

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that relator did not demonstrate that STRB abused its discretion by terminating her disability benefits and, accordingly, recommended that this court deny the requested writ of mandamus.

{¶3} Relator now raises the following objection to the magistrate's decision:

Despite the fact that the Plaintiff did not receive the relevant documentation from Defendant until after the hearing and upon receiving a copy of the record, the magistrate's decision found that Plaintiff waived the bias argument because she did not raise the issue at the hearing.

{¶4} Relator contends she was not aware until after she filed this mandamus action that, when deciding whether or not to terminate her disability benefits, STRB "continually considered the amount of benefits [relator] would receive." (Relator's Objections at 2.) Therefore, relator contends her argument that STRB was biased could not have been waived.

{¶5} We note, however, that relator has not provided any evidence that STRB "continually considered the amount of benefits" relator would receive when considering relator's application for disability benefits. As stated by the commission, STRB cannot have abused its discretion based on information that was not before it. Secondly, as concluded by the magistrate, relator's contention of bias on behalf of STRB is further eroded by the fact that STRB did grant disability benefits to relator in the first instance.

{¶6} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly

determined the pertinent facts and applied the appropriate law. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶7} Accordingly, relator's objection to the magistrate's decision is overruled, and the requested writ of mandamus is hereby denied.

*Objection overruled;
writ of mandamus denied.*

TYACK and CONNOR, 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. Lori Cardiff,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-345
	:	
State Teachers Retirement	:	(REGULAR CALENDAR)
System Board of Ohio,	:	
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on June 29, 2011

Cloppert, Latanick, Sauter & Washburn, and Sue A. Salamido, for relator.

Michael DeWine, Attorney General, and John E. Patterson, for respondent.

IN MANDAMUS

{¶8} Relator, Lori Cardiff, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, State Teachers Retirement Board ("STRB" or "board"), to vacate its order which terminated her disability benefits and ordering STRB to reinstate those benefits.

Findings of Fact:

{¶9} 1. Relator was a classroom teacher at Cardington-Lincoln Elementary School and last worked in December 2004.

{¶10} 2. In an application for disability dated July 26, 2005, relator listed three reasons for her disability:

[One] Severe neck and back pain, muscular spasms which require me to take serious medications to relieve pain. Meds. taken are Durgesic Patch, Methadone, Vicodin, Neurontin, Zanaflex, Nexium, Zoloft (My condition has become worse over the past 8 yrs.)

[Two] Blind in my left eye, which combined with the above causes serious headaches. Blindness in left eye since 1986 approx.

[Three] Emotional stress due to dealing with my health issues combined with the normal stress of working as a 1st gr. teacher.

{¶11} 3. Relator listed her doctors as Sudhir Dubey, Psy.D., and Dr. Lance Levitsky.

{¶12} 4. Relator submitted a report from Dr. Levitsky. In his report, Dr. Levitsky noted that relator had a corneal scar in her left eye secondary to recurrent Keratitis-Uveitis which caused decreased vision in her left eye. Dr. Levitsky did note that with correction, relator had 20/20 vision in both eyes and opined that, from an ocular standpoint, relator was not incapacitated from the performance of her job duties.

{¶13} 5. Relator also submitted a report from Dr. Dubey. Although he did not list a diagnosis, Dr. Dubey noted the following major symptoms: "labile mood, depressed affect, tearful, anhedonic, low stress tolerance, sleep disruption, appetite disturbance [and] anxious." Dr. Dubey noted that her prognosis was moderate,

depending on her ability and that she appeared to be doing better since she was removed from the work environment. He noted that she was struggling with adjustment with leaving work and that she was incapacitated from the performance of her work duties by virtue of her psychological condition.

{¶14} 6. Relator also submitted the 2004 MRI of her cervical spine which revealed the following impression:

[One] Multilevel mild degenerative spondylotic changes of the cervical spine, slightly more prominent at the C5/C6 level. Minimal reversal of the normal cervical spinal lordosis is present.

[Two] Findings as described above result in:

- a. C4/C5: Minimal bilateral neural foraminal stenosis.
- b. C5/C6: Minimal central canal stenosis as well as minimal bilateral neural foraminal stenosis, left greater than right.
- c. C7/T1: Minimal right neural foraminal stenosis.

{¶15} 7. Relator was referred to Nancy M. Vaughan, M.D., for an independent medical examination. Dr. Vaughan ultimately concluded that relator was not incapacitated from the performance of her job duties.

{¶16} 8. Relator was also examined by Richard H. Clary, M.D. Following his evaluation, Dr. Clary opined that relator had dysthymic disorder and that it was not work-prohibitive, nor did it cause long-term disability.

{¶17} 9. Following a review of the medical evidence by the medical review board members, Dr. Jeffery C. Hutzler, Dr. Charles F. Wooley, and Dr. Edwin H. Season, STRB denied relator's application for disability benefits.

{¶18} 10. Relator appealed and submitted additional medical evidence, including a new cervical MRI taken in 2006 which revealed the following:

[One] LARGE EXTRUDED LEFT POSTEROLATERAL DISC HERNIA AT C6-C7 WITH SEVERE LEFT LATERAL RECESS AND NEURAL FORAMINAL STENOSIS

[Two] SMALLER DISC HERNIAS IN THE LEFT LATERAL LOCATION AT C4-C5 AND C5-C6 WITH RESULTANT LEFT NEURAL FORAMINAL STENOSIS.

