

Mail Date:

AUG 13 2021

Mail Date: _____

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF M.K.
DOCKET NO. 2019-12
CLAIM OF M.K.

OPINION AND ORDER OF THE BOARD

The Public School Employees' Retirement Board ("Board") has carefully and independently reviewed the entire record of this proceeding, including the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the proposed Opinion and Recommendation and, accordingly, we hereby adopt it as our own.

IT IS HEREBY ORDERED that Claimant's request to reinstate his disability supplement is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: 8/6/21

By: 
Christopher SantaMaria, Chairman

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF M [REDACTED] K [REDACTED] :
DOCKET NO. 2019-12 :
CLAIM OF M [REDACTED] K [REDACTED] :

OPINION AND RECOMMENDATION

Date of Hearing: November 19, 2020
Hearing Officer: Jason C. Giurintano, Esquire
For the Claimant: Robert F. Stranick, Esquire
For PSERS: Cayla B. Jakubowitz, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by M██████K██████ ("Claimant") on August 16, 2019. Claimant appealed from a decision of the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") dated July 18, 2019 ("ESRC denial letter"), which denied Claimant's request to have his disability annuity reinstated, citing Claimant's continued failure to provide information that PSERS requested. On September 3, 2019, PSERS filed its Answer to Claimant's appeal.

By letter dated August 28, 2020, the Board's Secretary, Glen R. Grell, appointed Jason C. Giurintano to act as Hearing Officer for Claimant's administrative hearing. By letter of October 22, 2020, the Board's Appeal Docket Clerk notified counsel for Claimant that the administrative hearing was scheduled for October 22, 2020, in Harrisburg, Pennsylvania. The hearing occurred as scheduled. Claimant attended the hearing and was represented by Robert Stranick, Esquire, while Cayla B. Jakubowitz, Esquire, represented PSERS.

The Notes of Testimony ("N.T.") were filed on December 7, 2020. An Order Establishing Briefing Schedule directed Claimant to file his post-hearing brief by close of business on January 16, 2021, PSERS to file its post-hearing brief in response by close of business on February 16, 2021, and Claimant to file any reply brief by close of business on March 3, 2021. The parties filed timely briefs, Claimant did not file a reply brief, and therefore the record was closed on March 3, 2021. Accordingly, the matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant began substitute teaching in 1995 and began working as a full-time teacher in 1996. N.T. 46.
2. Claimant worked as a health and physical education teacher for the School District of [REDACTED] until he terminated employment on December 25, 2016. PSERS-2; N.T. 46, 55.
3. Claimant's job duties as a teacher of health and physical education, as summarized in the Employer 's Job Description for Disability Application ("Job Description") submitted to PSERS, included instructing students on sports, movement, and health promotion. PSERS-2; N.T. 89.
4. On January 3, 2017, Claimant filed an Application for Disability Retirement ("Initial Disability Application") with PSERS. PSERS-1; N.T. 86-87; Official Notice- Board Records.¹

¹ Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa. Code §35.173.

Official notice is also permitted under case law. *See*, for example, *Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the Commonwealth Court explained:

“Official notice” is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency’s field and those facts contained in reports and records in the agency’s files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also

(footnote continued on next page)

5. As part of Claimant's application, a Physician's Medical Report, Job Description, and Psychiatric Disability Determination were submitted to PSERS. PSERS-2, PSERS-3, PSERS-4; N.T. 89-90.

6. As of the date of the initial Psychiatric Disability Determination form, Claimant suffered from major depressive disorder, with anxiety, and panic attacks consistent with mild post-traumatic stress disorder. PSERS-4, p. 3.

7. In December 2016, Claimant was being treated by two separate providers– Dr. [REDACTED] (psychiatrist) and Dr. [REDACTED] (psychotherapy). PSERS-4.

8. In December 2016 his treating psychiatrist, Dr. [REDACTED], completed the Psychiatric Disability Determination form and indicated Claimant was being treated with the medications Lexapro, Wellbutrin, and Xanax, as well as receiving weekly psychotherapy with Dr. [REDACTED] PSERS-4, p. 4; N.T. 13.

9. By way of internal processes, PSERS receives all the required documentation for an initial disability application, the staff creates a file and then passes that file to a PSERS' medical examiner for review. N.T. 90.

10. After a review of the documentation, the medical examiner can recommend approving the disability, denying the disability, or requesting additional information. N.T. 91, 123.

11. If the medical examiner recommends approving the disability, he can recommend approving for a long-term disability or a short-term disability; a short-term disability will generally

recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

be one year, but the medical examiner can recommend a shorter period, such as six (6) months. N.T. 91, 123-25.

12. In the mental health context, a long-term disability will generally be granted if a person has been receiving a short-term disability for years and is not getting better. N.T. 124.

13. After Claimant's file was forwarded to and reviewed by the PSERS medical examiner, the medical examiner recommended granting Claimant's Initial Disability Application for four (4) months. N.T. 92.

14. By letter dated January 18, 2017, PSERS granted Claimant's Initial Disability Application for a period of four (4) months. PSERS-5; N.T. 92.

15. Because Claimant was granted a disability retirement for four (4) months, Claimant was required to file a renewal application with PSERS to request a disability retirement beyond that time. N.T. 92-93; PSERS-5; PSERS-6.

