to personal illness during the previous school year.

{¶ 20} 6. Pursuant to R.C. 3307.62(C), STRS appointed Elizabeth Mease, M.D., to conduct a medical examination of relator. Relator was evaluated by Dr. Mease on January 15, 2009.

{¶ 21} 7. On January 15, 2009, on a form provided by STRS, Dr. Mease certified that relator "is considered to be permanently or presumed to be permanently (12 continuous months) incapacitated for the performance of duty and that he or she should be retired."

{¶ 22} 8. In her three-page narrative report, dated January 29, 2009, Dr. Mease further states:

Diagnoses:

Non alcoholic steatohepatitis
Diabetes mellitus
Hypothyroidism
Fibromyalgia

Impression:

Ms. Robyn Kelly is a 45 year old woman with the complaint of extreme exhaustion and which causes her to miss several days of school and which inhibits her performance of her teaching duties once she is at school. She has a multifactorial etiology for her symptoms. She suffers with non alcoholic steatohepatitis, diabetes mellitus, hypothyroidism, and fibromyalgia. Treatment includes supranormal dosage of Synthroid. Current findings reveal multiple tender trigger

points about her joints and which would be consistent with the diagnosis of fibromyalgia.

It is not clear what is going to make her conditions better. I recommend that an endocrinologist be involved in her care to better manage her diabetes mellitus and thyroid condition. I recommend a re-evaluation in one year.

{¶ 23} 9. Pursuant to Ohio Adm.Code 3307:1-7-01, the State Teachers Retirement Board ("STRB") designates a group of independent physicians to serve as a medical review board ("MRB") under the direction of a chair appointed by STRB. The MRB members may be asked in panels of three to review any application. The MRB chair serves as an advisor to STRB. Ohio Adm.Code 3307:1-7-01(A).

{¶ 24} 10. On February 3, 2009, MRB Chair Earl N. Metz, M.D., wrote:

Acting on behalf of the Medical Review Board, I concur with the opinion of Dr. Elizabeth Mease that this member is incapacitated for the performance of regular duties as a teacher, and I recommend that disability be granted. Treatment should not be required as a condition to receive the benefit.

{¶ 25} 11. STRB granted relator's application for a disability benefit. Relator began receiving the benefit effective April 1, 2009.

{¶ 26} 12. On April 22, 2010, Dr. McCullough completed another "Attending Physician's Report." On the form, Dr. McCullough certified that relator remains incapacitated for the duties of her employment.

{¶ 27} 13. R.C. 3307.64 provides that STRB shall require any disability benefit recipient to submit to an annual medical examination by a physician selected by STRB.

{¶ 28} 14. On June 7, 2010, relator was again examined by Dr. Mease, pursuant to R.C. 3307.64. On a form provided by STRS, Dr. Mease certified that relator "is capable of resuming regular full-time service similar to that from which she is retired and that disability benefits should not be continued."

{¶ 29} Dr. Mease also issued a three-page narrative report dated June 7, 2010 stating:

Nature of Disability:

Fatigue/exhaustion

Medical History:

Ms. Roby[n] Kelly is a 46 year old former employee of New London Local Schools. She was employed there for 10 years. She was a special education teacher. She last worked 2-2009. She has been receiving disability retirement benefits since then.

She had been suffering with liver disease (NASH) and fibromyalgia. I evaluated her on 1-15-2009 and provided the opinion that she was disabled. I recommended further treatment of her diabetic and thyroid condition. I had the opinion that she was on an excessive dose of Synthroid.

She was noted to have elevated live[r] enzymes about 5 years ago. In 12-2007, a liver biopsy was performed. The diagnosis was NASH (nonalcoholic stea[t]ohepatitis) with cirrhosis. In 1-2008, an upper endoscopy showed no evidence of varices. She sees Dr. McCullough every 6 months. She reports that her liver enzymes have been stable. She last saw Dr. McCullough in 2-2010.

In 2-2008, she was diagnosed with non insulin dependent diabetes mellitus. Her family physician manages her diabetes mellitus. She takes Metformin and she is on a diet. Her last hemoglobin A1C in late May 2010 A1C was 7.8.

She reports that her fibromyalgia is better. She reports that she can lie down when she needs to. She has less pain. She does not take medications.

She had not been hospitalized anytime in the recent past.

