

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Paul E. Gerke,	:	
	:	
Relator,	:	No. 12AP-732
	:	
v.	:	(REGULAR CALENDAR)
	:	
Board of Ohio Highway Patrol Retirement System,	:	
	:	
Respondent.	:	

D E C I S I O N

Rendered on August 22, 2013

Law Offices of Gary A. Reeve, LLC, and Gary A. Reeve, for relator.

Michael DeWine, Attorney General, and Brandon C. Duck, for respondent.

IN MANDAMUS

BROWN, J.

{¶ 1} Relator, Paul E. Gerke, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, the State Highway Patrol Retirement Board ("board"), to vacate its decision denying his application for a disability retirement, pursuant to R.C. 5505.18, and to enter a decision granting the application.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended

that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶ 3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ denied.

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Paul E. Gerke,	:	
	:	
Relator,	:	No. 12AP-732
	:	
v.	:	(REGULAR CALENDAR)
	:	
Board of Ohio Highway Patrol	:	
Retirement System,	:	
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on May 24, 2013

Law Offices of Gary A. Reeve, LLC, and Gary A. Reeve, for relator.

Michael DeWine, Attorney General, and Brandon C. Duck, for respondent.

IN MANDAMUS

{¶ 4} In this original action, relator, Paul E. Gerke, requests a writ of mandamus ordering respondent, the State Highway Patrol Retirement Board ("board"), to vacate its decision denying his application for a disability retirement pursuant to R.C. 5505.18, and to enter a decision granting the application.

Findings of Fact:

{¶ 5} 1. Relator has been employed as a trooper with the Ohio State Highway Patrol.

{¶ 6} 2. On December 2, 2011, relator filed an application for disability benefits with the Ohio State Highway Patrol Retirement System ("HPRS") on a form provided by HPRS.

{¶ 7} 3. The application form asks the applicant to "provide a description of any condition that limits your ability to work as a Trooper, including a description of how the condition occurred."

In the space provided, relator wrote in his own hand:

Brain [aneurism] - blood vessels ruptured in my brain[.]
 Ruptured intestine/stomach - high fever with rupture[.]
 Torn [bicep] and shoulder - injury crash[.]
 Asthma - unknown/have trouble breathing[.]

{¶ 8} 4. Earlier, on November 2, 2011, attending physician Anthony R. Lanier, D.O., completed an HPRS form captioned "Attending Physician Medical Evaluation." The form asks the physician to provide a "Diagnosis." In the space provided, Dr. Lanier listed:

* [L]eft frontal lesion with cavernous malformation, cerebral hemorrhage
 * Cephalgia
 * Asthma mild COPD
 * PUD
 * Hypertension
 * [Right] [illegible] labral tear
 * [Bilateral] biceps tendonitis

{¶ 9} The last section of the form asks the physician to mark the appropriate box describing the applicant's medical situation:

On the basis of my medical knowledge and the examination of the applicant, it is my opinion that the applicant is:

TOTALLY INCAPACITATED to perform specific job duties and responsibilities in the employ of the patrol and that such incapacitation is permanent.

CURRENTLY UNABLE to perform specific job duties and responsibilities in the employ of the patrol, at this time but could return to work at sometime in the foreseeable future. Could return to work on _____.

- NOT TOTALLY INCAPACITATED to perform specific job duties and responsibilities in the employ of the patrol and that such incapacitation is not permanent.
- IS CURRENTLY UNDER TREATMENT AND OUTCOME IS NOT YET DETERMINED.

{¶ 10} In response, Dr. Lanier marked the first box indicating that relator is totally incapacitated and that the incapacity is permanent.

{¶ 11} 5. On January 6, 2012, at HPRS' request, relator was examined by Michael A. Riethmiller, M.D. In his nine-page narrative report dated January 11, 2012, Dr. Riethmiller states:

In summary, a review of the available medical records and this independent medical evaluation reveals that Patrolman Gerke has a number of abnormal medical conditions. These would include a left parietal cavernous malformation, migraine headaches, a right shoulder rotator cuff tear, anxiety and depression, hypertension, gastroesophageal reflux disease, diverticulitis, and asthma.

