

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Charles Deal, :
Relator, :
v. : No. 10AP-142
Martin D. Cunningham dba : (REGULAR CALENDAR)
Rainbow Muffler and Industrial :
Commission of Ohio, :
Respondents. :

D E C I S I O N

Rendered on December 16, 2010

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Charles Deal, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying his application for permanent total disability compensation and to find he is entitled to that compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. As the magistrate noted, relator essentially raises two issues: (1) whether the commission abused its discretion in relying on Dr. Murphy's report submitted 14 months before relator filed his application for permanent total disability compensation, and (2) whether the commission abused its discretion in redacting the reports of Drs. Muehleisen and Drown. In resolving the issues, the magistrate concluded the commission did not abuse its discretion in relying on Dr. Murphy's report. Moreover, the magistrate determined the commission, within its discretion, could find the reports of Drs. Muehleisen and Drown were not persuasive. Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Although relator does not separately set forth objections to the magistrate's decision, the memorandum filed in support of objections raises these issues: (1) the commission abused its discretion in relying on Dr. Murphy's report, since Dr. Murphy evaluated relator more than a year before relator's application and addressed not permanent total disability, but temporary total disability; (2) the commission abused its discretion in rejecting Dr. Muehleisen's report; and (3) the commission abused its discretion in rejecting Dr. Drown's report.

III. Dr. Murphy's report

{¶4} The magistrate properly and adequately addressed relator's contentions regarding staleness of Dr. Murphy's report. As the magistrate pointed out, Dr. Murphy's

report falls within the parameters of Ohio Adm.Code 4121-3-34(C)(1), as it is based on an examination conducted 14 months prior to the date relator filed his permanent total disability application. In the report, Dr. Murphy directly addressed relator's impairment, concluding relator's psychological impairment was mild and did not prevent him from returning to his former position of employment. "A finding of evidentiary staleness should always be approached cautiously." *State ex rel. Hiles v. Netcare Corp.*, 76 Ohio St.3d 404, 407, 1996-Ohio-169.

{¶5} To the extent relator contends the commission abused its discretion in relying on Dr. Murphy's report because it addressed temporary total disability rather than the permanent total disability at issue in relator's application, relator's contentions are unpersuasive. In *State ex rel. Baker v. Indus. Comm.*, 10th Dist. No. 09AP-373, 2010-Ohio-2727, this court concluded the commission could rely on the psychologist's expert report in determining an application for permanent total disability compensation even though the report earlier was requested in relation to a request for temporary total disability compensation.

{¶6} Accordingly, relator's first objection is overruled.

IV. Dr. Muehleisen's report

{¶7} Relator's second objection contends the commission improperly rejected Dr. Muehleisen's report, as nothing requires that a psychologist conduct psychological testing prior to submitting an expert report.

{¶8} Dr. Muehleisen's report concluded relator reached maximum medical improvement for his allowed depressive disorder and sustained a 25 percent psychological impairment, rendering relator incapable of work. Dr. Muehleisen's report

indicated "[p]sychological testing [was] not undertaken because of claimant's self-report and limited comprehension." The staff hearing officer rejected Dr. Muehleisen's report, concluding it was not "persuasive because he did not do any psychological testing." (Magistrate's Decision, ¶31.)

{¶9} The commission has the exclusive authority to evaluate the weight and credibility of the evidence. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20-21. The commission is not required to note the evidence it finds unpersuasive or the reason for rejecting it, because "[l]ogic dictates that if the identity of rejected evidence is irrelevant, so is the reason for the rejection." *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575, 578. Accordingly, the commission does not need to state why it found one doctor's report more persuasive than that of another doctor. *Id.* at 577.

{¶10} When, however, the commission states a reason for rejecting a report, it may not do so arbitrarily. *State ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 13-14. To avoid rejecting medical proof arbitrarily, the commission must have, "some reasonable basis for the * * * rejection of a physician's finding." *State ex rel. Eberhardt v. Flixible Corp.* (1994), 70 Ohio St.3d 649, 655; see also *State ex rel. Pavis v. Gen. Motors Corp.*, 65 Ohio St.3d 30, 33, 1992-Ohio-114.

