[Cite as *State ex rel. Rogers v. Pat Salmon & Sons, Inc.*, 2013-Ohio-284.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kelvin Rogers,	:	
Relator,	:	
v.	:	No. 12AP-113
Pat Salmon & Sons, Inc., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 31, 2013

Law Office of James A. Whittaker, LLC, Laura I. Murphy, and *James A. Whittaker,* for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore,* for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, Kelvin Rogers ("claimant"), 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 that denied permanent total disability ("PTD") compensation and to enter an order granting said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended

that this court deny claimant's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision.

{¶ 3} Claimant first argues that the magistrate erred when she found the commission did not abuse its discretion when it denied claimant's request to depose Dr. Donald Tosi. The magistrate found that claimant did not provide an adequate explanation to the commission demonstrating that his request for deposition was reasonable. Claimant argues herein that Ohio Adm.Code 4121-3-09, which provides for such requests to depose, does not require an elaborate or expansive explanation, and the commission hearing officer never indicated that the denial was based upon an inadequate explanation. Claimant asserts that the magistrate did not address his argument that Dr. Tosi should have been deposed to explain his controversial reliance upon the "fake bad" test score to suggest that claimant was malingering.

{¶ 4} We find no error in the magistrate's analysis of this issue. The hearing officer denied claimant's request to depose on the bases that the report was not internally inconsistent or ambiguous, and any discrepancies could be resolved by the hearing officer upon adjudication of the PTD application. As the magistrate indicated in her decision, the commission was charged with determining whether the request to depose was reasonable, and claimant gave no specific explanation as to why he was requesting Dr. Tosi's deposition. Claimant merely presented the hearing officer with generic language in his written motion, arguing Dr. Tosi's report was "ambiguous and contradictory" and Dr. Tosi's test results "completely contradict" his conclusions. Although claimant argues that the hearing officer did not deny his motion based upon insufficient information in the motion, the magistrate's point was that claimant cannot complain now about the hearing officer's denial of his request to depose by raising specific arguments in this court when he failed to present these same arguments to the hearing officer. Claimant should have presented these detailed arguments to the hearing officer at the time of his motion.

{¶ 5} Also, claimant's additional arguments that the magistrate wrongly suggests a claimant must submit a "full blown brief," that Ohio Adm.Code 4121-3-09 does not require an elaborate and expansive explanation, and that the C-86 form used to make such requests cannot accommodate lengthy explanations, are not persuasive. The magistrate does not suggest that a claimant must submit a full-blown brief with an

elaborate explanation; however, a claimant must present an argument specific enough to allow the hearing officer to make a reasonableness determination. Also, the C-86 form provides sufficient space to present a specific argument, and claimant here utilized less than one-third of the provided space. Therefore, we find these arguments without merit.

{¶ 6} Next, claimant argues that the magistrate incorrectly distinguished *State ex rel. Martin v. Indus. Comm.*, 10th Dist. No. 11AP-252, 2012-Ohio-2984. The magistrate found that "glaring" inconsistencies were present in *Martin* that are not present here. In *Martin*, we found that Dr. Tosi's report was inconsistent in that he found the worker could return to his former position as a police officer even though he also found the worker could only work in a low to moderate stress environment. Claimant argues that it is likewise inconsistent in the present case for Dr. Tosi to find claimant can work in a low to moderate stress environment given all of the impairments recognized in Dr. Tosi's report. However, although comparisons between *Martin* and the present case might be made, the circumstances are different. Besides the deficiency noted by the magistrate, claimant's own argument illuminates a key difference. In *Martin*, we were comparing a low to moderate stress environment to a job as a police officer, while claimant here seeks to compare a low to moderate stress environment to the number of impairments. These are two distinct comparisons; thus, *Martin* is not significantly comparable to the present case in this respect. Therefore, this argument is not well-taken.

{¶ 7} Claimant next contests the magistrate's determination that Dr. Hogya's report constituted some evidence. The magistrate found that, with the exception of the amount of force Dr. Hogya determined claimant could occasionally exert, his opinion that claimant could perform light-duty work was not vague. The magistrate acknowledged that Dr. Hogya imposed additional weightlifting limitations that technically rendered him unable to perform light-duty work but then found that, because the additional restriction rendered him still able to perform at least sedentary work, the commission did not abuse its discretion in relying on the report. Claimant argues in his objection that Dr. Hogya changed the definition of sedentary work set forth in the Ohio Administrative Code and did not provide additional information required to establish the other requirements of sedentary work. Claimant first points out that Dr. Hogya stated "overhead reaching and lifting should be occasional and under ten pounds," whereas "sedentary work" is defined

