

of Ohio ("the commission"), to vacate its order that denied relator permanent total disability ("PTD") compensation, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court issue a writ of mandamus ordering the commission to vacate the order denying relator's PTD application and, after eliminating the reports of Karen Gade-Pulido, M.D., enter a new order that adjudicates the application.

{¶3} None of the parties has filed objections to the magistrate's findings of fact, and we adopt them as our own. In brief, relator sustained work-related injuries in 1994, while working as a police officer. He applied for PTD compensation in 2009. A report by Mark Allen, M.D., indicated that relator was completely disabled. A report by James M. Lyall, Ph.D., indicated that relator's depressive disorder resulted in mild impairment (15 percent) that, considered in isolation from his physical claims, would not inhibit relator from returning to work. At issue here are reports by Dr. Gade-Pulido.

{¶4} As detailed in the magistrate's decision, Dr. Gade-Pulido examined relator and issued a five-page narrative report. In that report, she stated that "the significant degree of functional overlay and pain behavior" made relator's "degree of true impairment" resulting from the allowed claims "unratable." Dr. Gade-Pulido also concluded, based solely on relator's physical claims, that relator "does not have any clearly quantifiable functional limitations and is, therefore, capable of heavy labor." Dr.

Gade-Pulido also completed a physical strength rating form, on which she indicated her agreement with the statement that relator "has no work limitations."

{¶5} The magistrate concluded that Dr. Gade-Pulido's reports were internally inconsistent; therefore, they were not evidence on which the commission could rely. In its objections, the commission contends that Dr. Gade-Pulido's reports are not internally inconsistent. Dr. Gade-Pulido, the commission argues, essentially concluded that relator had a zero impairment rating, and her conclusion that relator is capable of heavy labor is not inconsistent with that rating. We agree with the magistrate, however, that Dr. Gade-Pulido's conclusion that relator's physical impairment "is unratable" is inconsistent with her conclusion that relator is capable of heavy labor. A fair reading of Dr. Gade-Pulido's reports is that, because she could not examine relator thoroughly, she could not determine relator's capabilities. We overrule the commission's first objection.

{¶6} In its second objection, the commission contends that, if we grant a writ requiring a new adjudication of relator's application, then the magistrate erred by suggesting that this court order the commission to eliminate Dr. Gade-Pulido's reports and enter a new order that adjudicates the application. The commission contends that the magistrate's suggested order would preclude it from clarifying those reports, and we agree. Because we have eliminated Dr. Gade-Pulido's reports as evidence, the commission may not rely upon them. The magistrate's order does not place other limitations on the evidence the commission may submit prior to a new adjudication of relator's application, nor does the order we enter below. We overrule the commission's second objection.

{¶7} In conclusion, we overrule the commission's objections to the magistrate's decision. Based on our independent review of the record in this matter, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. We grant a writ of mandamus ordering the commission to vacate its order denying relator's PTD application and to enter a new order that adjudicates the application without consideration of Dr. Gade-Pulido's June 9, 2009 reports.

*Objections overruled;
writ of mandamus granted.*

BROWN and KLATT, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gregory Orosz,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-275
	:	
North Randall Village and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on January 24, 2011

Bentoff & Duber Co., L.P.A., and Glen S. Richardson, for relator.

Michael DeWine, Attorney General, and Rachel L. Lawless, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} In this original action, relator, Gregory Orosz, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶9} 1. On August 29, 1994, relator sustained an industrial injury while employed as a police officer for respondent North Randall Village, a state-fund employer. On that date, the police cruiser relator was driving was rear-ended by another vehicle.

{¶10} 2. The industrial claim (No. PEL228252) is allowed for "cervical sprain; thoracic sprain; lumbar sprain; sprain shoulder, both; post concussion syndrome; depressive disorder; fibromyalgia."

{¶11} 3. On April 16, 2009, relator filed an application for PTD compensation. In support, he submitted a report dated January 14, 2009 from Mark Allen, M.D.:

Mr. Orosz has been a patient here at the South Pointe Pain Rehabilitation Center since 1998. He has persistent intractable and functional limiting pain which is directly related to his workman comp injury and the allowed claim diagnoses. Patient remains completely disabled from remunerative employment directly related to this injury and the allowed claim diagnoses.