{¶11} Although the staff hearing officer rejected Dr. Muehleisen's report because he did not conduct any psychological testing, the Ohio Industrial Commission Medical Examination Manual, in presenting "Commission policies for independent medical examinations and medical file reviews," does not require such testing. (Manual at 1.) In the section that covers "Mental and Behavioral Examinations," the manual provides the basic outline for a psychologist's report. The section labeled "Allowed Diagnostic Testing"

states that "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." (Manual at 66.) Dr. Muehleisen did so.

{¶12} In providing examples of those instructions as applied, the manual sets forth two sample independent psychiatric examination reports. The first has no testing, while the second shows the psychologist administered a "Beck Depression Inventory-2" test. (Manual 67-77.) Dr. Muehleisen's report substantially follows the requirements of the manual because, like the first sample provided, Dr. Muehleisen did not perform any psychological testing of relator.

{¶13} Because the manual does not require psychological testing, the staff hearing officer's reason for rejecting Dr. Muehleisen's report is unsupported. Accordingly, we sustain relator's second objection.

V. Dr. Drown's report

{¶14} Relator's final objection contends the commission wrongly rejected Dr. Drown's report.

{¶15} The magistrate appropriately and adequately addressed Dr. Drown's report. The staff hearing officer rejected the report as not persuasive because the report, in concluding relator was not able to perform sustained remunerative employment, considered relator's age, education, lack of marketable skills, diminished overall adaptiveness of his work injuries, and his psychiatric impairment. Because the report improperly considered nonmedical disability factors, the staff hearing officer rejected it. Moreover, the magistrate correctly concluded Dr. Drown's medical and vocational

commentaries cannot be separated from each other. "Instead, Dr. Drown's ultimate conclusion that relator is permanently and totally disabled is intertwined with vocational factors." (Magistrate's Dec., ¶51.) The magistrate correctly concluded the commission did not abuse its discretion in rejecting Dr. Drown's report. Relator's third objection is overruled.

VI. Disposition

{¶16} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, with the additional analysis of Dr. Muehleisen's report as reflected in our decision. Accordingly, we grant a limited writ returning this matter to the commission so it may consider relator's permanent total disability application in a manner consistent with this decision.

Objections overruled in part and sustained in part; limited writ granted.

FRENCH, J., concurs.

TYACK, P.J., concurs in part and dissents in part.

TYACK, P.J., concurring in part and dissenting in part.

{¶17} I agree that Dr. Muehleisen's report should not have been rejected for the reason stated by the staff hearing officer ("SHO"). To that extent, I concur.

{¶18} I disagree as to the SHO's reliance on the report of Michael A. Murphy, Ph.D.

{¶19} Dr. Murphy made findings that Deal was capable of work activity in a report which pre-dated relator's application for PTD compensation and which was primarily

directed at the issue of whether or not Deal had reached maximum medical improvement ("MMI").

{¶20} The SHO who reviewed relator's application relied upon Dr. Murphy's report in deciding that relator was not entitled to PTD compensation. Counsel for relator heavily questions this reliance.

{¶21} Counsel sets forth three primary objections. First, Dr. Murphy examined relator at a time that PTD compensation was not the issue. Second, Dr. Murphy examined relator over one year before relator applied for PTD compensation, so the report was stale, given the rapid changes which can occur with regard to mental health. Third, the SHO had no valid basis for rejecting the report of Dr. Muehleisen, who was an expert retained by the commission for an independent examination and who was specifically addressing the issue of whether or not relator was PTD.

{¶22} As noted above, Dr. Murphy examined relator to determine if relator had reached MMI. Dr. Murphy found that relator had reached MMI and the MMI plateau at which relator functioned was not work prohibitive. The finding that relator's dysthymia was not work prohibitive was a finding beyond the issue Dr. Murphy was primarily asked to address. Further, Dr. Murphy, while reporting that relator had reached MMI, recommended that relator be reevaluated in six months to see if treatment for dysthymia was still necessary. This recommendation is in tension with the MMI finding and at a minimum is an acknowledgment that relator's condition could change within six months. Presumably if relator could dramatically improve within six months, his condition could also deteriorate in six months. Further, Dr. Murphy found maintenance psychological

therapy to be required and acknowledged that Deal's medications could have an impact on Deal's ability to work.