She arises at 8:00 a.m. She does her exercises. She either walks outside or in place at the house. She cleans one room of the house. She does one load of laundry. She does her crafts in the afternoon. She rests for a couple of hours in the afternoon. Then she prepares dinner. She and her sister go to craft shows and try to sell their wares. She makes braided rugs. She goes to church and she visits her sisters on occasion. Most of the time she feels pretty good and believes that being able to work has helped her. She is not sure that she could go back to work and still feel alright.

* * *

Impression:

Ms. Robyn Kelly is a 46 year old woman who has a history of fibromyalgia and non alcoholic steatohepatitis. She also has non insulin dependent diabetes mellitus. She has been off of work since February 2009 and she has had more rest and her fibromyalgia symptoms have improved. Her liver enzymes have been stable. Her diabetes mellitus is under good control. Her dose of Synthroid for her thyroid condition is now more physiological than previously prescribed. Current findings reveal no areas of trigger point tenderness and no hepatomegaly.

Given that her symptoms are better and given that she has no current objective physical findings, then it is my opinion that she is able to resume her former teaching duties.

{¶ 30} 15. James N. Allen, M.D., Barry Friedman, M.D., and Albert J. Kolibash, Jr., M.D., all MRB members, were selected as the panel to review Dr. Mease's recommendation that the disability benefit be terminated.

{¶ 31} 16. By letter to Dr. Metz dated June 20, 2010, Dr. Allen states in part:

I reviewed disability application materials on Ms. Robyn L. Kelly. She is a 46-year old Intervention Specialist for New London Local Schools who has a stated disability of fatigue due to nonalcoholic st[e]atohepatitis, hypothyroidism, fibromyalgia, and depression.

* * *

On June 7, 2010, Dr. Mease performed a second independent medical examination and opined that she was no longer incapacitated to teach and that disability benefits should not be continued. Dr. Mease reported that her fibromyalgia symptoms were better and that she does not take medications for pain. Dr. Mease also reported that her thyroid replacement dose was now more appropriate, her liver enzymes were stable, and her diabetes was under better control. There were no trigger points of fibromyalgia on examination.

In summary, this teacher has a history of multi-factorial fatigue. One of the contributions to her fatigue is fatty liver with cirrhosis. This condition persists but is stable and not worsening. The other contributions to her fatigue have improved to the point that her overall symptoms are much better. I recommend that disability retirement be terminated.

{¶ 32} 17. By letter to Dr. Metz dated July 12, 2010, Dr. Friedman states in part:

The purpose of the present review is to determine whether Ms. Kelly is capable of returning to contributing service. She had previously been employed as an intervention specialist in the New London Local Schools. I have reviewed her initial application accompanied by a job description, the Employer's report and the Attending Physician's report completed by Dr. McCullough, a gastroenterologist/-hepatologist at The Cleveland Clinic. Dr. McCullough also completed an interim report dated April 22, 2010. In addition I have reviewed the disability evaluations performed by Dr. Mease, an internist on January 15, 2009 and the recent examination on June 7, 2010.

* * *

At the time of Ms. Kelly's second evaluation by Dr. M[e]ase on June 7, 2010 she reported pain related to fibromyalgia and some improvement of her fatigue by control of her daily schedule and afternoon rest. At the time of the evaluation Ms. Kelly's weight was 194 pounds (down six pounds from 2009). The palpable liver edge described in 2009 was not reported on this re-evaluation. Ms. Kelly's strength was reported as normal and no painful trigger points were noted on examination.

Dr. McCullough's interim Attending Physician report from April 22, 2010 described Ms. Kelly's prognosis as poor and he attributed her fatigue to her chronic liver disease. In 2009 he reported his significant concern over the next 3-4 years for hepatic decompensation.

Following re-evaluation it was Dr. Mease's opinion that Ms. Kelly was no longer disabled for the performance of her duties. Given the cirrhotic stage of Ms. Kelly's liver disease, her limited prognosis and her significant fatigue a well described major functional issue for NASH/cirrhosis[,] I

remain concerned regarding her ability to adequately function full time on a daily basis as a teacher/intervention specialist. On this basis, I recommend that her disability benefit be continued but recognize that further discussion may be warranted.

{¶ 33} 18. By letter to Dr. Metz dated July 19, 2010, Dr. Kolibash states in part:

I reviewed the disability application of the above-named applicant. Information reviewed includes an employer report including a letter from the applicant's school principal, a job description, two attending physician's reports, and two independent medical examination reports.