{¶12} 4. On May 22, 2009, at the commission's request, relator was interviewed and evaluated by James M. Lyall, Ph.D., who is board certified in neuropsychology.

{¶13} 5. Dr. Lyall issued a five-page narrative report stating:

Purpose of Examination: To conduct a psychological evaluation to answer specific referral questions.

Duration of Examination: Forty-five minute clinical interview with Mental Status Examination. No psychological testing could be administered as the claimant complained of serious levels of pain, which interfered with his concentration so much that he was unable to answer questions. The assessment was discontinued at that time.

Sources of Facts

Source information for this examination was obtained from a clinical interview and Mental Status Examination with the claimant, himself, in my office. As was stated above, testing could not be conducted as the claimant complained of so much pain that it interfered with his ability to answer even specific questions asked of him. The examination was discontinued at that point. This examiner also reviewed pertinent historical medical and psychological evaluations presented by the Industrial Commission.

* * *

CHIEF COMPLAINTS

The claimant complains of continuing difficulties with chronic pain. He describes his pain as an eight on the scale of one to ten. He reports that even medication does not help him that much and he has his own techniques for trying to control the pain, which involved meditation and prayer. The claimant also complains of significant level of depression, although it appears he has not followed through with continuing mental health treatment or any current use of antidepressant medication.

* * *

PSYCHOLOGICAL TESTING

No psychological testing could be conducted as the claimant began to complain of so much pain that he could not answer simple questions offered by this examiner. He began to get teary eyed during the interview and it was felt that it was best that the examination be ended in order to not upset the claimant further.

DISCUSSION

It appears that we have a fifty year old male who worked for the North Randall Police Department about five years before a motor vehicle accident in 1994. He appears to have injured his neck and upper back and also has allowances for Postconcussion Syndrome and Fibromyalgia. The claimant also has an allowed psychological condition of Depressive Disorder. The claimant complains of significant continuing pain and states that his pain is so severe that during the examination he was unable to answer this examiner's questions stating "I can't focus on your questions". The claimant showed significant signs of pain behavior by

complaining about his pain constantly, walking in a slow and effortful fashion with a cane and standing up and walked around the office, on and off, throughout the interview. He also changed office chairs stating that the other one would be more comfortable. It appears that the claimant has an allowed psychological condition of Depressive Disorder. He may have had some treatment with Dr. Belay, a psychologist, in the late 1990's. This examiner does not have records from Dr. Belay's treatment of the claimant. At any rate, the claimant indicates he has not had treatment for his psychological condition for many years and does not take antidepressant medication. In spite of this, he states he has continued depression with crying spells. He admits to feelings of hopelessness and worthlessness and a poor level of energy. Generally, individuals make the bulk of their improvement in Depressive Disorders within a period of one or two years following the diagnosis. This claimant certainly has had many years since his allowed Depressive Disorder diagnosis and taking this into account and to a reasonable degree of psychological certainty it appears that the claimant has reached maximum psychological improvement for his Depressive Disorder.

Examination of specific areas of functioning reveals the following information. Activities of daily living appear to be only mildly impaired by the claimant's depressive symptoms. The claimant states he has difficulty sleeping and performing most daily activities but this is due to his pain rather than his depressive symptoms. Socialization skills appear to be mildly impaired by his allowed psychological condition. Once again, the claimant states he doesn't have many friends but this is because he can't function because of his chronic pain. He does admit to some social withdrawal because of his pain condition. Attention and concentration skills may be mildly impaired by the claimant's allowed psychological condition. The claimant had great difficulty in focus and concentration during the interview but, once again, this appeared to be due to his expressed pain rather than his depressive symptoms. His pain complaints were quite severe and it got to the point that the claimant was unable to continue, even with simple questions, because he "couldn't concentrate" because of his pain. Adaptation to stress appears to be mildly impaired by his depressive condition. The claimant reports that he generally gets along with people but tends to avoid them because of his chronic pain

condition. He was cooperative to the extent that his pain would allow him with this examiner. The claimant might admit to increased irritability and this would appear to be due to his rather pervasive expressed pain symptoms rather than his depression.

