[Cite as *State ex rel. Dept. of Adm. Servs., Ohio Dept. of Agriculture v. Indus. Comm.*, 2012-Ohio-2651.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Department of Administrative Services, Ohio Department of Agriculture,	:	
Relator,	:	
v.	:	No. 11AP-470
Industrial Commission of Ohio and Sheila E. Jackson,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 14, 2012

Buckingham, Doolittle & Burroughs, LLP, *Marietta M.* Pavlidis and *Denise A.* Gary, for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman* for respondent Industrial Commission of Ohio.

Carl F. Gillombardo, Jr., for respondent Sheila E. Jackson.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Department of Administrative Services, Ohio Department of Agriculture, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding respondent, Sheila E. Jackson ("claimant"), permanent total disability ("PTD") compensation, and to enter an order denying the compensation.

{¶ 2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that Dr. Aronson's report was some evidence supporting the commission's decision. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision. In its first objection, relator agues that the magistrate erred when it found that Dr. Aronson's report was some evidence supporting the magistrate's decision because Dr. Aronson "failed to address the more significant and severe disallowed variation of the same allowed condition." We disagree.

{¶ 4} Dr. Aronson was not required to address in his report the non-allowed claim for "clinical depression." As noted by the magistrate, non-allowed medical conditions cannot be used to advance or defeat a claim for compensation. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). Dr. Aronson expressly based his opinion on the allowed claim for dysthymic disorder. At best, relator's argument challenges the weight that should be given to Dr. Aronson's report because Dr. Aronson did not discuss the relationship between the allowed claim for dysthymic disorder and the disallowed claim for clinical depression. This argument is unpersuasive because the commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). For this reason, we overrule relator's first objection.

{¶ 5} The thrust of relator's second objection is difficult to discern. It appears that relator simply objects to the commission's reliance on Dr. Aronson's report and to its grant of PTD compensation to the claimant. Because Dr. Aronson's report is some evidence supporting the commission's decision, the commission did not abuse its discretion when it granted the claimant PTD compensation. Therefore, we overrule relator's second objection.

{¶ 6} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law

contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BRYANT and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Department of Administrative Services, Ohio Department of Agriculture,	:	
Relator,	:	
v.	:	No. 11AP-470
Industrial Commission of Ohio and Sheila E. Jackson,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 27, 2012

Lee M. Smith & Associates Co., L.P.A., and *Natalie J. Tackett-Eby*, for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman* for respondent Industrial Commission of Ohio.

Carl F. Gillombardo, Jr., for respondent Sheila E. Jackson.

IN MANDAMUS

{¶ 7} In this original action, relator, Department of Administrative Services, Ohio Department of Agriculture, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Sheila E. Jackson permanent total disability ("PTD") compensation, and to enter an ordering denying the compensation.

Findings of Fact:

{¶ 8} 1. Sheila E. Jackson ("claimant") has two industrial claims arising out of her employment as a meat inspector for the Ohio Department of Agriculture.

{¶ 9} 2. The April 26, 1989 injury (claim No. PEL79482) is allowed for: "conjunctivitis both eyes; dysthymic disorder."

{¶ 10} 3. The December 18, 1990 injury (claim No. PEL102592) is allowed for:

> Strain cervical; strain lumbosacral; strain left wrist; bulging annulus L4-5; herniated L2-3; aggravation of pre-existing chiari malformation; dysphagia and narcolepsy/sleep apnea. (SR 1)

{¶ 11} 4. The December 18, 1990 industrial claim is disallowed for:

> Clinical depression; neurological impairments; namely persistent tonsillar herniation; flat pituitary; decreased space behind the dena; cerebellar prolapse and ventriculomegaly with features of aqueducutal stenosis; L3-4 bulge; small disc herniation at L4-5 and L5-S1. (SR 60)

{¶ 12} 5. On April 12, 2007, in claim No. PEL102592, claimant moved for additional allowances in the claim involving the December 18, 1990 injury.

{¶ 13} 6. Following a March 12, 2008 hearing, a district hearing officer ("DHO") issued an order stating in part:

> The claim is disallowed for CLINICAL DEPRESSION AND DEPRESSIVE DISORDER. Depressive disorder was requested by the claimant's counsel at this hearing as a clarification and based upon the reports of Dr. [*sic*] Richetta and Steinberg dated 11/20/07 and 9/31/07 [*sic*] these conditions are denied.

(Emphasis *sic*.)

