[Cite as *State ex rel. Anderson v. Indus. Comm.* , 2010-Ohio-1727.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cindy S. Anderson,	:	
Relator,	:	
v.	:	No. 09AP-691
Industrial Commission of Ohio and Perry County Foods, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on April 20, 2010

Larrimer & Larrimer, and *Thomas L. Reitz*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Cindy S. Anderson ("claimant"), 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 that denied her application for permanent total disability ("PTD") compensation, and to enter a new order granting said compensation.

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

{¶3} Claimant argues in her first objection that the magistrate failed to provide any reasoning to support the conclusion that the commission's application of Ohio Adm.Code 4121-3-34(C)(1) does not violate the Equal Clause of Ohio's Constitution. Claimant asserts that the commission's reliance upon evidence older than 24 months, when she is not permitted to rely on evidence older than 24 months under Ohio Adm.Code 4121-3-34(C)(1), is a violation of her equal protection rights under Article I, Section 2 of the Ohio Constitution. Claimant cites Section 2 for the proposition that the government is instituted for the people's equal protection and benefit, and no special privileges or immunities can ever be granted to the government.

{¶4} However, claimant's constitutional argument is a non-starter, as Ohio Adm.Code 4121-3-34(C)(1) only requires that a claimant's application for PTD be accompanied by medical evidence based upon an examination performed within 24 months prior to the date of filing of the application for PTD. The regulation does not limit either a claimant's or the commission's use of medical evidence that is older than 24 months. As this court explained in *State of Ohio ex rel. Wrobleski v. Huntington Bancshares Inc.*, 10th Dist. No. 02AP-654, 2003-Ohio-1111, ¶45, under Ohio Adm.Code 4121-3-34(C)(1), "expert reports dated several years prior to the hearing are not barred from evidentiary consideration as a matter of law." Id., citing *State ex rel. Menold v.*

Maplecrest Nursing Home (1996), 76 Ohio St.3d 197; *State ex rel. Hiles v. Netcare Corp.* (1996), 76 Ohio St.3d 404, 407. "[A]t the hearing, the parties and the commission may rely on any expert report in the file that contains relevant information and/or relevant opinions." Id., ¶46, citing *Menold*; *Hiles*; and *State ex rel. Shields v. Indus. Comm.* (1996), 74 Ohio St.3d 264, 268. Accordingly, because claimant was not prohibited from submitting or relying upon evidence older than 24 months, her equal protection argument is not well-founded. Claimant's first objection is without merit.

{¶5} Claimant argues in her second objection that the magistrate improperly determined that Dr. Donald Tosi's report from 2002, and Dr. Earl Greer's report from 2004, which pre-date Anderson's January 2009 PTD application, are not stale and are "some evidence" to support the commission's decision. We find claimant's argument unavailing. Claimant first asserts that the commission erred when it concluded that the prior permanent partial disability ("PPD") ratings from Drs. Tosi and Greer were some evidence to support her current PTD application. Claimant argues that PPD and PTD are distinct types of disability, with different forms of compensation and requirements, and require distinct findings. However, claimant fails to explain why these distinctions would render the actual findings within the reports of those two doctors inappropriate for consideration of her current PTD claim, and we fail to see why they would be inappropriate.

{¶6} Claimant next criticizes the magistrate's citation of *Menold*, which the magistrate fully summarized in her decision. Claimant asserts that the holding in *Menold* is inapplicable. Claimant contends that the reason the court in *Menold* denied the claimant's staleness argument and found the commission could deny two different PTD

applications based upon the same medical report was because the two applications were filed so closely in time to each other. Claimant points out that the medical report in *Menold* was filed only two weeks before the first PTD application and only six months before the second PTD application, while here the medical reports relied upon by the commission were submitted 5 and 7 years prior to her PTD application. Claimant asserts the magistrate did not explain how these reports could not be considered stale. However, the magistrate did explain her reasoning. The magistrate concluded several circumstances existed that supported the continued relevancy and reliability of Dr. Tosi's and Dr. Greer's reports, including that the two reports were consistent with the findings and percentage of impairment noted in the more recent report of Dr. Cheryl Benson-Blakenship; the reports of Drs. Tosi, Greer, and Benson-Blakenship were all in agreement that the impairment was mild; and all three doctors similarly concluded that claimant's condition had remained relatively unchanged over the years. Therefore, we find claimant's second objection to be without merit.

