

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jason S. Bailey,	:	
Relator,	:	
v.	:	No. 11AP-833
Industrial Commission of Ohio, The Qualstan Corporation and Construction Systems Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 11, 2012

Philip J. Fulton Law Office, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Jason S. Bailey filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to award him permanent total disability ("PTD") compensation.

{¶ 2} In accord with Loc.R. 13, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued the appended magistrate's decision which contains detailed

findings of fact and conclusions of law. The magistrate's decision included a recommendation that we deny the request for a writ of mandamus.

{¶ 3} Counsel for Bailey has filed objections to the magistrate's decision. The case is now before the court for a full, independent review.

{¶ 4} Bailey has been injured on the job on four separate occasions. Two of the injuries are relatively minor, namely "Open Wound of Right Thumb" and "contusion of right knee." A third injury is "right carpal tunnel syndrome." This injury combines with significant injuries to Bailey's right shoulder and even more significant psychological conditions related to that injury.

{¶ 5} Bailey has filed two applications for Ph.D compensation. His first application resulted in his being evaluated by Lee Howard, Ph.D. for Bailey's psychological problems. Dr. Howard reported that Bailey had a five percent permanent partial impairment due to his recognized conditions of pain disorder and aggravation of pre-existing dysthymia. Dr. Howard noted repeatedly that Bailey's complaints were subjective and that psychological testing done by Dr. Howard indicated high levels of exaggeration and malingering.

{¶ 6} As a result of Dr. Howard's report, Bailey was denied PTD compensation on his first application.

{¶ 7} Fourteen months later, Bailey filed his second application for PTD compensation. This led to his being evaluated by a different psychologist, Mary K. Hill, Ph.D. Dr. Hill viewed Bailey's psychological condition very differently, finding a 55 percent whole person impairment and finding that Bailey was incapable of work. Dr. Hill apparently accepted Bailey's claims that at times he was too depressed to get out of bed to use the bathroom.

{¶ 8} A staff hearing officer relied on Dr. Howard's evaluation of Bailey's psychological conditions and rejected Dr. Hill's opinion in deciding that Bailey was still not entitled to PTD compensation. Counsel for Bailey has contested the reliance upon Dr. Howard's report in this mandamus action and the magistrate's failure to find error by the commission in its handling of the reports.

{¶ 9} The specific objections to the magistrate's decision are:

SPECIFIC OBJECTION 1

The Magistrate Erred by Failing to Address Relator's Arguments Regarding Dr. Hill's Report.

SPECIFIC OBJECTION 2

The Magistrate Failed to Acknowledge the Significance of Mr. Bailey's Psychological Treatment as it Related to the Validity of Dr. Howard's Report.

{¶ 10} Counsel argues that Dr. Howard's opinion, rendered 16 months before Bailey filed his second application for PTD compensation, did not accurately reflect Bailey's psychological condition. Essentially, counsel argues the report from Dr. Howard was inaccurate because Bailey's conditions had worsened, a worsening reflected in Dr. Hill's later opinion. Counsel notes that Dr. Hill was also a commission expert, not a psychologist sought out and paid for by Bailey or his counsel.

{¶ 11} Dr. Howard evaluated Bailey over a period of less than two and one-half hours. Of that time, approximately 45 minutes was spent in face-to-face conversation and more time was spent in the taking of psychological tests.

{¶ 12} Bailey reported engaging in a course of psychotherapy which reduced his depression, but still left him depressed every day for an average of 12 hours a day. Bailey reported being on a wide range of medications, including valium, vicodin and Kodan-Morphines. He denied having a substance abuse problem, but acknowledged being treated at Maryhaven, a drug and alcohol treatment facility. He claimed the Maryhaven treatment was for "anger management." He claimed high levels of pain in his right shoulder and right wrist when evaluated by Dr. Howard. Bailey was 32 years old on that date.

{¶ 13} Dr. Howard administered the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"). The test indicated that Bailey was engaging in "a very high level of symptom magnification and/or exaggeration." The resulting profile led Dr. Howard to believe that the resulting profile was "grossly invalid." In lay terms, Bailey was trying to manipulate the test results to make himself look sicker than he actually was. Symptom validity testing also strongly indicated that Bailey was malingering.

