

**IN THE SUPREME COURT OF
THE STATE OF MONTANA**

Supreme Court Cause No. DA 13-0710

JEFF FAUQUE,

Appellant/Petitioner,

v.

MONTANA PUBLIC
EMPLOYEES RETIREMENT
BOARD,

Appellee/Respondent.

**APPELLANT JEFF FAUQUE'S
APPEAL BRIEF**

*On Appeal from the Montana First Judicial District Court
Lewis and Clark County
District Court Cause No. ADV-2013-143
Hon. Mike Menahan, Presiding*

APPEARANCES:

Ben A. Snipes

Lewis, Slovak & Kovacich, P.C.
P.O. Box 2325
Great Falls, MT 59403
Office: (406) 761-5595
Fax: (406) 761-5805
Email: Ben@lsklaw.net
Attorneys for Appellant, Jeff Fauque

Katherine E. Talley

Staff Attorney
Public Employee Retirement
Administration
P.O. Box 200131
Helena, MT 59620-0131
Office: (406) 444-3154
Fax: (406) 444-5428
*Attorney for Appellee, Montana
Public Employee Retirement Board*

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Did the District Court err in affirming the disability findings of the Public Employees' Retirement Board?

STATEMENT OF THE CASE

Appellant Jeff Fauque was denied Sheriffs' Retirement System (SRS) disability benefits by the Public Employees' Retirement Board (PERB), when the PERB adopted the medical findings of its file reviewer over the opinions of Fauque's three treating physicians.

Fauque filed for sheriffs' disability retirement in January of 2011. On June 9, 2011, the PERB rejected Fauque's application for disability benefits. Fauque's reconsideration was heard before the PERB on December 8, 2011 and again rejected. The case then proceeded to an administrative hearing on June 21, 2012. The hearing examiner recommended that Fauque's application be denied.

During the administrative hearing, Fauque presented the deposition testimony of his three treating physicians, Dr. Peter Stivers, Dr. Dean Webb and Dr. Rick Pullen, who unanimously opined that Fauque is permanently disabled from law enforcement work as a result of an occupationally-caused Post Traumatic Stress Disorder (PTSD) condition. The PERB presented the opinion of its retained file reviewer, Dr. Dean Gregg, who adopted the treating physicians' diagnosis that

Fauque suffered from occupational PTSD but opined that Fauque's condition does not permanently preclude him from his law enforcement position.

On January 10, 2013, the PERB adopted all of the hearing examiner's proposed findings of fact and conclusions of law, along with the examiner's recommendation that Fauque's application for benefits be denied. Thereafter, Fauque petitioned for judicial review of the PERB's decision before the First Judicial District Court.

The parties briefed the matter and a hearing was conducted before Judge Mike Menahan on July 17, 2013. The District Court rendered judgment in favor of the PERB on September 23, 2013, and the PERB submitted its Notice of Entry of Order on October 1, 2013. Fauque appeals.

STATEMENT OF FACTS

Fauque served as a peace officer and deputy coroner with the Glacier County Sheriff's Office (GCSO) from October 29, 1995 until November 15, 2010. Fauque began his career with the department as a Deputy Sheriff. He was promoted several times during his career and eventually reached the position of Undersheriff, the second highest ranking officer in the department. For all of his fifteen years of decorated service in the Cut Bank, Browning and East Glacier

communities, Fauque paid a portion of his salary to and maintained membership in the SRS. Admin. Hrg. Tr. at 16:3-19:14.

In addition to protecting and serving their community and enforcing Montana law, peace officers in the GCSO are assigned and required to perform first responder and coroner duties. As part of these duties, Fauque was required to respond to and investigate death scenes. The investigation process required that he document the scene and assist in removing the body and/or body parts. In doing so, Fauque would have to physically manipulate the corpse to determine its phase of decomposition, search the body for markings and photograph the lifeless remains. Following suicides involving firearms, Fauque would "assist in cleaning up the mess that the gun shot suicide created." Admin. Hrg. Tr. at 22:24-25. During his law enforcement career, Fauque attended approximately 250-300 deaths, some more traumatic than others. Admin. Hrg. Tr. at 19:15-23:7.

Fauque responded to dozens of horrific and traumatic deaths including motor vehicle deaths, gun shot suicides, death by hanging suicides and train/pedestrian encounters, often involving people he knew from his interactions within his small community. Admin. Hrg. Tr. at 23:8-27:1. Fauque recounted one such traumatic gunshot suicide response as follows:

It was a case with a mom and her son that I knew very well, and they would often fight, so they would call me specifically to come out and

help moderate their fights. And they just lived right out of town a little ways. And I'm not exactly sure what year it was, but I remember it was the night before Halloween, I got a call that there was a gunshot at that house. And I went out there and, as I pulled up, I could hear screaming, and there were people rolling around out in the yard. And I got to the door, and the mother's name was Debbie, and she grabbed onto me, and it was like as if she was looking through me, and she was yelling at me to save Danny, which was her son. And so I looked down at her feet and I could see a bloody footprint coming in the hallway, and there was brain matter all over her feet.

Admin. Hrg. Tr. at 23:16-24:6.

Despite Fauque's frequent exposure to such events, there was no debriefing policy following traumatic incidents or counseling opportunities available through the GCSO. Admin. Hrg. Tr. at 30:11-31:3. In approximately 2004, Fauque began suffering from recurring nightmares, hyper vigilance and avoidance behaviors. Admin. Hrg. Tr. at 52:13-16, 59:3-9. Over the years, as the traumatic situations mounted, Fauque's mental state became progressively worse. He became concerned about his ability to appropriately perform his job and present himself in public. By 2007, his emotions were inappropriately manifesting during his responder duties, as evidenced by the following account:

I remember specifically responding to a scene, and this was probably 2006, 2007. And I had to go to this house, this little boy was having a seizure, and it was so emotionally overwhelming for me that I started to tear up and cry. And I got the parents running around behind me, and I'm the only one on the scene, and I'm trying to keep his airway clear. And I'm turning my head away because I don't want ... to have

them see me crying when I'm supposed to be there to help this child and be in control, the only one in control at that moment.

And that's where I was, I would respond to scenes and I couldn't even emotionally deal with them the way I should be dealing with them.

Admin. Hrg. Tr. at 72:22-73:15.

In approximately 2008, Fauque took a formal leave of absence and independently sought the services of a licensed counselor to address his mounting emotional issues. Over a period of a couple months, Fauque received counseling for "stresses of the job" and "overwhelming feelings of doom." Admin. Hrg. Tr. at 31:25-32:9. He described struggling with his job and discussed leaving the force. He also described suffering from severe anxiety, suicidal ideation and the continuing nightmares. Despite seeking counseling, Fauque avoided detailed discussion of his feelings and the traumatic responder scenarios with his counselor, often speaking in generalities hoping that his counselor would read between the lines. As a result of his avoidance, Fauque never developed a therapeutic relationship with his counselor. Unbeknownst to Fauque, he was suffering the classic symptoms of PTSD. Admin. Hrg. Tr. at 31:9-36:23; Depo. Pullen 10:22-12:3, 14:14-15:4; Depo. Stivers 15:9-18:16.

During and after the time he sought counseling, Fauque continued working as Undersheriff. He did not tell any of his fellow officers of his counseling

sessions, or that he was struggling with his job. As a senior officer, Fauque felt he could not show "weakness" and then expect to command other officers in the field or during a gun call. In addition to his 2008 leave of absence, Fauque had taken multiple informal leaves of absence resulting from his struggles with the job. Avoiding detail regarding his feelings and struggles, he would advise the acting Sheriff, Wayne Dusterhoff, that he was having "personal issues" and required time away from his job. As the end of his leave drew nearer, Fauque would have feelings of anxiety and dread about returning to work. Admin. Hrg. Tr. at 34:16-38:20.

After more than a dozen years of significant job-related anxiety and stress, Fauque turned to opioids to help him cope with his psychological and emotional state. Fauque was first exposed to opioids as a young man, long before he began his law enforcement career. Prior to his law enforcement career, he never became addicted or abused opioids, despite multiple prescriptions stemming from surgical events. However, following sinus surgeries late in his law enforcement career, Fauque found that his prescribed opiates treated not only his physical pain but also lifted his grief and dulled the psychological and emotional trauma. Fauque began utilizing opioids to deal with his job-related stress and anxiety, self-medicating his

then undiagnosed PTSD condition. Admin. Hrg. Tr. at 39:14-40:9; Depo. Stivers 13:17-14:14; Depo. Pullen 22:4-18.

By October of 2010, Fauque was dependent upon opioids to manage what we now know to be his PTSD condition. His dependence began to take a toll on his life and his family. Eventually, his dependence led him to enter a home in search of opioids. Upon entering, he was confronted by the homeowner and immediately left the residence. This incident led to an investigation by the department, during which Fauque was placed on paid leave by the GCSO. Admin. Hrg. Tr. at 40:10-42:22.

Recognizing his urgent need for medical intervention, Fauque sought out a psychological evaluation for his opioid dependence issues. He was initially hospitalized at Pathways in Kalispell, and then transferred to the Rimrock Foundation in Billings for intensive in-patient chemical dependency treatment and evaluation. Admin. Hrg. Tr. at 43:7-44:3.

While at Rimrock, he was evaluated and treated by Rick Pullen, DO, a psychiatric and addiction medical specialist and medical director of the Rimrock Foundation. Depo. Pullen 3:17-23. Dr. Pullen is a trained military psychiatrist and has a strong background concerning the diagnosis, evaluation and treatment of individuals afflicted by trauma. *Id.* at 6:15-19. After a psychiatric examination

and over the course of Fauque's several weeks of in-patient care at Rimrock, Dr. Pullen diagnosed Fauque with PTSD. *Id.* at 10:24-11:12. Fauque exhibited the classic symptoms of PTSD including exposure to violent and traumatic situations, avoidance, hyperarousal and re-experiencing of the traumatic events. *Id.* Dr. Pullen recognized that Fauque was using opioids to relieve his psychological and emotional pain as well as avoid his traumatic symptoms. *Id.* at 19:25-22:18. Dr. Pullen summarized Fauque's condition and prognosis as follows:

Mr. Fauque has PTSD; yes, the most likely cause for it is that his employment exposed him to numerous scenes . . . he's seen things, terrible things that I hope no one gets to see, exposed to things that I hope no one gets exposed to, and did it year after year; and in a human way, he found something that relieves his pain, unfortunately that something he found is very habit-forming . . . To place him back into [law enforcement] again would risk re-experiencing, re-exacerbating his underlying trauma symptoms, it would also put him at risk for relapse into a substance use again.

Id. at 56:14-57:5.

After more than thirty days of in-patient care at Rimrock, Fauque entered a twelve week after care program with counselor Dennis Hansen, a licensed clinical psychologist, who provided further treatment for his PTSD condition. Towards the end of his after care sessions, Fauque's counselor recommended that he see Dr. Peter Stivers specifically for his PTSD condition. Depo. Stivers 8:2-9:1.

Fauque began seeing Peter Stivers, Ph.D., for outpatient therapy in August of 2011. Dr. Stivers has practiced as a clinical psychologist in Montana for twenty-three years. *Id.* at 4:5-7. Upon evaluating Fauque, Dr. Stivers diagnosed him with PTSD and began treating him with behavioral psychotherapy. Dr. Stivers opined that Fauque began using opioids as a way of numbing and avoiding his PTSD experiences, and that Fauque's PTSD proximately caused his opioid dependency. *Id.* at 13:17-14:14. Dr. Stivers determined Fauque to be permanently disabled as a result of his PTSD, and concluded his disability predated his incident of misconduct. *Id.* at 37:16-18. Concerning Fauque's potential for return to law enforcement, Dr. Stivers advised:

I believe it would be impossible for him to go back in that or a similar capacity, I believe that's permanent. No law enforcement, could not work as a firefighter, could not work as an ambulance or EMT provider, those careers are now off limits for him.

Id. at 21:9-13 (emphasis added).

In addition to the treatment he received from Dr. Pullen and Dr. Stivers, Fauque also received care from Randy Webb, M.D., a board certified family practice physician. Dr. Webb also diagnosed Fauque with PTSD. Dr. Webb concurred with Drs. Stivers and Pullen, that Fauque's PTSD caused his opioid dependency. Depo. Webb 15:12-16:15. Dr. Webb likewise opined that Fauque is permanently disabled from working as a law enforcement officer, and is incapable

of performing the duties of an Undersheriff. Given his PTSD condition, Dr. Webb advised Fauque that returning to law enforcement would put himself and the public at large in danger. *Id.* at 17:3-19:4.

After being discharged from Rimrock, Fauque resigned from the GCSO on November 13, 2010. He did so voluntarily and with great relief that he would not have to return to the job that had almost cost him his life and family. Admin. Hrg. Tr. at 56:18-57:11. Supported by Drs. Pullen, Stivers, and Webb who unanimously found that Fauque's PTSD condition permanently incapacitates him from returning to any kind of law enforcement work, Fauque presented a claim for SRS disability benefits on December 15, 2010.

On August 15, 2011, eight months after he resigned from the GCSO and applied for SRS disability, Fauque voluntarily relinquished his officer training certifications (POST certificates) in advance of pleading guilty to misdemeanor charges for his October 2010 misconduct. Admin. Hrg. Tr. 57:17-24.

The PERB does not deny that Fauque suffers from work-related PTSD. However, contrary to the findings of Fauque's three treating physicians, the PERB asserts that Fauque is not permanently disabled from returning to the job that caused his incurable, trauma-induced condition. The PERB's sole medical basis

for determining that Fauque's condition is not disabling is the findings of its retained file reviewer.

STANDARD OF REVIEW

The standards for judicial review of an administrative ruling are contained in Mont. Code Ann. § 2-4-704. Mont. Code Ann. § 2-4-704(2)(a)(v), provides that a reviewing court may reverse an agency's decision if it's factual findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The Montana Supreme Court established a three-prong test to determine when factual findings are clearly erroneous:

(1) the record will be reviewed to see if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, it will be determined whether the trial court misapprehended the effect of the evidence; and (3) if substantial evidence exists and the effect of evidence has not been misapprehended, the Supreme Court may still decide that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.

Weitz v. Montana Dept. of Natural Resources and Conservation, 284 Mont. 130, 133-34, 943 P.2d 990, 992 (1997).

Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be less than a preponderance. *Strom v. Logan*, 2001 MT 30,

¶23, 304 Mont. 176, ¶23, 18 P.3d 1024, ¶23. Whether substantial evidence supports a finding of fact is a question of law. *Moran v. Shotgun Willies, Inc.*, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995).

ARGUMENT

I. THE PERB COMMITTED CLEAR ERROR BY ADOPTING FINDINGS CONCERNING FAUQUE’S DISABILITY THAT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Despite the contrary opinions of Fauque’s three treating doctors, the PERB relied solely upon the opinion testimony of its file reviewer to find that Fauque is not permanently disabled from working as a sheriff’s deputy. The testimony of Fauque and his treating physicians demonstrates that Fauque's PTSD precipitated his dependence on opioids and caused his resignation. All competent medical testimony also establishes that no reasonable accommodations could have been made to facilitate Fauque's continued employment in law enforcement or any substantially similar occupation, making his incapacity both total and permanent. As an SRS member who suffered a permanent injury in the line of duty that prevents his continued employment, Fauque is entitled to full retirement disability benefits per Mont. Code Ann. § 19-7-601.

Under Mont. Code Ann. § 19-2-303(20), an employee who has become disabled, by reason of physical or mental incapacity, while in active service, is

eligible for disability retirement benefits. Such determinations must be made on the basis of “competent medical opinion.” *Id.* The competent medical opinions, provided by Fauque’s treating physicians, reveal that Fauque’s PTSD permanently precludes him from performing the job duties essential to law enforcement work, and no “reasonable accommodation” exists to facilitate his return to such work. See Mont. Admin. R. 2.43.2602(5).

The essential job functions and duties of a law enforcement officer have been thoroughly explored in this matter. In addition to providing the PERB with written job descriptions, former Sheriff Dusterhoff testified that the essential functions of a law enforcement officer include: attending and taking control of traumatic crime scenes and dead bodies; serving and protecting the community and fellow officers; and, attending first responder calls. Admin. Hrg. Tr. at 158:3-160:23. Former Sheriff Dusterhoff testified that such responsibilities could not be excepted from Fauque's general law enforcement duties by any accommodation. *Id.* at 159:20-25.

Considering these very responsibilities, Fauque's treating physicians unanimously opined that Fauque was unfit to perform the duties of a law enforcement officer, and therefor “disabled”:

It would not be safe I think for him to be in law enforcement at all. I mean, I don't know what kind of accommodations that you can make

for, you know, someone who is in law enforcement with part of their job duty is to use deadly force if needed and being in situations that are highly stressful

And, you know, for his personal safety and safety of the public at large, I don't think I could release him to go back to work as a law enforcement officer under any circumstances.

Depo. Webb 38:22-39:6.

I believe it would be impossible for him to go back in [law enforcement] or a similar capacity, I believe that's permanent. No law enforcement, could not work as a firefighter, could not work as an ambulance or EMT provider, those careers are now off limits for him.

Depo. Stivers 21:9-13.

To place him back into [a traumatic] environment again would risk reexperiencing, re-exacerbating his underlying trauma symptoms, it would also put him at risk for relapse into a substance use again.

Depo. Pullen 57:1-57:7.

The PERB suggests, without substantiation, that Fauque quit his job out of embarrassment over his October 2010 incident of misconduct. The focus the PERB gives to Fauque's misdemeanor incident is a red herring, designed to detract from the severity of Fauque's occupational trauma and PTSD. Any regard given to such an allusion is misplaced, as the testimony of Fauque's treating physicians demonstrates that Fauque's resignation and opiate use are directly attributable to his PTSD. See Depo. Webb 13:15-21, 15:9-17:2, 19:5-20:9; Depo.

Stivers 13:17-14:23, 16:13-17:4, 28:14-29:23; Depo. Pullen 21:13-22:18, 55:23-57:7.

Despite the unified convictions of Fauque's treating physicians, the PERB adopted the contrary findings of its retained file reviewer, Dr. Dean Gregg. Dr. Gregg was hired and paid by the PERB to do a cold review of Fauque's file and render medical opinions as to Fauque's diagnosis, prognosis and disability. Fauque does not dispute that the PERB's file reviewer is qualified to read and critique treating providers' medical records and render professional opinions concerning PTSD. However, the substantive record reveals that the PERB's file reviewer did not have the requisite knowledge to provide a reliable opinion as to Fauque's medical prognosis and disability, as required by Mont. R. Evid. 702. See *Harris v. Hanson*, 2009 MT 13, ¶ 36, 349 Mont. 29, 201 P.3d 151, "[i]n Montana, an expert's reliability is tested in three ways under Rule 702, M.R. Evid.: (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) **whether the qualified expert reliably applied the reliable field to the facts.**" (emphasis added).

