

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Colleen J. Smith,	:	
Relator,	:	
v.	:	No. 09AP-504
Cincinnati Schools and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 25, 2010

Law Offices of James A. Whittaker LLC, Laura J. Murphy and James A. Whittaker, for relator.

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

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Colleen J. Smith, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying her application for permanent total disability compensation and to find she is entitled to that compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In her decision the magistrate determined (1) the Industrial Commission did not abuse its discretion in denying relator's request to depose Steven S. Wunder, M.D. and Michael A. Murphy, Ph.D., and (2) some evidence supports the Industrial Commission's determination that relator is not entitled to permanent total disability compensation.

II. Objections

{¶3} Relator filed objections to the magistrate's conclusions of law. Relator does not separately state the objections, but in essence they are: (1) the magistrate wrongly concluded the commission did not abuse its discretion in denying relator's request to depose Drs. Wunder and Murphy, and (2) the magistrate wrongly concluded the commission did not abuse its discretion in finding relator is not entitled to permanent total disability compensation.

III. First Objection – Depositions of Drs. Wunder and Murphy

{¶4} The magistrate appropriately set forth the pertinent case law to be considered in permanent total disability compensation applications and adequately addressed the issue of relator's request to depose Drs. Wunder and Murphy. Relator's objections to the magistrate's conclusions of law, setting forth reasons why the depositions are necessary, are unpersuasive.

- Although relator contends Dr. Wunder did not record all the information she provided to him, the magistrate properly determined relator was able to provide any additional

information at a hearing on her application and at the same time undermine Dr. Wunder's report.

- To the extent relator contends Dr. Wunder's findings are inconsistent, the magistrate appropriately observed relator could point out such inconsistencies to the commission, which then could address and remedy the problem to the point of disqualifying the report if necessary, without the need for depositions.
- Relator contends Dr. Wunder failed to explain his use of "essentially" normal, but, to the extent the term is vague, relator was able to undermine Dr. Wunder's report with that factor.
- Relator suggests Dr. Wunder inaccurately described relator's participation in vocational rehabilitation, but the magistrate adequately addressed the issue. Moreover, any inaccuracy provided a basis for impeaching Dr. Wunder's report.
- Relator notes that Dr. Wunder's and Dr. Murphy's disability percentages differ vastly from those of other doctors, but, as the magistrate properly concluded, such disparity among reports does not support a request to depose the doctors who issued the reports. *State ex rel. Pate v. Indus. Comm.*, 97 Ohio St.3d 89, 2002-Ohio-5444 (noting such divergent opinions are resolved through the hearing process itself).

{¶5} Given the parameters the Supreme Court outlined in *Pate* for depositions within the context of permanent total disability compensation applications, the commission did not abuse its discretion in denying relator's requests to depose Drs. Wunder and Murphy. Relator's first objection is overruled.

IV. Second Objection – "Some Evidence"

{¶6} Relator's second objection suggests the commission abused its discretion in denying her request for permanent total disability compensation. The medical evidence before the commission supports the commission's determination both that relator physically could perform light duty work and that her allowed psychological conditions did not prevent her from working. The non-medical factors also support the commission's determination. Although relator was 59 years of age, she had both a bachelor's and master's degree from the University of Cincinnati. Her work history included teaching, serving as an administrative assistant, supervising, and claims processing. Based on those factors, the commission determined relator had transferrable skills necessary to perform sustained remunerative employment. Because some evidence supports the commission's decision, we overrule relator's second objection.

{¶7} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;
writ denied.*

KLATT and McGRATH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Colleen J. Smith,	:	
Relator,	:	
v.	:	No. 09AP-504
Cincinnati Schools and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 12, 2009

*Law Offices of James A. Whittaker LLC, Laura J. Murphy
and James A. Whittaker, for relator.*

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

IN MANDAMUS

{¶8} Relator, Colleen J. Smith, 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 has five allowed workers' compensation claims which have been allowed for the following conditions:

97-326817: ACUTE CERVICAL STRAIN; HEAD TRAUMA;
LEFT SIDED ATAXIA; DEPRESSIVE DISORDER.