The applicant is a 46-year-old lady whose occupation is that of an intervention specialist and who has taught 23 years. She has been considered disabled since February of 2009.

* * *

An initial independent medical examination was performed on January 15, 2009, by Dr. Elizabeth Mease, M.D., an Internist and specialist in preventive medicine and occupational medicine. Dr. Mease performed a thorough history and physical examination. In this report Dr. Mease notes that liver enzymes had been elevated for 4 years. A liver biopsy in December 2007 was consistent with the diagnosis of NASH with cirrhosis. She further notes in December of 2008 both the AST and ALT were normal. Hemoglobin A1c was 9.6. On December 23, 2008 a liver ultrasound showed findings consistent with a fatty liver. Her diagnoses included nonalcoholic steatohepatitis, diabetes mellitus, hypothyroidism, and fibromyalgia. Her recommendations included an endocrinological evaluation for better management of the claimant's diabetes and thyroid condition. Dr. Mease concluded her report with a recommendation for disability and opined that the disability was permanent and the applicant should be retired[.]

A letter from Dr. Earl Metz of the State Teacher's Retirement System on February 3, 2009 concurred with the recommendation for disability.

A second independent medical examination was performed by Dr. Mease on [June] 7, 2010. Dr. Mease again performed

a thorough history and physical examination. In her report she states that liver enzymes have been stable[.] She notes that diabetes control has been somewhat improved and the claimant's fibromyalgia is better. The report further states that the applicant is reasonably active and capable of performing activities of daily living. This report also notes that the applicant's symptoms "are better and that she has no current objective physical findings." On the basis of this second examination Dr. Mease opines that the applicant is capable of resuming her previous occupation and recommends that disability benefits not be continued.

In summary, the applicant is a 46-year-old lady who is an intervention specialist in the school system of the state of Ohio. She is seeking disability based upon a diagnosis of non-alcoholic steatohepatitis, cirrhosis, hypothyroidism, fibromyalgia, and diabetes. Her primary symptom is that of fatigue. She had been considered disabled in February of 2009. Her clinical parameters have either been stable or improved and she appears to be capable of activities of daily living. Based upon my review of the entire application, I cannot find any objective evidence to warrant continued disability and recommend that the applicant return to her former occupation as an intervention specialist.

{¶ 34} 19. On August 16, 2010, the MRB panel held a special conference to discuss relator's disability status. The MRB panel recommended that STRS schedule an independent medical examination to be performed by a hepatologist.

{¶ 35} 20. Pursuant to the MRB recommendation, on November 2, 2010, relator was examined by Christopher Mabee, M.D., who is apparently trained in hepatology.

{¶ 36} 21. In a three-page report to Dr. Metz dated November 2, 2010, Dr. Mabee wrote:

I have had the opportunity to review the disability application of the above-named applicant. As you may recall, Robyn Kelly is a delightful 47-year-old female from New London, Ohio, who has been receiving disability benefits for complications from fatty liver and cirrhosis, as well as fibromyalgia. She was initially found to be disabled in February of 2009 and has been receiving disability benefits roughly since April of that year. As you know, she works as

an interventionalist [sic] in disability teaching for the New London Schools System.

Her diagnosis was made and she has been treated by Dr. Arthur McCullough from the Cleveland Clinic Foundation. She was diagnosed with nonalcoholic fatty liver disease, cirrhosis and a metabolic syndrome. In addition, the patient suffers from fibromyalgia.

She presented to my office on Tuesday, November 2, 2010, for a followup disability assessment. She has complaints today of incapacitating fatigue and nocturnal itching. She also has some problems concentrating. She denies any significant peripheral edema, melena or formal mental status changes.

The patient's workup has been relatively extensive, it has included a percutaneous liver biopsy, which was performed on December 12, 2007, showing a macrovesicular steatosis. She does have a history of being a compound heterozygote for hemochromatosis, but on her biopsy did not have a significant iron deposition. She is also, as part of her workup, had several endoscopies, one in 2008 and one in 2010, not showing any significant gastroesophageal varices. In addition, apparently she gets an ultrasound every year, which has not shown a mass. She has been taking Pentoxifylline and vitamin E for her fatty liver.