{¶ 14} 7. The DHO's order of March 12, 2008 was administratively appealed.

{¶ 15} 8. Following an August 6, 2008 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of March 12, 2008. The SHO's order states in part:

> Staff Hearing Officer disallows this claim for the condition of "clinical depression" as being causally unrelated herein. This disallowance is made based on the 11/20/07 report and

> opinions of Dr. Richetta and the 9/31/07 [*sic*] report and opinions of Dr. Steinberg.

{¶ 16} 9. Earlier, on July 31, 2007, claimant was examined at relator's request by Joel S. Steinberg, M.D. In his six-page narrative report, Dr. Steinberg reports to a Mr. Martin, an attorney who requested the examination. Dr. Steinberg states in part:

> I offer the following opinions in response to the questions you have posed. Each opinion is offered within a reasonable degree of medical certainty.
>
> [One] Based upon the history, which you obtained from the claimant, the results of your psychiatric interviews and examination, including diagnostic testing, and a review of the information provided, do you have opinion, within psychiatric probability, as to whether Ms. Jackson suffers from "clinical depression" or any other DSM-IV diagnosable psychopathology?
>
> As you must know, Mr. Martin, "Clinical Depression" is <u>not</u> a diagnosis listed in DSM-IV. Ms. Jackson's claim has been allowed for Dysthymic Disorder in the past under claim PEL 79482 and she has received very extensive treatment for it. That treatment was mainly from Dr. Dowling. Earlier she had received treatment from other sources. She is currently on Cymbalta and Lorazepam, an antidepressant and an anti-anxiety agent respectively. I do <u>not</u> find that any psychiatric diagnosis beyond Dysthymic Disorder to be appropriate at this time.
>
> Please explain why or why not
>
> As I mentioned, "Clinical Depression" is a term I believe Dr. Haddad uses in his office practice, but it is <u>not</u> a term found in DSM-IV TR. (The Diagnostic and Statistical Manual, fourth edition, text revision. The Diagnostic and Statistical Manual is the standard for making psychiatric diagnoses throughout North America and in many other places.)
>
> [Two] Based upon the history which you obtain from the claimant, the results of your psychiatric interview and examination, including diagnostic testing, and a review of the information provided, do you have opinion, within psychiatric probability, as to whether the condition of "clinical depression" or any other DSM-IV diagnosable psychopathology that you find present, are causally related to

claimant's industrial injury of December 18, 1990, either by way of direct cause or aggravation of a pre-existing condition? I find only one psychiatric condition to be [possibly] present and that finding is based on the history that she provided. As I pointed out in the *Discussion* section, there are reasons to doubt the accuracy of her reporting. The condition Dysthymic Disorder is the only psychiatric problem that *may* be present. Dysthymic Disorder has been known by other [older] terms. Dysthymia and neurotic depression are two of the more common older terms used to describe the same condition. Sometimes it was described as characterologic depression.

As mentioned above, Dysthymic Disorder was an allowed condition with regard to the 4/26/89 claim, PEL 79482. I find no basis to opine that Ms. Jackson's dysthymia was either directly caused or aggravated by her injury of December 18, 1990 based upon the chronicity of Ms. Jackson's longstanding depression for which she has been under active treatment by Dr. Dowling and others for years. Based upon a review of the objective record, following Ms. Jackson's more recent injury, the frequency and regularity of her psychological counseling has in fact decreased. I find no evidence of any interruption in her psychological care nor do I find any evidence that her medications have needed to be altered or increased. While Ms. Jackson reports an "aggravating factor" that I have called the "hassle factor", there are reasons to question the veracity of her statements. As discussed previously, there is a very important issue of exaggeration. Please see the *Discussion* section above, with the results of the SIMS, the CARB, the Word Memory Test and the PAL.

"Clinical Depression" is not one of the listed diagnoses in DSM-IV TR. The kinds of depressive conditions that are listed there in addition to Dysthymic Disorder, follow:

Depressive Disorder NOS (I do not believe she has that);

Adjustment Disorder with Depressed Mood or various other combinations that include depression. That was one of the conditions that Dr. Fierman made remotely, but he said that it had changed to Dysthymic Disorder and so did Dr. Brooks. I accept that Dysthymic Disorder is the proper term. Another condition is

Major Depression Disorder. I do not find that condition to be present. After those conditions, we move into the conditions that include depressive elements but also include elevated

> mood. There is no evidence that she is suffering from a condition such as that.

