

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Ohio Department of Transportation,	:	
	:	
Relator,	:	No. 12AP-446
	:	
v.	:	(REGULAR CALENDAR)
	:	
Douglas E. Stegall and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on June 13, 2013

Buckingham, Doolittle & Burroughs, LLP, Marietta M. Pavlidis, and Denise A. Gary, for relator.

Philip J. Fulton Law Office, and Chelsea J. Fulton, for respondent Douglas E. Stegall.

Michael DeWine, Attorney General, and Andrew Alatis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

McCORMAC, J.

{¶ 1} Relator, Ohio Department of Transportation, filed this original action requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding respondent, Douglas E. Stegall, R.C. 4123.57(B) scheduled loss compensation for the loss of use of his right arm and to enter an order denying the compensation.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ because relator has not demonstrated that Dr. Douglas C. Gula's report was insufficient to support Dr. Gula's finding upon which the commission relied nor upon close examination was it internally inconsistent.

{¶ 3} No objections to the magistrate's decision have been filed.

{¶ 4} Finding no error of law or other defect in the magistrate's decision, we adopt the decision as our own including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ.

Writ of mandamus denied.

SADLER and CONNOR, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of the Ohio
Constitution, Article IV, Section 6(C).

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Ohio Department of Transportation,	:	
	:	
Relator,	:	No. 12AP-446
	:	
v.	:	(REGULAR CALENDAR)
	:	
Douglas E. Stegall and Industrial	:	
Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 28, 2013

Buckingham, Doolittle & Burroughs, LLP, Marietta M. Pavlidis, and Denise A. Gary, for relator.

Philip J. Fulton Law Office, and Chelsea J. Fulton, for respondent Douglas E. Stegall.

Michael DeWine, Attorney General, and Andrew Alatis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 5} In this original action, relator, Ohio Department of Transportation ("relator" or "ODOT") requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding to respondent

Douglas E. Stegall ("claimant") R.C. 4123.57(B) scheduled loss compensation for the loss of use of his right arm and to enter an order denying the compensation.

Findings of Fact:

{¶ 6} 1. On January 13, 2010, claimant injured his right upper extremity while employed as an ODOT highway technician. The industrial claim (No. 10-301792) is allowed for:

Sprain right upper arm; sprain right elbow; tear right biceps; reflex sympathetic dystrophy of the right upper extremity.

{¶ 7} 2. On February 12, 2010, claimant underwent an open repair of the biceps tendon that had ruptured at his right elbow.

{¶ 8} 3. On July 7, 2011, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), claimant was examined by Howard A. Pinsky, D.O. In his four-page narrative report, Dr. Pinsky wrote:

PHYSICAL EXAMINATION: * * * The right shoulder has no palpatory pain. Shoulder motion is limited in all planes with elevation to 80 degrees, abduction to 90 degrees, external rotation passively is 75 degrees and internal rotation passively at 70 degrees.

Examination of the right elbow reveals a lateral incision over the radial head and an anterior incision from biceps repair. The elbow lacks 90 degrees of complete extension and flexes to 45 degrees to 135-degree range of motion in flexion. Supination is nil and pronation is 45 degrees.

Examination of the right wrist reveals mild soft tissue swelling. Wrist dorsiflexion is to 40 degrees, palmar flexion is to 40 degrees, radial deviation is 5 degrees and ulnar deviation is 10 degrees. There is soft tissue swelling in the dorsum of the wrist and fingers and an inability to make a full fist is noted to the right hand. The skin is cool and dry. Distal pulses are 3+/4 to the right upper extremity.

* * *

His present condition is static and he has achieved no benefit from his past program of occupational and physical therapy. Unfortunately his motion is unchanged and his pain is well

managed on the present program under the direction of a pain management program.

* * *

I do not believe that the injured worker can return to his/her former position of employment. I believe that he has significant restriction and limitation in the use of the right arm.

* * *

Functional limitations solely due to the allowed physical conditions in the claim would limit the use of the right arm for any work type activities.