in Ohio Adm.Code 4121-3-34(B)(2)(a) as "exerting up to ten pounds of force occasionally * * * to lift, carry, push, pull, or otherwise move objects." However, as cited by the magistrate, Dr. Hogya specifically found earlier that claimant could "exert[ ] up to 15 pounds of force occasionally * * * in the course of lifting, carrying, pushing or pulling objects." Thus, Dr. Hogya's determination that claimant could exert up to 15 pounds of force occasionally fits within the definition of sedentary work. Dr. Hogya's further restriction on lifting concerns the narrow and specialized motion of overhead lifting, which we do not believe moves claimant's abilities outside of the scope of sedentary work as defined in Ohio Adm.Code 4121-3-34(B)(2)(a).

{¶ 8} Furthermore, as far as claimant may be seeking to distinguish "up to ten pounds," as used in the Ohio Administrative Code, versus "under ten pounds," as used by Dr. Hogya, we note that claimant has failed to cite any authority explaining whether "up to ten pounds" means "up to and including ten pounds," and we can find none. Dr. Hogya's use of the phrase "under ten pounds" sufficiently approximates the phrase "up to ten pounds," as used in the administrative code.

{¶ 9} Claimant also points out that Dr. Hogya did not indicate whether claimant could sit "most" of the time, which is required under both the light and sedentary work definitions. Instead, Dr. Hogya found that claimant could sit "up to one hour at a time with an opportunity to change positions." However, Dr. Hogya's finding is not clearly contrary to the definition of "sedentary" work, and the commission could have interpreted his finding as being consistent with sedentary employment. In a typical eight-hour workday, sitting "most" of the time would mean sitting over four hours. According to Dr. Hogya, claimant could sit up to one hour straight with the opportunity to change positions. Although Dr. Hogya does not specifically indicate the interval necessary between periods of sitting, the commission could have interpreted Dr. Hogya's restriction as meaning claimant could alternate between sitting for one hour and then being in some other position for less than one hour before returning to sitting for another hour, thereby sitting most of an eight-hour workday. We cannot find such a reading unreasonable. For these reasons, we find the commission could have found Dr. Hogya's report constituted some evidence.

{¶ 10} Claimant also argues that the magistrate did not address his argument that the hearing officer failed to give due consideration to his rehabilitation efforts. In 2008, claimant underwent rehabilitation but was found not to be appropriate for clerical sedentary work. Claimant then participated in a vocational program that deemed him incapable of competitive employment in other sedentary positions too. Thus, claimant contends, because the magistrate found that Dr. Hogya's report concluded claimant could do at least sedentary work, she also had to take into account that he tried but failed to do clerical and non-clerical sedentary work as part of his vocational rehabilitation. However, pursuant to *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997), and *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117 (1994), the commission is the exclusive evaluator of disability, is not bound to accept vocational evidence, even if uncontroverted, and, if bound to accept a rehabilitation report's conclusions, the rehabilitation division, and not the commission, would become the ultimate evaluator of disability, contrary to *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987); *Singleton* (the commission is not bound to accept or rely on any vocational reports that are presented since the commission is the ultimate evaluator of disability). Thus, contrary to claimant's argument, the commission could make the decision that claimant could participate in sedentary work despite vocational evidence that might opine otherwise. Therefore, we overrule this objection.

{¶ 11} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of claimant's objections, we overrule the objections and adopt the magistrate's findings of fact and conclusions of law. Claimant's writ of mandamus is denied.

Objections overruled; writ of mandamus denied.

SADLER and DORRIAN, JJ, concur.

_____

[Cite as *State ex rel. Rogers v. Pat Salmon & Sons, Inc.*, 2013-Ohio-284.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Kelvin Rogers,	:	
Relator,	:	
v.	:	No. 12AP-113
Pat Salmon & Sons, Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 7, 2012

Law Office of James A. Whittaker, LLC, Laura I. Murphy, and *James A. Whittaker*, for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} Relator, Kelvin Rogers, 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 which denied relator's application for permanent total disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 13} 1. Relator has sustained two work-related injuries during the course of his employment with Pat Salmon & Sons, Inc.

{¶ 14} 2. Relator's first injury occurred on March 9, 2002 and his workers' compensation claim was allowed for the following conditions:

> Sprain of right ankle; fracture right ankle, closed.

