

2004

Linda Malan Hilton v. Utah State Retirement Board, Long Term Disability Program : Brief of Respondent

Utah Court of Appeals

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Recommended Citation

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 20040950-CA**

BEFORE THE UTAH COURT OF APPEALS

LINDA MALAN HILTON,

Appellant/Petitioner,

v.

**UTAH STATE RETIREMENT BOARD,
LONG TERM DISABILITY PROGRAM,**

Appellee/Respondent.

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BRIEF OF APPELLEE

CASE NO. 20040950-CA

BRIEF OF APPELLEE

APPEAL FROM THE UTAH STATE RETIREMENT BOARD

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**FILED
UTAH APPELLATE COURTS
FEB 28 2005**

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1 In an effort to help the Court review Appellant's Brief, the following is a list of corrected citations from the brief provided by Mrs. Malan ("Petitioner"): *Austin v. Continental Casualty Company*, 216 F. Supp. 2d 550 (W.D.N.C. 2002); *Industrial Power Contractors v Industrial Comm.*, 832 P.2d 477 (Ut. Ct. App. 1992); *Mickles v. Shalala*, 29 F.3d 918 (4th Cir. 1994); *Sanderson v. Continental Casualty Corp.*, 279 F. Supp.2d 466 (D.Del. 2003). Also please find attached Appendix A which provides corrections to citations within Appellant's Brief.

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STATEMENT OF JURISDICTION

U.C.A. § 49-11-613 allows a member who is aggrieved by a decision of the Utah State Retirement Board (“Board”) to “obtain judicial review by complying with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.”

U.C.A. §63-46b-16 confers jurisdiction on the Supreme Court or Court of Appeals to review all final agency action resulting from formal adjudicative hearings. U.C.A. §78-2a-3(2)(a) and Rule 14 of the Utah Rules of Appellate Procedure confer jurisdiction on the Court of Appeals over the final orders and decrees resulting from formal adjudicative proceedings.

STATEMENT OF ISSUES

1. Did the Board reasonably determine that Petitioner failed to qualify for long-term disability benefits by using the AMA and Utah Impairment Guidelines as reasonable standards to determine an “objective medical impairment?”
2. Did the Board reasonably admit and consider all of Petitioner’s evidence?
3. Did substantial evidence exist to support the admission and persuasiveness of Dr. Knorpp’s testimony?
4. Did the Board’s Order reasonably determine all necessary issues and comply with the requirements of the Utah Administrative Procedures Act?

STANDARD OF REVIEW

Under the Utah Administrative Procedures Act (“UAPA”), Utah Code Ann. § 63-46b-16(4) specifically enumerates the relief which this Court may grant on an appeal from a formal administrative hearing before the Board. Utah Code Ann. §63-46b-16(4) states:

The appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by one of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency’s prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious.

Mrs. Malan (“Petitioner”) failed to point to any specific subsection for relief under Section 63-46b-16(4) where the Board erred. The Utah Court of Appeals has duly noted

that “Because the standard of review under UAPA will vary based on the subsection the claim is brought under, we strongly encourage counsel to *clearly identify under what section review is being sought and to make certain they identify the appropriate standard of review under that section.*” King v. Industrial Comm’n of Utah, 850 P.2d 1281,1287 n.7 (Utah Ct. App. 1993)(Emphasis added).

On issues of fact, “[a]n agency’s findings of fact . . . are accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible.” Murphy v. State Retirement Board, 2004 Ut. App. 109, *1 (Ut. Ct. App. 2004), cert. denied, (July 19, 2004); quoting, Hurley v. Board of Review of Industrial Comm’n, 767 P.2d 524, 526-27 (Utah 1988). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” Id; quoting, Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989)(quotations and citations omitted). The Appellate Court does not conduct a de novo credibility determination or reweigh the evidence. Questar Pipeline Co. v. State Tax Comm’n, 850 P.2d 1175, 1178 (Utah 1993). Nor will an agency’s findings of fact be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible. Hurley, 767 P.2d 524 at 526-27. It is the province of the agency, not the Appellate Court, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference. Albertsons Inc. v. Dept. of Employment Security, 854 P.2d 570, 575 (Utah Ct. App. 1993).

Similarly, the Appellate Court will grant deference to the agency's interpretation or application of law when "there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." Morton Int'n., Inc. v. Auditing Division, 814 P.2d 581, 589 (Utah 1991). "Where a grant exists, [the Appellate Court] will not disturb the agency's interpretation or application of the law unless its determination exceeds the bounds of reasonableness and rationality." King, 850 P.2d 1281 at 1286. The Utah Court of Appeals has interpreted such a grant of discretion broadly. See, Id., at 1288 (After reviewing examples of grants of discretion to agencies, the Court states, "In each case the language of the statute and the statutory scheme support a finding of at least an implicit grant of discretion.").

Here, the legislature granted to the Board's Long-Term Disability Program under U.C.A. § 49-21-401(3) the specific authority to "review all relevant information and determine whether or not the eligible employee is totally disabled." In addition, the Board maintains the general power to "develop broad policy for the . . . various . . . programs under broad discretion . . . , including the specific authority to interpret and define any provision or term under this title . . . [.]" U.C.A. § 49-11-203(1)(k). Thus, since the legislature granted express authority to the Board to determine whether an eligible employee meets the statutory definition of "total disability", this Court should not disturb the Board's interpretations of law unless they "exceed the bounds of reasonableness and rationality." King, 850 P.2d 1281 at 1286.

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 49-21-102(11)(a)

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

Utah Code Ann. §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.

SUMMARY OF THE PROCEEDINGS

Petitioner filed a Request for Board Action on August 26, 2003, requesting the Utah State Retirement Board (Hereinafter “the Board”) grant her a two-year own-occupation disability benefit. See, Hearing Record (hereinafter “HR”) at 5-6. A hearing was held on May 6th and June 1st, 2004, before the Adjudicative Hearing Officer (hereinafter “H.O.”) on Petitioner’s Request for Board Action. Petitioner was represented by Loren Lambert. The Board was represented by David B. Hansen. At the conclusion of the testimony, the H.O. requested closing arguments to be submitted via written briefs. See, Hearing Transcript (hereinafter “HT”) at 383:14-17. Petitioner’s Written Closing Argument was submitted on July 12, 2004. See, HR at 231. Respondent’s Closing Argument was submitted on August 9, 2004. See, HR at 298. Petitioner’s Reply to Respondent’s Closing Argument was submitted on August 23, 2004. See, HR at 329. The H.O.’s

Decision upholding the Long Term Disability Program's (hereinafter "LTD Program") denial of benefits was submitted on September 14, 2004. See, HR at 374. A Final Order was signed by the H.O. on October 15, 2004. See, HR at 381. The Board adopted the Order on October 21, 2004. See, Id. Petitioner filed her Petition for Review in this matter on November 5, 2004.

STATEMENT OF THE CASE/ FACTUAL BACKGROUND

1. Petitioner worked as an employee of the State of Utah as a Health Program Specialist II. See, HR, at 221 (Petitioner's Hearing Exhibit B-15, at 166).
2. Petitioner testified that her last day of work with the State of Utah as a Health Program Specialist II was October 1, 2002. See, TR. 173:13-15.
3. Petitioner presented into evidence a job description from the State of Utah which indicates that her position as a Health Program Specialist II was a sedentary position. See, HR, at 221 (Petitioner's Hearing Exhibit B-15). The physical demands of this position consisted primarily of sitting and included some walking, standing, bending, and carrying light items. See, Id. (Petitioner's Hearing Exhibit B-15 at 166-167).
4. On August 26, 2003, Petitioner applied for a two-year own occupation long-term disability benefit with the Public Employee's Health Program's LTD Program.
5. The LTD Program formally denied Petitioner's application for a two-year own occupation long-term disability benefit because she failed to show she suffers from

an objective medical impairment preventing her from performing her regular occupation.

6. A hearing was held on Petitioner's claim for disability benefits on May 6th and June 1st, 2004, before the Board's Adjudicative H.O..
7. Both Petitioner and Dr. Landon Beales, Petitioner's expert witness, testified at the hearing that the worst conditions Petitioner suffers from are pain and fatigue. See, TR. 21:17-18, 22:7, 18-23, 177: 11-25, 178:1-13. Dr. Beales testified, "There's no good objective measurement of pain, or fatigue. . ." and claimed he relied solely on Petitioner's self-reported symptoms in forming his opinion on her disability due to pain and fatigue. TR. 360:12-13.
8. Petitioner was also diagnosed with sleep apnea and lumbar degenerative disc disease. See, TR. 350:21-25, 29:4. However, she failed to provide any evidence that she was objectively impaired due to these conditions.
9. Dr. Beales testified that he was not familiar with either the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guidelines") or the Utah Impairment Guidelines. See, TR. 59:15-19, 60: 8-10.
10. Dr. Beales failed to provide Petitioner with an impairment rating using any accepted objective criteria, such as the AMA, or Utah Impairment Guidelines.
11. Dr. Scott Knorpp M.D. is board certified in physical medicine and rehabilitation. See, HR, at 135. Dr. Knorpp is proficient with the AMA Guidelines and the Utah Impairment Guidelines in determining impairment. See, TR. 65:15-16. Dr. Knorpp

testified that based upon these guidelines, as well as the disability standard defined in Title 49 of the Utah Code, he could not find anything that could objectively show that Petitioner would qualify for an impairment that would lead to a disability. See, TR. 105:18-21, 25, 106:1.