{¶19} 11. After reviewing the 2006 MRI, Dr. Vaughan opined that, in light of this new finding, it was her opinion that relator was currently disabled from her position as a teacher and recommended that she have a surgical consultation regarding the disc extrusion followed by a re-evaluation.

{¶20} 12. In a letter dated May 9, 2006, Earl N. Metz, M.D., from the medical review board, informed relator that, after reviewing the report of Dr. Vaughan, he would recommend that disability be granted.

{¶21} 13. Thereafter, relator was treated by Tim Chowdhury, M.D., at the Marion Pain Clinic. Dr. Chowdhury referred relator to the Central Ohio Neurological Surgeons where she was evaluated by Christian L. Bonasso, M.D. In his May 11, 2006 report, Dr. Bonasso explained the reasons why he was evaluating relator:

I had the opportunity to see Mrs. Cardiff today in the office with the chief complaint of headaches, neck pain and left upper extremity pain. She has been through multiple pain medications and multiple injections. Nothing has seemed to keep things under control except her medication regimen.

Dr. Bonasso diagnosed "Left C5-6, 6-7 disc osteophyte complexes" and informed relator of the following:

* * * [I]f she did have surgery the most likely thing to get better would be her left arm pain. I told her that her other symptoms would either stay the same or become worse. I also told her that I could not guarantee that she would come off of her medication.

{¶22} 14. In October 2007, Dr. Chowdhury was asked to complete an attending physician's report. Dr. Chowdhury noted that he had seen relator monthly, that her condition was stable with the changes in her activity, but that he did not evaluate her to determine whether or not she was incapacitated from the duties of her job as a teacher.

{¶23} 15. STRB sent a notice to Dr. Vaughan dated November 1, 2007 asking her to re-examine relator concerning continuing disability.

{¶24} 16. Dr. Vaughan did re-examine relator and, in her report dated November 20, 2007, Dr. Vaughan noted the following current complaints:

Currently she complains of constant, sharp, stabbing pain in the neck, stabbing in the interscapular region and stabbing pain in the low back. The intensity of the pain ranges from 4 to 9/10. She also complains of diffuse achy pain when her fibromyalgia flares.

She states that she has a bulging disc at C6-7. There is degenerative arthritis in the lumbar spine, fibromyalgia, blindness in her left eye, night seizures, hypertension, depression, and chronic diarrhea. * * *

Thereafter, Dr. Vaughan provided her physical findings upon examination, noting tenderness with palpation in the cervical region, and ultimately concluded that relator was physically capable of performing her assigned duties as a first grade teacher.

Specifically, Dr. Vaughan stated:

* * * Based on review of her records, her history and physical exam, it is my medical opinion that she is physically capable of performing her assigned duties as a first grade teacher. I understand that she has pain. Her treating physician may consider altering her medication. She may benefit from Lyrica instead of Neurontin. Lyrica has been proven in clinical trials to be effective for controlling fibromyalgia pain; also the Neurontin may be contributing to her depression. She may benefit more by the switch to Lyrica and also

consideration of Cymbalta. Cymbalta can help with pain as well as depression. Additionally, she is not on a nonsteroidal medication and that may help with pain in the cervical and lumbar region probably due to degenerative changes. An MRI of the cervical spine on 4/13/06, according to my note on April 28, 2006, revealed a large extruded disc herniation at C6-7. However, she has no findings on examination of cervical stenosis as a result of the disc herniation. Reflexes were not brisk. She had normal muscle tone; therefore, it is my medical opinion that is not a contributing factor to her complaints of pain. She told me she did see a neurosurgeon who did not recommend surgical intervention; 70% of the time the disc will resorb.

{¶25} 17. Thereafter, James N. Allen, M.D., reviewed the record and concluded that relator's disability benefits not be continued as follows:

In summary, this teacher has had left eye blindness since birth that does not result in incapacitation as judged by an ophthalmologist. She has myofascial pain that is due to fibromyalgia that is not incapacitating. She developed objective evidence of disc protrusion for which she received disability benefits in April, 2006. Her most recent independent medical examination indicates that the disc protrusion is causing no sign of spinal compression and Dr. Vaughan (who previously recommended for granting disability benefits) now recommends that disability benefits not be continued as her symptoms now are due to fibromyalgia and are not incapacitating. I recommend that Dr. Vaughan's most recent independent medical examination be accepted and recommend that disability benefits not be continued.

{¶26} 18. Dr. Season also evaluated the medical evidence. In his report dated December 18, 2007, Dr. Season ultimately opined that relator's disability retirement be denied.

{¶27} 19. The record was also reviewed by Dr. Wooley. In his December 19, 2007 report, Dr. Wooley concurred with Dr. Vaughan's assessment and recommended that disability benefits not be continued.

{¶28} 20. Thereafter, Dr. Metz recommended to STRB that relator's disability benefits be terminated.

{¶29} 21. STRB concluded that relator was no longer disabled and terminated her disability benefits.

