

[Cite as *State ex rel. Houston v. Indus. Comm.*, 2011-Ohio-3594.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jacqueline Houston,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-571
	:	
Mental Health Millcreek Children's Psych Hospital and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on July 21, 2011

Weisser and Wolf, and *Lisa M. Clark*, for relator.

Michael DeWine, Attorney General, and *Douglas R. Unver*,
for respondent Department of Mental Health Millcreek
Children's Psychiatric Hospital.

Michael DeWine, Attorney General, and *John R. Smart*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Jacqueline Houston, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding relator a two-percent increase in her percentage of

permanent partial disability ("PPD") compensation, and to order the commission to grant her a seven percent increase.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that Dr. Williams' report is some evidence upon which the commission could rely in awarding relator a two-percent increase in PPD, rather than the seven-percent increase sought by relator. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed an objection to the magistrate's decision. Relator makes two arguments in support of her objection. First, relator argues that the magistrate erred in interpreting Dr. Williams' report. Second, relator argues that the magistrate erred in determining that Dr. Williams' report was not equivocal and internally inconsistent. We disagree with both of relator's arguments.

{¶4} Contrary to relator's first argument, we agree with the magistrate's interpretation of Dr. Williams' report. The report indicates that Dr. Williams accepted Dr. Hawkins' clinical findings, but he opined that those findings were not related to the conditions in relator's claim. Consequently, Dr. Williams did not feel that there was a medical basis to support an increase in PPD compensation. Therefore, the magistrate did not err in her interpretation of Dr. Williams' report.

{¶5} Contrary to relator's second argument, we agree with the magistrate's finding that Dr. Williams' report is not equivocal or internally inconsistent. There is not an inconsistency between an opinion that Dr. Hawkins' clinical findings were not related to

the conditions in the claim, and therefore, do not support an increase in PPD, and an opinion recommending a new independent and unbiased psychological evaluation. Therefore, we reject relator's second argument.

{¶6} Finding relator's arguments unpersuasive, we overrule relator's objection.

{¶7} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, 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 deny relator's request for a writ of mandamus.

Objection overruled; writ of mandamus denied.

BRYANT, P.J., and CONNOR, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Jacqueline Houston,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-571
	:	
Mental Health Millcreek Children's	:	(REGULAR CALENDAR)
Psych Hospital and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 18, 2011

Weisser and Wolf, and Lisa M. Clark, for relator.

Michael DeWine, Attorney General, and Douglas R. Unver, for respondent Department of Mental Health Millcreek Children's Psychiatric Hospital.

Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} Relator, Jacqueline Houston, 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 awarded her a two percent increase in her

percentage of permanent partial disability ("PPD") compensation and ordering the commission to grant her a seven percent increase instead.

Findings of Fact:

{¶9} 1. Relator sustained a work-related injury on August 12, 1980 and her workers' compensation claim has been allowed for the following conditions:

Aggravation of pre-existing condition of low back, cervical injury; aggravation of pre-existing condition pelvis inflammatory disease; post traumatic stress disorder.

{¶10} 2. At some point, relator received an award of 23 percent PPD. (None of this documentation is contained in the stipulation of evidence before this court.)

{¶11} 3. Relator filed an application for an increase in her percentage of PPD with the Ohio Bureau of Workers' Compensation ("BWC") based upon a medical report from James R. Hawkins, M.D., her treating psychiatrist.

{¶12} 4. In his October 5, 2009 report, Dr. Hawkins opined that relator had a 30 percent whole person impairment. With regard to her functional capacities, Dr. Hawkins stated:

Ms. Houston is exhibiting some self care deficits and lacks motivation to take care of her home and chores in terms of cooking, cleaning and laundry. This represents a mild impairment of activities of daily living.

In terms of social functioning, she cannot get along with any of her family members. She has tried to work on several occasions and cannot get along with coworkers or supervisors. She is far too anxious and misinterprets many of their actions. She has drifted away from friends, and since her husband passed away, has essentially become a recluse. This represents a moderate impairment of social functioning.

