From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: **Can a determination that a claimant's psychological condition has reached maximum medical improvement be deemed to be "premature" when additional treatment and medication has been approved by the employer?**

A finding of "maximum medical improvement" (MMI) is rarely a static determination, as the claimant will often seek subsequent treatment or request additional conditions be added to her claim. The question, in evaluating medical or psychological reports, is whether they can be said to constitute "some evidence" upon which a determination of MMI can be based. A recent case from the Tenth District Court of Appeals considered this issue in the context of a psychological case.

State ex rel Gualdoni v. Indus. Comm., 2015-Ohio-1009, involved a claimant who was injured in 2005. A workers' compensation claim was filed, which was allowed for a number of physical and psychological conditions, including "depressive disorder, single episode." The claimant received temporary total disability benefits through October, 2013, when his psychologist filed a C-9 seeking additional treatment. This request was subsequently approved by the employer's MCO. In November, 2013, the BWC referred the claimant to an independent psychologist, who examined the claimant, reviewed his medical records, and issued a report finding that the claimant had reached MMI. Based upon this report, the BWC filed a motion to terminate TTD. The BWC's psychologist did not know that the MCO had previously approved the C-9 or that claimant's psychologist was trying different medications to eliminate the claimant's symptoms. The BWC's motion proceeded to hearing before a DHO, who denied the motion based upon reports from the claimant's treating psychologist issued before and after the IME and the claimant's testimony about the various medications that the was taking to treat his depression. The BWC appealed, and an SHO vacated the DHO order and found the claimant to be MMI based upon the IME report. Further appeals were denied, prompting the claimant to file a mandamus action in the Tenth District Court of Appeals. The magistrate recommended that the court deny the Mandamus action finding that the IME report constituted "some evidence" upon which the SHO could rely in finding Mr. Gualdoni to be MMI.

The question in *Gualdoni* was whether, as a matter of law, the IME doctor's report was "premature" and thus not probative on the issue of MMI because the doctor was not aware of the approved treatment or subsequent changes in medication. In *State ex rel. Sellards v. Indus Comm.*, 108 Ohio St.3d 306, the Supreme Court of Ohio held that a finding of MMI cannot stand when the reviewing doctor was not aware of a new course of treatment and that the claimant was having problems getting his prescriptions filled. The magistrate in *Gualdoni* distinguished *Sellards* noting that Mr. Gualdoni had been treating for more than 3 years and that his treating physician indicated his condition had improved. The BWC's IME doctor opined that Mr. Gualdoni needed additional treatment for maintenance only, and that the changes in medication were not similar to the situation in *Sellards* where the claimant had been denied prescribed medication for which approval was given. In sum, the magistrate concluded that the IME report

constituted “some evidence” upon which a finding of MMI could be based, and the Court approved the magistrate’s findings.

Gualdoni is a further retreat from the thought that contemporaneous approval of treatment or medication can be a basis for finding that an IME report is “premature.”

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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