* * *

I believe that the injured worker has reached maximum medical improvement. I do not believe that he is a candidate for vocational rehabilitation.

* * *

I believe the current treatment to be a pain management approach to his chronic symptomatology from the reflex sympathetic dystrophy and it is necessary and appropriate for this to continue.

{¶ 9} 4. On September 15, 2011, claimant moved for R.C. 4123.57(B) scheduled loss compensation for the alleged loss of use of his right arm. In support, claimant submitted the July 7, 2011 report of Dr. Pinsky.

{¶ 10} 5. On November 1, 2011, at the bureau's request, claimant was examined by Douglas C. Gula, D.O. In his four-page narrative report, Dr. Gula states:

Current Symptoms: At the present time, he does notice significant limitation of motion as related to the right elbow with a constant pain. He does have pain that radiates at the right hand and fingers of the right upper extremity. Any type of activity does cause increased pain. He finds himself spending most of the day in a chair with a pillow with his elbow positioned approximately 90 degrees of flexion. His pain level is approximately 8 to 10/10 and variable in nature.

* * *

Physical Exam: Mr. Stegall is a healthy, 52-year-old male who is 5 feet 8 inches and weighs 225 pounds. On examination specifically of the right elbow, there is evidence of coldness as related to the right upper extremity. Hyperpathia and allodynia are noted. I can palpate the intact repaired biceps tendon and note the healed surgical scars.

The range of motion of the right elbow reveals 100 degrees of flexion to 90 degrees of flexion (a range of motion of 10 degrees). Supination is 10 degrees and pronation is 20 degrees. Marked weakness as related to the right hand is noted. In addition, there is a significant limitation of motion as related to the right shoulder with diffuse discomfort appreciated anteriorly and laterally in the subacromial region.

* * *

QUESTIONS

The injured worker has filed an application for loss of use. Please address the questions below.

1) In your medical opinion, has the allowed injury resulted in total, permanent loss of use to such a degree that the affected body part is useless for all practical purposes, that is, the body part though present is not capable of performing most of the functions for which it commonly performs as a result of the allowed conditions in this claim?

The injured worker does indeed have evidence of an inability to utilize his right hand in a normal fashion based upon a marked limitation of motion as related to digits of the right hand. Significant weakness with regards to grip and pinch are noted. His range of motion of the elbow is 90 degrees to 100 degrees of flexion. In addition, there is evidence of hyperpathia and allodynia as related to the right upper extremity. There is marked weakness of function as related to the elbow and the shoulder.

Thus, based upon the medical records reviewed and the Independent Medical Evaluation, the allowed injury has

[resulted] in total permanent loss of use to such degree that the affected party is useless for all practical purposes.

2) Your report should identify and discuss your physical findings, including but not limited to range of motion, findings of contracture due to ankylosis, and other physical findings which establish the residual functional capacity of the affected body part and limitations of the function of the body preventing it from functioning as would be expected.

As mentioned previously, there is an extreme limitation of motion as related to the right elbow. Based upon the physical examination today, the elbow is practically useless for any type of normal activities of daily living, let alone the ability to return to gainful employment. Thus, in all practical purposes, loss of use is noted as related to the right elbow and upper extremity. In addition, there is marked limitation of function as related to the right hand with a severe limitation of motion and marked weakness with regards to any attempt at grip and pinch strength.

Thus, based upon this information, the injured worker has sustained a loss of use as related to the right upper extremity. This is based upon loss of motion, weakness, the presence of reflex sympathetic dystrophy, and all other abnormalities that affect the right upper extremity.

{¶ 11} 6. On November 21, 2011, the bureau mailed an order awarding R.C. 4123.57(B) compensation for loss of use of the right arm. The order relied exclusively upon the report of Dr. Gula.

{¶ 12} 7. Relator administratively appealed the bureau's order.

