

2015

Gloria Sherwin, Appellant, v. Utah State Retirement Board, Long-Term Disability Program, Appellee(s)

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLORIA SHERWIN,

Appellant,

v.

UTAH STATE RETIREMENT
BOARD, LONG-TERM DISABILITY
PROGRAM,

Appellee(s).

Court of Appeals Case No. 20140414

OPENING BRIEF OF APPELLANT GLORIA SHERWIN

Petition for Review of Decisions of the
Utah State Retirement Board

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UTAH APPELLATE COURTS

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1. LIST OF ALL PARTIES

Gloria Sherwin, Appellant

And

Utah State Retirement Board, Long-Term Disability Plan, Appellee

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STATEMENT AS TO PRIOR OR RELATED CASES

There are no prior or related appeals.

4. JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction of this appeal pursuant to §§ 49-11-203 and 49-11-613 (7) of the Utah State Retirement and Insurance Benefit Act, § 63G-4-401 of the Utah Administrative Procedures Act and § 78A-4-103 (2) (a) of the Utah Judicial Code.

5. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the Utah State Retirement Board's determination that the types of medical tests and findings upon which Ms. Sherwin's physicians based their diagnoses of Ms. Sherwin's conditions of Fibromyalgia and Chronic Fatigue Syndrome were not "objective medical tests or findings," a correct interpretation of Utah Code Annotated, § 49-21-102 (6)?

(A) CITATIONS TO DETERMINATIVE STATUTES,
RULES OR CASES:

- The Utah Public Employees' Long-Term Disability Act, Utah Code, § 49-21-101, et seq., particularly § 49-21-102 (6) and (11)
- *Bhatia v. Ret. Board*, 2013 UT App. 103, 302 P.3d 140, *Bailey v. Ret. Board*, 2013 UT App. 365, 294 P.3d 577, *Hilton v. Ret. Board*, 2005 UT. App. 408, 132 P.3d 683 (Utah 2006).

(B) APPLICABLE STANDARD OF APPELLATE REVIEW,

WITH SUPPORTING AUTHORITY: The standard of appellate review applicable to review of this agency's interpretation of the applicable statute is "correctness." *See, generally*, Utah Code Annotated, § 63G-4-403 (4) (g), *Epperson v. Utah State Ret. Bd.*, 949 P.2d 779, 781 (Utah Ct. App. 1997), *Hilton v. State Retirement Board*, 2005 UT App. 408, 132 P.3d 683 (Utah 2006).

2. Are the Board's findings of fact on the issue of whether Ms. Sherwin has one or more "physical objective medical impairments" based on "accepted objective medical tests or findings" rather than being based solely on "subjective complaints," supported by substantial evidence?

(A) CITATIONS TO DETERMINATIVE STATUTES,
RULES OR CASES:

- The Utah Public Employees' Long-Term Disability Act, Utah Code, § 49-21-101, et seq., particularly § 49-21-102 (6) and (11)
- *Bhatia v. Ret. Board*, 2013 UT App. 103, 302 P.3d 140, *Bailey v. Ret. Board*, 2013 UT App. 365, 294 P.3d 577, *Hilton v. State Ret. Board*, 2005 UT App. 408, 132 P.3d 683 (Utah 2006).

(B) APPLICABLE STANDARD OF APPELLATE REVIEW,
WITH SUPPORTING AUTHORITY: The standard of appellate review applicable to review of this agency's findings of fact is "substantial evidence."

See, generally, Utah Code Annotated, § 63G-4-403 (4) (g), *Bailey v. Ret. Board*, 2013 UT App. 365, 294 P.3d 577.

3. Are the Board's findings of fact on the issue of whether Ms. Sherwin's medical impairments preclude her from being able to work supported by substantial evidence?

(A) CITATIONS TO DETERMINATIVE STATUTES, RULES OR CASES:

- The Utah Public Employees' Long-Term Disability Act, Utah Code, § 49-21-101, et seq., particularly § 49-21-102 (6) and (11)
- The *Bhatia* and *Bailey* cases, cited *supra*.

(B) APPLICABLE STANDARD OF APPELLATE REVIEW, WITH SUPPORTING AUTHORITY: The standard of appellate review applicable to review of this agency's findings of fact is "substantial evidence." *See, generally*, Utah Code Annotated, § 63G-4-403 (4) (g), *Bailey v. Ret. Board*, 2013 UT. App. 365, 294 P.3d 577.

4. Are the Board's findings of fact on the issue of whether Ms. Sherwin's medical impairments preclude her from being able to work in any gainful occupation which is reasonable, considering the employee's education, training and experience, supported by substantial evidence?

(A) CITATIONS TO DETERMINATIVE STATUTES,

RULES OR CASES:

- The Utah Public Employees’ Long-Term Disability Act, Utah Code, § 49-21-101, et seq., particularly § 49-21-102 (6) and (11)
- The *Bhatia* and *Bailey* cases, cited *supra*.

(B) APPLICABLE STANDARD OF APPELLATE REVIEW,

WITH SUPPORTING AUTHORITY: The standard of appellate review applicable to review of this agency’s findings of fact is “substantial evidence.”

See, generally, Utah Code Annotated, § 63G-4-403 (4) (g), *Bailey v. Ret.*

Board, 2013 UT App. 365, 294 P.3d 577.

5. Did the Board engage in procedures and a decision making process which deprived Ms. Sherwin of a fair post-hearing review process and, thus, generate a decision which was erroneous, arbitrary, or capricious or did it constitute an abuse of discretion or was it otherwise contrary to the Agency’s statutory mandate, past decisions and practice?

(A) CITATIONS TO DETERMINATIVE STATUTES,

RULES OR CASES:

- Utah Code, §§ 49-11-203, and 49-11-613
- Utah State Retirement Board Adjudicative Hearing Procedures (“the Procedures”)

(B) APPLICABLE STANDARD OF APPELLATE REVIEW,

WITH SUPPORTING AUTHORITY: The standard of appellate review applicable to review of this agency's decision in following or not following its own rules is an intermediate deference "reasonableness and rationality" standard of review, *see, generally*, Utah Code Annotated, 63G-4-403-(4) (h) (ii), *Westside Dixon Assocs. LLC v. Utah Power & Light/Pacificorp*, 2002 UT 31, 44 P.3d 775.

6. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES

Utah Code Annotated § 49-21-102 (6):

"Objective medical impairment" means an impairment resulting from an injury or illness which is diagnosed by a physician and which is based on accepted objective medical tests or findings rather than subjective complaints.

...

and (11):

(a) "Total disability" or "totally disabled" means the complete inability, due to objective medical impairment, whether physical or mental, to engage in eligible employee's regular occupation during the elimination period and the first 24 months of disability benefits.

(b) (i) "Total disability" means, after the elimination period and the first 24 months of disability benefits, the complete inability, as determined under subsection (11) (b) (ii), to engage in any gainful occupation which is reasonable, considering the eligible employee's education, training and experience.

The Public Employees' Long Term Disability Act (hereinafter "the Act") does not define the phrase "accepted objective medical tests or findings." The Act does not require a claimant's impairment(s) to be rateable or rated under the AMA Guidelines for ratings of permanent impairment.

**7. STATEMENT OF THE CASE, NATURE OF THE CASE,
COURSE OF PROCEEDINGS, AND THE DISPOSITION
IN THE COURT BELOW**

a. Nature of the Case.

This appeal is from a final agency decision of the Utah State Retirement Board denying Ms. Sherwin's claim for ongoing long-term disability benefits under the Utah Public Employees Long-Term Disability Act (that is, denying her claim for continuing long-term disability benefits after she had received benefits for 24 months.) R. at 317-325.

b. Course of Proceedings.

Ms. Sherwin worked for the Utah State Department of Human Resources for several years. In approximately May 2007, following her exposure to the Epstein Barr virus, Ms. Sherwin developed several impairments, including Fibromyalgia, Chronic Fatigue Syndrome, anxiety and depression. Due to such impairments, Ms. Sherwin became incapable of continuing to work in her job for the Department of Human Resources. Ms. Sherwin then applied for long-term disability benefits with Utah State Retirement Systems—the LTD Program.

The LTD Program determined that Ms. Sherwin satisfied the statutory standard of eligibility for long-term disability benefits under the mental/psychological medical impairment definition part of the Utah Public Employees' Long-Term Disability Act, Utah Code Annotated, § 49-21-11 (b) (hereinafter "the Act"), and awarded her benefits for two years.

After Ms. Sherwin had received long-term disability benefits for two years, she applied to have the LTD Program continue to pay her long-term disability benefits under the "physical objective medical impairment" definition part of the Act (§ 49-21-11 (b)). The LTD Program denied her claim for ongoing eligibility after the first two years of benefits because it decided, among other things, that although what was causing Ms. Sherwin's disability might be a physical medical impairment or combination of physical medical impairments, such as Fibromyalgia and Chronic Fatigue Syndrome (as opposed to mental or psychological impairments), such physical medical impairments were not "physical objective medical impairments," within the meaning of § 49-21-102 (6) and (11) (b), because the physicians diagnosing her with such conditions did not base their diagnoses on "accepted objective medical tests or findings," within the meaning of § 49-21-102 (6), but based such diagnoses solely on "subjective complaints."