It is difficult to determine a degree of impairment due to the claimant's depressive symptoms as his pain expression is so high. It seems clear that the claimant's depressive symptoms are secondary to his expressed pain due to his industrial injury. As such, his Depressive Disorder is considered to be mild and this appears to be further confirmed by the fact that the claimant has not followed through with continuing mental health treatment and/or the use of appropriate antidepressant medication. Utilizing the AMA Guidelines for Impairment Due to Mental and Behavioral Disorders, Fifth Edition, we see mild impairment falling at Class 2 for the claimant's allowed psychological condition of Depressive Disorder. This would yield fifteen percent (15%) impairment due exclusively to the Depressive Disorder to the whole body.

DIAGNOSIS

Based on the above, the following diagnostic impression is offered from DSM-IV-TR.

Axis I:		Depressive Disorder
Axis II:	V71.09	No diagnosis
Axis III:		Deferred to Physician – The claimant reports residuals of his industrial injury.
Axis IV:		Psychosocial Stressors – Physical
Axis V:		Current Assessment of Global Functioning past week = 60

OPINION

[One] Has the claimant reached maximum medical improvement?

Yes. This individual has reached maximum medical improvement for his Depressive Disorder for the reasons discussed earlier in this report.

[Two] What is the percentage of permanent impairment arising from the allowed psychological conditions?

Utilizing the AMA Guidelines for Impairment Due to Mental and Behavioral Disorders, Fifth Edition, we see mild impairment due exclusively to the claimant's Depressive Disorder. This would fall at Class 2 and yield fifteen percent (15%) impairment due exclusively to the Depressive Disorder to the whole body.

{¶14} 6. On May 22, 2009, Dr. Lyall completed a commission form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Lyall placed his mark to indicate he agrees with the pre-printed statement "[t]his Injured Worker has no work limitations." He further wrote in his own hand:

This claimant's impairment due to his depressive disorder only is mild at 15%. This, in and of itself, would not inhibit a return to work. This, of course, does not take into account his physical claims.

{¶15} 7. On June 9, 2009, at the commission's request, relator was examined by Karen Gade-Pulido, M.D. Dr. Gade-Pulido issued a five-page narrative report stating:

Physical Examination

Mr. Orosz presented accompanied by his wife for the evaluation. His height is reported as 6', weight was measured at 205#, blood pressure 132/98, pulse 64, and respirations 14. He demonstrated marked pain behavior on his evaluation today. He frequently requested breaks in the examination because of pain and spasm with a minimal degree of activity. He insisted on using his cane in his left hand for ambulation because he was afraid that he might have a spasm on his right side that might cause him to fall.

When asked if he falls frequently, he stepped to the side and stood for a while and became tearful as he relayed that his youngest son used to ask him why he was always on the floor. Once recomposed, he resumed walking with a

somewhat wide based, non-antalgic gait. He states that he is not able to walk on his heels or toes because of pain in his right foot.

He is not able to range his cervical spine for me because of complaints of incapacitating pain in the right trapezius, and he then begins to collapse to the floor (although he does not fall). He demonstrates similar behavior with light touch of the right superior trapezius. When he was seated, I attempted to discern if there was any degree of spasm in the area – this was difficult as he actively moved away from even light touch.

There was a mild degree of spasm noted in the right mid superior trapezius, but no spasm was noted anywhere else on today's exam. He reports generalized tenderness to palpation diffusely throughout the back, neck, and right arm. No specific tender points with associated spasm, aside from the right mid superior trapezius, were identified. Thoracic and lumbar spine range of motion was also difficult to assess because of a significant degree of self-limitation and complaints of right-sided pain.

Range of motion of the left shoulder passively was full in all directions. Range of motion assessment of the right shoulder was limited by complaints of neck pain, even when this was attempted passively. He has full internal and external rotation of the shoulder as well as full extension and adduction. I was not able to range his right shoulder more than 140 degrees in abduction or 170 degrees forward flexion because of his pain complaints.