70-19066: LUMBOSACRAL SPRAIN; POST TRAUMATIC
NEUROSIS.

PEL85282: NECK PUNCTURE; SPRAIN OF NECK.

PEL230992: AGGRAVATION OF PRE-EXISTING
CERVICAL STRAIN; AGGRAVATION OF PRE-EXISTING
LUMBOSACRAL STRAIN.

95-573697: CONTUSION FACE, SCALP, NECK; SPRAIN
LUMBAR REGION; SPRAIN OF NECK.

{¶10} 2. Relator has not worked since 1998.

{¶11} 3. Between 1988 and 2005, relator received several awards of permanent partial disability ("PPD") compensation. The highest percentage was awarded in the 1970 claim (allowed for lumbosacral sprain and post-traumatic neurosis). All total, relator has been awarded more than 100 percent in PPD compensation.

{¶12} 4. Relator filed her first PTD application in August 2001 and dismissed that request in December 2001.

{¶13} 5. Relator filed her second application for PTD compensation in October 2006.

{¶14} 6. Relator's application was supported by reports from her treating physicians Stephen W. Halmi, Psy.D., licensed psychologist and Marvin H. Rorick, M.D.

{¶15} 7. In his October 16, 2006 report, Mr. Halmi opined that relator is permanently and totally disabled from working due to her depression "based upon several factors including her presentation, self report, and objective test results." According to Mr. Halmi, Roberto Madrigal, Ph.D., administered the Minnesota Multiphasic Personality Inventory-2nd Edition (MMPI-2) in 2003 and her Depression Scale T score fell within the severe range of depression. Although the test was re-administered in September 2006 and resulted in a lower score, Mr. Halmi opined that the results still fell within the serious range. Mr. Halmi opined that relator suffers with symptoms consistent with a major depressive episode. Mr. Halmi opined that relator's symptoms of chronic fatigue, poor concentration, apathy, and her reduced ability to concentrate, would negatively affect her work performance. He also noted that her ability to interact effectively with others was impaired, that she avoids being around other people because she is embarrassed that she uses a cane, and she is fearful that she will cry if asked any questions. Lastly, Mr. Halmi opined that relator's ability to adapt to daily stressors associated with routine work was impaired and that she would have difficulty responding appropriately to changes in a work setting because of her reduced frustration tolerance and her overly generalized pessimistic thought content.

{¶16} 8. In his November 15, 2006 report, Dr. Rorick noted that his physical examination revealed that relator has deficits in strength in the lower extremities for which she needs a cane and she has continuing neck and head pain as well. Because she is medication dependent, he opined that it was unlikely she would be able to return to useful work and he presumed that she was permanently and totally disabled.

{¶17} 9. Relator receives disability from the Public Employees Retirement System; however, the start date and amount of benefits were not reported. The stipulation of evidence indicated that relator receives a pension from the State Teachers Retirement System in the amount of \$1,656 per month.

{¶18} 10. Relator was also examined by Steven S. Wunder, M.D. In his April 4, 2007 report, Dr. Wunder provided a brief synopsis of relator's injuries and noted her allowed conditions. Thereafter, Dr. Wunder provided his physical findings upon examination:

Physical examination revealed her to be a well-developed, well-nourished female in no acute distress.

She was 5'0" tall and weighed 145 pounds.

Her gait was with a cane. It was slow. There was no significant ataxia though. She was independent with sit to stand and had good balance.

Inspection of the spine revealed no abnormal postural curves.

She was diffusely tender to palpation over the cervical and lumbar area. However, she had Waddell signs for symptom magnification with axial compression, rotation and shoulder movements.

Her lumbar flexion angle was 20 degrees, but straight leg raise was 90 degrees. Extension was 10 degrees, and lateral bending was 10 degrees.

Despite her complaints of ataxia, she was able to climb the step to the examination table unassisted.

She had a stocking-glove decreased sensation that was non-organic over the entire left leg. Her motor examination showed give-way responses. Her reflexes were 2+.

There was no atrophy present, and her thigh circumferences were 42 cm and symmetric, and calf circumferences were 33 cm and symmetric.

