[Cite as *State ex rel. Hudson v. Indus. Comm.*, 2013-Ohio-3496.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. William M. Hudson,	:	
Relator,	:	
v.	:	No. 12AP-362
Industrial Commission of Ohio, G. Robert Toney & Associates National Liquidators and Progress Wire Products, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 13, 2013

Alan I. Goodman, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, William M. Hudson, brings this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his application for permanent total disability ("PTD") compensation and to enter an order granting the compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate, who has now rendered a decision and recommendation that includes findings of fact and conclusions of law, which is appended to this decision. The magistrate found that the commission failed to consider all the allowed conditions in relator's industrial claims before denying relator's PTD application. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus. The commission has filed an objection to the magistrate's decision, and the matter is now before us for our independent review.

{¶ 3} As reflected in the facts given in the magistrate's decision, relator has two industrial claims. Claim No. 95-498095 was allowed for sprain lumbrosacral; contusion left hip; aggravation of pre-existing degenerative disc disease L5-S1; aggravation of L5-S1 spondyloisthesis; disc protusion; and dysthymic. Dysthymic disorder is also known as neurotic depression. Claim No. 06-886838 was allowed for cervical sprain; bilateral shoulder sprain; left knee contusion; thoracic sprain; and left shoulder sprain.

{¶ 4} Relator supported his application for PTD compensation with the July 30, 2010 report of M.P. Patel, M.D., relator's treating physician. In his report, Dr. Patel noted that relator appeared "fatigued, depressed and tired" and exhibited "lapses in memory and poor concentration." (Stipulated Record ("Stip. R."), 20.) Dr. Patel also noted that relator had tenderness, tightness and pain throughout his head, neck, spine, shoulder, hip and knee. Dr. Patel identified the allowed conditions as "lumbosacral sprain, contusion left hip, lumbar disc degen., protruding disc L5-S1, spondylolisthesis, neurotic depression, contusion scalp (head), sprain of neck, sprain thoracic spine, sprain shoulder/arm bilateral, contusion chest wall, contusion abdominal wall, [and] contusion left knee," and opined that relator was "permanently and totally disabled from engaging into any gainful employment." (Stip. R., 22.)

{¶ 5} At the commission's request, a psychologist, Dr. Raymond Richetta, Ph.D., examined relator for the allowed dysthymic disorder. In his report, Dr. Richetta observed that relator suffered from mood swings, could not carry out simple instructions, and could not "cope consistently with the general public." (Stip. R., 33.) Dr. Richetta also completed a form titled "Occupational Activity Assessment Mental & Behavioral Examination." (Stip. R., 34.) On the form, Dr. Richetta checked a pre-printed statement

indicating that relator was "capable of work with the limitation(s) / modification(s) noted below." (Stip. R., 34.) Below the pre-printed statement, however, Dr. Richetta stated that relator "could not, from a psychological perspective alone, manage sustained remunerative employment." (Stip. R., 34.)

{¶ 6} Regarding the remaining allowed physical conditions, the commission had relator examined by Elizabeth Mease, M.D. Dr. Mease determined that relator had reached maximum medical improvement on each of the allowed physical conditions, and concluded that relator had a combined whole person impairment of 24 percent. Dr. Mease opined that relator could perform sedentary physical demand activities.

{¶ 7} Following a hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO found Dr. Patel's report unreliable, as the report contained a diagnosis for non-allowed conditions and conflicted with statements Dr. Patel made in a later report. The SHO also found Dr. Richetta's report unreliable, as it contained an inherent conflict. Relying on Dr. Mease's report, the SHO concluded relator was not permanently and totally disabled.

{¶ 8} The commission sua sponte decided to exercise its continuing jurisdiction over the SHO's order. Following another hearing on the application, the commission denied relator's PTD application. The commission concluded that the internal inconsistency in Dr. Richetta's report rendered the report unreliable and unpersuasive. Relying on Dr. Mease's report, the commission found that relator was "physically capable of performing sedentary work," noting that the record contained "no reliable medical evidence that documents a work restriction related to the allowed psychological condition." (Stip. R., 120.)