{¶ 15} 3. Relator sustained a second work-related injury on February 25, 2005 and his workers' compensation claim was allowed for the following conditions:

> Sprain right knee/leg; sprain lumbar region; herniated disc T11-12; disc protrusion T12-L1; major depressive disorder, severe, with psychotic features; lumbar degenerative disc disease L5-S1.

{¶ 16} 4. Relator's 2005 claim has been disallowed for the following conditions:

> Chondromalacia of the patella right knee; aggravation of pre-existing osteoarthritis right knee.

{¶ 17} 5. Besides a two-month period of time when relator worked as a burial sales person, relator has not worked since 2005.

{¶ 18} 6. Relator participated in vocational rehabilitation with VocWorks.

{¶ 19} 7. Relator's rehabilitation file was closed effective August 4, 2008 because relator had not located a new job.

{¶ 20} 8. A Functional Capacity Evaluation was completed on August 6, 2009. It was determined that relator was able to perform light to light-medium physical employment.

{¶ 21} 9. Additional vocational screening was completed by VocWorks in August 2009. In the August 14, 2009 report which followed, it was noted that relator had applied for but had not yet received Social Security disability benefits and that, while he had doubts that he would be able to obtain and sustain work due to his restrictions, high pain levels, weight, age, lack of skills, and criminal record, relator expressed an interest in returning to full-time remunerative employment. Relator informed the evaluators that he could create simple documents using Microsoft Word, but that he was not familiar with Excel, Access, or Power Point. VocWorks determined that relator was capable of performing select unskilled and select lower level semi-skilled jobs at or below the light-

medium physical demand level, including jobs as a telemarketer, dispatcher, greeter, ticket-taker, information clerk, appointment setter, and bench assembly. The evaluator noted that relator might benefit from situational assessment to assess his work readiness and he might need time to develop alternate work approaches that consider his restrictions and address basic work behaviors (attendance/punctuality, endurance), work pacing issues (taking breaks as needed, changing positions, workplace accommodations), and productivity or work quality.

{¶ 22} 10. Shortly thereafter, relator participated in Goodwill Industries' ("Goodwill") evaluation program. Relator participated in a situational assessment with janitorial services for a three-day period. Following the evaluation, Goodwill determined that relator did not have the stamina to complete physical tasks due in part to his weight. Work conditioning, work hardening, and/or a weight-loss program were recommended. If successfully completed, it was recommended that training services be provided since relator's performance during the assessment suggested he could develop new job skills through hands-on training. Thereafter, placement services could be provided to help relator conduct a job search.

{¶ 23} 11. After completing the assessment with Goodwill, relator's file was referred back to VocWorks. At that time, relator's vocational rehabilitation file was closed because relator's physician of record, William Miles, M.D., provided a Medco-14 stating that relator was totally disabled. Specifically, the closure report states:

> CM met with the IW and POR Dr. William Miles, M.D. on 10/08/09 in follow up CM presented the POR with copies of the e [sic] Office Procedures and Computer Technology Summary Report and the Work Evaluation Discharge Summary Report and he reviewed both and their recommendations. He agreed with the evaluators that he didn't feel the IW was appropriate to place him in voc rehab at this time but perhaps if approved by CareWorks he would consider some P.T. at their facility to help strengthen the IW and increase his endurance. He provided a Medco 14 stating the IW is totally disabled from work from 10/08/09 to 12/31/09 with permanent restrictions of no lifting/carrying over 20 lbs., no bending, twisting/turning, reaching below knees, squatting/kneeling, and no lifting above shoulders. He can lift/carry up to 20 lbs., occasionally as well as stand/walk, and sit, and frequently lift/carry up to 10 lbs[.] The POR

> commented on the Medco 14 that the IW needs continued medication management, may benefit from short course of PT and is not a candidate for voc rehab. He is to follow up with the POR on 10/20/09 at 12:00 p.m. Medco 14 was faxed to all parties.
>
> * * *
>
> This file is closed effective 10/12/09 due to non support of POR.

{¶ 24} 12. Concerning his allowed physical conditions, relator treated primarily with Brian R. Nobbs, D.C. In his July 28, 2010 report, Dr. Nobbs opined that it was unlikely that relator would ever be able to return to work. Specifically, Dr. Nobbs stated:

> When considering all of the evidence, it is much more likely, rather than less likely, that the progression of Mr. Rogers' continued inability to work is directly attributable to his work injury.
>
> Based upon a reasonable degree of medial certainty, Mr. Rogers will be permanently unable to engage in any type of gainful employment as a result of the progression of his 2002 and 2005 work injuries. Due to these work injuries, Mr. Rogers has not been able to work since 2005. Mr. Rogers is 53 years old which is an important factor. He is permanently and totally disabled as a direct result of his work related injuries and will never return to the work place.