16. By letter dated March 27, 2017, PSERS advised Claimant that his renewal application was due, and asked that his provider complete the PSERS Psychiatric Disability Determination form to serve as Claimant's renewal application. PSERS-6; N.T. 93-94.

17. On April 13, 2017, PSERS received a copy of Claimant's Psychiatric Disability Determination ("April 2017 Renewal Application") that was completed by Dr. [REDACTED], which served as Claimant's renewal application. PSERS-7; N.T. 94.

18. As of April 10, 2017, the date Dr. [REDACTED] completed the form, Dr. [REDACTED] indicated that Claimant still suffered from major depressive disorder and generalized anxiety disorder, was still treating with the medications Lexapro, Wellbutrin, and Xanax, and was receiving periodic psychotherapy. PSERS-7, p. 3, 4, 6.

19. As with an initial application, once PSERS receives all the required documentation for a renewal application, staff will review the application to ensure it is complete, add the new information to the existing file, and pass the file to a medical examiner for review and recommendation. N.T. 95.

20. As with an initial application, after reviewing a renewal application, the PSERS medical examiner can recommend approving the disability, denying the disability, or requesting additional information. N.T. 91, 123, 125.

21. As with an initial application, if the PSERS medical examiner recommends approving the disability, he can recommend approving for a long-term disability or a short-term disability. N.T. 123, 125.

22. After Claimant's file was forwarded and reviewed by the PSERS medical examiner, the medical examiner recommended granting Claimant's April 2017 Renewal Application for six (6) months. N.T. 95-96.

23. By letter dated May 31, 2017, PSERS granted Claimant's April 2017 Renewal Application for a period of six (6) months. PSERS-8; N.T. 95-96.

24. Because Claimant was granted a disability retirement extension for only six (6) months, Claimant was obligated to file a renewal application with PSERS to request a disability retirement beyond that time. N.T. 96; PSERS-8; PSERS-9.

25. By letter dated September 28, 2017, PSERS advised Claimant that his renewal application was due by December 31, 2017, and asked that his provider complete the PSERS Psychiatric Disability Determination form to serve as Claimant's renewal application. PSERS-9; N.T. 97.

26. On October 9, 2017, Claimant submitted a Psychiatric Disability Determination form ("December 2017 Renewal Application") that was completed by Dr. [REDACTED], which served as Claimant's renewal application. PSERS-10; N.T. 97.

27. As of October 9, 2017, the date Dr. [REDACTED] completed the form, Dr. [REDACTED] indicated that Claimant suffered from major depressive disorder and generalized anxiety disorder, but had stopped treating with the medications Lexapro, Wellbutrin, and Xanax, and was only receiving psychotherapy every "2-3 months and as needed." PSERS-10, p. 3, 4, 6.

28. Beyond this, Dr. [REDACTED] did not include any additional information or attach additional papers to the Psychiatric Disability Determination form. PSERS-10.

29. PSERS staff followed its normal procedure when it received Claimant's December 2017 Renewal Application and passed the file to a medical examiner for review. N.T. 98.

30. PSERS'-then medical examiner, Dr. [REDACTED], a licensed psychiatrist, reviewed the documentation and requested additional medical information from Claimant. PSERS-11; N.T. 98, 102.

31. More specifically, by letter dated October 27, 2017, PSERS requested that Claimant provide PSERS with office progress notes for the last 12 months "from **both** [his] Psychiatrist and Psychotherapist." PSERS-11; N.T. 98.

32. The letter dated October 27, 2017, warned that the "[f]ailure to return the requested information will result in your disability benefit being stopped." PSERS-11.

33. In response to the letter dated October 27, 2017, on November 9, 2017, PSERS received handwritten notes from Dr. [REDACTED] that PSERS personnel found to be illegible and that they were otherwise unable to read. PSERS-12; N.T. 98-99.

34. PSERS did not receive any records other than the handwritten notes from Dr. [REDACTED] in response to its October 27, 2017, request. N.T. 98-99.

35. PSERS staff again followed its normal procedure when it received the notes from Dr. [REDACTED] on November 9, 2017, and staff passed the notes to the medical examiner for review. N.T. 99.

36. PSERS medical examiner at the time, Dr. [REDACTED], reviewed the illegible office notes from Dr. [REDACTED], and reiterated his need for additional information. N.T. 99.

37. On December 29, 2017, PSERS requested that Claimant provide PSERS with **legible** office progress notes for the last 12 months both from his **psychiatrist** and **psychotherapist**. PSERS-13; N.T. 99.

38. On January 11, 2018, PSERS received typewritten office notes from Claimant's psychiatrist, Dr. [REDACTED]. PSERS-14, N.T. 100.

39. PSERS did not receive any records, other than the typed notes from Dr. [REDACTED], in response to its December 29, 2017, request, *e.g.* notes from Dr. [REDACTED]. N.T. 100.

40. Pursuant to its procedures, PSERS forwarded the typed notes, along with the entire file, to its medical examiner, Dr. [REDACTED], for review. N.T. 100.

41. Based on his review of Claimant's file, including Dr. [REDACTED] typed records, Dr. [REDACTED] recommended denying Claimant's December 2017 Renewal Application. N.T. 100.

42. PSERS' Disability Denial Review Committee is a committee of PSERS upper management who review recommendations to deny disability applications. N.T. 100.