{¶23} Under the circumstances, I believe the objections of relator with regard to the Murphy report have merit. I would therefore sustain the objections to the magistrate's decision to that extent also. To that extent, I dissent.

APPENDIX

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TENTH APPELLATE DISTRICT

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Relator,	:	
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	:	
Martin D. Cunningham dba	:	(REGULAR CALENDAR)
Rainbow Muffler and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on July 22, 2010

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶24} Relator, Charles Deal, has filed this original action seeking a writ of mandamus from this court ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for permanent total

disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶25} 1. Relator sustained a work-related injury on February 3, 1986 and his workers' compensation claim has been allowed for the following conditions:

* * * ACUTE SPRAIN OF CERVICAL, THORACIC, AND LUMBAR SPINE WITH ASSOCIATED ACUTE CEPHALGIA, VERTIGO, CERVICAL PARA-SPINAL MYALGIA AND RIGHT BRACHIAL INVOLVEMENT; THORACIC AND LUMBAR PARA-SPINAL MYALGIA AND RIGHT SCIATIC INVOLVEMENT; ACUTE STRAIN OF RIGHT SHOULDER; ROTATOR CUFF TENDONITIS, FIBROMYOSITIS TRAPEZIUS AND TORN ROTATOR CUFF OF RIGHT SHOULDER; THORACIC OUTLET SYNDROME; HERNIATED NUCLEUS PULPOSUS AT C3-4; SPONDYLOSIS AT C4-5; DEGENERATIVE DISC DISEASE AT C2-3 THROUGH C5-6. AGGRAVATION OF PRE-EXISTING FIBROMYALGIA; AGGRAVATION OF PRE-EXISTING DYSTHYMIA.

{¶26} 2. On June 16, 2009, relator filed his application for PTD compensation based primarily on his allowed psychological conditions. According to his application, relator was 46 years of age, had completed the eighth grade, had not received his G.E.D., could not read, write, and perform basic math well, had filed for and was receiving Social Security disability benefits and had participated in rehabilitation in the past. In the statement of facts, it was noted that relator's rehabilitation file was closed in February 2006 because he was working at that time.

{¶27} 3. In support of his application, relator submitted the January 15, 2009 report of Michael Glenn Drown, Ph.D. Dr. Drown examined relator on October 13, 2008 and administered various tests. Specifically, the BDI-II revealed that relator fell within the category of severe depression. The ISB test revealed that relator was generally

maladaptive regarding his mood, anxiety, pain, and self-image. The MCMI ("Millon Clinical Multiaxial Inventory") revealed that a number of diagnostic categories were elevated at statistically significant levels. Dr. Drown stated that, according to the MCMI, relator is an "apprehensive and worrisome person presenting a variety of physical discomforts such as general anxiety, muscular aches some which are ill-defined; and nausea. He expresses psychological difficulties through somatic or visceral (internal bodily workings) channels. He reports persistent periods of fatigue and weakness. He is preoccupied with issues of ill-health and a variety of pain problems many of which can be hard to define and treat through traditional medicine." In addition, Dr. Drown indicated that the test results revealed that relator is insecure regarding the management of his affairs by himself, is very sensitive regarding the fact that he is unable to do for himself as he could in the past, and that relator is pulling away from other people. Ultimately, Dr. Drown concluded:

* * * Considering his age, education, lack of marketable skills, diminished overall adaptiveness, and his work injuries, it is within reasonable certainty that his psychiatric disability taking in the whole body is permanent total. In reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral Disorders, his psychiatric impairment (taking in the whole body) falls within the extreme range.