{¶ 25} 13. Concerning his allowed psychological condition, relator treated with Michael T. Farrell, Ph.D. Within that practice, Dr. Farrell prescribed relator's medications and relator treated with Jennifer J. Stoeckel, Ph.D., Mary L. Kelley, Ph.D., and Christopher C. Ward, Ph.D.

{¶ 26} 14. Ultimately, in a report dated May 18, 2011, Dr. Kelley opined that relator was incapable of returning to his former position of employment or any other sustained remunerative employment and that he would require continuing therapy to maintain his emotional stability and to help him adapt to a disabled life style.

{¶ 27} 15. Drs. Ward and Stoeckel also authored reports which are contained in the stipulation of evidence. Both Drs. Ward and Stoeckel opined that relator's impairment was mild to moderate. Both judged his activities of daily living to be

moderately impaired; his pace, persistence, attention, and concentration to be moderately impaired; his social functioning to be moderately impaired and his ability to adapt to stress as being moderately impaired.

{¶ 28} 16. Dr. Ward concluded relator had a 21 percent whole person impairment while Dr. Stoeckel concluded that he had a 25 percent whole person impairment. Neither offered an opinion as to whether or not he was capable of performing some sustained remunerative employment.

{¶ 29} 17. Relator was examined by Paul A. Deardorff, Ph.D. In his July 14, 2010 report, Dr. Deardorff also found that relator was mildly impaired in his activities of daily living and moderately impaired in terms of social functioning and his ability to adapt to stress. Dr. Deardorff assessed a 14 percent whole person impairment.

{¶ 30} 18. Relator filed his application for PTD compensation on February 22, 2011.

{¶ 31} 19. Relator was born in September 1955 and was 56 years of age when he filed his application. On that application, relator indicated that he had never filed for Social Security disability benefits.[1] Relator indicated that he obtained his GED in 1994 and that he had attended truck driver training. Relator indicated that he could read and write, but that, in terms of basic math, he could perform math but not well. Relator indicated that he utilized a cane, a tens-unit, and a C-Pap machine.

{¶ 32} 20. Relator's psychological condition was evaluated by Donald J. Tosi, Ph.D. In his April 8, 2011 report, Dr. Tosi identified the medical records which he reviewed and subjected relator to the Millon Clinical Multiaxial Inventory-III test. In discussing the test results, Dr. Tosi explained that there was reason to suspect that relator was over-reporting his symptoms. Specifically, Dr. Tosi stated as follows in his report:

> He was so unusually open in answering test questions that this may result in an over reporting of symptoms with test findings being a significant magnification of his true problems.
>
> Testing shows a strong "fake bad" response set in which Mr. Rogers overly exaggerated and distorted his problems. This limits the validity of the test findings as Mr. Rogers's [sic]

[1] Documentation from VocWorks indicates that he had applied for Social Security disability benefits.

> true level of problems/symptoms is likely to be less than what is indicated in the following test results.

{¶ 33} 21. Dr. Tosi also noted:

> Testing shows severe levels of depression that need further mental health treatment if they are clinically present and are not due to substance use, withdrawal, or malingering. Test scores may indicate a Major Depression or may represent a severe Adjustment Disorder.

{¶ 34} 22. Dr. Tosi ultimately concluded that relator had a mild impairment in the areas of daily activities, social interaction, adaptation, as well as concentration, persistence, and pace. Dr. Tosi opined that relator had an 18 percent whole person impairment and that he would be able to work in a "low to moderate work stress environment."

{¶ 35} 23. Paul T. Hogya, M.D., examined relator for his allowed physical conditions. In his May 11, 2011 report, Dr. Hogya described relator's two injuries, the treatment he had received, as well as his current symptoms. Dr. Hogya noted that relator's medical history was "positive for COPD, osteoarthritis, thyroid disease, BPH." Thereafter, Dr. Hogya provided his physical findings upon examination, opined that relator's allowed conditions had reached maximum medical improvement ("MMI") and that relator could perform sustained remunerative work as follows:

> [L]ow level light industrial demand capacity. That means exerting up to 15 pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly in the course of lifting, carrying, pushing or pulling objects. Sitting, standing and walking may be up to one hour at a time with an opportunity to change positions. Based solely on the allowed conditions, he is capable of climbing stairs and ramps as needed. He is capable of using step stools. He should generally avoid ladders. He should avoid crawling. Overhead reaching and lifting should be occasional and under ten pounds. He has no restrictions with regard to use of the hands or fine manipulation, grasping, gripping, squeezing or light assembly. He is capable of using small hand tools. He has no restrictions with regard to hearing, seeing or speaking. He is capable of operating a telephone, headset, keyboard or mouse.

