



decision, recommending that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, relator's requested writ of mandamus is denied.

*Writ of mandamus denied.*

BRYANT and McGRATH, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ronald Barton,	:	
Relator,	:	
v.	:	No. 09AP-330
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Champaign Residential Services, Inc.,	:	
Respondents.	:	
	:	

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MAGISTRATE'S DECISION

Rendered on September 30, 2009

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*Philip J. Fulton Law Office, Michael P. Dusseau and William A. Thorman, III, for relator.*

*Richard Cordray, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS

{¶4} In this original action, relator, Ronald Barton, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for permanent total disability ("PTD") compensation, and to enter an order awarding PTD compensation.

Findings of Fact:

{¶5} 1. On October 25, 2001, relator sustained an industrial injury while employed as the manager of a group home operated by respondent Champaign Residential Services, Inc. ("employer"), a state-fund employer. On that date, a ceiling fan blade broke and hit relator in the forehead, causing an open wound. Apparently, relator then fell backwards, hitting his head on the floor.

{¶6} 2. Initially, the Ohio Bureau of Workers' Compensation ("bureau") allowed the industrial claim (No. 01-471495) for "open wound of forehead; concussion." In 2003, the claim was amended to include "post concussion syndrome."

{¶7} 3. W. Jerry Mysiw, M.D., is an associate professor of physical medicine and rehabilitation and medical director of head trauma rehabilitation services, department of physical medicine and rehabilitation, at The Ohio State University Medical Center. On February 6, 2006, Dr. Mysiw wrote:

I have been involved in Mr. Barton's care and followed him through our head injury clinic at The Ohio State University since December 2, 2004. The medical care that I have provided have [sic] all been related to the work related injury that resulted in a traumatic brain injury in October of 2001. Based on the medical evidence that I have reviewed, the history that this gentleman has provided, and my evaluation of this gentleman, my working diagnoses include:

1. Traumatic brain injury.
2. Post-concussive syndrome secondary to number 1.
3. Cognitive deficits secondary to number 1 and 2.
4. Depression secondary to number 1 and 2.
5. Anxiety disorder with post-traumatic stress disorder and generalized anxiety secondary to number 1 and 2.
6. Post-traumatic headaches secondary to number 2.
7. Seizure disorder secondary to number 1.

In working with this gentleman over the several months, there has been some significant improvement. This is most

notably in the area of his post-traumatic headaches. Also[,] there has been a substantial decrease in the number and extent of his seizures. To a lesser extent, the magnitude of this gentleman's mood disorder and anxiety disorder have improved. These gains have apparently made no impact on the extent of his cognitive impairments.

I had the opportunity to review Mr. Barton's Industrial Commission of Ohio record of proceedings for Jaimee L. Touris from January of 2006. There were a couple of conclusions within that hearing that I believe warrant comment as they apparently reflect a lack of understanding of this gentleman's injury. For example, the sentence that states "it is found that Dr. Mysiw, the current physician of record, is treating the injured worker for non-allowed conditions of anxiety, depression, traumatic brain injury and a seizure disorder." This statement needs to be addressed because Mr. Barton's allowed conditions do include post-concussive syndrome and it is his traumatic brain injury that is the source of the post-concussive syndrome. Although the District Hearing Officer is correct in noting that the two conditions have different ICD codes, the Officer is incorrect in concluding that there is "no medical evidence that supports this argument" that traumatic brain injury and post-concussive syndrome are the same and related. To support this observation, I would refer you to the Diagnostic And Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). The criteria for post-concussional disorders in this text include:

- A. History of head trauma that caused a significant cerebral concussion.
- B. Evidence of cognitive impairment.
- C. Three or more of the following occurring shortly after the trauma and lasted at least three months:
  - 1. Becoming fatigued easily.
  - 2. Disordered sleep.
  - 3. Headaches.
  - 4. Vertigo or dizziness.
  - 5. Irritability or aggression on little or no provocation.
  - 6. Anxiety, depression, or affective lability.
  - 7. Changes in personality.
  - 8. Apathy or lack of spontaneity.

- D. Symptoms in criteria B and C have their onset following head trauma.
- E. Disturbance causes significant impairment.
- F. Symptoms did not meet the criteria for dementia due to head trauma or other disorder such as personality change due to head trauma.

Although these criteria for a post-concussional disorder are viewed as research criteria by DSM-IV, these are the most commonly agreed upon criteria for the diagnosis of a post-concussional disorder in the medical literature. You will note in section C of these criteria, Mr. Barton does, in fact, suffer from fatigue, disordered sleep, post-traumatic headaches, anxiety, depression, and personality changes. Hence, it is important to understand that a post-concussional disorder is secondary to a traumatic brain injury and that the post-concussional disorder implies residual physical, cognitive and neurobehavioral consequences of that traumatic brain injury.