{¶ 14} Under the circumstance, Dr. Howard's opinion that Bailey had minimal impairment is understandable.

{¶ 15} Bailey was 33 when evaluated by Dr. Hill. Dr. Hill listed the purpose of her evaluation to be to determine whether Bailey had reached maximum medical improvement and to assess his percentage of permanent partial impairment. She also listed as a purpose the determination of Bailey's "current occupational capacities."

{¶ 16} Bailey reported taking only two medications, but Dr. Hill could find neither medication in a pharmacological index. She claimed that the medications were not noted in his medical reports, but she had the extensive list of medications Bailey claimed in his interview with Dr. Howard less than two years earlier.

{¶ 17} Bailey changed other parts of his history when interviewed by Dr. Hill. He omitted any discussion of his being seriously injured in a motorcycle wreck. He also omitted being expelled from school in the 12th grade, claiming he quit school to work two jobs.

{¶ 18} Dr. Hill did not administer any standardized psychological tests to determine if Bailey was trying to deceive her, trying to amplify his symptoms or otherwise trying to malingering. She apparently accepted Bailey's history and complaints at face value and then used that history and his description of his condition to arrive at an opinion he had a 55 percent impairment.

{¶ 19} The commission was well-within its discretion to continue to rely upon Dr. Howard's report and to reject Dr. Hill's conclusion that Bailey was incapable of sustained remunerative employment. The evidence before us does not demonstrate that Bailey actually got worse, as opposed to changing his psychological history to make it appear that he got worse.

{¶ 20} The first objection is overruled.

{¶ 21} The fact that additional treatment was approved for Bailey does not render Dr. Howard's opinion invalid. The treatment was approved by a managed case organization ("MCO"), not by the commission. The MCO may have hoped that psychotherapy would help Bailey become productive, but the MCO's actions do not address the problems of Bailey's tendency to be deceptive when his psychological condition is being evaluated.

{¶ 22} The second objection is overruled.

{¶ 23} The findings of fact and conclusions of law in the magistrate's decision are adopted. For the reasons set forth in the magistrate's decision, as amplified here, the request for a writ of mandamus is denied.

Objections overruled; writ denied.

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jason S. Bailey,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-833
	:	
Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
The Qualstan Corporation and	:	
Construction Systems Inc.,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on May 30, 2012

Philip J. Fulton Law Office, and Chelsea J. Fulton, for relator.

Michael DeWine, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 24} In this original action, relator, Jason S. Bailey, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the May 23, 2011 order of its staff hearing officer ("SHO") denying relator's January 14, 2011 application for permanent total disability ("PTD") compensation, and to enter an ordering granting the application.

Findings of Fact:

{¶ 25} 1. Relator has four industrial claims.

{¶ 26} 2. On August 29, 1996, relator injured his thumb. The industrial claim (No. 96-487861) is allowed for "Open Wound of Right Thumb."

{¶ 27} 3. On November 2, 2001, relator injured his right shoulder. The industrial claim (No. 01-485956) is allowed for:

right shoulder sprain; right shoulder tendonosis/tendonitis;
right brachial nerve impingement; right shoulder
impingement; right subscapular entrapment neuropathy;
right glenohumeral instability; pain disorder; aggravation of
pre-existing dysthymia.

{¶ 28} 4. On August 11, 2002, relator injured his right knee. The industrial claim (No. 02-413979) is allowed for "contusion of right knee."

{¶ 29} 5. Relator also has a claim (No. 03-886882) that is allowed for "right carpal tunnel syndrome." December 23, 2003 is officially recognized as the date of injury.

{¶ 30} 6. On May 7, 2009, relator filed an application for PTD compensation. This was the first of two applications filed.

{¶ 31} 7. On June 25, 2009, at the commission's request, relator was examined by William Reynolds, M.D. In his five-page narrative report dated July 13, 2009, Dr. Reynolds opined that relator suffers a 27 percent whole person impairment based on all the allowed physical conditions of the four industrial claims.

{¶ 32} 8. On July 12, 2009, Dr. Reynolds completed a "Physical Strength Rating" form. On the form, Dr. Reynolds indicated by his mark that relator is capable of "light work." He also restricted lifting to ten pounds with the right upper extremity and he prohibited work above shoulder height.