{¶ 36} 24. Relator filed a C-86 motion asking to depose Dr. Tosi. Relator requested:

> IW requests the right to take the deposition of Dr. Donald Tosi as this report is ambiguous and contradictory and can not be used as some evidence. The test results completely contradict the [sic] Dr. Tosi's conclusions and opinions.

{¶ 37} 25. Following a hearing before a staff hearing officer ("SHO") on May 25, 2011, relator's request to depose Dr. Tosi was denied as follows:

> The Staff Hearing Officer finds that the request is unreasonable, because the report of Dr. Tosi is not internally inconsistent or ambiguous. Any discrepancies contained in Dr. Tosi's report can be resolved by the Hearing Officer who adjudicates the pending Permanent and Total Disability application.

{¶ 38} 26. Relator's application for PTD compensation was heard before an SHO on July 19, 2011 and was denied. In finding that relator could perform some sustained remunerative employment, the SHO relied on the reports of Drs. Hogya and Tosi and stated:

> The Hearing Officer finds that the Injured Worker has reached maximum medical improvement for the recognized conditions in the two claims. The Hearing Officer finds that the Injured [W]orker is unable to return to work as a truck driver. However, the Hearing Officer finds that the Injured Worker retains the residual functional capacity to perform at least sedentary work activity when considering the recognized physical conditions in the claim. The Hearing Officer finds that the Injured Worker is also able to return to work when considering the psychological condition that is recognized in the 2005 claim provided that it is in a low to moderate stress environment.

{¶ 39} 27. Thereafter, in discussing the non-medical disability factors, the SHO concluded that relator's age and work history were neutral factors and that a GED was a positive vocational factor. The SHO did acknowledge that relator had attempted rehabilitation, but did not find that his failed attempt was reason enough to find that he was permanently and totally disabled. Specifically, the SHO noted that Goodwill had indicated that relator was not an appropriate candidate for any clerical sedentary jobs;

however, as the SHO noted, sedentary work is not strictly limited to clerical or office and computer work. As such, the SHO determined that relator retained the capacity to perform sedentary work as long as he was permitted to change positions after a period of sitting.

{¶ 40} 28. Relator's request for reconsideration was denied by order of the commission mailed September 22, 2011.

{¶ 41} 29. Thereafter, relator filed this instant mandamus action in this court.

Conclusions of Law:

{¶ 42} In this mandamus action, relator contends that the commission abused its discretion by denying his motion to depose Dr. Tosi and that the reports of Drs. Tosi an Hogya do not constitute some evidence upon which the commission could rely. Specifically, relator contends that Dr. Tosi's report is internally inconsistent and that Dr. Hogya's report is vague and inconsistent.

{¶ 43} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 44} 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).

{¶ 45} 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 non-medical 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 non-medical 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).

{¶ 46} Relator's first argument is that the commission abused its discretion when it refused his request to depose Dr. Tosi.

{¶ 47} The procedures for obtaining the oral deposition of an industrial commission or bureau physician are set forth in Ohio Adm.Code 4121-3-09(A)(7) and 4121-3-15. Specifically, Ohio Adm.Code 4121-3-09(A)(7) provides, in pertinent part:

> Procedure for obtaining the oral deposition of, or submitting interrogatories to, an industrial commission or bureau physician.
>
> (a) A request to take the oral deposition of or submit interrogatories to an industrial commission or bureau physician who has examined an injured or disabled worker or reviewed the claim file and issued an opinion shall be submitted in writing to the hearing administrator within ten days from the receipt of the examining or reviewing physician's report and the applicant shall simultaneously mail a copy of the request to all parties, or if represented, to the representatives of the parties.
>
> (b) The request must set out the reasons for the request and affirm that the applicant will pay all costs of the deposition or interrogatories including the payment of a reasonable fee, as defined below, to the physician and will furnish a copy of the deposition or the interrogatory to the opposing party and to the file.
>
> (c) If the hearing administrator finds that the request is a reasonable one, the hearing administrator shall issue a compliance letter that will set forth the responsibilities of the party that makes the request.
>
> * * *