Ms. Sherwin disagreed and proceeded through the regular URS Appeal process. R. at 1-18. She ultimately filed a Request for Agency Action and requested

an evidentiary hearing. R. at 20-51. That process ultimately culminated in a hearing held on February 11, 2014.

During the hearing, Ms. Sherwin's then current treating physician testified as to the variety of diagnostic tests, tools and techniques she uses to diagnose a patient, TR at pages 31-34, 40, 47,¹ and unequivocally opined that she had based her diagnosis on "accepted objective medical tests or findings," TR at 34, 48, 53, 58, 60, and that, based on blood tests, physical examinations, clinical interviews, and multiple other, peer reviewed, well accepted, standardized diagnostic tests and tools, that Ms. Sherwin suffers from various "physical objective medical impairments," including post Epstein Barr virus exposure, Fibromyalgia and Chronic Fatigue Syndrome, TR at 36-39, 45, 49, 50-54, which were causing her to be unable to work.

At the end of the hearing, the Hearing Officer denied Ms. Sherwin's claim. The Hearing Officer based his decision of denial primarily on the premise that the diagnostic medical tests, tools and findings which Ms. Sherwin's treating physicians had used to arrive at Ms. Sherwin's diagnoses of Fibromyalgia and Chronic Fatigue Syndrome were "accepted...medical tests or findings" but were not "accepted objective medical tests or findings" and did not support the existence of

¹The Transcript of the Hearing is found at the end of the Record. See Index of Record, page 326. The Transcript suffers from a great number of "skips" where testimony was not captured.

“objective medical impairment,” and, therefore, that even though Ms. Sherwin might suffer from Fibromyalgia and Chronic Fatigue Syndrome, and even though such Fibromyalgia and Chronic Fatigue Syndrome might be causing Ms. Sherwin to be unable to work at all, she did not satisfy the requirements of the Act because the diagnoses her physicians had given her were not based on “accepted objective medical tests or findings.” R. at 317-325. TR at pages 138-139.

c. Disposition in the Agency Below.

Following an evidentiary hearing, the Adjudicative Hearing Procedures (hereinafter the “Procedures”), specifically Rule 7 (e) (i)), do allow the Hearing Officer to have counsel for the prevailing party write the decision for the Hearing Officer. Accordingly, at the end of the hearing, the Hearing Officer directed the LTD Program’s counsel, Ms. Liza Eves, to prepare appropriate Findings, Conclusions and an Order reflecting his ruling “from the bench.” R. at 294.

By letter dated March 13, 2011, Ms. Eves forwarded a draft of proposed Findings, Conclusions and Order to Ms. Sherwin’s counsel for review and comment. R. at 294. By letter dated March 18, 2014, Ms. Sherwin’s counsel, the undersigned (hereinafter “Mr. Holdsworth”) prepared and filed various objections under Rule 7 (e) (ii), to Ms. Eves’ proposed Order. R. at 295-305. In turn, Ms. Eves, via letter dated March 21, 2014, then objected to Mr. Holdsworth’s objections. R. at 306-316.

The Hearing Officer did make a ruling on the Findings, Conclusions

and Order which the LTD Program's counsel had drafted, the undersigned counsel's objections thereto and the LTD Program's counsel's responses thereto, by making minor revisions to Ms. Eves' initial proposed Order and signing the same on April 9, 2014. *See* Hearing Officer's ruling of April 9, 2014. R. at 317-325 (not sent to Mr. Holdsworth until April 18, 2014).

In other words, at no time between March 21, 2014 and April 9, 2014 (or after April 9, 2014) did anyone notify Ms. Sherwin or her counsel of the fact that the Hearing Officer had signed the revised Order, or when he had signed it.

With the case in this posture (that is, after the Hearing Officer signs a final written version of an Order), the Hearing Procedures allow the Board (in its discretion) to allow the parties to file briefs or other papers to supplement the record before the Board issues a final decision under Section 9 of the Procedures. *See* Procedures, Rule 9 (b) and 9 (e).

Of course, this post-hearing process only works if the Hearing Officer (or the Board) notifies the parties that the Hearing Officer has signed a final order under Rule 7 (e) (iii) before the Board acts on such Order. In the instant case, neither the Hearing Officer nor the Board notified Ms. Sherwin or her counsel of the Hearing Officer's signing of the Order on April 9, 2014 and did not give her any opportunity to request to submit anything further to the Board. Instead, on April 18, 2014, without notice to Ms. Sherwin (or the undersigned), the Board simply approved the

Order. Only then, after the Board had already made its decision and after it had already approved the Order, did the Board then notify Ms. Sherwin (and the undersigned) of what the Hearing Officer had done on April 9, 2014 (and what the Board had done on April 18, 2014) by sending a copy of the Order signed by both the Hearing Officer and the Board to Ms. Sherwin and her counsel.

Thus, following the Hearing Officer's written decision, the Board did not give Ms. Sherwin notice of the Hearing Officer's written decision or the opportunity to challenge the same or provide her with any opportunity to address the Board as the Adjudicative Hearing Procedures contemplate, but simply adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Order of Denial and then (and only then) mailed out notice of the same to Ms. Sherwin. By so doing, the Board deprived Ms. Sherwin of the opportunity to invoke Section 9 (b) and (d) of the Adjudicative Hearing Procedures before it made its final agency decision.

This appeal ensued.

Ms. Sherwin contends the information and medical records she submitted during the appeal process and during the hearing contains strong evidence that (1) Ms. Sherwin's physicians utilized "accepted objective medical tests and findings" to diagnose her with various "physical objective medical impairments;" (2) that she suffers from multiple "physical objective medical impairments;" (3) that such "physical objective medical impairments" create severe functional limitations in

walking, sitting, standing, concentrating and other tasks necessary to be able to work; and (4) that such “physical objective medical impairments” preclude competitive work in any gainful occupation.

d. Relevant Facts.

1. In April 2007, Ms. Sherwin was diagnosed with Epstein-Barr Virus disease and mononucleosis. *See*, Petitioner’s Request for Board Action, page 3. ¶ 4. R. at 24.

2. In July 2007, Ms. Sherwin was diagnosed with Chronic Fatigue Syndrome (a.k.a. Chronic Fatigue Immune Dysfunction Syndrome) and Fibromyalgia. *See* Petitioner’s Request for Board Action, page 5, R. at 26.

3. On September 5, 2007, at the request of the USRB, Elaine Clark, Ph.D., performed a neuropsychological evaluation on Ms. Sherwin. Based on psychological testing and an interview Dr. Clark formulated a diagnoses that Ms. Sherwin was suffering from Major Depressive Disorder as well as an Anxiety Disorder; including symptoms of mood disorder, and anxiety. Dr. Clark stated that it appeared that Ms. Sherwin’s neuropsychological condition would interfere with her ability to perform her job duties. R. at 54.

4. USRB approved Ms. Sherwin’s claim for 24 months of benefits. R. at 54.

5. As Ms. Sherwin’s two-year own occupational disability benefit

ended, Ms. Sherwin requested/applied for ongoing total disability benefits. R. at 1-18.

6. In May 2009, Ms. Sherwin's then treating physician, Dr. Greg Last, diagnosed Ms. Sherwin with Fibromyalgia and opined that she was not able to work full time. R. at 114-118.

7. In approximately August 2009, Dr. Last referred Ms. Sherwin to Dr. Alexey Ryskin, M.D., a specialist in pain management, for an evaluation. In Dr. Ryskin's evaluation on August 28, 2009, Dr. Ryskin opined: "The patient has a combination of chronic fatigue, sleep disturbance, cold intolerance and pain in multiple areas of the body, which qualifies her for that diagnosis." R. at 120.

8. In approximately September 2009, Dr. Greg Last, referred Ms. Sherwin to Dr. Gary L. Groom, Ph.D., a specialist in Clinical Psychology, for an evaluation. In Dr. Groom's evaluation on September 10, 2009, Dr. Groom concluded that Ms. Sherwin had Fibromyalgia Syndrome ("FMS"), and that her Fibromyalgia was helping to cause her depression. Dr. Groom also stated that it was his overall conclusion that Ms. Sherwin's overall already compromised physical condition, symptoms and functional limitations were being aggravated by her depression. R. at 55, 122-122.

9. URS denied Ms. Sherwin's claim, based on an alleged failure to provide evidence in the form of "accepted objective tests or findings" as to the

existence of “objective medical impairment: showing “total disability” from all gainful employment. R. at 19.

10. Ms. Sherwin pursued and exhausted all levels of appeal.

11. On February 1, 2010, Tim Kockler, Ph.D., a Neuropsychologist, completed an evaluation of Ms. Sherwin. Dr. Kockler diagnosed Ms. Sherwin with Somatoform Disorder, Major Depression and Personality Disorder NOS. Dr. Kockler found Ms. Sherwin’s overall disability fell in class 1 (0-14% Impairment of the Whole Person, Table 13-8, pg. 325). Dr. Kockler also found Ms. Sherwin to have mild limitation of activities of daily living and daily social and interpersonal functioning. Dr. Kockler, using a combination of neuropsychological and psychological test data, calculated Ms. Sherwin’s disability at 2%. Dr. Kockler did not believe that Ms. Sherwin was disabled from all gainful employment. R. at 56.