{¶ 33} 9. On September 24, 2009, at the commission's request, relator was examined by psychologist Lee Howard, Ph.D. Dr. Howard examined only for the conditions of "pain disorder" and "aggravation of pre-existing dysthymia" as allowed in claim No. 01-485956. In his 14-page narrative report, Dr. Howard opines:

[One] Has the injured worker reached maximum medical improvement with regard to each specified allowed condition? Briefly describe the rationale for

your opinion. If "yes" then please continue to items #2 and #3.

The claimant has reached maximum medical improvement. He has had in the range of 12 times the amount of treatment normally needed to bring about resolution and/or stabilization of psychopathology.

[Two] Based on the AMA Guides, second and fifth editions, and with reference to the Industrial Commission Medical Examination Manual, provide the estimated percentage of whole person impairment arising from each allowed psychological/psychiatric condition. Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment for an allowed condition indicate zero (0) percent.

The claimant has a 5% permanent partial impairment for pain disorder and dysthymic disorder. Note that his complaints are subjective in nature only without any objective validation.

[Three] Complete the enclosed Occupational Activity Assessment. In your narrative report provide a discussion setting forth mental limitations resulting from the allowed condition(s).

He can perform without significant limitations at this time. However, this does not take into account the physical allowances in this claim, unrelated physical problems, unrelated major life stressors, attitudinal/motivational issues, subjective presentation, and/or high levels of exaggeration and malingering measured on objective psychometric testing.

RECOMMENDATIONS AND TREATMENT

[One] Additional psychotherapy is not going to be beneficial for this individual. He is measuring a body of symptoms which is not amenable to traditional psychological or psychiatric care (exaggeration and malingering type tendencies are measured on objective testing today).

{¶ 34} In connection with his September 24, 2009 examination, Dr. Howard also completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Howard indicated by his mark: "This injured worker has no work limitations." Dr. Howard further wrote:

His presenting complaints are subjective in nature and not objectively validated. He can work without limitation. However, this does not take into account the physical allowances in this claim, unrelated physical problems, unrelated major life stressors, attitudinal/motivational issues, subjective presentation, and/or high levels of exaggeration and malingering measured on objective psychometric testing.

{¶ 35} 10. Following a November 13, 2009 hearing, an SHO issued an order denying relator's PTD application filed May 7, 2009. In determining relator's residual functional capacity, the SHO relied upon the reports from Dr. Reynolds generated from his June 25, 2009 examination and the reports of Dr. Howard generated from his September 24, 2009 examination. The SHO's order states:

The Injured Worker is physically limited to light strength work activities, with some additional restrictions resulting from his shoulder injury. The Injured Worker's psychological disability, to the extent that it results from the two allowed conditions, does not interfere with his work.

{¶ 36} 11. Following an April 20, 2010 hearing, a district hearing officer ("DHO") issued a corrected order awarding relator a 21 percent increase in his percentage of permanent partial disability ("PPD"). The order states reliance upon "the report(s) of Dr(s). Williams and Drown."

{¶ 37} 12. Many years earlier, on September 27, 2005, relator was examined at his own request by psychologist Michael Glenn Drown, Ph.D. In his six- page narrative report, dated October 10, 2005, Dr. Drown opines:

Based on the review of available prior medical and psychological reports, this most recent interview data along with psychometric test results, it can be said that Mr. Bailey continues to suffer from Dysthymic Disorder and Psychogenic Pain Disorder; his allowed psychiatric conditions have clearly worsened across time. Given

information from available medical reports as well as the most recent interview and psychometric data and given the duration of his allowed psychiatric conditions, it is within reasonable certainty that his psychiatric disability is conservatively gauged to be at or around 29% and is permanent partial in nature; in reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral Disorders, his psychiatric impairment falls within the moderate range. It is highly recommended that Mr. Bailey be afforded the opportunity to participate in at least 26 weeks of intensive cognitive and behavioral therapy that would focus on the management of mood, anxiety and physical pain. Such therapy should also address the issue of self-image reconstruction.

(Emphasis sic.)

{¶ 38} 13. Presumably, the reference in the DHO's order of April 20, 2010 to the report of Dr. Drown is a reference to the October 10, 2005 report of Dr. Drown.

