

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. The magistrate's decision concluded the Industrial Commission ("commission") did not abuse its discretion in relying on the report of Dr. Flanagan despite (1) his not being a specialist in neurology, and (2) the date of some of the reports on which Dr. Flanagan relied to reach his opinion that relator is capable of light duty work. Accordingly, the magistrate determined the requested writ of mandamus should be denied.

II. Objection

{¶3} Relator filed a single objection to the magistrate's conclusions of law:

The Magistrate erred in finding that the Industrial Commission did not abuse its discretion when it completely ignored and/or failed to address in its order **ANY** of the medical conditions which served as the basis for Relator's application for permanent total disability.

{¶4} In arguing her objection, relator addresses three points: (1) whether Dr. Flanagan was competent to render an opinion, since he is not a neurologist, (2) whether Dr. Flanagan improperly relied on the reports of Drs. Stevens and Schwabenbauer who examined relator in 2001, and (3) whether the commission's order failed to address the medical conditions on which relator's application for permanent total disability is premised.

{¶5} The magistrate's decision adequately addresses the first two points. Although Dr. Flanagan is not a neurologist, the magistrate noted "there is no legal authority for the proposition that only a neurologist may opine as to neurological disabilities and any lack of training in a particular area of medicine would not render the

doctor incompetent." (Magistrate's Decision, ¶34.) Rather, the magistrate aptly concluded, "any alleged lack of training in a particular area would go to the weight of the evidence and not its admissibility." (Magistrate's Decision, ¶34.)

{¶6} As to relator's claim that Dr. Flanagan relied on stale evidence, the magistrate appropriately noted that "Dr. Flanagan's conclusion was based on three things: (1) his own examination; (2) his review of the extensive reports by multiple psychologists; and (3) particularly upon the reports of Drs. Stevens and Schwabenbauer." (Magistrate's Decision, ¶36.) While the reports of Drs. Stevens and Schwabenbauer are the earliest reports regarding relator's post-concussion syndrome, the record includes the reports of other doctors who more recently discussed relator's current symptoms related to the allowed conditions. Dr. Flanagan added both sources to his own examination to reach his conclusion. We, like the magistrate, "cannot conclude that Dr. Flanagan's report was based on stale findings when he specifically states that his findings are based on his own examination, medical reports issued over the course of the previous five years and, particularly, the reports of two doctors who examined relator within the first year of her injury." (Magistrate's Decision, ¶37.)

{¶7} Relator's third point raises an issue not addressed in the magistrate's decision because it apparently was not raised in the proceedings that preceded that decision. To support her contention that the commission ignored, or at least failed to address, any of the medical conditions that served as the basis for relator's application for permanent total disability compensation, relator contends that Dr. Flanagan and the commission based their respective opinions regarding relator's physical restrictions "only on the sprains and contusions allowed in the claim and not her post-concussive

syndrome." (Objections, 2.) Relator's objection, in effect, asks us to reweigh the evidence, something we cannot do.

{¶8} The commission relied on the report of Dr. Flanagan, who specifically listed the allowed conditions in each of relator's three industrial injuries. In discussing the claim that included the post-concussion syndrome, he acknowledged the condition and noted the multiple examiners who were treating her at the time for the condition. Moreover, as the commission notes, Dr. Flanagan examined relator regarding the condition, as he asked her to perform tests addressed to assessing the condition. Were that not sufficient, Dr. Flanagan in his recommendation specifically stated that he accepted the allowed conditions and the objective findings of the examining physicians.

{¶9} In the final analysis, Dr. Flanagan's report addressed the allowed condition, the staff hearing officer relied on Dr. Flanagan's report, and the report constitutes some evidence to support the commission's decision. Accordingly, relator's single objection is overruled.

III. Disposition

{¶10} 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.

*Objection overruled;
writ denied.*

KLATT and McGRATH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Teri M. Starr,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-267
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Huber Heights City Schools,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on August 17, 2009

Shapiro, Marnecheck & Reimer, Philip A. Marnecheck and Matthew Palnik, for relator.

Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} Relator, Teri M. Starr, 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 relator's application for permanent total disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶12} 1. Relator has sustained three work-related injuries and her claims have been allowed as follows:

01-800480 – sprain of neck; sprain thoracic region; sprain acromioclavicular, right; contusion scalp (head); contusion face; post concussion syndrome; anxiety disorder with panic attacks.

96-584520 – contusion shoulder region, left; contusion of forearm, left; contusion of elbow, left.

98-307886 – concussion; sprain of sacrum, bilateral.

The most recent injury occurred on January 5, 2001.

{¶13} 2. Relator has not worked since this last injury.