Her peripheral joint examination showed good range of motion of the hips, knees and ankles, and straight leg raise was intact.

Her reflexes in the upper extremities were 1+ and symmetric, and her sensation again showed a stocking-glove decrease over the entire left arm that was not organic. Her motor strength also showed give-way responses.

There was no atrophy present. Her mid biceps circumferences were 28 cm and symmetric, and forearm circumferences were 25 cm and symmetric.

She was right-hand dominant, and her power grasp was 25 pounds, 20 pounds and 20 pounds on the dominant right side and 25 pounds, 35 pounds and 20 pounds on the left side.

Her cervical spine range of motion met Waddell's signs for symptom magnification. She would not move on formal examination more than 10-15 degrees in any one plane, but observed motions were greater.

Despite her complaints of tenderness, there was no muscle guarding or wasting over the cervical area.

Her cranial nerve exam II through XII was intact other than for nonorganic sensory loss over the cheek on both sides.

Dr. Wunder noted that relator was diffusely tender to palpation over both the cervical and lumbar area; however, he noted further that she had Waddell signs for symptom magnification with axial compression, rotation and shoulder movements. Thereafter, Dr. Wunder indicated that he reviewed relator's medical records and specifically noted the results of the following testing:

* * * CAT scan of the head that was normal on February 14, 1997. * * * CT scan of the lumbar spine on February 28,

1997, that was normal. * * * [I]ncidental L5 spina bifida. * * * CAT scan of the head on November 1, 1997, that was normal. * * * December 30, 1997, she had a cervical MRI that showed mild spondylosis and spurring at C6-C7 and to a lesser extent at C5-C6.

* * * January 17, 1975, EMG that was normal; * * * December 18, 1975, EMG that was normal; * * * February 3, 1979, EMG that was normal; * * * August 31, 1981, EMG of the legs that was normal; * * * December 7, 1981, EMG of the legs that was normal; * * * June 10, 1985 CT scan of the lumbosacral spine that was normal; * * * June 10, 1985, EMG of the legs that was normal; * * * September 28, 1990, CT of the lumbar spine that was normal; * * * October 5, 1991, lumbar MRI that was normal.

* * * EMG of the upper extremities on March 6, 1990, that was normal[,] * * * cervical MRI on December 7, 1991, that was normal.

* * * MRI of the brain that was normal on February 17, 1996; a cervical MRI on June 1, 1996, that showed minimal degenerative disease; and a lumbar MRI on August 17, 1996, that showed a partially sacralized L5 and a minor tiny L5-S1 protrusion.

{¶19} Thereafter, he discussed the reports of Dr. Rorick and Mr. Halmi as well as other psychological assessments in the record. Dr. Wunder noted that Dr. Rorick noted normal neurologic findings, tension headaches, her motor, sensory and reflex examination was normal, she ambulated with a cane, her cranial nerve examination was normal and there was no verifiable lower extremity weakness. He indicated further that Dr. Rorick's records consistently showed normal neurologic findings. Dr. Wunder opined that relator's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 16 percent whole person impairment and opined that she was capable of performing light-duty work. In conclusion, he noted that "she does have a

great deal [of] symptoms, but her diagnostic testing and physical findings have been relatively unremarkable."

{¶20} 11. Relator was also examined by Michael A. Murphy, Ph.D. In his April 13, 2007 report, Dr. Murphy listed the allowed conditions, the history of her injuries, and noted the records he reviewed. Dr. Murphy administered the Millon Clinical Multiaxial Inventory – II and noted as a possible diagnosis: "Obsessive-Compulsive Personality Disorder or compulsive personality style, depending on the degree of severity and functional impairment." He also opined that relator was reporting mild symptoms of depression. With regard to her residual functional capacities, Dr. Murphy found her daily activities, adaptation to the workplace, concentration, attention, and pace was mildly impaired and social interaction was mild to moderately impaired. Ultimately, Dr. Murphy concluded that relator's allowed psychological conditions had reached MMI, assessed a 16 percent whole person impairment, and concluded that her psychological condition alone was not work prohibitive; however, mild but periodic symptoms of emotional distress were present.