{¶ 39} 14. On March 6, 2010, at the request of the Ohio Bureau of Workers' Compensation ("bureau") a medical file review was conducted by Anthony Williams, M.D. In his one-page report, Dr. Williams wrote:

Dr. M. Drown's 10/10/05 psych report lists a 29% whole person impairment. This appears excessive in relation to the benign nature of the physical allowances. An unbiased, independent C-92 psych evaluation is recommended after which a more accurate combined effects review can be performed. At present, PPI remains unchanged at 34% whole person.

{¶ 40} 15. Presumably, the reference in the DHO's order of April 20, 2010 to the report of Dr. Williams is a reference to the March 6, 2010 report of Dr. Williams.

{¶ 41} 16. On September 3, 2010, treating psychologist Charles R. Paugh, Ph.D., wrote:

This letter was written on behalf of Jason Bailey to request that he resume psychotherapy at this center for three months (6 visits), to address issues related to dysthymia and pain disorders.

Mr. Bailey was treated for Dysthymic Disorder (300.4) and Pain Disorder with Both Psychological Factors and a General

Medical Condition (307.89), conditions that were the direct result of his industrial accident on 11-2-01 until discontinuing on 1-27-09. He reported that initially he was doing fine. He stated however that, "My body's gone to Hell". He lamented about the arthritis, shaking and aches he said are constant, even with treatment from a medical pain specialist. He rated his pain level to be a 7 to 8, on a scale of 1-10 with one being mild pain and 10 being excruciating.

In addition to the chronic pain, Mr. Bailey stated that he's become more depressed. He hates having to just 'scrape by'. He said that he doesn't care anymore. He reported substantial loss of libido. He also expressed a pervasive sense of pessimism, in addition to chronic fatigue[.]

It is my belief that Mr. Bailey will benefit from a resumption of psychotherapy for three months (6 visits) to address his dysthymic and pain conditions.

{¶ 42} 17. On September 7, 2010, Dr. Paugh completed a C-9 request for approval of psychotherapy. The managed care organization ("MCO") approved the C-9 for six visits to be scheduled during September, October, November, and December 2010.

{¶ 43} 18. On December 30, 2010, Dr. Paugh completed another C-9 request for approval of psychotherapy. The MCO approved the C-9 for five visits during December 2010 and January, February, and March 2011.

{¶ 44} 19. On January 14, 2011, relator filed his second application for PTD compensation.

{¶ 45} 20. On March 2, 2011, at the commission's request, relator was examined by Joseph Kearns, D.O., for the allowed physical conditions of the four industrial claims. In his five-page narrative report, Dr. Kearns opines:

He does have pain-limited function to the right upper extremity as a result of his injuries. He also has decreased grip strength in part from his injuries and in part from other conditions. As such, he would not be able to perform more than sedentary activity with the right arm. He could perform more intense activity or unrestricted activity with the left arm although this is not his dominant arm. For the right arm, he would be limited to 10 pounds maximum force, no over shoulder work, no repetitive gripping, no forceful gripping, and limited reaching.

{¶ 46} 21. On March 15, 2011, at the commission's request, relator was examined by psychologist Mary K. Hill, Ph.D. In her seven-page narrative report, Dr. Hill opines:

Based on the allowed conditions of Aggravation of Pre-Existing Dysthymia and Psychogenic Pain Disorder, the injured worker's functioning is in the **Marked Impairment** range and is consistent with an estimated 55% impairment of the whole person.

(Emphasis sic.)

{¶ 47} 22. On March 28, 2011, Dr. Hill completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Hill indicated by her mark: "This Injured Worker is incapable of work."

{¶ 48} In the space provided, Dr. Hill wrote in her own hand:

Based on the Injured Worker's symptoms of Dysthymic [disorder] and Psychogenic Pain [disorder], especially his problems with depressed mood [and] pain (e.g. too depressed at times to get out of bed to use the bathroom), he is not able to work[.] He would not be able to maintain gainful employment on a consistent basis.

{¶ 49} 23. Following a May 23, 2011 hearing, an SHO issued an order denying the PTD application filed January 14, 2011.