Dr. Gregg did not meet or make any effort to contact Fauque, nor did he make any effort to consult with Fauque's treating physicians before rendering his opinions. Admin. Hrg. Tr. at 123:25-124:7. Instead, he merely read Fauque's

records, adopted the PTSD diagnosis rendered by all of Fauque's treating physicians, and disagreed that Fauque's occupational PTSD was disabling. *Id.* at 118:21-123:14.

The lack of factual basis for Dr. Gregg's opinion becomes apparent when he attempts to provide expert testimony about the severity of Fauque's PTSD, without any understanding of the trauma Fauque experienced during his law enforcement career:

Mr. Snipes: Do you agree that Mr. Fauque has experienced and persistently reexperiences work-related traumas?

Dr. Gregg: I don't know.

Mr. Snipes: How is it that you don't know? I guess you never talked to him about that, have you? You never talked to Mr. Fauque about [his experiences]?

Dr. Gregg: No. No.

Admin. Hrg. Tr. at 113:16-23.

Dr. Gregg's admitted lack of any understanding of Fauque's work-related trauma, the cause of his PTSD, leaves no reliable basis to make determinations concerning Fauque's condition. Absent any knowledge of the trauma in which Fauque's PTSD is rooted, Dr. Gregg lacks the necessary foundation to provide competent opinions about the severity of Fauque's condition or his fitness for duty.

In a nearly identical scenario, the Montana Supreme Court held that a records reviewer lacked foundation to present competent opinions concerning a claimant's symptoms and disability. *Cottrell v. Burlington Northern R. Co.*, 261 Mont. 296, 301-302, 863 P.2d 381, 384-385 (1993). The reviewer admitted, like the PERB's file reviewer in this case, to never examining the claimant, never talking to the claimant's physicians and being unfamiliar with the traumatic event which allegedly caused the injury at issue. *Id.*

Like *Cottrell*, the file reviewer's opinion in the present matter was based on insufficient knowledge and lacked the requisite foundation to constitute competent, substantial evidence. Because the PERB's sole medical basis for finding that Fauque was not disabled was the unfounded opinion of its file reviewer, despite contrary opinions rendered by Fauque's treating physicians, the PERB's findings are not supported by substantial evidence.

II. THE PERB COMMITTED CLEAR ERROR BY MISAPPREHENDING THE EFFECT OF THE MEDICAL EVIDENCE CONCERNING FAUQUE'S DISABILITY

The medical record, when considered as a whole, provides overwhelming objective evidence that Fauque is disabled as a result of his occupational PTSD. This Court, citing Ninth Circuit authority, has held that the medical opinion of a PERB disability claimant's treating physician is "entitled to special weight and

should not be disregarded absent specific legitimate reasons for doing so." *Weber v. Public Employees Retirement Bd.*, 270 Mont. 239, 246, 690 P.2d 1296, 1300 (1995)(quoting *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988)). The rationale supporting this policy, as articulated in *Embrey*, is that "the subjective judgments of treating physicians are important, and properly play a part in their medical evaluations." *Embrey*, 849 F.2d at 422.

Weber involved an analogous evaluation of disability benefits by the PERB, where the PERB relied upon information that contradicted the claimant's treating physician's testimony. *Id.*, 270 Mont. at 248, 690 P.2d at 1301. This Court affirmed the District Court's ruling that the PERB's reliance on such information was clearly erroneous, and further agreed with the District Court's findings that the PERB committed a mistake in denying Weber benefits. *Id.*

Like *Weber*, the subjective judgments of Fauque's treating providers were essential to his diagnosis and treatment, uniquely qualifying them to assess his disability. His care providers include a board certified medical doctor (Dr. Webb), a clinical psychologist (Dr. Stivers), and a board certified psychiatrist and addiction specialist (Dr. Pullen). See Depo. Webb 7:2-23, 14:21; Depo. Stivers 6:4-17; Depo. Pullen 6:6-23, 32:6-22. They rendered professional opinions, by deposition testimony, based upon their expertise, reviews of each other's reports,

and most importantly, their extended interactions with and observations of Fauque. See Depo. Webb 8:5-10:18; Depo. Stivers 17:12-23, 24:14-25; Depo. Pullen 10:5-10. They unanimously concluded his work-related PTSD precipitated his opioid abuse and was the proximate cause of his incapacity as a law enforcement officer. See Depo. Webb 13:18-21, 15:9-16:15, 19:7-20:9; Depo. Stivers 13:17-14:14, 28:18-22; Depo. Pullen 13:7-14:1, 20:12-21, 22:4-18.

The guidance of this Court dictates that these conclusions are entitled to special weight. Furthermore, to the extent that Mont. Code Ann. § 19-2-303(20), requires disability determinations to be based upon “competent medical opinion,” Fauque's treating doctors' opinions should be conclusive.

The PERB adopted the medical findings of its file reviewer and failed to afford the treating physicians' conclusions special weight, without legitimate reason. By file review only, Dr. Gregg made critical credibility determinations regarding Fauque's medical condition and prognosis. He rendered his opinions without observing Fauque, without speaking to his treating physicians, and without any understanding of the trauma Fauque was exposed to in the line of duty. Admin. Hrg. Tr. at 113:16-23; 123:12-124:2. The Respondent's reliance solely on the file review is highly suspect in light of the credibility determinations made in that file review, the ongoing financial commitment it has with its retained

file reviewer, and the file reviewer's categorical dismissal of the opinions of Fauque's treating physicians. By failing to accord special weight to Fauque's treating physicians and by relying solely on the unfounded opinions of Dr. Gregg, the PERB misapprehended the effect of the medical evidence in this matter.

Because this case turns on the weight given to the opinions of Fauque's treating physicians, and their testimony was presented by deposition, this Court is no less qualified than the PERB to weigh and evaluate the medical testimony. See *Weber*, 270 Mont. at 244, 890 P.2d at 1299 (citing *Shupert v. Anaconda Alum.*, 215 Mont. 182, 696 P.2d 436 (1985), for the proposition that a reviewing court is in as good a position as the lower tribunal to evaluate deposition testimony). This Court can independently review the deposition testimony of doctors Webb, Stivers and Pullen, and determine the proper weight and effect to be given their testimony. The Court should, consistent with Montana law, afford special weight to the treating physicians' opinions. In doing so, the Court should also conclude the PERB's reliance on the contrary file review misapprehended the medical evidence.

III. THE PERB COMMITTED CLEAR ERROR BY MISTAKENLY CONCLUDING THAT FAUQUE COULD RETURN TO HIS LAW ENFORCEMENT JOB

The PERB mistakenly concluded that Fauque failed to establish a disability arising in the line of duty, and preventing his return to law enforcement. Again,

PERB's conclusion completely ignores the medical evidence. As detailed in the physicians' deposition testimony, Fauque is permanently disabled from returning to law enforcement work. Depo. Pullen 55:23-57:7; Depo. Stivers 21:9-13, 23:22-24:6; Depo. Webb 18:21-24, 20:14-25, 38:22-39:6. According to the treating physicians, Fauque's disability cannot be legitimately challenged:

This was very clear, this was not one of these iffy situations or sort of an is it or isn't, it was clear, he's seen things, terrible things that I hope no one gets to see, exposed to things that I hope no one gets exposed to, and did it year after year . . . To place him back into that environment again would risk reexperiencing, re-exacerbating his underlying trauma symptoms, it would also put him at risk for relapse into a substance use again.

Depo. Pullen 56:16-57:5 (emphasis added).

The only medical experts competent to opine in this case agree Fauque is disabled. The PERB's findings otherwise are contrary to the greater weight of the evidence, and clearly mistaken.

CONCLUSION

Appellant respectfully requests that the Court reverse the District Court's Order in this matter. PERB's denial of Fauque's request for benefits, based solely on the medical findings of its retained file reviewer, was clearly erroneous.

Fauque's application for SRS disability benefits should be granted, retroactive to the date of the application.

Dated this 14th day of March, 2014.

LEWIS, SLOVAK & KOVACICH, P.C.

By: 
Ben A. Snipes
P. O. Box 2325
Great Falls, MT 59403
Attorney for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

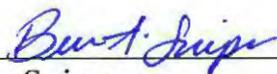
I hereby certify that I have filed a true and accurate copy of the foregoing Appellant Jeff Fauque's Appeal Brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing Appellant Jeff Fauque's Appeal Brief upon the persons named below, at the address set out below their names, by first class US Mail and email.

Katherine E. Talley
Staff Attorney
Public Employee Retirement Administration
P.O. Box 200131
Helena, MT 59620-0131

Public Employee Retirement Board
100 N Park Avenue Suite 200
P. O. Box 200131
Helena, MT 59620-0131

This is to certify that this Appellant Jeff Fauque's Appeal Brief is formatted with double line spacing and a proportionately spaced Arial typeface in 14 point font and to further certify that this brief contains 4,657 words as calculated by my WordPerfect X3 word processing system excluding the Table of Contents, Table of Authorities, Certificates of Service and Compliance and Appendix.

Dated this 14th day of March, 2014.



Ben A. Snipes
Lewis, Slovak & Kovacich, P.C.
P. O. Box 2325
Great Falls, Montana 59403

APPENDIX

1. Order on Petition for Judicial Review dated September 23, 2013
(DV-25-2013, D.C. Doc. 18)
2. Final Order of the Public Employees' Retirement Board dated January 10, 2013
3. Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order dated November 16, 2012

Order on Petition for Judicial Review dated September 23, 2013
(DV-25-2013, D.C. Doc. 18)

NANCY SWEENEY
CLERK DISTRICT COURT

2013 SEP 23 11:11:41

FILED
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DEPUTY

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

JEFF FAUQUE,

Petitioner,

v.

MONTANA PUBLIC EMPLOYEES
RETIREMENT BOARD,

Respondent.

Cause No.: ADV-2013-143

**ORDER ON PETITION
FOR JUDICIAL REVIEW**

On February 12, 2013, Petitioner Jeff Fauque (Fauque) filed a petition for judicial review of the Montana Public Employees' Retirement Board's (PERB) final order concluding Fauque is ineligible to receive disability benefits under the Sheriffs' Retirement System (SRS) because he is not permanently disabled. Ben A. Snipes represents Fauque. Katherine E. Talley represents the PERB. The parties have fully briefed the matter and presented oral arguments to the Court on July 17, 2013. Upon review of the entire record and in consideration of the arguments, the Court affirms the PERB's determination Fauque is not eligible to receive disability benefits under the SRS.

1 **BACKGROUND**

2 The Court incorporates the hearings officer's proposed findings of fact
3 the PERB adopted in its final order. The Court summarizes the relevant facts as
4 follows:

5 Fauque worked for the Glacier County Sheriff's Office (GCSO) from
6 1995 to 2010. Initially, Fauque started as a Deputy, but was later promoted to
7 Sergeant and Undersheriff. During his entire career at the GCSO, Fauque was a
8 member of the SRS. Fauque contributed to the SRS until November 13, 2010, when
9 he resigned his position as Undersheriff. In addition to his law enforcement duties,
10 Fauque was also a deputy coroner for Glacier County. In that capacity, Fauque
11 investigated deaths in which he encountered suicides, gunshot wounds, pedestrians
12 killed by trains, and other trauma. Glacier County is a rural county in which Fauque's
13 duties as deputy coroner required him to investigate the deaths of people he knew.

14 In 2007 or 2008, Fauque used his law enforcement position to steal
15 prescription medication from Glacier County residents. On October 4, 2010, Fauque
16 entered a private residence intending to locate and steal prescription drugs, hereinafter
17 referred to as the "October 2010 incident." The homeowner discovered Fauque and
18 confronted him. As a result of the October 2010 incident, Fauque was charged with
19 the misdemeanor offenses of official misconduct, in violation of section
20 45-7-401(1)(b), MCA, and criminal trespass to property, in violation of section
21 45-6-201(1), MCA. On August 10, 2011, Fauque entered a plea of guilty both
22 offenses. (Admin. Rec., Mont. Pub. Employees Ret. Admin.'s Ex. 4 (*State v.*
23 *Fauque*, No. DC-11-6, Jud. & Or. Suspending Sentence (Mont. 9th Jud. Dist. Ct.
24 (Aug. 22, 2011)).) The Judgment and Order contained the following provision:

25 ////

1 h. The Defendant shall voluntarily relinquishing (sic)
2 all of his POST certifications by submitting the original certificates
3 or signing an affidavit voluntarily relinquishing the following
4 certifications: Basic Certificate number 2882; Intermediate
5 Certificate number 1540; Supervisory Certificate number 791;
6 Command Certificate number 321; Advanced Certificate number
7 1195; Coroner Basic Certificate number 256; and Instructor
8 Certificate number 3788;

9 *Id.*, at 2, 3. Fauque surrendered his law enforcement certifications upon entry of his
10 guilty pleas.

11 Shortly after the October 2010 incident, Fauque was admitted to the
12 Pathways Treatment Center in Kalispell, Montana, where he sought treatment for
13 drug addiction. After a brief stay, Fauque was discharged from Pathways and on
14 October 8, 2010 was admitted to a program at the Rimrock Foundation in Billings,
15 Montana, for further diagnosis and treatment. There, Fauque saw Rick Pullen, D.O.,
16 a licensed physician, who is board certified in the specialty of psychiatry. Dr. Pullen
17 is also the medical director at Rimrock. Dr. Pullen diagnosed Fauque as suffering
18 from post-traumatic stress disorder (PTSD), major depression, and opioid dependence.
19 According to Dr. Pullen, Fauque's diagnoses were based upon a psychiatric
20 examination, mental status examination, and Fauque's history as he reported it to
21 Dr. Pullen. (Depo. Rick Pullen, D.O. at 10 (June 11, 2012).) Fauque was discharged
22 from the Rimrock Foundation on November 11, 2010.

23 On August 5, 2011, Fauque sought out-patient treatment from Peter
24 Stivers, Ph.D., a clinical psychologist in Great Falls, Montana. Dr. Stivers provided
25 treatment to help Fauque address his PTSD, which Dr. Pullen first diagnosed while
Fauque was undergoing treatment at the Rimrock Foundation. Although Fauque was
first diagnosed and treated for PTSD at the Rimrock Foundation in October 2010,
Fauque previously obtained treatment for depression and anxiety from Randy Webb,

1 M.D., his family physician in Cut Bank, Montana. Dr. Webb did not diagnose
2 Fauque with PTSD until he obtained the diagnosis at the Rimrock Foundation.
3 Fauque believed his addiction to opiates arose when he began using the drugs to
4 alleviate the symptoms of his PTSD. Drs. Pullen, Webb and Stivers opined Fauque's
5 opiate addiction developed, in part, when Fauque began self-medicating to address
6 the symptoms of PTSD. Fauque initially was prescribed opiates after a sinus surgery,
7 but discovered the drugs helped alleviate symptoms he later attributed to PTSD.

8 Following his diagnosis and treatment for PTSD, in January 2011,
9 Fauque applied for disability retirement benefits from the SRS—based upon his
10 contention he was permanently disabled as a result of PTSD he acquired while
11 working at the GCSO prior to the October 2010 incident. On June 9, 2011, the PERB
12 rejected Fauque's application. Upon Fauque's request, the PERB reconsidered his
13 application and on December 8, 2011, rejected it again. On June 21, 2012, Hearing
14 Examiner John Melcher conducted an administrative hearing concerning Fauque's
15 claim for disability retirement benefits under the SRS. In his findings, the Hearing
16 Examiner recommended the PERB conclude Fauque to be ineligible for disability
17 retirement under the SRS. On January 10, 2013, the PERB adopted the hearing
18 examiner's findings of facts and conclusions of law denying Fauque's application
19 for disability. In its final order, the PERB concluded Fauque's PTSD was not
20 permanently disabling and Fauque failed to prove he was unable to perform his
21 job duties with reasonable accommodation. Fauque failed to establish he became
22 disabled as a direct result of his service in the line or duty with the GCSO.
23 Accordingly, the PERB denied his claim for the SRS disability retirement benefits.
24 On February 12, 2013, Fauque filed his petition for judicial review. The PERB
25 does not dispute Fauque's PTSD diagnosis.

1 According to Fauque, his opiate addiction arose when he began
2 self-medicating to relieve the symptoms of PTSD. Fauque's treating physicians,
3 Drs. Pullen and Webb, and his clinical psychologist, Dr. Stivers, agree Fauque's
4 PTSD was the result of exposure to traumatic work experiences and his opiate
5 addiction stemmed from the underlying mental health condition. According to
6 Fauque, PTSD left him permanently disabled so that he could not return to work as
7 a law enforcement officer without likely triggering or aggravating the symptoms
8 of the disorder.

9 Dean Gregg, Ph.D., is a clinical psychologist in Helena, Montana.
10 The PERB retained Dr. Gregg to review Fauque's claim. Dr. Gregg did not meet or
11 examine Fauque, but instead reviewed Fauque's claim and the evidence he submitted
12 in support. The scope of Dr. Gregg's review was limited to reviewing files.¹ Dr.
13 Gregg concurs that Fauque suffers from PTSD, but disagrees that Fauque's PTSD is
14 permanently disabling. In 2008, while working for the GCSO, Fauque was placed on
15 administrative leave after allegedly stealing narcotics from a residence. Although
16 the subsequent investigation did not result in criminal charges, Dr. Gregg found the
17 incident significant when he analyzed Fauque's claim. Dr. Gregg noted he found no
18 evidence Fauque mentioned the 2008 incident to any of his healthcare providers, who
19 were likely unaware of this information when forming their opinions. Although
20 Dr. Webb treated Fauque for depression and anxiety, Dr. Gregg found no evidence
21 Fauque discussed his drug use with the physician. Dr. Gregg also observed Fauque's
22 condition appeared to have improved thereafter. Also, during his employment with
23

24 ¹ Dr. Gregg testified he did not speak with the treating physicians in the present matter because their
25 records were clear. Additionally, Dr. Gregg testified he does not examine petitioners so as not to
interfere with their treatment. Hrg. Transcr. 131:10 to 132:09 (June 21, 2012).

1 the GCSO, Fauque never requested an accommodation. Wayne Dusterhoff was the
2 Glacier County Sheriff in October 2010. According to Sheriff Dusterhoff, the office
3 could have accommodated Fauque by relieving him from certain duties as he had for
4 other deputies. Although Dr. Gregg agreed Fauque had PTSD and opiate dependency,
5 Dr. Gregg concluded Fauque was not permanently and totally disabled.

6 In a case involving a diagnosis of PTSD, Dr. Gregg typically expected
7 to find evidence indicating the person had problems at work such as poor attendance
8 (e.g. coming to work late and leaving early); difficulty getting along with co-workers;
9 work avoidance; and poor performance evaluations. In the case at hand, however,
10 there was no evidence from Fauque's employment records to suggest he had any
11 work impairment. Furthermore, Dr. Gregg testified PTSD is not always a permanent
12 condition and is not always disabling. Dr. Gregg did not believe PTSD was the only
13 or primary cause of Fauque's opiate dependency. Accordingly, Dr. Gregg testified
14 Fauque is not permanently disabled and is ineligible to receive disability retirement
15 benefits under the SRS.