12. Dr. Scott Knorpp's testimony concerning Petitioner's alleged impairment and disability was credible and persuasive. Dr. Knorpp affirmatively testified that Petitioner did not meet the definition of "total disability," under the definition in Utah Code Ann. §49-21-102(11). See, TR. 105:18-21, 25, 106:1.
13. Petitioner submitted into evidence a Neuropsychological Evaluation performed on her on February 20, 2003, by Dr. Elaine Clark, a licensed psychologist. See HR, at 221 (Petitioner's Hearing Exhibit B-11). Dr. Clark concluded, "this evaluation failed to provide any evidence that would suggest Mrs. Hilton² is disabled from work
14. for psychological or cognitive reasons." Id. (Petitioner's Hearing Exhibit B-11 at 135-136).
15. No evidence was presented by Petitioner to indicate that she qualifies for an objective impairment rating pursuant to the AMA Guidelines, the Utah Impairment Guidelines, or any other accepted objective criteria.
16. The H.O. reviewed and considered all of Petitioner's medical records in making his determination and order.

² Petitioner used the surname "Malan" at the time of the hearing. At the time of Dr. Clark's report, Petitioner went by the name "Hilton".

SUMMARY OF THE ARGUMENT

1. The Board reasonably denied Petitioner long-term disability benefits under U.C.A. Title 49, because Petitioner failed to prove that she suffered from any “objective medical impairment” which would prevent her from performing her regular occupation as a sedentary worker. An “objective medical impairment” must be proven through “accepted medical tests or findings” under U.C.A. § 49-21-102(6).

The Board reasonably found that the accepted medical standards in the community for determining an impairment are the AMA and Utah Impairment Guidelines. These impairment guidelines assign no impairment rating to Petitioner’s diagnoses of fibromyalgia and chronic fatigue syndrome. In addition, Petitioner failed to prove any objective medical impairment under these guidelines for her other diagnoses. Thus, because Petitioner failed to prove any “objective medical impairment” using “accepted medical tests or findings” the Board reasonably denied her long-term disability benefits.
2. The Board received substantial evidence that Dr. Knorpp’s testimony was credible and persuasive. Dr. Knorpp is an expert in physical medicine and rehabilitation. At the request of the Board’s Long-Term Disability Program, Dr. Knorpp conducted an independent medical examination of Petitioner. These types of examinations are specifically contemplated in U.C.A. § 49-21-401(8), and are the standard in the disability insurance industry to assist a trier of fact in determining

alleged impairment and disability.

In this case, Dr. Knorpp's examination consisted of a thorough review of the provided medical records, an interview with Petitioner regarding her medical history and subjective complaints, and a complete physical examination. Dr. Knorpp's examination report opined that Petitioner did not suffer from any objective medical impairment, and she did not qualify for disability. Thus, because the Board received substantial evidence that Dr. Knorpp's opinion was credible and persuasive, the Board committed no error in reliance on Dr. Knorpp's testimony.

3. The Board properly admitted and considered all of Petitioner's evidence in finding Petitioner failed to meet the statutory standard for "total disability" under U.C.A. § 49-21-102(11)(a). Petitioner points to nothing in the record which suggests that the Board or its Hearing Officer failed to admit or consider all of her evidence and arguments. That the Hearing Officer did not find Petitioner's evidence persuasive does not mean that he failed to consider her evidence or arguments.
4. The Board's Order was consistent with the Hearing Officer's Decision. In his Decision, the Hearing Officer clearly ruled on the ultimate issue, whether Petitioner was entitled to long-term disability benefits. Also in his Decision, the Hearing Officer requested that the Board's Counsel to prepare an Order consistent with the Decision. After the proposed Order was prepared, Petitioner took the opportunity to object to the proposed Order in writing. Thus, Petitioner was

provided a valid opportunity to complain that the Hearing Officer's Decision was inconsistent with his Order, prior to the Order's adoption by the Board. Since the Hearing Officer and the Board adopted the Order without changes, one must assume, without evidence to the contrary, that the Order complied with the Hearing Officer's reasoning.

In addition, Petitioner cannot point to one specific instance where the Hearing Officer's Decision was inconsistent with the Board's Order. Inconsistencies are more than merely word additions, they must include fundamentally different facts or legal reasoning as the basis for the Decision. Again, because the Hearing Officer adopted the proposed Order after considering the Petitioner's objections, the presumption is that the Order was consistent with the Decision.

ARGUMENT

I. PETITIONER FAILED TO PROVE THAT SHE MEETS THE STATUTORY STANDARD FOR RECEIVING LONG-TERM DISABILITY BENEFITS UNDER UTAH CODE ANN. §49-21-102(11)(A).

Petitioner did not prove that she meets the statutory standard for receiving long-term disability benefits under Utah Code Ann. §49-21-102(11)(a). In order to qualify for long-term disability benefits under this standard, Petitioner must prove that she suffers from an “objective medical impairment” which prevents her from performing her “regular occupation.” Petitioner failed to meet this burden.

A. PETITIONER MAINTAINS THE BURDEN OF PROOF UNDER U.C.A. §49-11-613(4) TO SHOW SHE SUFFERS FROM AN “OBJECTIVE MEDICAL IMPAIRMENT” WHICH PREVENTS HER FROM PERFORMING HER REGULAR OCCUPATION.

The burden of proof rests squarely upon Petitioner to prove by a preponderance of the evidence that she suffers from an “objective medical impairment” which prevents her from performing her regular occupation. Petitioner failed to meet this burden.

Petitioner brought this action under U.C.A. §49-11-613(4) which states, “the moving party in any proceeding brought under this section shall bear the burden of proof.” Pursuant to the Utah Court of Appeals in Murphy,³ “the plain language of section

³ In Murphy, the Utah Court of Appeals upheld the decision of the Utah State Retirement Board’s denial of Petitioner’s request for permanent and total long-term disability benefits. The basis for Ms. Murphy’s claim for disability before the Board was that she was impaired due to fibromyalgia. In fact, Murphy’s treating physician, Dr. Bateman, is also Petitioner’s treating physician.

49-1-610(4)⁴ clearly imposes the burden of proof on (Petitioner) to demonstrate that she has a “total disability.”” Murphy v. State Retirement Board, 2004 Ut. App. 109, at *2.

Although the Board submitted documents and provided expert testimony that provided ample support for denying Petitioner’s request for long-term disability benefits, the Board need not submit any evidence in order to prevail. Yet in order for Petitioner to prevail she must prove that she suffers from an “objective medical impairment,” and due solely to this impairment, that she is unable to perform her “regular occupation.”

Petitioner did not meet her burden.

B. THE HEARING OFFICER REASONABLY DETERMINED THAT PETITIONER FAILED TO PROVE AN “OBJECTIVE MEDICAL IMPAIRMENT” THROUGH “ACCEPTED OBJECTIVE MEDICAL TESTS OR FINDINGS” UNDER U.C.A. § 49-21-102(6).

Because Petitioner failed to prove any “objective medical impairment” under U.C.A. § 49-21-102(6), the H.O. correctly found that Petitioner did not meet the statutory standard to receive long-term disability benefits. Under the standard of review, the Court should give substantial deference to the Board’s findings of fact, and will not overturn the Board’s decision if based on “substantial evidence.” See, Murphy v. State Retirement Board, 2004 Ut. App. 109 at *1. Similarly, in reviewing the Board’s conclusions of law, the Court should only reverse if the Board’s interpretation of law “exceeds the bounds of reasonableness and rationality.” King, 850 P.2d 1281 at 1286. This is particularly true when, as here, the Board is interpreting an agency specific statute. See, Morton, 814 P.2d

⁴ U.C.A. §49-1-610 was renumbered in 2002. It is now numbered as U.C.A. §49-11-613.

581 at 589.

Eligible employees qualify to receive disability benefits under the Board's Long-Term Disability Program ("LTD Program") when they meet the definition of "Total Disability" under U.C.A. § 49-21-102(11)(a), which states, "'Total disability' means, the complete inability, *due to objective medical impairment*, whether physical or mental, to engage in the eligible employee's regular occupation during the elimination period and the first 24 months of disability benefits." (Emphasis added). U.C.A. § 49-21-102(6) then defines "Objective Medical Impairment" as "an impairment resulting from an illness or injury which is diagnosed by a physician and *which is based on accepted objective medical tests or findings* rather than subjective complaints." U.C.A. §49-21-102(6). (Emphasis added). While Petitioner's brief points to no specific language in the Board's Order which she deems to be in error in regards to the law on "impairment", the relevant portion of the Board's Order regarding the issue of impairment are Findings of Fact paragraphs 7 and 8, and Conclusions of Law paragraphs 9, 11 and 12 which state:

7. Dr. Beales testified that he was not familiar with either the American Medical Association Guidelines to the Evaluation of Permanent Impairment ("AMA Guidelines") or the Utah Impairment Guidelines. See, TR. 59:15-19, 60:8-10. Dr. Beales did not provide any other guidelines or standards that could be used in making his determination on Petitioner's disability.
8. Dr. Beales failed to provide Petitioner with an impairment rating using any accepted objective criteria, such as the AMA or Utah Impairment Guidelines. Impairment ratings are the standard used in the medical community to determine disability. See, TR. 60:1-7.