{¶30} 22. In a letter dated January 29, 2008, relator notified STRB of her intent to appeal the decision to terminate her disability benefits.

{¶31} 23. In support of her appeal, relator had a third cervical MRI on February 19, 2008. That MRI revealed the following:

* * * Trilevel disc displacements C4-5 through C6-7 with mild ventral cord flattening and central canal stenosis at C4-5 and borderline mild central canal stenosis at C5-6. The level which most coincides with a leftward radiculopathy is found at C5-6 where shallow broad based mixed spondylotic protrusion indents the thecal sac resulting in borderline mild central canal stenosis without cord compression. Moderate left foraminal narrowing is noted secondary to uncinata hypertrophy with abutment of the exiting left C6 nerve root.

{¶32} 24. Dr. Vaughan was provided with a copy of the 2008 MRI. In her April 14, 2008 report, Dr. Vaughan discussed both the 2006 and 2008 MRIs:

* * * Of particular note is the MRI of the cervical spine dated 2/19/08. At C6-7 there was a "shallow broad-based disc displacement indents the thecal sac without cord compression or central canal stenosis". An MRI of the cervical spine dated 4/13/06 by comparison revealed a "large extruded disc herniation to the left". Judging by the comparison of the MRI report, the disc extrusion at C6-7 has resorbed, which happens 70% of the time.

The rest of the findings of the MRI dated 2/19/08 revealed just mild decreased disc height and shallow broad-based disc protrusion and spondylitic changes consistent with mild degenerative changes. There was no significant central canal stenosis or cord compression.

(Emphasis sic.) Finding that the 2008 MRI showed some improvement over the 2006 MRI, Dr. Vaughan continued to opine that relator was physically capable of performing her assigned duties.

{¶33} 25. Relator underwent a nerve conduction study in April 2008 which revealed the following:

[One] Electrodiagnostic evidence of a median neuropathy at the wrist constant with mild carpal tunnel syndrome.

[Two] Polyphasic potentials were seen in a C7 distribution due to a chronic C7 radiculopathy. No evidence of acute radiculopathy was seen.

{¶34} 26. The hearing before STRB was held on May 14, 2008. At that time, the matter was held in abeyance because STRB requested the following additional evidence: "Lumbar MRI only, then to Dr. Vaughan for review."

{¶35} 27. In response, a lumbar MRI was performed on June 26, 2008. The lumbar MRI revealed the following:

Degenerative and spondylitic changes at L3-L4 resulting in mild effacement of the ventral subarachnoid space and mild bilateral foraminal encroachment.

Mild disc protrusion with an annular fissure is observed at L4-L5 with slight distortion of the ventral subarachnoid space.

Mild disc bulging is evident at L5-S1 without distortion of the thecal sac or displacement of the descending S1 nerve roots.

{¶36} 28. The results of the lumbar MRI constitutes all the evidence that relator submitted to STRB within three months from the May 14, 2008 hearing as required by STRB. In a letter dated July 22, 2008, Dr. Vaughan indicated that, following her review

of the MRI as well as an x-ray of the lumbar spine, her medical opinion remained the same. Specifically, Dr. Vaughan stated:

The x-rays of the lumbar spine revealed end plate sclerosis and spur formation at L3-4. There was no instability with lumbar flexion or extension. The MRI of the lumbar spine revealed mild disc bulge at L5-S1, subtle protrusion at L4-5, disc space narrowing at L3-4 and facet arthropathy; these are all degenerative changes without stenosis.

{¶37} 29. On July 31, 2008, relator underwent a fluoroscopic guided discogram at L3-L4 and L4-L5. That test yielded the following findings:

[One] Fluoroscopic spot images of the lumbar spine demonstrate moderate to severe disc space narrowing with endplate osteophyte formation at L3-L4.

[Two] Discogram at L4-L5 demonstrates a posterior annular fissuring without gross epidural contrast extravasation. There is reproduction of the patient's normal symptomatology with more intense degree relative to L3-L4.

[Three] Discogram at the L3-L4 demonstrates a severely degenerated disc with lateral and anterior concentric tears. There is epidural contrast extension demonstrated. There is reproduction of the patient's usual symptomatology but less severe than that elicited by the L4-L5.

IMPRESSION: Discography at L3-L4 and L4-L5 are both positive for the patient's symptomatology although L4-L5 produced more intense pain. Both discs are abnormal and will be further evaluated with CT.

In spite of the fact that this test was performed within three months from STRB's decision to permit relator additional time to submit additional evidence regarding her lumbar spine, relator did not submit this document until November 14, 2008 and was untimely.

{¶38} 30. In addition, relator also submitted the June 14, 2008 letter from Dr. Bonasso outside the deadline for submitted additional evidence. With regards to the results of relator's discogram and EMG, Dr. Bonasso stated:

I had the opportunity to talk with Ms. Cardiff about her discogram. It was positive at C5-C6. She had an EMG that showed chronic left C7 radiculopathy. Certainly, she is in a gray zone as far as the chances of surgery helping her. She also has a known lumbar problem. We are going to MRI her lumbar spine, and I will talk with her again in the office. I will send you an updated letter at that time. Thank you very much for allowing me to participate in this patient's care.