{¶ 9} Under its conclusions of law, the magistrate concluded that, while the commission acted within its discretion to reject Dr. Richetta's report, after rejecting the report, the record before the commission did not contain competent medical evidence regarding the dysthymic disorder. As such, the magistrate concluded that the commission failed to consider all the allowed conditions before denying relator's application for PTD compensation. The magistrate noted that, where the commission "finds no medical evidence upon which it can rely to meet its duty to consider all the allowed conditions of the claim, it cannot, in effect, refuse to obtain further medical evidence upon which it can

rely to meet its duty to consider all the allowed conditions of the claim." (Magistrate's decision, 11-12.)

{¶ 10} The commission asserts the following objection to the magistrate's decision:

> The Magistrate erred in finding that the commission failed to consider all of the allowed conditions or failed to schedule appropriate medical examinations.

{¶ 11} The commission asserts that, because relator supported his PTD application with only the report of Dr. Patel, relator failed to carry his burden to prove that he was permanently and totally disabled as a result of the allowed conditions. Because relator did not submit a psychologist's report in support of his PTD application, the commission asserts that if it erred "it was in hearing the PTD application at all." (Commission's objection, 10.) The commission further contends that, as it discussed and rejected Dr. Richetta's report, it adequately considered relator's allowed psychological condition. Finally, the commission asserts that "[t]here is no code or rule that requires the commission to send a claimant for a second examination if the report from the first expert is found to be inconsistent." (Commission's objection, 13.)

{¶ 12} " 'Permanent total disability' means the inability to perform sustained remunerative employment due to the allowed conditions in the claim." Ohio Adm.Code 4121-3-34(B)(1). The injured worker has the burden of proof "to establish a case of permanent and total disability" by a preponderance of the evidence. Ohio Adm.Code 4121-3-34(D)(3)(a).

{¶ 13} When an injured worker files an application for PTD, the application must be "accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent total disability compensation." Ohio Adm.Code 4121-3-34(C)(1). "If an application for permanent total disability compensation is filed that does not meet the filing requirements of this rule, or if proper medical evidence is not identified within the claim file, the application shall be dismissed without hearing." Ohio Adm.Code 4121-3-34(C)(1).

{¶ 14} Although relator did not file a psychologist's report with his PTD application, the commission did not dismiss the application without a hearing. Rather,

the commission processed the application under its rules. As such, whether or not the commission could have dismissed the PTD application ab initio is not an issue before this court. *See State ex rel. Lear Operations Corp. v. Crispen*, 10th Dist. No. 07AP-428, 2008-Ohio-5256, ¶ 43; *State ex rel. Koza v. Indus. Comm.*, 10th Dist. No. 02AP-903, 2003-Ohio-3434, ¶120.

{¶ 15} The commission properly processed relator's PTD application by scheduling relator for appropriate medical examinations for both the physical and psychological conditions in his industrial claims. *See* Ohio Adm.Code 4121-3-34(C)(5)(a)(iii) (following the filing of the application for PTD, the claims examiner must "[s]chedule appropriate medical examination(s) by physician(s) to be selected by the commission"). Moreover, the commission also acted within its authority when it rejected Dr's. Patel and Richetta's reports. *See State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 20-21 (1987) (the commission has the exclusive authority to evaluate the weight and credibility of the evidence); *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 449 (1994); *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994); *State ex rel. Ray v. Indus. Comm.*, 10th Dist. No. 03AP-1189, 2004-Ohio-6064, ¶ 3, citing *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993).

{¶ 16} While the commission appropriately exercised its authority to reject Dr's. Patel and Dr. Richetta's reports, the effect of the commission's action was to render the record devoid of any competent medical evidence regarding relator's allowed dysthymic disorder. In determining whether to award PTD compensation, the commission must consider every allowed condition. *State ex rel. Johnson v. Indus. Comm.*, 40 Ohio St.3d 339, 340 (1988). Although the commission asserts that it considered the psychological condition when it rejected Dr. Richetta's report, without medical evidence the commission could not have considered the effect the dysthymic disorder had on relator's ability to perform sustained remunerative employment. *See* Ohio Adm.Code 4121-3-34(D)(3)(i) (where a claim includes an allowed psychiatric condition "and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment").