....

9. Petitioner failed to present any non-hearsay evidence proving she suffered from any “objective medical impairment” resulting from an injury or illness based on accepted medical tests or findings. Although Petitioner provided evidence of diagnoses, Petitioner failed to provide any evidence showing that she was objectively impaired due to these conditions.

....

11. Although it is not mandatory that a petitioner use the AMA Guidelines and/or the Utah Impairment Guidelines to prove impairment, a petitioner must prove “objective medical impairment” through “accepted objective medical tests or findings.” Since the AMA Guidelines and the Utah Impairment Guidelines are the standards currently used by the medical community to determine impairment, these are reasonable guidelines to be used to determine the level of impairment.
12. No evidence was presented by Petitioner to indicate that she qualifies for an objective impairment rating pursuant to the AMA Guidelines, the Utah Impairment Guidelines, or any other accepted objective criteria.

HR., at 382-386.

1. THE BOARD REASONABLY USED THE AMA AND UTAH IMPAIRMENT GUIDELINES IN REQUIRING PETITIONER TO SHOW AN “OBJECTIVE MEDICAL IMPAIRMENT.”

The Board’s Findings of Fact regarding impairment were supported by “substantial evidence”, and the Board’s Conclusions of Law requiring the use of the medically acceptable American Medical Association (“AMA”) Guidelines and Utah Impairment Guidelines were both reasonable and rational. In determining whether an eligible employee has an “objective medical impairment”, the H.O. must determine what “accepted medical tests or findings” are appropriate to determine impairment. In this case, as in other previous long-term disability cases, expert testimony was received which

states that the Utah Impairment Guidelines are the accepted medical standard used in the community to determine impairment. HT. 104:1-5 While an “impairment rating” is not required by the statute, an “objective medical impairment” using “accepted medical tests or findings” is required.

Although the Utah Impairment Guidelines were developed⁵ for use in Worker’s Compensation cases,⁶ the guidelines are not limited to such cases. As Dr. Knorpp testified, “[The Utah Impairment Guidelines are] used for issues of classifying disability for any worker . . . [The Utah Impairment Guidelines are] equally applicable for all jurisdictions.” HT. 104:6-14 Even still, the Board in its Order recognized that the AMA and Utah Impairment Guidelines are not statutory guidelines, and the Board is not bound by these guidelines. See, HR. at 386. However, even Petitioner recognizes (See, Appellant’s Brief at 25) that the Board must provide some objective basis for its findings. These Guidelines allow for such an objective basis.

Since the Guidelines are the accepted standard in the medical community for determining impairment, the Board was reasonable in requiring Petitioner to either prove an objective medical impairment under these guidelines, or provide evidence of some other medically accepted objective criteria in which to measure impairment. Petitioner

⁵ The Utah Impairment Guidelines are to be used in tandem with the AMA Guidelines to determine impairment. See, HR. at 372.

⁶ Petitioner provides no evidence or even suggests that the AMA Impairment Guidelines only have applicability to Worker’s Compensation cases.

argues for the first time in this appeal ⁷ that the Board should have used the American Association of Disability Evaluating Physicians (“AADEP”) and the Social Security Administration (“SSA”) “guidelines” as medically accepted criteria to determine impairment. See, Appellant’s Brief at 29. However, the Board received no evidence that these “guidelines”⁸ are “medically acceptable.” One would expect that in order to adopt Petitioner’s alleged criteria, some smidgen of medical testimony would have to be received supporting the use of this criteria as medically acceptable. That is why the Board was correct in focusing on Petitioner’s expert witness in determining that “*Dr. Beales* did not provide any other guidelines or standards that could be used in making his determination on Petitioner’s disability[,]” and “*Dr. Beales* failed to provide Petitioner with an impairment rating using any accepted objective criteria” HR. at 383. (Emphasis added.)

Because Petitioner failed to prove any objective medical impairment under the

⁷ This is the first time Petitioner has presented this argument, typically in order to preserve an issue for appeal the issue must be presented to the prior trier of fact so that it may have an opportunity to rule on the issue.

⁸ AADEP and SSA do not really provide guidelines for determining impairment. The irony of Petitioner pointing to the AADEP “guidelines” is that even under this standard, Petitioner would not qualify for any “objective medical impairment.” The AADEP paper submitted by Petitioner states, “Must use AMA Guidelines.” In contrast, SSA does not use any medically acceptable “guidelines” but instead relies on the common law interpretation of the statutory definition of “medically determinable impairment” as its standard. Since the Utah Legislature in 2002 changed the applicable definition for the LTD Program from “medically determinable impairment” to “objective medical impairment”, presumably the Legislature did not want the LTD Program to use the SSA common law as persuasive authority.

AMA or Utah Impairment Guidelines, and because Petitioner provided no other medically acceptable objective basis for measuring impairment, the Board's conclusion that the AMA and Utah Guidelines "are reasonable guidelines to be used to determine the level of impairment" was correct and reasonable.

C. THE BOARD CORRECTLY APPLIED THE UTAH ADMINISTRATIVE PROCEDURES ACT HEARSAY RULES, AND CORRECTLY FOUND NO NON-HEARSAY EVIDENCE OF AN "OBJECTIVE MEDICAL IMPAIRMENT" UNDER THE AMA OR UTAH IMPAIRMENT GUIDELINES.

The Board's Conclusion of Law paragraph 9 correctly applied and interpreted the Utah Administrative Procedures Act ("UAPA") hearsay rules in finding, "Petitioner failed to present any non-hearsay evidence proving she suffered from any 'objective medical impairment' resulting from an injury or illness based on accepted medical tests or findings. Although Petitioner provided evidence of diagnoses, Petitioner failed to provide any evidence showing that she was objectively impaired due to these conditions." HR. at 386. In addition, the Board's conclusion that Petitioner has no "objective medical impairment" was reasonable. See, Id.

1. PETITIONER'S MEDICAL RECORDS CONSISTING OF OPINIONS REGARDING IMPAIRMENT AND DISABILITY ARE HEARSAY.

Any out of court "statement . . . offered to prove the truth of the matter asserted" is hearsay pursuant to the Utah Rules of Evidence, Rule 801(c). Statements from medical professions which opine on impairment or disability, even if contained within medical records are hearsay. Petitioner attempts to argue that her medical records are an

exception to the hearsay rules. See, Appellant's Brief, at 27. In support of this argument Petitioner points to Utah Rules of Evidence 803(4) which states,

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis and treatment.

(emphasis added.) This exception to the hearsay rule clearly provides that only, “statements made for purposes of medical diagnosis or treatment,” are an exception to hearsay. This rule does not make any mention regarding opinions of medical experts regarding impairment or disability.

In addition, nothing in the hearing record suggests that the H.O. failed to consider Petitioner's medical records regarding her diagnosis or treatment.⁹ However, the H.O. was correct in determining that the opinions regarding impairment and disability in Petitioner's records were hearsay. Therefore, the exception to hearsay in URE 803(4) does not apply to Petitioner's submitted opinions regarding impairment and disability, these opinions are clearly hearsay.

2. PETITIONER FAILED TO PROVE ANY “OBJECTIVE MEDICAL IMPAIRMENT” BECAUSE EITHER HER DIAGNOSES RESULTED FROM HER SUBJECTIVE COMPLAINTS RATHER THAN MEDICAL TESTS OR FINDINGS, OR HER DIAGNOSES DO NOT CAUSE IMPAIRMENT.

An “objective medical impairment” cannot be founded on subjective complaints or

⁹ As far as the Board can determine, no dispute exists between the parties that hearsay is admissible in administrative hearings under UAPA. However, hearsay evidence cannot be the sole basis for a finding of fact. See, Utah Code Ann. §63-46b-10(3).

mild diagnoses. Petitioner’s allegations of “impairment” are really nothing more than evidence of diagnoses. The Board recognized this and stated, “Although Petitioner provided evidence of diagnoses, Petitioner failed to provide any evidence showing that she was objectively impaired due to these conditions.” HR. at 385. A diagnosis is not an objective medical impairment. The Petitioner must prove that her diagnoses of illness or injury prevents her from performing some function. Petitioner failed to do this.

Petitioner points to some alleged “impairments”, none of which are truly impairments. See, Appellant’s Brief at 24. First, Petitioner argues that she suffers from the diagnoses of “fibromyalgia syndrome (FMS), [and] chronic fatigue syndrome (CFS) . . .” See, Id. Neither of these diagnoses constitutes an objective medical impairment because they are based on Petitioner’s subjective complaints rather than accepted objective medical tests or findings. Id. In addition to these diagnoses, Petitioner alleges she is “impaired” by sleep apnea, DDD, mild neuropathy, and cognitive problems. See, Id., at 30. These diagnoses also do not qualify for an “objective medical impairment” because they were not proven to functionally “impair” Petitioner in any way from performing her regular occupation.

a. FMS AND CFS ARE NOT RATABLE IMPAIRMENTS.

Neither FMS nor CFS qualify as a ratable diagnoses under the AMA or the Utah Guidelines. The Utah Impairment Guides state:

The diagnoses of fibromyalgia, CFS, and myofascial pain syndromes are based on an individual’s report of widespread **subjective pain** and reports of tenderness during physical

examination. Despite extensive research, no specific underlying biological abnormality has been discovered to explain the reports of these people. In that the medical community has not achieved consensus on how to construe such condition, ***these conditions are not to be rated.*** (Emphasis added.)