43. Rather than denying Claimant's December 2017 Renewal Application, the PSERS Disability Denial Review Committee reviewed Claimant's application and decided to provide him

with an additional opportunity to submit medical records establishing continued disability. N.T. 100; PSERS-15.

44. By letter dated January 31, 2018, PSERS requested that Claimant provide PSERS with information regarding the medications he was taking, what doses, and yet again requested office notes from his psychotherapist. PSERS-15; N.T. 101.

45. In response, on February 14, 2018, PSERS received a note from Dr. [REDACTED] that Claimant continues to take Xanax, but has stopped Lexapro and Wellbutrin. PSERS-16; N.T. 101.

46. PSERS did not receive any further records, other than the aforementioned prescription notes from Dr. [REDACTED], in response to its February 14, 2018, request. N.T. 101; PSERS-16.

47. In sum, PSERS asked for progress notes from Claimant's psychotherapist on three occasions, but never received those requested records. PSERS-11; PSERS-13; PSERS-15; N.T. 98-101, 104-5.

48. PSERS ultimately provided Claimant with multiple opportunities to submit additional records in support of his request for the renewal of his short-term disability annuity.² PSERS-10; PSERS-11; PSERS-13; PSERS-15.

49. Pursuant to its business procedures, PSERS forwarded the additional record received from Dr. [REDACTED] on February 14, 2018, to its medical examiner, Dr. [REDACTED], for review. N.T. 101.

50. Based on his review of the records received, Dr. [REDACTED] recommended denying Claimant's December 2017 Renewal Application. N.T. 101.

² Claimant understood the requests for records and never contacted PSERS to inquire about the requests. N.T. 114-16.

51. By letter dated April 20, 2018, PSERS advised Claimant that his December 2017 Renewal Application had been denied. PSERS-17; N.T. 103.

52. Because Claimant's December 2017 Renewal Application was denied, the disability supplement portion of Claimant's retirement benefit was stopped effective May 1, 2018,³ and pursuant to existing law PSERS automatically converted Claimant disability benefit to an early retirement benefit moving forward. PSERS-17; N.T. 103-04.

53. Claimant appealed PSERS' denial of his December 2017 Renewal Application to the PSERS' Executive Staff Review Committee ("ESRC"). N.T. 104

54. The ESRC denied Claimant's appeal at its June 20, 2019, meeting. PSERS-18, N.T. 104.

55. On August 16, 2019, Claimant appealed the ESRC's decision to the Public School Employees' Retirement Board ("Board"). Official Notice- Claimant's Appeal; N.T. 105.

56. On September 3, 2019, PSERS filed an Answer to Claimant's appeal. Official Notice- PSERS' Answer.

57. Claimant began experiencing depression and anxiety in the fall of 2014 into the spring of 2015. N.T. 47.

58. In May 2015, Claimant began treating with Dr. [REDACTED]. N.T. 16, 57.

59. In June 2015, Claimant began treating with Dr. [REDACTED] every two to three months. PSERS-14; N.T. 16-17, 39-40.

³ This amounts to an additional four (4) months of disability benefits from PSERS, from December 31, 2017 to May 1, 2018, to which he would otherwise not be entitled. PSERS-17; N.T. 103.

60. When Claimant first applied for a disability retirement with PSERS on January 3, 2017, he was treating weekly for psychotherapy with Dr. [REDACTED]. PSERS-1; PSERS-3, p. 2; PSERS-4, p. 4; N.T. 36, 56-57.

61. In April 2017, Claimant had ceased weekly psychotherapy with Dr. [REDACTED] but was still treating periodically for psychotherapy with an unspecified provider. PSERS-7, p. 4.

62. By late 2017, Claimant no longer required psychotherapy treatment with Dr. [REDACTED] and only treated thereafter with Dr. [REDACTED]. PSERS-10, p. 4; N.T. 57.

63. Claimant did not treat with any doctors for his mental health conditions in 2017 other than Dr. [REDACTED] and Dr. [REDACTED]. N.T. 57.

64. By late 2017, Claimant only treated with Dr. [REDACTED], and only treated with him once every three months. N.T. 57; PSERS-14.

65. In December 2016 and April 2017, Claimant was taking Lexapro, Wellbutrin, and Xanax for his mental health conditions. PSERS-4, p. 4; PSERS-7, p. 4; N.T. 36.

66. Dr. [REDACTED] prescribed Lexapro and Wellbutrin for Claimant's depression, and the Lexapro also worked to help with anxiety and panic attacks. N.T. 36.

67. Dr. [REDACTED] also prescribed a low dose of Xanax for Claimant's anxiety and panic attacks. N.T. 36.

68. Claimant has not taken any other medications for his mental health conditions. N.T. 39-40.

69. By late 2017, Claimant had stopped Lexapro and Wellbutrin, and had reduced his Xanax to an as needed basis. PSERS-10, p. 4; PSERS-16; N.T. 36, 37-39, 128.

70. In late 2017, Claimant did not need Xanax, and accordingly, was not taking any medications. PSERS-10, p. 4.

71. Claimant suffered from some side effects relating to the antidepressants, but ultimately, Dr. [REDACTED] stopped prescribing Claimant antidepressants because Claimant's condition had improved enough that he did not need to continue the ones he had been taking, nor try new medications. N.T. 38.