(Emphasis *sic*.)

{¶ 17} 10. On November 20, 2007, claimant was examined by psychologist Raymond D. Richetta, Ph.D., who issued a seven-page narrative report. On page one of his report, Dr. Richetta states "Purpose of Exam[:] Additional allowance 'clinical depression under ICD-9, chapter 1.' "

{¶ 18} 11. In his report, Dr. Richetta answers six questions:

> [One] Do the submitted medical evidence and the examination findings support the existence of the requested condition according to the DSM-IV classifications?
>
> The immediate examiner will ignore the fact there is no DSM-IV classification of "clinical depression," the requested diagnosis[.] The immediate examiner will respond to the questions as to whether any DSM-IV depressive diagnosis can be made given the record and the clinical presentation during the interview[.]
>
> The evaluation finds a Dysthymic Disorder (DSM-IV 300[.] 4) as evidenced by her complaints of depressed mood exceeding two years, in fact, her depression exceeds ten years[.] This could be considered "clinical depression Under ICD-9 Chapter 1[.]"
>
> [Two] What is the normal onset of this type of diagnosis?
>
> A Dysthymic Disorder typically follows a period of stress
>
> [Three] What is the normal recovery period for this condition(s)?
>
> By definition, a Dysthymic Disorder must continue for at least two years[.] Recovery varies greatly, and depression can continue indefinitely[.]
>
> [Four] Is/are the alleged condition(s) a direct and proximate result of the industrial injury?
>
> No[.] The evidence from both the clinical interview and the medical record indicate the IW's depressed mood was significantly severe prior to the current work injury, as

> evidenced for her being treated under the prior claim for over ten years[.] As late as 2002, Dr[.] Dowling still considered the effects of the initial depressed mood to preclude a return to work, as evidenced by his C84 dated 01/26/2002[.] Thus, 12 years after the 1990 work injury, her treating provider still considered the depression from the 1989 claim to be debilitating[.]
>
> [Five] If the condition was present prior to the injury, did the injury aggravate the psychological condition?
>
> No. There is no evidence her current depressive level exceeds the 2002 level, which Dr. Dowling described as precluding a return to her original position of employment.
>
> [Six.] If, in your opinion, the psychological condition is present, what should current and future treatment include. Please indicate frequency and duration.
>
> A Dysthymic Disorder is found, unrelated to the current work injury. A Dysthymic Disorder is best treated by a combination of both psychotherapy and psychiatric medication management[.] She has been treated for many years, and continuing psychiatric medication management is likely the best single treatment modality, given her having been in treatment for about a decade[.]

{¶ 19} 12. On March 5, 2009, claimant filed an application for PTD compensation. In support of her application, claimant submitted a report dated August 1, 2008 from Ghassa F. Haddad, M.D.. and a report dated December 11, 2008 from Cheryl Katz, M.D.

{¶ 20} 13. In her report dated December 11, 2008, Dr. Katz opines:

> She is unable to perform substantial gainful employment and therefore is considered permanently and totally disabled. This decision is made with a reasonable degree of medical certainty.

{¶ 21} 14. On June 16, 2009, at relator's request, claimant was examined by neurologist Michael Devereaux, M.D. In his eight-page narrative report, Dr. Devereaux opines:

> Comments:
>
> Although it is not the primary directive for this report it should be noted that the patient appears significantly

depressed. She is agitated. She was not able to provide an adequate history as outlined above. She presumably is upset by her husband leaving her several weeks ago. I think that she is in need of significant psychiatric intervention. I begin by saying I do not think her depression is the result of any of the claims. I strongly suspect that this is a chronic longstanding problem possibly aggravated by some of the things that have happened to her ranging from the 1989 event up to and including her husband leaving her several weeks ago.

* * *

[Two] In regard to your answer to question number 1 do you have any opinion based on your professional expertise, review of the record, your personal examination, the history provided and the objective medical evidence as to whether or not the conditions identified as being casually related to the industrial injury, renders the [claimant] permanently and totally impaired from returning to any and all other forms of employment?

As indicated above I do not think any of the identified conditions render the claimant permanently and totally impaired from returning to all forms of employment. Her biggest problem as indicated above is depression which I think severe enough at present to compromise her and make it difficult for her to work, but I think this is an "independent variable."

[Three] What physical restrictions if any exist as a result of the allowed conditions in this claim? Are those restrictions temporary or permanent?