16 Although Fauque, his treating physicians and psychologist all maintain
17 his PTSD led to his opiate addiction, Dr. Gregg identified other problems (e.g.
18 Fauque's marital problems and family dysfunction) that exacerbated his drug use and
19 prevented him from engaging in an abstinent lifestyle. The stress from his work may
20 have contributed to Fauque's opiate addiction, but these other factors also played a
21 role. The hearings officer concluded Fauque failed to demonstrate his disability
22 prevented him from continuing employment with the GCSO when Fauque resigned
23 his position as Undersheriff. Fauque did not ask the GCSO to accommodate his
24 claimed disability or give the office an opportunity to provide an accommodation
25 before submitting his resignation. The hearings officer noted Fauque continually

1 (i) in violation of constitutional or statutory provisions;
2 (ii) in excess of the statutory authority of the agency;
3 (iii) made upon unlawful procedure;
4 (iv) affected by other error of law;
5 (v) clearly erroneous in view of the reliable, probative,
6 and substantial evidence on the whole record;
7 (vi) arbitrary or capricious or characterized by abuse of
8 discretion or clearly unwarranted exercise of discretion; or
9 (b) findings of fact, upon issues essential to the decision,
10 were not made although requested.
11

12 The Montana Supreme Court adopted a three-part test to determine if
13 a finding is clearly erroneous. *Weitz v. Mont. Dep't of Nat. Resource & Conserv.*,
14 284 Mont. 130, 943 P.2d 990 (1997). First, the court must review the record to see
15 if the findings are supported by substantial evidence. Second, if the findings are
16 supported by substantial evidence, the court is to determine whether the agency
17 misapprehended the effect of the evidence. Third, even if substantial evidence
18 exists and the effect of the evidence has not been misapprehended, the court can
19 still determine that a finding is clearly erroneous when, although there is evidence
20 to support it, a review of the record leaves the court with the definite and firm
21 conviction that a mistake has been committed. *St. Personnel Div. v. Child Support*
22 *Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305 (citing *Weitz*, 284
23 Mont. at 133-34, 943 P.2d at 992). Conclusions of law, on the other hand, are
24 reviewed to determine if the agency's interpretation of the law is correct. *Steer, Inc.*
25 *v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

DISCUSSION

26 Fauque argues the substantive record supports his claim that PTSD is
27 a permanent condition that precludes him from performing essential duties as a law
28 enforcement officer. He argues the PERB's finding that he does not qualify for

1 disability under the SRS is clearly erroneous and not supported by substantial
2 evidence.

3 **I. The Record Contains Substantial Evidence to Support the PERB's Decision.**

4 The hearing examiner thoroughly weighed and considered the evidence
5 presented at the hearing. The proposed findings of fact and conclusions of law are
6 based on substantial evidence. When a court conducts judicial review of an
7 administrative agency's decision, the court's review must be confined to the record.
8 Section 2-4-704 (2), MCA. The Court must not substitute its judgment for that of an
9 agency as to weight of the evidence on questions of fact. *Id.* The court reviews the
10 agency's decision to ensure the findings, conclusions, and decisions are supported
11 by substantial evidence. *Id.* In the present matter, upon review of the evidence, the
12 hearing examiner concluded Fauque is not eligible to receive a disability retirement
13 under the SRS. The PERB reviewed the hearing examiner's recommendations and
14 adopted the proposed findings of fact and conclusions of law in its final order. The
15 record contains substantial evidence to support this decision.

16 A member contributing to the SRS during their employment may qualify
17 for disability retirement benefits under the SRS if they meet certain requirements.

18 Section 19-2-406, MCA. A disability is defined as:

19 a total inability of the member to perform the member's duties
20 by reason of physical or mental incapacity. The disability must
21 be incurred while the member is an active member and must be
22 one of permanent duration or of extended and uncertain duration,
as determined by the board of the basis of competent medical
opinion.

23 Section 19-2-303(20), MCA. A total inability of to perform one's duties exists when
24 "the member is unable to perform the essential elements of the member's job duties
25 even with reasonable accommodation" Admin. R. Mont. 2.43.2602(5) (2013).

1 The hearing examiner determined Fauque was ineligible to receive disability
2 retirement benefits under the SRS because Fauque did not have a total inability to
3 perform the essential elements of his job. The hearing examiner based his decision
4 largely on testimony from Dr. Gregg and Sheriff Dusterhoff. The hearing examiner
5 assigned less weight to the depositional testimony of Fauque's treating physicians,
6 Drs. Pullen and Webb, and Fauque's clinical psychologist, Dr. Stivers. Fauque's
7 treating physicians and psychologist testified Fauque's PTSD is so severe he cannot
8 return to work without negative implications. In their opinion, Fauque should be
9 considered disabled as a result of the PTSD which arose from performing law
10 enforcement duties. According to Drs. Pullen, Webb, and Stivers, Fauque's PTSD
11 rendered him disabled prior to the October 2010 incident. Upon reviewing Fauque's
12 medical records, Dr. Gregg agrees Fauque suffers from PTSD. Dr. Gregg, however,
13 concluded Fauque is not permanently disabled and Fauque's disability could be
14 reasonably accommodated. Dr. Gregg testified that although some cases of PTSD are
15 permanent, others are not. Whether an employee suffering from PTSD can return to
16 work is case specific. In Dr. Gregg's opinion, Fauque could return to work at the
17 GCSO with a reasonable accommodation.² Dr. Gregg reached his opinion after
18 conducting a complete review of Fauque's records which contained no evidence to
19 establish work impairment and no corroboration from family, friends, or employer
20 indicating impairment. According to Dr. Gregg, the treating physicians and
21 psychologist based their opinions largely on Fauque's reports to them. There was
22 no evidence in the medical reports indicating an impairment in which Fauque was

23
24 ² Of note, Fauque did not request any accommodation from the GCSO or give the agency an
25 opportunity to provide a reasonable accommodation before submitting his resignation. Fauque
was first diagnosed with PTSD only after resigning his position.

1 unable to perform his job. Similarly, Dr. Gregg testified he had access to Fauque's
2 personnel records which contained no evidence of work impairment. Dr. Gregg noted
3 there were inconsistencies in Fauque's medical reports. For example, Fauque did not
4 appear to have mentioned the 2008 incident (in which he allegedly entered homes
5 with the purpose to search for prescription medication) to any of his treatment
6 providers. Fauque did not discuss he prescription drug use with Dr. Webb and gave
7 inconsistent statements regarding his symptoms. In sum, Dr. Gregg did not believe
8 the record supported Fauque's claim for disability. Sheriff Dusterhoff testified
9 Fauque was suspended in December 2008 and placed on administrative leave
10 following allegations of wrong-doing. Upon his return to the GCSO, Sheriff
11 Dusterhoff had no concern Fauque was unable to perform his duties. Fauque never
12 avoided taking calls or missed work; he never discussed his concerns regarding PTSD
13 with the sheriff; he never asked to modify the conditions of his employment or
14 expressed concern about his ability to do his job. According to Sheriff Dusterhoff,
15 Fauque first expressed concern about his job when he was arrested after the October
16 2010 incident. Fauque never asked Sheriff Dusterhoff for an accommodation or to
17 modify any duties of his employment. Sheriff Dusterhoff testified Fauque "performed
18 exceptionally" prior to October 4, 2010.

19 Fauque argues the PERB's final order is not supported by substantial
20 evidence because Dr. Gregg's testimony was not a competent medical opinion on
21 which the hearing examiner and the PERB can rely. Montana Rule of Evidence 702
22 provides: "If scientific, technical, or other specialized knowledge will assist the trier
23 of fact to understand the evidence or to determine a fact in issue, a witness qualified as
24 an expert by knowledge, skill, experience, training, or education may testify thereto in
25 the form of an opinion or otherwise." Fauque argues because Dr. Gregg failed to

1 personally examine Fauque or his treating medical professionals, Dr. Gregg's opinion
2 is unreliable. Fauque cites *Cottrell v. Burlington N. R.R. Co.*, 261 Mont. 296, 302,
3 863 P.2d 381, 385 (1993), to support his claim it is not unreasonable for a court to
4 require, at a minimum, a doctor to know the extent of a recovery from an earlier injury
5 and the extent of trauma causing a subsequent injury before expressing an opinion on
6 a claimant. There, the Montana Supreme Court found that a neurosurgeon without
7 knowledge establishing this important foundation could not testify regarding the
8 plaintiff's injuries. *Id.* The *Cottrell* case is distinguishable from the present matter,
9 however. The evidence in the record clearly demonstrates Dr. Gregg is qualified to
10 testify as a competent medical expert. In *Cottrell*, the neurosurgeon did not examine
11 the plaintiff; read any of the plaintiff's depositional testimony; or read any of the
12 treating physician's depositional testimony. In short, the neurosurgeon was largely
13 unaware of the circumstances surrounding the plaintiff's injury. *Id.* In this case,
14 Dr. Gregg read all the depositional testimony from the treating physicians and
15 psychologist; read or reviewed all the files and evidence related to Fauque's condition,
16 including medical files of Fauque's treatment before and after the October 2010
17 incident; and read Fauque's personnel file. Clearly, Dr. Gregg was fully aware of the
18 circumstances of Fauque's condition and employment and established the foundation
19 for Dr. Gregg to testify as an expert witness. While this case is distinguishable from
20 *Cottrell*, it is comparable to *EBI/Orion Group v. Blythe*, 1998 Mont. 90, ¶¶ 21, 22, 288
21 Mont. 356, 957 P.2d 1134. There, the Montana Supreme Court upheld the testimony
22 of an expert psychologist who did not personally examine the plaintiff, but completed
23 a cold case review and observed the plaintiff's testimony at the hearing. *Id.* Similar
24 to the doctor in *EBI/Orion Group*, Dr. Gregg reviewed Fauque's medical reports and
25 ///

1 personnel files to establish the foundation for his testimony. Dr. Gregg was
2 competent to give an expert opinion in this case.

3 Fauque also argues Dr. Gregg was not competent to testify because he
4 violated the American Psychological Association's (APA) ethical requirements in
5 which a doctor should examine the patient prior to providing an opinion. The APA
6 Ethical Principles of Psychologists and Code of Conduct states "psychologists
7 provide opinions of the psychological characteristics of individuals only after they
8 have conducted an examination of individuals adequate to support their statements
9 or conclusions." Am. Psychologists Assn., *Ethical Principles of Psychologists &*
10 *Code of Conduct* (including 2010 amendments), 9.01(b) (available at
11 <http://www.apa.org/ethics/code/index.aspx?item=12> (June 1, 2010)). However, there
12 is an APA exception to the rule: when a psychologist is conducting a record review
13 and "an individual examination is not warranted or necessary for the opinion, [as long
14 as] psychologists explain this and the sources of information on which they based
15 their conclusions and recommendations." *Id.* at 9.01(c). Here, Dr. Gregg completed
16 a record review. According to Dr. Gregg, the records were clear. His testimony and
17 opinions were based upon information he identified at the hearing. Accordingly, he is
18 not in violation of any ethical standards. Dr. Gregg provided a competent medical
19 opinion upon which the hearing examiner and PERB could rely. Dr. Gregg's opinion
20 was competent substantial evidence upon which the PERB decided Fauque does not
21 qualify for disability retirement benefits under the SRS.

22 **II. The Hearing Examiner did not Misapprehend the Effect of the Evidence.**

23 The hearing examiner did not misapprehend the testimony of Fauque's
24 treating physicians and psychologist. Fauque argues the hearing examiner improperly
25 assigned greater weight to Dr. Gregg's testimony and ignored that from Drs. Pullen,

1 Webb and Stivers, all of whom concluded Fauque’s disability is both total and
2 permanent. Generally, “the opinion of a treating physician is accorded greater weight
3 than the opinions of other expert witnesses.” *EBI/Orion Group*, ¶ 12. However, a
4 treating physician’s opinion is not conclusive. *Id.*, ¶ 13. The hearing examiner has
5 the duty to act as the fact finder and weigh the evidence. The testimony of a treating
6 physician is “not always entitled to more weight than that of other physicians.”
7 *Wright v. Ace Am. Ins. Co.*, 2011 MT 43, ¶ 29, 359 Mont. 332, 249 P.3d 485. A
8 hearing examiner may assign less weight to the testimony of a treating physician than
9 other experts if the hearing examiner provides clear and convincing reasons for doing
10 so. *See Id.*, ¶ 28; *Weber v. Pub. Employees’ Ret. Bd.*, 270 Mont. 239, 246, 890 P.2d
11 1296, 1300 (1995); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). It is up to
12 the hearing examiner to weigh the evidence and make a determination. In the present
13 matter, the hearing officer gave more weight to Dr. Gregg’s opinion than that of
14 Fauque’s treating physicians and psychologist. In the proposed findings of fact and
15 conclusions of law, the hearing examiner thoroughly explained his reasons for doing
16 so. For example, Drs. Pullen, Webb and Stivers based their opinions largely on
17 Fauque’s self-reporting after the October 2010 incident. None of them reviewed
18 Fauque’s job description, spoke to Sheriff Dusterhoff about Fauque’s employment
19 history or performance. Similarly, no one evaluated a proposed accommodation plan.
20 In fact, the hearing examiner noted Drs. Pullen, Webb and Stivers, unlike Dr. Gregg,
21 failed to review all the evidence, including Fauque’s past medical reports and
22 personnel records. Dr. Gregg concluded: (1) Fauque’s PTSD was just one of several
23 issues which contributed to Fauque’s opiate dependency; and (2) there was no
24 evidence in the record from family, friends, or Fauque’s employer to corroborate any
25 claim of impairment. (Hrg. Exmr.’s Proposed Findings Fact (FOF), Conclusions Law

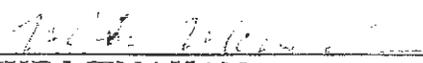
1 (COL) & Or., FOF ¶¶ 6-7, 9, 11-12, 14-16, 18-23 and COL ¶¶ 5-6, 8 (Nov. 16, 2012).)
2 In this case, the treating physicians and psychologist based their opinions primarily on
3 Fauque's self-reporting. Although they may genuinely believe Fauque's claims, they
4 do not necessarily have the benefit from having reviewed all the evidence. *See i.e.*
5 *EBI/Orion Group*, ¶ 14. The hearing examiner clearly set forth reasons why he
6 assigned greater weight to Dr. Gregg's opinions, which substantial evidence in the
7 record clearly supports. The hearing examiner did not misapprehend the evidence
8 when he concluded Fauque does not suffer from a permanent disability.

9 In review of the record, the Court is left with the definite and firm
10 conviction the PERB did not commit a mistake when denying Fauque's claim for
11 disability retirement benefits under the SRS. The court affirms the PERB's decision.

12 Based on the foregoing,

13 **IT IS HEREBY ORDERED** the petition for judicial review is DENIED
14 and the Public Employees' Retirement Board of the State of Montana's determination
15 Jeff Fauque is ineligible to receive disability benefits under the Sheriffs' Retirement
16 System is AFFIRMED.

17 DATED this 23rd day of September 2013.

18
19 
20 MIKE MENAHAN
21 District Court Judge

22
23 c: Ben A. Snipes
24 Katherine E. Talley

25 MM/d

Final Order of the Public Employees' Retirement Board dated
January 10, 2013

CEIVED

JAN 14 2013

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

IN THE MATTER OF:)
JEFF FAUQUE) FINAL ORDER

Hearings Examiner John Melcher issued Proposed Findings of Fact, Conclusions of Law, and Order (hereinafter Proposed Order) on November 19, 2012.

Exceptions to the Proposed Order and a supporting Brief were timely filed by counsel for Mr. Fauque, Ben Snipes, on December 10, 2012. Counsel for the Montana Public Employee Retirement Administration, Kate Talley, responded to the Exceptions and Brief on December 20, 2012.

The matter was noticed for consideration by the Montana Public Employees' Retirement Board (hereinafter Board) at its January 10, 2013 meeting. Oral argument was not requested by either party. After reviewing the record in its entirety, the Board orders as follows:

IT IS ORDERED that Hearings Examiner John Melcher's Proposed Findings of Fact, Conclusions of Law and Order be adopted as the Final Order of this Board in this matter.

Pursuant to Section 2-4-702(2), MCA, the parties have 30 days from service of this Final Order to appeal the Final Order to District Court.

DATED this 10th day of January, 2013.

MONTANA PUBLIC EMPLOYEES' RETIREMENT BOARD



SCOTT MOORE, President

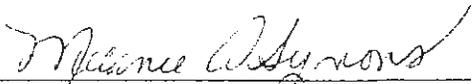
CERTIFICATE OF SERVICE

I certify that on January 11, 2013, I caused a copy of the foregoing Final Order to be delivered by US Mail to:

Ben A. Snipes
Lewis, Slovak, Kovacich & Marr, P.C.
P.O. Box 2325
Great Falls, MT 59403

I certify that on January 11, 2013, I caused a copy of the foregoing Final Order to be hand-delivered to:

Kate E. Talley
MPERA
100 N Park
Helena MT 69601



Melanie A. Symons
MPERA Chief Legal Counsel

Hearing Examiner's Proposed Findings of Fact, Conclusions of
Law and Order dated November 16, 2012

1 opinions of treating professionals, Drs. Stivers, Ph.D., Webb, M.D., and
2 psychiatrist, Pullen, D.O., to make his case. (See e.g., Petitioner's Proposed
3 Findings of Fact Nos. 14-20.) The MPERA contends that these opinions should be
4 discounted and that the opinion of the MPERA expert, Dean Gregg, Ph.D., should
5 provide the basis for finding that Fauque has not carried his burden showing
6 disability. (See e.g., MPERA's Proposed Conclusions of Law Nos. 29-33.)

7 As explained in detail below, the Hearing Examiner proposes that the Board
8 find and conclude that Fauque failed to meet his burden as to the existence of a
9 disability arising from injury in the line of duty that prevented his continuing
10 employment under the SRS.

11 The Hearing Examiner's proposed decision, if adopted, would appear to
12 moot any issue on application of the limitation provided in Mont. Code Ann. § 19-2-
13 906. The statute provides for denial of disability benefits where disability is
14 proximately caused by the gross negligence, willful misconduct, or violation of law
15 by the member. To the extent that any finding is necessary, the Hearing Examiner
16 finds that the source of the claimed disability—PTSD, did not arise from gross
17 negligence, willful misconduct, or violation of law by Fauque.

18 RECORD

19 The record compiled by the undersigned is summarized as follows:

20 DOC. NO.	DATE	DESCRIPTION
21 1	01/06/12	MPERA - Hearing Examiner Request letter
22 2	02/07/12	First Prehearing Order w/Questionnaire
23 3	02/13/12	Petitioner's Response to Administrative Hearing Status 24 Questionnaire
25 4	02/27/12	MPERA's Response to the Administrative Hearing Status 26 Questionnaire

DOC. NO.	DATE	DESCRIPTION
5	03/08/12	Scheduling Order
6	03/26/12	MPERA's Motion to Extend Discovery Time
7	03/29/12	Order Extending Discovery Deadline
8	04/18/12	Notice of Deposition of Randy Webb
9	04/18/12	Notice of Deposition of Peter Stivers, PhD
10	04/18/12	Notice of Deposition of Rick Pullen, D.O.
11	06/14/12	MPERA's Prehearing Memorandum
12	06/14/12	Petitioner's Prehearing Memorandum
13	06/22/12	Order on Post Hearing Briefs
14	07/26/12	MPERA's Proposed Findings of Fact and Conclusions of Law and Order
15	07/26/12	MPERA's Brief in Support of Proposed Findings of Fact and Conclusions of Law and Order
16	07/27/12	Petitioner's Proposed Findings of Fact and Conclusions of Law
17	07/27/12	Petitioner's Brief in Support of His Proposed Findings of Fact and Conclusions of Law
18	10/4/12	E-mails from Counsel for the Parties discussing that Page 9 of "Exhibit E" should be submitted and appended to the record in this matter as part of the admitted exhibit (<i>Page 9 attached</i>).

