

{¶ 2} This court referred the matter to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶ 3} Relator has not specifically identified his objection to the magistrate's decision. Nevertheless, we have reviewed relator's brief, and it appears that his objection is to the magistrate's conclusion of law as follows:

The Magistrate erred as a matter of law, by upholding the Commission's denial of Mr. Reedy's PTD application when there was no medical evidence to support the Commission's decision.

No party has filed objections to the magistrate's findings of fact.

{¶ 4} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matter "to ascertain that the magistrate has * * * appropriately applied the law."

{¶ 5} In order to be entitled to a writ of mandamus, a relator must establish "[1] a clear legal right to the requested relief, [2] a clear legal duty on the part of the commission to provide the relief, and [3] the lack of an adequate remedy in the ordinary course of the law." *State ex rel. General Motors Corp. v. Indus. Comm.*, 117 Ohio St.3d 480, 2008-Ohio-1593, ¶9. Further, "[s]uch a clear legal right exists when 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. Brown v. Indus. Comm.* (1983), 13 Ohio App.3d 178. Therefore, "when the record contains some evidence to support the commission's finding, there has been no abuse of discretion by the commission, and mandamus will not lie." *Id.*

{¶ 6} In his objection, relator argues that the magistrate erred in recommending that this court deny relator's request for a writ of mandamus because Dr. Koppenhoefer's medical report, solely relied upon by the commission in denying relator's PTD application, (1) did not take into account all of relator's allowed conditions, and/or (2) is ambiguous.

{¶ 7} In support of this argument, relator points to two specific references from Dr. Koppenhoefer's medical report: "severe degenerative changes and scoliosis unassociated with the injury in question," and "[w]hen taking into effect the allowed conditions in this claim, [relator] would be limited to sedentary work activities." (See July 14, 2009 report of Dr. Koppenhoefer.) Relator believes that, because Dr. Koppenhoefer mentioned "severe degenerative changes and scoliosis *unassociated* with the injury in question" (emphasis added), he did not take relator's allowed conditions of degenerative disc disease L4-5, L5-S1 into consideration when concluding that relator could perform "sedentary work activities." (Emphasis added.) In addition, relator contends that Dr. Koppenhoefer's statements are ambiguous because it is unclear whether he is considering "allowed or disallowed" conditions in determining that relator is medically capable of sedentary work. (Objection, 7.) Therefore, relator argues that Dr. Koppenhoefer's medical report cannot constitute "some evidence." (Objection, 6.)

{¶ 8} In response, the commission contends that there is no evidence that Dr. Koppenhoefer failed to consider all of relator's allowed conditions in determining that relator can perform sedentary work activities because the medical

report accurately lists all of the allowed conditions in relator's claim. (June 13, 2011 Memorandum in Support of Magistrate's Decision at 1-2.)

{¶ 9} It is well-settled law that, "[i]n determining whether to award permanent total disability compensation, the commission must consider every allowed condition." *State ex. rel. Johnson v. Indus. Comm.* (1988), 40 Ohio St.3d 339, see also *State ex rel. Roy v. Indus. Comm.*, 74 Ohio St.3d 259, 1996-Ohio-141. In the present matter, relator's claim has been allowed for (1) aggravation of a pre-existing low back injury affecting left hip and leg; (2) lumbar disc disease; (3) stenosis L5; and (4) degenerative disc disease L4-5, L5-S1. In addition, relator's claim has been disallowed for (1) lumbar scoliosis and (2) degenerative disc disease L2-3, L3-4. (See Staff Hearing Officer's Order mailed October 16, 2009.)

{¶ 10} Here, the record indicates that Dr. Koppenhoefer's medical report does, in fact, list each of relator's allowed claims, including degenerative disc disease L4-5, L5-S1. (See July 14, 2009 report of Dr. Koppenhoefer, 1.) In addition, Dr. Koppenhoefer noted regarding relator's physical exam that "[m]otion involving the lumbosacral spine showed no motion from L4 through S1." (See July 14, 2009 report of Dr. Koppenhoefer, 3.) Further, Dr. Koppenhoefer also read and reviewed several medical records relating to the allowed claim of degenerative disc disease L4-5, L5-S1, including Dr. Kendrick's operative note from October 3, 1978, stating that a "laminotomy at L4-5 and L5-S1 with excision of an extruded L5-S1 disc was performed," and Dr. Kendrick's operative note from November 11, 1982, stating that "an L4-S1 posterior lateral fusion was done." Clearly, relator's

allowed claims of degenerative disc disease L4-5, L5-S1 were mentioned in these medical records.

{¶ 11} Therefore, we find that Dr. Koppenhoefer's medical report constitutes "some evidence" upon which the commission could properly deny relator's PTD application because it unambiguously demonstrates that he considered all "allowed for" claims, including degenerative disc disease L4-5, L5-S1, in opining that relator could perform sedentary work activities.

{¶ 12} Following an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. As such, relator's objection to the magistrate's conclusions of law is overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Therefore, we deny the requested writ of mandamus.