12. On April 20, 2009, July 15, 2009 and March 1, 2010, the LTD Program reviewed Ms. Sherwin’s appeals, and upheld the LTD Program’s denial of total disability benefits, reasoning that Ms. Sherwin’s medical documentation was insufficiently objective to substantiate the existence of an “objective medical impairment” or to support a claim for ongoing long-term disability benefits.

13. On May 11, 2010, the Executive Director of the Utah Retirement Systems formally denied Ms. Sherwin’s request for ongoing permanent total disability benefits. R. at 19. Ms. Sherwin then appealed and requested an evidentiary hearing.

R. at 20-51.

14. In 2012, Ms. Sherwin began treating with Dr. Lucinda Bateman, M.D. Dr. Bateman is a specialist in diagnosing and treating Fibromyalgia and Chronic Fatigue Syndrome (C.V. at R. at 144-149). After performing and reviewing physical examinations of Ms. Sherwin, Dr. Bateman noted that Ms. Sherwin manifested mild symptomatic orthostatic intolerance, “crimson crescents” of the posterior pharynx, 18/18 tender points, and noticeable cognitive slowing. R. at 203.

15. After administering a number of tests, including physical examinations, clinical interviews and multiple standardized tests, R. at 150-165, 176-195, Dr. Bateman concluded that Ms. Sherwin met the accepted criteria for the diagnoses of Fibromyalgia and Chronic Fatigue Syndrome. R. at 166, 196-197.

16. Dr. Bateman also diagnosed Ms. Sherwin with osteopenia, diverticulosis, irritable bowel syndrome, headaches, heart murmur bronchitis and other impairments. R. at 166, 198.

17. On August 6, 2012, Dr. Bateman opined that Ms. Sherwin “has a well documented EBV trigger at the onset of illness (EBV IgM positive) and gives a clear history typical for CFS with features of widespread pain and tenderness typical for FM. *She meets established criteria for CFS* due to sudden onset of severe fatigue that is otherwise unexplained, activity/exertion intolerance with marked post-exertional malaise, cognitive dysfunction, unrefreshing sleep, headache and myalgia

(emphasis added).” R. at 203.

18. Dr. Bateman opined, “I do not doubt that depression and despair compounded the CFS/FM symptoms in 2007 during the time of her medical disability leave, but her marked decline in function was caused by CFS/FM, not by a primary mental health condition.” R. at 203.

19. Dr. Bateman further concluded that, “the CFS/FM currently renders her unable to sustain full time work of any type.” R. at 203.

20. During the hearing, Dr. Bateman testified that Chronic Fatigue Syndrome, as defined by several criteria, is an otherwise unexplained cluster of symptoms lasting at least six months that includes profound, remitting/relapsing fatigue that impairs functioning and is not relieved by rest or recovery. *See, generally*, TR at 34, 40, 45-49, 50-54.

21. She testified that in order for a practitioner to provide a diagnosis, the practitioner employs physical examinations, clinical interviews and standardized tests to determine if the claimant manifests such symptoms as (i) postexertional malaise (described as greatly increased fatigue and the feeling of sickness beginning six to 24 hours after exercise and continuing for several days or weeks), (ii) unrefreshing sleep, (iii) muscle pain, (iv) joint pain, (v) new or change in headaches, (vi) impairment of memory or concentration, (vii) sore throat, and (viii) tender lymph nodes. *See, generally*, TR at 31-34, 40, 47.

22. Dr. Bateman confirmed her findings of a post mono onset in 2007 for Chronic Fatigue Syndrome; and that Ms. Sherwin has experienced fatigue, exertion intolerance, unrefreshing sleep, arthralgia, myalgia, achiness, headaches, brain fog, and tender points of 18/18 cognitive slowing and the symptoms have lasted longer than six months. R. at 203.

23. Based on the criteria listed above and her tests and findings, Dr. Bateman opined there should be no question that Ms. Sherwin has the “physical objective medical impairments” of Fibromyalgia and Chronic Fatigue Syndrome. TR at 58, 60.

24. Dr. Matthew Rondina, M.D., the LTD program’s medical consultant, never examined or interviewed Ms. Sherwin. Nevertheless, he determined that Ms. Sherwin had a Mental & Behavioral Disorders (“M&BD”) impairment rating of 10% for Major Depressive Disorder, based on the AMA Sixth Edition of the Guides to the Evaluation of Permanent Impairment. Dr. Rondina did not administer any “accepted objective medical tests or findings” or conduct a physical examination of or even participate in a clinical interview with Ms. Sherwin. He based his determination on Ms. Sherwin’s medical records, and Dr. Kockler’s report and other information and determined that Ms. Sherwin was capable of employment, at least in the light work category.

8. SUMMARY OF ARGUMENT

The instant case presents the question of what the statutory phrase “accepted objective medical tests or findings” in Utah Code Annotated, § 49-21-102 (6), means.

The parties have a fundamental dispute about how the Court ought to interpret this statutory provision.

Because this issue is so important, Ms. Sherwin desires to begin her opening brief by discussing the statutory definition of “accepted objective medical tests or findings” in some detail.

Ms. Sherwin asserts the statutory phrase “accepted objective medical tests or findings” certainly includes traditional, classical medical diagnostic tests, such as blood tests, x-rays, MRIs, etc., but also the types of tests and findings which seasoned health care providers who specialize in diagnosing and treating Fibromyalgia and Chronic Fatigue Syndrome use consistent with the standard of care in that medical speciality.

The LTD Program interprets the statutory phrase “accepted objective medical tests or findings” differently, so as to exclude any types of tests or findings based in any way on any subjective input from a patient, even if experienced providers practicing in the medical speciality at issue routinely use such diagnostic tests and tools.

Thus, the parties have a fundamental disagreement as to the type of test,

findings and evidence which satisfies the definition of “accepted objective medical tests or findings.”

The core issue the instant case presents is whether the types of tests which Ms. Sherwin’s health care providers employed to diagnose Ms. Sherwin’s conditions are the types of medical tests which fall within or fall outside of the definition of “accepted objective medical tests or findings.”

As the understanding of such conditions as Fibromyalgia and Chronic Fatigue Syndrome evolves and as the sophistication of the methods health care providers use to diagnose such conditions evolves, the Court needs to give the parties (and all state employees) some guidance on what this phrase of “accepted objective tests or findings” means. If the statute means what Ms. Sherwin suggests it means, then state employees who are unfortunate enough to develop Fibromyalgia, Chronic Fatigue Syndrome or other similar autoimmune diseases may have some hope that they can qualify for long-term disability benefits for the long term. On the other hand, if the statute means what the LTD Program asserts it means, then state employees will know that if they develop Fibromyalgia, Chronic Fatigue Syndrome or similar autoimmune diseases, they are going to be “out of luck.” Thus, the instant case has substantial ramifications. The Court’s decision will either leave state employees who develop any condition falling within a whole class of conditions or diseases, with coverage for long-term disability benefits or will leave them without coverage.

As set forth below, Ms. Sherwin argues that the time has now come for the Court to interpret the phrase “accepted objective medical tests or findings” more broadly than it has heretofore interpreted it.

9. ARGUMENT

INTRODUCTION

THE STATUTORY FRAMEWORK FOR LONG-TERM DISABILITY BENEFITS

According to U.C.A. § 49-11-613 (4), Ms. Sherwin has the burden of proof in this case to prove by a preponderance of the evidence that she meets the statutory definition of “total disability.” *See Murphy v. State Retirement Board*, 2004 Ut. App. 109 (Ut. Ct. App. 2004) (finding that the plain language of the statute clearly imposes a burden upon a claimant to demonstrate “total disability”).

Because the proper adjudication of the instant case hinges on how the Court defines the term “accepted objective medical tests and findings” as the basis upon which a physician must base a diagnosis of “objective medical impairment,” it may be useful to discuss the overall framework the Utah Public Employees Long-Term Disability Insurance statute creates.

U.C.A. § 49-21-102 (11) (b) defines “Total Disability” as:

11 (b) (i) “Total Disability” means, after the elimination period and the first 24 months of disability benefits, the complete inability, as determined under Subsection (11) (b) (ii), to engage in any gainful

occupation which is reasonable, considering the eligible employee's education, training, and experience.

(b) (ii) for purpose of Subsection (11) (b) (i), inability is determined:

(A) based solely on physical objective medical impairment; and

(B) regardless of the existence or absence of any mental impairment (*emphasis added*).

Put simply, the governing statute means that after receiving benefits for two years, a claimant has the burden to show the existence of a "physical objective medical impairment" which is causing "total disability."²

U.C.A. § 49-21-102 (6) defines "objective medical impairment" as follows:

An impairment resulting from an injury or illness which is diagnosed by a physician and ***which is based on accepted objective medical tests or findings rather than subjective complaints*** (*emphasis added*).

The Act defines "objective medical impairment," but does not define

²The Act does not define "physical" objective medical impairment, other than contrasting such with "mental impairment," which the Act also doesn't define. This is problematical because many mental impairments may have a physical cause (traumatic brain injury) or component (chemical imbalance). And it is doubly problematical because some mental impairments may aggravate or exacerbate physical impairments. The State long-term disability statute stands in stark contrast to the federal Social Security Administration statute, which draws no distinction between impairments causing disability.