{¶ 13} 8. On January 12, 2012, at relator's request, claimant was examined by Kevin L. Trangle, M.D. In his six-page narrative report, Dr. Trangle states:

Mr. Stegall does demonstrate some movement of his shoulder, and in fact, he uses these movements in order to get his shirt on and off and his clothes on and off.

He has no ostensible use of his right elbow or wrist. He does have some minimal movement of his hands and he has the ability to make a partial fist which he can create not to the point of actually approximating the digits to the palm but to

the point he is able to move from, in essence, normal extension to being able to hold a racquetball-sized circle object.

Clearly, he has not lost the use of his entire right upper extremity. He has quite diminished use from his elbow on down.

I do believe, however, that with appropriate adaptive evaluation and possible device(s), he may regain even more function in his right upper extremity. Based upon this evaluation and the available information, it would be my recommendation that he see an Occupational Therapist specifically for the purposes of evaluating him for adaptive devices such as braces and grippers among other apparatuses that he could attach to his right arm and hopefully gain some more useful function than he has demonstrated to date.

At this point in time, however, the examination and presented information do indicate he has movement of his shoulder to the point it is useful for him in terms of dressing and undressing. He also needs to be evaluated in terms of adaptive technology and devices inasmuch as it is seemingly probable that he will be able to obtain some type of device that will allow him more function of his right upper extremity.

As such, based upon this information, I do not believe that at this point in time he has lost the use of his right arm for all intents and purposes. It is premature to come to that conclusion based upon the above analysis.

{¶ 14} 9. Following a January 19, 2012 hearing, a district hearing officer ("DHO") issued an order affirming the bureau's order. The DHO's order explains:

It is the order of the District Hearing Officer that the Injured Worker has sustained a total loss of use of the right arm. Accordingly, the District Hearing Officer orders that the Injured Worker be paid permanent partial compensation for 225 weeks.

The District Hearing Officer relies upon the medical examination report from Douglas Gula, D.O., dated 11/01/2011. In this report, Dr. Gula concludes that the

Injured Worker's right arm is useless for all practical purposes.

{¶ 15} 10. Relator administratively appealed the DHO's order of January 19, 2012.

{¶ 16} 11. Following a March 2, 2012 hearing, a staff hearing officer ("SHO") issued an order that affirms the DHO's order. The SHO's order explains:

The Injured Worker is awarded compensation under Revised Code 4123.57 for total loss of use of the right arm. The Injured Worker is awarded 225 weeks of compensation.

The Staff Hearing Officer relies on the Bureau of Workers' Compensation independent medical examination of Dr. Gula dated 11/01/2011 in rendering this decision. Dr. Gula examined the Injured Worker and concluded [that] he had a permanent total loss of use of his right arm in that the same was useless for all practical purposes.

{¶ 17} 12. On March 28, 2012, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of March 2, 2012.

{¶ 18} 13. On May 23, 2012, relator, Ohio Department of Transportation, filed this mandamus action.

Conclusions of Law:

{¶ 19} The main issue is whether the report of Dr. Gula, upon which the commission exclusively relied, provides the some evidence to support the award for the total and permanent loss of use of the right arm.

{¶ 20} Finding that Dr. Gula's report does provide the some evidence to support the award, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 21} R.C. 4123.57(B) provides for scheduled loss compensation for enumerated body parts. It provides as follows:

For the loss of a hand, one hundred seventy-five weeks.

For the loss of an arm, two hundred twenty-five weeks.

{¶ 22} Under R.C. 4123.57(B), 225 weeks of compensation for an arm necessarily includes compensation for the hand of the same limb. *See State ex rel. Cook v. Zimpher*, 17 Ohio St.3d 236 (1985) (loss of a leg includes loss of the foot; schedule of awards

regarding the lower limb are cumulative and not consecutive); *State ex rel. Sears Roebuck & Co. v. Campos*, 10th Dist. No. 04AP-1266, 2005-Ohio-5700, ¶ 20 (R.C. 4123.57(B) claimant was awarded 225 weeks of compensation for loss of his right hand and arm); *State ex rel. Bradford v. Indus. Comm.*, 10th Dist. No. 06AP-125, 2007-Ohio-424, ¶ 39 (in the context of R.C. 4123.57(B), an arm includes the hand of that arm; citing *Cook*).