> (d) Except as may be provided pursuant to rule 4121-3-15(D) of the Administrative Code, when determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.
>
> Ohio Adm.Code 4121-3-15(D) provides, in pertinent part:
>
> Procedure for obtaining the oral deposition, or submitting written interrogatories, to a commission or a bureau of workers' compensation physician who examined an injured or disabled injured worker or reviewed the claim file and issued an opinion as a result of an injured or disabled injured worker filing an application as defined in paragraph (A)(1) of this rule.
>
> (1) If either the injured worker or the employer believe that the oral deposition, or the submission of written interrogatories * * * is necessary for the proper determination of the percentage of permanent partial disability and there exists a substantial disparity as defined in paragraph (A)(2) of this rule between the report of the physician selected by the bureau of workers' compensation or the commission who is to be deposed and another medical report on file submitted on the issue of percentage of permanent partial disability that is to be adjudicated, or it appears that the estimate of disability made by the physician to be deposed was based, in part, on disability for which the claim has not been allowed, or an allowed disability was inadvertently omitted from consideration, such party shall make such request, in writing, to the hearing administrator, within ten days from the receipt of the examining or reviewing physician's report.

{¶ 48} As the above code provisions provide, obtaining the oral deposition of or submitting interrogatories to a physician may be requested. The request must be made in writing, filed within 10 days from the receipt of the examining or reviewing physician's report, and the party making the request must set out the reasons for the request. The determination of the issue is considered under a reasonableness standard and the hearing

officer must consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved through the adjudicatory process instead. Ohio Adm.Code 4121-3-09(A)(6)(a) through (d). Depositions may also be requested if the applicant believes it is necessary for the proper determination of the percentage of permanent partial disability and there exists a substantial disparity between the report of the physician selected by the commission or the bureau who is to be deposed and another medical report on file submitted on the issue of permanent partial disability or it appears that the estimate of the disability made by the physician to be deposed was based, in part, on disability for which the claim had not been allowed or an allowed disability that was inadvertently omitted from consideration. Ohio Adm.Code 4121-3-15(D)(1).

{¶ 49} In enacting Ohio Adm.Code 4121-3-09(A)(7) the legislature repealed a former provision under which, in determining the reasonableness of a request to depose a physician, a hearing officer was to consider whether a substantial disparity existed between various medical reports on the issue, whether one medical report was relied upon to the exclusion of others, and whether the request was for harassment or delay. In *State ex rel. Cox v. Greyhound Food Mgt., Inc.*, 95 Ohio St.3d 353, 2002-Ohio-2335, the Supreme Court of Ohio noted that the criteria of "substantial disparity" and "exclusive reliance" were not very useful in determining the reasonableness of a deposition request. In *Cox*, the court relied upon two other criteria to judge the reasonableness of the deposition request: "(1) Does a defect exist that can be cured by deposition? and (2) Is the disability hearing an equally reasonable option for resolution?" *Id.* at 24. *See also State ex rel. Sears Roebuck Co.mpany v. Indus. Comm.*, 10th Dist. No. 05AP-1135, 2007-Ohio-838.

{¶ 50} In arguing that Dr. Tosi's report was ambiguous and contradictory, relator stated nothing more than that the test results completely contradicted his conclusions and opinions. No further explanation was provided by relator and the magistrate finds that relator failed to provide enough of an explanation from which the hearing officer could have concluded that the request was reasonable. In essence, the magistrate finds that relator failed to meet his burden of proving that the deposition should have been granted.

{¶ 51} In denying the request, the SHO determined that Dr. Tosi's report was not internally inconsistent nor was it ambiguous and that any discrepancies contained in that report could be a result, at the time of hearing, adjudicating the pending PTD application. The fact that relator raises additional arguments here concerning why the SHO should have granted his request to depose Dr. Tosi here in his brief, does not support his argument that the commission abused its discretion when it denied his request. The SHO had only relator's original argument to consider and not the additional arguments he raises here before this court. Relator has not demonstrated the commission abused its discretion by denying his motion to depose Dr. Tosi.

{¶ 52} Relator's main focus in this mandamus action is that the reports of Drs. Tosi and Hogya do not constitute some evidence upon which the commission could have relied. For the reasons that follow, this magistrate finds that these reports do constitute some evidence upon which the commission could rely.

{¶ 53} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.* A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994); *State ex rel. Taylor v. Indus. Comm.*, 71 Ohio St.3d 582 (1995).