In addition to filings listed above as Nos. 1-18, the record also includes the exhibits offered for admission or admitted at the hearing, recordings of depositions perpetuating testimony, and the transcript of the hearing.

The hearing took place as scheduled. (See Scheduling Order, Doc. No. 5, above.) At the hearing, all the exhibits specifically listed in Fauque's Prehearing Memorandum (Doc. No. 12 in the list above) were admitted without objection from the MPERA. With respect to the MPERA exhibits, all but a portion of one of the exhibits listed in the MPERA Prehearing Memorandum were also admitted without any objection from Fauque (for list of exhibits of MPERA, see Doc. No. 11).

1 Fauque objected to admitting a document included in the MPERA Exhibit
2 No. 3. In addition, the Hearing Examiner reserved ruling on a portion of the
3 MPERA Exhibit No. 5, but Fauque did not object to the portion of Exhibit No. 5
4 containing Dr. Gregg's reports. (Tr. at p. 64.) Fauque's objection with respect to
5 the MPERA Exhibit No. 3 concerned a copy of a letter from the Glacier County
6 Attorney within the exhibit. The other copy of a letter contained in the MPERA's
7 Exhibit No. 3, a letter from Glacier County Sheriff Wayne Dusterhoff, addressed
8 "To Whom it May Concern," was admitted without objection. The Hearing
9 Examiner sustained Fauque's objection to the portion of Exhibit No. 3 that consisted
10 of the copy of the letter from the Glacier County Attorney. With respect to
11 reservation of the issue of admission of MPERA Exhibit No. 5, (Fauque initially
12 objected to the wholesale admission of MPERA Exhibit No. 5), at the end of the
13 hearing, Counsel for Fauque agreed that all the other MPERA proposed exhibits
14 (except the portion of Exhibit No. 3 consisting of the copy of the County Attorney's
15 letter) should be considered admitted without objection. (Tr. at p. 185.) Therefore,
16 except for the copy of the letter from the Glacier County Attorney, (part of Exhibit
17 No. 3), all the MPERA proposed exhibits were admitted without objection of
18 Fauque.

19 At hearing, Fauque testified and the video deposition testimony of Dr. Stivers
20 was played. Fauque also submitted the video depositions of Drs. Stivers and Webb
21 on a flash drive, and the video recordings of these depositions are thus also part of
22 the record. Fauque also perpetuated, without objection, the deposition testimony of
23 Dr. Pullen via submission of the transcript of his deposition. Thus, the transcripts of
24 all three depositions are also on file in this matter.

25 Following presentation of Fauque's case, the MPERA called its expert,
26 clinical psychologist Dr. Gregg, and the MPERA also called former Glacier County
27 Sheriff Wayne Dusterhoff.

1 Following the testimony and closing argument, Counsel for the Parties
2 agreed to submit proposed findings of fact and conclusions of law with supporting
3 briefs. These filings were submitted, as shown above—Doc. Nos. 14-17.

4 There was an additional “house-keeping” matter addressed after the hearing.
5 In an exchange of e-mails between Counsel for the Parties, Mr. Snipes and Ms.
6 Talley, initiated by the assistant to the Hearing Examiner, Ms. Santiago, it was
7 determined that all of the copies of the Discharge Summary of Dr. Pullen, (on
8 record in this matter as “Exhibit E” of the deposition of Dr. Stivers), had a missing
9 page—Page 9. After this determination, the parties agreed that the missing page
10 should be submitted and considered to be part of Exhibit E. Thereafter, Page 9 was
11 submitted and, by agreement, considered to be part of Exhibit E. (See e-mails on
12 file as Doc. No. 18.) Page 9 contains the discussion of Dr. Pullen on Fauque’s
13 PTSD and drug addiction, and his opinion on Fauque’s prognosis.

14 It is the understanding of the Hearing Examiner that the procedure set out in
15 Mont. Admin. R. 2.43.1502 applies to this matter, and that the Rule requires that the
16 Hearing Examiner provide for the Board’s consideration a proposal for a decision,
17 including proposed findings of fact, conclusions of law, and order. See also, Mont.
18 Code Ann. § 2-4-621 (person conducting hearing submits proposed decision).

19 After considering all the evidence admitted, and in light of the record, the
20 proposals that follow are made for the Board’s consideration.

21 PROPOSED FINDINGS OF FACT

22 1. The parties did not specifically request that the Hearing Examiner take
23 notice of the procedural history of this matter. However, the parties in their filings
24 show basic agreement with respect to the procedural history. In particular, Fauque
25 applied for line of duty disability retirement benefits in December of 2010
26 (Petitioner’s Prehearing Memorandum), or January of 2011 (MPERA Proposed
27 Findings of Fact and Conclusions of Law). After making his application, Fauque

1 submitted additional documents for consideration by the Montana Public Employees
2 Retirement Board (Board). On June 9, 2011, the Board denied the application, and
3 following Fauque's request for reconsideration, the Board reconsidered the
4 application and additional documents submitted by Fauque, and upheld its previous
5 denial of the application on December 8, 2011 (MPERA Proposed Findings of Fact
6 and Conclusions of Law), or December 9, 2011 (Prehearing Memorandum of
7 Fauque). According to Fauque's Prehearing Memorandum, Fauque appealed the
8 determination on reconsideration on January 3, 2012. As shown by the documents
9 on record in this proceeding, the Hearing Examiner's file contains the letter of
10 Counsel for the MPERA dated January 6, 2012, requesting appointment of a
11 Hearing Examiner (Doc. No. 1, above), and contested case proceedings before the
12 undersigned Hearing Examiner were thus initiated. (Doc. No. 2, above.)
13 Thereafter, the matter was scheduled for hearing. (Doc. No. 5, above.)

14 2. As shown by testimony at the hearing, Fauque worked for the Glacier
15 County Sheriff's Office from 1995 to 2010. (Tr. at pp. 16-17, Test. of Fauque.) He
16 started as a Deputy, was promoted to Sergeant, and then became Undersheriff. (Id.)
17 As conceded by the MPERA's Prehearing Memorandum, during the entirety of his
18 employment with the Glacier County Sheriff's Office, he was a member in the SRS.

19 3. By letter dated November 13, 2010, Fauque resigned his position as
20 Undersheriff. (MPERA Ex. 1.)

21 4. Treatment records show Fauque used his law enforcement position to
22 steal prescription drugs from Glacier County residents beginning sometime in 2007
23 or 2008. (See Exhibit E of Dr. Stiver's deposition, Discharge Summary of Dr.
24 Pullen, and see, Tr. at p. 42, Test. of Fauque.)

25 5. In October of 2010, Fauque entered a private residence intending to
26 locate and steal prescription drugs. (Tr. at p. 42, Test. of Fauque.) (Hereinafter, this
27 incident is referred to as the "October, 2010 incident.") The owner of the home

1 discovered Fauque's presence and confronted him. (Id.) Thereafter, Fauque
2 admitted to the misconduct. (Id. at pp. 56-57.) He surrendered his law enforcement
3 certification and entered a guilty plea to criminal charges. (Id., and see, MPI:RA
4 Ex. 4, Judgment and Order Suspending Sentence, State v. Fauque.)

5 6. Soon after the October, 2010 incident, Fauque entered treatment for
6 drug addiction. His first stint of treatment occurred at a program referred to as
7 "Pathways" in Kalispell. (Tr. at p. 43, Test. of Fauque.) The Pathways treatment
8 records are not part of the Hearing Examiner's record, and no treating professional
9 from Pathways testified or had their testimony perpetuated by deposition. After
10 treatment at Pathways, Fauque entered a program in Billings supervised by Dr.
11 Pullen and run by the Rimrock Foundation. (Id. at p. 44.) After treatment at
12 Rimrock, Fauque obtained treatment for PTSD from Peter Stivers, Ph.D. (Id. at p.
13 48.) Fauque had not previously been diagnosed as suffering from PTSD until
14 diagnosed with the condition while undergoing treatment at Rimrock. (Id. at p. 47.)
15 However, he had previously been treated for depression and anxiety by Randy
16 Webb, M.D., his family physician in Cut Bank, Montana. (Dep. of Webb at page 12
17 and page 23.)

18 7. Fauque explained in his testimony his belief that his opioid addiction
19 arose from self-medicating to lessen his PTSD symptoms. (Tr. at p. 39.) Treating
20 professionals Drs. Pullen, Stivers and Webb opined that Fauque's opioid addiction
21 had developed, at least in part, in response to his attempts to self-medicate his PTSD
22 symptoms. (Dep. of Pullen, p. 22; dep. of Stivers, p. 36; dep. of Webb, pp. 15-16.)
23 However, of these three, only Dr. Webb treated Fauque prior to the October 2010
24 incident. (Tr. at p. 45, Test. of Fauque on initiating treatment with Dr. Pullen; id. at
25 p. 47 on initiating treatment with Dr. Stivers.) Yet, Dr. Webb did not diagnose
26 PTSD until after Fauque received the diagnosis during treatment at Rimrock. (Dep.
27 of Webb at p. 34.)

1 8. Consistent with information that Fauque provided to Drs. Stivers,
2 Webb and Pullen, Fauque described in his testimony instances over the course of his
3 career with the Glacier County Sheriff's office that had caused him to be
4 emotionally traumatized, leading to his suffering from PTSD. (Tr. at pp. 22-29.)
5 These instances involved reporting to scenes where individuals had died in a
6 gruesome fashion. (Id.) Fauque explained in his testimony that his duties as
7 Coroner required he respond to calls to photograph the body of the deceased and to
8 otherwise document the details connected to the death. (Id.) He described picking
9 up body parts when a pedestrian was struck by a train; he helped lower the body of
10 an individual who had hung himself; and, he reported to a residence where a person
11 had been shot in the head. (Id.) Fauque recalled he encountered the shooting
12 victim's mother who pleaded with him to save her son, though her son's brain
13 matter could be observed covering her feet. (Id., and see, Ex. 2, copy of letter of
14 Sheriff Billedeaux, dated February 24, 2011, describing records showing Fauque
15 reported to scenes of deaths.) Fauque also described in his testimony, consistent
16 with information provided to his health care providers, that these instances plagued
17 him. (Tr. at p. 32; and see, Fauque's written statement in application of benefits,
18 within MPERA Exhibit 2.) He began to experience feelings of sadness, impending
19 doom, and obsessive concern over the safety and wellbeing of his own family.
20 (Test. of Fauque, Tr. at p. 32.) Fauque also testified that his emotional state
21 interfered with his ability to perform his job duties. He recalled one instance where
22 he attempted to assist a child who was having a seizure, and he began to cry. (Id., at
23 p. 73.) Fauque did not want the child's parents to see he was crying. (Id.) He
24 testified that his emotional response in that circumstance interfered with his ability
25 to help the child. (Id.) Fauque testified that he was prescribed opioids to relieve
26 pain following a "couple of sinus surgeries," and he discovered that the opioids also
27

1 helped to relieve symptoms he later attributed to arising from PTSD—"my grief
2 inside of me was lifted." (Id. at pp. 39-40.)

3 9. In 2008, Fauque sought treatment from counselor Terry Hanson
4 (hereinafter "Hanson"). While Fauque recognized at that time that he was
5 struggling with feelings of doom and related problems such as obsessive concern
6 over the safety of his own family, he testified that he was not "completely open [to
7 Hanson] about everything going on in my life." (Tr. at pp. 34-34.) However, he did
8 inform Hanson of some of the difficulties he was having with his job. (Tr. at p. 35.)

9 10. Hanson did not testify at hearing, and Hanson's testimony was not
10 perpetuated by deposition. Hanson's records of treatment have not been submitted
11 to the Hearing Examiner, and Dr. Stivers testified he had no recollection of
12 reviewing any notes of treatment of Fauque with Hanson in 2008. (Dep. of Stivers,
13 p. 31.) (To avoid confusion, it should be noted that another healthcare provider, also
14 named Hanson--Denny Hanson, referred Fauque to Dr. Stivers in 2011, see dep. of
15 Stivers at pp. 8-9.)

16 11. Hanson's records from the 2008 counseling were reviewed and relied
17 upon by Dean Gregg, Ph.D., a clinical psychologist retained by the Board. (Tr. at
18 pp. 92-93.) Dr. Gregg relied on the records in recommending to the Board that
19 disability be denied. (MPERA Ex. 5, "Initial Review June 9, 2011;" and additional
20 report signed by Dr. Gregg on p. 2 of the report, with the report dated
21 "11/17/2011.") Dr. Gregg concurred on the PTSD diagnosis, but disagreed that the
22 condition was disabling. (Tr. at pp. 91-97.) According to Dr. Gregg's reports in
23 Exhibit 5, Fauque was previously investigated and put on leave in 2008 for
24 allegedly stealing narcotics from a residence and these allegations, while made,
25 were not proven. (Id.) Also in 2008, Hanson treated Fauque for depression and
26 generalized anxiety disorder, and these records of treatment indicated that Fauque's
27 condition had improved. (Id.) Dr. Gregg pointed out in his report that Fauque

1 would have known at that point (“he was ‘on notice’ so to speak.”) of the threat to
2 his career posed by his drug problem. (Ex. 5, report signed by Dr. Gregg on p. 2
3 and dated “11/17/2011.”) As noted by Dr. Gregg, he nevertheless returned to work
4 and continued to use his position to obtain drugs to self-medicate his PTSD. (Id.)
5 Dr. Gregg testified his opinions were based on the fact that this information—“that
6 he got in trouble back in 2008,” may not have been shared with Fauque’s healthcare
7 providers (Tr. at p. 95), demonstrating that the facts relied upon in forming their
8 opinions on the disability issue might not be based on complete and accurate
9 information. (Id.) Dr. Gregg also relied on other inconsistencies he identified in the
10 records of treatment, opined that PTSD is not always disabling or permanent, and
11 testified to his opinion that other problems of Fauque may have led to his addiction
12 to opioids. (Id.) Dr. Gregg also relied on the lack of a showing of impairment from
13 employment records. (Id., at 96.)

14 12. On cross-examination, Dr. Gregg conceded he was aware of opposite
15 conclusions reached by treating healthcare providers. He admitted that Drs. Stivers,
16 Webb and Pullen had all examined and treated Fauque, while he had conducted no
17 examination or treatment of Fauque. (Tr. at pp. 118-124.) He agreed that these
18 three treating professionals all had opined that Fauque’s condition disabled him
19 from working in law enforcement, and that their opinions were also that the
20 condition had arisen from performance of his duties. (Tr. at pp. 119-123.) Dr.
21 Gregg was also cross-examined on requirements of the American Psychological
22 Association; his statement in his report in Exhibit 5 regarding his personal
23 knowledge of law enforcement officers and others who suffer from PTSD but who
24 are not disabled from employment; and, the fact that he did not limit his opinion
25 previously given to the Board, although he did not examine Fauque or consult with
26 Fauque’s treating mental healthcare professionals. (Tr. at pp. 124-130.)

1 On re-direct examination, Dr. Gregg again relied on the lack of a showing of
2 impairment affecting performance of employment duties during the period of
3 employment. (Tr. at pp. 133.) Dr. Gregg had previously testified on direct that,
4 where benefits are sought, independent corroboration of the symptoms from friends,
5 family or an employer is important. (Tr. at p. 88.) On redirect examination, Dr.
6 Gregg opined on the vagueness of treatment records of Drs. Stivers and Pullen on
7 the presence of PTSD symptoms and the presence or absence of corroborating
8 information. He explained that evidence of PTSD symptoms in the treatment
9 history consisted only of Fauque's "self-report." (Tr. at p. 134.)

10 13. Fauque presented, through his own testimony, some evidence of a
11 history of difficulties at his employment resulting from his claimed impairment but,
12 except as summarized above (e.g., the Hearing Examiner's Proposed Finding of
13 Fact No. 8), there was not an extensive history of performance problems that he
14 could identify. Fauque also relied on the fact that he had sought treatment in 2008
15 from Hanson, and he described that there was a period of leave from work around
16 that period of time. (Tr. at pp. 31-37.) When asked whether there were "other
17 leaves of absences besides 2008" (tr. at 37), Fauque testified, without providing
18 many details, to taking three or four days off after informing the "old sheriff" he
19 needed time away from his job. (Tr. at pp. 37-38.) Fauque also recalled that, in
20 another instance, he was "pretty emotional" in describing to Sheriff Dusterhoff that
21 he needed additional time away from work. This leave occurred when there was a
22 "fire in East Glacier" but, other than this reference, Fauque did not testify on direct
23 examination as to when this leave occurred. (Tr. at p. 38.) Fauque did testify that
24 Sheriff Dusterhoff approved that he take "another week off," apparently referring to
25 the fact that he was returning from a trip or a vacation. (*Id.*) Fauque also explained
26 that his request for additional time off was due to "overwhelming anxiety and
27

1 sadness.” (Id.) On cross-examination, he dated the leave as occurring “probably
2 about 2007.” (Tr. at p. 70.)

3 14. In addition to lacking evidence of any extensive need for leave,
4 Fauque’s descriptions of periods of absence from work were vague. On cross-
5 examination, Fauque explained generally that he continued to perform his work
6 duties hoping that his condition would improve, but it only worsened. (Tr. at pp.
7 68-69.) He testified that he began to recognize his mental health was affecting his
8 job performance “when I first started being treated for depression, which was like
9 2004 or 2005.” (Id.) Fauque testified that, while he underwent treatment for
10 depression or anxiety for a considerable time with Dr. Webb and shared some of his
11 difficulties in counseling with Hanson in 2008, he was not willing to share problems
12 now attributed by him as arising from PTSD. (Tr. at p. 34; p. 53; and p. 71.)
13 Fauque explained he was reluctant to admit to any weakness, and feared the shame
14 or humiliation that might accompany disclosure of problems connected to his
15 increasing inability to cope with the job. (Id.)

