[Cite as *State ex rel. Infocision Mgt. Corp. v. Hartson*, 2012-Ohio-2468.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Infocision Management Corporation,	:	
Relator,	:	No. 11AP-515
v.	:	(REGULAR CALENDAR)
Judith Hartson and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 5, 2012

Kastner Westman & Wilkins, LLC, and *James W. Ellis*, for relator.

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley*, for respondent Judith Hartson.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Infocision Management Corporation ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that granted Judith

Hartson ("claimant") permanent total disability ("PTD") compensation, and to enter an order denying that compensation.

{¶ 2} This matter was referred 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 deny the requested writ. Relator filed an objection to the magistrate's decision contending that the magistrate's decision was "unsupported by Ohio law."

I. BACKGROUND

{¶ 3} In brief, claimant suffered a work-related injury in 2005, and she applied for PTD compensation in 2010. Following a hearing, a staff hearing officer granted claimant's application.

II. RELATOR'S OBJECTION

{¶ 4} In its objection, relator raises the same arguments it raised before the magistrate. Specifically, relator contends that the reports of Robert L. Byrnes, Ph.D., and Anthony DeRosa, Ph.D., are not evidence on which the commission could rely to award compensation because they were insufficient under Ohio Adm.Code 4123-3-09. We agree, however, with the magistrate's careful consideration of this issue. For the reasons she stated, both reports satisfied the rule's requirements. And further, even if Dr. Byrnes' use of the term "likely" precluded its use as evidence, Dr. DeRosa's conclusions were more detailed and indicated that claimant was incapable of work. Standing alone, Dr. DeRosa's report was some evidence on which the commission could rely to award compensation. Therefore, we overrule relator's objection.

III. CONCLUSION

{¶ 5} Based on our independent review, and having overruled relator's objection, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ of mandamus.

Objection overruled;
writ of mandamus denied.

SADLER and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. Infocision Management Corporation,	:	
Relator,	:	No. 11AP-515
v.	:	(REGULAR CALENDAR)
Judith Hartson and Industrial Commission of Ohio,	:	
Respondents.	:	

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

Rendered on February 23, 2012

Kastner Westman & Wilkins, LLC, and *James W. Ellis*, for relator.

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley*, for respondent Judith Hartson.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 6} Relator, Infocision Management Corporation, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting permanent total disability ("PTD") compensation to Judith Hartson ("claimant") and ordering the commission to find that she is not entitled to that compensation.

Findings of Fact:

{¶ 7} 1. Claimant sustained a work-related injury on August 17, 2005 and her workers' compensation claim has been allowed for the following conditions:

> Left knee contusion; left ankle sprain; right shoulder contusion; tear anterior cruciate ligament left knee; tear medial collateral ligament left knee; fracture left fibula; osteochondritis left ankle; Achilles tendon tear left ankle; aggravation of pre-existing major depressive disorder, recurrent episode without psychotic features of moderate degree; aggravation of pre-existing dysthymia; aggravation of pre-existing panic disorder without agoraphobia, disallowed; aggravation of pre-existing degenerative joint disease, left knee.

{¶ 8} 2. On July 21, 2010, claimant filed her application for PTD compensation. Pursuant to her application, claimant was 61 years of age, had filed for and was receiving Social Security disability benefits, graduated from high school in 1966, could read, write, and perform basic math, utilized a cane and a brace for walking, and had participated in rehabilitation for her left knee, left ankle, and right knee.

{¶ 9} 3. The record contains two medical reports pertaining to claimant's allowed physical condition. Dean J. DePerro, Sr., D.O., examined claimant and, in his May 10, 2010 report, Dr. DePerro provided his physical findings upon examination and concluded that, based solely on the allowed physical conditions, claimant was permanently and totally disabled.

{¶ 10} 4. The record also contains the August 24, 2010 independent medical evaluation prepared by Dean Erickson, M.D. After identifying the medical records which he reviewed, his history of claimant's treatment, Dr. Erickson provided his physical findings upon examination. Dr. Erickson concluded that claimant had an 11

percent whole person impairment for her allowed physical condition and that she was capable of performing work at a sedentary level.