{¶ 54} In challenging the report of Dr. Tosi, relator argues that because his testing showed severe levels of depression, it was inconsistent for Dr. Tosi to classify relator's psychological limitations as being mild. However, the magistrate notes that Dr. Tosi specifically opined that the test results were not valid. Specifically, Dr. Tosi stated:

> He was so unusually open in answering test questions that this may result in an over reporting of symptoms with test findings being a significant magnification of his true problems.
>
> Testing shows a strong "fake bad" response set in which Mr. Rogers overly exaggerated and distorted his problems. This limits the validity of the test findings as Mr. Rogers's [sic] true level of problems/symptoms is likely to be less than what is indicated in the following test results.

{¶ 55} Because Dr. Tosi opined that psychological testing revealed a strong tendency toward symptom magnification, the magistrate finds that it was not inconsistent for Dr. Tosi to thereafter opine that, in his professional medical opinion, relator's actual impairment was mild.

{¶ 56} Relator cites this court's decision in *State ex rel. Jackson v. Indus. Comm.*, 10th Dist. No. 10AP-465, 2011-Ohio-3605**,** and argues that, for the same reasons that this court found that another report from Dr. Tosi did not constitute some evidence upon which the commission could rely, this report of Dr. Tosi should likewise be removed from evidentiary consideration.

{¶ 57} Hubert Jackson sustained a work-related injury in 1990. Jackson's claim was additionally allowed for major depressive disorder, single episode in 2007, and he received a period of temporary total disability ("TTD") compensation based upon that newly allowed psychological condition.

{¶ 58} Dr. Tosi examined Jackson in December 2008. Dr. Tosi was asked to provide an opinion concerning whether Jackson's allowed psychological condition had reached MMI, whether he could return to his former position of employment, and whether or not he had any restrictions. Dr. Tosi concluded that Jackson's allowed psychological condition had reached MMI and that he had no restrictions as a result. Based upon Dr. Tosi's report, Jackson's TTD compensation was terminated.

{¶ 59} In October 2009, Jackson filed an application for PTD compensation. Relator's treating psychiatrist opined that his allowed psychological condition prevented him from returning to sustained and gainful employment. The commission had Jackson examined by Norman L. Berg, Ph.D., who found that Jackson had a 55 percent permanent impairment and that he was incapable of working.

{¶ 60} In denying Jackson's application for PTD compensation, the commission relied on the earlier report of Dr. Tosi.

{¶ 61} Jackson filed a mandamus action in this court arguing in part, that the commission abused its discretion by relying on the report of Dr. Tosi because that report concerned an application for temporary total disability compensation and not PTD compensation. Relator challenged that report because it was not generated pursuant to

the commission's rules applicable to the adjudication of PTD applications. A magistrate of this court rejected Jackson's arguments and recommended that the court deny Jackson's request for a writ of mandamus.

{¶ 62} The matter was heard on objections by a three-judge panel of this court. At that time, the court determined, sua sponte, that Dr. Tosi's report did not constitute some evidence upon which the commission could rely finding that the report was internally inconsistent. Specifically, this court stated:

> Dr. Tosi's report suffers from some flaws. First, he notes guidelines which indicate the injured worker who suffers from depressive disorder returns to work on average after 53 days. These guidelines clearly do not apply to a claimant whose psychological conditions were not recognized until 17 years after the physical injuries.
>
> Dr. Tosi seems to be much affected by the fact that Jackson drinks three to four beers a day and five to six beers on occasion. This is so despite Dr. Tosi's testing which showed Jackson not to be alcohol dependant.
>
> Dr. Tosi reported "[f]rom a psychological standpoint, this Injured Worker is not clinically impaired in his daily activities, cognitive or social functioning." At the same time, Dr. Tosi's test scores showed Jackson has indications of "significant schizoid, avoidant, and passive-aggressive features that are likely to affect daily functioning." The testing also showed that Jackson wished to be left alone and that due to a lack of self-confidence, Jackson could be indecisive and have problems with decision-making.
>
> These observations by Dr. Tosi cannot be reconciled, making Dr. Tosi's report internally inconsistent. Because of these inconsistencies, Dr. Tosi's report cannot constitute some evidence in support of a denial of PTD compensation, especially in light of the required psychological report of Dr. Berg, a commission expert, finding Jackson incapable of sustained remunerative employment. Dr. Berg's report was prepared for the commission specifically to assist it in addressing the merits of this application for PTD compensation, whereas Dr. Tosi's report was prepared for other purposes before Jackson claimed to be entitled to PTD compensation.

Id. at ¶ 10-13.

{¶ 63} For the reasons that follow, the magistrate finds that this court's decision in *Jackson* does not warrant the granting of a writ of mandamus here.