Recent laboratory assessment shows a normal AST and ALT, prothrombin time was normal at 10.2 seconds, hemoglobin 15.3 with a platelet count 206,000. Bilirubin from May showed that it was normal. Creatinine was 0.6, albumin was 4.0.

* * *

IMPRESSION AND PLAN:

[One] Cirrhosis of the liver. The patient clearly has compensated cirrhosis of the liver. Her combined MELD score is 8, which is completely normal for comparison in _____ region 10 of which the State of Ohio is in, one needs to have at least a MELD score of 18 to be considered seriously for liver transplantation. Transaminases are currently normal with a normal prothrombin time and albumin, bilirubin, prothrombin time and creatinine all suggestive of

very well compensated liver disease. The Child-Turcotte-Pugh classification system would be Child's A. While I do know the patient has cirrhosis based on her biopsy and I believe that her fatigue and itching symptoms are [of] some degree related to her liver disease, it is my professional opinion that the patient currently is no longer completely disabled. It [is] on the basis of this objective physical examination and laboratory assessment that in my opinion, is that the patient is capable of resuming her previous occupation and I recommend that disability benefits not be continued. I do recommend that the patient continue to have followup with her liver condition and continue to vigorously treat her diabetes, thyroid disease, as well as her liver disease with a concerted effort at a carbohydrate controlled diet, weight loss, vitamin E, Pentoxifylline and further biochemical assessment for decompensation. It is possible the patient could decompensate at any time and that she may require further disability assessment in the near future; however, it is my opinion at this time that the patient can safely return to her previous occupation.

{¶ 37} 22. Upon receipt of Dr. Mabee's report, Dr. Metz requested that Drs. Allen, Kolibash, and Friedman review Dr. Mabee's report.

{¶ 38} 23. In a letter to Dr. Metz dated November 20, 2010, Dr. Allen states:

On November 2, 2010, she underwent an independent medical examination by hepatologist Dr. Christopher Mabee who opined that she is capable of returning to work and that disability benefits should be discontinued. He recorded that her physical examination was normal. He determined that she is Child's class A and that her MELD (Model for End-stage Liver Disease) score is 8 (essentially normal).

In summary, this teacher has cirrhosis by lever biopsy that is due to fatty liver. Her liver disease appears to be mild and stable. She has normal hepatic synthetic function, a normal bilirubin, and normal transaminases. She has not had complications of her cirrhosis such as esophageal varices. Her subjective complaints of fatigue are out of proportion to her liver disease and may relate to her fibromyalgia. I recommend that the independent medical examiners' (Drs. Mease and Mabee) recommendations be accepted and I recommend that disability retirement be terminated.

{¶ 39} 24. In a letter to Dr. Metz dated December 10, 2010, Dr. Kolibash states:

An independent medical examination was performed on November 2, 2010 by Dr. Christopher Mabee, M.D., a Hepatologist. Dr. Mabee performed a thorough evaluation including history, physical, review of medical records and lab results. He notes the results of the blood work described above. In addition his letter also indicates a normal bilirubin in May of 2010 and a normal serum albumin with normal creatinine. Dr. Mabee confirms that the applicant has compensated cirrhosis and a Child's A classification with a MELD score of 8 which he notes is normal. He then opines "the patient currently is no longer completely disabled.["] His report then further states that the member is capable of resuming regular full-time service and that her disability benefits should not be continued.

In summary, the applicant is a 47-year-old female intervention specialist who was granted permanent disability in 2009 based upon symptoms of fatigue and exhaustion attributed to non-alcoholic steatohepatitis with cirrhosis. After reviewing the complete application for continued disability benefits including the new information provided it is my opinion that this member is no longer incapacitated for the performance of her previously assigned duties and that she is capable of returning to her occupation as an intervention specialist.

{¶ 40} 25. In a letter to Dr. Metz dated December 13, 2010, Dr. Friedman states:

Ms. Kelly was evaluated by Dr. Christopher Mabee, a gastroenterologist/hepatologist on November 2, 2010. Dr. Mabee reviewed Ms. Kelly's records and her symptoms related to fatigue. A complete physical examination was performed which was normal without hepatosplenomegaly. Dr. Mabee reviewed Ms. Kelly's most recent laboratory studies which showed normal coagulation function and normal bilirubin. It was Dr. Mabee's opinion that Ms. Kelly has stable cirrhosis which clinically is well-compensated. He recognized that Ms. Kelly has an element of fatigue which may in part relate to her liver disease. He did not find evidence of permanent disability.