Once again this patient's restrictions are more psychologically based than physically based. As indicated her neurologic examination was essentially normal.

[Four] In your opinion is the claimant temporarily or totally impaired, permanently and partially impaired, or permanently and totally impaired by the allowed conditions?

I do not think this patient is permanently and totally impaired by the allowed conditions. I recognized that others have listed her as having a partial disability for some of her symptoms. Once again I think most of the specifically identified problems are not related to her falls. I think that it is impossible to know how much of the ongoing symptomatology is related to

> the aftereffects of a Chiari malformation with subsequent surgery. Her symptoms are ongoing even though the surgery relieved the problem. I personally do not think her ongoing symptomatology is a result of the Chiari malformation aggravated by trauma, etc., etc. I think her ongoing symptoms are related to a chronic depression not directly the result of her injuries or the Chiari malformation.
>
> [Five] In your opinion is the claim[ant] capable of performing heavy, medium, light duty or sedentary work as a result of any restriction that stems solely from the allowed conditions in this claim?
>
> No, given her psychiatric conditions. However, she does not have any restrictions based on any of the allowed conditions in this claim.
>
> In summary, this is very difficult problem of a patient with an underlying depressive disorder and excessive fixation on events that have taken place in her life which standing alone are of relatively minor consequence. I do think she is clearly in need of aggressive psychiatric care.

{¶ 22} 15. On May 27 and September 9, 2009, at relator's request, claimant was examined by clinical psychologist Richard Litwin, Ph.D. In his 12-page narrative report, Dr. Litwin opines:

> [Three] What mental restrictions, if any, exist as a result of the allowed conditions in this claim? Are those restrictions temporary or permanent? What impairment in her activities of daily living, social functioning, pace, concentration, and ability to adapt to stress or change are solely the result of the allowed dysthymic disorder in the 1989 claim?
>
> As noted above, Ms. Jackson presents with severe cognitive deficits. She has deficits in all major cognitive domains including attention/concentration, language, spatial processing, memory and executive functions. In many instances, her deficits are quite severe as with her language and memory skills. There are strong signs of expressive aphasia or word finding difficulties along with an underlying amnesic disorder.
>
> There is no reasonable way to ascribe the above cognitive deficits to any one or more conditions in the allowed claims from 1989 or 1990. This is because Ms. Jackson's medical

> history suggest multiple etiological factors may have been, or continue to be, operating synergistically to undermine normal neurocognitive brain functioning. These factors include a history of two motor vehicle accidents, reported stroke, reported history of sleep apnea (still not treated), brain surgery for her Chiari Malformation, a fall down a flight of steps resulting in an untreated head injury, and persistent depression and chronic pain with poor sleep regulation. In light of her complex medical history, *her cognitive deficits are likely **not** the result only of her A. Chiari malformation condition, her dysthymic disorder, or a combination of these two diagnoses in the allowed claims referenced above.*
>
> With regard to her dysthymic disorder, this condition is more than likely strongly contributing to social isolation, reduced mental persistent and concentration (especially under the demanding or stressful situations), low tolerance for stress, reduced mental energy for optimal cognitive functioning, and lack of motivation to seek out more stimulation and challenge in daily living. When pain symptoms increase, her dysthymia will also increase correspondingly.
>
> [Four] In your opinion, is the Claimant temporarily and totally impaired, permanently and partially impaired, or permanently and totally disabled by the allowed conditions? Please explain your answer.
>
> My area of expertise only allows me to offer an opinion with regard to Ms. Jackson's dysthymic disorder and her cognitive deficits. Given the severity of Ms. Jackson's cognitive impairment, and the fact that many contributing factors to her cognitive deficits occurred many years ago, it is unlikely any appreciative gain in her cognitive and mental functioning will occur over time. Moreover, her age and ongoing health condition would further suggest any "significant" spontaneous improvement in cognitive functioning is unlikely. Ms. Jackson's dysthymic condition also appears to be chronic with no significant expected improvement to occur given the breadth and extensiveness of her medical conditions. As such, Ms. Jackson appears to be permanently and partially disabled within reasonable medical certainty.

(Emphasis *sic*.)

{¶ 23} 16. On October 30, 2009, at the commission's request, claimant was examined by clinical psychologist David Aronson, Ph.D., who issued a six-page narrative

report. Dr. Aronson only examined for the dysthymic disorder allowed in claim No. PEL 79482.