“accepted objective medical tests or findings,” other than contrasting such with the term “subjective complaints.”

Over the past several years, the undersigned (and other practitioners) has been trying to get the Court of Appeals to broaden the scope the coverage of the Utah Public Employees’ Long Term Disability Act. That effort has been spectacularly unsuccessful, with the Court of Appeals commenting that the statutory scheme “does not provide a comprehensive disability benefit to state employees,” *see Hilton v. State Ret. Board*, 2005 UT. App. 408, 132 P.3d 683 (Utah 2006), and is “narrowly drawn.” *See Bailey v. Retirement Board*, 2012 UT. App. 365, paragraph 4. The instant case tests how broadly or how narrowly the Court will interpret the phrase “accepted objective medical tests or findings.”

In the undersigned’s case of *Bailey v. Retirement Board*, *supra.*, the Court had occasion to consider the restrictions the Act places on claimants after receiving benefits for an initial period of 24 months (namely, of having to prove disability based solely on physical impairment, as opposed to mental impairment (or a combination of physical and mental impairments). In *Bailey*, the Court recited the definition of “objective medical impairment,” found in § 49-21-102 (6), but did not further discuss the component parts of said definition.

In the undersigned’s case of *Bhatia v. Retirement Board*, 2013 UT.App. 103 (2013), the Court had another opportunity to interpret the term “objective

medical impairment.” But other than reciting the definition found in § 49-21-102 (6) and interpreting the definition in such a way (in the undersigned’s view, erroneously) that a claimant has to prove not only the existence of an “objective medical impairment” by “accepted objective medical tests or findings,” but also has to prove the existence of disability by objective medical evidence (namely, that “accepted objective medical tests or findings” establish not only that the claimant has an “objective medical impairment,” but also that such objective medical tests or findings establish that the claimant is completely unable to engage in any gainful employment), the Court did not have occasion to define what is meant by the term “accepted objective medical tests or findings.”

With these recently decided cases not addressing the definition of “accepted objective medical tests or findings,” how should the Court define that phrase? The place to start, of course, is the language in the Act itself. The adjective “accepted” is not difficult to define. It can only mean tests or findings which the medical community or medical specialty community accepts as scientifically valid, peer reviewed, legitimate ways to diagnose a health impairment. The rest of the phrase, “objective medical tests or findings,” is more challenging. The Act contrasts “objective medical tests or findings” with the term “subjective complaints.” The Act does not contrast the term “objective medical tests or findings” with the term “medical tests or findings based on subjective complaints” or “medical tests or

findings based solely on subjective complaints,” it just contrasts it with “subjective complaints.” Thus, Ms. Sherwin argues that the definition should certainly be interpreted to include standard, well accepted objective tests such as blood tests and x-rays, but to also include medical tests or findings based on subjective complaints, if such are validated through “accepted objective medical tests or findings.” In other words, if such “objective medical tests or findings” as physical examinations, clinical interviews with specialists, and answers to multiple standardized tests relating to physical health and psychological health, are the basis upon which a physician formulates a diagnosis of a “physical objective medical impairment,” the claimant satisfies those elements of the definition of “accepted objective medical tests or findings.”

This “broad” definition seems to be mandated by, or at least consistent with, the two cases in which the Court has previously addressed this particular issue. In a case decided ten years ago, *Murphy v. State Retirement Board*, 2004 UT. App. 109, the Court seemed to define the term “objective medical tests or findings” by referring to the phrase “medically accepted clinical and laboratory diagnostic techniques.”³ Thus, the *Murphy* court explained:

...“therefore, without introducing any non-hearsay

³This appears to be based on the text of the definition of “medical impairment” found in an earlier version of the Act.

evidence of an impairment based on medically accepted clinical and laboratory diagnostic techniques, the Board did not have a “residuum of legal evidence” allowing it to rely on the additional hearsay evidence” (*emphasis added*).

In *Murphy*, the Court did not define the terms “clinical...diagnostic techniques” or “laboratory diagnostic techniques,” perhaps because it assumed that such terms were already well understood—“clinical diagnostic techniques,” meaning information gathered in clinical interviews and physical or psychological examinations with health care specialists in a clinical, *i.e.*, office, setting, and “laboratory diagnostic techniques,” meaning information gathered through tests and tools such as blood tests, biopsies, etc.

In *Hilton v. State Retirement Board*, 2005 UT. App. 408, 132 P.3d 683 (Utah 2006), the Court affirmed a Hearing Officer’s ruling that “the tests on which Hilton relied to show Fibromyalgia and Chronic Fatigue Syndrome did not show any objective results.” Importantly, the Court noted that claimant’s doctor testified that there were other tests which might have been available to better objectify the medical impairments which the claimant was claiming were causing her to be unable to work but the doctor had not administered those tests. While this language is somewhat helpful to define the terms “objective medical tests or findings” and “subjective complaints,” it does not directly define such terms.

Other than in the *Murphy* case and the *Hilton* case, on the issue of what

are “objective medical tests or findings,” or, in other words, what medical tests or findings are “objective medical tests or findings” and what medical tests or findings are not “objective medical tests or findings,” the Court has been silent.

The instant case presents the Court with clear opportunity to weigh in on that very issue.

Incidentally, the SSA defines “objective medical evidence” in 20 C.F.R. § 404.1512 as follows:

(b) (1) Objective medical evidence, that is, medical signs and laboratory findings as defined in § 404.1528 (b) and (c).

§ 404.1528 (b) and (c) read as follows:

(b) Signs are anatomical, physiological or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques.

(c) Laboratory findings are anatomical, physiological or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques.

See also 20 C.F.R. § 404.1529 (a):

“In determining [disability] we consider all...symptoms, including pain, and the extent to which...symptoms can reasonably accepted as consistent with the objective medical evidence and other evidence. **By objective medical evidence we mean medical signs and laboratory findings**, as defined in §§ 404.1512 (b) and (c)...including, statements or reports [from claimant],

[claimant's] treating or nontreating source, medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how...impairments and any related symptoms affect [claimant's] ability to work (*emphasis added*).

20 C.F.R. § 404.1529 (d) (2) further states:

“Objective medical evidence is evidence obtained from the application of medically acceptable clinical and laboratory diagnostic techniques, such as evidence of reduced joint muscle motion, muscle spasm, sensory deficit or motor disruption. Objective medical evidence of this type is a useful indicator to assist us in making reasonable conclusions about the intensity and persistence of symptoms and effect of those symptoms, such as pain, on the ability to work (*emphasis added*).

Thus, the Social Security Administration focuses not so much on the nature of the test itself, but whether the diagnostic techniques a health care provider may use are “medically acceptable” and used in a “clinical setting” (meaning one-on-one with the patient) or in a “laboratory setting.”⁴

In Ms. Sherwin’s view, the Act provides an important benefit to employees of state government. She does not question the right of an insurance carrier to define “total disability” in a manner consistent with the Act. She does not

⁴Ms. Sherwin is not arguing that the Board or the Court are obligated to follow, or even consider, Social Security regulations on evaluating claims of disability. She is simply arguing that in evaluating how broadly or how narrowly to interpret these statutory terms, the guidance of the government agency that evaluates tens of thousands of claims for disability every year, may be instructive.

dispute the right of an insurance carrier to restrict qualification for long-term disability benefits after two years of coverage to needing to be based solely on physical as opposed to mental impairment (or physical and mental impairment together).⁵ She does not dispute the right of an insurance carrier condition eligibility for ongoing long-term disability benefits, after two years of coverage, from being unable to perform work in one's regular occupation to being unable to work any gainful occupation (which is "reasonable").

But Ms. Sherwin takes the literal language of the Act seriously. The Act requires a claimant has to prove that she has one or more "objective medical impairment[s]" which is causing her to suffer "total disability."

The Act places two sub-requirements on this first element: (1) the impairment has to be diagnosed by a physician; and (2) the physician diagnosing the impairment has to base his or her diagnosis on "accepted objective medical tests or findings" rather than on "subjective complaints" or solely on subjective complaints.

Thus, the Act requires that the impairment (or impairments) allegedly causing functional limitations and, therefore, "total disability" must be (a) diagnosed by a physician; and (b) that such physician must base his diagnoses on "accepted

⁵Whether such a statutory distinction might violate the Americans with Disabilities Act or the Mental Health Parity Act or the U.S. or Utah Constitutions is an intriguing question, but Appellant has not made such argument in the instant case. That case is surely coming, but it is not the instant case.

objective medical tests or findings.” The Act does not define the term “objective medical tests or findings,” but, presumably, it includes medical tests such as x-rays, MRIs, bone scans, blood tests, EEGs, EKGs, biopsies, etc. Such classic tests are certainly “objective medical tests.”

The Act also clearly states that a claimant’s “subjective complaints” (of pain, fatigue, etc.) are not enough—there needs to be some sort of “objective medical tests or findings” which explain or confirm or corroborate or correlate with the claimant’s subjective complaints. Thus, a claimant’s subjective complaints of pain or fatigue, even if completely credible by themselves, are not enough. There must be some finding through some medical test which explains the presence of a condition or disease—degenerative disc disease, arthritis, torn ligaments, broken bones, low blood iron levels, infectious disease process, etc.—which explains or correlates with the claimant’s subjective complaints.