{¶28} 4. The record also contains the July 30, 2009 report of Robert A. Muehleisen, Ph.D., who examined relator at the commission's request. According to his report, Dr. Muehleisen's examination was based solely on relator's own self reporting, the doctor's behavioral observations, and a mental status examination. No objective psychological testing was administered. In the mental status examination portion of his report, Dr. Muehleisen stated:

* * * He was well oriented in all spheres and acknowledged understanding the nature, purpose, and confidentiality limits of the examination. He related in a cooperative manner, but his general demeanor was querulous and complaining. Speech was normal in volume, but slightly pressured. He displayed no significant restlessness, agitation, or psychomotor retardation. Mood was depressed accompanying resentful and rather bitter, disgruntled affect. The claimant displayed a pronounced attitudes of pessimism and negativity, anhedonia, and suicidal thinking. Responses were generally relevant and on point, and stream of thought was rambling and occasionally tangential, but not peculiar or patently bizarre. Train of thought often gravitated toward feelings of resentment and unfair persecution. Though clearly hypersensitive and prone to feeling victimized, the claimant denied notions of persecution or conspiracy. * * *

Ultimately, Dr. Muehleisen opined that relator's allowed psychological condition had reached maximum medical improvement ("MMI"), assessed a 25 percent whole person impairment, and concluded that relator was incapable of working.

{¶29} 5. Harry M. Popovich, M.D., examined relator regarding his allowed physical conditions. In his August 3, 2009 report, Dr. Popovich provided his physical findings upon examination, concluded that relator's allowed physical condition had reached MMI, assessed a 31 percent whole person impairment, and concluded that relator is capable of performing sedentary work.

{¶30} 6. The record also contains the earlier April 24, 2008 report of Michael A. Murphy, Ph.D., who had been asked to opine whether relator's allowed psychological conditions had reached MMI and whether relator's allowed psychological conditions were work prohibitive. Dr. Murphy noted that relator's chief complaints revolved around chronic pain. With regard to his mental status examination, Dr. Murphy stated:

Cognitively, the Injured Worker appears to be a man of low average intelligence. He is alert, oriented in all spheres, with

adequate reality contact. Concentration and attention are unimpaired. He is distracted by pain. * * * Comprehension of simple commands is unimpaired. Comprehension of complex commands is unimpaired. Stream of thought and flow of ideas are normal and coherent. Educational deficits are absent. There is no evidence of neurological impairment. There is no evidence of cognitive dysfunction due to psychoses, head injury, or organicity. He shows no obsessions, phobias, or ideas of reference. Delusions, obsessive ruminations, and hallucinations are absent. The Injured Worker's thoughts are clear, understandable, relevant, and goal-directed. Paranoid ideations are absent. There is no tangentiality, circumstantiality, disturbances of logic, or distractibility. His associations are reasonably well organized. The Injured Worker answers questions appropriately. Memory functions are generally intact in all time frames. However, intermittent deficits in short-term memory are reported. Long-term memory is mildly impaired. * * * He is a good historian. * * * Abstract reasoning, concept formation, and fund of knowledge are estimated to be within normal limits. * * * His judgement [sic] is not impaired. Executive functions such as decision making, flexibility, and social perceptions are intact and estimated to be within normal limits. * * *

With regards to the aspects of residual functioning, Dr. Murphy concluded that relator had a mild impairment with regard to his daily activities, social interactions, adaptations, concentrating, persistence, and pace. Specifically, Dr. Murphy noted that relator's daily activities include driving, light housework, laundry, walking and taking care of one dog, talking to people on the phone, preparing meals, caring for his children, watching television, shopping, visiting friends and relatives, yard work, and attending medical appointments and therapy. With regard to his social interaction, Dr. Murphy noted that relator lives with his son and girlfriend, relates to friends and his children's family, and is not in conflict with his siblings. Dr. Murphy concluded that relator was mildly impaired in this area because he was uneasy and indicated that people upset him. With regard to