{¶ 50} 24. For the determination of residual functional capacity, the SHO relied upon the September 24, 2009 report of Dr. Howard and the March 2, 2011 report of Dr. Kearns. The SHO's order explains:

The Staff Hearing Officer has reviewed the medical reports on file from 2009 through the date of today's hearing that address the Injured Worker's residual functional capacity in relation to the psychological conditions recognized in claim 01-485956. Such a review persuades the Staff Hearing Officer that the most accurate assessment of the Injured Worker's psychological capacity for work is that included in the 09-24-2009 report from psychologist Dr. Howard, with that report serving in part as the basis for the denial of the Injured Worker's prior application for permanent total disability benefits per Staff Hearing Officer dated 11/13/2009. Dr. Howard's report indicates that during the course of his examination of the Injured Worker, the Injured

Worker displayed normal intelligence, with his presentation being relevant, goal-directed, coherent, and flowing; the Injured Worker further presented with normal concentration and intact immediate and long-term memory. Based on his examination findings, including testing procedures, and a review of file documentation, Dr. Howard concluded that the Injured Worker has a 5% permanent partial impairment resulting from the two allowed psychological conditions in the 2001 claim that does not result in any work limitations.

Based on the report from Dr. Howard, which is persuasive, the Staff Hearing Officer finds that the impairment arising from the psychological conditions recognized in claim 01-485956 does not prevent the Injured Worker from returning to work at his former position of employment and does not result in any work limitations.

Dr. Kearns, an occupational medicine specialist, examined the Injured Worker on 03/02/2011 with regard to the allowed physical conditions of the four industrial claims and the permanent total impairment issue. Based on his examination findings and review of file documentation, Dr. Kearns concluded that when only the impairment arising from all of the allowed physical conditions is considered, the Injured Worker has a total permanent partial impairment of 11%; Dr. Kearns further concluded that while the Injured Worker would be limited to sedentary work activity with regard to his right upper extremity, with a ten-pound lifting limit and restrictions against over-shoulder activity, repetitive or forceful gripping, and more than limited reaching with the right upper extremity, he was otherwise capable of unrestricted activity with left upper extremity.

Based on the report from Dr. Kearns, which is persuasive, the Staff Hearing Officer finds that when only the impairment arising from the allowed physical conditions of the four claims is considered, the Injured Worker has the residual functional capacity to perform sedentary work activity with the right upper extremity and unrestricted activity with the left upper extremity as specified in the report. Furthermore, when his degree of overall medical impairment is considered in conjunction with his non-medical disability factors, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled.

{¶ 51} 25. On September 29, 2011, relator, Jason S. Bailey, filed this mandamus action.

Conclusions of Law:

{¶ 52} The commission, through its SHO's order of May 23, 2011, relied upon the reports of Dr. Howard in determining relator's residual functional capacity. The issue is whether Dr. Howard's reports must be eliminated from evidentiary reliance due to alleged staleness.

{¶ 53} Finding that the reports of Dr. Howard do constitute some evidence upon which the commission relied, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 54} In *State ex rel. Menold v. Maplecrest Nursing Home*, 76 Ohio St.3d 197 (1996), the commission denied a second PTD application based upon the report of Dr. McCloud who had examined the claimant on November 20, 1989. The second PTD application was filed two months after the commission denied the first PTD application on April 18, 1990.

{¶ 55} In finding Dr. McCloud's report to be probative as to the second PTD application, the *Menold* court states:

The commission is exclusively responsible for judging evidentiary weight and credibility. *State ex rel. Burley v. Coil Packing Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936. Claimant's contention that McCloud's report is nonprobative simply because it predates the claimed disability period lacks merit. Certainly, the probative value of a medical report may be lessened by later changes in the claimant's condition, and the longer the time between the report and the disability alleged, the more likely this is to have occurred. Claimant, however, has failed to show that McCloud's report was no longer probative.

In this case, it must be remembered that claimant first claimed permanent total disability compensation on December 1, 1989. Permanent total disability compensation was denied on April 18, 1990 and claimant reapplied less than two months later. Because of the extremely short time between denial and reapplication, it is reasonable to say that claimant has been alleging permanent total disability consistently since December 1, 1989. In other words, the condition alleged in 1990 was no different from that alleged in 1989, and McCloud's report preceded claimant's original

application for permanent total disability compensation by only eleven days. Claimant cannot, therefore, sustain her claim of staleness.

Id. at 202.