HR, at 224.

Therefore, pursuant to accepted guidelines in the Utah medical community the diagnoses of FMS and CFS are not ratable diagnoses. This explanation of “impairment” for CFS and FMS excludes any finding of an “objective medical impairment” under Title 49 because they are based on symptoms of self-reported pain and fatigue. Under U.C.A. §49-21-102(6), an “objective medical impairment” must be based on “accepted objective medical tests or findings rather than subjective complaints.” Similar to the Utah Impairment Guidelines, the American Academy of Disability Evaluating Physicians (“AADEP”) defines FMS as, “not a discrete disorder, nor a disease, but a group of symptoms and physical findings that occur together frequently- a syndrome.” HR, at 183. AADEP also states, “the key feature of the potential common fibromyalgia impairments is that they are all based on self report . . . Just as a diagnosis of fibromyalgia is not necessary in order for there to be a finding of impairment, neither is a diagnosis or fibromyalgia sufficient for determination of impairment.” Id. at 184.

The U.S. 9th Circuit Court of Appeals has stated, “. . . fibromyalgia’s cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective.” Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 872 (9th Cir. 2004). The court stated, “. . . [T]he Mayo Clinic states

that the syndrome is neither ‘progressive’ nor ‘crippling,’ the symptoms can be worse at some times than others.” Id., at 872, n.6 and n.7. Finally, the 9th Circuit confirmed that “objective tests are administered to rule out other diseases, but not establish the presence or absence of fibromyalgia.” Id., at n.8. The National Center for Infectious Diseases has defined CFS “*as self-reported* persistent or relapsing fatigue of 6 or more consecutive months.” Id. (Petitioner’s Hearing Exhibit B-17, at 5) (Emphasis added.). These definitions of FMS and CFS, exclude any finding of an “objective medical impairment” due to FMS and CFS because they are based on findings of symptoms and self-reported pain. An “objective medical impairment” must be based on accepted objective medical tests or findings rather than subjective complaints. Therefore, Petitioner claims of impairment under the diagnoses for FMS and CFS do not qualify as an “objective medical impairment” under Title 49.

Even one of Petitioner’s own physicians fails to objectify an impairment due to FMS and CFS. Dr. Richard Call who originally diagnosed Petitioner with FMS states, “Linda has Fibromyalgia Syndrome. In as much as it is for the most part subjectively defined, it is very difficult to dictate disease course or disability in as much as the disability is variable. An objective basis of disability determinations is extremely difficult.” Id. (Petitioner’s Hearing Exhibit B-13, at 146). Dr. Beales, Petitioner’s expert witness, was questioned regarding this statement from Dr. Call, and he answered that he generally agrees with this statement. TR. 360: 3-9. Additionally, Dr. Beales testified that he collaborated with Dr. Call on many occasions, and he is well acquainted with FMS.

TR. 360 18-23. Dr. Beales acknowledges that he agrees with another physician he considers an expert in working with FMS, that it is a disease which is subjectively defined, and any type of disability determination is difficult. Even though Dr. Beales labels Petitioner as “disabled,” he never objectively defined a “medical impairment” which was not based solely on Petitioner’s self reported symptoms. Additionally, Dr. Beales failed to give Petitioner any type of impairment rating, or suggest any other way to objectively define her alleged impairment or disability.

Dr. Beales testified that the major most disabling symptoms of FMS and CFS are fatigue and muscle pain, neither of which can be objectively verified or measured. TR. 21:17-18, 22: 7, 18-23. In reference to objectively measuring pain and fatigue, Dr. Beales testified that “there’s no good objective measurement of pain, of fatigue . . .” TR. 360:12-13. When Dr. Beales was questioned about what objective criteria or medical evidence he used to establish that Petitioner has chronic pain, he answered that he used the medical history from Petitioner and tested her for tender points. TR. 55:15-21. Dr. Beales stated that he could tell that Petitioner was in pain when examining Petitioner if her response to pushing on the tender points was that she was in pain or that she hurts. TR. 55:22-23, 56: 10-13. In reality, Dr. Beales could only report Petitioners reported reactions of pain and could not objectify the pain itself.

When Dr. Beales was questioned about what objective criteria or medical evidence he used to establish that Petitioner has CFS he answered, “mostly her story and the patterns she gave . . .” TR. 56: 17-19. Finally, when Counsel asked, “so it was based on

her reported symptoms of fatigue that you established that; is that right?” Dr. Beales answered, “Yes.” TR. 57:4-6. Thus, the testimony of Dr. Beales plainly shows that he cannot objectively measure the two worst symptoms that Petitioner suffers from, which are also two of the main symptoms of FMS and CFS, cannot be objectively measured. These symptoms are based solely on Petitioner’s statements. As such, Petitioner’s claim of objective medical impairment for FMS and CFS fails to meet the statutory standard.

No accepted medical test exists to objectively verify FMS or CFS. The diagnosis must be based upon Petitioner’s statements that she is in pain and suffers from fatigue. Petitioner failed to provide and cannot provide any medically acceptable clinical and laboratory diagnostic techniques to support claims that she suffers from an objective medical impairment due to FMS and CFS. As such, Petitioner does not qualify for an objective medical impairment and long-term disability benefits must be denied.

In sum, FMS and CFS, by their very definition, do not meet the criteria of an “objective medical impairment” under Utah law. Neither the medically accepted AMA Guidelines nor Utah Impairment Guidelines give an impairment rating for FMS and CFS. Petitioner failed to show that there are other guidelines to use as a basis for determining impairment based upon a diagnosis of FMS and CFS. Thus, Petitioner has failed to show that she suffers from an objective medical impairment due to FMS or CFS.

b. PETITIONER’S DIAGNOSES OF SLEEP APNEA, DEGENERATIVE DISC DISEASE (DDD), NEUROPATHY AND COGNITIVE PROBLEMS DO NOT SHOW AN OBJECTIVE MEDICAL IMPAIRMENT.

Petitioner also argues that she suffers from the diagnoses of severe sleep apnea,

degenerative disc disease (DDD), neuropathy and cognitive problems. See, Appellant's Brief, at 30. However, she failed to prove an objective medical impairment due to these diagnoses or a combination thereof. Petitioner provided no evidence showing that due to these conditions she is even impaired, let alone that these impairments render her disabled.

When Dr. Beales was questioned regarding whether Petitioner is disabled due to sleep apnea he answered, "Well, I don't think sleep apnea causes disability, per se." TR. 350:21-25. Additionally, Petitioner provides the following from her treating physician, Dr. Lucinda Bateman, "The abnormalities of sleep architecture and respiration, as discussed above, would account for clinical symptoms such as nonrestful sleep, daytime fatigue, and excessive daytime sleepiness." Appellant's Brief, at 32. However, Dr. Bateman does not provide for a disability based on this conclusion. Dr. Bateman is merely stating that Petitioner suffers from fatigue and sleepiness. Therefore, based on Petitioner's own witness's testimony and treating physician's conclusions, she cannot prove she suffers from an objective medical impairment based on her diagnoses of sleep apnea.

Dr. Elaine Clark performed a neuropsychological evaluation on Petitioner per the Board's request on February 20, 2003. See, HR. at 221 (Petitioner's Hearing Exhibit B-11). In her report Dr. Clark states,

. . . there is no evidence that she (Petitioner) would not be able to perform her job duties as a result of cognitive problems. Although there is evidence of significant visual memory problems, and some mild verbal learning and

memory problems, there is no reason to believe that she could not do her work based on cognitive deficits alone. In fact, *this evaluation failed to provide any evidence that would suggest Mrs. Hilton is disabled from work for psychological or cognitive reasons.*

Id., at 135-136. (emphasis added.)

Therefore, the cognitive test performed on Petitioner by Dr. Clark found that there is no reason why she could not work based on cognitive problems.

In conclusion, Petitioner failed to present any other evidence which shows that based on the diagnosis of DDD or neuropathy Petitioner suffers from an objective medical impairment. Additionally, Petitioner has failed to point to any evidence which shows that based on the combination of these diagnosis she suffers from an objective medical impairment. Thus, Petitioner does not suffer from an objective medical impairment based on the diagnoses of sleep apnea, DDD, neuropathy and cognitive problems.

D. PETITIONER FAILED TO PROVE THAT SHE CAN NO LONGER ENGAGE IN HER REGULAR OCCUPATION.

Even if Petitioner can prove some impairment, Petitioner failed to prove that she can no longer engage in her regular occupation. The statutory standard for receiving disability benefits found in Utah Code Ann. § 49-21-102(11)(a), defines “total disability,” or “totally disabled,” as “the complete inability, due to objective medical impairment, whether physical or mental, to engage in the eligible employee’s regular occupation during the elimination period and the first 24 months of disability benefits.”

In order to establish that she meets the standard for “total disability”, Petitioner

must prove that she is unable to engage in her regular occupation due to her physical or mental impairments. Pursuant to Murphy, the burden of proof is clearly imposed upon Petitioner to demonstrate that she has a total disability, which includes the inability to engage in her regular occupation. See, Murphy, 2004 Utah App. 109 (2004), at 3.