Objection overruled; writ denied.

FRENCH and KLATT, JJ., concur.

APPENDIX

State of Ohio ex rel. Everett F. Reedy, :
 Relator, :
 v. ; No. 10AP-822
 Industrial Commission of Ohio and : (REGULAR CALENDAR)
 Martin Marietta Energy Systems, Inc., :
 Respondents. :

MAGISTRATE'S DECISION

Rendered on May 10, 2011

Philip J. Fulton Law Office, and Ross R. Fulton, for relator.

Michael DeWine, Attorney General, and Robert Eskridge, III, for respondent Industrial Commission of Ohio.

Vorys, Sater, Seymour & Pease LLP, and Robert E. Tait, for respondent Martin Marietta Energy Systems, Inc.

IN MANDAMUS

{¶ 13} In this original action, relator, Everett F. Reedy, 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:

{¶ 14} 1. On January 11, 1978, relator injured his lower back while employed as a welder for respondent Martin Marietta Energy Systems, Inc., a state fund employer.

{¶ 15} 2. The industrial claim (no. 78-3023) is allowed for:

Aggravation of a pre-existing low back injury effecting left hip and leg; lumbar disc disease; stenosis L5; degenerative disc disease L4-5, L5-S1.

3. The industrial claim is disallowed for:

Lumbar scoliosis; degenerative disc disease L2-3, L3-4.

{¶ 16} 4. On April 14, 2008, relator filed an application for PTD compensation.

{¶ 17} 5. On July 13, 2009, at the commission's request, relator was examined by Ron M. Koppenhoefer, M.D., who thereafter issued a four-page narrative report dated July 14, 2009.

{¶ 18} On the first page of the report, Dr. Koppenhoefer correctly lists the allowed conditions of the claim. However, Dr. Koppenhoefer does not indicate that the claim is disallowed for certain conditions.

{¶ 19} Following a recitation of the medical history, Dr. Koppenhoefer states:

Physical Examination Focused to the Allowed Condition(s): His physical examination revealed his height to be 5 foot 11 inches, weight 127 pounds. On inspection, he was noted to have a well healed surgical scar in the lumbar area. The scar was slightly tender to palpation with associated fibrosis noted. Marked scoliosis was noted with convexity to the right involving the lower thoracic and upper thoracic area. His gait

was abnormal. He kept his trunk in the flexed position and stride length was decreased.

Motion involving the cervical spine showed some restriction secondary to the aging process. Spurling's sign was unremarkable. Examination of the upper extremity joints revealed full passive range. Actively, both glenohumeral joints showed active abduction and forward flexion limited to 140 degrees. Neurological exam of the upper extremities was within normal limits in regards to reflexes, manual muscle testing and sensation.

Motion involving the lumbosacral spine showed no motion from L4 through S1. Forward flexion was limited to 30 degrees, extension 5 degrees, right/left lateral bending 5 degrees because of pain. Motion was done on an active basis. Range of motion of the hip joints was full. Examination of the knees and ankles was unremarkable. Straight leg raising was unremarkable. Neurological exam of the lower extremities revealed reflexes to be symmetric, sensation was grossly intact to fine touch, manual muscle testing revealed normal strength and was reliable. No fasciculations were noted. Muscle tone was normal. Thigh/calf circumferential measurements were symmetric.

Cardiovascular exam revealed [sic] apical rate to be 85, rhythm was regular, no extra sounds or murmurs were heard. Peripheral pulses were present and symmetric. Skin temperature was symmetric.

His lungs were clear to A&P.

Review of Medical Records Provided: All of the medical records submitted were read and reviewed and consisted of the following:

1. Examination Worksheet and Statement of Facts.
2. Application for Permanent Total Disability.
3. Dr. Otten's To Whom It May Concern letter dated February 12, 2008.
4. Dr. Kendrick's operative note dated October 3, 1978 where a laminotomy at L4-5 and L5-S1 with excision of an extruded L5-S1 disc was performed. His operative report of November 11, 1982 which

indicated an L4-S1 posterior lateral fusion was done.

5. Dr. Lundeen Sr.'s exam dated August 14, 2005.
6. Dr. Harris' CT scan dated May 4, 2006.
7. Dr. DelGrosso's X-ray report of the lumbar spine interpreted as showing severe degenerative changes of the lumbar spine with rotoscoliosis concave to the left and degenerative disc space loss at all levels.
8. Numerous past medical records.

Discussion: Based on my examination and review of the medical records, I believe I can answer the questions posed in the cover letter.

Based on my examination, I believe Mr. Reedy has reached maximum medical improvement for the allowed conditions in this claim. My opinion is based on my history and physical exam as well as review of the diagnostic studies.

When using the AMA Guides Fifth Edition, Mr. Reedy would have a 20% impairment to the body as a whole when using DRE Lumbar Category Table 15-3. I realize he has had two surgeries but the range of motion table cannot be used because of the severe degenerative changes and scoliosis unassociated with the injury in question.