This does not mean that a physician cannot consider or should discount subjective complaints of pain or fatigue. It means only that he cannot make a diagnosis as to the existence of an “objective medical impairment” on the basis of subjective complaints alone. There must be some “objective medical test or findings” in addition to subjective complaints which provide a basis for his diagnosis.

Assuming the claimant satisfies those two sub-requirements, the Act requires the claimant to prove that the “objective medical impairment” is causing

“total disability.”

Then, after two years, the Act requires a claimant to prove (by any type of evidence) that the claimant’s “physical objective medical impairments” (and not any mental impairments) are causing “total disability” (inability to work in any gainful occupation which is reasonable).

Thus, the Act sets up a four-step process:

Step 1: Accepted Objective Medical Tests or Findings	Step 2: Impairment	Step 3: Which Causes Limitations in Functioning	Step 4: Which, in Turn, Precludes Working in Any Gainful Occupation which is Reasonable
(Evidencing some impairment)	(Must be an “objective medical impairment”—after two years, the impairment causing total disability must be exclusively a physical impairment)	(In sitting, standing, lifting, thinking, concentrating, etc.)	(Show up for work on a regular basis, perform at a satisfactory level and work, day after day, week after week, on a sustained, continuous, productive basis)

The Act requires a claimant to prove the existence of one or more “objective medical impairments” by “accepted objective medical tests or findings.” The Act does not require a claimant to prove “total disability” by “objective medical tests or findings.” But that is the way the Court of Appeals has interpreted the Act. *See Bhatia, supra.*

After receiving benefits for two years, the Act requires a claimant to prove she cannot work in any gainful occupation which is suitable for her, given her occupational profile (such factors as her education, training and experience). The Act does not require a claimant to prove that she cannot work in any occupation. But that is the way the Court of Appeals has interpreted the Act. *See Bhatia, supra*.

I. THE TESTS AND FINDINGS MS. SHERWIN'S PHYSICIANS USED TO DIAGNOSE MS. SHERWIN'S CONDITIONS SHOULD BE VIEWED AS COMING WITHIN THE DEFINITION OF "OBJECTIVE MEDICAL TESTS OR FINDINGS"

Marshaling the Evidence in Favor of the Appellee's Position:

The LTD Program asserted that the term "accepted objective medical tests or findings" can include only such medical tests as x-rays, MRIs, EEGs, EKGs, bone scans, biopsies, etc.—medical tests or findings which cannot be based on or depend in any way, credible or not, on a claimant's words or reactions. Thus, it asserted that because health care providers who specialize in diagnosing and treating Fibromyalgia or Chronic Fatigue Syndrome (or similar autoimmune diseases), diagnose such conditions by means of a variety of medical tests, which are accepted in that medical speciality, but which involve some subjective reporting, such medical tests cannot be considered "objective medical tests or findings" and, thus, cannot serve as the basis for diagnosing the existence of an "objective medical impairment."

Accordingly, it argued that all of the tests Ms. Sherwin's health care

providers, including Dr. Bateman, administered to Ms. Sherwin were essentially subjective in nature and that their diagnoses of Ms. Sherwin's conditions were essentially based on subjective complaints.

Thus, the LTD Program challenged Ms. Sherwin's eligibility for continued benefits by arguing that, despite the accepted use of such standardized diagnostic tests and tools by those in the medical speciality community and despite the sophistication of such diagnostic tests and techniques, such tests were just tests of "subjective complaints" and, therefore, even if a physician administering such tests arrived at a definition of Fibromyalgia or Chronic Fatigue Syndrome (or both), such diagnoses were not diagnoses of "objective medical impairments."

The Hearing Officer and the Board sided with the LTD Program in deciding that the diagnoses which Ms. Sherwin's multiple treating medical providers had given her were not based on "objective medical tests or findings." TR at 138-139.

Ms. Sherwin asserts such an interpretation is too narrow an interpretation of the statutory phrase "accepted objective medical tests or findings."

Ms. Sherwin's Position:

The Court decided the *Murphy* case in 2004. It decided the *Hilton* case in 2005. The subsequent years have seen a great deal of development in the recognition of autoimmune conditions/diseases such as Fibromyalgia and Chronic

Fatigue Syndrome and in the diagnosis and treatment of such conditions.

In the present case, several treating physicians made diagnoses of Ms. Sherwin based on medically accepted clinical and laboratory diagnostic techniques. As a result, the Court should determine that Ms. Sherwin did prove the existence of “physical objective medical impairments” based on “accepted objective medical tests or findings” rather than “subjective complaints” and that the Hearing Officer’s and Board’s interpretation of that phrase in the Act was unduly restrictive. (The Court should also determine that Ms. Sherwin established that such impairments preclude gainful employment.)

In 2012, Ms. Sherwin began treating with Dr. Lucinda Bateman, M.D. Dr. Bateman performed physical examinations of Ms. Sherwin. This is a well accepted “clinical diagnostic technique.”

On physical exam, Dr. Bateman noted that Ms. Sherwin has mild symptomatic orthostatic intolerance, “crimson crescents” of the posterior pharynx, 18/18 tender points, and noticeable cognitive slowing. R. at 203.

Dr. Bateman also administered a battery of well accepted clinical tests and laboratory diagnostic techniques to Ms. Sherwin. These included the following standardized tests:

- The Fibromyalgia Impact Questionnaire
- The Widespread Pain Index/Symptom Severity Score

- The Fatigue Severity Scale/Knupp
- The Epworth Sleepiness Scale
- The RAND 36-item short-form health survey covering subjects such as physical functioning, pain, energy/fatigue, and role limitations due to physical health. R. at 165, 173

She also administered other well accepted psychological tests, including:

- The Hospital Anxiety and Depression Scale
- The Beck Depression Inventory
- The Beck Anxiety Inventory
- The Mood Disorder Questionnaire
- The Mini Mental Status Exam. R. at 165, 172.

Dr. Bateman also reviewed the blood tests Ms. Sherwin underwent on May 22, 2007, showing a positive result of a screen for Epstein Barr Virus Mono, and lab tests in April 12, 2012, showing osteopenia. R. at 172.

After administering all of these examinations and conducting interviews with Ms. Sherwin in a clinical setting, and evaluating all of the results of such standardized medical tests, Dr. Bateman opined that Ms. Sherwin “has a well documented EBV [Epstein Barr Virus] trigger at the onset of illness (EBV IgM positive) and gives a clear history typical for CFS with features of widespread pain

and tenderness typical for FM.” R. at 207. Dr. Bateman opined that, based on the established criteria, “*She meets established criteria for CFS* due to sudden onset of severe fatigue that is otherwise unexplained, activity/exertion intolerance with marked post-exertional malaise, cognitive dysfunction, unrefreshing sleep, headache and myalgia” (*emphasis added*). R. at 203.

During the hearing, Dr. Bateman testified that Chronic Fatigue Syndrome, as defined by various criteria, is an otherwise unexplained cluster of symptoms lasting at least six months that includes profound, remitting/relapsing fatigue that impairs functioning and is not relieved by rest or recovery.

She testified that in order for a practitioner to provide a diagnosis of Fibromyalgia and/or Chronic Fatigue Syndrome, the practitioner must look for whether the following symptoms are present: (i) postexertional malaise (described as greatly increased fatigue and the feeling of sickness beginning six to 24 hours after exercise and continuing for several days or weeks), (ii) unrefreshing sleep, (iii) muscle pain, (iv) joint pain, (v) new or change in headaches, (vi) impairment of memory or concentration, (vii) sore throat, and (viii) tender lymph nodes.

Dr. Bateman confirmed her report that after Ms. Sherwin had a bout with the Epstein Barr virus, in 2007, she developed Chronic Fatigue Syndrome; and that Ms. Sherwin has experienced fatigue, exertion intolerance, unrefreshing sleep, arthralgia, myalgia, achiness, headaches, brain fog, and tender points of 18/18. She

concluded that Ms. Sherwin has manifested post-exertional malaise, has experienced unrefreshing sleep, experiences headaches, and has had cognitive slowing and the symptoms have lasted longer than six months. R. at 203.

Dr. Bateman testified that, based on the well accepted criteria listed above, there should be no question that Sherwin has the “physical objective medical impairments” of Fibromyalgia and Chronic Fatigue Syndrome.

Dr. Bateman also diagnosed Ms. Sherwin with osteopenia, diverticulosis, irritable bowel syndrome, headaches, heart murmur and bronchitis. R. at 163-164, 166-167.

The central issue in the instant appeal is whether the tests and findings Dr. Bateman used were “objective medical tests or findings.” Dr. Bateman testified about how this medical specialty has advanced in the past ten years in developing tests and tools to diagnose Fibromyalgia and Chronic Fatigue Syndrome and how practitioners such as her routinely use the tests and tools she uses to diagnose and treat patients with Fibromyalgia and Chronic Fatigue Syndrome. The Court should interpret the phrase “accepted objective medical tests or findings” to now include the type of tests Dr. Bateman and other specialists in this field routinely use.