1. PETITIONER’S “REGULAR OCCUPATION” WAS A SEDENTARY POSITION.

Petitioner worked 40 hours per week as a Health Program Specialist II which is a sedentary type position. See, HR. at 221 (Petitioner’s Hearing Exhibit B-15, at 166). The physical demands of this position consisted of sitting. See, Id. at 167. Her duties also included some walking, standing, bending, and carrying light items. See, Id.

2. EVEN GIVEN PETITIONER’S ALLEGED IMPAIRMENTS, SHE COULD PERFORM HER SEDENTARY REGULAR OCCUPATION.

Petitioner failed to show any physical impairment, psychological impairment, or a combination of both, which shows that she is not able to work in her position as a Health Program Specialist II.

In the alternative, if Petitioner is found to have some minor physical ailments, these ailments, taken separately as well as together, do not qualify for any objective medical impairment. Neither sleep apnea and lumbar degenerative disc disease nor cognitive problems completely prevent Petitioner from engaging in her regular occupation as a Health Program Specialist II. Petitioner’s occupation as a Health Program Specialist II was a sedentary position. See, HR., at 221 (Petitioner’s Hearing Exhibit B-15, at 166). Dr. Knorpp testified that Petitioner could perform sedentary duty

work given her physical condition. TR. 101:1-3. Likewise, Dr. Elaine Clark stated, “this evaluation failed to provide any evidence that would suggest Mrs. Hilton is disabled from work for psychological or cognitive reasons.” HR. at 221 (Petitioner’s Hearing Exhibit B-11, at 135-136).

Petitioner relies solely on the testimony of Dr. Beales and the medical records of Dr. Lucinda Bateman to prove that she is unable to perform her regular occupation. Dr. Beales gave the following reasons for his opinion that Petitioner could engage in her regular occupation:

. . . her job description requires her to read and remember; it requires her to be there at a set time and participate in activities in her department all the time and she has demonstrated that she’s not able to do this and progressively so, not able to function in this way to a good enough degree that she would be really acceptable to most managers.

TR. 32:20-25, 33:1.

Dr. Beales never testified he had any expertise in job training and what would be acceptable to “most managers.” Instead, he speaks only generally, when the statute calls for a specific determination. Dr. Beales stated that he arrived at the conclusion Petitioner could not work:

based on my experience and based on the history and the patterns that she’s demonstrated and the history that I obtained from her that she would be able to, in a consistent way, be a reliable employee and be able to perform in a way that she was expected to do.

TR. 34: 12-17.

Again, Dr. Beales relies solely on Petitioner’s self-reported symptoms, instead of any

actual evidence, to determine that Petitioner cannot work. The only evidence presented from Dr. Bateman regarding Petitioner's ability to work is the following: "she has enough energy just to take care of basic activities of daily living but not enough to work in any part time or full time situation." HR. at 221 (Petitioner's Hearing Exhibit B-1, at 00). Neither Dr. Beales nor Dr. Bateman discussed whether or not Petitioner could engage in her regular occupation due to sleep apnea, DDD, or any other diagnoses.

These opinions given by Dr. Beales and Dr. Bateman of Petitioner's inability to engage in her regular occupation are generalized statements which give no objective basis for their reasoning. Dr. Beales testified that the basis for his finding was the history he obtained from Petitioner. Dr. Bateman did not come and testify at the hearing, and her opinion also does not include any basis for the determination Petitioner cannot work. Dr. Bateman merely states that Petitioner does not have enough energy. Additionally, Dr. Beales stated that he is unfamiliar with the AMA Guidelines for rating impairments for FMS, nor is he familiar with the Utah Impairment Guidelines. TR. 59:15-19, 60:8-10. These opinions are not based on any type of objective basis.

In sum, Petitioner has failed to prove that she is unable to work in her sedentary regular occupation due to either physical impairment, psychological impairments, or a combination of both. The only evidence Petitioner presented to meet her burden of proof was the testimony of Dr. Beales who admitted he is unfamiliar with the standards for determining disability and arrived at his conclusion that she could not work based on Petitioner's statements to him of her work history.

**II. THE COURT SHOULD NOT DISTURB THE HEARING OFFICER’S FINDING
THAT DR. KNORPP’S TESTIMONY WAS CREDIBLE AND PERSUASIVE.**

Because this Court grants the Board’s H.O. substantial deference in determining findings of fact, particularly facts involving the credibility of witnesses, the Board’s finding that “Dr. Scott Knorpp’s testimony concerning Petitioner’s alleged impairments and disability was credible and persuasive,” should not be disturbed. HR., at 383. It is the province of the agency, not the Appellate Court, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference. Albertsons Inc., 854 P.2d 570 at 575. Dr. Knorpp conducted a statutory independent medical exam consistent with the AMA and Utah Impairment Guidelines. Yet, Petitioner spends a good portion of her argument attempting to discredit Dr. Knorpp’s testimony .¹⁰ See, Appellant’s Brief, at 19-21, 37-42.

¹⁰ No one who comes to testify as a witness before the Board should be required to endure the harassment and vitriol that Dr. Knorpp endured during this hearing. The Utah Standards of Professionalism and Civility state, “. . . lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.” It continues, “in fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth seeking process designed to resolve human and societal problems in a rational, and peaceful, and efficient manner.” Utah Standards of Professionalism and Civility.

From the moment of his arrival, Petitioner’s counsel regarded Dr. Knorpp with nothing but contempt in violation of the Utah Standards of Professionalism and Civility. As Dr. Knorpp sat down on the first day of the hearing, Petitioner’s Counsel, with no authority to enforce respect for the proceedings, screamed at Dr. Knorpp to show his client proper respect, after Dr. Knorpp, without interrupting the proceedings, had whispered “hello” to his colleague. See, TR. 14:2-25, 15:1-11. During his cross-examination of Dr. Knorpp, Petitioner’s Counsel, without evidence, accused Dr. Knorpp of bias and referred to him as “prostituting himself.” TR. 107:20. Petitioner’s Counsel intentionally and repeatedly mispronounced Dr. Knorpp’s name after having been told the

Dr. Knorpp's opinion and expertise are above reproach. Dr. Knorpp graduated with his medical degree from the University of Nevada School of Medicine in 1987 and completed a year internship with St. Mary's Hospital and Medical Center in 1988. See, TR. 64-65; HR., at 135. Dr. Knorpp completed his residency at the University of Utah in the field of physical medicine and rehabilitation in 1991 and became board certified in his field in 1992. See, Id. For the past 13 years, Dr. Knorpp has been practicing in his field of medicine. See, Id. It is evident from both Dr. Knorpp's testimony and his resume that he has extensive experience in the field of physical medicine and rehabilitation. These credentials bolster the Board's finding Dr. Knorpp's testimony credible and persuasive.

When Petitioner applied for long-term disability benefits, Dr. Knorpp was asked by the Board's LTD Program to conduct an independent medical examination of Petitioner, and opine on the level of Petitioner's objective medical impairment and disability. Such an exam is specifically authorized under U.C.A. § 49-21-401(8), stating, "The office may, at any time, have any eligible employee claiming disability examined by a physician chosen by the office to determine if the eligible employee is totally disabled."

Dr. Knorpp performed his examination of Petitioner and made his report on February 27, 2003. See, HR. at 118-125.

correct pronunciation. Finally, in her closing argument, Petitioner's Counsel compared accepting Dr. Knorpp's opinion to Germans who followed Adolf Hitler. See, HR. at 253-254. Even now, Petitioner's Counsel has continued these distasteful personal attacks in the Appellant Brief claiming that "Dr. Knorpp is an activist who expels the ill into the wilderness to die. . ." Appellant's Brief, at 41. Such hyperbole calls into question all of Petitioner's arguments.

Dr. Knorpp took a thorough medical history from Petitioner and conducted a physical examination in an attempt to objectify Petitioner's disability. See, Id. In addition Dr. Knorpp tested Petitioner's subjective complaints for credibility and found her to be less than credible, stating, “. . . I have some concerns that perhaps [Petitioner] was volitionally attempting to add some flavor to her clinical examination.” Id. at 124.

After reviewing Petitioner's history and conducting his examination Dr. Knorpp opined:

. . . I am unable to objectify any neurologic, orthopedic or musculoskeletal disorder that wold [sic] rightfully or reasonably preclude this patient's resumption of productive employment. More specifically, . . . [Petitioner's] clinical examination does not lend itself to receptivity or easy identification of any specific disorder, condition, disease or pathology that would preclude a return to her employment activities in a sedentary job position for the State of Utah.

Id.

Then, after quoting from the Utah Impairment Guidelines in reference to FMS and CFS, Dr. Knorpp summarized:

. . . I am unable to identify any specific disease, disorder or condition for which the patient would be precluded from returning to productive employment. Stated otherwise, I find no reason that the patient could not or should not return to her work at the State of Utah in her sedentary position as a Medicaid representative.

Id. at 125.

Because Dr. Knorpp performed a medical examination which complies with both the statute and the Utah Impairment Guidelines, his opinion is both credible and persuasive. Thus, the Board received substantial evidence to support its finding.