{¶14} 3. Relator filed an application for PTD compensation on November 16, 2006. Relator's motion was supported by the reports of Katrina C. Rakowsky, D.O., Kenneth J. Klak, D.O., Doris Eliana Cohen, Ph.D., and Marian Chatterjee, Ph.D.

{¶15} 4. In her November 13, 2006 report, Dr. Rakowsky indicated that she had been treating relator since January 2001. She noted that the most troublesome persistent effects of relator's injuries result from the post-concussion syndrome symptoms. Those effects include: "disabling headaches, intolerance to light and noise, difficulty concentrating, easy fatiguability, and a need for several hours sleep in the middle of most days." Dr. Rakowsky also noted that relator's neck is particularly sensitive to impacts, her attempts at concentration and short term memory have proved problematic and her panic attacks are also quite problematic. Dr. Rakowsky concluded that relator had been totally disabled for the last five years, since the date of injury.

{¶16} 5. In his October 17, 2006 report, Dr. Klak indicated that he had been treating relator since May 2003 and has tried to alleviate her headaches, neck pain and associated difficulties with orientation. Dr. Klak indicated that he had given relator some relief from her headaches, but that her condition had not completely resolved. Dr. Klak indicated that relator's injury has affected multiple areas of her brain and that "there is a break down in ability to maintain constant appropriate interpretation of sensory perception which leads her to inappropriate responses, fatigue and ultimately disruption of the sympathetic nervous system which ultimately acts as a trigger for neurogenic inflammation for migraine headaches, visual difficulties and loss of appropriate coordination." Dr. Klak explained further:

* * * With reasonable medical certainty I believe that she is unable to return to work because these areas are permanently damaged which makes it extremely difficult for her to maintain constant visual perception and subsequently her brain interpret these appropriately. I suspect that there has been damage within the brain that will not allow her to sustain visual perception, interpretation of visual perception and maintaining proper and appropriate responses.

{¶17} 6. In her October 29, 2006 report, Dr. Cohen indicated that she had been treating relator for the past five years and that her progress has remained limited. Dr. Cohen indicated that relator continues to have consistent, recurrent and repetitive panic attacks, anxiety attacks, and pernicious physiological reactions. She also noted that relator was extremely sensitive to lights and could not function in the presence of florescent lights. Dr. Cohen opined that relator could not be gainfully employed.

{¶18} 7. In her November 1, 2006 report, Dr. Chatterjee noted that relator displayed at least a moderate level of impairment in concentration and sustained attention in her activities of daily living and social functioning. Dr. Chatterjee opined that relator

had a marked impairment in regards to her adaptation to changes and stress as well as concentration, persistence and pace. Dr. Chatterjee opined that relator had a 55 percent whole person impairment, was permanently and totally disabled, and would require ongoing psychotherapy maintenance to prevent decompensation.

{¶19} 8. Relator was examined by Robert L. Byrnes, Ph.D., on April 3, 2007. Dr. Byrnes examined relator for her allowed psychological conditions. Dr. Byrnes noted that relator was oriented in all spheres and her sensorium was clear, her mood was generally appropriate with some anxiety, she appeared to be of average intellectual ability, her concentration and memory were fair, her capacity to learn had likely declined from previous levels, and her problem solving skills, judgment and insight were fair. Dr. Byrnes opined that relator's allowed psychological condition had reached maximum medical improvement ("MMI"), and opined that relator had a mild impairment in the activities of daily living, as well as a mild to moderate impairment in social functioning, concentration, persistence and pace, and deterioration or decompensation in work-like settings. Dr. Byrnes opined that relator's allowed psychological condition is mild to moderate and assessed an 18 percent whole person impairment. Dr. Byrnes opined that relator's allowed psychological condition, in and of itself, would not prevent her from returning to work in non-stressful positions for which she was otherwise qualified.

{¶20} 9. Relator was also examined by Kirby J. Flanagan, M.D. Dr. Flanagan identified all three claims and the history associated with them. Regarding the January 4, 2001 injury, Dr. Flanagan noted the following history:

* * * She was injured while working as a physical education teacher. She was teaching basketball when she tripped over a student's foot and landed with her head against a brick wall. There was no loss of consciousness. She was seen at

a local urgent care center on one occasion. The file reflects that her initial care was at Greene Memorial Hospital. Her initial follow-up care was with a chiropractor whose name she does not recall. The file indicates that this was Dr. Greg Palkowski, D. C. Dr. Palkowski ordered a CT of the brain on January 26, 2001 which was normal. He also ordered an MRI of the cervical spine on January 24, 2001 that showed "1. Mild degenerative disk disease C5-6 and C6-7 levels. 2. No focal disk herniations are noted within the cervical region." She was also seen by a local physician whose name she does not recall. The file indicates that this was Dr. Gary Dunlap, D.O. When her symptoms persisted, she moved to the Cleveland area to live with her sister. She was seen at MEDGroup by Dr. Breitenbach. She was seen in consultation by neurologist Dr. Glenn Stevens, D.O., Ph.D., on 03/24/01. Dr. Stevens opined a post concussion syndrome. She was then seen by multiple examiners whose names she does not recall. Currently she is under the care of Dr. Katrina Rakowski D.O. and Dr. Doris Eleana [sic] Cohen, Ph.D., psychologist. She is also being seen for pain management by Dr. Mok.