{¶7} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of claimant's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny claimant's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

TYACK, P.J., and McGRATH, J., concur.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cindy S. Anderson,	:	
Relator,	:	
v.	:	No. 09AP-691
Industrial Commission of Ohio and Perry County Foods, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on January 14, 2010

Larrimer & Larrimer, and *Thomas L. Reitz*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} Relator, Cindy S. Anderson, 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 ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶9} 1. Relator sustained a work-related injury on February 20, 1987. Relator had sustained a previous injury in 1986; however, the more severe conditions are in the 1987 claim.

{¶10} 2. Relator's workers' compensation claims have been allowed for the following conditions: claim number 87-56239 is allowed for "low back strain; dysthymia; disc protrusion L5-S1," and claim number 86-53669 is allowed for "left knee ankle and toe sprain/contusion."

{¶11} 3. Relator was 34 years of age when she was injured in the 1987 claim.

{¶12} 4. Relator has not returned to any employment since the date of her injury.

{¶13} 5. Ultimately, relator filed four separate applications for PTD compensation. Specifically, relator's April 16, 1997 application ("first application") was denied by order dated October 23, 1997. Relator's December 11, 2001 application ("second application") was denied by order dated June 11, 2002. Relator's July 1, 2004 application ("third application") was denied by order dated December 16, 2004. The application which is the subject of this mandamus action was filed January 16, 2009 ("fourth application").

{¶14} 6. The earliest medical evidence in the record is the October 15, 2001 report of relator's treating physician, Jeffrey J. Haggenjos, D.O. This report was submitted in support of relator's second application. In that report, Dr. Haggenjos provided a lengthy summary of relator's complaints. Thereafter, he provided his physical findings upon examination:

> * * * Lumbar: point tenderness over L4-S1, Involuntary bilateral musculoskeletal spasms right greater than the left; - SLR right; flexion <30 degrees, extension 7 degrees; lateral flexion left 18 degrees; lateral flexion right 12 degrees; rotation nil without pain. Left knee crepitus with hinged movement; - drawers; point tenderness MCL with lateral rotation. Ankle/toe increase restriction of movement; dysthymia – long discussion. She is very cynical over her inability to work. * * *

{¶15} 7. In response to relator's second application, relator was examined by commission specialist Boyd W. Bowden, D.O., who issued a report dated March 4, 2002. Dr. Bowden examined relator for her allowed physical conditions. His physical findings provided:

> With reference to the low back, forward bending S-1 13 degrees, D-12 16 degrees, backward bending S-1 2 degrees, D-12 3 degrees, side bending right 6 degrees, left 5 degrees, straight leg raising left 25 degrees, right 40 degrees. Neurologic examination reveals a +3 deep tendon reflex to the plantar, achilles and patellar tendons. Good dorsalis pedis pulse. Heel and toe walking could be achieved. No extensor hallucis weakness is noted on either lower extremity. A negative Lasegue's[1] on both lower extremities was noted. There was pain in the low back. Negative Faber-Patrick's.
>
> With reference to the left knee, the angle of greatest flexion 125 degrees, the ankle of greatest extension 0 degrees, negative medial lateral collateral instability, no effusion is present, negative Drawer's, negative Lachman's, negative McMurray's, negative Apley's. * * *

{¶16} Dr. Bowden ultimately concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a five percent whole person impairment and concluded that relator was capable of performing at a sedentary work level.

[1] Test for pain radiating into the leg after the hips and knees are flexed and the knee is extended.

