

[Cite as *State ex rel. Wilkes v. Indus. Comm.*, 2011-Ohio-5403.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio ex rel. Ima J. Wilkes, | : | |
| Relator, | : | |
| v. | : | No. 10AP-1009 |
| Industrial Commission of Ohio and Gahanna Christian Academy, | : | (REGULAR CALENDAR) |
| Respondents. | : | |
| | : | |

D E C I S I O N

Rendered on October 20, 2011

Law Offices of Thomas Tootle Co., L.P.A., and Thomas Tootle, for relator.

Michael DeWine, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Ima J. Wilkes ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator permanent total disability ("PTD") compensation, and to enter an order requiring the commission to reconsider her

application and base its decision on medical evidence that properly considers all of her allowed conditions.

{¶2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections were submitted concerning the magistrate's findings of fact, and we adopt them as our own.

{¶3} In brief, relator suffered work-related injuries. Following a 2003 injury, her claims were allowed for the following conditions: contusion of the right thumb, left shoulder region, left wrist, and left upper arm; lumbosacral sprain; herniated nucleus pulposus L4-5; major depression; and anxiety disorder. In 2010, her claims were additionally allowed for gastro-intestinal complaints/irritable bowel syndrome ("IBS").

{¶4} Following a hearing on September 1, 2010, a staff hearing officer ("SHO") denied relator's PTD application. As to the medical findings, the SHO relied on the medical reports of Richard H. Clary, M.D., and James J. Powers, M.D. Dr. Clary performed a psychiatric examination and made a report dated December 8, 2009. Dr. Powers performed a physical examination and made a medical report dated June 28, 2010.

{¶5} Before the magistrate, relator argued that the commission should not have relied on Dr. Clary's psychiatric examination and report because they occurred prior to the commission allowing relator's claim for IBS. More specifically, relator contends that her IBS is psychological in nature; therefore, any psychiatric report is incomplete without

its consideration. The magistrate rejected this argument and concluded that the commission did not abuse its discretion by relying on the reports of Drs. Clary and Powers.

{¶6} Relator submitted a single objection to the magistrate's decision, as follows:

The Magistrate erred when she concluded at page eight "...[r]elator herself is the only person asserting that her gastrointestinal problems are psychological..."

{¶7} In this objection, relator takes issue with a single sentence in the magistrate's decision. In response, the commission argues that, in context, the sentence reflects the magistrate's observation about the psychiatric reports contained within the record, not a rejection of the relationship between relator's anxiety and her IBS. While we do not necessarily disagree with the magistrate's observation concerning the psychiatric reports, for the sake of clarity, we decline to adopt that single sentence. Therefore, we sustain relator's objection to the extent she seeks removal of the sentence from the magistrate's decision.

{¶8} More broadly, relator's contention is that the commission should not have relied on Dr. Clary's report concerning relator's psychiatric conditions because her IBS is a manifestation of those conditions, and her claim for IBS was not allowed until after Dr. Clary examined her. As relator notes, numerous reports in the record indicate this connection between relator's anxiety and her IBS. Whether her IBS is termed a psychological condition or a physical condition, however, the question before the commission was whether, taking all of her conditions together, relator was capable of

sustained remunerative employment such that PTD should be denied. Relying on Dr. Clary's 2009 report and Dr. Powers' 2010 report, the commission concluded that relator was capable of sedentary work and, therefore, denied relator's application.

{¶9} We decline to reweigh the evidence before the commission, which is the exclusive evaluator of the medical evidence before it. While Dr. Clary's psychiatric examination predated the allowance for IBS, Dr. Powers expressly considered relator's IBS in his determination that she had a 22% whole person impairment, 10% of which was attributable to her IBS. Taken together, the reports of Drs. Clary and Powers were some evidence on which the commission could rely to deny PTD. Therefore, to the extent relator's objection argues otherwise, we overrule it.

{¶10} In summary, following an independent review of the record in this matter, we sustain in part and overrule in part relator's objection. We adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own, with the exception of the following sentence on page 12: "Relator herself is the only person asserting that her gastrointestinal problems are psychological." Accordingly, we deny the requested writ of mandamus.