Manual muscle testing demonstrated variable give way weakness that was not reproducible throughout his upper and lower extremities. When both sides were assessed simultaneously, he tended, at times, to give way on both sides. He reports reduced sensation diffusely on the right side of his face and body and also numbness, subjectively, in the right median nerve and left ulnar nerve distributions. Tinel's at the right wrist and left cubital tunnel were negative and strength in the hand intrinsic appeared to be normal, although the interossei were somewhat variable.

He is alert and oriented times three. He did frequently ask me to repeat my instructions during the physical

examination, stating that he was having a hard time following what I wanted him to do. His fund of knowledge appeared to be appropriate. He was able, with some hesitation, to spell world forwards and backwards correctly. He stated that he could not tell me the meaning of a couple of simple proverbs. He reported that a horse and dog both had four legs and that an apple and an orange were both round. He was able to relay his history without significant difficulty with the exception of a couple of word substitutions (i.e., wrist for ankle and finger for eye). Cranial nerves II-XII were grossly intact.

It is within a reasonable degree of medical certainty after careful review of provided outside documentation, as well as physical examination of the injured worker and history obtained from the injured worker, that I answer the following questions posed:

[One] Has the injured worker reached maximum medical improvement with regard to each specified allowed condition?

Yes, the injured worker is at MMI for all of the allowed physical conditions in this claim.

[Two] Based on AMA Guides, 5th Edition, provide the estimated percentage of whole person impairment arising from each allowed condition. Please indicate zero if there is no impairment for a given allowance.

The marked functional overlay and pain behavior on today's examination precluded any quantifiable determination of impairment in this injured worker. The allowed sprains of the cervical, thoracic, and lumbar spine are soft tissue injuries and do not result in long-term impairment. The injured worker does have radiographic evidence of underlying degenerative spine disease that may contribute to some dysfunction, but this is not an allowed diagnosis under this claim. The allowed fibromyalgia syndrome and post concussion syndrome could not be quantified on today's examination due to the significant functional overlay. Waddell's signs were markedly positive on today's examination, suggesting a significant degree of nonorganic dysfunction.

In summary:

Due to the significant degree of functional overlay and pain behavior on today's examination, this injured worker's degree of true impairment relative to the allowed diagnoses in the claim is unratable.

[Three] Complete the enclosed Physical Strength Rating.

Based solely upon the physical components of the claim, the injured worker does not have any clearly quantifiable functional limitations and is, therefore, capable of heavy labor. This determination does not take into account any underlying, unrelated diagnoses, nor does it take into account any limitations imposed by the psychological component of the claim.

(Emphases omitted.)

{¶16} 8. On June 9, 2009, Dr. Gade-Pulido completed a physical strength rating form. On the form, Dr. Gade-Pulido placed her mark to indicate her agreement with the pre-printed statement "[t]his Injured Worker has no work limitations." Beside the pre-printed statement, Dr. Gade-Pulido wrote in her own hand: "Relative to Allowed Physical Diagnoses."

{¶17} 9. Following a September 8, 2009 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

Prior to a discussion on the merits the Injured Worker's counsel challenged the sufficiency of the 05/22/2009 psychological evaluation by Dr. Lyall and the 06/09/2009 physical evaluation by Dr. Gade-Pulido. Dr. Lyall indicated no psychological testing could be conducted as the Injured Worker complained he was in too much pain to answer simple questions. Dr. Lyall also indicated it was difficult to determine a degree of impairment attributable to the Injured Worker's depressive symptoms as the Injured Worker's pain expression was so high. Similarly, Dr. Gade-Pulido indicated the Injured Worker's "marked functional overlay and pain behavior on today's examination precluded any quantifiable determination of impairment in this Injured Worker."

The Injured Worker's counsel contends the estimate of whole person impairment given by Dr. Lyall and the absence of a whole person impairment from Dr. Gade-Pulido render the respective reports defective. The Injured Worker's counsel further requested either the permanent total disability hearing be continued so that new psychological and physical evaluations could be obtained, or in the alternative, that the reports of Drs. Lyall and Gade-Pulido be disregarded in the permanent total disability determination.

The Injured Worker's counsel's position is not well-taken. No authority has been presented to substantiate the position that whole person impairment ratings must be included in permanent total disability evaluations. Therefore, the absence of definitive whole person impairment ratings does not render either report defective.