{¶ 17} It is well-settled that the commission must rely upon medical evidence in order to determine disability, as neither the commission nor its hearing officers have medical expertise. *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 81 Ohio St.3d 56, 58 (1998). Because the commission rejected the medical evidence regarding the psychological condition, the extent of relator's dysthymic disorder has not been determined. Moreover, by concluding that relator was not permanently and totally disabled, the commission effectively determined that relator's dysthymic disorder was not work prohibitive, without any medical evidence to support such a determination. *See State ex rel. Yancey v. Firestone Tire & Rubber Co.*, 77 Ohio St.3d 367, 370-71 (1997), citing *Johnson* at 340 (finding that "[t]o deny PTD in the face of two allowed conditions, the commission must have some evidence that neither condition renders the claimant unfit for sustained remunerative employment").

{¶ 18} The commission asserts that the magistrate incorrectly found that the commission was obligated to schedule relator for another psychological examination after it rejected Dr. Richetta's report. We do not agree with the commission's interpretation of the magistrate's decision. *Compare Koza* at ¶ 107, 125 (where the commission rejected "all the psychological/psychiatric medical opinions before it," the magistrate held that "[t]he commission must schedule relator for a new medical examination when the report of its specialist is rejected and there is no other evidence that the commission finds persuasive").

{¶ 19} While the magistrate's decision indicates that the commission could have, and possibly should have, scheduled another psychological evaluation, it does not expressly state that the commission was obligated to do so here. The magistrate's decision is premised on the commission's failure to obtain additional medical evidence regarding relator's allowed psychological condition after it rejected all the medical evidence in the record relevant to the psychological condition.

{¶ 20} The commission must have medical evidence upon which it can rely to determine whether relator's dysthymic disorder, alone or in combination with the allowed physical conditions, renders relator permanently and totally disabled. Although the commission was not obligated to have Dr. Richetta reconsider his report, the commission was obligated to rely on medical evidence regarding each allowed condition. Accordingly,

the commission may either schedule relator for a new psychological examination or allow Dr. Richetta to reconsider his report, so long as the record ultimately contains competent medical evidence upon which the commission may rely to evaluate whether relator's allowed conditions render him permanently and totally disabled.

{¶ 21} 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 therein. In accordance with the magistrate's decision, we issue a writ of mandamus ordering the commission to vacate its order denying relator's application for PTD, to further process relator's PTD application consistent with this decision, and to enter a new order that adjudicates the PTD application.

Objection overruled;
writ granted.

TYACK and BROWN, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. William M. Hudson,	:	
Relator,	:	
v.	:	No. 12AP-362
Industrial Commission of Ohio, G. Robert Toney & Associates National Liquidators and Progress Wire Products, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on November 28, 2012

Alan I. Goodman, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

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

Findings of Fact:

{¶ 23} 1. Relator has two industrial claims arising from his employment with respondent Progress Wire Products, Inc., a state-fund employer.

{¶ 24} 2. Claim No. 95-498095 involves a September 8, 1995 injury that occurred while relator operated a fork lift. The claim is allowed for:

> Sprain lumbosacral; contusion left hip; aggravation of pre-existing degenerative disc disease L5-S1; aggravation of L5-S1 spondylolisthesis; disc protrusion; dysthymic.

{¶ 25} 3. Claim No. 06-886838 involves a December 14, 2006 injury that occurred while relator was employed as a laborer. The claim is allowed for:

> Cervical sprain; bilateral shoulder sprain; left knee contusion; thoracic sprain; left shoulder sprain.

{¶ 26} 4. On July 30, 2010, at relator's own request, he was examined by treating physician, M.P. Patel, M.D. In his three-page narrative report, Dr. Patel concludes:

> After reviewing history of accident, clinical course, diagnostic studies, subjective, objective findings, in my opinion, **Mr. Hudson with regards to claim numbers; 95-498095, 06-886838, with allowed conditions; lumbosacral sprain, contusion left hip, lumbar disc degen., protruding disc L5-S1, spondylolisthesis, neurotic depression, contusion scalp (head), sprain of neck, sprain thoracic spine, sprain shoulder/arm bilateral, contusion chest wall, contusion abdominal wall, contusion left knee is permanently and totally disabled from engaging into any gainful employment.**

(Emphasis sic.)

{¶ 27} 5. On November 16, 2010, relator filed an application for PTD compensation. In support, relator submitted the July 30, 2010 report of Dr. Patel.