{¶ 24} The first paragraph on the first page of the report is captioned "Sources of Data." Therein, the July 31, 2007 report of Dr. Steinberg is listed.

> Dr. Aronson's report states in part:
>
> Description of Claimant:
>
> Sheila Jackson is a 59-year-old separated (from her second husband) female who has three adult children. She was referred for evaluation by the Industrial Commission of Ohio (ICO) to assist in making a determination regarding whether she is permanently and totally disabled. The purpose of this report is to offer an opinion on the extent of impairment due to Dysthymic Disorder (300.4), a form of depression. This disorder is an allowed condition on her BWC claim related to an injury that occurred on 04/26/1989. It should be noted that this worker has a second work injury that occurred on 12/18/1990 (PEL 102592). The injury of 1990 has no allowed psychological disorders and therefore it is not the subject of this examination. Both injuries occurred while Ms. Jackson was employed by the Department of Agriculture as a meat inspector. Ms. Jackson arrived on time for the evaluation; she was accompanied by a friend who assisted with transportation. Ms. Jackson was very open and cooperative during the evaluation. She appeared to make every effort to respond to questions honestly and as completely as she could. However, she did have significant problems with memory and often had difficultly giving accurate details about her past. When she was unsure of an answer, she indicated this to me so as to be clear about how confident she was of her response. I believe that the clinical and test data gathered result in a valid assessment of her current functioning and impairment.
>
> * * *
>
> Psychological Diagnosis of Record:
>
> I. Dysthymic Disorder (300.4)
> II. No Diagnosis on Axis II.
> III. Conjunctivitis both eyes.
> IV. Problems with primary support group, financial problems, occupational problems, economic problems.
> V. 45

Discussion/Opinion:

Sheila Johnson is a 59-year-old separated female who was injured on 04/26/1989 while working as a meat inspector for the Ohio Department of Agriculture. She was referred for a psychological evaluation by the Industrial Commission of Ohio to help determine how much impairment she experiences due to her BWC allowed psychological disorder (Dysthymic Disorder, a form of depression; 300.4) and to help make a decision about whether she is permanently and totally disabled.

[One] Has the claimant reached maximum medical improvement (MMI)? If "yes" then please continue to items #2 and #3.

Yes. Ms. Jackson was involved with psychological therapy or counseling sessions along with psychiatric medication management for "quite a few years." Records sent with the information packet documented that she participated in therapy sessions from at least 1994 — 2000. This period of treatment would allow Ms. Jackson to reach maximum psychological (medical) improvement with regard to her Dysthymic Disorder (300.4). However, Ms. Jackson indicated that the BWC is no longer allowing her to receive treatment for this allowed disorder. Based on my evaluation, it is clear that continued maintenance treatment is needed. Her depression remains severe and she has a continued need to address this with her therapist. By definition Dysthymic Disorder is a lifelong psychological disorder; she will require treatment (at least on and off) for the rest of her life. Treatment will need to include both psychological intervention and psychotropic medication aimed at her depression.

[Two] Based on the AMA Guides, Second and Fifth Editions, and with reference to the ICO Medical Examination Manual, provide the estimated percentage of whole person impairment arising from each allowed psychological/psychiatric condition. If there is no impairment indicate zero (0) percent.

Using the AMA Guides to the Evaluation of Permanent Impairment, Second and Fifth Editions, this claimant exhibits Class 3 (Moderate) impairment in the area of Activities of Daily Living; Class 3 (Moderate) impairment in the area of Social Functioning; Class 4 (Marked) impairment in the area of Concentration, Persistence and Pace; and Class 4 (Marked)

> impairment in the area of Adaptation. Taken together, it is my professional opinion that the claimant exhibits 48% impairment of the whole person, taking into consideration only the allowed psychological disorder of this claim and not taking into consideration any of the physical/medical disorders. It should be noted that some symptoms of depression (attention, focus, concentration and memory) can be caused by other disorders in addition to the depression (300.4). In particular, neurological impairment can account for this type of symptom. Ms. Jackson recently went through a detailed neurological evaluation by Dr. Devereaux at the University Hospitals Case Medical Center. This evaluation was done in relation to her other work injury that occurred on 12/18/1990 (see above). After conducting his neurological evaluation, Dr. Devereaux concluded: "I personally do not think her ongoing symptomatology is a result of the Chiari malformation aggravated by trauma, etc, etc. I think her ongoing symptoms are related to a chronic depression not directly the result of her injuries of the Chiari malformation." This opinion was relied on to help clarify the extent to which these symptoms were caused by the depression or by neurological impairment from the Chiari malformation.
>
> [Three] Complete the enclosed Occupational Activity Assessment. In your narrative report provide a discussion setting forth mental limitations resulting from the allowed condition(s).
>
> As indicated on the attached Occupational Activity Assessment, it is my opinion that this claimant is currently unable to return to any former position of employment and is unable to perform any sustained remunerative employment at this time.