{¶39} 31. Relator also submitted the July 1, 2008 report of Dr. Bonasso indicating that relator had elected to forego further intervention at this time. This report was also submitted late.

{¶40} 32. Relator also submitted the August 5, 2008 report of Dr. Bonasso indicating that relator wanted to proceed with surgery including a decompression, fusion and fixation with interbody grafting from L3 to L5. This report was also submitted late.

{¶41} 33. At first, STRB refused to accept and consider this additional evidence because STRB had only requested that relator submit an MRI and because all of those documents were submitted after the August 14, 2008 deadline for the submission of additional evidence. However, ultimately STRB did allow relator to submit all of this additional evidence and, in a letter dated January 13, 2009, STRB submitted that additional evidence to Dr. Vaughan and asked her to consider that new evidence and respond with regards to her opinion as to disability.

{¶42} 34. In a letter dated January 19, 2009, Dr. Vaughan responded, in full, as follows:

* * * I did receive the additional medical information on Lori Cardiff and I did review this information. I reviewed the letters from her attorney. Of particular importance is the cervical discography dated 5/21/08. The discography was done at L5-6 and C6-7. At C5-6, there was replication of her cervical neck pain. There were no radicular symptoms. According to a letter dated July 1, 2008, by Dr. Banasso [sic], she did have the positive discogram at C5-6. An MRI of the lumbar spine revealed severe degenerative disc disease at L3-4. He said, "She says her pain is tolerable." "She is going to hold off on any further intervention at this time, and she will follow up with me in about three months." The CT of the lumbar spine dated 7/31/08 did reveal a central/left paracentral radial annular tear and disc protrusion at L4-5. There was anterior and left paracentral annular tears at L3-4. The discogram was "positive for the patient's symptomatology, although L4-5 produced more intense pain." According to an office note on June 14, 2008, by Dr. Banasso [sic], an EMG showed a chronic left C7 radiculopathy. "Certainly, she is in a grey zone as far as chances of surgery helping her." An EMG of the left upper limb dated 4/23/08 did reveal a chronic C7 radiculopathy, but no acute changes were seen. In the attorney letter dated November 13, 2008, there was an operative report from 9/24/08 and a discharge summary from 9/28/08, which were returned. I do not have copies of those.

Recommendations: Based on the records provided to me, it remains my medical opinion that she is physically capable of performing her assigned duties. Again, I do not have copies of an operative report or discharge summary from September 2008. My opinion is just based on the medical records provided to me.

{¶43} 35. In a letter dated February 6, 2009, STRB informed relator that it would reopen her appeal at the February 18, 2009 meeting.

{¶44} 36. Following the hearing on February 20, 2009, STRB affirmed its prior decision indicating that relator's disability benefits would remain terminated.

{¶45} 37. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶46} In this mandamus action, relator contends that STRB abused its discretion in the following ways: (1) STRB's procedures and forms resulted in bias; (2) STRB failed to consider and address evidence relevant to her psychological condition; (3) STRB failed to consider and have her evaluated for her serious headaches; (4) STRB failed to consider all of her conditions in combination; (5) STRB did not evaluate, consider, or otherwise acknowledge all the objective findings revealed in the diagnostic testing performed in the summer 2008; and (6) STRB did not consider that she and her doctor had decided to proceed with lumbar surgery.

{¶47} It is this magistrate's decision that STRB did not abuse its discretion. Specifically: (1) STRB's procedures and forms do not demonstrate bias, and further, relator failed to raise this issue below; (2) STRB did consider relator's psychological condition and the evidence she submitted regarding that condition; (3) STRB did consider all the allowed conditions, including relator's explanation of her severe headaches for which she submitted supporting medical evidence; (4) STRB did consider all the conditions in conjunction with each other; (5) STRB did consider the findings revealed in the diagnostic tests; and (6) to the extent that STRB did not consider relator's surgery, relator's evidence of that surgery was filed outside the time period for the filing of additional evidence.

{¶48} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform

the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶49} Mandamus is the appropriate remedy where there is no statutory right of appeal from a decision of a public retirement system. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219; *State ex rel. Mallory v. Pub. Emp. Retirement Bd.* (1998), 82 Ohio St.3d 235; *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123; and *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760. As such, the determination by the state teachers retirement system ("STRS") and its retirement board of whether a person is entitled to disability retirement benefits is reviewable by mandamus because R.C. 3307.62 does not provide for an appeal from the administrative determination. *Id.* The determination of whether a member of STRS is entitled to disability retirement is solely within the discretion of the board. See R.C. 3307.62(F) and *Fair v. School Emp. Retirement Sys.* (1978), 53 Ohio St.2d 118.

{¶50} All of relator's arguments, including her bias argument, can essentially be addressed together. Relator argues that the commission did not consider all the conditions affecting her ability to perform her job, including the psychological evidence and her assertion of severe headaches, that the commission did not consider all the objective findings revealed in the diagnostic testing and did not consider all of her conditions in combination with each other. Lastly, relator contends that STRB completely ignored the fact that she was proceeding with surgery.

{¶51} R.C. 3307.62 provides as follows regarding disability coverage for members of STRS:

(A) The state teachers retirement system shall provide disability coverage to each member participating in the plan * * * who has at least five years of total service credit.