In regards to concentration, Ms. Houston is very distractible, indecisive, and exhibits a short attention span. During our

interview, she required redirection on several occasions as well as multiple explanations of rather simple concepts.

Additionally, she has difficulty understanding and following through with even simple 1 and 2 step instructions. She is unable to develop a routine and could not work without supervision. This represents a moderate impairment of concentration.

In regards to work adaption, although aware of workplace rules and regulations, she would have difficulty working with coworkers and supervisors because of her indecisiveness and constant need for redirection. This represents a moderate impairment of work adaption.

Her diagnosis remains severe Post Traumatic Stress Disorder, chronic. I would assign a GAF of 55 based on severity of symptoms and multiple limitations.

{¶13} 5. A file review was conducted by Anthony Williams, M.D. In his January 5, 2010 report, Dr. Williams opined that relator should not be awarded an increase in her percentage of PPD and that the award should remain at 23 percent. Dr. Williams explained:

The [mechanism of injury] is that almost 30 years ago a psychiatric patient assaulted the [injured worker] resulting in multiple soft tissue injuries. Dr. J. Hawkin's [sic] 10/5/09 psych report lists a 30% whole person impairment solely as a result of the psych allowance. Dr. Hawkins explains that the [injured worker] cannot get along with family members or co-workers and has drifted from her friends since her husband died and has essentially become a recluse. He states she is easily distracted, is indecisive and has a short attention span. She has difficulty understanding and following through with simple instructions and is unable to develop a routine. His rating was based on these assessments.

The findings cited by Dr. Hawkins are unlikely related to or a result of the injury incurred in this claim 30 years ago and appear to be a result of unrelated psychosocial issues. It is recommended that an independent and unbiased psych C-92 evaluation be scheduled so that an accurate impairment

assessment and rating be conducted, afterwhich [sic] a combined effects review can be performed. At this point, [permanent partial impairment] remains unchanged at 23% whole person.

{¶14} 6. In an order mailed January 5, 2010, the BWC denied relator's request for an increase in her percentage of PPD as follows:

The administrator finds on 10/28/2009 the injured worker filed an application for the determination or subsequent determination (increase) of percentage of permanent partial disability as a result of his/her work-related injury/disease. Pursuant to the provisions of Ohio Revised Code 4123.57, Dr. WILLIAMS conducted a medical exam or review on behalf of the Ohio Bureau of Workers' Compensation (BWC) on 01/05/2010. Attached is a copy of the report resulting from the examination or review.

After review of the medical report, the administrator finds the evidence warrants the issuance of this tentative order, finding the injured worker is not entitled to an increase in percentage of permanent partial disability. Therefore, this order indicates no additional award.

{¶15} 7. Relator's appeal was heard before a district hearing officer ("DHO") on February 25, 2010. The DHO affirmed the order of the administrator and denied relator's request as follows:

The Application is denied. The District Hearing Officer finds from proof of record that the Injured Worker does not have a percentage of permanent partial disability above that which was previously awarded.

This order is based upon the report of Dr. Williams.

The District Hearing Officer notes that the medical report of Dr. Hawkins, dated 10/05/2009, was considered but found not to be persuasive.

{¶16} 8. Relator's further appeal was heard before a staff hearing officer ("SHO") on March 25, 2010. The SHO modified the prior DHO's order and granted relator a two percent increase as follows:

The Staff Hearing Officer order[s] that the District Hearing Officer's decision is modified to the extent that the Injured Worker is found to have a permanent partial disability of 25 percent, which is an increase of 2 percent, which entitles the Injured Worker to an additional award of compensation for a period of 4 weeks.

* * *

This order is based upon the report(s) of Dr(s). Williams (01/05/2010) and Hawkins (10/05/2009).

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

Conclusions of Law:

{¶18} Relator argues that the commission abused its discretion by relying on the medical report of Dr. Williams. Specifically, relator contends that Dr. Williams' report cannot constitute some evidence upon which the commission could rely because: (1) he did not provide any medical or clinical findings which were reasonably demonstrable, and (2) Dr. Williams' report is equivocal and internally inconsistent since he recommends an independent psychiatric evaluation followed by a combined effects review and yet he provides his opinion regarding her percentage of PPD anyway.