{¶21} 12. Relator filed motions with the commission requesting the right to depose Drs. Wunder and Murphy. Relator argued that the reports were vague and inconsistent, that Dr. Wunder did not provide any actual return-to-work restrictions and did not actually consider all the allowed conditions, and that Dr. Murphy's report was completely disparate from most of the other psychological reports contained in her file. In support of these motions, relator prepared her own personal critique of the doctors' reports in an effort to demonstrate that they omitted pertinent medical evidence.

{¶22} 13. Relator's motions were heard before a staff hearing officer ("SHO") on June 28, 2007. The SHO denied relator's request to depose both physicians.

Concerning the report of Dr. Wunder, the SHO stated:

The injured worker's motion, filed 05/14/2007, requests authorization to depose Steven Wunder, M.D., concerning his report dated 04/04/2007. This report was prepared at the request of the Industrial Commission on the issue of permanent and total disability. The injured worker requested authorization to depose Dr. Wunder alleging that the report is inconsistent and vague, does not provide actual return to work restrictions and does not provide examination findings on all conditions. The injured worker further alleges that the defects in the report cannot be cured through the hearing process.

The Staff Hearing Officer finds that Dr. Wunder's report is clear, is not ambiguous and is supported by adequate findings. Dr. Wunder's report records his interview of the injured worker, his examination findings and a summary of the medical evidence which he reviewed. The Staff Hearing Officer further finds that the report of Dr. Wunder includes a sufficient functional capacities opinion. Dr. Wunder completed the Physical Strength Rating Form indicating that the injured worker would be capable of light work. The Staff Hearing Officer finds that the description of light work is specifically included on the form. The Staff Hearing Officer further finds that any disparities between the opinion of Dr. Wunder and the opinion of other examining physicians can best be resolved through the hearing process.

The Staff Hearing Officer therefore finds that deposing Dr. Wunder is not necessary to the fair adjudication of the injured worker's permanent total disability application. Therefore the injured worker's motion is denied.

The SHO addressed the report of Dr. Murphy as follows:

The injured worker's motion filed 04/26/2007 requests authorization to depose Michael Murphy, Ph.D., concerning his report dated 04/13/2007. Dr. Murphy evaluated the injured worker for the condition depressive disorder on the

issue of permanent total disability. The injured worker's motion alleges that Dr. Murphy's report is vague and inconsistent. The injured worker's motion further alleges that the opinion of Dr. Murphy is disparate from most other psychological reports contained in the claim file.

The Staff Hearing Officer finds that Dr. Murphy's lengthy report is not vague or inconsistent. The Staff Hearing Officer finds that Dr. Murphy's report contains extensive interview notes, the results of testing that Dr. Murphy administered to the injured worker and a summary of medical reports that Dr. Murphy reviewed in the evaluation process. The Staff Hearing Officer finds that Dr. Murphy's report and opinion are clear and are clearly supported by adequate findings.

The Staff Hearing Officer further finds that Dr. Murphy's opinion is not completely disparate from the opinion of other psychological evaluators. The Staff Hearing Officer notes that Dr. Mohammad, who evaluated the injured worker in December of 2004 opined that the injured worker could return to work.

The Staff Hearing Officer finds that the differences between the opinion of Dr. Murphy and the opinion of the injured worker's treating physicians can best be resolved through the hearing process.

Therefore the injured worker's motion, filed 04/26/2007, is denied.

{¶23} 14. Thereafter, relator's motion for PTD compensation was heard before an SHO on September 25, 2007 and was denied. The SHO relied on the medical reports of Drs. Wunder and Murphy and found that relator had the functional capacity to perform light-duty work and that her psychological conditions are not work prohibitive. Thereafter, the SHO considered the nonmedical disability factors and concluded as follows:

The Staff Hearing Officer finds that the injured worker's age, fifty-nine years old, constitutes a mild barrier to re-employment. However, pursuant to State ex rel. Moss v. Industrial Commission (1996) 75 Ohio St.3d 414, age alone does not constitute an absolute barrier to re-employment.

Rather, the injured worker's age must be considered in conjunction with all other relevant factors.