Based upon a review of the available medical records and this independent medical evaluation, it is my medical opinion that Patrolman Gerke is totally and permanently incapacitated for duty with the Ohio State Highway Patrol. This opinion is based primarily upon his persistent headaches which are associated with migraine and also probably with the left parietal cavernous malformation. This latter abnormality did bleed on one occasion and the resultant irritation has led to a neurologic deficit. There is a further chance, although minimal, of further bleeding and it can be difficult to determine whether or not his persistent headaches are secondary to migraine or to a further complication from the left parietal cavernous malformation. A secondary medical condition resulting in his total and permanent incapacity for duty would be the right shoulder rotator cuff tear which has resulted in limited active motion and strength.

Although he initially declined surgery since he didn't wish to be absent from work, he certainly could undergo a corrective surgical procedure but then would have to participate in extensive post-operative rehabilitation in order to determine

whether or not he would regain full strength and motion of the right shoulder girdle. His other medical conditions appear to be well-controlled and wouldn't prevent him from performing his regular work duties.

{¶ 12} 6. On January 11, 2012, Dr. Riethmiller completed an HPRS form captioned "Independent Medical Evaluation." On the form, Dr. Riethmiller indicated by his mark: "This patient is totally and permanently incapacitated for duty with the Ohio State Highway Patrol."

{¶ 13} 7. On January 23, 2012, the board's consulting physician, Earl N. Metz, M.D., wrote an internal memorandum to the board:

Paul Gerke is 48 years old and was a member of cadet class #123. He applied for disability benefits in December 2011 with the following problems:

Brain aneurism - blood vessels ruptured in my brain
Ruptured intestine/stomach - high fever with rupture
Torn [bicep] and shoulder - injury crash
Asthma - unknown / have trouble breathing

The member's personal internist, Dr. Lanier, indicated that the trooper was "totally incapacitated" to perform the duties of a trooper due to the problems listed above.

The trooper's disability file begins with entries dated 1990 dealing with possible hypertension at the time Mr. Gerke applied to the academy. There is also correspondence which covers a ten year period and deals with his brain lesion, presumed to be a cavernous hemangioma. Other records deal with heartburn which has apparently been treated successfully with [P]rilosec. During the past six months or so he has been treated for asthma - pulmonary function tests have been near normal.

In August 2010 the trooper was involved in an auto accident which injured his shoulder and necessitated time off from work. He seems to have made a satisfactory recovery with physical therapy and injections.

On December 8, 2011, OHPRS received a note from William Beckett, LPCC indicting that he was treating Mr. Gerke for depression and anxiety - "conditions exacerbated by

workplace difficulties he is facing." There is no elaboration of the workplace difficulties.

On January 6, 2012 Mr. Gerke was examined by Michael Riethmiller, M.D.J.D., a specialist in occupational medicine. Dr. Riethmiller was able to put a rather complicated medical history into logical order and did a careful physical examination. His conclusion was that the trooper was disabled by a combination of factors, especially the headaches and the rotator cuff tear. None of the several conditions seems to be disabling individually and I believe there is some question whether or not they collectively add up to a disabling situation. I believe that further discussion is in order.

(Emphasis sic.)

{¶ 14} 8. By letter dated January 19, 2012, relator was informed by HPRS Executive Director Mark R. Atkeson that the Health Wellness and Disability ("HWD") committee will review his application on January 26, 2012.

{¶ 15} 9. By letter dated January 31, 2012, relator was informed by Atkeson:

This letter is to advise you that the Health, Wellness and Disability Committee took no action on a recommendation for your disability application pending the results of your neurological exam that is scheduled in February. Please forward us the results of that exam as soon as possible. Once received, our medical consultants will review the results of that exam and may require you to complete an independent medical evaluation from a designated neurologist. Your disability application will be re-evaluated by the Health, Wellness, and Disability Committee once the exam and review process is complete.

{¶ 16} 10. On February 14, 2012, relator underwent a brain MRI. The interpreting radiologist James E. Port, M.D., wrote:

Findings-

Comparison- MR brain 2006 history of left parietal cavernous angioma.

There is no evidence of restricted diffusion or pathologic enhancement to suggest acute/early subacute ischemic infarction, neoplasm or infectious/inflammatory process.

There is a heterogeneous focus in the left posterior frontal/parietal lobe most compatible with hemosiderin deposition patient's known cavernous angioma. There is no interval change compared to 9/29/2006 MR brain.

* * *

Impression- Stable focus of hemosiderin deposition. The left posterior frontal/parietal lobe most compatible with known cavernous angioma. No new or acute intracranial abnormality is identified. No pathologic enhancement.