{¶ 28} 6. On December 23, 2010, at the commission's request, relator was examined by psychologist Raymond D. Richetta, Ph.D. Dr. Richetta examined only for the dysthymic disorder allowed in claim number 95-498095.

> In his seven-page narrative report, Dr. Richetta concludes:
>
> His ability to remember and carry out more than very simple instruction is impaired. He has limited ability to tolerate

> even minor stress. He has mood swings with provocation or sometimes with no provocation whatsoever. He is unable to cope consistently with the general public. He would have difficulties coping with co-workers or supervisory criticism. He could not, from a psychological perspective alone, manage a sustained position of competitive remunerative employment.

{¶ 29} 7. On December 23, 2010, Dr. Richetta completed a form captioned "Occupational Activity Assessment Mental & Behavioral Examination ("OAA")." The OAA form asks the examining doctor to mark one of three pre-printed statements:

> This Injured Worker has no work limitations.
>
> This Injured Worker is incapable of work.
>
> This Injured Worker is capable of work with the limitation (s) / modification (s) noted below[.]

{¶ 30} On the form, Dr. Richetta marked the third pre-printed statement. In the space provided below the selected statement, Dr. Richetta wrote in his own hand:

> His ability to remember and carry out more than very simple instructions is impaired. He has limited ability to tolerate even minor stress. He has mood swings with provocation or sometimes with no provocation whatsoever. He is unable to cope consistently with the general public. He would have difficulty coping with co-workers or supervisory criticism. He could not, from a psychological perspective alone, manage sustained remunerative employment.

{¶ 31} 8. On December 27, 2010, at the commission's request, relator was examined by Elizabeth Mease, M.D. Dr. Mease examined only for the allowed physical conditions of the two industrial claims. In her seven-page narrative report, Dr. Mease concludes:

> It is my opinion that the combined whole person impairment for the allowed condition (s) in this/these claim (s) is: 24%
>
> * * *
>
> He is able to perform sedentary physical demand activities. He should be allowed to sit and stand as needed.

{¶ 32} 9. On December 31, 2010, Dr. Mease completed a physical strength rating form. On the form, Dr. Mease indicated by her mark that relator is capable of sedentary work.

{¶ 33} 10. Following a May 12, 2011 hearing, a staff hearing officer ("SHO") mailed an order on May 24, 2011 denying the PTD application. The SHO's order explains:

> Staff Hearing Officer finds that there is no competent persuasive medical evidence in support of this application.
>
> The 07/30/2010 report of the treating physician, Dr. M.P. Patel cannot be relied upon based on the following. In his report, Dr. Patel states that Mr. Hudson is incapable of engaging in gainful employment and is permanently and totally disabled. It is noted that Dr. Patel's report contains a number of diagnoses for which neither claim is allowed. The conclusion in the report of 07/30/2010 is in conflict with the C-140 medical section filled out by Dr. Patel on 09/21/2010. On that form Dr. Patel has restrictions noted that would not prevent Mr. Hudson from returning to work in a sedentary work capacity. This conflict in medical reports renders this report both unreliable and unpersuasive.
>
> Dr. Raymond Richetta performed a psychological evaluation of Mr. Hudson for the Bureau of Workers' Compensation.[1] In his report dated 12/23/2010, Dr. Richetta opined that Mr. Hudson could return to work with restrictions. He then outlines restrictions that appear to be work prohibitive. This inherent conflict in the report renders the report of Dr. Richetta unreliable and, therefore, unpersuasive. There has been no medical report filed on the Injured Worker's behalf in support of the psychological condition allowed in the 1995 claim being disabling.
>
> The only medical report on file containing no inherent and, as a result of same, discrediting opinions regarding the issue of allowance of the within application is the report of 12/27/2010 from Dr. Elizabeth Mease. Dr. Mease opined that her review of applicable medical documentation and her examination of Mr. Hudson caused her to conclude that Mr. Hudson was capable of working in a sedentary work capacity. This being the only persuasive medical proof on file is the report relied upon in denying the request for benefits [sic].

[1] As earlier noted, Dr. Richetta examined at the request of the commission.