{¶ 23} In *State ex rel. Alcoa Bldg. Products v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166, at ¶10, the court succinctly set forth the historical development of scheduled awards for loss of use under R.C. 4123.57(B). The *Alcoa* court states:

Scheduled awards pursuant to R.C. 4123.57(B) compensate for the "loss" of a body member and were originally confined to amputations, with the obvious exceptions of hearing and sight. In the 1970's, two cases--*State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64, * * * and *State ex rel. Walker v. Indus. Comm.* (1979), 58 Ohio St.2d 402, * * *-- construed "loss," as similarly used in R.C. 4123.58, to include loss of use without severance. *Gassmann* and *Walker* both involved paraplegics. In sustaining each of their scheduled loss awards, we reasoned that "[f]or all practical purposes, relator has lost his legs to the same effect and extent as if they had been amputated or otherwise physically removed." *Gassmann*, 41 Ohio St.2d at 67 * * *; *Walker*, 58 Ohio St.2d at 403-404[.] * * *

{¶ 24} In *Alcoa*, the claimant sustained a left arm amputation just below the elbow. Continuing hypersensitivity at the amputation site prevented the claimant from ever wearing a prosthesis. Consequently, the claimant moved for a scheduled-loss award for loss of use of his left arm.

{¶ 25} *Alcoa* established through a videotape that the claimant could use his remaining left arm to push open a car door and to tuck paper under the arm. Nevertheless, the commission granted the claimant an award for the loss of use of his left arm.

{¶ 26} This court denied *Alcoa's* complaint for a writ of mandamus and *Alcoa* appealed as of right to the Supreme Court of Ohio.

{¶ 27} Affirming this court's judgment and upholding the commission's award, the *Alcoa* court explained, at ¶10-15:

Alcoa urges the most literal interpretation of this rationale and argues that because claimant's arm possesses some residual utility, the standard has not been met. The court of appeals, on the other hand, focused on the opening four words, "for all practical purposes." Using this interpretation, the court of appeals found that some evidence supported the commission's award and upheld it. For the reasons to follow, we affirm that judgment.

Alcoa's interpretation is unworkable because it is impossible to satisfy. *Walker* and *Gassmann* are unequivocal in their desire to extend scheduled loss benefits beyond amputation, yet under Alcoa's interpretation, neither of those claimants would have prevailed. As the court of appeals observed, the ability to use lifeless legs as a lap upon which to rest a book is a function unavailable to one who has had both legs removed, and under an absolute equivalency standard would preclude an award. And this will always be the case in a nonseverance situation. If nothing else, the presence of an otherwise useless limb still acts as a counterweight--and hence an aid to balance--that an amputee lacks. Alcoa's interpretation would foreclose benefits to the claimant who can raise a mangled arm sufficiently to gesture or point. It would preclude an award to someone with the hand strength to hold a pack of cards or a can of soda, and it would bar--as here--scheduled loss compensation to one with a limb segment of sufficient length to push a car door or tuck a newspaper. Surely, this could not have been the intent of the General Assembly in promulgating R.C. 4123.57(B) or of *Gassmann* and *Walker*.

Pennsylvania defines "loss of use" much as the court of appeals did in the present case, and the observations of its judiciary assist us here. In that state, a scheduled loss award requires the claimant to demonstrate either that the specific bodily member was amputated or that the claimant suffered the permanent loss of use of the injured bodily member for all practical intents and purposes. Discussing that standard, one court has written:

"Generally, the 'all practical intents and purpose' test requires a more crippling injury than the 'industrial use' test in order to bring the case under section 306(c), supra. However, it is not necessary that the injured member of the claimant be of absolutely no use in order for him to have lost the use of it for all practical intents and purposes." *Curran v.*

Walter E. Knipe & Sons, Inc. (1958), 185 Pa.Super. 540, 547, 138 A.2d 251.