{¶17} 8. A psychological examination was conducted by Donald J. Tosi, Ph.D. In his March 6, 2002 report, Dr. Tosi noted that relator had not participated in formal psychological or psychiatric treatment for her allowed condition, but that Dr. Haggenjos had been prescribing Zoloft since 1993. He noted further that relator had not participated in any vocational rehabilitation. Ultimately, Dr. Tosi concluded that relator's allowed psychological condition had reached MMI, assessed a 15 percent permanent partial impairment, and found that she would be able to return to her former position of employment.

{¶18} 9. An employability assessment was prepared by Jeffrey R. Berman, CDMS, ATR. In his April 15, 2002 report, Mr. Berman opined that relator's age did not affect her ability to perform entry-level occupations, her education was adequate for many light and some sedentary occupations, her limited work history provided her with no transferable skills, and based upon the reports of Drs. Bowden and Tosi, relator had numerous sedentary strength level employment options which he listed in his report.

{¶19} 10. Relator's second application for PTD compensation was heard before a staff hearing officer ("SHO") on June 11, 2002. The SHO relied upon the medical reports of Drs. Bowden and Tosi as well as the vocational evaluation prepared by Mr. Berman. The SHO also determined that, when considering relator's age, education and work history, she was able to perform some sustained remunerative sedentary employment. In closing, the SHO stated:

> In this case, the injured worker exhausted all workers' compensation benefits possible and applied for permanent and total disability benefits. She has not worked in the last 15 years and has not sought any type of formal vocational training. She could have attended community college, vocational education training programs provided by the

> Bureau of Vocational Rehabilitation, and adult night vocational training programs provided by the Board of Education to make herself more marketable.
>
> The Staff Hearing Officer further notes in 1997 she applied for permanent and total disability; the Industrial Commission denied her application. Five years later, records demonstrate that the injured worker has not attempted to make herself more marketable.
>
> The Staff Hearing Officer finds that if the injured worker was so motivated she could become employed.

{¶20} 11. Relator's third application for PTD compensation was filed on July 1, 2004. In support of her application, relator submitted the May 19, 2004 report of her treating psychiatrist, Jafar Almashat, M.D. His report provided:

> Ms. Anderson sustained a work-related injury in 1987 with injury to her back. She has been feeling depressed. She has been under my care and been treating her for dysthymia since I saw her for the first time 7/23/2002.
>
> It is my opinion and belief that she is unable to sustain remunerative employment. I believe Ms. Anderson to be permanently disabled because of her condition.

{¶21} 12. In support of her third application, relator also included the April 27, 2004 report of Dr. Haggenjos who concluded as follows:

> Her allowed diagnoses are low back strain, dysthymia, L5-S1 disc protrusion.
>
> In discus[s]ion: She comes to office with cane and uses it appropriately. She has severe depression and problems dealing with her inability to do even daily chores and faces the fact that she awakes every AM with her same pain she went to bed with.
>
> Therefore[,] using her allowed diagnosis only, she is totally and permanently disabled to do any type of gainful employment.

{¶22} 13. Relator was examined by commission specialist Robin G. Stanko, M.D., M.S., on September 16, 2004. After providing his physical findings upon examination, Dr. Stanko concluded that relator's allowed physical conditions had reached MMI, assessed a five percent whole person impairment, and concluded that relator was capable of performing at a sedentary work level.

{¶23} 14. Relator was also examined by commission specialist Earl F. Greer, Jr., Ed.D., for her allowed psychological condition. In his September 16, 2004 report, Dr. Greer concluded that relator's allowed psychological condition had reached MMI, assessed a ten percent whole person impairment, and concluded that her psychological condition would not be expected to solely prevent her from returning to her former position of employment. He concluded that a return to employment would be therapeutic and enhance her self-worth. However, he noted that motivation was a significant factor and that any vocational readjustment should be coordinated with psychological/psychiatric intervention.