The Staff Hearing Officer finds that the injured worker is a high school graduate who has obtained both a bachelors degree and a masters degree from the University of Cincinnati. The Staff Hearing Officer finds that the injured worker's educational history indicates that the injured worker can read, write and perform basic math skills as would be expected of an individual with the injured worker's level of formal education. The Staff Hearing Officer further finds that the injured worker's educational history demonstrates that the injured worker is highly skilled and has an above average intellect. Accordingly, the Staff Hearing Officer finds that the injured worker's educational background constitutes a positive vocational asset which enhances the injured worker's ability to gain re-employment.

The Staff Hearing Officer finds that the injured worker's IC-2 Application for Permanent and Total Disability Compensation indicates that the injured worker has a very impressive work history. Specifically, the Staff Hearing Officer finds that the injured worker has previously been employed as a teacher, an administrative assistant, a supervisor and a claims processor.

The injured worker's duties at her previous positions of employment included supervising and disciplining students, developing lesson plans, monitoring and evaluating students, teaching career education to teachers, performing counseling, coordinating community resources and supervising personnel. Additionally, the injured worker's prior work history required the injured worker to proficiently use maps, computers, overhead projectors, copiers, books, manuals, TVs and VCRs and various types of office equipment. Accordingly, the Staff Hearing Officer finds that the injured worker's prior work history demonstrates that the injured worker has the transferable work skills necessary to perform sustained remunerative employment. Therefore, the Staff Hearing Officer finds that the injured worker's prior work history constitutes a positive vocational asset which enhances the injured worker's ability to gain re-employment.

Based on these non-medical disability factors, the Staff Hearing Officer finds that the injured worker has the

education, intellect and literacy abilities to perform sustained remunerative employment.

{¶24} 15. Relator's request for reconsideration was denied by order of the commission mailed March 12, 2008.

{¶25} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶26} 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.

{¶27} 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.

{¶28} Relator's contention that the commission abused its discretion by denying her request to depose Drs. Wunder and Murphy will be addressed first.

{¶29} Ohio Adm.Code 4121-3-09(A)(7) provides, in pertinent part:

Procedure for obtaining the oral deposition of, or submitting interrogatories to, an industrial commission or bureau physician.

(a) A request to take the oral deposition of or submit interrogatories to an industrial commission or bureau physician who has examined an injured or disabled worker or reviewed the claim file and issued an opinion shall be submitted in writing to the hearing administrator within ten days from the receipt of the examining or reviewing physician's report[.]

(b) The request must set out the reasons for the request[.]

* * *

(d) [W]hen determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problems raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.

{¶30} As noted in the findings of fact, relator's request to depose Dr. Wunder was based on her opinion that his report was inconsistent, vague, and failed to provide actual

return-to-work restrictions. Further, relator argued that Dr. Wunder did not examine her on all the allowed conditions. For the reasons that follow, the magistrate finds that the commission did not abuse its discretion.

{¶31} In *State ex rel. Pate v. Indus. Comm.*, 97 Ohio St.3d 89, 90-91, 2002-Ohio-5444, ¶6-12, the Supreme Court of Ohio discussed the standards under which the commission is to consider motions to depose physicians. The court noted that, while an inconsistent report and substantial disparity among experts had been recognized as legitimate factors for determining the reasonableness of a request to depose a physician, those factors are not relevant when considering a claimant's eligibility for PTD compensation. The court noted that the term "substantial disparity" is undefined in the context of PTD and that disability hearings occur because there is a disparity in the medical evidence. If all physicians agreed, there would be no need for a hearing. As the court noted, a hearing is needed when one doctor says that a claimant can work and another says the claimant cannot work.

{¶32} The court also considered the issue of internal inconsistency, and stated that the commission can disqualify a report that is so internally inconsistent as to negate its credibility. This is a problem which the commission can address and remedy without deposition testimony. Instead, the court identified two other criteria: (1) whether a defect exists that can be cured by deposition, and (2) whether the disability hearing provides an equally reasonable option for resolution.

{¶33} One of relator's criticisms for Dr. Wunder's report was that he did not write down in his report everything she said. The magistrate finds that this issue could have been resolved through testimony at the hearing.