In her attempt to strike Dr. Knorpp's testimony, Petitioner misapplies State v. Rimmasch, 775 P.2d 388 (Utah 1989) regarding excludable expert testimony under Utah Rules of Evidence, Rule 702. In both State v. Adams, 2000 UT. 42, 5 P.3d 642 (Utah 2000) and State v. Kelly, 2000 UT. 41, 1 P.3d 546 (Utah 2000) the Utah Supreme Court held that the Rimmasch test requiring a foundation of reliability of scientific testimony is inapplicable where "there is no plausible claim that the type of expert testimony offered by the prosecution was based on novel scientific principles." Alder v. Bayer Corp., AGFA Division, 2002 UT. 115, 61 P.3d 1068, 1083-84 (Utah 2002), quoting, Kelly, 2000 UT. 41, 1 P.3d 546 at ¶19. Although clearly a disagreement exists between Dr. Knorpp and Petitioner regarding the medical standards for determining impairment:

disagreement among experts, even between the experts and the judge is not a valid basis for exclusion of testimony. The Ninth Circuit Court of Appeals made this clear in *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir. 1998), stating:

Judges in jury trials should not exclude expert testimony simply because they disagree with the conclusions of the expert.... The test is whether or not the reasoning is scientific and will assist the jury. If it satisfies these two requirements, then *it is a matter for the finder of fact to decide what weight to accord the expert's testimony*. In arriving at a conclusion, the factfinder may be confronted with opposing experts, additional tests, experiments, and publication, all of which may increase or lessen the value of the expert's testimony. But their presence should not preclude admission of the expert's testimony- - *they go to*

the weight, not the admissibility. Id. at 1230-31 (emphasis added.) Therefore, we reaffirm our previous holdings that the *Rimmasch* test applies only to novel scientific methods and techniques.

Alder, at 1084, 60.

Because Dr. Knorpp conducted an evaluation which would assist the H.O. in making a decision whether Petitioner suffered from an objective medical impairment, his testimony goes to the weight of the evidence, not its admissibility. As such, Dr. Knorpp's testimony is admissible and the H.O. committed no error in finding it credible and persuasive.

In addition, contrasting Dr. Knorpp with Petitioner's expert, (who was not her treating physician) Dr. Beales, leads one to believe Dr. Knorpp's opinion regarding Petitioner's alleged disability is reasonable.

Dr. Beales is not board certified in his specialty, internal medicine. See, TR. 43. While Dr. Beales may have experience in internal medicine, he has not been trained in physical medicine and rehabilitation and is unfamiliar with medically accepted guidelines in determining impairment. Dr. Beales retired from the practice of medicine several years ago, See, TR. 358:1, and only conducts physical evaluations from his home. Dr. Beales does not maintain an office. See, TR. 357:22-25. Within the past year Dr. Beales only conducted one other medical evaluation. See, TR: 358:18. In addition to these problems Dr. Beales has a bias concerning FMS and CFS because his son has been diagnosed with CFS. TR: 45-9-11. Therefore, while Dr. Beales is a nice person, if there is a physician

who was or competent at the hearing, it was Dr. Knorpp, not Dr. Beales.

Although, Dr. Beales testified he received no known financial remuneration for his opinion in this case, Dr. Beales does receive personal, academic and professional benefits. First, Dr. Beales has become a FMS and CFS physician advocate. At the hearing Dr. Beales stated that he only testifies on behalf of FMS or CFS patients claiming to be disabled. See, TR. 43-44. This probably stems from his son being diagnosed with CFS and receiving Social Security Disability benefits. See, TR. 45: 9-17. If CFS is somehow discredited, or disregarded as a legitimate diagnosis, then it reflects poorly on his son who claims to be disabled due to CFS.

Additionally, Dr. Beales, and particularly Dr. Lucinda Bateman, have a personal academic and professional interest in legitimizing FMS and CFS. Dr. Beales only sees FMS and CFS patients today to prepare for litigation as an expert witness. Meanwhile Dr. Bateman's entire practice is devoted to these syndromes. Both Dr. Beales and Dr. Bateman speak and attend conferences related to these syndromes and receive compensation for their services. If these syndromes are not found to be credible disabling illnesses, these physicians would suffer financial, personal, and academic embarrassment and loss.

Hence, because of Dr. Beales risk of personal, financial and academic loss and embarrassment, he has much more a risk of bias in his testimony than Dr. Knorpp who does not have these academic and social pressures. As such, the Board was reasonable in accepting Dr. Knorpp's testimony over Dr. Beales.

Lastly, the Board correctly determined Dr. Knorpp's opinion was more persuasive than Petitioner's treating physicians who failed to testify at the hearing. Petitioner attempts to argue that her attending physician's opinions should be given more weight than Dr. Knorpp. See, Appellant's Brief, at 34. Ironically, Petitioner quotes the Utah Impairment Guidelines (after earlier stating they are irrelevant) stating, "the attending physician is deemed the person most knowledgeable regarding the condition, progress and final status of the injured employee." HR. at 373. However, Petitioner failed to provide the remainder of this quote from the Guidelines which significantly adds to its meaning. It continues, "therefore the treating physician is encouraged to render the final *impairment rating*." HR., at 373. (emphasis added.) In this instance, Petitioner's treating physicians did not provide any impairment rating or basis for determining that she is disabled.

The United States Supreme Court recently held concerning giving additional weight to treating physicians,

the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. And if a consultant engaged by a plan may have an 'incentive' to make a finding of "not disabled," so a treating physician, in a close case, may favor a finding of "disabled."

Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832, 123 S. Ct. 1965, 155 L.Ed.2d 1034 (2003). Therefore, pursuant to the United States Supreme Court, the Board's lack of deference to treating physicians was not error. Thus, just because a physician is a

treating physician does not automatically give them additional credibility. Therefore, the Board was correct in not giving deference to these physicians.

III. THE HEARING OFFICER PROPERLY CONSIDERED ALL OF PETITIONER'S EVIDENCE IN FINDING SHE FAILED TO MEET THE STATUTORY STANDARD FOR "TOTAL DISABILITY" UNDER U.C.A. §49-21-102(11)(A).

Petitioner cannot point to anything in the record to suggest that the H.O. did not consider all of her evidence in reaching his decision. Petitioner erroneously concludes that the H.O. disregarded the Social Security determination and her medical records. However, Petitioner failed to point to anything specific in the record to support this claim. See, Appellant's Brief, at 37.

To support her argument regarding the persuasiveness of a Social Security determination, Petitioner cites to a case involving an ERISA plan which denied long-term disability benefits. See, Appellant's Brief, at 37, quoting, Austin v. Continental Casualty Company, 216 F.Supp.2d 550 (W.D.N.C. 2002). In Austin, the court opines, in dicta that an ERISA plan administrator may find a Social Security vocation determination helpful in reaching a decision. See, Austin, 216 F. Supp. 2d 550 at 556. The court however, did not provide a specific ruling which found that an administrator is bound by a Social Security determination.

Petitioner cannot point to anything in the record which suggests that the H.O. did not review or use her Social Security determination in reaching his decision. The record shows that the H.O. considered all of Petitioner's evidence consisting of the testimony provided by all of the witnesses at the hearing and all documents admitted into evidence

including the Social Security determination. See, HR. at 384; See also, HT. 381:17-18 (Exhibit B accepted into evidence it includes Social Security determination).

Petitioner also erroneously argues that the H.O. failed to consider her testimony regarding her subjective complaints, primarily those regarding her worst problems as pain and fatigue. See, TR. 21:17-18, 22:7, 18-23, 177: 11-25, 178:1-13 As discussed supra page 14, her subjective complaints should not be taken into consideration unless an objective medical impairment is found. In this case, the H.O. did not find an objective medical impairment, therefore, he was correct in not finding Petitioner's subjective complaints persuasive of impairment or disability.

In conclusion, there is nothing in the record to suggest that the H.O. did not consider all of Petitioner's evidence including her SSA determination and subjective complaints. However, the H.O. was correct in determining that Petitioner "failed to present any non-hearsay evidence proving she suffered from any 'objective medical impairment' resulting from an injury or illness based on accepted medical tests or findings." HR. at 385.

IV. THE BOARD'S ORDER WAS CONSISTENT WITH THE HEARING OFFICER'S DECISION.

The H.O.'s Decision was consistent with the Order adopted by the H.O. and the Board. Petitioner makes no valid argument in claiming that the Order was not consistent with the H.O.'s Decision for three reasons: 1) the H.O. ruled on Petitioner's ultimate issue

of whether she was entitled to long-term disability benefits; 2) the Petitioner did not point to any instance where the H.O.'s Decision was inconsistent with the Board's Order; and 3) the Petitioner failed to provide any evidence of bias on the part of the H.O. in making his decision.

First, the H.O.'s Decision clearly ruled on the ultimate issue of Petitioner, namely, whether she was entitled to long-term disability benefits under the statute. Petitioner's request for board action only requests, "payment of long-term disability benefits." HR., at 5. As such, the H.O.'s Decision clearly ruled on the only ultimate issue presented by the Petitioner in denying her long-term disability benefits.