Not later than October 16, 1992, the state teachers retirement board shall give each person who is a member on July 29, 1992, the opportunity to elect disability coverage either under former section 3307.43 of the Revised Code or under former section 3307.431 of the Revised Code. * * *

* * *

Disability coverage shall be provided under section 3307.631 of the Revised Code for persons who become members after July 29, 1992, and for members who elect under this division to be covered under section 3307.631 of the Revised Code.

The board may adopt rules governing elections made under this division.

(B) Application for a disability benefit may be made by a member, by a person acting in the member's behalf, or by the member's employer, if the member is participating in the plan described in sections 3307.50 to 3307.79 of the Revised Code, has at least five years of total service credit, and has disability coverage under section 3307.63 or 3307.631 of the Revised Code. The application for a disability benefit shall be made on a form approved by the board. * * *

* * *

(C) 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. * * *

(D) Application for a disability benefit must be made within two years from the date the member's contributing service terminated, unless the board determines that the member's medical records demonstrate conclusively that at the time

the two-year period expired, the member was physically or mentally incapacitated for duty as a teacher and unable to make application. * * *

(E) If the physician or physicians determine that the member qualifies for a disability benefit, the board concurs with the determination, and the member agrees to medical treatment as specified in division (G) of this section, the member shall receive a disability benefit under section 3307.63 or 3307.631 of the Revised Code. If such physician or physicians determine that the member does not qualify for a disability benefit, the report of the examiner or examiners shall be evaluated by a board of medical review composed of three physicians appointed by the retirement board.

(F) The state teachers retirement board shall render an order determining whether or not the applicant shall be granted a disability benefit. Notification to the applicant shall be issued, and upon the request of an applicant who is denied a disability benefit, a hearing or appeal relative to such order shall be conducted in accordance with procedures established by the retirement board.

(G) The state teachers retirement board shall adopt rules requiring each disability benefit recipient, as a condition of continuing to receive a disability benefit, to agree in writing to obtain any medical treatment recommended by the board's physician and submit medical reports regarding the treatment. If the board determines that a disability benefit recipient is not obtaining the medical treatment or the board does not receive a required medical report, the disability benefit shall be suspended until the treatment is obtained, the report is received by the board, or the board's physician certifies that the treatment is no longer helpful or advisable. Should the recipient's failure to obtain treatment or submit a medical report continue for one year, the recipient's right to the disability benefit shall be terminated as of the effective date of the original suspension.

{¶52} As above indicated in subsection (C), relator was referred to competent, disinterested physicians selected by STRB to determine whether she was mentally or physically incapacitated from the performance of duty by disabling conditions, either

permanent or presumed to be permanent for 12 continuous months, following the filing of the application.

{¶53} As the above statutory provisions provide, there are certain requirements which must be met before a member can qualify for disability payments. First, the member must have at least five years of total service credit. R.C. 3307.62(B). Second, the application must be made within two years from the date the member's contributing service terminated unless the board determines otherwise. R.C. 3307.62(D). Third, the board must determine whether or not the member is mentally or physically incapacitated from the performance of their last assigned duties by a disabling condition which is either permanent or presumed to be permanent for 12 continuous months after the filing of the application. R.C. 3307.62(C). Fourth, because of changes made to the statute, the board must be aware of whether or not the member has elected disability coverage under former R.C. 3307.43 or 3307.431. R.C. 3307.62(B). Further, all applications are to be made on a form approved by the board. R.C. 3307.62(B).

{¶54} Relator argues that STRS' disability forms clearly establish that STRB is biased. In making this argument, relator explains that STRS has two disability benefit programs available for members participating in the defined benefit plan and who have at least five years of total service credit. Those two plans are designated as the Disability Allowance Plan and Disability Retirement Plan. See R.C. 3307.62(A). Relator explains that the main difference in these two plans is that members enrolled in the disability retirement plan can continue to receive disability benefits regardless of their age, while members enrolled in the disability allowance plan have their benefits terminated once they reach age 65. Relator argues that disability retirement is

theoretically more costly than disability allowance and that since she was receiving benefits under the disability retirement plan (more costly plan), STRB elicited information from her which would inform the members of STRB that she was receiving benefits under the more costly plan and give them a reason to terminate her benefits in spite of the medical evidence.

{¶55} Relator points out that the forms drafted by STRS require that the member provide the number of years that the member has been a contributor to STRS. Because she had more than 19 years of service credit, relator contends that STRB could easily calculate that she began teaching prior to 1992 and was more likely covered under the disability retirement plan. Relator also points out that her age and/or date of birth are referenced numerous times, allowing STRB to estimate the number of years she could continue to receive benefits. Lastly, because some of the forms provide information about her current benefits and calculate her future benefits, relator asserts that having this type of financial information clearly biased members of STRB to terminate disability benefits in spite of the medical evidence.

{¶56} The magistrate finds that relator's arguments do not establish bias. By statute, the board must know whether a member applying has at least five years of service credit. This information is necessary under the statute. Relator also contends that bias is clearly demonstrated where the form requires that she provide the last day of service and a description of her former job responsibilities. However, by statute, the application must be made within two years of the last day of service and it is the responsibility of the board to determine whether or not the member is mentally or

physically incapacitated from the performance of their prior job. The board must know whether or not the application is timely filed.