his adaptation (ability to respond appropriately to changes in the work place), Dr. Murphy noted that relator's work history was average, he was able to maintain attendance, perform the normal duties of his former job or another job with restrictions, use public transportation for his own transportation, be aware of normal hazards, deal with supervisors, and work under specific instructions. With regard to his concentration, persistence, and pace, Dr. Murphy noted that relator was able to sustain focus or attention long enough to permit the completion of tasks in the workplace. Dr. Murphy administered the Millon Clinical Multiaxial Inventory-III ("MCMI-III") psychological test. Dr. Murphy explained the findings: relator is overly pessimistic and negative, his impulse control is poor, his reported energy level low, when under stress, he may report unusual sensations and have peculiar physical dysfunctions and bodily complaints that concern him, he is extremely introverted and tends to be more comfortable when alone, he has a stable sense of identity and believes that he can tolerate stress and effectively deal with the people and problems in his life, he has a severe character pathology which causes interpersonal and intrapsychic problems, he tends to be emotionally flat and has difficulty experiencing pleasure, his thinking is vague and unconventional, he tends to be preoccupied with abstract, theoretical ideas, and easily withdraws into fantasy as his primary source of gratification, he is usually indecisive and absent minded, and displays poor judgment. In conclusion, Dr. Murphy opined that relator's allowed psychological condition had reached MMI, indicated he was 22 years post-injury and had undergone four years of psychiatric treatment. Dr. Murphy also opined that relator's psychological condition was not work-prohibitive, in that he has the cognitive, social, and behavioral capacity to return to his former activities.

{¶31} 7. Relator's application was heard before a staff hearing officer ("SHO") on October 21, 2009. The SHO rejected the reports of Drs. Muehleisen and Drown as follows:

* * * However, the Hearing Officer does not find Dr. Muehleisen's report in regard to Injured Worker's psychological condition persuasive because he did not do any psychological testing. Additionally, Dr. Drown, Injured Worker's treating physician comments on issues that he is not qualified to address. Dr. Drown provides an opinion as to Injured Worker's employability and indicates that Injured Worker's age, education, lack of marketable skills, diminished overall adaptiveness, and work injures, result in permanent and total disability. The Hearing Officer finds that Dr. Drown's opinion is not persuasive as he is providing an opinion based upon factors which he is not qualified to determine.

The SHO relied on the reports of Drs. Popovich and Murphy to find that relator is capable of returning to sedentary work and that his allowed psychological conditions were not work prohibitive. Thereafter, the SHO discussed the vocational factors:

The vocational factors in this claim are found to indicate that Injured Worker would be capable of finding sustained remunerative employment within his restrictions. At 56 years old the Injured Worker is not elderly. Therefore his age is found to be a positive factor in terms of his potential for reemployment. Injured Worker has not been out of the workforce long. He was last employed in 2006. Injured Worker has only an eighth grade education and this is considered a negative factor in terms of his rehabilitation potential. However, most importantly, Injured Worker's prior rehabilitation efforts have been successful. Injured Worker was involved with rehabilitation in February 2006 and obtained new work with a new employer. He then left the workforce and has had no further contact with rehabilitation. Given the Injured Worker's prior successful endeavor with vocational rehabilitation, the Hearing Officer is not convinced that Injured Worker could not become reemployed again with their help.

The SHO found that relator was capable of performing sustained remunerative employment and denied his application for PTD compensation.

{¶32} 8. Thereafter, relator filed this mandamus action.

Conclusions of Law:

{¶33} In this mandamus action, relator asserts that the commission abused its discretion by relying on the report of Dr. Murphy which was submitted 14 months prior to the filing of relator's application for PTD compensation. In making this argument, relator also contends that the commission abused its discretion by rejecting the reports of Drs. Muehleisen and Drown.

{¶34} As hereinafter explained, it is this magistrate's decision that the commission did not abuse its discretion by relying on the report of Dr. Murphy and it was within the commission's discretion to find that the reports of Drs. Muehleisen and Drown were not persuasive. As such, this court should deny relator's request for a writ of mandamus.

{¶35} The Supreme Court of Ohio has set forth three requirements that must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶36} The relevant inquiry in a determination for permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693, 1994-Ohio-95. Generally, in making this determination, the commission must consider not only medical impairments but, also, the claimant's age, education, work record and other relevant nonmedical factors. *State ex*

rel. Stephenson v. Indus. Comm. (1987), 31 Ohio St.3d 167. The burden of proof is on the claimant to establish, by a preponderance of the evidence, that the disability is permanent and that the inability to work is causally related to the allowed conditions. Ohio Adm.Code 4123-3-34(B)(2)(b).