72. Claimant eventually restarted Lexapro, but it was well after 2017, and at a minimum, after April 25, 2018. N.T. 37-39.

73. Claimant has never restarted Wellbutrin. N.T. 39.

74. Claimant's conditions significantly improved, as evidenced by his elimination of weekly psychotherapy sessions, infrequent treatment with Dr. [REDACTED], and reduction from three medications to only a low-dose prescription of Xanax, for an as needed basis. PSERS-4; PSERS-10, p. 4; PSERS-14, PSERS-16; N.T. 36, 37-39, 128, 142.

75. Generally, if a patient has significant depression and anxiety, they take medications for those symptoms. N.T. 130.

76. Treating with a psychiatrist every two to three months is consistent with a patient who is stable, and the psychiatrist is just managing medications. N.T. 164, 166.

77. For patients with significant anxiety and depression, treatment with a psychiatrist every three to four weeks, to modify medications, is expected. N.T. 164.

78. Patients with significant anxiety and depression generally will treat through psychotherapy as well as their psychiatric appointments for medications. N.T. 164-65.

79. In December 2016, Claimant was suffering from severe excessive worry and panic attacks and moderate post-traumatic stress disorder symptoms. PSERS-4, p. 3; N.T. 32-33.

80. By April 2017, and continuing throughout that year, Claimant's panic attacks and post-traumatic stress disorder symptoms had resolved completely. PSERS-7, p. 3; PSERS-10, p. 3; N.T. 32-33, 139.

81. Claimant acknowledged that since leaving the classroom, Claimant's anxiety and depression have improved. N.T. 49-50.

82. As opined by Dr. [REDACTED], by late 2017, Claimant was "much less anxious," he was "better able to concentrate," and "is doing pretty well now." N.T. 26.

83. As opined by Dr. [REDACTED], by late 2017, Claimant had neither severe symptoms nor extreme limitations. PSERS-10, p. 3, 6; N.T. 31.

84. Dr. [REDACTED] acknowledged that Claimant could return to his prior public school job and work at least some days. N.T. 41-42.

85. The improvements in Claimant's health are documented, in part, in the Psychiatric Disability Determination form that Dr. [REDACTED] completed on October 9, 2017, which reflects improvements since Dr. [REDACTED] completed the same form on December 3, 2016. PSERS-4; PSERS-10; N.T. 35.

86. As opined by Dr. [REDACTED], D.O., a licensed psychiatrist and PSERS' current medical examiner, and reflected in the forms completed by Dr. [REDACTED], by late 2017, Claimant's "symptoms were markedly improved." PSERS-19; N.T. 127.

87. Dr. [REDACTED] is an expert in the field of psychiatry. N.T. 121.

88. By October 2017, as reflected in Dr. [REDACTED] office notes, Claimant was only suffering from "residual anxiety and difficulty concentrating." PSERS-14, p. 2; N.T. 147.

89. By October 2017, Claimant presented "a very stable mental status." N.T. 148.

90. Claimant and his girlfriend, [REDACTED], met in 2013 when Ms. [REDACTED] began teaching at the same school as Claimant, [REDACTED]. N.T. 68.

91. In 2017 and onward, Ms. [REDACTED] and Claimant only spent small periods of time together. N.T. 73.

92. As described by Ms. [REDACTED], towards the end of 2017, she saw Claimant "[v]ery infrequently," and they "really did not spend any periods of time together." N.T. 74.

93. Because Ms. [REDACTED] was not generally present with Claimant, she did not have first-hand knowledge of how Claimant was doing at the end of 2017, or any knowledge beyond what Claimant relayed to her when they periodically spoke by phone. N.T. 75.

94. As agreed by both medical experts who testified at the administrative hearing, an individual suffering from anxiety and depression can improve to the point that they can return to work. N.T. 40, 150.

95. Once an individual suffering from anxiety and depression has improved to the point they can return to work, there is no way to medically know whether they will relapse if they return to work. N.T. 152.

96. With proper treatment, however, there is a good probability that an individual will not relapse. N.T. 153.

97. By the time Claimant filed his December 2017 Renewal Application on October 9, 2017, Claimant had recovered enough from his mental health conditions that he could return to his prior public school employment. N.T. 26, 31, 49-50, 127, 147.

98. As of Claimant's December 31, 2017, renewal date, Claimant was able to perform all job duties as set forth in his Job Description. PSERS-2; N.T. 153.

99. As of his renewal date of December 31, 2017, Claimant was not disabled from performing his prior public school employment. N.T., *passim*.

100. An administrative hearing on Claimant's appeal was held on November 19, 2020, before Hearing Officer Jason C. Giurintano, Esquire. N.T., *passim*.

101. Claimant was present at the hearing, represented by counsel, had the opportunity to be heard, and filed a post-hearing brief in support of his appeal. N.T., *passim*.

CONCLUSIONS OF LAW

1. PSERS is a creature of statute and derives its authority from the provisions of the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 *et seq.* ("Retirement Code").

Forman v. Pub. Sch. Employees' Ret. Bd., 778 A.2d 778, 780 (Pa. Cmwlth. 2001).

2. Members of PSERS have only those rights recognized by statute and none beyond. *Bittenbender v. State Employees' Retirement Board*,⁴ 622 A.2d 403 (Pa. Cmwlth. 1992).