{¶ 17} 11. On March 13, 2012, at his own request, relator was examined by neurologist M. Eyad Zonjy, M.D. Dr. Zonjy completed the HPRS form captioned "Attending Physician Medical Evaluation."

{¶ 18} The form asks the physician to provide a "Diagnosis." In response, Dr. Zonjy wrote:

Migrainous status.
[H]istory of intracerebral hemorrhage[.]
Cavernous angioma[.]

The form also poses the following query:

Which of the listed duties and responsibilities is the applicant unable to perform, and what specific disabling condition prevents performance?

In the space provided, Dr. Zonjy wrote:

Pain from headache and decreased focusing will affect the patient['s] ability to react quickly enough or responds [sic] to urgent situations.

{¶ 19} The form also asks the physician to mark the appropriate box describing the applicant's medical situation. Dr. Zonjy marked the box stating:

CURRENTLY UNABLE to perform specific job duties and responsibilities in the employ of the patrol, at this time but could return to work at sometime in the foreseeable future.
Could return to work on _____[.]

In the space provided, Dr. Zonjy wrote:

Reevaluate in 3 months[.]

{¶ 20} 12. On March 20, 2012, Dr. Metz wrote another internal memorandum to the board:

HPRS has received additional information regarding Paul Gerke. It came from a neurologist, Dr. Mohamed Zonjy, who described the trooper's headaches as migraine with a daily headache component. He concluded that Mr. Gerke was "currently unable to perform specific job duties" and should be "re-evaluated in three months."

I don't believe this new information adds much to our discussion.

{¶ 21} 13. By letter dated April 5, 2012, Atkeson informed relator:

This letter is to advise you that the Health, Wellness and Disability (HWD) Committee took no action on a recommendation for your disability application. The board appointed medical consultant was instructed to elect another doctor for an independent medical exam. This is to advise you that we have scheduled an exam with Dr. Marjorie Gallagher. She will evaluate your condition relative to identified job duties and responsibilities and report her findings and recommendations.

{¶ 22} 14. On April 19, 2012, at the request of HPRS, relator was examined by psychiatrist Marjorie Gallagher, M.D. In her 12-page narrative report, Dr. Gallagher states:

Trooper Gerke has been in counseling with a psychologist for years and has been on antidepressant medication prescribed by his family physician for the last six months. He reports some improvement in his symptoms, but from his mental status and continued significant severe symptoms of depression including intermittent suicidal ideation, it is my opinion that he has not had any significant improvement in his symptoms of depression. Other than his legs shaking, there was minimal evidence of and he denied any anxiety symptoms. The antidepressant medication has not been adjusted, changed or increased, since it was started.

Trooper Gerke requires more aggressive treatment with a psychiatrist. With psychiatric treatment and medication

adjustments, Trooper Gerke's psychiatric symptoms would be expected to improve and not persist for 12 months.

RECOMMENDATION: Trooper Gerke is currently disabled based on psychiatric evaluation, but this disability is not permanent or presumed to be permanent and would be expected to improve within the year with appropriate psychiatric treatment. Psychiatric treatment with medication adjustments is recommended.

{¶ 23} 15. On April 27, 2012, Dr. Gallagher completed the HPRS form captioned "Independent Medical Evaluation." On the form, Dr. Gallagher indicated by her mark:

This patient is not totally and permanently incapacitated for duty with the Ohio State Highway Patrol.

(Emphasis sic.)

{¶ 24} 16. On May 14, 2012, Dr. Metz wrote another internal memorandum to the board:

Our reports regarding Trooper Gerke included the fact that he was being treated for anxiety and depression. To follow up on that he was examined by an independent psychiatrist, Dr. Marjorie Gallagher on April 19, 2012.

Dr. Gallagher provided a comprehensive psychosocial history regarding the trooper and concluded that he was disabled - but probably not permanently and that, with psychiatric treatment may be able to return to work. She did not comment on the "workplace difficulties" mentioned by the trooper's therapist and, in fact said that, "He denies that he had any issues at work."

Based on the reports from Drs. Riethmiller and Gallagher, the best solution might be to grant disability for one year specifying regular psychiatric treatment and then have him re-examined.