{¶19} The magistrate finds that the medical report of Dr. Williams does constitute some evidence upon which the commission could rely. Specifically, the magistrate finds: (1) that in reviewing the report of Dr. Hawkins, Dr. Williams found that Dr. Hawkins' findings are the result of unrelated psychosocial issues and are not attributable to the allowed conditions in relator's claim, and (2) that in opining that Dr. Hawkins' opinion was

based on unrelated psychosocial issues and not related to the allowed conditions in her claim, Dr. Williams' report is not inconsistent with his recommending an independent and unbiased psychological evaluation. Finding that Dr. Williams accepted the medical and clinical findings of Dr. Hawkins but not his opinion, the magistrate finds that Dr. Williams' report does constitute some evidence upon which the commission could rely as more fully explained below.

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

{¶21} Relator's first argument challenging Dr. Williams' report is that Dr. Williams failed to make any objective medical findings. Relator is correct to make this observation; however, Dr. Williams did not conduct an independent medical examination of relator and could not have made his own clinical findings. Instead, the BWC had requested that Dr. Williams conduct a medical review of relator's records and give his opinion.

{¶22} Pursuant to R.C. 4123.57(A), when an employee files an application for a subsequent determination of the percentage of the employee's permanent disability, the BWC "may require a medical examination or medical review of the employee." In *State ex rel. Dobbins v. Indus. Comm.*, 109 Ohio St.3d 235, 2006-Ohio-2286, the Supreme Court of Ohio stated that a doctor, as a nonexamining physician, is required to consider and accept the factual findings, as of the time of the examinations, of all the examiners who preceded him when performing a medical file review.

{¶23} In reviewing Dr. Williams' report, Dr. Williams identified the report of Dr. Hawkins and noted that Dr. Hawkins found a 30 percent whole person impairment. Thereafter, Dr. Williams noted the clinical findings made by Dr. Hawkins and explained that, in his opinion, these findings demonstrated that any additional psychiatric impairment relator was currently suffering was not due to the allowed condition in her claim but was, in fact, due to other circumstances. Specifically, Dr. Williams stated as follows:

* * * Dr. Hawkins explains that the [injured worker] cannot get along with family members or co-workers and has drifted from her friends since her husband died and has essentially become a recluse. He states she is easily distracted, is indecisive and has a short attention span. She has difficulty understanding and following through with simple instructions and is unable to develop a routine. His rating was based on these assessments.

The findings cited by Dr. Hawkins are unlikely related to or a result of the injury incurred in this claim 30 years ago and appear to be a result of unrelated psychosocial issues. * * *

{¶24} As required, Dr. Williams accepted the clinical findings of Dr. Hawkins; however, Dr. Williams came to a different conclusion. As such, relator's argument that Dr. Williams' report cannot constitute some evidence upon which the commission could properly rely because he failed to provide objective clinical findings lacks merit because, as a nonexamining physician conducting a file review, Dr. Williams complied with the law and accepted the clinical findings of Dr. Hawkins when he rendered his opinion.

{¶25} Relator also contends that the report of Dr. Williams is equivocal and internally inconsistent. Specifically, relator argues that because Dr. Williams recommended an independent psychological evaluation, it was inconsistent for him to also opine as to relator's actual percentage of impairment. This magistrate disagrees.

{¶26} It is undisputed that equivocal medical opinions cannot constitute "some evidence" upon which the commission can rely. *State ex rel. Eberhardt v. Flexible Corp.* (1994), 70 Ohio St.3d 649, 655. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.* Further, a physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445.

{¶27} In *Lopez*, the claimant, Valentin Lopez, suffered a low back injury while in the course of his employment. Ultimately, Lopez applied for permanent total disability ("PTD") compensation.

{¶28} Lopez was examined by Dr. Gary I. Katz who, upon physical examination, determined that the majority of physical findings were within normal limits.