> Staff Hearing Officer notes the following, Mr. Hudson is forty-nine years old. He is a high school graduate with electronics training obtained at a vocational school, in 1998. Mr. Hudson's work history has consisted of jobs as a laborer, copy repair technician and a forklift operator. Since his date of injury of 09/08/1995, Mr. Hudson's employment has consisted of less strenuous job activities. He last worked on the 12/14/2006 date of injury in claim 06-886838.
>
> An attempt at vocational rehabilitation was made in 2008. This was closed on 07/07/2008 due to Mr. Hudson's inability to find employment after performing an extensive thirteen week job search.
>
> A low back surgery was performed on 05/15/1997 with regard to the allowed conditions in the 1995 claim. This surgery included a complete L5/S1 laminectomy and discectomy with bilateral fusion, at that level, and the implantation of a titanium pedicle. An iliac bone graft and bone growth stimulator were also implanted then. There has been no surgery performed regarding the allowed conditions in the 2006 claim.
>
> The last psychological/psychiatric treatment received in the 1995 claim occurred on or about June 2010, with a fifteen minute medical check performed by Dr. Ranjan. The Injured Worker testified at hearing that it has been quite some time since he last received counseling.
>
> The vocational report of Barbara Burk, dated 04/13/2011 has been reviewed but is not relied upon as the report is based on medical repots that have been determined to be legally unreliable.
>
> Therefore, based on the above, the Staff Hearing Officer finds that Mr. Hudson has failed to meet his burden of proof in support of a compensable permanent and total disability request. Mr. Hudson is capable of engaging in sustained remunerative employment despite the allowed conditions in his claims. Further, Mr. Hudson is not permanently and totally disabled as a result of the allowed conditions in his claims.

{¶ 34} 11. On June 3, 2011, relator moved the three-member commission for reconsideration.

{¶ 35} 12. In an order mailed August 17, 2011, the commission unanimously denied relator's request for reconsideration.

{¶ 36} However, on a two-to-one vote, the commission sua sponte ordered that it would consider its continuing jurisdiction over the SHO's order. The commission's order states:

> Sua Sponte, the claim is referred to the Commission Level Hearing Section to be docketed before the members of the Industrial Commission. The issue to be heard is:
>
> [One] Continuing jurisdiction of the Commission pursuant to R.C. 4123.52
>
> [Two] Permanent Total Disability
>
> It is the finding of the Industrial Commission that evidence in file is of sufficient probative value to warrant adjudication of a probable clear mistake of law in the Staff Hearing Officer order, issued 05/24/2011.
>
> Specifically, it is arguable that the Staff Hearing Officer failed to sufficiently analyze the disability factors.
>
> Based on these findings, the Commission directs that the claim be set for hearing to determine whether the probable mistake of law as noted herein is sufficient for the Commission to invoke its continuing jurisdiction.
>
> In the interest of administrative economy and the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Commission will take the matter under advisement and proceed to hear the merits of the underlying issues. The Commission will thereafter issue an order on the matter of continuing jurisdiction pursuant to R.C. 4123.52. If authority to invoke continuing jurisdiction is found, the Commission will address the merits of the underlying issues.
>
> This order is issued pursuant to State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454; State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and in accordance with Ohio Admin.Code 4121-3-09(C) (9) (b) (iii).

> This portion of the order is interlocutory in nature and not subject to appeal pursuant to Ohio Admin.Code 4121-3-09 (C) (9) (b) (iii).

{¶ 37} 13. On September 8, 2011, the commission heard the matter of its continuing jurisdiction and the merits of the PTD application. On November 3, 2011, the commission mailed an order exercising continuing jurisdiction over the SHO's order and adjudicating the merits of the PTD application. The commission's order states:

> 09/08/2011 - After further review and discussion, it is the finding of the Industrial Commission that the Injured Worker has met his burden of proving that the Staff Hearing Officer order, issued 05/24/2011, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer did not address the Stephenson factors in the order issued 05/24/2011. Simply listing factors without analysis is legally deficient. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990, in order to correct this error.
>
> The Injured Worker's request for reconsideration, filed 06/03/2011, is granted and the Staff Hearing Officer order, issued 05/24/2011, is vacated.
>
> It is the further order of the Commission that the IC-2 Application for Compensation for Permanent Total Disability, filed 11/16/2010, is denied.
>
> The Injured Worker is a 50 year-old male with a high school education and additional training in electronics obtained from a vocational school. He has a work history that includes jobs as a laborer, copy machine repair technician and fork lift operator. The Injured Worker last worked in 2006. An attempt was made at vocational rehabilitation in 2008. His rehabilitation file was closed on 07/07/2008 due to the Injured Worker's inability to find employment after performing a thirteen week job search.
>
> The Injured Worker sustained two work-related injuries related to this application for permanent total benefits. The first injury occurred on 09/08/1995 when the Injured