{¶ 25} 17. By letter dated May 29, 2012, Atkeson informed relator:

This letter is to advise you the Health, Wellness and Disability (HWD) Committee voted to recommend the Board approve your disability application in the line of duty. As a condition you adhere to a prescribed medical follow up plan. This includes physical therapy, psychiatric care, and

quarterly reporting to the board. The full Board will consider the Committee's recommendation at the June 28, 2012, Board meeting. The committee's recommendation may be adopted or rejected, in whole or in part, or remanded to the HWD committee for further consideration. More details will be forthcoming if your application for disability is approved by the full Board.

{¶ 26} 18. By letter dated July 2, 2012, Atkeson informed relator:

This letter is to advise you at the June 28, 2012 meeting, the Retirement Board voted to deny your disability retirement. The decision of the Board is final per ORC 5505.18(A).

{¶ 27} 19. On August 30, 2012, relator, Paul E. Gerke, filed this mandamus action.

Conclusions of Law:

{¶ 28} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 29} R.C. 5505.18(A) currently provides:

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

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

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

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

{¶ 30} Mandamus is the appropriate remedy for relator to seek relief from the board's denial of his application for disability benefits because R.C. 5505.18 does not provide for an appeal from the board's decision. *State ex rel. Grein v. Ohio State Hwy. Patrol Retirement Sys.*, 116 Ohio St.3d 344, 2007-Ohio-6667, ¶ 6, citing *State ex rel. Moss v. Ohio State Hwy. Patrol Retirement Sys.*, 97 Ohio St.3d 198, 2002-Ohio-5806 ¶ 6.

{¶ 31} As long as there is "sufficient evidence" to support the board's decisions, the courts will not disturb them. *Grein* at ¶ 9.

{¶ 32} In *State ex rel. Worthy v. Ohio State Hwy. Patrol Retirement System*, 10th Dist. No. 07AP-507, 2008-Ohio-2462, this court, speaking through its magistrate, states:

Unfortunately, R.C. Chapter 5505, which governs OSHPRS, does not define the meaning of "permanent" as that term is used at R.C. 5505.18(A) which provides for a retirement benefit for a member "who becomes totally and permanently incapacitated for duty in the employ of the state highway patrol."

Thus, R.C. Chapter 5505 is unlike R.C. Chapter 3307, which governs the State Teachers Retirement System ("STRS"). A member of STRS who is mentally and/or physically incapacitated for the performance of duty by a disabling condition qualifies for disability retirement if the condition is either "permanent or presumably permanent for twelve continuous months following the filing of an application." R.C. 3307.62(C).

R.C. Chapter 5505 at issue here does not provide for presumptive permanency based on 12 continuous months of incapacitation as does R.C. Chapter 3307. See, also, R.C. 3309.39(C) which provides for presumptive permanency based upon 12 continuous months of incapacitation for a member of the School Employees Retirement System ("SERS").

Given that R.C. Chapter 5505 does not specifically provide for presumptive permanency, this magistrate is reluctant to incorporate that concept into R.C. Chapter 5505 simply because the concept appears in the statutes governing STRS and SERS.

Id. at ¶ 67-70.

{¶ 33} Former, Ohio Adm.Code 5505-3-02, effective December 16, 2011¹, supplemented R.C. 5505.18 and provided:

(C) Upon receipt of the application and any medical reports, the board will-

(1) Identify the member's duties and responsibilities effective on the day preceding the disabling condition; and

(2) Appoint one or more health care professionals with expertise in the disabling condition to examine the applicant at the expense of the retirement system to determine fitness for duty.

(D) After examining the applicant and reviewing the application, any medical reports submitted by the applicant, and the results of any additional medical testing, the health care professional or professionals will file a written report with the board with the following information:

(1) Whether the member is totally incapacitated for duty in the employ of the patrol,

(2) Whether the incapacity is expected to be permanent, and

(3) The cause of the member's incapacity.

(E) The board will forward a copy of the written report of the health care professional or professionals to the disability committee, which will schedule a hearing date.

* * *

(G) The disability committee will consider the application, any medical reports submitted by the applicant, the results of any additional medical testing, the written report of the

¹ Effective March 28, 2013, Ohio Adm.Code 5505-3-02 was substantially amended. Ohio Adm.Code 5505-3-02(A)(3) currently provides:

"Totally and permanently incapacitated" means a disabling condition that physically or mentally totally incapacitates a member from the performance of regular duty for a period of at least twelve months from the date of HPRS's receipt of the completed application packet.

In the magistrate's view, former Ohio Adm.Code 5505-3-02, effective December 16, 2011, is the rule applicable to this case.

health care professional or professionals, and other relevant information.