After review of the additional disability evaluations submitted I concur with Dr. Mabee's opinion with the

recommendation that Ms. Kelly's disability benefit be terminated.

{¶ 41} 26. On December 14, 2010, Dr. Metz wrote to STRB:

The medical file of the above named member has been studied by the following Medical Review Board members, Dr. James Allen, Dr. Albert Kolibash, and Dr. Barry Friedman. The Medical Review Board concurs with the opinions of the appointed examiners and recommends that disability benefits be terminated.

{¶ 42} 27. On January 13, 2011, STRB voted to terminate the disability benefit.

{¶ 43} 28. In a letter from STRS dated January 18, 2011, relator was informed of the STRB decision. She was also informed of her right to appeal the STRB decision under R.C. 3307.64 and Ohio Adm.Code 3307:1-7-05.

{¶ 44} 29. Relator timely appealed the STRB decision.

{¶ 45} 30. STRS granted relator until April 14, 2011 to submit new medical information.

{¶ 46} 31. On April 13, 2011, STRB received additional information from relator. That information included a transcript of a March 30, 2011 interview of relator by her counsel; a 20-page functional capacity report dated March 21, 2011, authored by physical therapist Melinda DePolo; a so-called "After Visit Summary" regarding a March 29, 2011 visit with Dr. McCullough; and a February 16, 2011 letter from Mary Ames, CNP.

{¶ 47} 32. The March 21, 2011 functional capacity report authored by physical therapist Melinda DePolo concludes with the following three recommendations:

[One] Based on the results of this FCE, the client would not likely be able to return to her job as a special education teacher as the client is very limited with standing, walking, lifting, kneeling, and crouching. Her job consists of many of these movements that are performed numerous times throughout the day and the client had increased pain and difficulty with all of these movements. It would not be safe for the client to care for children with special needs as the client herself does not demonstrate the ability to perform these movements without pain or difficulty.

[Two] The client may want to seek a job that she can complete safely and with the restrictions as noted above.

[Three] The client may benefit from seeking disability services if the client is unable to find a job that she can complete safely and with the restrictions as noted above[.]

{¶ 48} 33. The February 16, 2011 report of Mary Ames, CNP, of the Wakeman Area Family Care Center states:

Robyn Kelly was evaluated in our office on 2-14-11 for her fibromyalgia. She has positive tender points 12 of 18 specific areas that include: sub-occipital, low cervical, lateral epicondyle, knees, trapezius, and gluteal. Robyn experiences chronic fatigue with poor endurance during physical activities, limiting her ability to sustain meaningful employment.

{¶ 49} 34. The transcript of the March 30, 2011 taped interview consists of eight pages of an exchange between relator and her counsel. The transcript states in part:

M: Why don't you tell us a little about the job you had that is at issue here before you applied for disability.

R: I worked in New London Local School District. I was a Special Education Intervention Specialist for Kindergarten through 5th Grade students. I had students that were physically disabled, I had students that were mentally disabled, I had students that just had minor learning disabilities, I had students with severe behavior problems, and I did a combination of inclusion which is where I went into the regular general education classrooms and helped the students with IEPs, which are Individual Educational Plans. I would go into the general classroom and help them stay on task, make sure they were taking notes the way they were supposed to, answer specific questions they had, work with them in a small group in the back of the classroom and then I also did work in my own classroom where the children were pulled out of the general education classroom.

* * *

M: Let's talk briefly about the physical aspects of that job in terms of, let's talk about lifting first of all. Did you have to do any lifting or pushing or pulling?

R: Yes. You know there were students that, like I stated before, that had physical disabilities. I would have to help them, um there were times I had to help them in and out of wheelchairs, I had to help them get on and off of school buses, um there were times when I was asked to extend the work of the physical therapists when they weren't there every single day and so I would do stretches and pushing and pulling with the kids in order to help with their physical therapy.

M: Do you know whether the lifting or the pushing or pulling would involve twenty (20) pounds or more or twenty (20) pounds or less?

R: Twenty (20) pounds or more. Most of my students definitely weighed more than twenty (20) pounds.

M: What about sitting and walking in a typical day at your job, can you give us an idea of what that involved, how much in a day, hour wise or anything?