{¶ 11} 5. Three doctors provided reports relating to claimant's allowed psychological condition. In his May 5, 2010 report, Robert L. Byrnes, Ph.D., examined claimant and noted that she was depressed, that her attention and concentration, short-term memory, long-term memory, problem-solving skills, and her insight were fair. After his examination, Dr. Byrnes concluded that claimant had a 35 percent whole person impairment, which he described as moderate. Dr. Byrnes opined:

> Based on the findings of the history and examination, it is my opinion that her impairment, arising from her allowed mental conditions, is likely to preclude successful return to remunerative employment. In spite of treatment she remains anxious, depressed and has panic attacks. Her stress tolerance is poor. She would likely have trouble maintaining focus in a work environment.

{¶ 12} 6. Anthony DeRosa, Ph.D., examined claimant on November 2, 2010. Dr. DeRosa took a history from claimant and administered several psychiatric inventories, which provided the following results:

> Beck Depression Inventory: Severe depression
> Beck Hopelessness Scale: Severe hopelessness
> Burns Anxiety Inventory: Moderate to severe anxiety

{¶ 13} 7. Dr. DeRosa also administered the MNPI-2; however, he declined to elaborate on her clinical profile because of her tendencies to over report and exaggerate. During his mental status examination, Dr. DeRosa indicated that "there was no evidence of any severe symptom magnification." Concerning claimant's activities of daily living, Dr. DeRosa estimated that her degree of impairment in this area due to her depression and panic disorder was moderate to severe. Concerning her social functioning, Dr. DeRosa noted that claimant showed marked limitations in her ability to interact appropriately with the general public or customers, moderate limitations concerning her ability to maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness, and mild limitations concerning her ability to ask simple questions, request assistance from supervisors, accept instructions, respond

appropriately to criticism, and getting along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes. He concluded that her degree of impairment in this area was moderate. Concerning claimant's concentration, persistence, and pace, Dr. DeRosa noted that she had marked limitations in her ability to perform activities within a schedule, maintain regular attendance and be punctual, work in coordination with or proximity to others without being unduly distracted, and to complete a normal work day or work week without interruption from her psychologically based symptoms. He noted she had a moderately limited ability to carry out detailed instructions or tasks which may or may not be repetitive, to sustain an ordinary routine without special supervision, and to make simple work-related decisions. He noted mildly limited ability to carry out short and simple instructions or tasks. In this area, he concluded that her degree of impairment was moderate. Regarding her adaptation to stressful circumstances, Dr. DeRosa noted markedly limited ability to travel in unfamiliar places and to set realistic goals or make plans independently of others. He noted mildly limited ability to respond appropriately to expected or unexpected changes in the work setting and to be aware of normal hazards and take appropriate precautions. In this area, he estimated her degree of impairment was moderate. Dr. DeRosa concluded that claimant's Global Assessment of Functioning ("GAF") score was 55, indicating moderate symptoms or moderate difficulty in social, occupational or school functioning. Dr. DeRosa also concluded that claimant's allowed psychological conditions had reached maximum medical improvement ("MMI"), and assessed a 40 percent permanent impairment. In completing the Occupation Activity Assessment Form, Dr. DeRosa checked the box indicating that "This Injured Worker is incapable of work." Dr. DeRosa explained further:

> It is examiner's opinion that [claimant's] major depressive disorder, dysthymia and panic disorder, in and of themselves, significantly interferes with her doing any type of remunerative and competitive employment. Her depressive symptoms – including diminishments in concentration, energy level, self-confidence and stress tolerance – would prevent her from succeeding in sustained employment. Panic disorder would definitely interfere with concentration and her dependability as an employee.

> Therefore, it is highly unlikely that [claimant] would be able to obtain and then maintain competitive employment.