When taking into effect the allowed conditions in this claim, Mr. Reedy would be limited to sedentary work activities.

{¶ 20} 6. On July 13, 2009, Dr. Koppenhoefer also completed a physical strength rating form. On the form, Dr. Koppenhoefer indicated by his mark that relator is capable of "sedentary work."

{¶ 21} 7. Following an October 13, 2009 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. In determining residual functional capacity to be at the sedentary work level (see Ohio Adm.Code 4121-3-34(B)(4)), the SHO relied exclusively upon the reports of Dr. Koppenhoefer.

{¶ 22} 8. On August 30, 2010, relator, Everett F. Reedy, filed this mandamus action.

Conclusions of Law:

{¶ 23} The sole issue is whether Dr. Koppenhoefer considered all the allowed conditions in the claim in rendering his opinion that the industrial injury permits sedentary employment.

{¶ 24} Finding that Dr. Koppenhoefer did consider all the allowed conditions in the claim, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 25} It is well settled that when adjudicating an application for PTD compensation, the commission must consider all of the allowed conditions of the claim. *State ex rel. Johnson v. Indus. Comm.* (1988), 40 Ohio St.3d 339; *State ex rel. Cupp v. Indus. Comm.* (1991), 58 Ohio St.3d 129; *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17; *State ex rel. Didiano v. Beshara*, 72 Ohio St.3d 255, 1995-Ohio-190; *State ex rel. Roy v. Indus. Comm.*, 74 Ohio St.3d 259, 1996-Ohio-141.

{¶ 26} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.*

{¶ 27} 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.*, 69 Ohio St.3d 445, 449, 1994-Ohio-458; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582, 585.

{¶ 28} However, in mandamus, courts will not second-guess the medical expertise of the doctor whose report is under review. *State ex rel. Young v. Indus. Comm.*, 79 Ohio St.3d 484, 1997-Ohio-162.

{¶ 29} The evaluation of the weight and credibility of the evidence before it rests exclusively with the commission. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31, 33, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

{¶ 30} " 'In general, the court does not 'second guess' medical opinions from medical experts and will remove a medical opinion from evidentiary consideration as having no value only when the report is patently illogical or contradictory * * *.' " *State ex rel. Certified Oil Corp. v. Mabe*, 10th Dist. No. 06AP-835, 2007-Ohio-3877, ¶4, quoting *State ex rel. Tharp v. Consol. Metal Prods.*, 10th Dist. No. 03AP-124, 2003-Ohio-6355, ¶67.

{¶ 31} According to relator, notwithstanding that Dr. Koppenhoefer correctly lists all the allowed conditions of the claim at the beginning of his report, the following paragraph of the report indicates that he did not consider the allowed condition "degenerative disc disease L4-5, L5-S1":

When using the AMA Guides Fifth Edition, Mr. Reedy would have a 20% impairment to the body as a whole when using DRE Lumbar Category Table 15-3. I realize he has had two surgeries but the range of motion table cannot be used because of the severe degenerative changes and scoliosis unassociated with the injury in question.

{¶ 32} According to relator, because Dr. Koppenhoefer refers to "severe degenerative changes" as being "unassociated with the injury in question" he thereby indicates or suggests that the severe degenerative changes allowed in the

claim were not considered in rendering his opinion that the industrial injury permits sedentary work. Relator further contends that, at best, the report is ambiguous as to whether Dr. Koppenhoefer eliminated consideration of the allowed condition "degenerative disc disease L4-5, L5-S1."

{¶ 33} The magistrate disagrees with relator's proposition that the report may even be viewed as fatally ambiguous as to whether all allowed conditions of the claim were considered.

{¶ 34} There is no true ambiguity in the report. The claim is allowed for what can be called "severe degenerative changes" and it is disallowed for what can be called "severe degenerative changes." Moreover, as indicated in Dr. Koppenhoefer's report, Dr. DeGrosso's X-ray report of the lumbar spine indicates "degenerative disc space loss at all levels." Thus, Dr. Koppenhoefer was well aware that relator has degenerative changes at levels other than L4-5 and L5-S1 that are not allowed in the claim.

{¶ 35} Significantly, the reference to "severe degenerative changes * * * unassociated with the injury" appears with the explanation as to why the range of motion table cannot be used in estimating a percentage of impairment. This explanation makes perfect sense. That is, with severe degenerative changes in the lumbar area – some allowed and others not allowed – range of motion cannot provide an accurate indicator of impairment related only to the allowed conditions. Rather than presenting an ambiguity, the paragraph at issue actually provides Dr. Koppenhoefer's medical insight into the task of properly evaluating the allowed conditions of the claim.

{¶ 36} Based upon the above analysis, the magistrate concludes that Dr. Koppenhoefer considered all the allowed conditions in the claim in rendering his opinion that the industrial injury permits sedentary work. Also, there is no true ambiguity in the report as to whether all allowed conditions were considered.

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

/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).