Worker was getting off a forklift and hurt his hip and sprained his back. The claim was initially allowed for the conditions of SPRAIN LUMBOSACRAL and CONTUSION OF LEFT HIP. The claim was subsequently allowed for the conditions of AGGRAVATION OF PRE-EXISTING DEGENERATIVE DISC DISEASE L5-S1, AGGRAVATION OF L5-S1 SPONDYLOLISTHESIS, DISC PROTRUSION, and NEUROTIC DEPRESSION (DYSTYMIC DISORDER). The Injured Worker underwent a laminectomy and discectomy with a fusion in 2007. All other treatment in the claim has been conservative in nature.

The Injured Worker sustained a second industrial injury on 12/14/2006 when he was lifting a piece on a boat. The piece became dislodged causing the Injured Worker to fall. The claim was initially allowed for a CONCUSSION and SPRAIN LUMBOSACRAL. The claim was subsequently allowed for the conditions of SUBSTANTIAL AGGRAVATION OF LUMBAR DEGENRATIVE DISC DISEASE, SPONDY-LOLISTHESIS, and PROTRUDING L5-S1 DISC. All treatment in this claim was conservative.

On 12/27/2010, Elizabeth Mease, M.D., conducted an examination of the Injured Worker in regard to all his allowed physical conditions at the request of the Industrial Commission. Dr. Mease opined that the Injured Worker had reached maximum medical improvement and had a 24% permanent partial impairment based on all the physical conditions allowed in both of the Injured Worker's claims. Dr. Mease concluded that the Injured Worker physically retained the ability to perform sedentary work. The Commission finds the report of Dr. Mease to be persuasive.

On 12/23/2010, Raymond Richetta, Ph.D., conducted a psychological examination of the Injured Worker at the request of the Industrial Commission. Dr. Richetta opined that the Injured Worker, "could not, from a psychological perspective alone, manage a sustained position of competitive remunerative employment." Dr. Richetta then outlines restrictions that appear to be work prohibitive, checking the box labeled, "This Injured Worker is capable of work with the limitations / modifications noted below." This internal inconsistency in the report renders the report unreliable and, therefore, unpersuasive. See State ex rel. Eberhardt v. Flxible Corp. (1994), 70 Ohio St.3d 649. No report clarifying the ambiguity has been submitted, nor has

> the Injured Worker submitted any medical report that supports the finding that the Injured Worker is permanently and totally disabled based on the allowed psychological condition.
>
> Consequently, the Commission finds that the Injured Worker is physically capable of performing sedentary work, with no reliable medical evidence that documents a work restriction related to the allowed psychological condition.
>
> The Injured Worker is 50 years old. The Commission finds this age is a positive factor in regard to the Injured Worker's ability to resume sustained remunerative employment. He is young enough to learn the duties of entry-level, sedentary employment and could have many productive years of employment before he reached a typical retirement age. The Injured Worker's high school education with additional training is also considered to be a positive vocational factor. A high school education is sufficient to learn the duties necessary to perform entry-level, sedentary work. Entry-level, sedentary work typically only requires a brief demonstration of duties or a short period of instruction. The Injured Worker's work history is also a positive factor toward reemployment. His prior work history includes skilled work as a copy machine repair technician. The ability to perform skilled employment would demonstrate the Injured Worker's capacity to learn and perform high-level work functions. He would certainly possess the ability to learn entry-level work. Based on the Injured Worker's ability to perform sedentary work and his positive vocational factors, the Commission finds that the Injured Worker is capable of engaging in sustained remunerative employment.
>
> Therefore, the IC-2 Application for Compensation for Permanent Total Disability, filed 11/16/2010, is denied.

{¶ 38} 14. On April 23, 2012, relator, William M. Hudson, filed this mandamus action.