{¶21} Thereafter, Dr. Flanagan examined her cervical, thoracic, and lumbar spine as well as her right and left shoulder, left elbow, face and scalp. Dr. Flanagan noted that he accepted the objective findings of the examining physicians and opined that relator's allowed conditions had reached MMI, assessed a 22 percent whole person impairment, and concluded that relator could perform light-duty work. With regard to her condition of post-concussion syndrome, Dr. Flanagan specifically noted:

* * * [I]t is my opinion that whole person impairment is 10% based on table 13-6 of the AMA Guides, 5th edition. This determination is made based on my examination and my review of the extensive reports by multiple psychologists relying particularly on the reports of Dr. Glenn Stevens, D.O., Ph.D. and Dr. Michael Schwabenbauer, Ph.D. * * *

{¶22} As above noted, in determining the percentage of impairment related to relator's post-concussion syndrome, Dr. Flanagan made his determinations based on his own examination as well as his review of the many reports in the record and relying

particularly upon the reports of Glenn Stevens, D.O., Ph.D., and Michael Schwabenbauer, Ph.D.

{¶23} 10. Dr. Stevens examined relator on March 24, 2001 and noted that, physically, relator's condition was improved; however, her neurological symptoms persisted, although they were slowly improving. Dr. Stevens noted that relator was having constant headaches, sonophobia and photophobia, as well as problems with her short-term memory. Dr. Stevens recommended cognitive rehabilitation for relator and offered to contact a doctor in her area to begin vestibular rehabilitation. Dr. Stevens issued a second report on November 15, 2001 opining that relator's claim should be additionally allowed for post-concussion syndrome.

{¶24} 11. Dr. Schwabenbauer issued a report dated November 2, 2001 in response to a request for further comment regarding relator's claim. Dr. Schwabenbauer also concluded that relator's claim should be additionally allowed for post-concussion syndrome and stated:

Ms. Starr has demonstrated symptoms quite consistent with those reported following concussion and has also demonstrated mild improvements in these symptoms. Furthermore, completion of the neuropsychological assessment demonstrated findings consistent with limitations in completing more complex attentional tasks and slowed information processing. These are, again, quite common features seen following this type of injury. In Ms. Starr's case, it was well established that slowed information processing was evident premorbidly based on her report. She also acknowledged involvement in two prior accidents in which some whiplash action was reported. Nonetheless, she was able to function well in her position prior to onset in spite of these limitations. This most recent injury has served to further exacerbate these premorbid limitations.

Finally, a growing body of literature supports the notion that objective neuro-imaging techniques (CT scan, MRI scan) do

not demonstrate any notable findings following this type of injury. As a consequence, one must rely on subjective findings, including those symptoms most frequently reported: pattern of recovery, estimated premorbid level of function, and other variables in considering the diagnosis. * * *

{¶25} Dr. Schwabenbauer also stated that most individuals recover from this condition within three to six months, some individuals experience persistent cognitive and physical residuals.

{¶26} 12. Relator's application was heard before a staff hearing officer ("SHO") on January 29, 2009 and was denied. The SHO specifically relied upon the reports of Drs. Byrnes and Flanagan and concluded that relator was capable of performing light-duty work for which she was otherwise qualified. Thereafter, the SHO analyzed the nonmedical disability factors as follows:

A review of Injured Worker's vocational factors indicates that Injured Worker would be entitle[d] to find employment within her residual functional capacity, i.e. light work on the physical conditions and work in a nonstressful environment on the psychological condition. Injured Worker has extremely positive vocational factors. Injured Worker is currently 36 years old and has an extremely strong vocational work history and educational background. Injured Worker has a degree from Wright State University, has taught school since 1996, and this educational and work history are factors that would be positive in Injured Worker in finding work within her residual functional capacity. The skills needed to teach are easily transferred to jobs in a sedentary to light strength capacity.

The Bureau of Workers' Compensation was persuasively [sic] in arguing that Injured Worker's vocational factors are strong and that someone of her young age, her educational background, and prior work history would be able to find work within her residual functional capacity as noted above.

The Bureau of Worker's [sic] Compensation further argued persuasively that there has been no attempt by the Injured Worker regarding rehabilitation as the Injured Worker's

rehab file was closed on 03/14/2002 due to medical instability.