{¶24} 15. Relator's third application for PTD compensation was heard before an SHO on December 16, 2004. The SHO denied the application after relying on the reports of Drs. Stanko and Greer. The SHO found relator's then age of 51 years was a positive vocational asset and that her age would not, in and of itself, prevent her from obtaining and performing sustained remunerative employment. The SHO also concluded that relator's educational level was a positive vocational factor and that she would be able to perform entry-level, unskilled types of employment. The SHO found relator's work history to be a neutral vocational factor. The SHO identified several jobs within relator's capabilities, noted that she had not worked since she was 34 years of age, has had no

surgeries in either of her claims, and has had two applications for PTD compensation previously denied.

{¶25} 16. Relator's fourth application for PTD compensation, which is the subject of this mandamus action, was filed on January 16, 2009. In support, relator submitted the November 7, 2008 report of Dr. Haggenjos whose opinion remained the same: relator's allowed conditions had left her both physically and mentally permanently incapacitated from performing sustained remunerative employment.

{¶26} 17. In support of her fourth application, relator also submitted the February 19, 2009 report of Patricia Morrison, M.S., C.N.P., and Patricia Gainor, M.D. It was noted that relator reported good and bad days and that, on bad days, she feels more depressed, irritable, lacks energy, and sleeps a lot. In that report, the following was also noted:

> MENTAL STATUS EXAMINATION: Patient does present today with fairly bright affect. She is able to respond to humor. Appearance is neat. Thought processes are complete and goal directed. She does not present as an eminent risk to self or others.
>
> IMPRESSION: Mood and anxiety symptoms are likely to resume and be aggravated by the patient's chronic pain. Irritability, depressive symptoms, and dissociative cognitive symptoms would impair the patient's ability to function in a work environment.

{¶27} 18. An independent medical examination was performed by Kenneth A. Writesel, D.O., relative to her fourth application. In his March 9, 2009 report, Dr. Writesel concluded that relator's allowed physical conditions had reached MMI, assessed a five percent whole person impairment, and concluded that relator could perform light-duty work.

{¶28} 19. On behalf of the commission, relator was also examined by Cheryl Benson-Blakenship, Ph.D. In her February 20, 2009 report, Dr. Benson-Blakenship noted that relator was sad, but that her behavior presentation was within the normal range. Relator's mood and affect were within the normal range. She did note some deficits with concentration, attention and focus. Ultimately, Dr. Benson-Blakenship opined that relator's allowed psychological condition had reached MMI. Dr. Benson-Blakenship noted the following limitations: with regard to her activities of daily living, a class II or mild level of impairment; with regard to her social functioning, a class II or mild level of impairment; with regard to her concentration, persistence and pace, a class II or mild level of impairment; and considering her adaptation, a mild level of impairment. Overall, Dr. Benson-Blakenship assessed a 12 percent whole person impairment and concluded that relator was unable to work as follows:

> Ms. Anderson's dysthymia has resulted in social withdrawal, diminished focus and concentration, decreased self-esteem, decreased stress tolerance, and lack of energy. These issues are a substantial impediment to any kind of sustained, ongoing, remunerative employment. She is not capable of working due to these limitations. Functional limitations from the dysthymia are a barrier to any type of work capacities.

{¶29} 20. Relator's fourth application for PTD compensation was heard before an SHO on May 28, 2009 and was denied. The SHO relied on the medical reports of Drs. Writesel, Greer and Tosi. The SHO specifically rejected the report of Dr. Benson-Blakenship and found persuasive the reports of Drs. Greer and Tosi as follows:

> * * * Dr. Benson-Blakenship indicated that the Injured Worker had a class II, or mild impairment of 12 percent, but concluded that it totally prohibited the Injured Worker from performing any work activity. This latter conclusion is not found to be consistent with a rating of a mild impairment of 12 percent, and for this reason the Staff Hearing Officer

> does not find the report of Dr. Benson-Blakenship to be persuasive. The Staff Hearing Officer chooses to rely on the previous reports from Drs. Greer and Tosi in regard to the issue of whether the allowed dysthymia condition is work prohibitive. The Staff Hearing Officer does not find that the latter reports are stale, as there is no evidence that the condition has appreciably worsened since those reports were issued. All three reports rated the Injured Worker's psychological impairment as mild, between 10 and 15 percent. There have been no hospitalizations or significant changes in the treatment of the dysthymia condition. And Dr. Benson-Blakenship herself indicated in her report that the Injured Worker's mood remained relatively unchanged through the last several years, with no evidence of mood lability. Based on these reasons the Staff Hearing Officer finds that the reports of Drs. Greer and Tosi are still some evidence which can be relied on. See the cases of State ex rel. Menold v. Maplecrest Nursing Home (1996), 76 Ohio St.3d 197 and State ex rel. Kroger Co. v. Indus. Comm. (1998), 82 Ohio St.3d 231.