After full consideration of the issue it is the order of the Staff Hearing Officer that the application for permanent total disability filed 04/16/2009 is denied. This decision is based on the 05/22/2009 report of Dr. Lyall and the 06/09/2009 report of Dr. Gade-Pulido.

Dr. Lyall interviewed the Injured Worker on 05/22/2009 and reviewed the Injured Worker's records to render an opinion. Dr. Lyall noted the Injured Worker had not received any psychological treatment in approximately 10 years, since 1999. It was further observed that the Injured Worker is not presently taking any anti-depressant medication.

As noted previously, Dr. Lyall indicated it was difficult to determine a degree of impairment caused by the Injured Worker's depressive symptoms due to the Injured Worker's high expressions of pain. Dr. Lyall concluded that the Injured Worker's depressive symptoms were secondary to his expressed pain and, as such, the Injured Worker's depressive disorder was considered to be mild. As a result, Dr. Lyall indicated the allowed depressive disorder had reached maximum medical improvement, resulted in an estimated 15% whole person impairment based on the "mild" classification, and did not result in any work limitations.

When Dr. Gade-Pulido evaluated the Injured Worker on 06/09/2009 she was unable to fully examine him due to

complaints of incapacitating pain. However, she noted the allowed sprains in this claim did not result in any long-term impairment. Further, Dr. Gade-Pulido noted that radiographic evidence demonstrated the Injured Worker had underlying, non-allowed degenerative spine disease which may be contributing to his dysfunction. The allowed fibromyalgia and post-concussion syndrome could not be quantified on examination due to the significant functional pain overlay. Dr. Gade-Pulido further noted that Waddell's signs were markedly positive on examination suggesting a significant degree of non-organic dysfunction.

Dr. Gade-Pulido indicated the allowed conditions of this claim had reached maximum medical improvement, indicated the Injured Worker's degree of true impairment relative to this [sic] allowed diagnoses in this claim is unratable, and concluded as a result of the allowed conditions in this claim the Injured Worker has no work limitations.

It is not necessary to consider the Injured Worker's disability factors as the Injured Worker has not met the medical impairment threshold established in State, ex rel. Speelman v. Industrial Commission (1992), 73 Ohio App. 3d 757. Specifically the Injured Worker's medical impairment does not prevent the Injured Worker from returning to work at his former position of employment. Speelman held:

If the Industrial Commission finds that a person is medically able to return to his or her former position of employment based upon some evidence upon which it specifically relies, the inquiry ends because any inability to work is not causally [related] to the allowed condition.

Speelman further holds that in such a situation, it is unnecessary to evaluate the non-medical disability factors as they are irrelevant to the issue of causal relationship to the allowed conditions. As both Dr. Lyall and Dr. Gade-Pulido have found the allowed conditions of this claim present no work limitations, the Injured Worker is not entitled to permanent total disability.

{¶18} 10. On September 15, 2009, relator moved for reconsideration.

{¶19} 11. On October 16, 2009, the three-member commission, voting two-to-one, mailed an order denying reconsideration.

{¶20} 12. On March 26, 2010, relator, Gregory Orosz, filed this mandamus action.

Conclusions of Law:

{¶21} Two issues are presented: (1) whether the reports of Dr. Lyall constitute some evidence upon which the commission can rely, and (2) whether the reports of Dr. Gade-Pulido constitute some evidence upon which the commission can rely.

{¶22} The magistrate finds: (1) the reports of Dr. Lyall do constitute some evidence upon which the commission can rely, and (2) the reports of Dr. Gade-Pulido do not constitute some evidence upon which the commission can rely.

{¶23} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶24} Preliminarily, it may be helpful to review portions of the Medical Examination Manual ("manual") published by the commission effective September 2009.

{¶25} The manual provides a sample medical examination referral letter stating:

The above Injured Worker has been referred to you for an independent medical evaluation to assist the Industrial Commission in its consideration of the Injured Worker's application for a determination of Permanent Total Disability. Pertinent medical records are enclosed. Based solely on the allowed condition(s) within your specialty, which are highlighted on the enclosed Medical Examination Worksheet, provide opinions on the following issues:

[One] **Maximum Medical Improvement.** Please refer to your specialty section of the Medical Manual for complete instructions.