{¶29} While Dr. Katz did opine that Lopez was not permanently and totally disabled and that he could return to his former position of employment, Dr. Katz opined that Lopez had a 50 percent permanent partial impairment. In his report, Dr. Katz had identified Lopez as a laborer, generally performing heavy duty work with frequent lifting of 35 pounds. Because Dr. Katz appeared confused regarding Lopez's actual job duties, the commission submitted an interoffice communication explaining that Lopez's foundry job required him to lift and carry between 25 and 50 pounds 70 times per day and between 51 and 100 pounds 30 times a day. Dr. Katz replied that his opinion was unchanged by this information.

{¶30} The commission relied on the report of Dr. Katz and concluded that Lopez could return to his former position of employment and denied his PTD compensation.

{¶31} Ultimately, the matter was heard before the Supreme Court of Ohio at which time Lopez argued that Dr. Katz's report was equivocal. Although the court determined that his report was not equivocal, the court determined that it was so internally inconsistent that it could not constitute "some evidence" supporting the commission's decision. Specifically, the court noted that despite normal physical findings, Dr. Katz assessed a high degree of impairment and yet concluded that Lopez could perform heavy duty foundry labor. The court was unable to reconcile these contradictions and determined that Dr. Katz's report did not constitute "some evidence" upon which the commission could rely to deny Lopez PTD compensation.

{¶32} The present case is not similar to the situation in *Lopez*. As noted earlier, Dr. Williams did not examine relator. Instead, Dr. Williams reviewed the report of Dr. Hawkins, which was the medical evidence relator submitted in support of her application for an increase in her percentage of PPD. Dr. Williams opined that Dr. Hawkins' report was not sufficient to support any increase because, in Dr. Williams' opinion, Dr. Hawkins' opinion that relator had an increase in impairment was not due to the allowed psychological condition in the claim, but was, instead, due to unrelated psychosocial issues. Because he found that the report of Dr. Hawkins did not support an increase in relator's percentage of PPD, Dr. Williams recommended that an independent and unbiased psychological evaluation be scheduled.

{¶33} The magistrate finds that Dr. Williams' report is neither equivocal nor internally inconsistent. Instead, after accepting Dr. Hawkins' objective findings, Dr. Williams concluded that any increase was not due to the allowed psychological conditions. Thereafter, Dr. Williams essentially noted that there was no evidence to

support an increase at this time; however, an independent and unbiased psychological evaluation might prove otherwise. This does not make his report internally inconsistent.

{¶34} At oral argument, counsel for relator indicated that Dr. Williams was neither a psychologist nor psychiatrist. Counsel believes that Dr. Williams recommended an independent psychological evaluation because he knew he was not qualified to do so.

{¶35} There is nothing in the stipulation to support or refute counsel's contention that Dr. Williams lacked any psychological training. Further, any argument as to his expertise should have been argued at the hearing before the SHO where the credibility and weight to be given the report could have been determined. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶36} In relying on the reports of Drs. Hawkins and Williams, the commission awarded relator a two percent increase in her impairment. In *State ex rel. Chrysler, LLC v. Indus. Comm.*, 10th Dist. No. 08AP-1005, 2010-Ohio-85, ¶40-41, this court noted:

This court has repeatedly held that it is within the commission's discretion to fashion a PPD award by choosing a percentage of impairment within the range of percentages contained in the medical reports upon which it has relied. *State ex rel. Core Molding Technologies v. Indus. Comm.*, Franklin App. No. 03AP-443, 2004-Ohio-2639; *State ex rel. Wrenn v. [The] Kroger Co.*, Franklin App. No. 03AP-14, 2003-Ohio-6470. In that situation, there is no requirement that the commission explain why it selected the percentage chosen.

Although this court's holdings in *Core Molding* and *Wrenn* were not discussed or cited, the Supreme Court of Ohio appears to have adopted this court's rationale in *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 97 Ohio St.3d 179, 777 N.E.2d 241, 2002-Ohio-5811, ¶9.

{¶37} As such, it was not an abuse of discretion for the commission to grant a two percent increase, an award which is in between the range of zero and seven percent.

{¶38} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in granting her a two percent increase in her percentage of PPD, and this court should deny relator's 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).