{¶8} 4. On March 22, 2006, citing Dr. Mysiw's February 6, 2006 report, relator moved for additional claim allowances.

{¶9} 5. Following a May 10, 2006 hearing, a district hearing officer ("DHO") issued an order denying the motion.

{¶10} 6. Relator administratively appealed the DHO's order of May 10, 2006.

{¶11} 7. Following a June 28, 2006 hearing, a staff hearing officer ("SHO") issued an order additionally allowing the claim for various "symptoms/conditions" based upon Dr. Mysiw's report.

{¶12} 8. The employer administratively appealed the SHO's order of June 28, 2006.

{¶13} 9. Following an October 5, 2006 hearing, the three-member commission issued an order stating:

The claim remains additionally allowed for "TRAUMATIC BRAIN INJURY" based on the report of Dr. Mysiw, dated

02/06/2006. The Commission finds this is a clarification of the already allowed condition of "POST CONCUSSION SYNDROME." Accordingly, the Commission is persuaded, based on the report of Dr. Mysiw, that the requested condition of "traumatic brain injury" is causally related to the industrial injury of this claim.

The claim is not allowed for "RESIDUAL PHYSICAL, COGNITIVE AND NEURO-BEHAVIORAL CONSEQUENCES" as well as "HEADACHES, MEMORY AND ATTENTION IMPAIRMENT, MOOD AND ANXIETY SYMPTOMS" on the basis that these describe symptoms and are not actual diagnoses. A claim may be allowed for a diagnosable medical condition according to R.C. 4123.01. Accordingly, the Commission vacates the allowance for the above-requested "consequences" and "symptoms."

The claim is disallowed for "SEIZURE DISORDER" based on a finding that the injured worker has not sustained the burden of proving the objective existence of this condition. The Commission notes that there is no objective testing on file which supports the allowance of this condition. The Commission also relies on the medical review by Dr. Bloomfield, dated 04/08/2006, which notes that a 05/16/2003 EEG was negative for seizures. In addition, Dr. Bloomfield states "evaluation in May, 2004 at DePaul Health Center was negative and Mr. Barton was not felt to be suffering from epileptic seizures." Accordingly, based on Dr. Bloomfield's review and the lack of objective evidence on file, the claim is disallowed for "SEIZURE DISORDER."

(Emphases sic.)

{¶14} 10. On April 24, 2008, Dr. Mysiw wrote:

This letter is to inform you of Mr. Barton's current medical condition and his ability to effectively return to work. I have been treating Mr. Barton for many years for traumatic brain injury with resultant post concussion syndrome, cognitive deficits, decreased memory and attention skills, mood disorder including depression, generalized anxiety, chronic headaches, and seizure disorder. With his mounting medical conditions it is my professional medical opinion that Mr. Barton has obtained permanent total disability and is unable to sustain gainful employment.

{¶15} 11. On May 7, 2008, relator filed an application for PTD compensation. In support, relator submitted the April 24, 2008 report of Dr. Mysiw.

{¶16} 12. On July 29, 2008, at the commission's request, relator was examined by Kottil W. Rammohan, M.D. In his report dated July 31, 2008, Dr. Rammohan stated:

SUMMARY:

The major issue at this time is some attention deficit issue. This was evident during the history taking. My evaluation of the forehead did not identify any visual problems from the open wound and laceration that he sustained.

OPINION:

After review of all his records and evaluation of the injured worker, it is my opinion that this claimant has reached MMI from the injury that he sustained in 2001. Additional investigations or treatment is unlikely to make any difference to make him more employable. With regards to the laceration of the forehead, this is completely healed without any sequelae and I would grant him 0% impairment to the person as a whole. For the concussion, once again he has recovered completely from the concussion and there is 0% impairment of the person as a whole. For post-concussive syndrome, the only residual problem is some mild attention deficit. Review of the video file that was provided identified the claimant to be able to participate in all activities of daily living and a significant degree of independence that I would consider the attention deficit disorder to be mild if any. Using the Table 13-5, Page 320 from the 5th Edition of the AMA Guides to Evaluation of Permanent Impairment, a CDR score of 0.5 is appropriate. This translates to a Class I impairment as per Table 13-6. I think it is appropriate to grant him 5% impairment of the person as a whole for this problem. So eventually, for the concussion, post-concussion syndrome and traumatic brain injury collectively, he has a 5% impairment of the person as a whole. There is no residual impairment for the open wound of forehead.