[Two] **Percentage of Impairment.** Please refer to your specialty section of the Medical Manual for complete instructions.

[Three] **Complete the enclosed form (Physical Strength Rating, Occupational Activity Assessment, Residual Functional Assessment) specific to your specialty.** Please refer to your specialty section of the Medical Manual for complete instructions.

{¶26} The manual provides instructions to the examining physician with respect to a specific "body system."

{¶27} Pertinent here is a body system described as "musculoskeletal, cardiovascular, respiratory, central and peripheral nervous system" (hereafter "musculoskeletal"). Another body system is described by the manual as "mental and behavioral."

{¶28} For musculoskeletal examinations, the manual provides a "format" which states in part:

Opinion

Opinions must be based solely on impairment arising from the allowed condition(s) in the claim. Examiners may not consider disability factors (age, education, and work training) in their opinion. Opinions on the following three issues are required.

[One] Has the Injured Worker's condition(s) reached Maximum Medical Improvement (MMI) with regard to each specified allowed condition? Briefly describe the rationale for your opinion. If 'yes' then please continue to items #2 and #3.

Maximum Medical Improvement is defined as a treatment plateau (static or well stabilized) where no fundamental or

physiological change can be expected within reasonable probability, in spite of continuing medical or rehabilitative procedures. An Injured Worker may require supportive treatment to maintain this level of function.

Under AMA Guides, Fifth Edition, a condition must be Maximum Medical Improvement before permanent impairment can be estimated.

[Two] Based on AMA Guides, Fifth Edition, and with reference to the Industrial Commission Medical Examination Manual, provide the estimated percentage of whole person impairment from each of the allowed condition(s). Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment for an allowed condition, indicate zero percent.

Cite the AMA Guides source for your impairment opinion.

Combine multiple allowed condition impairments using the AMA Guides Combined Values Chart.

[Three] Complete the Physical Strength Rating form. In your narrative report provide a discussion setting forth physical limitations resulting from the allowed conditions.

Consider only impairment arising from the allowed condition(s) in your opinion of the Injured Worker's strength rating. Do not consider disability factors (age, education and work training/experience).

Musculoskeletal and nervous system impairment directly limits body function, while cardiovascular and respiratory system impairment indirectly limits function by reducing work capacity. Use the Physical Strength Rating form for allowed condition(s) in any of these body systems.

{¶29} For mental and behavioral examinations, the manual also provides a "format." For the opinion to be rendered, the manual instructs:

[Two] Impairment

Based on the AMA Guides Second and Fifth Editions, and with reference to the Industrial Commission Medical

Examination Manual, provide the estimated percentage of whole person impairment arising from each psychological/psychiatric allowed condition. Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment for an allowed condition, indicate zero percent.

The AMA Guides, Fifth Edition, Chapter 14, (Mental and Behavior Disorders) discusses an approach to evaluate and classify mental and behavioral disorders. However, neither the Guides Fourth or Fifth Editions provide impairment percentages. The Industrial Commission of Ohio requires a percent impairment be given for each allowed condition.

Therefore, a table has been constructed for use by the examiners to assist them in classifying and estimating percent impairment, and in order to fulfill the Industrial Commission requirements. * * *

The Independent Medical Examination shall indicate the class of impairment in each functional area, and an estimated percent whole person impairment for each allowed condition. If there is no impairment, indicate zero percent.
* * *

Under "Allowed Diagnostic Testing," the manual provides:

MMPI and Bender-Gestaldt are considered part of a psychological examination and are not billable. Injured Workers may decline testing, and if this is the case, note the refusal and base opinions on the available data.

Dr. Lyall's Reports

{¶30} According to relator, the reports of Dr. Lyall do not constitute some evidence because, due to relator's pain complaints, the assessment was discontinued and testing was not performed. Relator concludes that the examination was "incomplete," and thus cannot be relied upon by the commission in the PTD determination. Relator further argues that Dr. Lyall's use of the terms "appears" or "appear" or "appeared" throughout his report is evidence of his uncertainty as to his

findings due to an incomplete examination. The magistrate disagrees with relator's argument.