3. Claimant bears the burden of establishing the facts necessary to sustain his claim. *See Gierschick v. State Employees' Ret. Bd.*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *see also Wingert v. State Employees' Ret. Bd.*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).

4. Claimant was afforded notice and an opportunity to be heard in connection with his appeal. Findings of Fact 53-56, 101-102.

5. Claimant is not psychiatrically or physically disabled from performing his prior public school employment as a teacher of health and physical education, and at the time he filed his December 2017 Renewal Application, Claimant was able to return to that prior public school employment. Findings of Fact 1 – 102.

6. Claimant has failed to demonstrate by a preponderance of the evidence that he is disabled from public school employment and that his December 2017 Renewal Application for a disability retirement should be granted. Findings of Fact 1 – 102.

7. Costs and attorney's fees cannot be awarded in an action before the Board. *See generally* 24 Pa.C.S. § 8101 *et seq.*; *Forman v. Pub. Sch. Employees' Ret. Bd.*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).⁵

⁴ Cases interpreting provision of the State Employees' Retirement Code "are equally applicable in deciding issues arising under similar or identical provisions" of the Retirement Code. *Krill v. Pub. Sch. Employees' Ret. Bd.*, 713 A.2d 132, 134 n.3 (Pa. Cmwlth. 1998).

⁵ Claimant's Post-Hearing Brief at pg. 8 states a claim for attorney's fees and costs.

DISCUSSION

Burden of Proof

Claimant bears the burden of proof in this proceeding. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 751 A.2d 194 (Pa. 2000); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269 (Pa. Cmwlth. 1991). The preponderance of the evidence standard is the correct burden of proof to be applied in this administrative action. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 529 Pa. 654, 602 A. 2d 863 (1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A. 2d 678 (Pa. Cmwlth. 2005). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Appellant's case must weigh slightly more than the opposing evidence. *Se-Ling Hosierey, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950).

Credibility of Witnesses and Weight of the Evidence

In an administrative proceeding, the fact finder determines questions of the credibility of witnesses and of the weight of the evidence. *See e.g., Nepa v. Department of Public Welfare*, 551 A.2d 354 (Pa. Cmwlth. 1988) (determination of credibility of witnesses in health care providers' appeal is the province of the fact finder); *Aloe Coal Co. v. Department of Transportation*, 643 A. 2d 757, 762 (Pa. Cmwlth. 1994) (It is within the purview of the agency to determine the credibility of witnesses and to determine the weight to be accorded evidence). In weighing any evidence, a factfinder "may rely on his or her experience [and] common sense" to arrive at a proper conclusion. *Commonwealth v. Segida*, 985 A.2d 871, 879 (Pa. 2009). *See*

also, *Summers v. Certaineed Corp.*, 997 A.2d 1152, 1161 (Pa. 2010) (“The credibility of witnesses, professional or lay and the weight to be given their testimony is strictly within the proper province of the trier of fact.”).

Governing Law

This matter arises under section 8307 of the Public School Employees’ Retirement Code, 24 Pa.C.S. § 8101 *et seq.* (“Retirement Code”), which provides as follows with regard to eligibility for a disability annuity:

§ 8307. Eligibility for annuities.

* * *

(c) Disability annuity. — An active or inactive member who has credit for at least five years of service shall, upon filing of a proper application, be entitled to a disability annuity if he becomes mentally or physically incapable of continuing to perform the duties for which he is employed and qualifies for an annuity in accordance with the provisions of section 8505(c)(1) (relating to duties of board regarding applications and elections of members and participants).

* * *

24 Pa.C.S. § 8307(c). The Board’s regulations implementing this provision further provide that “[a]n active or inactive member with at least 5 years of credited school service shall be eligible, *upon submitting appropriate medical evidence*, to a disability annuity. . .” 22 Pa.Code § 213.44(a) (emphasis added).

Background of the Claim

Claimant began substitute teaching in 1995 and then began working as a full-time teacher in 1996. More specifically, Claimant worked as a health and physical education teacher for the

School District of [REDACTED] His job duties included instructing students on sports, movement, and health promotion.⁶

Claimant terminated his employment with the School District of [REDACTED] on or about December 25, 2016. On January 3, 2017, Claimant filed an Initial Disability Application with PSERS. The underlying basis for the disability application was Claimant suffering from major depressive disorder, with anxiety, and panic attacks consistent with mild post-traumatic stress disorder. At the time of the Initial Disability Application, Claimant was being treated by two separate providers— Dr. [REDACTED] and Dr. [REDACTED]. In December 2016, when Dr. [REDACTED] completed PSERS' Psychiatric Disability Determination form and indicated Claimant was being treated with Lexapro, Wellbutrin, and Xanax, as well as receiving weekly psychotherapy with Dr. [REDACTED].

By letter dated January 18, 2017, PSERS granted Claimant's Initial Disability Application for a period of four (4) months and he was awarded a disability annuity.⁷ On April 13, 2017, Claimant filed a timely disability renewal application, seeking to extend his disability annuity. On that renewal application, Dr. [REDACTED] indicated that Claimant still suffered from major depressive disorder and generalized anxiety disorder, was still treating with the medications Lexapro, Wellbutrin, and Xanax, and was still receiving periodic psychotherapy. After review by the PSERS' medical examiner, PSERS then extended Claimant's benefits another six (6) months.⁸

⁶ His job duties are more comprehensively summarized in the Employer's Job Description found at PSERS-2.