{¶ 14} 8. The record also contains two psychological reports by Robert G. Kaplan, Ph.D. In the first report dated September 13, 2010, Dr. Kaplan identified the medical reports which he reviewed, and concluded that claimant had a GAF score of 68, representing a mild impairment. Based upon testing he administered, Dr. Kaplan concluded that claimant was "exaggerating pain and disability due to pain." Thereafter, Dr. Kaplan identified many discrepancies which, in his opinion, appeared in claimant's reporting and the records which he reviewed. Dr. Kaplan gave the following impression of claimant's current symptoms:

> Therefore, it is reasonable to conclude that [claimant] is still exaggerating, fabricating and malingering psychological symptoms and is exaggerating pain and physical limitations. It would also be reasonable to conclude that she is not a reliable reporter of her history or causes of her psychological symptoms, has been intentionally deceptive in minimizing her pre-existing psychological symptoms, and has been exaggerating psychological symptoms that developed after the industrial injury of 8/17/05.

Ultimately, Dr. Kaplan concluded that claimant had, at most, five percent permanent impairment and that she could return to her former position of employment as there were no restrictions based on her allowed psychological conditions.

{¶ 15} 9. Dr. Kaplan authored a second report dated January 3, 2011, wherein he criticized Dr. DeRosa's approach when examining claimant, as well as his findings.

{¶ 16} 10. Claimant's application was heard before a staff hearing officer ("SHO") on January 31, 2011. Based solely upon the reports of Drs. Byrnes and DeRosa, the SHO determined that claimant was permanently and totally disabled.

{¶ 17} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 18} Relator contends that the reports of Drs. Byrnes and DeRosa do not constitute some evidence upon which the commission could rely as those doctors utilized an inappropriate and irrelevant standard for determining claimant's abilities. Specifically, relator criticizes the doctors' use of the word "likely" in their opinions.

Relator contends further that such a term is unclear and subject to multiple interpretations.

{¶ 19} The magistrate finds that the commission's order is supported by evidence and that relator's request for a writ of mandamus should be denied.

{¶ 20} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 21} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693 (1994). 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.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 22} The focus of relator's arguments is on the doctors' use of the word "likely." Relator contends that the doctors failed to express their opinions to a degree of medical probability. Relator cites Ohio Adm.Code 4123-3-09 which provides, in pertinent part:

(C) Proof.

> (1) In every instance the proof shall be of sufficient quantum and probative value to establish the jurisdiction of the bureau to consider the claim and determine the rights of the applicant to an award. "Quantum" means measurable quantity. "Probative" means having a tendency to prove or establish.
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> * * *
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> "Preponderance of the evidence" means greater weight of evidence, taking into consideration all the evidence presented. Burden of proof does not necessarily relate to the number of witnesses or quantity of evidence submitted, but to its quality, such as merit, credibility and weight. The obligation of the claimant is to make proof to the reasonable degree of probability. A mere possibility is conjectural, speculative and does not meet the required standard.

Specifically, Dr. Byrnes had concluded that claimant had a moderate impairment of 35 percent and:

> Based on the findings of the history and examination, it is my opinion that her impairment, arising from her allowed mental conditions, is *likely* to preclude successful return to remunerative employment. In spite of treatment she remains anxious, depressed and has panic attacks. Her stress tolerance is poor. She would likely have trouble maintaining focus in a work environment.

(Emphasis added.)

{¶ 23} Dr. DeRosa concluded that claimant had a GAF score of 55 (moderate impairment), that her allowed psychological conditions had reached MMI, assessed a 40 percent permanent impairment, and, after checking the box indicating that relator was "incapable of work," he made the following statement:

> It is examiner's opinion that [claimant's] major depressive disorder, dysthymia and panic disorder, in and of themselves, significantly interferes with her doing any type of remunerative and competitive employment. Her depressive symptoms – including diminishments in concentration, energy level, self-confidence and stress tolerance – would prevent her from succeeding in sustained employment. Panic disorder would definitely interfere with concentration and her dependability as an employee.

> Therefore, it is *highly unlikely* that [claimant] would be able to obtain and then maintain competitive employment.

(Emphasis added.)

{¶ 24} The commission and claimant argue that the term "likely" is synonymous with "high probability" and constitutes some evidence. The magistrate agrees.