[I] think the injured worker is fully employable and I would grant him for his physical impairment rating ability to work without any limitations. Other than this, I have no other recommendations.

{¶17} 13. On July 29, 2008, Dr. Rammohan completed a physical strength rating form. On the form, Dr. Rammohan indicated by his mark: "This injured worker has no work limitations."

{¶18} 14. Following a September 24, 2008 hearing, an SHO issued an order denying relator's PTD application. The SHO's order explains:

The Staff Hearing Officer finds the injured worker is a 54 year old male with a GED and several years of college. He has the ability to read, write and do basic math. He was injured on 10/25/2001 when a ceiling fan blade struck a kitchen cabinet resulting in him being knocked unconscious. The claim is allowed for the conditions of open wound of forehead, concussion, post-concussion syndrome, and traumatic brain injury.

The Staff Hearing Officer finds that Dr. Mysiw's letter, dated 04/24/2008, submitted to support the injured worker's application for permanent total disability includes conditions not allowed in this claim, specifically mood disorder including depression, generalized anxiety, and seizure disorder. Consequently, Dr. Mysiw's letter is not medical evidence upon which the Staff Hearing Officer could rely to find permanent total disability.

The remaining medical evidence in regard to this issue is the 07/29/2008 report of Dr. Rammohan. Dr. Rammohan conducted an examination of the injured worker at the request of the Industrial Commission. Dr. Rammohan states the injured worker has reached maximum medical improvement and has a 5% permanent partial impairment. Dr. Rammohan concludes the injured worker has no work limitations related to the allowed conditions in this claim and is capable of engaging in sustained remunerative employment with no restrictions. The Staff Hearing Officer finds Dr. Rammohan persuasive.

Based on the finding that the injured worker has no limitation related to this claim and is capable of engaging in sustained remunerative employment with no restrictions, no analysis related to the injured worker's age, education and work history is required.

Therefore, it is the order of the Staff Hearing Officer that the application for permanent total disability compensation filed 05/07/2008 is denied.

{¶19} 15. On April 1, 2009, relator, Ronald Barton, filed this mandamus action.

Conclusions of Law:

{¶20} The commission, through its SHO, relied exclusively upon the report of Dr. Rammohan in determining "residual functional capacity." See Ohio Adm.Code 4121-3-34(B)(4). In his report, Dr. Rammohan found that the industrial injury presents no work limitations.

{¶21} Here, relator does not challenge the report of Dr. Rammohan as failing to constitute some evidence upon which the commission relied to support its determination of residual functional capacity. Rather, relator challenges the commission's stated reason for rejecting the report of Dr. Mysiw. Relator contends that the commission abused its discretion in rejecting the report on grounds that Dr. Mysiw premised his disability opinion in part on conditions not allowed in the claim. The commission, through its SHO, concluded that Dr. Mysiw's report fails to present a medical opinion upon which it could rely.

{¶22} In its determination of residual functional capacity, the commission was not required to set forth in its order a reason for rejecting Dr. Mysiw's report. *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 577-578, 1995-Ohio-121 (the commission is not required to set forth the reasons for finding one report more persuasive than the other). Likewise, the commission is not required to enumerate, list, or even mention evidence it has considered but not relied upon. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252, 1996-Ohio-321.

{¶23} However, if the commission voluntarily chooses to set forth a reason for rejecting a medical report, that reason must be valid. Presumably, the commission abuses its discretion if it rejects, for an invalid reason, evidence that could have constituted the some evidence upon which it relied. See *State ex rel. Bruce v. State Teachers Retirement Bd. of Ohio*, 153 Ohio App.3d 589, 2003-Ohio-4181, ¶97.

{¶24} Thus, the issue here is whether the commission's stated reason for rejecting Dr. Mysiw's report constitutes an abuse of discretion.

{¶25} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶26} A claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. Nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. *Id.*

{¶27} The mere presence of a nonallowed condition in a claim does not itself destroy the compensability of the claim, but the claimant must meet his burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242.

{¶28} In rejecting Dr. Mysiw's April 24, 2008 report, the commission explained:

The Staff Hearing Officer finds that Dr. Mysiw's letter, dated 04/24/2008, submitted to support the injured worker's application for permanent total disability includes conditions not allowed in this claim, specifically mood disorder including depression, generalized anxiety, and seizure disorder. Consequently, Dr. Mysiw's letter is not medical evidence upon which the Staff Hearing Officer could rely to find permanent total disability.



**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).