Second, Petitioner failed to point to any instance where the Order adopted by the H.O. was inconsistent with the H.O.'s Decision. Although the Order was longer than the Decision, and used different language, the Order was consistent with the Decision in every way. Because the H.O. requested that the Board's Counsel prepare a proposed Order based on the Decision,¹¹ presumably the H.O. did not expect the Order to be a word for word recital of the H.O.'s Decision. Thus, the fact that the Order contained some additional language to the Decision should not surprise the Petitioner or this Court. In

¹¹ Having the prevailing party's legal counsel draft a proposed Order is not error. It is common practice in Utah for the court, "to ask counsel for the prevailing party to draw proposed findings of fact. That practice is so general as to be said to be the universal practice in this jurisdiction." Erkman v. Civil Service Comm'n of Provo, 114 Utah 228, 236; 198 P.2d 238, 244 (Utah 1948). The Court continued, "it would not be seriously contended that such proposed findings, when approved and adopted by the court, are not proper findings of fact sufficient to satisfy the statutory requirement [to make findings of fact] . . ." Id.

order to show some inconsistency between the Decision and the Order, the Petitioner must show a material factual or legal discrepancy between the two documents. This is more than just pointing to different words and phrases used in the two documents, she must show an intent by the H.O. to rule differently in the Decision than the Order. Petitioner cannot show such a discrepancy because both the Decision and the Order are factually and legally consistent.

Nevertheless, even if the Decision is considered to be inconsistent with the Board's Order, it is not reversible error because the Order was specifically reviewed and adopted by the H.O. Petitioner had and took the opportunity to review the proposed Order prior to its being adopted by the H.O., and made objections to it. See, HR. at 378-80. This review of the proposed Order allowed the Petitioner the ability to explain to the H.O. any perceived "inconsistencies" between the Decision and the Order. The H.O., after reviewing Petitioner's objections, then adopted the Order without changes. Thus, because Petitioner had the opportunity to object ¹² to the proposed Order prior to the H.O. adopting the Order, the Order became the final appealable ruling of the H.O. after it was signed by the H.O. and approved by the Board.

Third, Petitioner can point to no evidence that the H.O. is biased, or that Board or its Counsel predetermined this case. Although Petitioner correctly states that the Utah

¹² One court has even held that in cases where opposing counsel did not have the opportunity to review and refute the proposed findings of fact, this did not invalidate the order signed by the court. See, Barnes v. L.M. Massey, Inc., 612 So.2d 120, 123 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 81 (La. 1993).

Retirement Systems hires a H.O. under U.C.A. § 49-11-613 to adjudicate claims against the Board, this is not evidence of bias. District court, court of appeals and Supreme Court judges all are hired/selected by the State. No one seriously contends that these judges are biased in favor of the State because of this association.

In addition, Petitioner's allegation that "in his tenure with the Agency, the [H.O.] has never ruled in favor of a claimant[,]" is blatantly untrue. Appellant's Brief, at 43. Although unsurprisingly, the H.O. has never ruled in favor of a disability claimant with FMS or CFS, it is simply untrue that the H.O. has never ruled in favor of any claimant against the Board. Therefore, because Petitioner cannot prove or point to any evidence of bias or impropriety in the Board's hearing process, the Court ought to reject Petitioner's implications that the H.O. was biased in adopting the Order.

In conclusion, because the Board's Order was consistent with the H.O.'s Decision, the H.O. did not err in adopting the proposed Order. Yet, even if the Order was inconsistent in some way with the H.O.'s original Decision, the Petitioner had ample opportunity to object to the proposed Order to point out any perceive discrepancies. That the H.O. adopted the Order after reviewing Petitioner's objections is not error.

CONCLUSION

The Board hereby asks this Court to reject Petitioner's appeal in its entirety. Petitioner failed to show that she meets the statutory standard for receiving long-term disability benefits because she cannot prove an objective medical impairment.

Additionally, Petitioner failed to prove that the H.O. did not consider all of her evidence in making his determination. Finally, Petitioner failed to show that the Order was not competent, complete and contained reversible error.

DATED this 28th day of February, 2005.




DAVID B. HANSEN
Howard, Phillips & Andersen

CERTIFICATE OF MAILING

I hereby certify that on this the 28th day of February, 2005, I mailed a true and correct copy of the above **Appellee's Brief**, postage pre-paid, to the following:

Loren M. Lambert
Attorney for Petitioner/Appellant
266 East 7200 South
Midvale, Utah 84047

 _____

ADDENDUM

A

In an effort to assist the Court in reviewing Petitioner’s brief, the following is a list of corrected citations.

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CORRECTIONS TO PAGE NUMBERS OF CASES CITED

Alder v. Bayer Corporation, 61 P.3d 1068 (Utah 2002), the page number Petitioner's Counsel cites to is actually 1083.

Industrial Power Contractors v Industrial Comm., 832 P.2d 477 (Ut. Ct. App. 1992), the page number Petitioner's Counsel cites to is actually 479.

Layton v. Heckler, 726 F.2d 440 (8th Cir. 1984), the page number Petitioner's Counsel cites to is actually 442-443 and it is a direct quote from *Landess v. Weinberger*, 490 F.2d 1187, 1190 (8th Cir. 1974).

Mickles v. Shalala, 29 F.3d 918 (4th Cir. 1994), the page number Petitioner's Counsel cites to is actually 921.

Morton v. State Tax Comm., 814 P.2d 581 (Utah 1991), Petitioner's Counsel cites to pages 588-589, however, upon review of the case cannot find where Court of Appeals held that de novo standard of review should apply.

Sanderson v. Continental Casualty Corp., 279 F. Supp.2d 466 (D.Del. 2003), Petitioner's Counsel cites to 417, however, there is no page 417.

State v. Tucker, 96 P.3d 368 (Ut. App. 2004), the page numbers Petitioner's Counsel cites to are 370-371.

CORRECTIONS TO CITATIONS MADE TO HEARING RECORD (HR) AND HEARING TRANSCRIPT (HT)

First Issue on Appeal at Page 1, the correct citation is Hearing Transcript (HT) 59:5-11, 69:9-21, 70:4-8, 71:2-9, 102:4-12 and Hearing Record (HR) 233-241, 335, 339-347, 348-349, 358-359, 362-363.

Fourth Issue on Appeal at Page 2, the correct citation is HT 105:3-25, 106:1, HR 241-257, 347-348, 359-362.

Summary of Facts, 6. at page 7, the correct citation is HR 221 Exhibit B pp 00-191.

Summary of Facts, 7. at page 9, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 67:11-18, 139:8-18.

Summary of Facts, 8. at page 9-10, the correct citation is HR 174.

Summary of Facts, 19. at page 12, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 292:13-20.

Summary of Facts, 23. at page 13, the correct citation is HR 172.

Summary of Facts, 24. at page 13, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 239:5-11.

Summary of Facts, 27. at page 14, Petitioner's Counsel cites to HT 307:8-13, however, this is not what Dr. Knorpp testified to.

Summary of Facts, 34. at page 15-16, the correct citation is HT 100:14-18 and HT 116:15-22.

Summary of Facts, 35. at page 16, Petitioner's Counsel mischaracterizes Dr. Beales testimony found in HT 331:16-20, 333, 334:1-6. Dr. Beales did not make statements he merely agreed with statements read to him by Petitioner's Counsel.

Summary of Facts, 36. at page 16, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 251:16-18.

Summary of Facts, 58. at page 21, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 122:5-6.

Summary of Facts, 59. at page 21, This alleged fact is completely unfounded. Petitioner's Counsel has mischaracterized Petitioner's testimony found in HT 146-161, 165-171. In fact Petitioner admits in Summary of Fact, 64. that "her employer tried to accommodate her. . ."

Summary of Facts, 61. at page 22, Petitioner's Counsel mischaracterizes Dr. Beale's testimony found in HT 26:21-25.

Summary of Facts, 67. at page 23, This alleged fact is completely unfounded. There is nothing in the record which suggests that the Hearing Officer did not take into consideration that Petitioner was found disabled by SSA.

Argument at page 26, paragraph 2, the correct citation is HR 383, 386.

Argument at page 27, paragraph 1, the correct citation is HR 375, 386.

Argument at page 28, paragraph 3, the correct citation is HR 385.

Argument at page 36, paragraph 3, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 86:9 and HT 122:5-6.

Argument at page 40, paragraph 2, Petitioner's Counsel mischaracterizes this as Dr. Knorpp's testimony, however, it is the testimony of Dr. Beale's found in HT 17:22-25, 18:1-12, 23:22-25. Additionally, Petitioner's Counsel mischaracterizes Dr. Knorpp's testimony found in HT 224:1-13.

Argument at page 41, paragraph 1, the correct citation is HR 331, Exh. B at 179.

Argument at page 41, paragraph 1, Petitioner's Counsel cites to HR 246 indicating that this direct quote comes from the CDC Clinical Course of CFS, however, this cite to the HR is actually Petitioner's closing argument and Petitioner's Counsel fails to cite correctly to the CDC Clinical Course of CFS in the closing argument.

Argument at page 44, paragraph 1, Petitioner's Counsel cites to HR. 263-297 in an attempt to support this argument. However, the orders which were provided to Petitioner were specific cases involving FMS and CFS. See, HR. at 229-230.

ADDENDUM

B

BEFORE THE UTAH STATE RETIREMENT BOARD

LINDA MALAN HILTON,

Petitioner,

v.

**UTAH STATE RETIREMENT BOARD,
LONG TERM DISABILITY PROGRAM,**

Respondent.