II. MS. SHERWIN MET HER BURDEN OF PROOF THAT SHE SUFFERS FROM ONE OR MORE “PHYSICAL OBJECTIVE MEDICAL IMPAIRMENTS”

Marshaling the Evidence in Favor of the LTD Program's Position:

Based on its position that the multiple treating physicians, all of whom had diagnosed Ms. Sherwin as suffering from Fibromyalgia and/or Chronic Fatigue Syndrome, did not make such diagnoses based on “accepted objective medical tests or findings,” the LTD Program asserted that Ms. Sherwin did not have an “objective medical impairment.” The Hearing Officer and the Board sided with this narrow interpretation of the term.

Ms. Sherwin’s Position:

As set forth above, Ms. Sherwin contends such a position is an unreasonably narrow interpretation of the statutory term “objective medical impairment” and unjustifiably excludes a whole class of conditions and diseases from coverage under the Act. If the Court broadens the definition of “accepted objective medical tests or findings,” as she is advocating, the Court should conclude that Ms. Sherwin did meet her burden of proving that she has “objective medical impairments.”

III. MS. SHERWIN MET HER BURDEN OF PROOF THAT HER OBJECTIVE MEDICAL IMPAIRMENTS PRECLUDE HER FROM WORKING

Marshaling the Evidence in Support of the Agency’s Position:

The LTD Program asserted that a claimant has to prove what the “objective medical impairment” causes in terms of functional limitations by “objective medical evidence” and that because the medical tests and findings her

health care providers had used were not “objective” and that she, therefore, did not have any “objective medical impairment,” Ms. Sherwin could not show that “objective medical impairments” were precluding her from being able to work.

Ms. Sherwin contends such a position is an unreasonably narrow interpretation of the statutory term.

Ms. Sherwin's Position:

Ms. Sherwin asserts the Act requires her to prove the existence of “objective medical impairment” by objective evidence, but does not require her to prove “total disability” by objective medical evidence.

The Act only requires a claimant to prove the existence of “objective medical impairment” by objective evidence.

The Act does not require that a claimant prove the functional limitations which an “objective medical impairment” may be causing the claimant to experience by “objective medical tests or findings.”

This only makes sense. Whether any given “objective medical impairment”—for example, arthritis or cancer or Chronic Fatigue Syndrome—limits any given employee’s ability to function and work usually depends on how much pain or fatigue the impairment is causing. And those issues are going to be subjective. There is no “pain-o-meter” which objectively measures pain or “fatigue-o-meter” which measures fatigue.

Ms. Sherwin asserts that, after proving the existence of an “objective medical impairment” by objective evidence, the Act allows a claimant to introduce and rely upon a number of different types of evidence to prove how the “objective medical impairment(s)” may be causing disability: certainly the testimony of the claimant is highly relevant. Testimony from family members, friends, coworkers, supervisors and doctors may, if credible, also be relevant.

Nevertheless, the Court has required claimants to prove not only the existence of “objective medical impairment” by objective medical evidence, but also to prove functional limitations and “total disability” by objective medical evidence. *Bhatia, supra., citing Hilton v. State Board of Retirement*, 2005 UT. App. 408, 132 P.3d 683 (Utah 2006). Ms. Sherwin respectfully contends that such is too narrow an interpretation of the statutory phrase.

During the hearing, Ms. Sherwin testified as to the multiple physical impairments she has and the functional limitations they cause her. In the hearing, Ms. Sherwin testified that her Fibromyalgia and Chronic Fatigue Syndrome causes limitations in sitting, standing, lifting, carrying, concentrating, stamina, working for more than an hour or two a day.

Ms. Sherwin also introduced reports from her treating physicians in which they opined that Ms. Sherwin exhibits “physical objective medical impairments” which are causing complete inability to engage in any gainful

employment.

Dr. Gregory Last, M.D., one of the first physicians to treat Ms. Sherwin for her pain and fatigue, diagnosed Ms Sherwin with Fibromyalgia. R. at 118. Dr. Last opined “that Ms. Sherwin is not able to work full-time,” and “it is very unlikely that this condition can be cured....” “Therefore, it is my opinion that this patient is currently unemployable and will remain so.” R. at 117-118.

Dr. Greg Last referred Ms. Sherwin to Dr. Alexey Ryskin, M.D. Dr. Ryskin agreed with the diagnosis of Fibromyalgia. Dr. Ryskin opined, “I believe that the patient’s condition really seriously interacts with her activities of daily living and unfortunately with her ability to maintain any kind of work....” “I believe that patient’s condition is a legitimate and appropriate reason to be on disability.” R. at 119-120.

Dr. Last also referred Ms. Sherwin to a clinical psychologist, Dr. Gary L. Groom. Dr. Groom, Ph.D., administered the MMPI, a well recognized, well accepted medical test to Ms. Sherwin. R. at 121. Dr. Groom opined: “According to the MMPI results[,] [Petitioner] is indeed depressed but there is no evidence that this is primary. It is my impression that her depression is significant enough to contribute to her overall physical symptoms and functional limitations. But the depression itself is likely secondary to the physical condition of her FMS [Fibromyalgia Syndrome].” R. at 121-122.

In 2012, Ms. Sherwin began treating with Dr. Lucinda Bateman.

Following physical examination^{of} Ms. Sherwin, following clinical[^] interviews with Ms. Sherwin and following evaluation of the results^{of} over a dozen[^] standardized tests, Dr. Bateman opined: “I do not doubt that depression and despair compounded the CFS/FM symptoms in 2007, during the time of her medical and disability leave, but her marked decline in function was caused by CFS/FM, not by a primary mental health condition.... The CFS/FM currently renders her unable to sustain full time work of any type. It is unlikely she would sustain a regular part time work schedule without severe symptom escalation.” R. at 203.

If the Court is willing to broaden the definitions in the Act, as she is advocating, the Court should conclude that she met her burden of proving that her “objective medical impairments” are precluding her from being able to work.

IV. MS. SHERWIN MET HER BURDEN OF PROOF THAT HER MEDICAL IMPAIRMENTS PRECLUDE HER FROM WORKING IN “ANY GAINFUL EMPLOYMENT WHICH IS REASONABLE”

Marshaling the Evidence in Support of the Agency’s Position:

The Act requires a claimant to prove that the “objective medical impairment” and the functional limitations it causes precludes working in any gainful occupations which are “reasonable,” given the claimant’s vocational profile.

The LTD Program seems to endorse a position that reads the modifier of “reasonable” out of the definition of “any gainful occupation.” The LTD

Program's interpretation does not allow for how education, training or experience might limit the base of possible jobs for a claimant. Thus, under the LTD Program's view of the Act, if a lawyer could no longer practice law but, after two years, could work as a car wash attendant, she wouldn't be getting any more long-term disability benefits.

The LTD Program also seems to endorse a position that a claimant does not have to be competitive in a work setting. What that must mean is that the LTD Program does not recognize that a claimant must have regular attendance, perform at a satisfactory level or better and work on a sustained basis, day after day, five days a week, week after week, in order to be considered "able to work."

Most critically, the LTD Program seems to interpret the Act in such a way as to require a claimant (after two years) to prove complete inability to work in an gainful activity by objective medical evidence—namely, by requiring treating physicians to be familiar with the statute and to be able to render a competent opinion on the ultimate issue (whether a claimant meets the statutory definition of "total disability").

Nevertheless, in *Bhatia* the Court seems to have adopted the extra burden the LTD Program seeks to graft onto the definition of "total disability." "The plain language of the statute provides LTD Program benefits only where objective medical tests or findings establish that the claimant is completely unable to engage in

any gainful employment.” *See Bhatia, supra.*

Ms. Sherwin contends such a position is an unreasonably narrow interpretation of the statutory term.

Ms. Sherwin's Position:

The Act does not require a claimant to demonstrate that she can't work at all. Under § 49-21-102 (11) (b), the claimant has the burden of proof to show that, because of objective medical impairment(s), she cannot work in any gainful occupation that is “reasonable,” that is, suitable for her—given her education, training and experience. For example, the statute does not contemplate that a lawyer (who works for the state) who develops multiple sclerosis and becomes unable to practice law but who might be able to work as a Wal-Mart greeter is going to be ineligible for benefits after two years just because she can work in an entry level position. The work must be “reasonable,” taking into consideration the three vocational factors listed.

Ms. Sherwin also contends that the phrase “complete inability” to engage in any gainful occupation which is reasonable should be interpreted in a reasonable, common sense way—not meaning whether the claimant has the utter incapacity to show up for even one hour of work a day, but does a claimant have the ability to show up for work on a consistent basis, work productively for at least eight hours a day, work at least five days a week, and demonstrate satisfactory performance

on a sustained basis, day after day, week after week, month after month?

In other words, Ms. Sherwin believes the statutory focus on whether “objective medical impairments” are causing inability to work should be interpreted in a real world way, consistent with the purpose of the Act—in the first place, to consider whether an individual with the claimant’s impairments could even get hired (be competitive vis a vis other candidates for jobs), and, in the second place, to inquire whether a person with the claimant’s impairments (if fortunate enough to be hired) would be able to work at a competitive level and retain employment for some meaningful length of time.