{¶57} Relator also argues that it is clearly prejudicial that she be required to provide her date of birth on the application. Relator argues that the purpose of this is so the board can calculate the length of time for which benefits might be paid thereby giving the board a reason to deny or terminate benefits to a younger member. And finally, relator contends that information in her file concerning the amount of benefits being paid obviously biases the board to terminate a member's benefits.

{¶58} Relator did not raise any of these bias arguments when she appeared before the board. The magistrate finds that, because relator failed to raise this issue at a time when it could have been addressed by the board, relator has waived the issue.

{¶59} Respondent cites *State ex rel. Marchiano v. School Emps. Retirement Sys.*, 121 Ohio St.3d 139, 2009-Ohio-307, in support of its argument that relator has waived the issue. In that case, Barbara Marchiano had been employed as an elementary school instructional aide when she was injured. Marchiano filed an application for disability retirement benefits with State Employees Retirement System ("SERS"); however, when her application was denied administratively, Marchiano sought a writ of mandamus.

{¶60} One of Marchiano's arguments was that Dr. Hawkins, who had examined her for her psychiatric condition, was biased against her. Relator argued that Dr. Hawkins was a professional witness whose testimony in previous cases clearly indicated that he shapes his testimony in favor of whatever party is paying him and that he was hostile towards her during her evaluation. Essentially, Marchiano argued that Dr. Hawkins was not a disinterested medical examiner because of his financial relationship with SERS.

However, the Supreme Court of Ohio indicated that relator could not establish that SERS had abused its discretion based on an argument that was never presented.

{¶61} Similarly, in this case, relator did not present her concerns to STRB and never raised this as an issue. Further, as indicated earlier, STRB must establish whether or not a member is eligible for disability retirement. This determination requires knowing the number of years of credit the member has, the member's prior job duties, and the member's last date of service. Further, STRB needs to know the member's age to help determine whether or not the member is disabled. What might cause an older member to be disabled might not cause a younger member to be disabled. Further, after granting disability, the board might require a member, as a condition of receiving disability benefits, to agree in writing to obtain medical treatment. Whether or not to require this as a condition of receiving benefits, it is necessary to understand who your member is to determine whether or not such treatment would be beneficial. Further, with regard to age, virtually every medical report begins with a brief history of the patient which, by necessity, includes an indication of the patient's age.

{¶62} Relator's last argument concerning bias is that forms are generated after the application is filed which indicate the amount of benefits the member would receive. Relator contends that this type of financial information, which is calculated prior to the board's decision, clearly establishes bias. Again, relator failed to raise this issue and, her argument is further eroded by the fact that STRB actually granted her disability benefits in the first instance. As will be hereinafter discussed, relator's benefits were ultimately terminated due to her failure to timely submit medical evidence of her continuing disability.

{¶63} The magistrate finds that relator's first argument lacks merit.

{¶64} In her second argument, relator contends that STRB did not adequately consider her psychological condition either in the first instance or when terminating her disability retirement. In making this argument, relator argues that STRB did not ask Dr. Clary to reconsider his opinion regarding her psychological condition after her treating psychologist, Dr. Dubey, authored a follow-up opinion to Dr. Clary's report. Relator contends that if STRB would have properly considered her psychological condition when she initially filed her application, STRB may have granted her application based, in part, on her psychological condition and thereby would have been required to obtain an additional psychiatric evaluation before STRB could terminate her disability retirement. For the reasons that follow, the magistrate disagrees.

{¶65} In support of her application, relator submitted a report from Dr. Dubey which appears to have been signed by him on July 5, 2005. Dr. Dubey opined that relator was incapacitated from the performance of her job duties and that the disability was considered to be permanent. In support, while Dr. Dubey did not provide a diagnosis, he did note that she had the following symptoms: "labile mood, depressed affect, tearful, anhedonic, low stress tolerance, sleep disruption, appetite disturbance [and] anxious" which resulted in physical signs of disrupted sleep and a change in weight/appetite. Dr. Dubey noted that her prognosis was moderate depending on her ability and that she appeared to be doing better since she had removed herself from the work environment. At that time, Dr. Dubey noted that relator was struggling with her adjustment to leaving work.

{¶66} STRB had relator examined by Dr. Clary. In his November 11, 2005 report, Dr. Clary noted that relator's speech was a normal velocity and that her thoughts were logical, coherent, and goal directed; her affect was reactive and appropriate and that while she smiled and laughed during the evaluation, she was also tearful noting that her mood varies from day-to-day; there was no motor manifestations of anxiety such as shaking or fidgeting, diaphoresis or hyperventilation and there was no history of panic attacks or post traumatic stress disorder; she was not experiencing any hallucinations, delusions, or paranoid ideation and there were no loose associations, no grandiosity nor obsessions or compulsions; her concentration was good, her short and long term memory were good and she appeared to be of above average intelligence; and that her insight was fair and her judgment was intact. Dr. Clary diagnosed her with dysthymic disorder and opined that it was not work prohibitive and that it did not cause long-term disability.