{¶31} To begin, psychological testing is not an absolute requirement under the manual which specifically provides that the claimant may decline testing. Here, testing could not proceed because of relator's pain complaints. In either event, the lack of testing does not automatically invalidate the examination or the opinions based thereon.

{¶32} Significantly, Dr. Lyall indicates in his narrative report that the clinical interview lasted 45 minutes. Nowhere in his report does Dr. Lyall indicate that he felt that the interview was insufficient.

{¶33} In his discussion, Dr. Lyall states: "It appears that we have a fifty year old male who worked for the North Randall Police Department." Does Dr. Lyall's use of the word "appears" signal that he is uncertain of relator's age and former position of employment? Later, Dr. Lyall states: "It appears that the claimant has an allowed psychological condition of Depressive Disorder." Does Dr. Lyall's use of the word "appears" signal that he is uncertain of the allowed psychological condition? The answer to these two questions seems obvious. No, Dr. Lyall is not uncertain as to relator's age, former position of employment or the allowed condition for which he is examining.

{¶34} Use of the word "appears" to identify facts beyond dispute can be viewed as an unfortunate writing style, and need not be viewed as a signal of uncertainty.

{¶35} Viewed in that context, Dr. Lyall's further use of the word in the context of a clinical finding need not be viewed as a signal of uncertainty. Thus, when Dr. Lyall states: "Socialization skills appear to be mildly impaired by his allowed psychological

condition" or "Adaptation to stress appears to be mildly impaired by his depressive condition," the interpreter of the evidence, i.e., the commission, need not view those clinical findings as uncertain, as relator here argues.

{¶36} The commission is the exclusive evaluator of the weight and credibility to be given medical reports of record, and reviewing courts cannot second-guess the commission's credibility determination in mandamus. *State ex rel. Chrysler Corp. v. Indus. Comm.*, 81 Ohio St.3d 158, 166, 1998-Ohio-460

{¶37} Based on the foregoing analysis, the magistrate concludes that relator has failed to show that the reports of Dr. Lyall do not constitute some evidence upon which the commission can and did rely.

Dr. Gade-Pulido's Reports

{¶38} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flixible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶39} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 449, 1994-Ohio-458; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585.

{¶40} In her narrative report, Dr. Gade-Pulido writes: "The allowed fibromyalgia syndrome and post concussion syndrome could not be quantified on today's

examination due to the significant functional overlay¹." Dr. Gade-Pulido concludes: "[T]his injured worker's degree of true impairment relative to the allowed diagnoses in the claim is unratable." (Emphasis added.)

{¶41} Despite her conclusion that impairment is "unratable," in the physical strength rating form, Dr. Gade-Pulido opines: "This injured worker has no work limitations."

{¶42} If impairment is "unratable," as Dr. Gade-Pulido concludes, then how can it be further concluded that relator "has no work limitations." It seems to this magistrate that, if impairment is "unratable," at best, we can only say that we do not know whether relator has work limitations.

{¶43} While the form does not provide for the conclusion when impairment is found to be "unratable," that does not justify selection of a pre-printed response that does not logically follow from the conclusion that impairment is "unratable."

{¶44} The commission, through its SHO, relied upon the opinion of Dr. Gade-Pulido as indicated by her mark on the physical strength rating form.

{¶45} In the magistrate's view, Dr. Gade-Pulido's reports are internally inconsistent as to the ultimate opinion relied upon by the commission. The commission cannot rely upon a medical opinion that the injured worker "has no work limitations," when the doctor has also determined that impairment is "unratable." *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445.

¹ "Functional overlay" is defined by Taber's Cyclopedic Medical Dictionary (20th ed.2005) as: "The emotional response to physical illness. It may take the form of a conversion reaction, affective overreaction, prolonged symptoms of physical illness after signs of the illness have subsided, or combinations of these. Functional overlay may appear to be the primary disease; skill may be required to determine the actual cause of illness."

{¶46} Thus, the reports of Dr. Gade-Pulido did not provide the commission with some evidence upon which the commission can rely.

{¶47} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order denying the PTD application and, after elimination of the reports of Dr. Gade-Pulido, enter a new order that adjudicates the PTD application.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).