16 15. Sheriff Dusterhoff (hereinafter “Dusterhoff”) testified he worked with
17 Fauque during the period Fauque was employed at the Sheriff’s Office. (Tr. at pp.
18 123-138; pp. 155-156.) Dusterhoff was Undersheriff when Fauque was a Deputy in
19 1995. (Tr. at p. 156.) Dusterhoff took the job as Sheriff in 2002 or 2003 and, at that
20 time, Fauque became Undersheriff. (Tr. at p. 138.) Dusterhoff found Fauque to be
21 very competent. (Tr. at p. 139.) Dusterhoff recalled that Fauque was on leave in
22 2008. However, Dusterhoff recalled that there were allegations against Fauque that
23 resulted in an investigation in 2008, and that Fauque was put on administrative leave
24 during the investigation. (Tr. at pp. 139-140.) When Fauque returned to work,
25 Dusterhoff had no concerns that he would be unable to do his job. (Tr. at p. 142.)
26 Dusterhoff testified he did not discuss any mental health issues with Fauque until
27 around February of 2010. (Tr. at pp. 146-147.) (Dusterhoff explained in his

1 testimony that the conversation occurred “about a year” before the date of his letter
2 of February 18, 2011, part of Exhibit 3.) At that time, Dusterhoff discussed with
3 Fauque difficulties Fauque reported connected to Fauque’s depression. (Id.)
4 Dusterhoff also testified that his letter in Exhibit 3 correctly set out that he had
5 another conversation with Fauque about his depression. However, according to
6 Dusterhoff, this conversation occurred only after the October, 2010 incident. (Tr. at
7 pp. 147-148.) Dusterhoff deemed Fauque unfit for duty at that time because he
8 “couldn’t allow [the October, 2010 incident] to be happening.” (Tr. at p. 154.)
9 Dusterhoff’s testimony did not provide any observations of Dusterhoff
10 corroborating Fauque’s claimed difficulties arising from PTSD. Prior to the
11 October 2010 incident, Dusterhoff did not observe that Fauque avoided calls
12 requesting the assistance of law enforcement or was unavailable for scheduled
13 work. (Tr. at p. 150.) Dusterhoff also did not observe that Fauque was unusually
14 tense or easily startled. (Id.)

15 16. Dusterhoff testified that, had Fauque requested accommodation for
16 mental health problems, accommodation could have been attempted. (Tr. at p. 154.)
17 Fauque could have been relieved of coroner duties. (Id.) Dusterhoff recalled that
18 one deputy had been relieved of coroner duties because the cultural beliefs of the
19 deputy prevented the performance of the coroner duties. (Id.) Dusterhoff also
20 testified that leave time for treatment could have been provided. (Id.) On cross-
21 examination, Dusterhoff conceded that “first responder” duties could not always be
22 delegated to other deputies, and that absent the availability of the sheriff or other
23 deputies to respond to emergencies, Fauque, while on call, would be required to
24 respond and perform first responder duties. (Tr. at p. 159.) Fauque’s treating
25 professionals also opined on this topic, providing their opinions that Fauque’s
26 condition prevented him from responding to life-threatening or emergency
27 situations, and that Fauque’s resumption of work in law enforcement could result in

1 re-exacerbation of PTSD and relapse to opioid dependency. (Dep. Webb at pp. 38-
2 39; Dep. of Stivers, pp. 23-24; Dep. Pullen at p. 25.)

3 17. The treating professionals, Drs. Stivers, Pullen and Webb, all
4 concurred on the diagnosis of PTSD and that the opioid dependency arose, at least
5 in part, from Fauque attempting to self-medicate to treat symptoms arising from the
6 PTSD. They also all opined that Fauque should be considered disabled from his
7 SRS covered employment as a result of the PTSD arising in the line of duty.
8 According to these experts' opinions, the severity of the PTSD prevented Fauque
9 from continuing in law enforcement in 2010, and currently prevents Fauque from
10 returning to a position in law enforcement. As set out above, Drs. Webb and Stivers
11 also opined that he would be unable to adequately perform in response to
12 emergencies or crises, e.g., Dr. Webb opined that Fauque would be unable to use
13 deadly force which Dr. Webb understood to be essential to the ability to perform the
14 job. (Dep. of Webb at pp. 38-39.) Dr. Stivers also opined that his condition posed a
15 risk to the public because PTSD exacerbation could cause him to hesitate in
16 performing his duties and he might also lack empathy, be anxious, or have reduced
17 abilities of concentration and attention. (Dep. of Dr. Stivers at pp. 23-24.)

18 On the issue of re-exacerbation of PTSD, Dr. Stivers referred to Fauque's
19 need to avoid "triggers" that aggravate PTSD symptoms. He repeatedly referred to
20 what he considered to be an "avoidance behavior" associated with hypersensitivity
21 from PTSD—that is, that Fauque not only experiences distress at the suggestion of
22 "a uniform," (Dep. of Dr. Stivers at p. 20), he will "avoid the entire town [of Cut
23 Bank]" because of avoidance behaviors arising from his PTSD. (Dep. of Dr. Stivers
24 at p. 18.) Dr. Stivers also discussed that Fauque's need to avoid reminders of
25 trauma supported his opinion on Fauque's inability to return to a career in law
26 enforcement. (Dep. of Dr. Stivers at pp. 20-21.)

1 18. Dr. Gregg is correct that there are aspects of the opinions of the
2 treating physicians and psychologist that are based on incomplete information, are
3 vague or are otherwise less than thorough. (Tr. at p. 134, lines 2-11.) They
4 provided scant information on corroboration of symptoms from Fauque's friends,
5 family, or his employer. They relied principally on information supplied by Fauque
6 after the October 2010 incident. In addition, the therapist sought out by Fauque
7 during the period near in time to the alleged onset of the disability, Hanson, was not
8 called as a witness by Fauque, her treatment records were not submitted to the
9 Hearing Examiner, and Dr. Stivers was unaware of the treatment. According to the
10 record, the only professional testifying to having reviewed Hanson's records, Dr.
11 Gregg, opined that they did not support his claims for disability. Further, Drs.
12 Pullen, Stivers and Webb provided no analysis based specifically on consideration
13 of the facts supplied at hearing by Sheriff Dusterhoff.

14 Inconsistencies are also obvious in the record. In assessing avoidance
15 behavior and PTSD, Dr. Pullen opined that work in law enforcement would
16 "reinforce further the already underlying traumatic memories." (Dep. of Dr. Pullen,
17 p. 18, lines 6-9.) He explained that the memories are reinforced through a triggering
18 process: "certain things in our environment that help perhaps trigger memories of
19 those traumatic events," and that PTSD symptoms are "exacerbated, further stirred
20 up and the symptoms are further exacerbated." (Dep. of Dr. Pullen, p. 16, lines 23-
21 25, p. 17, lines 1-2.) As illustrating this process as it relates to Fauque, Dr. Pullen
22 testified that, following development of Fauque's PTSD, Fauque used opioids to
23 numb pain triggered by the reminders of past trauma. (Dep. of Dr. Pullen, p. 22,
24 lines 4-7; p. 39, lines 4-9.)

25 However, Dr. Pullen never explained how Fauque's need to numb the pain
26 brought on by reminders of past trauma could be reconciled with one of the methods
27

1 used by Fauque to obtain opioids. Dr. Pullen's own report records that Fauque told
2 him:

3 He began getting opioids at people's houses for instance if he had to
4 go to houses *where people had died*. He would sometimes go through
their medications and take their opioids.

5 (Exhibit E of Dep. of Stivers, copy of Discharge Summary of Dr. Pullen, p. 1.)

6 (Emphasis added.)

7 While seeking and obtaining mental health treatment from Counselor Hanson
8 and Dr. Webb for anxiety and depression, Fauque was nevertheless engaged in using
9 calls to houses where people had died to illegally obtain drugs. At least in those
10 instances, the drug addiction proved to be more compelling to Fauque than his
11 reluctance to expose himself to situations that might trigger painful recollections of
12 past trauma. This circumstance, not addressed by Fauque or Drs. Pullen, Stivers or
13 Webb, calls into question the severity of the alleged symptoms Fauque claimed to
14 have been experiencing during his employment and prior to the October 10, 2010,
15 incident. In addition, on Page 9 of Exhibit E (as discussed above, submitted after
16 the hearing), Dr. Pullen opines that the "prognosis for this patient's full recovery is
17 optimistic."

18 Fauque also relies on the less than thorough opinion of Dr. Stivers that
19 avoiding the town of Cut Bank evidences the ongoing severity of his PTSD. Dr.
20 Stivers opined on the avoidance concept using a baseball bat analogy—"If you hit
21 me with a baseball bat, I not only want to avoid you, if I develop PTSD, I might
22 want to avoid baseball bats. . . . Jeff doesn't want to go back to Cut Bank. He'll
23 avoid an entire town because of the experiences [of traumatic events] that occurred
24 in and around there." (Dep. of Stivers, p. 18, lines 5-14.) Dr. Stivers also testified
25 that "[h]e consistently engaged in avoidance behavior in order to deal with that
26 trauma, and those heightened physical and emotional symptoms. He did that by
27 avoiding Cut Bank." (Dep. of Stivers, p. 40, lines 14-17.)

1 However, a more thorough opinion on the desire to avoid Cut Bank would
2 have addressed feelings of shame and humiliation of Fauque connected to the
3 October 2010 incident. (See Ex. C., Dcp. of Stivers, notes of sessions dated
4 “9/15/2011,” and “9/28/2011.”) While Dr. Stivers’ notes record, as one focus of
5 treatment, the shame and humiliation Fauque experienced and continued to
6 experience as a result of his continuing residence in Cut Bank after the October
7 2010 incident, Dr. Stivers attributed the desire to avoid Cut Bank entirely to the
8 severity of the PTSD avoidance problem.

9 19. Fauque, in his testimony, also attributed his reluctance to discuss
10 symptoms associated with his PTSD in his private treatment with Dr. Webb and
11 counselor Hanson, occurring during his employment, to his fear of exposure of the
12 symptoms of PTSD, causing humiliation. However, Fauque never explained how
13 this fear of exposure and thus, humiliation, (claimed to have been at risk in private
14 healthcare communications with his counselor, Hanson, and his physician, Webb),
15 would compare to the humiliation he risked by continuing to steal drugs, even after
16 the 2008 investigation. Fauque has also not provided any explanation on his failure
17 to produce evidence of treatment by Hanson, though he attempts to rely on the
18 treatment as supporting his claim for disability. (See discussion below on Fauque’s
19 proposed Finding of Fact No. 13.) Based on the evidence, Fauque was not primarily
20 concerned in 2008 with exposure of PTSD symptoms. His primary concern was
21 hiding his misconduct and drug addiction.

22 20. Fauque contends that the Hearing Examiner should accord particular
23 weight to opinions of treating professionals. However, Dr. Webb failed to detect
24 and diagnose PTSD, even while treating Fauque during the period when he was
25 engaged in self-medicating through illegal use of stolen drugs. Similarly, the
26 substantial weight generally accorded to treating professionals such as Drs. Stivers
27 and Pullen is reduced here because of the timeframe during which they treated

1 Fauque. They cannot opine based on interactions or examinations occurring at the
2 time of the claimed onset because they only interacted\examined him after the
3 severely humiliating arrest leading to Fauque’s criminal conviction.

4 21. It is undisputed that Fauque failed to request reasonable
5 accommodation for his claimed disability. Based on the testimony of Drs. Stivers,
6 Pullen and Webb, Fauque urges that the Hearing Examiner find and conclude that
7 attempts at accommodation would have been ineffective. This contention is based
8 on the opinions of the treating professionals that the PTSD was sufficiently severe
9 in 2010, that no accommodation could have been expected to have relieved the
10 symptoms to a degree that would allow Fauque to work as Undersheriff without
11 endangering himself or the public. However, again, the weight to be afforded this
12 opinion testimony is reduced by the fact that neither Drs. Stivers nor Pullen treated
13 Fauque in 2010, and Dr. Webb, while treating Fauque, had not diagnosed the
14 condition which he claims could not have been accommodated. None of the
15 experts evaluated any specific plan to address the claimed impediments to
16 accommodation, nor could they have, since no plan was ever formulated. Their
17 opinions are necessarily based, in part, on incomplete information and speculation.

18 22. Sheriff Dusterhoff testified that he could have accommodated
19 Fauque’s condition with respect to relieving him of his coroner duties. As detailed
20 above, Dusterhoff recalled that a deputy had been relieved of coroner duties because
21 the duties conflicted with cultural beliefs held by the deputy. However, Fauque
22 contends that Dusterhoff could not accommodate him with respect to first responder
23 duties. This contention exaggerates the possible difficulty that was the subject of
24 the testimony. Dusterhoff only testified that he could not accommodate Fauque’s
25 condition to relieve him of first responder duties to the extent that he would not be
26 required “to show up” to an emergency if no other officers were available. (Tr. at p.
27 178.) The possibility that an emergency might require Fauque to report as a first

1 responder is not the same as showing no accommodation could be effective.
2 Fauque, without the benefit of any employer-provided accommodation, performed
3 all his duties to the satisfaction of his employer primarily relying on self-medication.
4 Therefore, it is the finding of the Hearing Examiner that the possibility that a plan of
5 accommodation may have required Fauque to respond to an emergency when no
6 other officer was available is insufficient to show that no accommodation could
7 have been effective.

8 It is also the finding of the Hearing Examiner that Fauque's failure to request
9 accommodation, and his subsequent resignation (again without any request for
10 accommodation), prevented any attempt by the employer at providing an
11 accommodation.

12 23. Based on the Findings set out above, Fauque failed to carry his burden
13 by showing a preponderance of evidence that he suffered from a disability
14 preventing continuation of employment under the SRS when he resigned his SRS-
15 covered position in 2010. As summarized above, Fauque performed his duties by
16 self-medicating his PTSD symptoms until the October 10, 2010, incident; the
17 treating professionals' opinions that he was disabled at that time, regardless of the
18 October 10, 2010, incident, are not convincing; and, accommodation of Fauque's
19 condition could have been attempted if Fauque had requested, and accommodation
20 may have succeeded.

21 **PROPOSED CONCLUSIONS OF LAW**

22 1. Montana law established the SRS by statute at Mont. Code Ann. § 19-
23 7-102. The statute also sets out that the SRS is governed by chapter 2, Title 19, of
24 the Montana Code Annotated.

25 2. Under Mont. Code Ann. § 19-2-403(1), the Montana Board of Public
26 Retirement is authorized to administer "the provisions of the chapters enumerated in
27 19-2-302." Mont. Code Ann. § 19-2-302, provides that, except as otherwise

1 provided in Title 19, “this chapter [chapter 2 of Title 19 entitled “The Public
2 Employees’ Retirement Act”] applies to chapters 3, 5 through 9 and 13 of this title
3 [Title 19].” Thus, the SRS, provided for in chapter 7 of Title 19, is generally subject
4 to the administration of the Montana Board of Public Retirement and the
5 requirements of statutes at Mont. Code Ann. § 19-2-301 to -1015.

6 3. Mont. Code Ann. § 19-2-406, provides for determination of disability
7 of a member. The statute requires the Montana Public Retirement Board determine
8 whether a member has become disabled, and it authorizes MAPA proceedings to
9 determine disabilities. “Disability” or “disabled” is defined at Mont. Code Ann.
10 § 19-2-303(20), providing that the terms mean:

11 total inability of the member to perform the member’s duties by reason
12 of physical or mental capacity. The disability must be incurred while
13 the member is an active member and must be one of permanent
14 duration, as determined by the board on the basis of competent
15 medical opinion.

16 Mont. Code Ann. § 19-2-303(20).

17 Under Mont. Code Ann. § 19-7-601(2), a member in the SRS is eligible for
18 disability retirement benefits that are the direct result of the member’s service in the
19 line of duty. Eligibility under the disability retirement specified in Mont. Code Ann.
20 § 19-7-601(2), is at issue here.

21 4. The process for determining disability is initiated by the applicant.
22 Mont. Admin. R. 2.43.2602. The applicant must submit an “attending physician’s
23 statement, including all medical records required to substantiate a disability claim.”
24 Id. The Rule also requires that the employer must define the essential elements of
25 the member’s position and show reasonable accommodation was attempted. In
26 accord with the definition of disability at Mont. Code Ann. § 19-2-303(2), the
27 Montana Supreme Court has interpreted eligibility for disability under the Public
Employees Retirement System as requiring that the claimant show an inability to
perform job duties. Weber v. Pub. Employees’ Retirement Bd. (1995), 270 Mont.

1 239, 242, 890 P.2d 1296, 1298. The inability must be shown to be permanent,
2 extended or of uncertain duration. Id. The inability must arise by reason of physical
3 or mental incapacity while in active service. Id. The determination of inability to
4 perform job duties must be based on competent medical opinion. Id.

5 5. In evaluating whether or not a claimant is disabled, the Board must
6 accord special weight to the opinions of treating physicians. Weber, 890 P.2d at
7 1300 (citing Embrey v. Bowen, 849 F.2d 418, 421 (9th Cir. 1988)). Further, the fact
8 finder should not disregard opinions on the issue provided by treating physicians
9 absent specific legitimate reasons for disregarding the opinions. Id. However, a
10 treating physician's opinion as to the existence of a disability is not conclusive.
11 EBI\Orion Group v. Blythe, 1998 MT 90, ¶ 13, 288 Mont. 356, 957 P.2d 1134.
12 Otherwise, the role of the fact finder of fact would be usurped by a treating
13 physician whose principal duty is owed to their patient. EBI\Orion Group, at ¶¶ 13-
14 14. The Rule would also ignore that treating physicians often do not have the full
15 benefit of all the evidence presented. Id.

16 6. There are specific, legitimate reasons for disregarding the opinions of
17 the treating physicians and psychologist in this case, as detailed above in the
18 Hearing Examiner's Proposed Findings of Fact. The competent opinion of Dr.
19 Gregg provides a basis for denying Fauque's claim.

20 7. Under the undisputed facts, there can be no showing here that the
21 employer attempted reasonable accommodation as required by Mont. Admin. R.
22 2.43.2602. In addition, the employer's duty to accommodate under the Americans
23 with Disabilities Act generally arises only after the employee requests
24 accommodation, except where the employer knows, or has reason to know, that the
25 disability prevents the employee from requesting a reasonable accommodation.
26 Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000). As detailed in the
27 Findings of Fact above, there is no dispute here that Fauque failed to request any

1 accommodation during the period he claims his condition had become disabling.
2 Nor is there any evidence to support a finding that the employer knew, or had reason
3 to know, that Fauque's PTSD prevented him from requesting an accommodation.
4 To the extent that Fauque can show no accommodation would have been effective,
5 (thus, arguably, meeting the burden provided under Mont. Admin. R. 2.43.2602),
6 Fauque also failed to meet his burden on this issue. He failed to show by a
7 preponderance of the evidence that accommodation would necessarily have been
8 ineffective.

9 8. Based on the record in this matter, the Board has properly followed
10 the procedure for advancing this matter to a contested case hearing under the
11 Montana Administrative Procedure Act. Following hearing and Findings of Fact
12 proposed by the Hearing Examiner, the Board has properly denied disability
13 retirement benefits applied for by Fauque. In particular, the Board has properly
14 denied the application for benefits of Fauque based on his claim of disability arising
15 as the direct result of his service in the line of duty under Mont. Code Ann. § 19-7-
16 601(2).

17 **PROPOSED ORDER**

18 Fauque failed to establish by a preponderance of the evidence that he became
19 disabled as a direct result of his service in the line of duty during his employment
20 with the Glacier County Sheriff's Office, and therefore his claim for the SRS
21 disability benefits is denied.