*Objection sustained in part, overruled in part;
writ of mandamus denied.*

TYACK and CONNOR, JJ., concur.

A P P E N D I X

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| Gahanna Christian Academy, | : | |
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| Respondents. | : | |
| | : | |

M A G I S T R A T E ' S D E C I S I O N

Rendered on May 24, 2011

Law Offices of Thomas Tootle Co., L.P.A., and Thomas Tootle, for relator.

Michael DeWine, Attorney General, and Jeanna R. Volp, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} Relator, Ima J. Wilkes, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied her application for permanent total disability ("PTD") compensation and asking the commission to reconsider her

application and base its decision on medical evidence that properly considers all of her allowed conditions.

Findings of Fact:

{¶12} 1. Relator has sustained two work-related injuries during the course of her employment, the most significant being on August 26, 2003. Relator's workers' compensation claim was ultimately allowed for the following conditions: "contusion of right thumb; contusion of left shoulder region; contusion of left wrist; contusion of left upper arm" and "sprain lumbosacral, herniated nucleus pulposus L4-5; major depression; anxiety disorder; gastro-intestinal complaint/irritable bowel syndrome."

{¶13} 2. Since her injuries, relator has received various periods of temporary total disability ("TTD") compensation. Relator's most recent award of TTD compensation was terminated effective January 26, 2010.

{¶14} 3. In terminating her TTD compensation, the commission relied on the December 8, 2009 report of Richard H. Clary, M.D. Dr. Clary considered relator's allowed psychological conditions of: "Major depression, 296.2. Anxiety disorder, NOS, 300.00" and determined that her allowed psychological conditions had reached maximum medical improvement ("MMI") and that they did not cause any limitations or restrictions in her ability to work. In his report, Dr. Clary identified the allowed physical conditions, as well as relator's other physical medical conditions: "Lumbosacral sprain and L4-5 HNP. Unrelated to the claim, she suffers from hypothyroid and she's had chronic nausea and diarrhea off and on since 2005. She also complains of daily headache and neck pain."

{¶15} 4. In an order mailed April 7, 2010, the Ohio Bureau of Workers' Compensation ("BWC") additionally allowed relator's claim for the following condition: "gastro-intes compl/irritable bowel syndr." The BWC relied on the March 31, 2010 report of Richard A. Schwartz, M.D., who concurred with the opinions of certain other doctors, and stated as follows:

* * * Dr. Laura Distel stated in a letter to Miss Wilkes on 01/14/2010 that in the work up for chronic diarrhea at this time it seems most likely that the diarrhea is related to anxiety/stress or IBS (irritable bowel syndrome). On 01/15/2010, one day later, the Association for Psychotherapy, Inc., Dr. Altman, a Diplomate [sic] of the American Board of Forensic Medicine, states that Ima Wilkes has anxiety disorder and part of the anxiety disorder is somatization. Doctor felt that Miss Wilkes has developed gastrointestinal complaints due to stress secondary to her industrial injury. Doctor states that gastrointestinal disorder is a somatization expression of her anxiety. With no other information available and a history on the chart recently of gastrointestinal complaints and diarrhea with abdominal pain it would seem that within a reasonable degree of medical probability the patient has developed irritable bowel syndrome.

* * * [I]t seems reasonable to assume that the ongoing problems associated with her industrial injury mixed with her anxiety disorder could have caused chronic diarrhea/irritable bowel syndrome. The mechanism of this flow through from the injury is simply that of hyperactive gastrointestinal activity associated with the anxiety.

{¶16} 5. On May 21, 2010, relator filed her application for PTD compensation. In support, relator attached the May 4, 2010 report of J. Nick Marzella, Ph.D., a psychologist who had been treating relator since May 2008. In his report, Dr. Marzella stated that his office had been treating relator since May 14, 2008 "for symptoms related to her allowed condition of Major Depressive Disorder (296.22), and Generalized

Anxiety Disorder (300.02)." Dr. Marzella noted that relator's "current symptoms include hypervigilance, social avoidance, depersonalization, depressed mood, sleep disturbance, ruminations, anger, frequent crying spells and panic attacks." Ultimately, Dr. Marzella opined that: "It is our opinion, with a reasonable degree of psychological certainty and probability, Ms. Wilkes is permanently and totally disabled as a result of her psychological condition alone. This allowed psychological condition (296.22) and (300.02) is a direct and proximate result of her industrial injury sustained in 2003."