⁷ A portion of the disability annuity is the disability supplement, which is the amount of the disability annuitant's monthly benefit that is in excess of the annuity to which he would otherwise be entitled to receive in retirement if he was not disabled. 24 Pa.C.S. § 8102 (def. "disability annuitant"), 8344(a), 8505(c)(2). If a member recovers from his disability, the member's disability supplement is stopped, but, if otherwise eligible, the member may still receive an early or regular retirement benefit from PSERS. 24 Pa.C.S. 8344(c). In such a case, PSERS automatically converts the member to an early or regular retirement benefit so that the member does not miss a pension payment. N.T. 103-04.

⁸ The Retirement Code requires that a PSERS medical examiner review a member's application for a disability retirement and any supporting documentation and make a recommendation as to a finding of disability or nondisability. 24 Pa.C.S. 8505(c)(1).

Given that his disability benefit was set to cease in December 2017, Claimant again filed a timely disability renewal application in October 2017, *i.e.*, the December 2017 Disability Renewal Application. To that end, on October 9, 2017, Claimant submitted a Psychiatric Disability Determination wherein Dr. [REDACTED] indicated that Claimant suffered from major depressive disorder and generalized anxiety disorder, but had stopped treating with the medications Lexapro, Wellbutrin, and Xanax, and was only receiving psychotherapy every "2-3 months and as needed." After receiving and reviewing this information, PSERS'-then medical examiner, Dr. [REDACTED] requested additional information from Claimant. More specifically, by letter dated October 27, 2017, PSERS requested that Claimant provide PSERS with office progress notes for the last 12 months from both his Psychiatrist and Psychotherapist.

In response to the letter dated October 27, 2017, the **only** documents PSERS received were illegible handwritten notes from Dr. [REDACTED]. Dr. [REDACTED] attempted to review the illegible office notes from Dr. [REDACTED], was unable to do so and on December 29, 2017, PSERS requested that Claimant provide PSERS with legible office progress notes for the last 12 months both from his psychiatrist and psychotherapist. On January 11, 2018, PSERS received the typewritten office of Dr. [REDACTED]. PSERS did not receive any other records from Claimant, from either his psychotherapist or otherwise. Dr. [REDACTED] reviewed the typewritten notes and recommended denying Claimant's December 2017 Renewal Application.

However, rather than going ahead and outright denying Claimant's December 2017 Renewal Application, the PSERS Disability Denial Review Committee decided to provide him yet another opportunity to submit medical records establishing continued disability. By letter dated January 31, 2018, PSERS requested that Claimant provide PSERS with information regarding the medications he was taking, what doses, and yet again requested office notes from his

psychotherapist. In response, on February 14, 2018, PSERS received a note from Dr. [REDACTED] that Claimant continues to take Xanax, but has stopped Lexapro and Wellbutrin. PSERS did not receive any further records.

Pursuant to its business procedures, PSERS forwarded the additional record received from Dr. [REDACTED] on February 14, 2018, to Dr. [REDACTED] for review. Based on his review, Dr. [REDACTED] recommended denying Claimant's December 2017 Renewal Application. By letter dated April 20, 2018, PSERS advised Claimant that his December 2017 Renewal Application had been denied. Because Claimant's December 2017 Renewal Application was denied, the disability supplement portion of Claimant's retirement benefit was stopped effective May 1, 2018, and PSERS automatically converted Claimant to an early retirement benefit moving forward.

Claimant then appealed his denial to PSERS' ESRC. The ESRC denied this appeal as set forth in a letter dated July 18, 2019, which explained the denial of Claimant's request to have his disability annuity reinstated. The ESRC's letter cited, *inter alia*, the following basis for the denial:

“You have not met the burden of proof to establish continued medical eligibility to receive a disability benefit. PSERS' Medical Examiner has determined that there is not sufficient documentation to establish your continued medical eligibility to receive a disability benefit. The information you did submit shows a symptomatic improvement in your condition for which you were granted a disability retirement. You are, therefore, no longer eligible to receive a disability retirement benefit from PSERS.”

PSERS Exhibit 18 (emphasis added).

On August 16, 2019, Claimant appealed the ESRC's decision to the Public School Employees' Retirement Board, thereby giving rise the instant administrative proceeding. At the hearing, Claimant was represented by counsel and was afforded the opportunity to be heard.

Claimant did not meet his burden

As a general matter, the existing statutory/regulatory scheme set forth in the Retirement Code puts the onus on the member to establish that he is disabled. For example, at the time of renewal, the Retirement Code requires that the member has the burden of establishing that he or she remains disabled from returning to his prior public school employment. 24 Pa.C.S. 8508(d); 24 Pa.C.S. § 8505(c)(2). There are also statutory/regulatory mechanisms in place that allow PSERS' to award only a short-term disability retirement annuity, thereby requiring the putatively disabled member to periodically demonstrate to PSERS that s/he remains disabled. These reasonable guardrails certainly do not rise to the level of a "completely flawed" or "shameful" process as Claimant's Counsel suggested at the hearing.⁹ N.T.131, 171.