{¶ 64} As stated previously, in the present case, Dr. Tosi expressly determined that relator was magnifying his symptoms. That fact, in and of itself, differentiates relator's case from Jackson's case. Because Dr. Tosi found that relator was magnifying his symptoms, the results of the testing were invalidated. By comparison, Dr. Tosi made no such finding in Jackson's case. This court relied heavily on the fact that the testing results and Dr. Tosi's conclusions were inconsistent. Again, here, Dr. Tosi noted that the results of the testing were not valid. As such, the magistrate finds that Dr. Tosi's report here does not suffer from the same flaws this court pointed out in *Jackson*.

{¶ 65} At oral argument, counsel for relator discussed a more recent decision from this court where this court found another report of Dr. Tosi's to be internally inconsistent and argues that, for the reasons stated therein, this report from Dr. Tosi should likewise be removed from evidentiary consideration.

{¶ 66} In *State ex rel. Martin v. Indus. Comm.*, 10th Dist. No. 11AP-252, 2012-Ohio-2984, James M. Martin suffered two work-related injuries arising out of his employment as a police officer. Martin's claims were allowed for significant physical conditions as well as the psychological condition of prolonged post traumatic stress disorder. Martin's treating psychologist opined that he was permanently and totally disabled.

{¶ 67} Martin was examined by Dr. Tosi. In discussing Martin's level of functioning, Dr. Tosi opined that he would "function best under normal to moderate stress conditions with work tasks that are simple to moderate in complexity [and he was] not at risk in the workplace." *Id*. at ¶ 11.

{¶ 68} Dr. Tosi also opined that Martin could "sustain focus and attention long enough to permit completion of tasks in a low to moderate stress work environment." *Id*. Dr. Tosi ultimately concluded that Martin could return to his former position of employment as a police officer.

{¶ 69} The commission relied on Dr. Tosi's report and found that he could perform some sustained employment within the above noted restrictions. Martin filed a mandamus action.

{¶ 70} In adopting the decision of the magistrate, this court granted a writ of mandamus returning the matter to the commission for further consideration after finding that Dr. Tosi's report was so internally inconsistent that it must be eliminated from evidentiary consideration. As the magistrate stated:

> On January 20, 1997, the date of relator's second injury, he was severely injured while arresting a person for domestic violence. A fight ensued when the subject resisted arrest.
>
> Clearly, it is inconsistent for Dr. Tosi to opine that relator can return to police work with no work limitations when his ability to concentrate limits him to "a low to moderate stress work environment." Under *Lopez*, Dr. Tosi's report is so internally inconsistent that it must be eliminated from evidentiary consideration.

Id. at ¶ 42-43.

{¶ 71} The issue in *Martin* is distinguishable from the issue here. In the present case, there is no such glaring inconsistency.

{¶ 72} In the present case, the magistrate finds that this report of Dr. Tosi does not contain a glaring inconsistency as this court found in the *Martin* case. Here, while Dr. Tosi noted that relator's allowed psychological condition was mildly impairing, he concluded that relator could work in a low to moderate work stress environment. As such, the magistrate finds that Dr. Tosi's report is not internally inconsistent and that it does constitute some evidence upon which the commission could rely.

{¶ 73} Relator also contends that the report of Dr. Hogya is vague and inconsistent and does not constitute some evidence. The magistrate disagrees. Relator points out that Dr. Hogya opined that he could perform light-duty employment but reduced the amount of weight he could lift from 20 pounds to 15 pounds. Relator contends that in providing this additional restriction, Dr. Hogya's report is inconsistent.

{¶ 74} The magistrate disagrees. It is clear from Dr. Hogya's report that, with the exception of the amount of force Dr. Hogya determined that relator could occasionally

exert, Dr. Hogya was of the opinion that relator could perform at a light-duty level. Further, relator challenges Dr. Hogya's report because Dr. Hogya did not indicate whether or not his complaint that he could sit, stand or walk for no more then five to ten minutes was consistent with his allowed conditions.

{¶ 75} In relying on the report of Dr. Hogya, the commission was clearly cognizant of the additional limitation he imposed on relator because the 15-pound limitation technically rendered relator capable of performing less than light-duty work (exerting up to 20 pounds of force occasionally) but more than sedentary work (exerting up to 10 pounds of force occasionally). The commission did not abuse its discretion by relying on Dr. Hogya's report to find that relator was capable of performing at least sedentary work. By definition, an ability to exert up to 15 pounds of force occasionally indicates that one can exert up to 10 pounds of force occasionally as well.

{¶ 76} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion in denying his application for PTD compensation and this court should deny his request for a writ of mandamus.

/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).