R: Being a special ed teacher I didn't sit a whole lot. I would say that I probably never had the opportunity to sit more than twenty (20), twenty-five (25) minutes at a time. There was a lot of walking involved going from classroom to classroom. When I was doing inclusion there were a lot of times that I was assigned to pick students up from the art room or the gymnasium and bring them back to the general ed classes. With the new complex at the school that we were in, the gym and the art room are at least a quarter mile away from my classroom.

M: Did your job involve more standing or walking than it did sitting?

R: Yes.

M: Was the standing and walking involve[d] more than 50% of the day?

R: Yes, I would say probably.

(Tr. at 1-3.)

{¶ 50} 35. On May 3, 2011, Dr. Metz issued a one-page memorandum to STRB stating in part:

STRS then received extensive correspondence from the member's attorney, Mr. Michael Malyuk. This material includes letters from Ms. Kelly's colleagues, notes from her physician, a functional performance report, a sworn interview with the member conducted by Mr. Malyuk, and several internet-derived reports regarding liver function, disease, and cirrhosis which add little, if anything, to support a disability determination for Ms. Kelly.

{¶ 51} 36. On May 18, 2011, relator personally appeared with her counsel before the STRS Disability Review Panel. On May 19, 2011, STRB voted to affirm its previous decision that disability benefits be terminated.

{¶ 52} 37. On June 15, 2011, relator, Robyn Kelly, filed this mandamus action.

Conclusions of Law:

{¶ 53} Two issues are presented: (1) whether respondent abused its discretion by failing to have the STRS examining physicians (i.e., Drs. Mease and Mabee) review the additional evidence relator submitted on April 13, 2011 in support of her appeal of the January 13, 2011 decision to terminate her disability benefit and, (2) whether the STRS examining physicians (i.e., Drs. Mease and Mabee) had sufficient knowledge of the duties of relator's employment with the New London Local Schools such that they could render competent opinions as to relator's capacity for return to work.

{¶ 54} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 55} Because STRB's final decision to terminate relator's disability benefit is not appealable, mandamus is available to correct an abuse of discretion by STRB in its determination concerning the disability benefit. *State ex rel. Hulls v. State Teachers Retirement Bd. of Ohio*, 113 Ohio St.3d 438, 2007-Ohio-2337, at ¶ 27, citing *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219.

{¶ 56} Even though STRB's final decision is reviewable in mandamus, STRB is not required to comply with *State ex rel. Noll v. Indus.Comm.*, 57 Ohio St.3d 203 (1991), when it issues an order or decision granting or denying a disability benefit. *Pipoly* at 330-

32. Accordingly, STRB has no clear legal duty cognizable in mandamus to specify what evidence it relied upon and explain the reasoning for its decision terminating relator's disability benefit. *Id.*

{¶ 57} R.C. 3307.64 states:

The state teachers retirement board shall require any disability benefit recipient to submit to an annual medical examination by a physician selected by the board * * *.

After the examination, the examiner shall report and certify to the board whether the disability benefit recipient is no longer physically and mentally incapable of resuming the service from which the recipient was found disabled. If the board concurs in a report by the examining physician that the disability benefit recipient is no longer incapable, the payment of a disability benefit shall be terminated * * *.

{¶ 58} R.C. 3307.62(C) states:

Medical examination of the member shall be conducted by a competent, disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition, either permanent or presumed to be permanent for twelve continuous months following the filing of an application.

{¶ 59} Turning to the first issue, following the January 13, 2011 decision of STRB to terminate the disability benefit, relator timely appealed and submitted additional information in pursuit of her appeal.

{¶ 60} Preliminarily, the magistrate notes that the magistrate's statement of the issue to be addressed here is a clarification of relator's brief.

{¶ 61} According to relator, "the doctors that examined Relator did not have the benefit of either the functional capacity report or the detailed testimony." (Relator's brief, at 7-8.)

{¶ 62} Relator further states that "the functional capacity exam was not recognized by the Board, and could not have been considered by Respondent's doctors as it is dated after the medical exams." (Emphasis sic.) (Relator's brief, at 7.)

{¶ 63} In her reply brief, relator states: "There is no evidence that this functional report was sent to or was even reviewed by the medical doctors that examined the Relator and made their recommendations that she could resume her teaching position." (Relator's reply brief, at 1.)