V. THE BOARD’S FAILURE TO FOLLOW ITS OUR PROCEDURES IN ITS DECISION MAKING PROCESS DEPRIVED MS. SHERWIN OF A FAIR POST-HEARING REVIEW PROCESS

Marshaling the Evidence in Support of the Board’s Decision:

As set forth in the section above entitled “Disposition in the Agency Below,” after a claimant has had an evidentiary hearing before a Hearing Officer, the Adjudicative Hearing Procedures do contemplate the claimant having some opportunity to address the Hearing Officer’s decision with the Board. The Administrative Rules do not contemplate the claimant having the right to a second hearing before the Board, but do contemplate the opportunity to at least present “final arguments” to the Board.

While the procedures are somewhat vaguely defined, the Rules do set

forth an opportunity for a claimant to have contact with the Board. That opportunity may be discretionary with the Board, but that opportunity to invoke the Board's discretion only works if a claimant is made aware that the Hearing Officer has signed a final written Order.

As set forth above, in the instant case, after the hearing, but before the Hearing Officer signed a final written Order, the parties did have the opportunity to comment on the proposed Order. After the Hearing Officer signed the final written Order, Ms. Sherwin did not have the opportunity to have any contact with the Board.

Because, at that time, the Board had not yet acted, the LTD Program did not have any opportunity to lay out a position as to this issue no. 5.

Nevertheless, the LTD Program would presumably argue that, in the instant case, whatever process the Board followed or did not follow would not have made any difference in the outcome and, therefore, could not have prejudiced Ms. Sherwin.

Ms. Sherwin disagrees rather completely with this position.

Ms. Sherwin's Position:

The Adjudicative Hearing Procedures exist for several reasons. One reason may be to enable the Board to consider the policy implications of upholding a Hearing Officer's decision in any given case. Such policy implications might include protecting the financial health of the system, as well as carrying out the Legislative

will, as set forth in the Act.

The instant case presented a question of fundamental policy to the Board.

If the Board determined that the types of tests and findings which the health care community uses to diagnoses Fibromyalgia and Chronic Fatigue Syndrome, could come within the phrase “accepted objective medical tests or findings,” then the Board’s decision would open the door to coverage to state employees who develop such conditions and become unable to work on a long-term basis. If the Board decided that the tests and findings the health care community uses to diagnose Fibromyalgia and Chronic Fatigue Syndrome do not fall within the term “accepted objective medical tests or findings,” then the Board’s decision would close the door to coverage to state employees who develop such conditions and become unable to work.

This is an important question of public policy.

Ms. Sherwin never got the opportunity to discuss that question with the Board or even to ask the Board for permission to address that issue.

As set forth above, the Board bypassed the procedures set forth in Sections 9 (b) and (d) of the Adjudicative Procedures.

Whether intentionally or unintentionally, the Hearing Officer and the Board kept Ms. Sherwin in the dark about the Hearing Officer’s action in signing the

final written version of the Order. The Board then acted on such Order, signing it on April 18, 2014, and then (and only then) notifying Ms. Sherwin of the fait accompli.

The Court should determine that by so doing, the Board engaged in procedures and a decision making process which deprived Ms. Sherwin of a fair post-hearing review process.

10. CONCLUSION

The instant case presents an important question of public policy. The decision the Court makes in the instant case will impact potentially scores of state employees.

Ms. Sherwin met her burden of proof that the well accepted medical tests or findings Ms. Sherwin's medical providers used to diagnose Ms. Sherwin's physical impairments qualify as "accepted objective medical tests or findings." She met her burden of proving such "accepted objective medical tests or findings" manifested the existence of "objective medical impairments." She met her burden to prove that such impairments are causing limitations in functioning to such a degree as to preclude the ability to work "in any gainful occupation which is reasonable" and consistent with Ms. Sherwin's vocational profile.


Given Ms. Sherwin's treating physicians' efforts to arrive at scientifically valid diagnoses and their much greater familiarity with all of Ms. Sherwin's conditions, and their unanimity, the Hearing Officer (and the Board)

should have given the opinions of her treating physicians controlling weight.

Ms. Sherwin respectfully asks the Court to reverse the Board's decision and reinstate Ms. Sherwin's disability benefits.

ORAL ARGUMENT STATEMENT

If the Court adopts the LTD Program's narrow interpretation of the operative definitions in the Act and affirms the Board's decision, such will preclude any state employee with Fibromyalgia or Chronic Fatigue Syndrome (or similar autoimmune conditions) from ever qualifying for long-term disability benefits. TR at 10. Whether that is what the Legislature intended is a subject the Court should carefully explore. Oral argument may aid in that process.


David J. Hordsworth
Attorney for Petitioner

11. CERTIFICATE OF COMPLIANCE

Please complete one of the sections:

Section 1. Word Count

As required by Fed.R.App.P.32 (a) (7) (C), I certify that this brief is proportionally spaced and contains 10,784 words.

Complete one of the following:


X I relied on my word processor to obtain the count and it is: Corel WordPerfect 15.

 I counted five characters per word, counting all characters, including citations and numerals.

Section 2. Line count

My brief was prepared in a monospaced typeface and contains _____ lines of text.

I certify that the information that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.



/s/ David J. Holdsworth
David J. Holdsworth

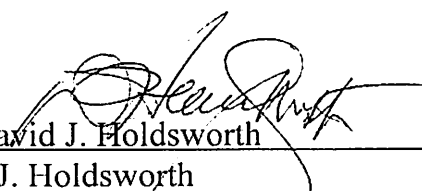
COC-1 Certificate of Compliance – 11/98

13. CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of January, 2015, two true, correct and complete copies of the foregoing APPELLANT'S OPENING BRIEF were delivered upon the attorney(s) indicated below by the following method(s); and that the original and seven copies of the foregoing APPELLANT'S OPENING BRIEF were delivered to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, UT 84114, by the following method(s):

___	Facsimile
___	U.S. Mail
<u>X</u>	Hand Delivery (Court)
___	Overnight Delivery
<u>X</u>	E-Mail (Opposing Counsel)
___	Electronic Filing

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14. ADDENDUM

(a) (11) Addendum to the Brief

(a) (11) (A) Any constitutional provision, statute, rule or regulation of central importance cited in the brief but not reproduced verbatim in the brief:

None (already reproduced verbatim in the brief)

(a) (11) (B) Any court opinion of central importance to the appeal:

See Hearing Officer Decision dated April 9, 2014, enclosed herewith

See Findings of Fact, Conclusions of Law and Order dated April 17, 2014, enclosed herewith

(a) (11) (C) Those parts of the record on appeal that are of central importance to the determination of the appeal:

None.

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4-19-14
CSM
4-22-14

BEFORE THE UTAH STATE RETIREMENT BOARD	
GLORIA SHERWIN, Petitioner, v. UTAH STATE RETIREMENT BOARD, LONG-TERM DISABILITY PROGRAM, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER File #: 10-13D

A hearing was held on February 11, 2014, before the Adjudicative Hearing Officer, Frank G. Noel, on Petitioner's Request for Board Action. Petitioner, Gloria Sherwin ("Ms. Sherwin"), was represented by David Holdsworth. The Utah State Retirement Board ("Board") was represented by Liza Eves of Howard, Larsen, Hansen and Eves. Based upon the testimony given, the evidence received, and the legal memoranda submitted, the Adjudicative Hearing Officer issued an oral decision on February 11, 2014, denying Petitioner's Request for Board Action. The Adjudicative Hearing Officer now makes the following Findings of Fact, Conclusions of Law and Order.

BACKGROUND

The Utah State Retirement Board, Long-Term Disability Program ("LTD Program") granted Ms. Sherwin a two-year disability benefit based on psychological disability from August 2007 through July 2009. When Ms. Sherwin's two-year disability benefit ended in July 2009, she requested ongoing permanent total disability benefits based upon her diagnoses of Chronic Fatigue Syndrome ("CFS") and Fibromyalgia. The LTD Program comprehensively reviewed Ms. Sherwin's appeal for ongoing permanent total disability

benefits and denied Ms. Sherwin's request because she failed to provide sufficient evidence of total disability ^{as} defined in U.C. A. § 49-21-102(11)(b)(2009). On May 11, 2010, the Executive Director of the Utah Retirement Systems formally denied Ms. Sherwin's request for ongoing and permanent disability benefits.

STANDARD

Utah Code Ann. § 49-21-102(11)(b) (2009) defines "Total disability" or "totally disabled:"

"Total disability" means, after the elimination period and the first 24 months of disability benefits, the complete inability, ***based solely on physical objective medical impairment***, to engage in any gainful occupation which is reasonable, considering the employee's education, training, and experience.
(Emphasis added.)

Utah Code Ann. § 49-21-102(6) defines "Objective medical impairment:"

"Objective medical impairment" means an impairment resulting from an injury or illness which is diagnosed by a physician and which is based on accepted objective medical tests or findings rather than subjective complaints.

Both parties agree that in order to be entitled to receive disability benefits under Utah law, Ms. Sherwin must show her inability to perform any gainful employment, considering her education, training and experience, due solely to an "injury or illness which is diagnosed by a physician and **which is based on accepted objective medical tests and findings rather than subjective complaints.**" Utah Code Ann. § 49-21-102(6) (emphasis added). Both parties further agree that the key and relevant time period in this matter for a determination regarding Ms. Sherwin's condition is the time immediately following the termination of Ms. Sherwin's disability benefits on July 31, 2009.