22 **ADDITIONAL DISCUSSION:** 23 **PARTIES' PROPOSED FINDINGS OF FACT**

24 To the extent that Mont. Code Ann. § 2-4-623(4), requires an agency final
25 decision that provides a ruling on the parties' proposed Findings of Fact which were
26 submitted to the Hearing Examiner, the following additional discussion is included.
27

1 The MPERA proposed Findings of Fact are rejected because the subject
2 matter of these proposed Findings of Fact is adequately addressed in the Hearing
3 Examiner's Proposed Findings of Fact.

4 Fauque's proposed Findings of Fact Nos. 1-4 on Fauque's history of service
5 are rejected because the subject matter of these proposed Findings is also adequately
6 addressed in the Hearing Examiner's Proposed Findings of Fact.

7 Fauque's proposed Findings of Fact Nos. 5-6 cover coroner duties,
8 responding to emergencies, the lack of a formal policy excepting an employee from
9 coroner duties, or notice that exceptions from performing the duties would be
10 available. These subjects are either adequately addressed by the Hearing
11 Examiner's Proposed Findings of Fact, or are unnecessary to determination in this
12 matter, and are thus rejected.

13 Fauque's proposed Finding of Fact No. 7 proposes that the Hearing Examiner
14 find that Fauque attended as Coroner 250-350 deaths over his fifteen year career
15 based on an estimate provided in the testimony of Fauque. Dusterhoff testified that
16 the coroner was called to deaths occurring in the hospital only if the decedent had
17 been admitted to the hospital less than 24 hours prior to the time of death. (Tr. at p.
18 161.) Dusterhoff testified that his estimate of the number of coroner calls per year
19 would be 10-14, maximum. (Tr. at p. 175.) Also, whether an officer is called upon
20 to perform coroner duties depends on whether the officer is on shift. (Id.) Based on
21 Dusterhoff's testimony, conflicting evidence exists on the number of coroner calls
22 of Fauque during his 15 year career. Even in the absence of evidence in conflict
23 with Fauque's proposed Finding of Fact, the Hearing Examiner's Proposed Findings
24 of Fact adequately address the coroner duties, and also adequately address the other
25 proposed facts in Fauque's proposed Finding of Fact No. 7 (e.g., detailing gruesome
26 scenes of death that Fauque had been called to as coroner or as deputy or
27 undersheriff). Therefore, Fauque's proposed Finding of Fact No. 7 is rejected. For

1 the same reason, the Hearing Examiner rejects Fauque's proposed Findings of Fact
2 Nos. 8-9—these proposed findings on emergencies and responding to scenes of
3 deaths are adequately addressed by the Hearing Examiner's Proposed Findings of
4 Fact.

5 Proposed Finding of Fact No. 10 of Fauque requests that the Hearing
6 Examiner find that the employer failed to adopt an official debriefing policy or
7 provide debriefing or counseling services. Fauque's proposed Finding of Fact No.
8 10 is rejected because the failure to provide formal debriefing or counseling is not
9 determinative of any issue in this matter. To the extent that the finding is proposed
10 as supporting Fauque's credibility that he did not know or understand that he should
11 request assistance from his employer to accommodate his condition, the proposed
12 finding is also rejected. Absent request for an accommodation from the employee,
13 or in the circumstance where the employer should have known that the disability
14 prevents the employee from making the request, the employer is not obligated to
15 offer an accommodation. Barnett, 228 F.3d at 1112. Fauque successfully hid his
16 PTSD condition from his employer. In addition, the findings proposed by the
17 Hearing Examiner address the essential considerations in weighing Fauque's
18 credibility on his reasons for failing to seek additional assistance with his
19 difficulties, i.e., Fauque's principal motivation was to conceal from his employer
20 and his community his illegal drug activity, and continue the activity.

21 Fauque's proposed Findings of Fact Nos. 11-13 are rejected because the facts
22 underlying these proposals are adequately addressed in the Hearing Examiner's
23 Proposed Findings of Fact, and also because they exaggerate the clarity of the
24 version of events attributed to Fauque's testimony, or are otherwise not supported
25 by the testimony. For example, Fauque's proposed Finding of Fact No. 13 offers
26 that the Hearing Examiner find that Fauque took a leave of absence in 2008 to
27 specifically address his depression and anxiety. As detailed in the Hearing

1 Examiner's proposed findings, "probably" in 2007, Fauque testified that he
2 extended his vacation or leave because of anxiety resulting in his dreading to return
3 to work. However, this testimony does not support the proposed finding that
4 Fauque took a leave of absence in 2008 to specifically address anxiety and
5 depression from PTSD. Also in 2008, as explained in Dusterhoff's testimony,
6 Fauque was put on administrative leave pending an investigation related to
7 allegations of misconduct by Fauque. According to Dr. Gregg's report in Exhibit 5,
8 Fauque was under investigation in 2008 for allegedly stealing drugs from a
9 residence, the same misconduct leading to his resignation in 2010. Yet, Fauque
10 provided no testimony on whether this investigation was a source of depression or
11 anxiety for him in 2008.

12 Fauque's proposed Finding of Fact also provides that "after substantial
13 counseling and treatment," Fauque returned to work in 2008. However, Fauque
14 never testified to receiving substantial counseling and treatment allowing any return
15 to work. Fauque's testimony was that he "didn't establish really a therapeutic
16 relationship" with his counselor in 2008 (Tr. at p. 34); the counseling only occurred
17 "over a period of a couple of months" (Tr. at p. 31); and Fauque was not
18 forthcoming to his counselor with respect to his claimed PTSD problems—"even
19 though I went to her [the counselor] a couple of times, I wasn't completely open
20 about everything that was going on with my life." (Tr. at pp. 33-34.)

21 Fauque's proposed Findings of Fact Nos. 14-21 detail facts on development
22 of Fauque's opioid addiction and PTSD, and his treating experts' opinions on these
23 matters. These proposals are rejected because the subject matter of these proposed
24 findings is more correctly addressed in the Hearing Examiner's proposed findings.
25 As set out in the Hearing Examiner's Proposed Findings of Fact, the Hearing
26 Examiner is not persuaded that Fauque has carried his burden of showing by a
27 preponderance of the evidence that he suffered from a disabling condition as a result

1 of his PTSD at the time of his resignation, or that the condition could not have been
2 effectively accommodated by his employer.

3 Fauque’s proposed Finding of Fact No. 22 sets out that the “Montana Public
4 Employees Administration” [or the Board—see above, Hearing Examiner’s
5 Proposed Finding of Fact No. 3] previously denied disability benefits to Fauque
6 “without any medical examination by the Public Employees Retirement
7 Administration, or any request for an examination.” With respect to this proposed
8 finding, it is undisputed that Dr. Gregg did not examine Fauque, as already set out in
9 the Hearing Examiner’s Proposed Finding of Fact No. 12.

10 However, in connection with the fact that Dr. Gregg did not examine Fauque
11 or conduct a review that consisted of more than a review of records, Fauque seeks to
12 exclude consideration of the testimony of Dr. Gregg for the reasons set out in his
13 proposed Conclusion of Law No. 4. Fauque proposes a ruling that Dr. Gregg’s
14 testimony cannot be considered competent under Mont. R. Evid. 702, or that it is
15 incompetent under ethical mandates governing the practice of psychology. In
16 advocating that the law allows or requires an examination by Dr. Gregg prior to
17 admission of his opinion testimony, Fauque relies on Mont. Code Ann. §§ 19-3-
18 1015 and 19-7-612, statutes on cancelation of disability benefits. (Doc. No. 17,
19 Petitioner’s Brief in Support of His Proposed Findings of Fact and Conclusions of
20 Law, p. 12.)

21 Fauque also relies on ethical guidelines referred to in questioning on cross-
22 examination of Dr. Gregg, arguing that Dr. Gregg’s opinion is not competent
23 evidence because of Dr. Gregg’s failure to follow the guidelines requiring an
24 examination prior to rendering an opinion. (Doc. No. 17, Petitioner’s Brief in
25 Support of His Proposed Findings of Fact and Conclusions of Law, pp. 8-10.) With
26 respect to this contention, there has been no formal request that the Hearing
27 Examiner take notice of the contents of these ethical requirements, and Fauque

1 failed to provide copies of the documents containing the ethical requirements.
2 Instead, Fauque quotes provisions advocated as applicable here, and refers the
3 Hearing Examiner to a website.

4 Fauque cited no case where a psychologist's opinion has been excluded
5 under Article VII of the Rules of Evidence (Rules 702 and 703 cover expert
6 opinions) based on failure to comply with the ethical requirements that arguably
7 require an examination prior to rendering an opinion. To the contrary, a similar
8 argument made to the Montana Supreme Court in EBI\Orion Group, was rejected.
9 EBI\Orion Group, at ¶ 22. Other courts addressing the issue have ruled in accord
10 with the view expressed in EBI\Orion Group. See Peteet v. Greenhill, 868 F.2d
11 1428, 1432 (5th Cir. 1989); In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717,
12 762 (3rd Cir. 1994); James v. Martin Transport, LTD., 2006 U.S. LEXIS 91768, *6
13 (N. Dist. Ind., December 15, 2006).

14 Dr. Gregg's testimony on the extent of his review included that he was
15 retained by the Board to advise the Board on the disability application. (Tr. at p.
16 135.) Dr. Gregg has conducted numerous "face-to-face" examinations of applicants
17 for disability benefits, either under programs providing disability benefits through
18 the Social Security Administration, or the Veterans Administration, in cases where
19 the claimed disability is from PTSD. (Tr. at p. 88-89.) However, with respect to
20 Fauque's application for disability benefits under the SRS, he testified he
21 understood his assignment from the Board was to make a recommendation
22 following review of Fauque's application and treatment records. (Tr. at p. 131-
23 135.)

24 Contrary to Fauque's argument citing Mont. Code Ann. §§ 19-3-1015 and
25 19-7-612, the applicable statute, Mont. Code Ann. § 19-2-406(2), does not provide
26 that the Board's retained expert must conduct an examination. The applicable
27 statute provides that the Board "shall retain medical personnel to advise it in

1 assessing the nature and extent of disabling conditions while reviewing claims for
2 disability requirement.” Mont. Code Ann. § 19-2-406(2). While the language on
3 retaining medical personnel to advise the Board is mandatory, subsection 1 of Mont.
4 Code Ann. § 19-2-406 provides only that the Board “*may* order medical
5 examinations.” (Emphasis added.) Further, even assuming the provisions of Mont.
6 Code Ann. §§ 19-3-1015 and 19-7-612 (statutes concerned with cancellation of
7 disability benefits), applied here, these statutes also grant the Board discretion on
8 whether a medical examination will be required.

9 Based on Dr. Gregg’s testimony, he was never provided any order from the
10 Board directing that Fauque be examined for the purpose of evaluating Fauque’s
11 claim. The Board requested he review the records and advise it on the claim, as
12 authorized by the applicable statute. Based on the record, the statute, EBI\Orion,
13 and Mont. R. Evid. 702 and 703, the opinion testimony of Dr. Gregg is competent
14 and may be relied on by the Board. The lack of examination goes to the weight, not
15 the admissibility of the testimony.

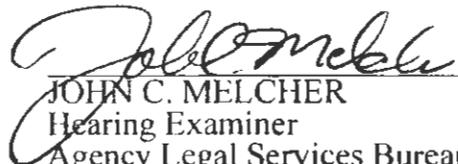
16 Finally, Fauque proposes that the Hearing Examiner conclude that grounds
17 do not exist for concluding that Fauque may be denied benefits based on disability
18 arising from gross negligence, willful misconduct, or violation of the law under
19 Mont. Code Ann. § 19-2-906. (Fauque’s proposed Conclusion of Law No. 1.) In
20 Fauque’s proposed Finding of Fact No.16, Fauque outlines the circumstances
21 demonstrating that his misconduct did not result in termination of his employment.
22 With respect to the MPERA position, the MPERA proposed no findings or
23 conclusions based on a contention that benefits should be denied pursuant to Mont.
24 Code Ann. § 19-2-906. However, the MPERA’s Prehearing Memorandum set out
25 as a legal issue whether denial of benefits should occur because Fauque’s disability
26 was proximately caused by his gross negligence, willful misconduct or violation of
27 the law.

1 The record does not support a finding that the condition claimed to be
2 disabling-PTSD, arose from gross negligence, willful misconduct or violation of the
3 law. In addition, given the lack of a proposed finding on this issue from the
4 MPERA, it appears the MPERA abandoned any contention that disability could be
5 refused based on Mont. Code Ann. § 19-2-906. Therefore, as set out in the
6 introduction section above, and to the extent this issue is not moot, the record in this
7 matter does not support finding or concluding that Fauque should be made ineligible
8 for retirement benefits under the SRS based on Mont. Code Ann. § 19-2-906, and
9 this decision may be considered as also resolving this issue, unless otherwise
10 addressed by the Board in its final decision in this matter.

11 **CONCLUSION**

12 For the reasons detailed above, the Hearing Examiner recommends that the
13 Board find and conclude that Fauque is not eligible for disability retirement under
14 the SRS.

15 DATED this 16th day of November, 2012.

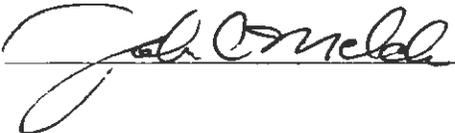
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17 
18 JOHN C. MELCHER
19 Hearing Examiner
20 Agency Legal Services Bureau
21 1712 Ninth Avenue
22 P.O. Box 201440
23 Helena, MT 59620-1440
24 (406) 444-2026
25
26
27

1 CERTIFICATE OF SERVICE

2 I hereby certify that I caused a true and accurate copy of the foregoing
3 Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order to
4 be mailed to:

5 Ms. Katherine E. Talley
6 Public Employee Retirement Administration
7 P.O. Box 200131
8 Helena, MT 59620-0131

9 Mr. Ben A. Snipes
10 Lewis, Slovak, Kovacich & Marr, P.C.
11 P.O. Box 2325
12 Great Falls, MT 59403

13 DATED: 11/16/12 

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0710

JEFF FAUQUE,

Petitioner and Appellant

v.

MONTANA PUBLIC EMPLOYEES'
RETIREMENT BOARD,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, The Honorable Mike Menahan, Presiding
District Court Case No. ADV 2013-143

APPEARANCES:

KATHERINE E. TALLEY
Special Assistant Attorney General
P.O. Box 200131
Helena, MT 59620-0131
Phone: 406-444-3154
Fax: 406-444-5428
Email: ktalley@mt.gov

ATTORNEY FOR APPELLEE

BEN A. SNIPES
Lewis, Slovak & Kovacich
P.O. Box 2325
Great Falls, MT 59403
Phone: 406-761-5595
Fax: 406-761-5805
Email: ben@lsklaw.net

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE

Whether the District Court erred in affirming the determination of the Public Employees' Retirement Board that Jeff Fauque is not eligible for disability benefits?

STATEMENT OF THE CASE

Fauque was caught using his law enforcement position to steal prescription drugs in October 2010; he subsequently pled guilty to criminal charges with the condition that he relinquish all of his law enforcement certifications. (Ex. 4, Judgment and Order Suspending Sentence, *State v. Fauque*). He terminated his position as a deputy sheriff in November 2010 and applied for disability benefits from the Sheriffs' Retirement System (SRS) in January 2011. Following administrative review and a contested case proceeding the Montana Public Employees' Retirement Board (PERB) issued a Final Order on January 10, 2013 denying his application for disability benefits. Fauque then filed a petition for judicial review of the PERB's order in the First Judicial District Court of Lewis and Clark County. Upon review of the entire record and in consideration of oral arguments, the District Court issued a September 23, 2013 Order on Petition for Judicial Review affirming the PERB's Final Order determining Fauque is not eligible to receive SRS disability benefits. He appeals that decision.

STATEMENT OF THE FACTS

Fauque worked for the Glacier County Sheriff's Office and was a member of the Sheriffs' Retirement System from 1995 to 2010. He started as a deputy, then was promoted to sergeant and finally undersheriff. (Admin. Tr. at 16:3-17:18.) In 2007 or 2008 he started to use his law enforcement position to steal prescription drugs from Glacier County residents. (*Id.* at 39:14-40:9; Ex. E.) On October 4, 2010, he entered a local home to search for and steal prescription drugs. (Admin. Tr. at 41:20-42:10.) He was criminally charged in the Glacier County District Court for this conduct and ultimately pled guilty to Official Misconduct and Criminal Trespass to Property, a plea which included the requirement he relinquish all of his Montana Public Safety Officer Standards and Training (POST) certifications. (Ex. 4.) Following Fauque's October 4, 2010 arrest, he sought treatment for opioid dependency, first at Pathways in Kalispell, then at Rimrock in Billings. (Admin Tr. at 43:7-44:3.)

In January 2011 he filed an incomplete application for SRS disability benefits. He did not submit all of the required documents for his application until May 2011, delaying the PERB's full review of his application until their monthly meeting in June 2011, more than 6 months after his misconduct and termination. The PERB denied his application for disability benefits in their initial determination and Fauque appealed. A reconsideration of his application before

the PERB was scheduled for September 8, 2011; however, Fauque then requested and the PERB agreed to postpone their reconsideration to allow him even more time to acquire and submit additional documentation in support of his application. Fauque's postponed reconsideration was heard before the PERB on December 8, 2011. The PERB again denied disability benefits concluding as recommended by psychologist Dr. Dean Gregg, the PERB's medical reviewer and medical expert who testified in this case, that the records did not establish a disability. Dr. Gregg explained that in his review he looks both for a disorder and impairment. (Admin. Tr. at 91:5-92:13.) While he concurred with the finding of PTSD here, he did not find evidence that it was impairing. *Id.* This conclusion is supported by his review of Fauque's entire disability application including the employer's job duty questionnaire, attached job description, medical records from before and after the October 2010 incident, the records of Drs. Webb, Pullen and Stivers, and their deposition testimony.

The Employer Questionnaire submitted with Fauque's application shows that he was able to perform his job duties as detailed in his job description until his October 4, 2010 arrest. (Ex. 2.) He was not deemed unfit for duty until that incident. (Admin. Tr. at 154:2-6.) Prior to his arrest, Fauque did not express concerns about PTSD (*id.* at 150:14-16) or any other concern about his ability to do his job; nor did he request job duty modifications. (*Id.* at 75:2-19, 152:2-11.)

Fauque had no negative performance appraisals (*id.* at 139:10-16) and he was not only able to accomplish the essential functions of his primarily administrative job duties as the undersheriff, but exceeded expectations. (*Id.* at 138:18-139:9.) When asked if Fauque adequately performed his job duties prior to this incident, Sheriff Dusterhoff, his former supervisor stated:

Yes. Yes. He wrote several policies, he was very crucial in what he established with the jail. He performed exceptionally.

He was the DARE officer for our agency. He was also selected as officer of the year by our agency.

As I said, he did some admirable work, and it reflected well upon law enforcement and it reflected well upon our department.