{¶30} The SHO found relator's age of 56 years was a neutral vocational factor, her education was a positive vocational factor and her work history was a negative vocational factor. However, the SHO found that there were numerous unskilled and semi-skilled light-duty jobs which relator could perform through short on-the-job training. Further, the SHO noted that relator had over 20 years to attempt to participate in some type of appropriate vocational rehabilitation program, but that she had made no effort to do so. As such, her fourth application for PTD compensation was denied.

{¶31} 21. Relator's request for reconsideration was denied by order of the commission mailed June 30, 2009.

{¶32} 22. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶33} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought

and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶34} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments, but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm*. (1991), 57 Ohio St.3d 203.

{¶35} Relator makes two arguments in this mandamus action. First, relator argues that she was denied equal protection of law because, while she was required to present medical evidence based upon examinations conducted within 24 months prior to

the date of the filing of her fourth application for PTD compensation, the commission was not required to likewise present evidence within 24 months of her application. Relator points to the commission's reliance upon the reports of Drs. Greer and Tosi to support this argument. Second, relator contends that the commission abused its discretion by relying on the reports of Drs. Greer and Tosi and by finding that her relatively consistent percentage of permanent partial disability should not have been a factor in the denial of her PTD compensation. For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶36} Relator's equal protection argument is completely misfounded. Relator cites Ohio Adm.Code 4121-3-34(C) which provides, in pertinent part:

> Processing of applications for permanent total disability[.]
>
> The following procedures shall apply to applications for permanent total disability that are filed on or after the effective date of this rule.
>
> (1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation.

{¶37} In support of her 2009 (fourth) application for PTD compensation, relator submitted the November 2008 report of Dr. Haggenjos and the February 2009 report of Dr. Gainor. Both those reports were prepared within 24 months of relator's fourth application for PTD compensation. As such, relator asserts that she clearly complied with the requirements of the Ohio Administrative Code.

{¶38} In making her equal protection argument, relator contends that the commission did not comply with Ohio Adm.Code 4121-3-34(C)(1); however, the magistrate finds that the commission did comply. First, the commission had relator examined for her allowed physical conditions by Dr. Writesel whose report is from March 2009. Further, the commission also had relator examined by Dr. Benson-Blakenship and her report is from February 2009. As such, the commission did have relator examined and did provide objective medical evidence within 24 months of the filing of relator's fourth application for PTD compensation.

{¶39} There is no equal protection issue presented in this case. Relator's argument really goes to the commission's decision to reject the report of Dr. Benson-Blakenship and to rely on the 2002 report of Dr. Tosi and the 2004 report of Dr. Greer. The issue is one of "some evidence" and there is no equal protection issue raised by the facts of this case.

{¶40} The real issue here is whether the commission abused its discretion in relying on the medical reports of Drs. Tosi and Greer to find that relator's psychological condition did not prevent her from working. In reality, relator is arguing that those reports are stale and cannot constitute "some evidence" upon which the commission could rely. For the reasons that follow, the magistrate finds that relator's argument lacks merit.