{¶ 64} Given the above-quoted portions of relator's opening brief and reply brief, the magistrate formulates the first issue: whether respondent abused its discretion by failing to have the STRS examining physicians (i.e., Drs. Mease and Mabee) review the additional evidence relator submitted on April 13, 2011 in support of her appeal of the January 13, 2011 decision to terminate her disability benefits.

{¶ 65} The answer to the first issue is found in the administrative rules promulgated by STRS regarding the procedure for exercising the right to appeal.

{¶ 66} Supplementing the statutes, Ohio Adm.Code 3307:1-7-05 is captioned "Disability benefits-denials and terminations."

{¶ 67} Ohio Adm.Code 3307:1-7-05 provides:

(B) Following board action terminating or denying disability benefits:

(1) The applicant or recipient will be informed in writing of the action taken by the board.

* * *

(2) Procedure for exercising right to appeal:

(a) Written notice of appeal, accompanied by a statement from the applicant or recipient, his or her counsel and/or attending physician that an appeal will be based on evidence contrary to the findings of the independent medical examiners, must be filed with the retirement system within fifteen calendar days of receipt of notification of board action.

* * *

(3) Following the retirement system's timely receipt of written notice of appeal from an applicant or recipient, the retirement system shall provide the applicant or recipient

with the following information confirming the appeal:

(a) Confirmation that the applicant or recipient, counsel for the applicant or the recipient, and/or person acting on the member's behalf, member's employer, or attending physician may present additional medical evidence orally at an appeal hearing that will be scheduled by the retirement system or that additional medical evidence may be presented in writing. Such additional medical evidence shall not have been previously considered by the independent medical examiner or the medical review board.

* * *

(5) Scope and procedure upon appeal:

* * *

(c) The purpose of the appeal hearing shall be for the applicant or recipient to present information to the retirement board or its designees(s) based on additional objective and pertinent medical evidence not previously considered by the independent medical examiner or the medical review board.

* * *

(d) Additional written medical evidence or written information may not be submitted at the hearing.

(e) Upon consideration of the record on appeal and the information, positions, contentions and arguments of the applicant or recipient, the retirement board may direct further examination or testing by independent medical examiners and may return a record for review and recommendation by the medical review board.

(f) When the retirement board is satisfied that the record before it is complete and has completed its deliberations, it may affirm, disaffirm or modify its prior action by a majority vote.

{¶ 68} The parties to this action do not cite or discuss the above quoted portions of Ohio Adm.Code 3307:1-7-05 which the magistrate, nevertheless, finds relevant here.

{¶ 69} In the magistrate's view, relator's position that STRS abused its discretion by failing to have Drs. Mease and Mabee review the additional evidence relator filed on April 13, 2011 in support of her appeal is contrary to Ohio Adm.Code 3307:1-7-05(B)(5)(c)'s statement of the purpose of the appeal hearing. The purpose of the hearing, as the rule explains, is to permit the recipient to present information "based on additional objective and pertinent medical evidence not previously considered by the independent medical examiner or the medical review board."

{¶ 70} Thus, Ohio Adm.Code 3307:1-7-05(B)(5)(c) contemplates that STRB shall consider the additional evidence in the absence of any review by one or more "independent medical examiners or the medical review board." The reason for STRB's consideration of the additional evidence in the absence of such review is set forth at Ohio Adm.Code 3307:1-7-05(B)(5)(e) which provides that STRB "may direct further examination or testing by independent medical examiners and may return a record for review and recommendation by the medical review board."

{¶ 71} Given the above discussed administrative rules, under the circumstances here, relator did not have a clear legal right to have the additional evidence reviewed by the physicians that examined on behalf of STRS.

{¶ 72} Given the above analysis, the magistrate concludes that respondent did not abuse its discretion by failing to have the STRS examining physicians review the additional evidence submitted by relator in support of her appeal.

{¶ 73} Turning to the second issue, the magistrate finds *State ex rel. Clark v. Indus. Comm.*, 72 Ohio St.3d 377 (1995), a case involving workers' compensation, to be helpful, if not instructive, on the issue here.

{¶ 74} In *Clark*, at 379, the court applied a legal principle from *State ex rel. Braswell v. Indus. Comm.*, 25 Ohio St.3d 61, 63 (1986):

"[A] physician conducting a medical examination, where the claimant seeks temporary total disability benefits, should, in most cases, possess some knowledge of the physical requirements associated with the former position of employment[.] [W]e deem it unnecessary for the physician to trace, in detail, every physical movement necessitated during the average workday."