Thus, the Staff Hearing Officer finds that the Injured Worker's work injuries have left her with the residual functional capacity to perform light duty work in a non stressful situation. The Staff Hearing Officer finds that Injured Worker has extremely positive vocational factors in her young age, her high degree of educational level, and her prior work history as a school teacher which would be considered within the light duty capacity. As noted Injured Worker has not attempted to rehabilitate herself since the Injured Worker's rehab file was closed in 2002, and thus Injured Worker is not entitled to permanent total disability benefits and her permanent total disability application filed 11/16/2006 must be denied.

{¶27} 13. Relator's request for reconsideration was denied by order of the commission mailed March 6, 2009.

{¶28} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶29} 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.

{¶30} 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.

{¶31} Relator first contends that the commission abused its discretion by relying on the report of Dr. Flanagan because he is not a specialist in neurology and because his opinion was based on his reliance upon the conclusions of other doctors who had examined relator in 2001. Relator also contends that the commission ignored all of the valid neuropsychological evidence in the file and instead relied on the report of a non-qualified physician who relied upon the stale medical findings of competent physicians. For the reasons that follow, it is this magistrate's conclusion that this court should deny relator's request for a writ of mandamus.

{¶32} Relator first challenges the report of Dr. Flanagan and contends that report does not constitute some evidence upon which the commission could rely for two reasons: (1) Dr. Flanagan's specialty is not in neurology, and (2) Dr. Flanagan relied on

objective findings of other doctors whose reports were stale; specifically, the reports of Drs. Stevens and Schwabenbauer.

{¶33} Relator is unable to cite any case law supporting her contention that Dr. Flanagan was not competent to render an opinion regarding her allowed conditions because he did not specialize in neurology. As evidence, relator notes that Dr. Flanagan did not discuss her photophobia, headaches, or any other symptoms of her post-concussion syndrome.

{¶34} In his report, Dr. Flanagan indicated that he had reviewed the reports which he had been provided. Relator's medical reports submitted regarding her conditions were all written in 2006. As such, it appears that, when writing his April 2007 report, Dr. Flanagan reviewed that evidence. All those reports noted her photophobia, headaches, and other symptoms. In his report, it appears that Dr. Flanagan did not ask relator to recite the symptoms from which she was currently suffering; instead, he relied upon the medical evidence relator had submitted. Again, there is no legal authority for the proposition that only a neurologist may opine as to neurological disabilities and any lack of training in a particular area of medicine would not render the doctor incompetent. Instead, any alleged lack of training in a particular area would go to the weight of the evidence and not its admissibility.

{¶35} Relator also contends that Dr. Flanagan's report cannot constitute some evidence because he relied, in part, on stale reports. In support, relator cites *State ex rel. Hiles v. Netcare Corp.* (1996), 76 Ohio St.3d 404. In *Hiles*, the claimant had applied for impaired earning capacity compensation. The commission denied the claimant's application based on four reports. Three of those reports were more than one year old.

In finding that the commission abused its discretion, the *Hiles* court found that the passage of 16 months, 31 months, and 16 months respectively, rendered those three doctors' reports stale. Because the remaining report did not corroborate the commission's determination, the *Hiles* court concluded that there was not some evidence to support the commission's denial of impaired earning capacity and granted a writ of mandamus.

{¶36} The facts of the present case are not similar to the *Hiles* case. In the present case, Dr. Flanagan examined relator and provided his findings based upon his examination. Thereafter, he indicated that he had reviewed the extensive reports submitted by multiple psychologists in rendering his conclusion that relator had a ten percent whole person impairment for the allowed condition of post-concussion syndrome. Dr. Flanagan noted that he relied particularly on the reports of Drs. Stevens and Schwabenbauer whose reports had been authored in 2001. Again, Dr. Flanagan's conclusion was based on three things: (1) his own examination; (2) his review of the extensive reports by multiple psychologists; and (3) particularly upon the reports of Drs. Stevens and Schwabenbauer.

{¶37} A review of the medical evidence contained in this stipulated record indicates that the reports of Drs. Stevens and Schwabenbauer are the earliest reports regarding relator's post-concussion syndrome condition. Thereafter, other doctors, including Drs. Rakowski, Klak, Cohen and Chatterjee all discussed relator's current symptoms. Dr. Flanagan had evidence of relator's symptoms from the first year of her injury, as well as descriptions of those symptoms as experienced by relator over the next five years. This magistrate cannot conclude that Dr. Flanagan's report was based on

stale findings when he specifically states that his findings are based on his own examination, medical reports issued over the course of the previous five years and, particularly, the reports of two doctors who examined relator within the first year of her injury. The magistrate finds that his reliance on those reports does not render Dr. Flanagan's report stale and, as such, the commission did not abuse its discretion by relying on that report.

{¶38} 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).