{¶ 28} Relying upon *Alcoa*, this court, in [*State ex rel.*] *Richardson v. Indus. Comm.*, Franklin App. No. 04AP-724, 2005-Ohio-2388, explained the standard that *Alcoa* clarified:

[W]hen a claimant seeks a scheduled loss award, the proper inquiry is whether, taking into account both medical findings and real functional capacity, the body part for which the scheduled loss award is sought is, for all practical purposes, unusable to the same extent as if it had been amputated or otherwise physically removed.

Id. at ¶ 7.

{¶ 29} According to relator, the report of Dr. Gula is fatally flawed in two alleged respects: (1) Dr. Gula focused only upon claimant's right elbow, ignoring the shoulder, wrist, hand, and fingers, and (2) the report is internally inconsistent and equivocal.

{¶ 30} The magistrate finds: (1) Dr. Gula examined the entire right arm, and (2) the report is not internally inconsistent. Accordingly, the writ of mandamus must be denied, as more fully explained below.

The First Issue

{¶ 31} Turning to the first issue, focusing exclusively upon the paragraph of Dr. Gula's report captioned "Physical Exam," relator asserts that Dr. Gula failed to assess the entire right arm. Relator notes particularly that, in the paragraph, Dr. Gula states "[o]n examination specifically of the right elbow." Dr. Gula finds that the right elbow is limited to 10 degrees range of motion. Relator concedes that Dr. Gula "mentioned that there was weakness in Stegall's right hand," but then adds "but he did not give any specific findings regarding the extent of the weakness or what grade of weakness that Stegall had." (Relator's brief at 8.) Relator further concedes that, in the paragraph, Dr. Gula finds a "significant limitation of motion as related to the right shoulder," but then adds that Dr. Gula "never gave any specific examination findings for the right shoulder." (Relator's brief at 8.)

{¶ 32} Relator's argument might be persuasive if Dr. Gula's reported clinical findings are restricted to what can be found in the paragraph captioned "Physical Exam." But that is clearly not the case in reviewing Dr. Gula's report.

{¶ 33} Clearly, significant clinical findings are reported in other portions of Dr. Gulas report, most notably in his answers to the two questions posed.

{¶ 34} For example, Dr. Gula finds "marked limitation of motion as related to digits of the right hand." He notes "[s]ignificant weakness with regards to grip and pinch." The shoulder and the elbow are found to have "marked weakness of function."

{¶ 35} In his answer to the second question in his report, Dr. Gula finds "marked limitation of function as related to the right hand," and he also finds "severe limitation of motion and marked weakness with regards to any attempt at grip and pinch strength."

{¶ 36} Contrary to relator's assertion here, a careful reading of Dr. Gula's report clearly shows that Dr. Gula assessed the entire right arm. Accordingly, that challenge to Dr. Gula's report lacks merit.

The Second Issue

{¶ 37} Turning to the second issue, 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.*

{¶ 38} 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). However, a court will not second-guess a doctor's medical expertise to support a claim of internal inconsistency. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484 (1997).

{¶ 39} Citing *Eberhardt*, relator contends that Dr. Gula's report "is not consistent." (Relator's brief at 10.) Relator endeavors to explain the alleged inconsistency:

How Dr. Gula makes the "jump" from finding that the **right elbow** is "practically useless" to the **entire right upper extremity** is not at all clear especially considering the significant lack of examination findings in regard to the other parts of Stegall's right arm.

(Emphasis sic.) (Relator's brief at 11.)

{¶ 40} Relator's second argument has already been addressed and shown to lack merit. There is no inconsistency as alleged by relator.

{¶ 41} Based upon the forgoing analysis, the magistrate concludes that the report of Dr. Gula provides the some evidence to support the commission's award of scheduled loss compensation.

{¶ 42} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
KENNETH W. MACKE

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).