{¶17} 6. Relator was evaluated by James J. Powers, M.D. In his June 28, 2010 report, Dr. Powers identified relator's allowed conditions: "major depression; anxiety disorder; gastrointestinal complaint/irritable bowel syndrome. 02-353986 04/26/2002 contusion of right thumb; contusion of left shoulder region; contusion of left wrist; contusion of left upper arm." Dr. Powers took a history from relator, provided his physical findings upon examination, and concluded that relator's allowed physical conditions had reached MMI. With regard to the percentage of impairment, Dr. Powers opined that relator had a zero-percent impairment based on the 2002 injury. However, concerning the 2003 injury, Dr. Powers opined that relator had a 22-percent whole person impairment. With regard to her back conditions, Dr. Powers opined as follows: "[F]or the lumbosacral sprain and herniated nucleus pulposus at L4-5, using Table 15-3, p. 384, I feel she is Category III. Given her extreme pain syndrome and need for narcotic medication, I feel that she warrants a 13% whole body impairment." Concerning her gastrointestinal problems, Dr. Powers opined: "In consideration of the gastrointestinal complaints and irritable bowel syndrome, using Table 6-4, p. 128, I feel

she is Class II, or 10% whole body impairment." Dr. Powers concluded that relator was capable of performing light-duty work.

{¶18} 7. The record also contains the June 29, 2010 report of John M. Malinky, Ph.D., a psychologist. At the outset of his report, Dr. Malinky identified the allowed psychological conditions: "Major Depression and Anxiety Disorder." Dr. Malinky identified relator's chief complaints:

Ms. Wilkes was asked to describe how her depression and anxiety affected her and she stated, "It changed my life. I don't go places. I am in constant fear of my stomach problems and irritable bowel syndrome caused depression. I will be sitting and I will feel overwhelmed. Nothing has happened and nobody has given me bad news. I just feel overwhelmed. My thoughts go through my head. I feel like a roller coaster and I cry."

Dr. Malinky stated that his psychological testing supported the diagnoses of depression and anxiety. Dr. Malinky noted the following diagnoses:

- Axis I. Major Depression and Anxiety Disorder.
- Axis II. Deferred.
- Axis III. Sprain Lumbosacral; Herniated Nucleus, Poplus [sic] L4-5; Gastrointestinal Complaints/Irritable Bowel Syndrome.
- Axis IV. Occupational Stress
- Axis V. GAF of 50

Dr. Malinky opined that relator's allowed psychological conditions had reached MMI and concluded that she had a moderate impairment with regard to her activities of daily living, social functioning, and decompensation in work or work settings, as well as a marked impairment with respect to her concentration, persistence, and pace. Dr.

Malinky opined that the "best estimate of the whole person impairment based only on the allowed Major Depression and Anxiety Disorder is 38 percent." Dr. Malinky opined that relator was incapable of work for the following reasons: "This injured worker is not able to deal with the public. She is not able to respond appropriately to supervisors or peers. She cannot concentrate for extended periods of time. She cannot withstand the stress of a normal workday or workweek."

{¶19} 8. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on September 1, 2010. The SHO relied on the medical reports of Drs. Power and Clary and concluded that relator was capable of performing light-duty work with no restrictions due to her allowed psychological conditions. Thereafter, the SHO addressed the non-medical disability factors and concluded that relator was capable of performing some sustained gainful employment, and her application for PTD compensation was denied.¹

{¶20} 9. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶21} In this mandamus action, relator contends that the commission abused its discretion when it denied her application for PTD compensation based upon a medical report that failed to address the impact of all of the allowed medical conditions recognized in her claim. Specifically, relator asserts that her PTD application was premised solely upon her allowed psychiatric conditions and asserts that the allowed conditions of "gastro-intestinal complaint/irritable bowel syndrome" are psychological in

¹ Relator does not challenge the commission's analysis of the non-medical disability factors.

nature and not physical. Because Dr. Clary's report was prepared prior to the allowance of those conditions, relator asserts that Dr. Clary did not consider those allowed conditions when he issued his report opining that relator's allowed psychological conditions would not prevent her from working.