{¶41} In relying on the reports of Drs. Tosi and Greer, the SHO cited the Supreme Court of Ohio's decision in *State ex rel. Menold v. Maplecrest Nursing Home* (1996), 76 Ohio St.3d 197. In *Menold*, the claimant sustained a low back sprain/strain, followed up with conservative treatment, and never returned to work. The claimant filed an application for PTD compensation supported by the November 1989 report of Dr. Joseph

A. DiDomenico who, after providing his physical findings upon examination, concluded that given the claimant's age of 63 years, her educational level and work experience, she was permanently and totally disabled from gainful employment. The commission also had before it the November 1989 report of Dr. W. Jerry McCloud who opined that the claimant did not demonstrate medical evidence consistent with finding her permanently and totally disabled. He assessed a 30 percent impairment of the body as a whole. In April 1990, the commission relied on the report of Dr. McCloud and denied the claimant's application for PTD compensation.

{¶42} Two months later, the claimant filed another application for PTD compensation. She submitted the June 1990 report of Dr. DiDomenico who again concluded that, based on her physical limitations, her age, education, and work experience, she was permanently and totally disabled from any and all gainful employment. The claimant was examined by Dr. David M. Baroff who issued a report in November 1990. In that report, he provided his physical findings upon examination, assessed a 15 percent whole person impairment, and concluded that she could return to her former position of employment. The commission again denied the claimant's request for PTD compensation.

{¶43} The claimant filed a mandamus action and this court issued a writ of mandamus ordering the commission to vacate its order because it failed to comply with *Noll*. In June 1993, the commission again denied her request for PTD compensation. The commission relied on the November 1989 report of Dr. McCloud.

{¶44} The claimant again filed a complaint in mandamus in this court and this court found that the commission had abused its discretion in denying her application.

This court found that Dr. McCloud's report did not constitute some evidence as to medical conditions which he did not find to be in existence seven months before the claimant filed her second application for PTD compensation. This court concluded that the claimant's work-related physical problems had apparently increased in the intervening time period.

{¶45} On appeal, the Supreme Court of Ohio reversed this court's decision. The claimant argued that Dr. McCloud's report was non-probative because it pre-dated the period of disability. After noting that the commission is exclusively responsible for judging evidentiary weight and credibility, the court noted that the probative value of a medical report may be lessened by later changes in a claimant's condition. Further, the court noted that the longer the time between the report and the disability alleged, the more likely it was that a claimant's condition had changed. In that case, the court noted the extremely short time between the denial of her application and her reapplication for PTD compensation.

{¶46} In the present case, the magistrate acknowledges that the time between the 2002 report of Dr. Tosi and the 2004 report of Dr. Greer clearly pre-dates relator's 2009 application for PTD compensation by several years. However, the magistrate finds that those reports were, nevertheless, some evidence.

{¶47} With regard to her second application for PTD compensation, relator only submitted evidence pertaining to her allowed physical conditions. The commission had relator examined by Dr. Tosi who noted that she had not participated in any former psychological or psychiatric treatment, but that her family physician, Dr. Haggenjos, had prescribed her Zoloft since 1993. Dr. Tosi assessed a 15 percent whole person impairment and concluded that relator could return to her former position of employment.

To the extent that Dr. Haggenjos' opinion included a medical assessment, he opined that relator's allowed conditions, in combination, rendered her permanently and totally disabled. The commission relied on the psychological report of Dr. Tosi as well as the report of Dr. Bowden and the vocational evaluation of Mr. Berman and denied relator's second application for PTD compensation.

{¶48} Relator filed her third application for PTD compensation in July 2004. She submitted the April 2004 report of Dr. Haggenjos who again stated that, based on all the allowed conditions, relator was permanently and totally disabled, as well as the May 2004 report of Dr. Almashat who indicated that he first saw relator for her dysthymia in July 2002 and that, in his opinion, she was unable to perform sustained remunerative employment. Relator did not submit any office notes from either physician.

{¶49} The commission had relator examined by Dr. Greer. In his September 2004 report, Dr. Greer noted that relator had been involved in psychological/psychiatric treatment for the last one and one-half years. Ultimately, he assessed a ten percent impairment and concluded that her allowed psychological condition would not prevent her from returning to her former position of employment. In denying this, her third application for PTD compensation, the commission relied on the report of Dr. Stanko to find that relator could perform at a sedentary work level, and the report of Dr. Greer to find that relator's psychological condition did not prevent her from working.