{¶ 25} 17. On October 30, 2009, Dr. Aronson completed a form captioned "Occupational Activity Assessment, Mental and Behavioral Examination." On the form, Dr. Aronson indicated by his mark "[t]his injured worker is incapable of work."

{¶ 26} In the space provided, Dr. Aronson wrote in his own hand:

> The injured worker is experiencing impairment in attention, focus, concentration [and] memory due to her BWC allowed psychological disorder (300.4). This impairment prevents her from functioning in a competitive work environment[.]

{¶ 27} 18. On December 7, 2009, at the commission's request, claimant was examined Daniel J. Leizman, M.D., who specializes in physical medicine and rehabilitation. Dr. Leizman examined for all the allowed physical conditions in both industrial claims. In his seven-page narrative report dated December 8, 2009, Dr. Leizman opined that claimant has a 27 percent whole person impairment and she is physically capable of "sedentary type work."

{¶ 28} 19. On December 7, 2009, Dr. Leizman completed a physical strength rating form on which he indicated by his mark that claimant is capable of "sedentary work."

{¶ 29} 20. On December 14, 2009, at the commission's request, claimant was examined by Allen J. Cropp, M.D. He examined only for narcolepsy. In his two-page narrative report, Dr. Cropp opined:

> Based on the material available to me, it is unlikely that this claimant has narcolepsy. Although there are some symptoms suggestive of cataplexy such as dropping to the ground with emotional distress, most cataplexy lasts only a few minutes, not up to 12 hours such as is the case here. Also, most patients with narcolepsy have vivid dreams very frequently. They also frequently have sleep paralysis and hypnagogic hallucinations. This claimant has none of those. Also, when reviewing the polysomnogram, if this claimant had narcolepsy, one would expect to see an increased amount of REM sleep (in this case, the amount of REM sleep is decreased) and a very short REM latency (in this case the REM latency is prolonged). When the claimant states that she only sleeps 4-5 hours nightly, this can account for her complaints of feeling tired all the time and the hypersomnolence seen on the polysomnogram. Therefore, based on the information available to me, I doubt that this patient has narcolepsy.
>
> A second issue is whether or not the narcolepsy is related to Chiari malformation and therefore, casually related to the MVA. Based on a literature review that I have done, I cannot find any link between Chiari malformation and narcolepsy. Therefore, even if I am wrong about this claimant not having narcolepsy, I am fairly convinced that it would not be associated with the Chiari malformation.

> I did not complete the physical strength rating as this is out of my field of expertise and is unrelated to narcolepsy.

{¶ 30} 21. On February 19, 2010, Dr. Cropp wrote an addendum report stating:

> [One] In your medical opinion, has the injured worker reached maximum medical improvement (MMI) in regards to each specified allowed condition? Briefly describe the rationale for your opinion. If yes, than please continue to Items 2 and 3.
>
> I do not believe that the injured worker has reached maximum medical improvement with regard to each specified allowed condition.
>
> In regards to the sleep apnea syndrome, the preferred treatment for moderate sleep apnea syndrome is CPAP or Bi-level positive airway pressure. Although the patient is on Provigil, which does help as far as daytime sleepiness, this is not a first line treatment for this condition and should not be used unless the claimant is successfully using CPAP and remains tired. Therefore, my recommendation as far as the sleep apnea would be to send this claimant back to a sleep laboratory for purposes of CPAP/Bi-level titration (as suggested in the report) followed by use of the equipment in her home. Hopefully, this will help to alleviate the patient's fatigue and we will be able to consider the claimant as having reached maximum medical benefit for this condition.
>
> As far as the narcolepsy, once the sleep apnea syndrome has been appropriately treated, Provigil could be adjusted for any residual daytime sleepiness.
>
> Once this has been accomplished, or the claimant has reached maximum doses of Provigil and is still symptomatic, than [*sic*] we could again say that the claimant has reached maximum medical benefit.
> [Two] Based on the AMA Guides, Fifth Edition, and with reference to the Industrial Commission Medical Examination manual, provide the estimated percentage of whole person employment [sic] arising from each allowed condition. Please list each condition in whole person impairment separately than [*sic*] provide a combined whole person impairment.
>
> Based on the original communication from the Industrial Commission, I am not sure this question should be answered as the claimant has not reached MMI.