{¶67} In response, Dr. Dubey authored a report dated January 25, 2006. Nowhere in his report does Dr. Dubey mention the report of Dr. Clary. Instead, Dr. Dubey expressed his opinion that stress would exacerbate her general level of pain and depression and that in his opinion, if she were required to return to the work environment, she would have difficulty maintaining appropriate pacing and management of responsibilities and that she would become increasingly depressed and emotionally labile.

{¶68} Relator contends that STRB abused its discretion by not submitting the January 26, 2006 report of Dr. Clary for his response. Relator argues that, if STRB would have, Dr. Clary may have changed his opinion and STRB may have granted her

disability benefits based, at least in part, on her psychological condition. The magistrate disagrees.

{¶69} In the stipulation of evidence, relator presented a significant amount of medical evidence concerning her physical conditions. STRB had relator initially examined by Dr. Vaughan. At first, Dr. Vaughan opined that relator was not disabled. Thereafter, relator submitted additional medical evidence of her physical conditions and STRB submitted those documents to Dr. Vaughan for consideration. First, Dr. Vaughan was presented with additional information in September 2005 and, in a report dated September 30, 2005, Dr. Vaughan indicated that the additional information did not change her opinion.

{¶70} Thereafter, during the pendency of relator's appeal, Dr. Vaughan was presented with additional medical evidence. Again, in a report dated March 1, 2006, Dr. Vaughan opined that the additional medical evidence did not change her opinion and that relator was not disabled.

{¶71} However, after Dr. Vaughan was shown the April 13, 2006 MRI results of relator's cervical region, Dr. Vaughan changed her opinion and opined that, in light of that new evidence, relator was disabled.

{¶72} As is clearly evident, relator presented new evidence concerning her physical problems. Because the evidence was new and included additional diagnostic testing, STRB submitted that additional evidence to Dr. Vaughan in order to assist STRB in determining whether or not relator was disabled.

{¶73} With regard to her psychological evidence, the magistrate finds that the January 25, 2006 report of Dr. Dubey did not consist of new evidence regarding relator's

psychological condition. No additional testing had been performed, no additional diagnosis was provided. Instead, Dr. Dubey's opinion remained the same. In his May 2005 report, Dr. Dubey noted that relator appeared to be doing better since she removed herself from the work environment and that, in his opinion, she would not be able to return to work. After Dr. Clary opined that relator's psychological problem was not work prohibitive, Dr. Dubey simply said that, in his opinion, returning to work would increase her stress.

{¶74} This does not constitute any new evidence. Unlike the additional physical evidence which relator submitted and which was reviewed by Dr. Vaughan, relator did not submit new evidence of her psychological condition. As such, there was no new evidence for Dr. Vaughan to consider. Either relator could return to work based upon her psychological condition or she could not. Dr. Dubey's opinion that returning to work would essentially cause her condition to worsen was no different than his original opinion that she was incapacitated from performing her job based upon her psychological condition.

{¶75} There simply was no new evidence for Dr. Clary to consider and the magistrate finds that relator's argument in this regard is not well-taken.

{¶76} Relator next contends that STRB did not consider all of her allowed conditions. Specifically, relator argues that STRB did not consider or have her evaluated for her serious headaches. The magistrate disagrees with relator's argument.

{¶77} In her initial application, relator indicated that she had severe neck and back pain, as well as muscular spasms and she suffered blindness in her left eye.

Relator argued that the combination of the blindness in her left eye as well as her neck and back pain caused her to have serious headaches.

{¶78} From a medical standpoint, relator did not present any medical evidence that would have accounted for her headaches. Relator did provide the May 11, 2006 report from her treating physician, Dr. Bonasso, in which he indicated that he saw relator with the chief complaint of headaches, neck pain and left upper extremity pain. Dr. Bonasso diagnosed "Left C5-6, 6-7 disc osteophyte complexes," and opined that if relator had surgery, her left arm pain would likely get better; however, he noted that her other symptoms would either stay the same or become worse.

{¶79} When he saw her again in April 2008, Dr. Bonasso indicated that relator had increasing leg pain and left upper extremity pain; however, there was no mention of any headaches. Dr. Bonasso's later report of June 14, 2008 again failed to make any mention of headaches.

{¶80} Further, to the extent that relator opined that the blindness in her left eye caused her headaches, at least in part, Dr. Levitsky, her ophthalmologist, made no mention of headaches.

{¶81} In making this argument, relator does not point to any medical evidence substantiating her headaches, their severity, or their effect on her ability to return to her job. Instead, relator points only to the statement she made on her application that the blindness in her left eye in combination with the neck and back pain caused serious headaches. Without any medical evidence for STRB or any of the examining physicians to consider, relator simply failed to present any medical evidence.

{¶82} In *State ex rel. Bruce v. State Teachers Retirement Bd. of Ohio*, 153 Ohio App.3d 589, 606-07, 2003-Ohio-4181, relator, Deborah S. Bruce, argued that STRS had abused its discretion when it failed to have her evaluated by a psychiatrist. At her own request, Bruce had been examined by Dr. Hutzler, a psychiatrist. Dr. Hutzler opined that Bruce was getting excellent treatment, that he encouraged her to continue in psychotherapy, which was benefiting her and that she had made a good adjustment. Dr. Hutzler concluded that, from a *global medical standpoint*, Bruce was disabled in her ability to teach.