{¶22} In response to relator's argument, the commission argues that the allowed conditions of gastrointestinal problems were considered by Dr. Powers, who opined that she had a ten-percent whole person impairment based on those conditions. The commission also points out that Dr. Marzella, relator's treating psychologist, indicated in his May 4, 2010 report that relator was being treated for the allowed psychological conditions of major depressive disorder and generalized anxiety disorder and that he did not even address the gastrointestinal problems in finding that she was totally disabled. The commission also points out that Dr. Malinky, a psychologist, only identified major depression and anxiety disorder as relator's allowed psychological conditions in his June 29, 2010 report finding that she had a 38-percent whole person impairment and was not capable of working.

{¶23} It is this magistrate's decision that the commission's order denying relator's application for PTD compensation relied on medical reports which discussed the impact of all of relator's allowed conditions, and this court should deny her request for a writ of mandamus.

{¶24} It is undisputed that the commission cannot deny PTD compensation without considering all the allowed conditions in relator's claim. *State ex rel. Roy v.*

Indus. Comm. (1996), 74 Ohio St.3d 259. Here, the commission did consider all of relator's allowed conditions, both psychological and physical.

{¶25} The entire thrust of relator's argument here centers around her assertion that the allowed gastrointestinal problems are psychological in nature, not physical, and because Dr. Clary did not consider those allowed "psychological" conditions, the commission abused its discretion in relying on them. According to relator, her gastrointestinal problems are a physical manifestation of her psychological conditions and must be considered in an evaluation of her allowed psychological conditions and not in an evaluation of her allowed physical conditions.

{¶26} The magistrate finds that relator's argument is not borne out by the evidence. In fact, none of the psychological reports in the stipulation of evidence addressed relator's gastrointestinal problems from a psychological perspective. ~~Relator herself is the only person asserting that her gastrointestinal problems are psychological.~~ Specifically, the magistrate notes that Dr. Marzella did not consider her gastrointestinal problems when he rendered his psychological evaluation. Dr. Marzella, relator's treating psychologist, considered her allowed psychological conditions of major depressive disorder and generalized anxiety disorder as rendering her permanently and totally disabled. Nowhere in his May 4, 2010 report did Dr. Marzella even mention her gastrointestinal problems.

{¶27} Further, Dr. Malinky, a psychologist who examined relator at the request of the commission, considered the psychological conditions of major depression and anxiety disorder and listed her gastrointestinal problems in a section including her other

allowed physical conditions. Dr. Malinky concluded that the "best estimate of the whole person impairment based solely on the allowed Major Depression and Anxiety Disorder is 38 percent," and that relator was incapable of working because she was "not able to deal with the public[,] * * * not able to respond appropriately to supervisors or peers[,] * * * cannot concentrate for extended periods of time[,] * * * [and] cannot withstand the stress of a normal workday or workweek."

{¶28} Dr. Powers, who examined relator at the commission's request for her allowed physical conditions, considered those physical conditions, including relator's gastrointestinal problems and concluded that they caused a ten-percent whole body impairment.

{¶29} After reviewing the entire record, the magistrate rejects relator's argument that her gastrointestinal problems had to have been considered as part of her allowed psychiatric conditions and not her allowed physical conditions. Relator's own treating psychologist, as well as Dr. Malinky, did not consider her gastrointestinal problems when they rendered their opinions concerning her allowed psychological conditions. However, because Dr. Powers did examine relator for those conditions and did find a ten-percent whole body impairment, the magistrate finds that those conditions were considered, and the commission did not abuse its discretion by relying on the reports of Drs. Powers and Clary. Contrary to relator's argument, the commission did consider all of her allowed conditions when it denied her application for PTD compensation.

{¶30} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion, and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).