{¶37} In arguing that the commission abused its discretion, relator first argues that the April 24, 2008 report of Dr. Murphy was stale and that Dr. Murphy did not examine relator on the issue of permanent total disability. This magistrate disagrees.

{¶38} Ohio Adm.Code 4121-3-34(C)(1) describes the relevant medical evidence which all claimants must submit in support of their applications for PTD compensation:

* * * The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation. The medical evidence used to support an application for permanent total disability compensation is to provide an opinion that addresses the injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s). * * *

{¶39} After the filing of an application for PTD compensation, the commission schedules the claimant for appropriate medical examinations. For obvious reasons, it is equally important that other medical evidence considered by the commission is also based upon examinations performed within 24 months prior to the date of the filing of the application for PTD compensation. Furthermore, if the commission determines that the claimant may be able to perform some employment, Ohio Adm.Code 4121-3-34(D)(2)(b) provides:

If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained

remunerative employment, the non-medical factors shall be considered by the adjudicator.

{¶40} Keeping the above requirements in mind, the magistrate finds that Dr. Murphy's report falls within these requirements. First, Dr. Murphy's report was based on an examination conducted 14 months prior to the date that relator filed his PTD application. This is clearly less than 24 months and falls within the above requirements. Second, Dr. Murphy did provide his opinion of relator's medical impairment resulting from the allowed psychological conditions in his claim. Specifically, Dr. Murphy found that relator's psychological impairment was mild and that it did not prevent him from returning to his former position of employment. This opinion goes to the central issue addressed by the commission when considering an application for PTD compensation: whether or not relator can perform some sustained remunerative employment. Finding that Dr. Murphy's report was based on an examination conducted less than 24 months before relator filed his PTD application and that Dr. Murphy's report addressed relator's impairment, the magistrate finds that it was not an abuse of discretion for the commission to rely on his report.

{¶41} Relator also argues that the commission abused its discretion by rejecting the reports of Drs. Muehleisen and Drown. Ordinarily, the commission's rejection of medical evidence is not an issue. It is undisputed that questions of credibility and the weight to be given evidence are clearly within the discretion of the Industrial Commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. It is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio

St.3d 373, 1996-Ohio-126. Further, the commission is only required to cite the evidence relied on and is not required to explain why some evidence is rejected. *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481. As such, the commission was not obligated to accept the opinions contained in these reports and the commission was not required to explain why the reports were rejected.

{¶42} In the present case, the commission determined that Dr. Muehleisen's report was not persuasive. While not required to give a reason, the SHO explained that the report was being rejected because Dr. Muehleisen had not performed any psychological testing. While relator is correct to assert that Dr. Muehleisen was not required to administer any psychological tests to relator, the commission did not abuse its discretion when it found that his report was not persuasive and then relied on reports prepared by doctors who did perform psychological testing. The SHO found that the report of Dr. Murphy was more credible and persuasive.

{¶43} Relator also argues that because Dr. Muehleisen had agreed with Dr. Drown's opinion that relator was permanently and totally disabled, the commission was required to find that he was entitled to an award without consideration of the nonmedical disability factors citing *State ex rel. Galion Mfg. Div., Dresser Industries, Inc v. Haygood* (1991), 60 Ohio St.3d 38. However, *Galion Mfg.* does not support relator's argument.

{¶44} In *Galion Mfg.*, Herman L. Haygood's application for PTD compensation was supported by the report of his treating physician, Dr. Retter. The commission had Haygood examined by Dr. Lyons who agreed with Dr. Retter's opinion that Haygood could not engage in sustained remunerative employment. The commission relied on the

reports of both doctors and, after considering the nonmedical disability factors, granted PTD compensation to Haygood.

{¶45} Dresser, the employer, filed a complaint in mandamus in this court alleging in part that the report of Dr. Lyons contained contradictions and that Dr. Lyons considered nonallowed conditions. As such, Dresser argued that his report did not constitute some evidence to support the commission's award of PTD compensation. This court granted a limited writ ordering the commission to clarify its decision and issue a new order.