Conclusions of Law:

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

{¶ 40} At the outset, it can be noted that relator does not challenge the commission's exercise of continuing jurisdiction over the SHO's order. The commission

determined that the SHO's order contains a clear mistake of law with respect to consideration of the non-medical factors by "simply listing factors without analysis." Relator does not contend here that the SHO's order fails to contain the clear mistake of law that the commission found. Accordingly, the magistrate shall presume that the commission appropriately determined that the SHO's order contains a clear mistake of law upon which the exercise of continuing jurisdiction can be premised. Accordingly, it is the merit determination of the PTD application that is at issue here.

{¶ 41} The Supreme Court of Ohio has repeatedly held that, in determining whether a claimant is permanently and totally disabled, the commission must consider all the allowed conditions. *State ex rel. Johnson v. Indus. Comm.*, 40 Ohio St.3d 339 (1988). (The claimant's PTD application was supported by a report from psychiatrist, G.M. Sastry, who found claimant to be permanently totally disabled. The commission exclusively relied upon a report from Dr. Colquitt, who evaluated only the physical conditions.) *State ex rel. Cupp v. Indus. Comm.*, 58 Ohio St.3d 129 (1991). (The "numerous serious conditions" additionally allowed in the claim were not mentioned in the commission's order nor evaluated by Dr. McCloud upon whom the commission exclusively relied.) *State ex rel. Didiano v. Beshara*, 72 Ohio St.3d 255 (1995). (Claimant's "serious psychiatric condition," major depression, was not evaluated by the two doctors' reports upon whom the commission relied.) *State ex rel. Roy v. Indus. Comm.*, 74 Ohio St.3d 259 (1996). (Following the PTD hearing, claimant moved to amend his claim to include a psychiatric condition. The commission added the psychiatric claim allowance, but failed to consider it when it denied reconsideration.)

{¶ 42} Ohio Adm.Code 4121-3-34(C) provides the commission's rules for the processing of PTD applications. Ohio Adm.Code 4121-3-34(C)(5)(a)(iii) provides that the claims examiner shall schedule appropriate medical examinations of physicians to be selected by the commission.

{¶ 43} As earlier noted, the commission selected Dr. Richetta to examine relator for the allowed dysthymic disorder. In his narrative report, Dr. Richetta opined that relator "could not, from a psychological perspective alone, manage a sustained position of competitive remunerative employment." On the OAA form, Dr. Richetta offered a similarly worded medical opinion. However, on the OAA form, Dr. Richetta also

indicated by his mark: "This Injured Worker is capable of work within the limitation(s) / modification (s) noted below." Given his opinion in his narrative report and the OAA that relator, from a psychological perspective alone, cannot manage sustained remunerative employment, one would expect Dr. Richetta to indicate by his mark on the OAA: "This Injured Worker is incapable of work." Dr. Richetta's failure to so indicate on the OAA is arguably inconsistent with his opinion that relator cannot manage sustained remunerative employment.

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

{¶ 45} In its order citing *Eberhardt*, the commission determined that Dr. Richetta's reports contain an "internal inconsistency" and, on that basis, found Dr. Richetta's reports to be "unreliable and, therefore unpersuasive."

{¶ 46} Perhaps it could be argued that it would have been better had the commission given Dr. Richetta an opportunity to clarify his reports. But the commission was not required to do so. It is the commission that weighs the evidence before it. Clearly, it was within the commission's discretion to reject Dr. Richetta's reports for the reasons given by the commission.

{¶ 47} Given the commission's rejection of the reports of its own psychologist, there was no medical report upon which the commission could rely that evaluates the dysthymic disorder.

{¶ 48} Rather than request another evaluation from another psychologist or psychiatrist, the commission held:

> [T]he Commission finds that the Injured Worker is physically capable of performing sedentary work, with no reliable medical evidence that documents a work restriction related to the allowed psychological condition.

{¶ 49} That is, the commission failed to consider all the allowed conditions. While relator had the burden of proof to establish a case of PTD, Ohio Adm.Code 4121-3-

34(D)(3)(a), that burden of proof does not absolve the commission from its duty to schedule appropriate medical examinations under Ohio Adm.Code 4121-3-34(C).

{¶ 50} Where the commission, as here, finds no medical evidence upon which it can rely to meet its duty to consider all the allowed conditions of the claim, it cannot, in effect, refuse to obtain further medical evidence upon which it can rely to meet its duty to consider all the allowed conditions of the claim.

{¶ 51} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate that portion of its September 8, 2011 order that adjudicates the PTD application and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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