* * *

> Based on the sum of the two conditions, my opinion is that this claimant, in her current condition, has 50% impairment of the whole person. Certainly, if this claimant were to use CPAP and her Provigil be titrated based on results of an MSLT or, at least symptoms, it is quite possible that my opinion would change as to her degree of disability.

{¶ 31} 22. On February 22, 2010, Dr. Cropp completed a physical strength rating form on which he indicated by his mark that relator can perform "sedentary work." In the space provided, Dr. Cropp wrote in his own hand "no driving or operating any heavy equipment."

{¶ 32} 23. The record contains a vocational report dated April 5, 2010, prepared for relator by Craig Johnston, Ph.D. In his seven-page narrative report, Dr. Johnston opines that claimant is vocationally able to perform sustained remunerative employment.

{¶ 33} 24. Following a May 13, 2010 hearing, an SHO issued an order awarding PTD compensation. The SHO's order explains:

> This order is based particularly upon the report of Dr. David Aronson, Ph.D.
>
> David Aronson evaluated the Injured Worker on 10/28/2009 at the request of the Ohio Industrial Commission concerning this application for permanent and total disability. He concluded that the Injured Worker has a 48% impairment of the whole person due to the allowed psychological conditions in the claim and that she is unable to perform any sustained remunerative employment at this time.
>
> Similarly there are reports in the file from Dr. Cheryl Katz, M.D., dated 12/11/2008 and Dr. Ghassan F. Haddad, M.D., that indicate that the Injured Worker is permanently and totally disabled and unable to engage in sustained remunerative employment.
>
> Ms. Jackson had brain surgery involving a suboccipital craniotomy, C-1 laminectomy and posterior fossa decompression and other surgery has been recommended. She has also been hospitalized for the allowed Chiari condition. The Industrial Commission had the Injured Worker examined by Drs. Cropp, Aronson and Leizman and

> the combined permanent partial impairment, without using the AMA combined value chart, exceeds 100%.
>
> The term permanent as applied to disability under the workers' compensation law does not mean that such disability must necessarily continue for the life of the Injured Worker but that it will, within reasonable probability, continue for indefinite period of time without any present indication of recovery therefrom.
>
> Staff Hearing Officer finds that the Injured Worker is 60 years old and last work[ed] in 1992. She last received temporary total compensation on 05/16/2009. Her age of 60 is a neutral factor, her education she has 3 years of college at Cleveland State University and also went to bartending school. It took her many years to complete the 3 years at Cleveland State and she did not graduate. Therefore, this is considered to be a neutral factor towards employability. Her past work experiences [as] meat inspector for the Ohio Department of Agriculture from 1988 to 1992 is viewed as a neutral factor for employability.
>
> Considering the substantial impairment indicated by the relied on specialist, and the long period of time since the Injured Worker has worked in any capacity due to this injury, the Hearing Officer finds that the weight of the evidence indicates that the Injured Worker is permanently and totally disabled and unable to engage in sustained remunerative employment and this application is therefore granted.

{¶ 34} 25. On May 20, 2011, relator, Department of Administrative Services, Ohio Department of Agriculture, filed this mandamus action.

Conclusions of Law:

{¶ 35} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

{¶ 36} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications.

{¶ 37} Ohio Adm.Code 4121-3-34(D)(2)(a) states:

> If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative

> employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.

{¶ 38} Here, the SHO's order of May 13, 2010 awarding PTD compensation states that it "is based particularly upon the report of Dr. David Aronson, Ph.D."

{¶ 39} As earlier noted, based solely upon the dysthymic disorder allowed in claimant No. PEL79482, Dr. Aronson found:

> [T]his claimant is currently unable to return to any former position of employment and is unable to perform any sustained remunerative employment at this time.

{¶ 40} Also, on an Occupational Activity Assessment form, Dr. Aronson indicated by his mark "[t]his injured worker is incapable of work."

{¶ 41} Given the commission's reliance upon Dr. Aronson's report, under Ohio Adm.Code 4121-3-34(D)(2)(a) it was unnecessary for the commission to consider the vocational factors.