{¶ 25} "Likely," is defined in *Merriam-Webster's Collegiate Dictionary* (10th Ed.1995) as:

> [H]aving a high probability of occurring or being true.

"Probable" is defined as:

> 1: supported by evidence strong enough to establish presumption but not proof (a ~ hypothesis) 2: establishing a probability (~ evidence) 3: likely to be or become true or real (~ events).

{¶ 26} Relator cites from a malpractice case for the proposition that "[p]robability is most often defined as that which is more likely than not" and that words like "maybe" and "around" do "not provide a basis from which probability can reasonably be inferred." *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242 (1971).

{¶ 27} Considering again the two reports, the magistrate points out that at the beginning of his opinion section, Dr. Byrnes stated: "Based on the findings of the history and examination, it is my opinion that to a reasonable degree of medical probability [claimant] has reached [MMI] relative to her allowed mental conditions." A few paragraphs later, Dr. Byrnes stated that claimant's impairments likely precluded a successful return to remunerative employment. This is not like the situation in *Cooper*. Dr. Byrnes is not saying "maybe" or "around." Instead, he is saying that there is a high probability that claimant cannot return to work.

{¶ 28} Similarly, Dr. DeRosa is indicating that there is an even higher probability that claimant cannot return to work.

{¶ 29} In order to establish that she was entitled to an award of PTD compensation, claimant had the burden of establishing, by a preponderance of the

evidence, that she was permanently and totally disabled as a result of the allowed conditions in her claim. Relator appears to be arguing that the use of the word "likely" means nothing more than possible or speculative, and that, as such, the reports do not constitute some evidence and/or the reports are ambiguous.

{¶ 30} It is undisputed that equivocal medical opinions are not evidence. *Id*. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions or fails to clarify an ambiguous statement. *Id*. By comparison, ambiguous statements are considered equivocal only while they are unclarified. Repudiated, contradictory or uncertain statements indicate that the doctor is uncertain as to what he means and are unreliable. By comparison, ambiguous statements demonstrate that the doctor did not effectively convey his meaning and, while not inherently unreliable, need to be clarified. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649 (1994).

{¶ 31} The magistrate finds that the use of the word "likely" and "highly unlikely" by Drs. Byrnes and DeRosa is neither a repudiated, contradictory, uncertain or ambiguous statement. The doctors opined that there was a high probability that claimant was not capable of performing some sustained remunerative employment. There is no contradiction and there is no ambiguity.

{¶ 32} Even if this court disagrees and finds that the terms "likely" and "highly unlikely" are ambiguous, Dr. DeRosa's report, standing alone, constitutes some evidence upon which the commission could properly rely to find that claimant was permanently and totally disabled. As noted in the findings of fact, Dr. DeRosa checked the box indicating that claimant was incapable of work and the magistrate finds that his comments which followed do not contradict his opinion. Dr. DeRosa concluded that claimant was moderately impaired by her psychological conditions, and, as a result of those conditions, she was experiencing 40 percent impairment. He opined that claimant's major depressive disorder, dysthymia, and panic disorder significantly interfered with her performing any type of remunerative and competitive employment, and that her depressive symptoms would prevent her from succeeding in sustained employment. Finding that his written paragraph does not contradict his checking the

box indicating that claimant is incapable of work, the magistrate finds that, standing alone, the report of Dr. DeRosa constitutes some evidence upon which the commission could rely and relator has not demonstrated the commission abused its discretion by relying on that report and granting claimant's application for PTD compensation.

{¶ 33} Further, to the extent that relator argues that the commission did not address the other medical evidence in the record, this does not demonstrate that the commission abused its discretion. The commission is required only to cite that evidence upon which it relies and is not required to explain why other evidence has not been found to be persuasive. *Noll.* The commission is the exclusive evaluator of the weight and credibility to be given the evidence and it is immaterial whether other evidence, even if greater in quantity and/or quality, supports a conclusion which is contrary to the commission's. *Teece*; *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996).

{¶ 34} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in awarding claimant 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).