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ORDER

File #: 03-16D

A hearing was held on May 6th and June 1st, 2004, before the Adjudicative Hearing Officer on Petitioner's Request for Board Action. The Petitioner was represented by Loren Lambert. The Board was represented by David B. Hansen. Based upon the evidence in this matter and the legal memoranda submitted, the Adjudicative Hearing Officer makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Petitioner worked as an employee of the State of Utah as a Health Program Specialist II. See, Petitioner's Hearing Exhibit B-15, at 166.

2. Petitioner testified that her last day of work with the State of Utah as a Health Program Specialist II was October 1, 2002. See, Hearing Transcript [Hereinafter “TR”]173:13-15.

3. Petitioner presented into evidence a job description from the State of Utah which indicates that her position as a Health Program Specialist II was a sedentary position. See, Petitioner’s Exhibit B-15. The physical demands of this position consisted primarily of sitting and included some walking, standing, bending, and carrying light items. See, Id, at 166-167.

4. The LTD Program denied Petitioner’s application for a two-year own occupation long-term disability benefit because she failed to show she suffers from an objective medical impairment preventing her from performing her regular occupation.

5. At the hearing, Petitioner’s expert witness, Dr. Landon Beales, testified that there are tests which might provide some objective markers for identifying fibromyalgia and chronic fatigue syndrome, but that most of these tests have not been performed on Petitioner. See, TR, 343:16-25, 344:1-25 (Dr. Beals cannot remember if MRI was performed on Petitioner), 345:1-25, 346:1-25(no testing done on Petitioner’s anti-viral pathways), 347:1-25(neuropsychological exam done, but no reason why Petitioner cannot work based on cognitive problems), 348:1-25(did not see lab work to see if blood tests were done to test growth hormone secretion or adrenal hormone measurements), 351:13-25, 352:1-25, 353:1-25(no tilt table test performed), 354:1-25, 355: 1-3(no ultrasound performed on nasal cavity).

6. Both Petitioner and Dr. Beales testified that the worst conditions Petitioner suffers from are pain and fatigue. See, TR, 21:17-18, 22:7, 18-23, 177: 11-25, 178:1-13. Dr. Beales testified, “There’s no good objective measurement of pain, of fatigue . . .,” TR,360:12-13. Dr.

Beales testified that he relied on Petitioner's self-reported symptoms in forming his opinion regarding Petitioner's disability due to pain and fatigue. . . TR. 60: 1-7.

7. Dr. Beales testified that he was not familiar with either the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guidelines") or the Utah Impairment Guidelines. See, TR. 59:15-19, 60: 8-10. Dr. Beales did not provide any other guidelines or standards that could be used in making his determination on Petitioner's disability.

8. Dr. Beales failed to provide Petitioner with an impairment rating using any accepted objective criteria, such as the AMA or Utah Impairment Guidelines. Impairment ratings are the standard used in the medical community to determine disability. See, TR. 60: 1-7.

9. Dr. Knorpp is board certified in physical medicine and rehabilitation. See, Respondent's Hearing Exhibit 1. Dr. Knorpp is proficient with the AMA Guidelines and the Utah Impairment Guidelines in determining medical impairment and disability. See, TR. 65:15-16. Dr. Knorpp testified that the AMA guidelines have been supplemented with the Utah Impairment Guidelines in Utah to establish disability due to pain and fatigue. See, TR. 70:13-24. Dr. Knorpp testified that based upon these guidelines as well as the disability standard defined in Title 49 of the Utah Code, he could not find anything that could objectively show that Petitioner would qualify for an impairment that would lead to a disability. See, TR. 105:18-21, 25, 106:1.

10. Dr. Scott Knorpp's testimony concerning Petitioner's alleged impairment and disability was credible and persuasive. Dr. Knorpp affirmatively testified that Petitioner did not meet the definition of "total disability," under the definition in Utah Code Ann. § 49-21-102(11). See, TR. 105:18-21, 25, 106:1.

11. Petitioner submitted into evidence a Neuropsychological Evaluation performed on Petitioner on February 20, 2003, by Dr. Elaine Clark, a licensed psychologist. See, Petitioner's

Exhibit B-11. Dr. Clark concluded, “this evaluation failed to provide any evidence that would suggest Mrs. Hilton is disabled from work for psychological or cognitive reasons.” Id. at 135-136.

12. The Hearing Officer reviewed and considered all of Petitioner’s medical records in making this determination and Order.

CONCLUSIONS OF LAW

1. Petitioner’s claim appealed the LTD Program’s denial of a two-year long-term disability benefit.

2. Pursuant to Utah Code Ann. § 49-11-613(2), “the hearing officer shall be hired by the executive director after consultation with the Board and shall follow the procedures of Title 63, Chapter 46B, Administrative Procedures Act, except as specifically modified by this Title.” No evidence was presented which shows the Board failed to follow any of its procedures in conducting this hearing.

3. Petitioner proved no bias in these proceedings. The procedure for administrative hearings has been determined by statute and upheld by Utah Courts.

4. Petitioner proved no bias on the part of the hearing officer in these proceedings. Evidence of previous decisions by a hearing officer does not create bias See, Prickett v. Amoco Oil Co., 31 Fed.Appx. 608, 611 (10th Cir. 2002) (finding that, a judge enjoys a presumption of honesty and integrity which is rebutted only by a showing of “some substantial countervailing reason to conclude that a decision maker is actually biased with respect to factual issues being adjudicated.”).

5. Pursuant to Utah Code Ann. § 49-11-613(4), “the moving party in any proceeding brought under this section shall bear the burden of proof.” Here, as it was in Murphy, the Court

of Appeals held, “the plain language of section 49-1-610(4)¹ clearly imposes the burden of proof on (Petitioner) to demonstrate that she has a ‘total disability.’” Murphy v. Utah State Ret. Bd., 2004 Ut. App. 109, at 2. In long-term disability cases, Petitioner bears the burden to prove she meets the criteria under Title 49, Chapter 21 to be eligible for a long-term disability benefit.

6. Pursuant to Utah Code Ann. §63-46b-8(c), in administrative hearings, the hearing officer “may not exclude evidence only because it is hearsay.” However, hearsay evidence cannot be the sole basis for a contested finding of fact unless that evidence is admissible under the Utah Rules of Evidence. Utah Code Ann. §63-46b-10(3).

7. “Total disability” is defined in Utah Code Ann. § 49-21-102(11)(a) as “the complete inability, due to objective medical impairment, whether physical or mental, to engage in the eligible employee’s regular occupation during the elimination period and the first 24 months of disability benefits.”

8. Pursuant to Utah Code Ann. §49-21-102(6), “Objective medical impairment,” is defined 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.”

9. Petitioner failed to present any non-hearsay evidence proving she suffered from any “objective medical impairment” resulting from an injury or illness based on accepted medical tests or findings. Although Petitioner provided evidence of diagnoses, Petitioner failed to provide any evidence showing that she was objectively impaired due to these conditions.

¹ U.C.A. § 49-1-610 was renumbered in 2002. It now appears as U.C.A. § 49-11-613.

10. Because Petitioner failed to provide any objective medical impairment, Petitioner does not meet the statutory standard of “total disability.” and does not qualify for long-term disability benefits.

11. Although it is not mandatory that a petitioner use the AMA Guidelines and/or the Utah Impairment Guidelines to prove impairment, a petitioner must prove “objective medical impairment” through “accepted objective medical tests or findings.” Since the AMA Guidelines and the Utah Impairment Guidelines are the standards currently used by the medical community to determine impairment, these are reasonable guidelines to be used to determine the level of impairment.

12. No evidence was presented by Petitioner to indicate that she qualifies for an objective impairment rating pursuant to the AMA Guidelines, the Utah Impairment Guidelines, or any other accepted objective criteria.

ORDER

IT IS HEREBY ORDERED that Petitioner’s appeal for two-year own occupation long-term disability benefits 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 making the request. The Board chairman or executive

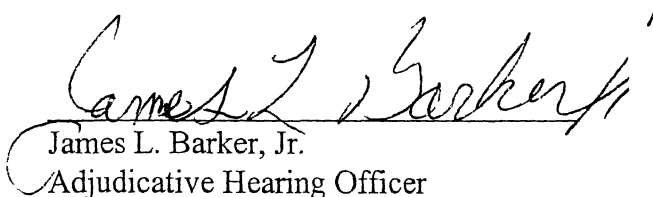
director shall issue a written order granting or denying the request within twenty (20) days of receipt. If no order is issued within twenty (20) days, the request is denied.

JUDICIAL REVIEW

If Petitioner is aggrieved with the final Board order, she 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. § 63-46b-17.

APPROVED AS TO FORM

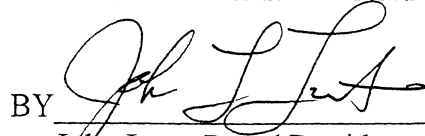
DATED this 15 day of October, 2004.


James L. Barker, Jr.
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 21 day of October, 2004.

UTAH STATE RETIREMENT BOARD


BY 
John Lunt, Board President

CERTIFICATE OF MAILING

I hereby certify that on this the 25 day of October, 2004, I mailed a true and correct copy of the above **Order**, postage pre-paid, to the following:

Loren Lambert
Arrow Legal Solutions, LLC
266 East 7200 South
Midvale, UT 84047

David B. Hansen
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Salt Lake City, Utah 84102



~~Renee Jensen~~