{¶46} On appeal, the Ohio Supreme Court found that the commission's order was supported by some evidence and reversed this court's decision. Haygood asked the court to require the commission to specifically identify the nonmedical disability factors relied on in granting or denying benefits. The court refused citing its recent decisions in *State ex rel. Hartung v. Columbus* (1990), 53 Ohio St.3d 257, and *State ex rel. Noll v. Indus. Comm.* (1991) 57 Ohio St.3d 203. The court reiterated that while PTD compensation may never be denied based solely on the medical evidence without considering the nonmedical disability factors, PTD compensation may, in some instances, be granted based solely on the medical evidence.

{¶47} Although Haygood's doctor and the commission's doctor both agreed that Haygood was unable to perform any kind of work and the commission's order was upheld, nothing in the court's decision in *Hartung* supports relator's argument here that the commission is required to grant PTD compensation where the doctor to whom the commission refers a claimant agrees with the claimant's treating physician that the claimant is unable to work. That was not the issue addressed in *Hartung*.

{¶48} Relator also argues that the commission abused its discretion when it rejected the report of Dr. Drown and argues that the commission was clearly "doctor shopping." The magistrate disagrees.

{¶49} The SHO determined that Dr. Drown's report was not persuasive. As the SHO noted, Dr. Drown's ultimate conclusion that relator was not able to perform any sustained remunerative employment was based on his consideration of relator's age, education, lack of marketable skills, diminished overall adaptiveness, his work injuries, and his psychiatric impairment. The SHO rejected this report because he considered nonmedical disability factors in reaching his conclusion.

{¶50} In *State ex rel. DaimlerChrysler Corp. v. Bilbao*, 10th Dist. No. 04AP-861, 2005-Ohio-2802, ¶4, this court had the occasion to succinctly summarize the law as it relates to a doctor's opinion:

It is well-settled that, when a medical expert expresses a disability opinion based on non-medical factors, such as education and employment history, that opinion is disqualified from evidentiary consideration. *State ex rel. Ohio State Univ. v. Allen*, Franklin App. No. 03AP-823, 2004-Ohio-3839, at ¶18, citing *State ex rel. Shields v. Indus. Comm.* (1996), 74 Ohio St.3d 264, 268 * * * and *State ex rel. Catholic Diocese of Cleveland v. Indus. Comm.* (1994), 69 Ohio St.3d 560 * * *. "However, where the doctor's medical and vocational commentaries can be separated, the commission may simply disregard a physician's opinions on vocational matters and accept the purely medical opinion." *Allen*, at ¶18, citing *Catholic Diocese*. Thus, when it is clear from the doctor's report that he or she rendered a medical opinion based solely on the allowed conditions, the commission may rely on the medical opinion while ignoring any superfluous vocational opinion offered by the doctor. *State ex rel. Steelcraft Mfg. Co. v. Indus. Comm.*, Franklin App. No. 01AP-1271, 2002-Ohio-3788, at ¶37, citing *Catholic Diocese*.

{¶51} In the present case, Dr. Drown's medical and vocational commentaries cannot be separated from each other. Instead, Dr. Drown's ultimate conclusion that relator is permanently and totally disabled is intertwined with vocational factors. Dr. Drown had stated:

* * * Considering his age, education, lack of marketable skills, diminished overall adaptiveness, and his work injuries, it is within reasonable certainty that his psychiatric disability taking in the whole body is permanent total. In reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral Disorders, his psychiatric impairment (taking in the whole body) falls within the extreme range.

Finding that Dr. Drown's ultimate opinion cannot be separated, the magistrate finds that it was not an abuse of discretion for the commission to reject his report. Further, the magistrate finds that the evidence does not support relator's argument that the commission was simply searching for any report to support the denial of compensation to him.

{¶52} Relator has not challenged the commission's analysis of the nonmedical disability factors. Finding that the commission did not abuse its discretion in relying on the report of Dr. Murphy, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his application for PTD compensation and relator's request for a writ of mandamus should be denied.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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