{¶50} Relator filed her fourth application for PTD compensation in 2009. Relator included the November 2008 report of Dr. Haggenjos who simply noted that, within the last two years, relator's condition had deteriorated and that she remained permanently and totally disabled. Relator also submitted the February 2009 report of Dr. Gainor

indicating that relator had been seen in that office since July 2002. Nowhere in that report did Dr. Gainor opine that relator's allowed psychological condition prevented her from returning to sustained remunerative employment.

{¶51} The commission had relator examined by Dr. Benson-Blakenship whose ultimate conclusion the commission rejected. Dr. Benson-Blakenship concluded that relator had a mild impairment, assessed a 12 percent impairment, yet concluded that she was permanently and totally disabled. The commission concluded that the percentage of impairment assessed was in line with the percentages assessed by Drs. Tosi and Greer, but that it was incongruous with her conclusion that relator was permanently and totally disabled. The commission ultimately looked back at the 2002 report of Dr. Tosi and the 2004 report of Dr. Greer and, in conjunction with the report of Dr. Benson-Blakenship, found that all three reports rated relator's psychological impairment as mild, assessed impairment ratings between 10 and 15 percent, noted that there had been no hospitalizations or significant changes in her treatment and that even Dr. Benson-Blankenship indicated that relator's mood had remained relatively unchanged through the last several years. As such, the commission found that her allowed psychological condition was not work prohibitive.

{¶52} In the present case, the magistrate finds that the commission clearly explained its reasoning. The three commission doctor reports related to relator's allowed psychological condition had found a 10 percent, 12 percent, and 15 percent impairment. All three doctors opined that relator's impairment was mild. All three doctors noted that relator's condition had remained relatively unchanged over the years. What the commission rejected was the fact that Dr. Benson-Blakenship came to the opposite

conclusion after making essentially the same findings that Drs. Tosi and Greer made. For these reasons, the commission accepted Dr. Benson-Blakenship's findings; however, rejected her ultimate conclusion.

{¶53} Although the commission did not cite this additional reason, it must be noted that, with the exception of the very general report from Dr. Haggenjos indicating that either her allowed psychological or allowed physical conditions had deteriorated in the past two years and that, when considering all her allowed conditions, both physical and psychological, she was permanently and totally disabled. The other psychological evidence submitted by relator, from Dr. Gainor, did not include the conclusion that her allowed psychological condition precluded her from working. As such, relator failed to meet her burden of proving that her allowed psychological condition rendered her permanently and totally disabled.

{¶54} Relator also challenges the commission's reliance on those reports because the commission relied on the low percentages of impairment found by those doctors. Relator argues that percentage of impairment alone cannot be used to deny a PTD application.

{¶55} Relator is correct to argue that percentage of impairment alone cannot be used to defeat an application for PTD compensation. However, that is not what happened in the present case. Instead, the commission noted the percentages of impairment found by Drs. Tosi, Greer and Benson-Blakenship were within 10 to 15 percent impairment. That is a relatively low percentage of impairment; however, that is not the only factor upon which the commission relied. Instead, the commission specifically noted that all three doctors opined that her impairment was mild and that her

condition had remained relatively unchanged for the last several years. Further, the commission noted that relator had not been hospitalized or required any significant changes in her treatment over the years. Based on all those factors, the commission found that her allowed psychological condition did not render her permanently and totally disabled.

{¶56} As indicated above, the magistrate finds that the commission did not abuse its discretion by relying on the reports of Drs. Tosi and Greer. First, contrary to relator's argument, there is no equal protection issue here. Instead, the issue was whether the reports of Drs. Tosi and Greer were stale and whether the commission relied solely upon a low level impairment to deny her application for PTD compensation. The magistrate finds that the reports of Drs. Tosi and Greer are not stale given the consistency and the percentage of impairment noted by them as well as Dr. Benson-Blakenship, and the fact that her impairment was mild and there had been no significant changes in her condition.

{¶57} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation and this court should deny relator's request for a writ of mandamus.

/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).