(*Id.* at 155:1-5, 157:7-9, 157:20-24.)

Months after initially submitting his disability application, Fauque submitted a summary with dates of exposure to nine accidents occurring between 1996 and 2007, each involving a death that he attended while on duty. (Ex. 2.) However, he submitted no corroborating evidence that the effects of these deaths incapacitated him prior to his arrest and later diagnosis of PTSD during his treatment for opioid dependency. On the contrary, Dusterhoff testified to not seeing any observable symptoms of PTSD while they worked together – Fauque was not unusually jumpy, tense or startled at work and did not avoid calls or miss scheduled work. (Admin Tr. at 150:11-20.) Further, medical records indicate that Fauque actually

used on-duty calls to houses where people had died to go through their medications and to take their opioids. (Ex. E at 1.)

Fauque submitted two Attending Physician's Statements in support of his application, but neither evidenced consideration by the attending physician of the requirements to demonstrate a disability. The undated Attending Physician's Statement from Dr. Rick Pullen, who first diagnosed Fauque's PTSD at the Rimrock Foundation (Depo. Pullen 30:21-25, 31:1) did not recommend disability. (Ex. F.) Dr. Pullen's Statement indicated that Fauque's prognosis was uncertain and he did not indicate that he had reviewed Fauque's job description, nor that he had any awareness of available accommodation. He wrote that he was "unable to state" the impact Fauque's medical condition had on his ability to perform his job and was "unable to state" whether the condition would be temporary or permanent. *Id.*

The Attending Physician's Statement dated December 23, 2010 from Dr. Randy Webb, Fauque's personal physician, conflicted with Dr. Pullen's Statement by concluding that Fauque should not work again as a law enforcement officer, but also indicated that Dr. Webb had not reviewed Fauque's job description, made no reference to accommodations and indicated no awareness that any accommodations were available. (Ex. B.)

Fauque has not and cannot prove that he was unable to perform his job with reasonable accommodation as *required* to establish a disability. Section 19-2-406(2), MCA; Admin. R. Mont. 2.43.2602. It is undisputed that Fauque did not request job accommodations as required. Although accommodation could have been provided, including relief from coroner duties, altered job duties, medical leave, counseling, or other treatment, it was not attempted because he did not make a need for accommodation known. (Proposed Order, Findings, ¶ 16; Admin. Tr. at 154:7-25, 174:21-25, 175:4-25.) Fauque does not qualify for disability benefits.

Although the Court is not tasked with determining whether there is evidence to support different findings than those made, to the extent Fauque's Statement of Facts differ from the findings made, they were not adopted for the reasons explained in the hearing examiner's findings and as detailed below. (Proposed Order, Additional Discussion: Parties' Proposed Findings of Fact at 22-29.)

Whereas Fauque claimed he attended approximately 250-300 deaths, Fauque's former supervisor testified that the number of coroner calls per year, including natural deaths, was a maximum of 10-14 and that whether an officer was called upon to perform coroner duties depended on whether the officer was on shift and if the death occurred outside a hospital. (Admin. Tr. at 161, 175:6-25.) Fauque himself submitted a list compiled by the current Sheriff at his request, of only nine deaths he attended during his 15 year tenure with the Glacier County

Sheriff's Office. (Ex. 2.) Fauque's statements describing leave he took from work and the associated emotional issues he was experiencing overstates the clarity of the version of events described in the record. While he testified to having taken leave in 2008 to address job stresses, PTSD, feelings of doom and suicidal ideation (Admin. Tr. at 32-41), the record shows he was suspended in 2008 due to an investigation for allegedly stealing drugs. (*Id.* at 139:17-23; Ex. 5 at 5, ¶ 3.) The record also includes an admission that his suicide threat was made to get help for his drug addiction. (Ex. E at 2.)

Fauque's claim that his opioid abuse was proximately caused by job-related stress and disabling PTSD overstates the conclusions provided by his treating physicians in this regard and disregards critical details contained in the record. Although he was treated by Dr. Webb for depression before October 4, 2010, Dr. Webb said prior to that point Fauque did not have "any complaints related to his work as a police officer that was predisposing him or causing him to feel depressed." (Depo. Webb at 12:2-15.) Significantly, Fauque's conclusion about the cause of his opioid abuse ignores his history of abuse unrelated to his employment, as summarized in the November 11, 2010 Discharge Summary from the Rimrock Foundation. He explained there that he was "first abusing opiates at age 39 following the removal of his wisdom teeth," that he recalled telling his wife that he "could get addicted to this stuff," (Ex. E at 3) and that he was using opioids

“more heavily” following his second sinus surgery. (*Id.* at 1.) His causal conclusion here also ignores the six other clinical problems identified prior to PTSD in Rimrock’s Discharge Summary (Ex. E) and his own testimony about the cause of his opioid addiction:

“I have other issues that have caused this addiction in my life that I have to resolve because if I don’t address those issues, I’m not going to be able to stay in recovery...”

(Admin. Tr. at 48:8-12.)

Fauque’s treating physicians did not unanimously and unequivocally conclude his PTSD precipitated and proximately caused his opioid abuse. In fact, Dr. Pullen opined that “it would be speculating” to answer whether Fauque’s PTSD predated his opioid dependence. (Depo. Pullen at 20:22-21:12.) Dr. Webb, the only provider to both treat Fauque prior to his arrest in 2010 and to testify in this case never himself diagnosed PTSD during the course of his treatment of Fauque, which started in 1997. (Depo. Webb at 13:15-21, 34.) While Dr. Webb eventually relied on Fauque’s PTSD diagnosis from Rimrock, he stated he was not sure PTSD precipitated Fauque’s opioid dependency. (*Id.* at 15:12-23, 39:12-15.)

Dr. Stivers did not meet Fauque or become acquainted with his case until August 2011 and had to “assume that he was in fact developing PTSD prior to 2010, 2011.” (Depo. Stivers at 38:20-24.) Nonetheless, Dr. Stivers did conclude in November 2011 that Fauque’s PTSD was the proximate cause of his drug

addiction. (Ex. A.) However, Dr. Stivers did not have access to Fauque's employment records or other important medical records and his opinion in support of Fauque's disability was based on statements Fauque made to him nearly a year after his arrest. (Depo. Stivers at 8:2-4, 31:1-8, 32:20-25, 40:23-41:7.)

STANDARD OF REVIEW

Judicial review of a final agency decision is limited by § 2-4-704, MCA. In conducting its review, "the court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Section 2-4-704(2), MCA. The court may reverse or modify the agency's decision if the administrative findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Id.*

The test the Montana Supreme Court has adopted to determine if a finding is clearly erroneous requires the Court to review the record to see if the findings are supported by substantial evidence and if so to determine whether the agency misapprehended the effect of the evidence. *Weitz v. Mont. Dept. of Nat. Resource & Conserv.*, 284 Mont. 130, 943 P.2d 990 (1997). Even if substantial evidence exists to support the findings made and the evidence has not been misapprehended, the court may still determine a finding is clearly erroneous if a review of the record leaves the court with a definite and firm conviction a mistake was committed. *Id.*

In reviewing findings, “the question is not whether there is evidence to support *different* findings, but whether substantial evidence supports the findings actually made.” *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595. The court should give deference to an agency’s evaluation of evidence where its experience, technical competence and specialized knowledge are used, and great deference should be given to the hearing examiner’s determinations as to witness credibility due to his unique position of observing live testimony. *Id.* Conclusions of law are reviewed for correctness. *Id.*

SUMMARY OF THE ARGUMENT

The District Court correctly affirmed the PERB’s Final Order denying Fauque’s application for disability benefits and determining the Final Order was based on substantial evidence, the effect of which was correctly apprehended and that in review of the record it was left with the definite and firm conviction the PERB did not commit a mistake. Although Fauque will be eligible for service retirement benefits when he attains age 50, he does not qualify for disability benefits. The PERB does not dispute the existence of Fauque’s PTSD but based on substantial evidence concluded that it was not disabling. Fauque was able to and did perform the duties of his position until his drug addiction led him to engage in criminal conduct on October 4, 2010. He terminated employment not because he was disabled, but because of his own misconduct.

ARGUMENT

I. **The District Court’s Order affirming the PERB’S decision to deny Fauque’s application should be affirmed because he is not eligible for SRS disability benefits.**

Disability under the provisions of the Sheriffs’ Retirement System means:

a **total inability** of the member to perform the member's duties by reason of physical or mental incapacity. The disability must be incurred while the member is an active member and must be one of permanent duration or of extended and uncertain duration, as determined by the board on the basis of competent medical opinion.

Section 19-2-303(20), MCA (emphasis added). In this context, “total inability” means “**the member is unable to perform the essential elements of the member’s job duties even with reasonable accommodation**” required by the Americans with Disabilities Act (ADA). Section 19-2-406(2), MCA; Admin. R. Mont. 2.43.2602(5). An applicant for disability benefits must also submit a job duty questionnaire completed by his employer and an attending physician’s statement before the PERB will consider the application. Admin. R. Mont. 2.43.2602(2).

Although Fauque has submitted evidence illustrating the presence of depression, opioid dependence and PTSD among other clinical problems, the mere existence of a problem or disorder does not constitute a disability under the governing provisions. To constitute a disability, a member’s medical condition must prevent the member from performing their job duties, even with reasonable accommodation. Admin. R. Mont. 2.43.2602(4) (“The employer of the disability

benefit applicant must define the essential elements of the member's position and show reasonable accommodation was attempted for the member's disabling condition(s) in compliance with the Americans with Disabilities Act statutes and rules.").

The employer's duty to accommodate under the Americans with Disabilities Act only arises when the employee requests accommodation or the employer knows or has reason to know that the disability prevents the employee from requesting accommodation. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000)(vacated in part on other grounds). This duty was not triggered here because Fauque did not request accommodation and there is no evidence the employer knew or had reason to know that Fauque had a disability preventing him from requesting an accommodation. Contending that Fauque may have been required to respond to an emergency despite accommodation is speculative, as is the conclusion that no accommodation of any kind would have been successful. Both arguments fail to prove that any accommodation would have been ineffective.

A. The record contains substantial evidence supporting the PERB's decision.

The PERB's Final Order in this matter adopted the hearing examiner's Proposed Order. The hearing examiner thoroughly reviewed and weighed the evidence, as indicated by his thirty-page Proposed Order with frequent citations to the record, including three medical depositions, the testimony of Fauque, his

former supervisor, and the PERB's medical examiner during the nearly five hour long hearing. Each finding made was supported by substantial evidence in view of the whole record and a thorough explanation for the exclusion of those proposed findings that were not adopted was included. (Proposed Order at 22-29.)

Because the hearing examiner is in the unique position of hearing and observing all testimony entered, his findings, especially as to witness credibility, are entitled to great deference. *Brackman v. Bd. of Nursing*, 258 Mont. 200, 205, 851 P.2d 1055, 1058 (1993). After hearing all the testimony and reviewing the entire record in this case, the hearing examiner determined that Fauque was not eligible for SRS disability benefits provided under § 19-7-601(2), MCA. In making this determination, he carefully explained why he largely based his decision on testimony from Sheriff Dusterhoff and Dr. Gregg. The District Court supported this determination finding the PERB's denial of benefits was supported by substantial evidence as summarized below.

Prior to his 2010 resignation, Fauque competently performed his job duties. Although Fauque alleged in his disability application (Ex. 2) that depression, drug addiction and PTSD caused incapacity or prevented him from performing his job duties, this allegation is not supported by Sheriff Dusterhoff, his former supervisor. While the existence of Fauque's medical condition(s) and their permanence are obviously within the scope of expert medical opinion, whether Fauque was

adequately performing his job is a question for his supervisor. Medical records based on Fauque's self-reporting after his termination are not an accurate measure of his previous job performance. Unlike Fauque's doctors, Fauque's supervisor has personal knowledge of Fauque's work through daily observation over the course of 15 years of working together and directly supervising Fauque for the last seven or eight of those years. (Admin.Tr. at 137:10-138:10.) As detailed above, Dusterhoff testified he worked closely with Fauque on a daily basis and that Fauque was able to and did adequately perform the essential elements of his position until he engaged in misconduct on October 4, 2010. (*Id.* at 139:10-143:5.)

In spite of the hearing examiner's well-reasoned reliance on Dr. Gregg's testimony, Fauque attempts to discredit his testimony under Montana Rule of Evidence 702. This rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Id. In support of his argument to discredit Dr. Gregg, Fauque also cites *Harris v. Hanson*, 2009 MT 13, ¶ 36, 349 Mont. 29, 201 P.3d 151, which provided three ways to test an expert's reliability under Mont. R. Evid. 702. These tests include: (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts.

Harris, ¶ 36. Where the first two tests are satisfied, the third is a question for the fact finder. *Id.*

Fauque does not argue about the reliability of the field of psychology. As to the second test, Dr. Gregg's knowledge and experience are extensive. Dr. Gregg has a Ph.D. in psychology and has evaluated over 3,000 disability benefit cases counting examinations and record reviews (Ex. 9), which include approximately 600 examinations for the Veterans' Administration in the last five years of individuals who were alleging PTSD. (Admin. Tr. at 88:18-89:9.) As to the third test, the hearing examiner determined that Dr. Gregg did provide a competent opinion on which to base the decision to deny Fauque's claim. (Proposed Order at 21:16-19)

Despite the hearing examiner's determination in this regard, Fauque argues that Dr. Gregg's opinion is unreliable because he did not contact Fauque's physicians or examine Fauque. However, the PERB is not required to conduct a medical examination of an applicant for disability benefits, nor to contact the applicant's medical providers. Dr. Gregg was retained by the PERB to advise them on the disability claim based on the application and medical records as required by Montana law. Section 19-2-406(4), MCA ("The board shall retain medical personnel to advise it in assessing the nature and extent of disabling conditions while reviewing claims for disability retirement.") Fauque cites no

case where a psychologists' opinion has been excluded for lack of personally examining the subject of the opinion and the Montana Supreme Court rejected this argument in *EBI\Orion Group v. Blythe*, 1998 MT 90, 288 Mont. 356, 957 P.2d 1134 (relying on the expert opinion of a psychologist who had not examined the claimant but reviewed the claimant's records and observed his testimony). Other courts have rejected similar arguments. See *Sweet v. United States*, 687 F.2d 246, 249 (8th Cir. 1982); *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1432 (5th Cir. 1989); *James v. Marten Transp., LTD.*, 2006 U.S. Dist. Lexis 91768, *6 (N. Dist, Ind. Dec. 15, 2006).

In further support of his argument that Dr. Gregg's opinion is unreliable, Fauque cites *Cottrell v. Burlington N. R.R. Co.*, 261 Mont. 296, 863 P.2d 381 (1993). This case is distinguishable from *Cottrell*, where the expert witness in question, a neurosurgeon, was asked to apportion the plaintiff's symptoms and disability between two injuries that occurred nine years apart. The neurosurgeon did not examine the plaintiff, did not read any of the plaintiff's deposition testimony, nor the treating physician's testimony and he did not know anything about the plaintiff's job description. *Cottrell*, 261 Mont. at 302-303, 863 P.2d at 385. Here, Dr. Gregg's review of the case and his opinion were very thorough – he spent more than ten hours on three different occasions reviewing Fauque's entire

disability application.¹ Dr. Gregg's review included the employer's job duty questionnaire and attached job description; medical records from before and after the October 2010 incident, including records from Fauque's 2008 medical provider, Terry Hanson; Pathways records; Rimrock records; the records of Drs. Webb, Pullen and Stivers, and their deposition testimony. None of the three treating physicians had access to all of this information or testified to spending this amount of concentrated time on Fauque's case. Dr. Gregg was fully aware of Fauque's medical conditions and employment circumstances and clearly established the foundation to provide a reliable opinion as an expert witness under M.R.Evid 702. The Board was entitled to and did appropriately rely on the opinion testimony of Dr. Gregg, which was supported by substantial evidence.

B. The hearing examiner did not misapprehend the effect of the evidence.

In making his determination, the hearing examiner carefully explained why he ultimately assigned more weight to the testimony of the PERB's medical examiner, Dr. Gregg, than Fauque's treating physicians. Although Fauque contends that his claim for disability benefits should solely be based on the judgments of his treating physicians, the hearing examiner, the PERB and District Court found this argument to not be persuasive. As this Court found in *Weber v. Public Employees' Ret. Bd.*, 270 Mont. 239, 246, 690 P.2d 1296, 1300 (1995), in

¹ These occasions include the PERB's initial consideration, their reconsideration and the administrative hearing.

evaluating a claim for disability benefits the PERB must generally accord special weight to the opinions of treating physicians. However, a treating physician's opinion as to the existence of disability is not conclusive, particularly where his opinion rests largely on what his patient tells him. *EBI\Orion Group*, ¶¶ 13-14. Similarly, the treating physician's beliefs are not binding on a fact finder, whose function is to weigh the credibility of both medical evidence and non-medical evidence. *Id.* Absent this rule, the role of the fact finder, who is in the best position to assess witnesses' credibility and testimony, would be misappropriated by the treating physician, who often does not have the full benefit of all the evidence presented and whose principal duty is owed to his patient. *Id.* See also *Wright v. Ace Am. Ins. Co.*, 2011 MT 43, ¶ 29, 359 Mont. 332, 249 P.3d 485, citing *Snyder v. S.F. Feed & Grain*, 230 Mont. 16, 27, 748 P.2d 924, 931 (1987) (determining a treating physician's opinion is not always entitled to more weight than that of other physicians, especially where the treating physician is not as knowledgeable about a diagnosis as the non-treating physician). In assigning weight to expert medical opinions, consideration should not only be given to whether the expert has physically examined the claimant, but to the expert's background and experience working with the particular condition in question. *Mont. State Fund v. Grande*, 2012 MT 67, ¶¶45-46, 364 Mont. 333, 274 P.3d 728.

This case is distinguishable from *Weber* in several important ways. In that case, the PERB had not engaged a medical expert and did not present any testimony to contradict the treating physician's deposition testimony in the determination to deny benefits. *Weber.*, 270 Mont. at ___, 690 P.2d at 1300. Here, the PERB engaged and relied on the live testimony of their medical expert, Dr. Gregg to contradict that of the treating physicians. The PERB also relied on the live testimony of Fauque and Sheriff Dusterhoff during the administrative hearing. Further, after considering the medical depositions, hearing the live testimony and considering the rest of the record, the hearing examiner explained the clear and convincing reasons for affording reduced weight to the opinions of the treating physicians Fauque engaged and paid, and whose diagnosis of disabling PTSD rested largely on Fauque's self-reporting. (Depo. Stivers at 16:13-17:4, Depo. Pullen at 10:5-10.) While Fauque's physicians may genuinely believe his claims, if their opinions were conclusive as he urges, there would be no need for the PERB to employ a medical examiner and no role here for a fact finder.