{¶34} Relator also asserts that Dr. Wunder incorrectly noted that the MRIs and CAT scans have generally been normal. Relator argues that, if those tests were normal, there would not have been a reason to perform so many. As noted at findings of fact number ten, results of the tests listed were essentially normal.

{¶35} Relator also argues that Dr. Wunder noted that she had participated in rehabilitation several times; however, relator argues that this is inaccurate. Upon review of the record, the magistrate finds that, in the statement of facts prepared by the commission, reference to rehabilitation is mentioned more than once and Dr. Wunder's statements are, in fact, represented by the record. Specifically, her rehabilitation file was closed as follows: (1) 1975, because they were unable to establish the presence of a disability to qualify relator for services; (2) 1981, because relator did not fall within the guidelines for eligibility; (3) 1985, because relator wanted to discuss participation with her doctor before committing, and then failed to contact the rehabilitation division after 30 days had passed; (4) 2004, because relator was not a feasible candidate in light of Dr. Farrell's certification of temporary total disability; and (5) after relator filed her application for PTD compensation in 2006, she was not contacted because, in her 2001 application, she had indicated that she was not interested in vocational rehabilitation.

{¶36} Lastly, relator argues that Dr. Wunder's finding of 16 percent impairment is so much lower than the percentage of PPD she has received that his report is clearly flawed. At best, the evidence shows that relator has received a 21 percent PPD award for her back condition. Dr. Wunder's assessment of 16 percent is not significantly different. Relator argues that we must assume that part of the 85 percent PPD award she received in 1985 was related to her back. However, at that time, from a physical

standpoint, relator's claim was only allowed for lumbosacral sprain. Her claim was also allowed for post-traumatic neurosis. There is no evidence indicating what percentage was granted for either allowed condition. Without any evidence supporting her statement, the magistrate finds that relator's argument is not persuasive.

{¶37} The magistrate finds that the commission did not abuse its discretion in denying relator's motion to depose Dr. Wunder. The commission found that any disparities could best be resolved through the hearing process.

{¶38} Likewise, relator argued that Dr. Murphy's report was vague, inconsistent and completely disparate from other psychological reports contained in the file. Again, relator mentions the rehabilitation issue which this magistrate has already addressed. Further, to the extent that Dr. Murphy did not write down everything that relator told him and that he summarized the reports of other physicians, those alleged deficiencies do not make his report vague or inconsistent. Further, the fact that Dr. Murphy's conclusion differs from Mr. Halmi's conclusion is not a reason for the commission to grant relator's motion to depose Dr. Murphy. Dr. Murphy assessed a 16 percent impairment for relator's psychological conditions. There is other psychiatric evidence in the record. In 1998, Dr. Edelstein opined that relator met the criteria for disability retirement. He did not give a percent of impairment. In 2000, Dr. Parsons, who had treated relator over the years, assessed a 30 percent impairment. In 2001, Dr. Weaver examined relator and found a 10 percent impairment. Based on these other opinions, Dr. Murphy's assessment of a 16 percent impairment is reasonable. Further, to the extent that the PPD award of 85 percent granted in 1985 was primarily based on relator's allowed psychological condition, it appears her condition improved. Again, the magistrate finds that relator has not

demonstrated that the commission abused its discretion in denying her motion to depose Dr. Murphy.

{¶39} Having found that the reports of Drs. Wunder and Murphy constitute some evidence upon which the commission can rely, the magistrate finds that the commission's determination that she was not entitled to PTD compensation did not constitute an abuse of discretion. The commission found that relator could perform light-duty work and that her allowed psychological conditions would not prevent her from working. Relator was 59 years of age, and had obtained both a bachelor's and master's degree from the University of Cincinnati. Relator's work history included teacher, administrative assistant, supervisor and claims processor. The magistrate finds that it was not an abuse of discretion for the commission to find that those factors were favorable to relator's ability to perform some sustained remunerative employment. As such, relator has not shown that the commission abused its discretion in this regard either.

{¶40} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying her motions to depose Drs. Wunder and Murphy and further that the commission did not abuse its discretion in denying her application for PTD compensation. As such, 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).