The disability committee may recommend one or more of the following:

- (1) Approval or denial of the application,
- (2) A finding on whether or not the disability occurred in the line of duty,
- (3) A finding that disability retirement be contingent on compliance with a treatment plan,
- (4) Further investigation,
- (5) Additional examination of the applicant.

* * *

(J) At the next regularly scheduled meeting of the board, the disability committee's recommendations on a disability application may be adopted or rejected, in whole or in part, or remanded to the disability committee for further consideration.

{¶ 34} It can be noted that neither R.C. 5505.18 nor former Ohio Adm.Code 5505-3-02, effective December 16, 2011, required the board to state the evidence relied upon or to give a brief explanation for its decision. Presumably, the board is therefore under no legal duty to state the evidence relied upon or to provide an explanation for its decision in the absence of a statute or rule requiring it to do so. *See State ex rel. Cydrus v. Pub. Emp. Retirement Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770 ¶ 14-27. Parenthetically, it can be further noted that former Ohio Adm.Code 5505-3-02(F)(7)(c) (effective March 25, 2004) provided that the board's "[d]enial notification shall contain a reasonable explanation for denial."

{¶ 35} Here, the board gave no explanation for its decision denying relator's application for disability retirement and it did not state what evidence it relied upon. Moreover, the board gave no explanation as to why it decided to reject the recommendation of its HWD committee that the application be approved, and that, as a

condition, relator adhere to a prescribed medical follow-up plan. The board, speaking through its executive director, simply states:

This letter is to advise you at the June 28, 2012 meeting, the Retirement Board voted to deny your disability retirement. The decision of the Board is final per ORC 5505.18(A).

{¶ 36} Presumably, based on *Grein*, the issue before this court is whether the administrative record contains "sufficient evidence" to support the board's decision to deny relator's application. Determination of this issue requires some analysis and scrutiny of the administrative record.

{¶ 37} Analysis begins with the observation that the R.C. 5505.18(A) medical examiners of record universally found that relator was at least temporarily incapacitated from the performance of duty as a trooper. Given that observation, it seems that the board must have felt that relator failed to prove that any of his identified medical conditions caused permanent incapacity.

{¶ 38} A brief review and summary of the medical evidence before the board is in order.

{¶ 39} As earlier noted, attending physician Dr. Lanier indicated by his mark that relator is "totally incapacitated as a trooper" and that the incapacitation is "permanent." Dr. Lanier's report was submitted by relator in support of his application.

{¶ 40} As earlier noted, on January 6, 2012, relator was examined by Dr. Riethmiller who was appointed by the board. Dr. Riethmiller identified two medical conditions that, in his opinion, caused relator to be "totally and permanently incapacitated" for duty as a trooper. The two medical conditions he identified were: (1) persistent headaches associated with migraine and probably with the left parietal cavernous malformation, and (2) right shoulder rotator cuff tear. Dr. Riethmiller added that relator "could undergo a corrective surgical procedure but then would have to participate in extensive post-operative rehabilitation."

{¶ 41} Conceivably, the board could have viewed Dr. Riethmiller's statement regarding surgery as being inconsistent with his opinion that the right shoulder rotator cuff tear was a cause of permanent incapacity.

{¶ 42} As earlier noted, on March 13, 2012, at his own request, relator was examined by Dr. Zonjy. On the HPRS form, Dr. Zonjy indicated by his mark that relator is "currently unable" to perform his trooper duties. In response to the form's query as to when relator could return to work, Dr. Zonjy wrote "reevaluate in 3 months."

{¶ 43} Dr. Zonjy's report could be viewed by the board as his unwillingness to opine that relator's medical conditions were permanent because Dr. Zonjy did not mark the box indicating total and permanent incapacity.

{¶ 44} As earlier noted, on April 19, 2012, relator was examined by psychiatrist Dr. Gallagher who was appointed by the board. In her narrative report, Dr. Gallagher opined that relator is "currently disabled" but "this disability is not permanent or presumed to be permanent and would be expected to improve within the year with appropriate psychiatric treatment."

{¶ 45} Viewing all of the above summarized medical reports, it appears that the administrative record provides "sufficient evidence," if not some evidence, that relator's medical conditions were not permanently disabling.

{¶ 46} Based upon the above analysis, the magistrate concludes that relator has failed to show that this court should issue a writ of mandamus.

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

/S/ MAGISTRATE
KENNETH W. MACKE

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).