Nevertheless, the hearing examiner undertook his fact finding role here weighing Fauque's self-reporting against the other evidence presented, including employer testimony. Fauque's own testimony suggested that his medical records are not all based on complete and accurate information because he has not always been forthcoming or "completely honest" with his medical providers. (Admin. Tr.

at 36:1-9, 52:10-19, 53:12-21; Depo. Stivers at 40:23-41:5.) The hearing examiner found that the treating physicians' opinions that Fauque had been unable to perform his duties prior to his misconduct and termination were based on incomplete information, and were not actually produced until well after his misconduct and termination when it was no longer possible to evaluate accommodations. (Proposed Order, Findings, ¶¶18-21.)

Significantly, none of Fauque's treating physicians reviewed his job duties (Ex. B at 2, Ex. F at 2) or acknowledged awareness of the difference between the primarily administrative duties assigned to Fauque as undersheriff versus those of a sergeant or deputy. (Ex. 2 at 6-10.) None of his treating physicians consulted Fauque's employer or evaluated a plan to address the claimed impediments to accommodation, because no accommodation was attempted. None of them asserted that Fauque's mental state had deteriorated to the point that he was no longer able to control his actions or that he was not responsible for his voluntary misconduct. Each of them owed a principal duty to their patient, and, unlike the PERB's medical examiner, Dr. Gregg, none of them had the full benefit of all of the evidence presented in this case. Dr. Gregg had the unique perspective and advantage as a third party physician able to thoroughly review all of the records in this matter, including those dating back to 2008. (Admin. Tr. at 93:1-95:10.) These records were not provided to all of Fauque's treating physicians but

constituted part of Dr. Gregg's review and basis for recommending denial. (Ex. 5 at 5, ¶3.)

The hearing examiner also assigned less weight to the opinions of the treating physicians and psychologist in this case and relied on the opinion of Dr. Gregg due to his significant expertise and qualifications working with PTSD and disability claims; his recognition of additional clinical problems associated with Fauque's opioid dependence; and his understanding that where benefits are sought, there is a need to attain independent corroboration of symptoms from friends, family or an employer. (Admin. Tr. at 87:21-89:9; Ex. 9.) Dr. Gregg acknowledged the importance of a treating medical provider's opinion but stated that if the treating provider does not have complete and accurate information, "their opinions get to be on thin ice." (*Id.* at 94:4-10.) Dr. Gregg also reported that he discovered inconsistencies indicating that Fauque has omitted information to some of his providers and "gives a different history to different people." (*Id.* at 94:11-17.)

The hearing examiner made extensive findings on these factors and based on substantial evidence in the record, he appropriately assigned more weight to Dr. Gregg's opinion than the treating physicians' opinions. (Proposed Order, Finding, ¶¶ 11-13, 18.) This determination was not based on a misapprehension of the evidence.

C. No mistake has been committed.

The PERB does not suggest that Fauque return to work as a law enforcement officer but acknowledges that he is no longer eligible for such a position because of the October 2010 incident and resulting conviction, which required him to relinquish his law enforcement certifications. Fauque competently performed his duties until this point; his treating professionals' opinions that he was disabled at that time are not convincing and fail to acknowledge that accommodation could have been attempted if requested and may have been successful. This Court should be left with the definite and firm conviction the PERB did not commit a mistake when it denied Fauque's claim for SRS disability benefits.

CONCLUSION

The PERB respectfully requests this Court affirm the District Court's Order on Petition for Judicial Review. The District Court correctly affirmed the PERB's Final Order determining that Fauque is not eligible for SRS disability benefits. This determination was based on substantial, credible evidence and a correct interpretation and application of the law.

Respectfully submitted this 10th day of April, 2014.

State of Montana
Public Employees' Retirement Board

Katherine E. Talley
Special Assistant Attorney General

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be sent by prepaid first-class U.S. mail to:

BEN A. SNIPES
Lewis, Slovak & Kovacich
P.O. Box 2325
Great Falls, MT 59403

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted or indented material; and the word count calculated by Microsoft Word for Windows is 5,085 words, excluding the Table of Contents, Table of Authorities, and Certificate of Service and Compliance.

Dated this 10th day of April, 2014

State of Montana
Public Employees' Retirement Board

Katherine E. Talley
Special Assistant Attorney General

**IN THE SUPREME COURT OF
THE STATE OF MONTANA**

Supreme Court Cause No. DA 13-0710

JEFF FAUQUE,

Appellant/Petitioner,

v.

MONTANA PUBLIC
EMPLOYEES RETIREMENT
BOARD,

Appellee/Respondent.

**APPELLANT JEFF FAUQUE'S
REPLY BRIEF**

*On Appeal from the Montana First Judicial District Court
Lewis and Clark County
District Court Cause No. ADV-2013-143
Hon. Mike Menahan, Presiding*

APPEARANCES:

Ben A. Snipes

Lewis, Slovak & Kovacich, P.C.

P.O. Box 2325

Great Falls, MT 59403

Office: (406) 761-5595

Fax: (406) 761-5805

Email: Ben@lsklaw.net

Attorney for Appellant, Jeff Fauque

Katherine E. Talley

Staff Attorney

Public Employee Retirement

Administration

P.O. Box 200131

Helena, MT 59620-0131

Office: (406) 444-3154

Fax: (406) 444-5428

Attorney for Appellee, Montana

Public Employee Retirement Board

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INTRODUCTION

The Public Employee Retirement Board's (PERB) Answer Brief tendered multiple issues designed to influence this Court's determination of Fauque's disability, not on the merits of the competent medical findings but on extrinsic and immaterial information. Fauque's disability must be determined "on the basis of competent medical opinion," and nothing else. Mont. Code Ann. § 19-2-303. Fauque requests the Court to determine, using the relevant portions of the record, that the PERB was clearly erroneous in denying his request for Sheriff's Retirement System (SRS) disability.

I. THE PERB'S EMPHASIS ON FAUQUE'S MISCONDUCT IS IRRELEVANT TO FAUQUE'S SRS DISABILITY DETERMINATION

The PERB cites to Fauque's misconduct more than a half dozen times in its Answer Brief. It does so despite finding Fauque's misconduct does not preclude his eligibility for SRS disability benefits. The multiple references to Fauque's misconduct are not germane to this matter and distract from the essential medical analysis necessary for determining Fauque's disability.

Mont. Code Ann. § 19-2-906, provides that disability benefits can be refused to SRS members if their disability was proximately caused by the member's gross negligence, willful misconduct or violation of the law. The PERB

used this provision to initially deny Fauque's disability claim, prompting Fauque to seek a determination before a hearing examiner.

When addressing this provision, the hearing examiner found that:

[T]he record in this matter does not support finding or concluding that Fauque should be made ineligible for retirement benefits under the SRS based on Mont. Code Ann. § 19-2-906. . .

Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order, p. 29 (contained in Appendix to Appeal Brief)

The PERB adopted the hearing examiner's findings, without modification, including the finding that Fauque's misconduct does not preclude his eligibility for SRS disability benefits. Although this remains undisputed, the PERB continues to overtly emphasize Fauque's misconduct rather than focusing on the medical basis of his disability.

The PERB's attempt to take refuge behind Fauque's misconduct is problematic for many reasons. First, it is entirely irrelevant to the present analysis. The PERB's references to misconduct draws the Court's attention away from the issue at hand, Fauque's PTSD disability. Fauque's treating physicians have addressed the logical fallacy concerning Fauque's misconduct and its relation to his disability. The testimony of Fauque's physicians confirms that Fauque's opiate dependence stemmed from his PTSD condition and that he was resultantly disabled prior to his misconduct. See Depo. Stivers 37:9-18. The only semblance

of relevance Fauque's misconduct has to the present disability analysis is to show that Fauque was struggling to performing his officer duties and cannot return to this line of work without risk of relapse. Depo. Pullen 57:1-57:7. The Court should exercise caution in giving any credence to Fauque's misconduct in determining his eligibility for SRS disability.

Second, the emphasis on Fauque's misconduct attempts to draw attention away from the disability analysis by defaming Fauque's character and law enforcement service. Besides being incredulous, this tact is contrary to the record. Fauque had an exemplary career with the Glacier County Sheriff's Office (GCSO), accumulating many accolades over his 15 years of service: City/County Officer of the Year, DARE officer, President of the local Crime Stoppers, Special Olympics Torch Run Hall of Fame. Admin. Hrg. Tran. 157:4-24. Former Sheriff Dusterhoff described Fauque as performing "admirable work" noting "it reflected well upon law enforcement, it reflected well upon our department." Admin. Hrg. Tran. 157:22-24.

Following his law enforcement career, Fauque has used his experiences with PTSD and addiction to better himself and others. Fauque's PTSD condition was deemed disabling by the Montana Department of Public Health and Human Services, qualifying him for vocational rehabilitation services. Fauque used his

disability-based vocational retraining to return to school and pursue a career as a licensed addiction counselor. Admin. Hrg. Tran. 82:1-19. He continues to counsel those suffering with substance abuse and chemical dependence issues.

In the context of his disability claim, the relevance of Fauque's misconduct is limited to demonstrating that he was struggling to perform his law enforcement duties and that placing him back into that scenario would increase his risk of relapse. It is undisputed that Fauque's misconduct does not affect his eligibility for SRS disability benefits under Mont. Code Ann. § 19-2-906. Fauque's disability determination should be based solely on "competent medical opinion" per Mont. Code Ann. § 19-2-303.

II. THE FUTILE GESTURE DOCTRINE EXCUSES FAUQUE FROM REQUESTING ACCOMMODATION WITH THE GCSO WHERE NO REASONABLE ACCOMMODATION EXISTS

The PERB claims that Fauque's failure to request reasonable accommodations prior to resigning from the GCSO precludes his eligibility for SRS disability benefits. This position is inaccurate for two reasons. First, it incorrectly assumes reasonable accommodations were available to Mr. Fauque. Second, it misstates the Americans with Disabilities Act (ADA) requirements, which control the reasonable accommodations analysis for SRS disability determinations. See Admin. R. Mont. 2.43.2602.

The record for this matter establishes that no reasonable accommodations exist to allow Fauque's return to the GCSO. Besides determining Fauque's PTSD condition disabling, Fauque's treating physicians have opined that no reasonable accommodations exist to allow him to return to law enforcement work:

[F]or his personal safety and safety of the public at large, I don't think I could release him to go back to work as a law enforcement officer under any circumstances.

Depo. Webb 38:22-39:6.

I believe it would be impossible for him to go back in [law enforcement] or a similar capacity, I believe that's permanent. No law enforcement, could not work as a firefighter, could not work as an ambulance or EMT provider, those careers are now off limits for him.

Depo. Stivers 21:9-13.

To place him back into [a traumatic] environment again would risk reexperiencing, re-exacerbating his underlying trauma symptoms, it would also put him at risk for relapse into a substance use again.

Depo. Pullen 57:1-57:7.

Likewise, former Sheriff Dusterhoff agreed there is no way to accommodate the GCSO requirement that all officers perform first responder duties (i.e. attending and taking control of traumatic crime scenes and dead bodies, serving and protecting the community and fellow officers) Admin. Hrg. Tran. at 158:3-160:23. Logically, in the rural law enforcement setting, all officers on shift must be capable and ready to engage in first responder duties ranging from fatal car

accidents to incidents involving firearms. When there is only one officer on shift, as is frequently the case with the GCSO, that officer must perform first responder duties. Admin. Hrg. Tran. at 159:11-25. Fauque’s treating physicians’ opine that such first responder duties would put Fauque and the community at risk, precluding any reasonable accommodations purporting to allow his return to the GCSO.

The PERB’s argument that Fauque had to request accommodation with the GCSO, despite his inability to engage in mandatory first responder calls, is contrary to the ADA requirements under the futile gesture doctrine. Fauque was the second highest ranking officer at the GCSO and was instrumental in drafting and enacting the policies for the GCSO. Admin. Hrg. Tran. 155:1-3. He knew that GCSO policy required all officers to perform first responder duties. Fauque also knew his treating doctors precluded his return to law enforcement work, which includes potentially traumatic first responder duties. In such scenarios, where an employer’s policy prevents reasonable accommodation under the ADA, the futile gesture doctrine applies such that a disabled employee “need not ignore the policy and subject himself to personal rebuffs by making a request that will surely be denied.” *Davoll v. Webb*, 194 F.3d 1116, 1132-1133 (10th Cir. 1999) (internal quotations omitted).

The Court in *Davoll*, addressed this very situation in the context of disabled police officers. Three police officers, formerly of the Denver Police Department, were disabled from their law enforcement jobs because of their inability to fire weapons and make forcible arrests. *Id.* at 1133. The city had a policy of refusing to accommodate disabled officers through transfers to Career Service civilian positions (i.e. criminal investigator, staff probation officer). *Id.* The city's policy against transfer accommodations was known to the disabled officers. *Id.* The Court held that the futile gesture doctrine excused the disabled officers from requesting transfers as reasonable accommodations for their disabilities, where each knew of the city's policy of refusing to reassign disabled officers to other positions. *Id.*

The PERB argues that Fauque's SRS disability is precluded by his failure to seek accommodations for his return to law enforcement. However, where Fauque, his treating doctors and former supervising officer all acknowledge that no reasonable accommodation would allow Fauque to engage in the mandatory first responder calls with the GCSO, the futile gesture doctrine excuses him from requesting accommodations which cannot exist in his line of work.

III. DUSTERHOFF'S OPINION CONCERNING FAUQUE'S PTSD CONDITION IS ADMITTEDLY INCOMPETENT AND DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE

The PERB's reliance on former Sheriff Dusterhoff's opinion as to fitness for duty is contrary to the disability standards identified in Mont. Code Ann. § 19-2-303. The PERB cites to testimony from Dusterhoff that Fauque was not exhibiting symptoms of PTSD while with the GCSO. Ans. Br. at 4. However, when examined regarding his ability to assess Fauque's mental fitness for duty in light of his PTSD condition, Dusterhoff admitted he was not competent to render such assessments. Admin. Hrg. Tran. 171:16-23. Likewise, Dusterhoff's testimony fails to account for the findings by Fauque's treating physicians that prior to his resignation he turned to opioids as a mechanism to numb his PTSD and continue working in his stressful and traumatic law enforcement occupation:

Mr. Slovak: In the discharge report in this same section of the report, there's reference that Jeff commented to the effect that, "There are a lot of deaths by the reservation. I was close friends with a lot of people who I saw killed, how do you get over something like that? I was trying as hard as I could, but it was too much for me to control," end quote; is that consistent with your diagnosis of PTSD?

Dr. Pullen: Yes, sir. It's part of it.

Mr. Slovak: Is that also consistent with the use of [opioids] to numb or to attempt to continue on in that law enforcement position?

Dr. Pullen: If I understand your question correctly -- and if I don't, please correct me -- is you're asking me when a person is exposed to these terrible tragic and extraordinary events, and yet for the sake of maintaining their employment,

continuing to work, they have to turn to some extraordinary means to keep themselves together, so to speak, or to keep those very powerful feelings at bay; the answer would be it would be entirely consistent with that.

Pullen depo. 28:6-29:1

The competent opinions of Fauque's treating physicians establish Fauque was permanently disabled when he resigned and is precluded from returning to his time of injury position. Dusterhoff's testimony to the contrary is admittedly incompetent and does not constitute substantial evidence.

IV. THE PERB'S ADMINISTRATIVE FINDINGS WERE CLEARLY ERRONEOUS

A reviewing court may reverse an agency's decision if its factual findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Mont. Code Ann. § 2-4-704(2)(a)(v). This Court adopted a three-prong test to determine when factual findings are clearly erroneous:

1) the record will be reviewed to see if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, it will be determined whether the trial court misapprehended the effect of the evidence; and (3) if substantial evidence exists and the effect of evidence has not been misapprehended, the Supreme Court may still decide that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.

Weitz v. Montana Dept. of Natural Resources and Conservation, 284 Mont. 130, 133-34, 943 P.2d 990, 992 (1997).

The substantial evidence does not support the PERB's findings. The PERB attempts to cite to antiquated treating records to suggest that Fauque was not deemed disabled by his treating physicians. These records however are in complete discord with the subsequent testimony of Fauque's treating physicians. A reasonable reading of the medical deposition testimony leaves no doubt that Fauque's treating physicians have unanimously opined Fauque to be permanently disabled from law enforcement work. Depo. Pullen 56:14-57:5; Depo. Stivers 21:9-13; Depo. Webb 38:22-39:6.

All reliable expert testimony establishes that no reasonable accommodations could have been made to facilitate Fauque's continued employment in law enforcement. According to his physicians, Fauque's incapacity is both total and permanent. Any analysis to the contrary is a misapprehension of the effect of the substantive medical evidence.

The entire record has been provided to this Court so it may reliably ascertain whether a mistake has been committed. Given the perpetuated deposition testimony of Fauque's treating physicians, this Court is in as good a position as the lower tribunal to evaluate the reliability and credibility of such expert deposition testimony. *Weber v. Public Employee's Retirement Bd.*, 270

Mont. 239, 244, 890 P.2d 1296, 1299 (1995). Once this Court reviews the record submitted in this case it, like it did in *Weber*, it will be left with a definite and firm conviction that the PERB committed a mistake by disregarding the testimony of Fauque's three treating physicians in favor of its retained file reviewer. *Id.*, 270 Mont. at 248, 890 P.2d at 1301. The file reviewer, Dr. Gregg, admitted to his lack of knowledge of the trauma in which Fauque's PTSD is rooted. Admin. Hrg. Tr. at 113:16-23. Fauque's treating physicians are the only medical professionals who have established a reliable basis to testify concerning Fauque's trauma-induced condition. The testimony of Fauque's treating physicians is entitled to controlling weight.

In light of the substantial evidence establishing Fauque's disability, this Court should find that the PERB's administrative findings were clearly erroneous and subject to reversal.

CONCLUSION

Fauque respectfully requests a ruling reversing the District Court's Order. Without the support of substantial medical opinion evidence, the PERB committed clear error by denying Fauque SRS disability benefits for his permanent and total occupational disability. Fauque should be granted SRS disability benefits, retroactive to the date of his application.

Dated this 24th day of April, 2014.

LEWIS, SLOVAK & KOVACICH, P.C.

By: *Ben A. Snipes*
Ben A. Snipes
P.O. Box 2325
Great Falls, MT 59403
Attorney for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

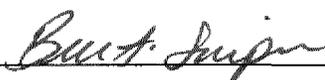
I hereby certify that I have filed a true and accurate copy of the foregoing Appellant Jeff Fauque's Reply Brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing Appellant Jeff Fauque's Reply Brief upon the persons named below, at the address set out below their names, by first class US Mail and email.

Katherine E. Talley
Staff Attorney
Public Employee Retirement Administration
P.O. Box 200131
Helena, MT 59620-0131

Public Employee Retirement Board
100 N Park Avenue Suite 200
P. O. Box 200131
Helena, MT 59620-0131

This is to certify that this Appellant Jeff Fauque's Reply Brief is formatted with double line spacing and a proportionately spaced Times New Roman typeface in 14 point font and to further certify that this brief contains 2,382 words as calculated by my WordPerfect X3 word processing system excluding the Table of Contents, Table of Authorities and Certificates of Service and Compliance.

Dated this 24th day of April, 2014.



Ben A. Snipes
P.O. Box 2325
Great Falls, MT 59403
Attorney for Appellant