{¶83} According to Bruce, STRS did not appoint a competent disinterested psychiatrist to examine her and she argued that this constituted an abuse of discretion. However, the court agreed with the magistrate's conclusion that, because Dr. Hutzler appeared unwilling to opine that she was incapacitated by a psychological disorder, STRS was not required to appoint a psychiatrist, pursuant to R.C. 3307.62(C), to examine her. Because Bruce had failed to present medical evidence that she was disabled by a psychological disorder, this court concluded that STRS did not abuse its discretion by not having her examined by a psychiatrist.

{¶84} Similarly, in the present case, the only evidence that relator was disabled due to headaches came from her own statement on her application. There was no evidence from any physician regarding the origin of those headaches or indicating that the headaches were disabling. There is no evidence that relator was taking medication for the headaches.

{¶85} Relator's next two arguments will be addressed together. Relator argues that STRB abused its discretion by failing to consider all of the allowed conditions in

combination with each other. Relator argues that the statute does not require that she be disabled by a single diagnosis; instead, relator argues that it is the member's overall condition that is to be considered when determining whether or not the member is entitled to disability benefits. Relator contends that the record does not establish that STRB considered all the allowed conditions.

{¶86} In making this argument, it appears that relator is contending that, inasmuch as there is no statement made in a specific doctor's report, or in a statement made by any of the members of the medical review committee or by the board, it is clear that STRB did not consider all of her allowed conditions in combination with each other.

{¶87} Relator also criticizes the reports of Dr. Vaughan because, when considering the additional medical evidence which relator submitted in support of her appeal and which STRB forwarded to Dr. Vaughan for review, Dr. Vaughan did not individually identify and discuss each and every finding on the MRIs and discograms. For the reasons that follow, the magistrate disagrees with relator's argument.

{¶88} STRB decisions are not subject to the same requirements to which orders of the Industrial Commission of Ohio are subjected. Specifically, pursuant to *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the commission is required to identify the medical evidence upon which it relied and further to provide a brief analysis and explanation of its decision to grant or deny benefits. Such an explanation is required by statute.

{¶89} By comparison, STRB is not required to specifically identify the medical evidence upon which it relies and is not required to give an explanation. Instead, this

court reviews the record to determine whether or not there is some evidence in the record upon which STRB could rely to support its decision. Somewhat complicating this determination is the fact that members of the medical review committee, who are doctors, review all of the medical evidence and submit their opinions to the board for final consideration. Thereafter, the board, comprised of physicians, considers all the medical reports as well as the opinions of its medical review committee and reaches a determination concerning whether or not the member is disabled. Neither the physicians on the medical review committee nor the physicians on the board are required to identify the medical evidence relied upon nor are they required to provide an explanation.

{¶90} In support of her argument, relator points out that Dr. Vaughan did not specifically identify every finding revealed by diagnostic testing. As explained in the findings of fact, after relator's benefits were terminated, she appealed and presented additional medical evidence. The board then concluded that it wanted relator to submit an additional lumbar MRI before the board reached its decision and relator was given a certain date by which to present that evidence.

{¶91} In response, relator did submit a lumbar MRI which was reviewed by Dr. Vaughan. In a letter dated July 22, 2008, Dr. Vaughan indicated that she reviewed the MRI and that, in her opinion, relator was no longer disabled.

{¶92} After the final date for submitting evidence, relator submitted additional evidence and then complained when STRB refused to consider that additional evidence. Ultimately, STRB permitted relator to submit additional evidence which was submitted to Dr. Vaughan for review. As such, in spite of the fact that STRB was not required to accept that additional evidence and in spite of the fact that the statute and the Ohio

Administrative Code specifically provide that no evidence will be accepted after the deadline, STRB accepted and considered the additional medical evidence. At this point in time, to argue that STRB did not consider all the conditions and findings simply because each finding was not specifically enumerated, the magistrate finds that relator is asking this court to reweigh the evidence. STRB has the discretion to make these determinations and, in the absence of an abuse of discretion, this court should not disturb those determinations. Here, relator cannot substantiate her arguments and is asking the court to reweigh the medical evidence. Relator simply has not established that STRB doctors did not consider all the conditions which she alleged caused her disability. As such, these two arguments of relator should be rejected as well.

{¶93} Relator's final argument is that STRB should have reopened the record and admitted evidence of her surgery before finally determining that her disability should be terminated. However, the record reveals that STRB extended the deadline for the filing of evidence by relator and, even after that deadline had been extended, and relator submitted untimely medical evidence, STRB again permitted her to file that evidence and STRB actually considered that evidence. Ohio Adm.Code 3307-1-17-05 provides that STRB will establish a date after which no additional medical evidence will be accepted for consideration. Further, in numerous letters, relator was reminded of the final date to submit additional medical evidence. In spite of this evidence, relator submitted additional untimely medical evidence. The simple fact that STRB declined to again extend her deadline for submitting medical evidence does not demonstrate STRB abused its discretion. STRB cannot abuse its discretion based upon evidence that was created after the record before STRB was closed.

{¶94} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that STRB abused its discretion by terminating her disability benefits and relator's request for a writ of mandamus should be denied.

/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).