{¶ 42} If Dr. Aronson's report constitutes some evidence upon which the commission relied to support its determination that dysthymic disorder alone prohibits all sustained remunerative employment, the commission's PTD award must be upheld and the request for a writ of mandamus denied. *State ex rel. Galion Mfg. Div., Dresser Industries, Inc. v. Haygood*, 60 Ohio St.3d 38 (1991). Thus, this action must necessarily focus upon relator's challenges to the report of Dr. Aronson.

{¶ 43} Two main issues are presented with respect to Dr. Aronson's report.

{¶ 44} First, does Dr. Aronson's use of the word "currently" and the phrase "at this time" compel the conclusion here that claimant's stated inability to perform any sustained remunerative employment is in fact a temporary condition, and thus Dr. Aronson's opinion cannot support the commission's decision? (*See* relator's brief, at 13 and 23.) Secondly, is Dr. Aronson's report and opinion flawed for the failure to acknowledge that "clinical depression" had been disallowed in claim No. PEL102592?

{¶ 45} Turning to the first issue, Ohio Adm.Code 4121-3-34(D)(1)(f) states:

> If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured

> worker shall be found not to be permanently and totally disabled because the condition remains temporary.

{¶ 46} Significantly, in his October 30, 2009 report Dr. Aronson opined that the dysthymic disorder had reached maximum medical improvement ("MMI"). Given his opinion on MMI, the commission was not required to view Dr. Aronson's use of the word "currently" or the phrase "at this time" as indicators that inability to perform sustained remunerative employment is a temporary condition. After all, the commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987).

{¶ 47} As earlier noted, the second issue is whether Dr. Aronson's report and opinion is flawed for the failure to acknowledge in the report that "clinical depression" had been disallowed in claim No. PEL102592.

{¶ 48} The magistrate notes that the second issue, as stated above, derives from relator's counsel at oral argument before the magistrate. In its brief, relator does assert that Dr. Aronson's report "considers disallowed conditions from outside the scope of the 1989 claim." (Relator's brief, at 23.)

{¶ 49} Moreover, in its brief, relator described Dr. Aronson's report:

> This report should be limited to her dysthymic disorder allowance due to the 1989 bilateral conjunctivitis. Any clinical depression allegation in the 1990 claim was specifically denied by the IC.

(Relator's brief at 12.)

{¶ 50} Again, at oral argument, counsel asserted that it was the failure of Dr. Aronson to acknowledge in his report the disallowance of "clinical depression" that flaws Dr. Aronson's analysis of claimant's psychological condition.

{¶ 51} It is well-settled that non-allowed medical conditions cannot be used to advance or defeat a claim for compensation. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993).

{¶ 52} In the magistrate's view, an examination of the SHO's order of August 6, 2008 that disallowed the claim for "clinical depression" based upon the reports of Drs. Richetta and Steinberg completely undermines relator's argument that Dr. Aronson's failure to acknowledge the disallowance flaws his report.

{¶ 53} The reports of Drs. Richetta and Steinberg agree that "clinical depression" is not a psychiatric diagnosis to be found in the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV). Also, the reports both acknowledge that dysthymic disorder is an allowed condition in the earlier claim involving the April 26, 1989 injury.

{¶ 54} Relator seems to suggest incorrectly that the so-called "clinical depression" disorder was disallowed on grounds that, although it exists, it is not related to the industrial injury of December 18, 1990, and thus, due to its alleged severity, must be reckoned with when the dysthymic disorder is evaluated. The reports of Drs. Richetta and Steinberg do not support relator's suggestion. In fact, Dr. Richetta finds a dysthymic disorder but unrelated to the "current work injury," *i.e.*, the injury of December 18, 1990.

{¶ 55} Moreover, Dr. Aronson clearly indicates in his report that he reviewed the report of Dr. Steinberg dated July 31, 2007, which is one of the reports upon which the SHO relied in disallowing the claim for "clinical depression."

{¶ 56} Thus, under the circumstances here, any failure on the part of Dr. Aronson to acknowledge the disallowance of the other claim for "clinical depression" cannot be grounds for elimination of Dr. Aronson's report from evidentiary consideration. At best, relator's argument simply goes to the weight to be given to Dr. Aronson's report. As earlier noted, the commission is exclusively responsible for weighing and interpreting medical reports. *Burley*, 31 Ohio St.3d 18.

{¶ 57} Accordingly, for the 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).