FINDINGS OF FACT

1. Ms. Sherwin testified that she is a covered member of the Utah State Retirement Board's ("Board"), Long-Term Disability Program ("LTD Program").
2. Ms. Sherwin testified that she was employed by the State Department of Human Resource ("Employer") as a Compliance Agent.
3. Ms. Sherwin testified that her last day of actual work with her Employer was May 1, 2007.
4. Ms. Sherwin testified that on September 5, 2007, Elaine Clark, Ph.D. performed a neuropsychological evaluation on Petitioner. *See* Hearing Exhibit 2.
5. Elaine Clark found that the psychological testing and interview data indicate that Ms. Sherwin was suffering from a Major Depressive Disorder as well as an Anxiety Disorder. Other problems evident on testing included severe symptoms of mood disorder and anxiety. Additionally, there was evidence of some somatoform symptoms (e.g., conversion of psychological stress into physical complaints). Dr. Clark stated that it appeared that Ms. Sherwin's neuropsychological condition would interfere with her ability to perform her job duties. *See id.*
6. Ms. Sherwin testified that the LTD Program granted her a two-year long-term disability benefit based on psychological disability from August 2007 to July 2009, due to her inability to perform the tasks of her job as a Compliance Agent.
7. Ms. Sherwin testified that she was diagnosed with CFS and Fibromyalgia in July 2007.
8. Ms. Sherwin testified that she suffers from fatigue, pain, and brain fog.
9. Ms. Sherwin's current treating physician, Lucinda Bateman, M.D. ("Dr. Bateman"),

- testified that the first time she met with and evaluated Ms. Sherwin was in July 2012.
10. Dr. Bateman testified that there are criteria based upon several tests to diagnose someone with CFS and Fibromyalgia. The hearing officer finds that these tests are subjective in nature, as they essentially catalogue, categorize and review purely subjective complaints.
 11. Dr. Bateman testified that any laboratory tests that Ms. Sherwin underwent were done to eliminate the possibility that there is another diagnoses to account for Ms. Sherwin's symptoms.
 12. Dr. Bateman testified that she is not familiar with the statutory requirements for granting disability benefits in this matter.
 13. Dr. Matthew Rondina, M.D. ("Dr. Rondina"), the LTD Program's medical consultant, testified that there are no objective tests to make the diagnoses of CFS and Fibromyalgia.
 14. Dr. Rondina testified that he is familiar with and uses the American Medical Association Sixth Edition of the Guides to the Evaluation of Permanent Impairment ("Guides"). Dr. Rondina testified that the Guides do not provide an impairment rating for the diagnoses of CFS and Fibromyalgia.
 15. Dr. Rondina testified that he knows what the statutory requirements for granting disability benefits are in this matter and that he applies those standards in providing his medical opinions and recommendations to the LTD Program.
 16. Dr. Rondina testified that he reviewed Petitioner's medical records regarding her ongoing appeal for disability benefits on July 9, 2009, October 19, 2009, December 9, 2009, February 20, 2010, and September 6, 2012. *See* Hearing Exhibits 4,5,6,8 and 9.

17. Dr. Rondina testified that on February 1, 2010, Tim Kockler Ph.D., ("Dr. Kockler"), a Neuropsychologist, completed an independent medical evaluation ("IME") on Petitioner. Dr. Kockler diagnosed Petitioner with Somatoform Disorder, Major Depression and Personality Disorder NOS. Dr. Kockler indicated that Ms. Sherwin's cognitive functioning was normal. Dr. Kockler stated that he does not believe Ms. Sherwin is disabled from all gainful employment and appears to have the capacity to hold down employment should she choose to do so. Additionally, Dr. Kockler opined there should be no restrictions or limitations relative to employment because he found that Ms. Sherwin's abilities are within normal functioning limits. *See* Hearing Exhibit 7.
18. Dell C. Felix, P.T., ("Mr. Felix") testified that on November 24, 2009, he performed a functional capacity evaluation ("FCE") on Ms. Sherwin. After three hours of testing, Mr. Felix found that Ms. Sherwin demonstrated practically full range of motion and that by lifting and carrying 20 pounds with both hands and up to 15 pounds with each hand, she met the LIGHT Physical Demand Characteristic of Work Level according to the U.S. Department of Labor. *See* Hearing Exhibit 11.
19. Dr. Rondina testified that based upon his review of Petitioner's medical records, the Independent Medical Exam conducted by Dr. Kockler, and the Functional Capacity Evaluation performed by Dell C. Felix that there are no objective findings to substantiate Petitioner's claim of disability from all gainful employment.

CONCLUSIONS OF LAW

1. The LTD Program is governed by Title 49 of the Utah Code.

2. Utah Code Ann. § 49-21-102(11)(b) (2009) defines “Total Disability” as: “. . . after the elimination period and the first 24 months of disability benefits, the complete inability, based solely on physical objective medical impairment, to engage in any gainful occupation which is reasonable, considering the employee’s education, training, and experience.”
3. “Objective medical impairment” is defined in Utah Code Ann. § 49-21-102(6) as: “an impairment resulting from an injury or illness which is diagnosed by a physician and which is based on accepted objective medical tests or findings rather than subjective complaints.”
4. The Utah Court of Appeals has clearly stated that:

section 49-21-102(6) limits ‘objective medical impairment’ to impairment ‘based on accepted objective medical tests or findings rather than subjective complaints.’ Thus, the plain language of the statute provides LTD Program benefits only where objective medical tests or findings establish that the claimant is completely unable to engage in any gainful employment. *See Hilton v. State Retirement Bd.*, 2005 UT App 408 U, para. 2 (mem.) (‘Not every impairment or disability qualifies a state employee for benefits under the Act . . .’).

Bhatia v. Ret. Bd., 2013 UT App. 103, ¶ 20, 302 P.3d 140 (internal citation omitted); *see also Bailey v. Ret. Bd.*, 2012 UT App 365, 294 P.3d 577.

5. As the moving party in this proceeding, Ms. Sherwin bears the burden of proof under Utah Code Ann. § 49-11-613(4) to prove that she is totally disabled under Title 49. *See Murphy v. State Ret. Bd.*, 2004 UT App 109U, *2, 2004 WL 797621 (finding plain language of statute clearly imposes burden upon Petitioner to demonstrate total disability).

6. Utah Code Ann. § 49-21-102(11)(b) (2009) and Utah Code Ann. § 49-21-102(6) are clear and narrowly drawn to require Ms. Sherwin to demonstrate that she is totally disabled based solely upon a physical injury or illness which is based on accepted objective medical tests or findings rather than subjective complaints.
7. The diagnoses of CFS and Fibromyalgia, which are made based upon subjective complaints of fatigue and pain, do not meet the statutory definition of “objective medical impairment” as required under Utah Code Ann. § 49-21-102(6).
8. Ms. Sherwin has failed to show that she is “totally disabled” as required by Utah Code Ann. § 49-21-102(11)(b) (2009).

ORDER

IT IS HEREBY ORDERED that Ms. Sherwin’s Request for Board Action for ongoing total disability benefits based on Utah Code Ann. § 49-21-102(11)(b) is denied.

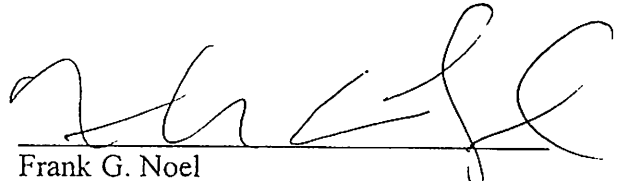
BOARD RECONSIDERATION

Within ten (10) days of a Board order, any party may file a written request for reconsideration stating the specific grounds upon which relief is requested as set forth in Utah Code Ann. § 49-11-613. This filing for reconsideration is not a prerequisite for seeking judicial review of the order on review. The request for reconsideration shall be filed with the Board and one copy sent by mail to each person by the party making the request. The Board chairman or executive director shall issue a written order granting or denying the request within twenty (20) days of receipt. If no order is issued within twenty (20) days, the request is denied.

JUDICIAL REVIEW

If Petitioner is aggrieved with the final Board order, he may seek a judicial review within thirty (30) days after the date that the order constituting final Board action is issued. Petitioner shall name the Board and all other appropriate parties as respondents. The Utah Court of Appeals has jurisdiction to review all final Board actions resulting from formal proceedings. All petitioners shall follow the procedures established in Utah Code Ann. § 63G-4-101 et. seq.

DATED this 9 day of April, 2014.


Frank G. Noel
Adjudicative Hearing Officer

The foregoing Findings of Fact, Conclusions of Law, and Order of Denial of the Adjudicative Hearing Officer is hereby adopted as the order of the Utah State Retirement Board.

Dated this 17th day of April, 2014.

UTAH STATE RETIREMENT BOARD

BY 

Richard K. Ellis, Board President

APPROVED AS TO FORM

BY _____
David Holdsworth
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this the 18th day of April, 2014, I mailed a true and correct copy of the above **Findings of Fact, Conclusions of Law and Order**, postage pre-paid, to the following:

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Liz Ann Miskin