PSERS gave this gentleman numerous bites at the apple to offer documentation, including, but not limited to, Dr. [REDACTED] records, supporting his contention that he continued to be disabled as of December 2017 to the extent that he was unable to perform his job duties. In fact, PSERS sent Claimant letters dated October 27, 2017, December 29, 2017, and January 31, 2018, each of which informed him of the following things:

- PSERS' medical examiner had reviewed the medication documentation submitted with Claimant's 2016 Renewal Application.
- In order to properly evaluate Claimant's continued eligibility for a disability annuity, PSERS must determine whether or not Claimant's condition had improved.
- Based on the information received from him, PSERS was unable to make that determination.
- PSERS' medical examiners needed additional documentation that proved Claimant's original conditions of major depressive disorder and anxiety disorder still existed, had not improved, and still prevented him from performing the duties of his public school employment.
- Claimant's failure to do so would result in the disability supplement portion of his benefit being terminated.

⁹ Claimant's Counsel is reminded that appropriate hearing decorum and civility are to be observed in all proceedings before this agency.

PSERS Exhibits 11, 13, 15.

Claimant here appears to take issue with the fact that PSERS and its medical examiners based their opinions solely on the records Claimant supplied, or failed to supply, instead of conducting some sort of independent medical analysis. This is correct to the extent that is not incumbent upon PSERS to contact Claimant's medical practitioners to get additional information. Instead, it was Claimant's responsibility – or burden – under section 8508(d) of the Retirement Code, to establish his continued disability. 24 Pa.C.S. § 8508(d).¹⁰ As a practical matter, that means it was Claimant's responsibility, not the responsibility of PSERS or its medical examiners, to see that all of the information and medical records necessary to establish his continued disability were provided to PSERS and its medical examiners.

As noted above, PSERS tried multiple times to obtain the additional information from Claimant, even by specifically stating what he needed to produce, but he did not fulfill his responsibility by providing it. Given the numerous chances PSERS provided to Claimant so that Claimant could fulfill his burden under 24 Pa.C.S. § 8508(d), especially in the context of 22 Pa.Code § 215.5(a)(2)¹¹, and especially when all of those chances are considered in combination

¹⁰ § 8508. Rights and duties of annuitants

* * *

(d) Continuances of disability annuities. — In all instances, the member shall have the burden of establishing continued disability.

24 Pa.C.S. § 8508(d).

¹¹ § 215.5. Duties of the Board.

(a) Application, elections and disability annuities. Duties of the Board regarding applications and elections of members and disability annuities include the following:

* * *

(footnote continued on next page)

with the fact that it was Claimant's responsibility to produce the requested information, any contention by Claimant that PSERS and/or its medical examiners should have done more simply cannot be sustained.

PSERS acted reasonably inasmuch as it "bent over backwards" to give Claimant multiple chances to provide PSERS with additional information and medical records necessary to establish his continued disability. This included extending this disability benefit for four (4) months beyond December 2017.

However, Claimant's mere failure to provide requested information was not, in and of itself, PSERS' sole basis for denial. Even assuming, *arguendo*, that PSERS did receive records from Dr. [REDACTED] based upon the contents of those records, his Renewal Application may still have been denied. Thus, PSERS decision here was based upon the fact that the contents of the medical documentation Claimant did submit to PSERS were insufficient to support his claim for a continued disability benefit.

Rather than establishing continued disability, the records Claimant submitted to PSERS reflect that by late 2017, Claimant's condition had improved to the point where he was able to return to his prior public school employment. More specifically, Claimant had stopped taking the medications Lexapro and Wellbutrin, and was only prescribed Xanax on an as needed basis. (PSERS-10, p. 4; PSERS-16). In late 2017, Claimant did not need Xanax and was not actually taking any medications. (PSERS-10, p. 4). In addition, Claimant no longer required weekly

(2) A disability applicant who is required by the Board to furnish additional medical documentation to support the application, shall provide the documentation within 30 days of the request, or the Board may render the disability application void.

* * *

psychotherapy with Dr. [REDACTED] in fact, he ceased all treatment with Dr. [REDACTED]. (PSERS-10, p. 2, 4). He also was only treating with Dr. [REDACTED] once every three months. (PSERS-14). This reduced level of treatment is consistent with a patient who is stable and is only treating with a psychiatrist to manage medications. N.T. 164, 166. This level of treatment is not consistent with a patient who is struggling with disabling anxiety and depression. N.T. 164. Indeed, Dr. [REDACTED] acknowledged that, by late 2017, Claimant had no severe symptoms or extreme limitations. (PSERS-10, p. 3, 6).

Pursuant to the Retirement Code at 24 Pa.C.S. § 8307(c), there are essentially five elements that a member must prove in order for the member to be eligible for a disability annuity: the applicant must (1) be an active or inactive member of PSERS when he initially files his Application for Disability Retirement; (2) have credit for at least five years of service; (3) file a proper application; (4) become mentally or physically incapable of continuing to perform the duties for which he is employed; and (5) qualify for an annuity in accordance with section 8505(c)(1) of the Retirement Code. 24 Pa.C.S. § 8307(c). Additionally, section 8508(d) of the Retirement Code, provides that “[i]n all instances, the member shall have the burden of establishing continued disability.” 24 Pa.C.S. § 8508(d). Therefore, to warrant the renewal of his disability retirement, Claimant must prove that all elements exist. In Claimant’s case, the first two elements are not in dispute. However, the third, fourth, and fifth elements are at issue, and although they are closely intertwined, for sake a clarity each will be addressed each in turn.