{¶ 56} In *State ex rel. Hiles v. Netcare Corp.*, 76 Ohio St.3d 404, 407 (1996), the court states:

A finding of evidentiary staleness should always be approached cautiously. More relevant than the time at which a report was rendered are the content of the report and the question at issue. For example, where the issue is maximum medical improvement, a report that finds a permanent impairment is rarely rendered invalid by the passage of time. Conversely, the changeable nature of a claimant's ability to work is often affected by time.

{¶ 57} As relator correctly points out, Dr. Howard's September 24, 2009 examination pre-dates the January 14, 2011 filing of his second PTD application by almost 16 months. The magistrate further notes that the commission scheduled relator to be examined by Dr. Howard for evaluation of his psychiatric conditions in connection with the filing of the first PTD application on May 7, 2009. With respect to the second PTD application, the commission scheduled relator to be examined by Dr. Hill for evaluation of his psychiatric conditions. Obviously, the commission refused to rely upon Dr. Hill's reports in determining the second PTD application. Rather, the commission decided to again rely upon Dr. Howard's reports upon which it had previously relied in denying the first PTD application.

{¶ 58} Relator does not contend that Dr. Howard's reports were not available to the commission for evidentiary consideration with respect to the second PTD application, simply because Dr. Howard's reports pre-date the filing of the second application by some 16 months. Nor could relator successfully so contend. As the court states in *Hiles*, "[m]ore relevant than the time at which a report was rendered are the content of the report and the question at issue." *Id.* at 407.

{¶ 59} Relator contends that Dr. Howard's reports are stale evidence because allegedly, the evidentiary record shows that relator's psychiatric conditions worsened subsequent to the commission's denial of the first PTD application. In support of this

contention, relator points to two events that post-date the commission's denial of the first PTD application: (1) The commission's 21 percent increase of PPD based solely upon relator's psychiatric allowances as described in the report of Dr. Drown, and (2) the approval of relator's request for psychotherapy which was authorized to begin in September 2010.

{¶ 60} As will be shown below, neither of those events prove that Dr. Howard's reports were stale as of the adjudication of the second PTD application.

{¶ 61} As earlier noted, the April 20, 2010 corrected order of the DHO indicates reliance upon the report of Dr. Drown who indicates that relator was examined on September 27, 2005, over four years prior to the hearing. Thus, while the commission did increase PPD by 21 percent subsequent to the commission's denial of the first PTD application, the percentage increase was premised upon medical evidence that pre-dates the commission's denial of the first PTD application by nearly four years. Relator's contention that the 21 percent increase in PPD is evidence that relator's psychiatric conditions worsened after the commission's denial of the first PTD application is seriously undermined by the fact that Dr. Drown's examination pre-dates the commission adjudication of the first PTD application.

{¶ 62} As earlier noted, on September 3, 2010, Dr. Paugh wrote a letter to support the C-9 request for authorization of psychotherapy. In the letter, Dr. Paugh states: "Mr. Bailey stated that he's become more depressed." Relator seemingly points to Dr. Paugh's statement to support his contention here that his psychological conditions worsened after the commission denied his first PTD application.

{¶ 63} Clearly, relator's statement to Dr. Paugh, as reported by Dr. Paugh, is not evidence that the allowed psychological conditions worsened after the commission's denial of the first PTD application.

{¶ 64} To begin, what relator reportedly said to Dr. Paugh is not a medical opinion that the conditions have worsened. Clearly, Dr. Paugh does not opine in his September 3, 2010 letter that the allowed conditions have worsened. He merely reports what relator said. Significantly, even relator's statement that he has become more depressed lacks a stated time reference. That is, relator does not say when he became more depressed.

{¶ 65} That the MCO approved psychotherapy beginning September 2010 is not evidence or proof that relator's allowed psychological conditions had worsened after the commission's denial of the first PTD application. Presumably, the psychotherapy was designed to improve relator's mental condition. That relator underwent psychotherapy subsequent to the commission's denial of his first PTD application does not necessarily show a worsening of his allowed conditions at the time immediately preceding the initiation of psychotherapy, or, perhaps more significantly, after the regimen of psychotherapy.

{¶ 66} In short, relator has not shown here that the reports of Dr. Howard must be eliminated from evidentiary reliance due to alleged staleness.

{¶ 67} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/Kenneth W. Macke
KENNETH W. MACKE
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).