{¶ 75} The issue in *Clark* was whether Dr. Dobrowski's report satisfied *Braswell*. In his report, Dr. Dobrowski opined that the claimant "could return to his previous position as a construction worker." *Id.* at 378. He also noted that the claimant was injured "pushing an air compressor." *Id.* Concluding that Dr. Dobrowski's report satisfied *Braswell*, the *Clark* court states, at 380:

Claimant responds that "construction worker" is too general a term, claiming that it encompasses many different duties entailing many different levels of physical exertion. While this may be true, there is no evidence that Dr. Dobrowski misperceived claimant's duties to the detriment of any interested party. There is no indication that Dr. Dobrowski based his conclusion on the erroneous belief that claimant's occupation consisted of sedentary, light or medium work. To the contrary, Dr. Dobrowski noted that claimant was injured while pushing an air compressor—a heavy piece of machinery. Accordingly, we find that the report was "some evidence" supporting the commission's decision.

{¶ 76} In her brief, relator asserts:

There is no indication in the record that the examining doctors of Respondent had a thorough knowledge, or even some knowledge, of Relator's job and the functional requirements of same. A physician cannot make a determination that an individual can work a specific job, if they have absolutely no knowledge, or little knowledge, of its requirements. The Respondent's doctors in this case made no reference to the specific job requirements and made no mention of even understanding them. * * * A medical doctor providing an opinion as to disability without details of that job and its functional requirements and some vocational knowledge cannot meet the intent of the statute and public policy demands that there be a proper review of a state employee's disability claim.

(Emphasis sic.) (Relator's brief, at 9-10.)

{¶ 77} The magistrate disagrees with relator's contention that Drs. Mease and Mabee did not possess sufficient knowledge of the job to which relator would return.

{¶ 78} The magistrate begins with Dr. Mease. In her June 7, 2010 three-page narrative report, Dr. Mease states "she was a special education teacher." In that report,

Dr. Mease opines that relator "is capable of resuming regular full-time service to that from which she is retired and that disability benefits **should not** be continued." (Emphasis sic.)

{¶ 79} In her January 29, 2009 three-page narrative report, Dr. Mease wrote:

Ms. Robyn Kelly is a 45 year old employee of New London Local Schools. She has been employed there for 9 years. This is her 23rd year teaching. She teaches special education at the elementary school. She teaches about 13 in the morning with an aide. She teaches about 9 in the afternoon. She is responsible for 27 students. She is currently working. She reports that she has missed 16 days this current school year.

{¶ 80} Here, relator does not address the references in Dr. Mease's reports to relator's employment with New London Local Schools. That is, relator does not endeavor to explain why Dr. Mease's references to relator's employment do not show sufficient familiarity with relator's employment duties.

{¶ 81} To the extent that the *Clark* and *Braswell* cases set forth a legal principle applicable to STRS, the magistrate finds that Dr. Mease's reports meet the standard set forth in *Clark* and *Braswell*. See *State ex rel. Boyd v. Ohio School Emps. Retirement Sys. Bd.*, 10th Dist. No. 06AP-933, 2007-Ohio-3878, ¶ 51-53.

{¶ 82} The magistrate now turns to Dr. Mabee. In his November 2, 2010 three-page narrative report, Dr. Mabee writes:

As you know, she works as an interventionalist [sic] in disability teaching for the New London Schools System.

{¶ 83} In his "Consultation report," also dated November 2, 2010, Dr. Mabee writes:

The patient has been on disability from her teaching responsibilities since 2009. She works as a interventionalist [sic] in kids with learning disabilities.

{¶ 84} Here, relator does not address the references in Dr. Mabee's reports to relator's employment with the New London Local Schools.

{¶ 85} Again, applying the principle set forth in *Clark* and *Braswell*, the magistrate finds that Dr. Mabee's reports meet the standard set forth in those cases.

{¶ 86} The magistrate further notes that relator contends that the STRS examining physicians are not competent to opine as to her capacity to return to her employment at New London Local Schools because the examining physicians do not have vocational expertise. However, it is well-settled in the law of workers' compensation that examining physicians are indeed competent to opine as to the claimant's medical capacity to return to his or her former position of employment. *Clark; Braswell.*

{¶ 87} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).