Third Element- proper application/appropriate medical evidence

The regulations implementing the Retirement Code flesh out the third element, filing a proper application, by defining what constitutes a “proper application.” That is, the regulations require an applicant for a disability annuity to submit “appropriate medical evidence.” 22 Pa. Code

§ 213.44(a). At the hearing, PSERS offered into evidence the expert testimony of Dr. [REDACTED]¹², PSERS' current medical examiner, who reviewed Claimant's file and all of the medical records he submitted in order to determine if his medical conditions, as documented in his December 2017 Renewal Application, warranted a finding of a disability. There is no dispute that Claimant never submitted the records of Dr. [REDACTED] when he submitted his December 2017 renewal application. Accordingly, the medical records he submitted were deficient and not appropriate in that regard.

Based upon the records Claimant did submit, Dr. [REDACTED] testified as to Claimant's mental status. He concluded, after reviewing all of the available medical evidence provided by Claimant, that said evidence was insufficient to support a finding that Claimant is disabled, either mentally or physically, from performing his prior public school employment. As noted above, he was given the opportunity to submit numerous evidence on numerous occasions, but failed to do so. At the hearing, Claimant had the opportunity to present additional medical evidence to support his disability claim. The Hearing Examiner finds that Claimant did not, in fact, present sufficient credible evidence to contradict or rebut PSERS' medical examiner's expert medical opinion, which was offered to a reasonable degree of medical certainty. The third element, therefore, is missing.

Fourth Element- become mentally or physically incapable of continuing to perform the duties for which he is employed

Because appropriate medical evidence to demonstrate Claimant's asserted disability is absent from the record, it follows that Claimant has failed to demonstrate, by a preponderance of the evidence, that the major depressive and anxiety disorder prevented him from continuing to work as a physical education teacher he left the school district as of the December 2017

¹² Dr. [REDACTED] was PSERS' medical examiner at the time Claimant's December 2017 Renewal Claim was submitted.

renewal application. In light of these considerations, the evidence does not support the presence of the fourth element.

Fifth Element- qualify for an annuity in accordance with section 8505(c)(1) of the Retirement Code

With regard to the fifth element, section 8505(c)(1), the provision of the Retirement Code referenced in 24 Pa.C.S. § 8307(c), provides as follows:

(c) Disability annuities. — In every case where the board has received an application duly executed by the member or by a person legally authorized to act in his behalf for a disability annuity based upon the member's physical or mental incapacity for the performance of the job for which he is employed, the board shall:

(1) Through the medical examiner, have the application and any supporting medical records and other documentation submitted with the application reviewed and, on the basis of said review and the subsequent recommendation by the medical examiner regarding the applicant's medical qualification for a disability annuity along with such other recommendations which he may make with respect to the permanency of disability or the need for subsequent reviews, make a finding of disability or nondisability and, in the case of disability, establish an effective date of disability and the terms and conditions regarding subsequent reviews.

24 Pa.C.S. § 8505(c)(1).

Under this provision, the fifth element that must be present is that a PSERS medical examiner must make a finding of disability after reviewing the application, any supporting medical records, and other documentation submitted with the application. As is clear from the discussion above, PSERS' medical examiner, Dr. [REDACTED], and later Doctor [REDACTED], reviewed Claimant's file and all of the medical records he submitted to determine if his medical conditions, as documented in his December 2017 Renewal Application, warranted a finding of a disability. Both of PSERS' medical examiners were unable to make such a finding. In weighing the evidence, the Hearing Examiner finds that Claimant did not present sufficient credible evidence to contradict or

rebut PSERS' medical examiner's expert medical opinion, which was offered to a reasonable degree of medical certainty. The fifth element, therefore, is also missing.

And finally, Claimant must prove by a preponderance of the evidence that he remains disabled from returning to his prior public school employment. Section 8508(d) of the Retirement Code, already mentioned above, provides that "[i]n all instances, the member shall have the burden of establishing continued disability." 24 Pa.C.S. § 8508(d). For reasons stated above, including that PSERS' medical examiner testified that Claimant is not disabled, physically or psychiatrically, from returning to his prior public school employment. The testimony of the medical examiner in conjunction with the lack of sufficient evidence produced by Claimant fails to tip the evidentiary scales in his favor.

In light of all of the foregoing, the evidence of record does not support the required elements three, four, five of a successful request for renewal of Claimant's disability annuity. It follows that Claimant has not sustained his burden of proof.

CONCLUSION

Based on all of the above, the facts of record support the conclusion that Claimant failed to furnish sufficient medical documentation to support his December 2017 Renewal Application notwithstanding numerous opportunities for him to do so. Claimant was not disabled from performing his job duties as teacher of health and physical education when he filed his December 2017 Renewal Application, or at the time of the hearing. Consequently, he has not established, by a preponderance of the evidence, all of the elements of a successful disability renewal claim under the Retirement Code at 24 Pa.C.S. §§ 8307(c) and 8505(c)(1). Accordingly, the following recommendation will be made to the Board:

