

**From:** Don Drinko  
**Sent:** Wed 5/18/2016 4:19 PM  
**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: In a permanent total disability (PTD) proceeding, is it error to disregard medical evidence of disability due to non-allowed conditions that develops after the application date?**

In permanent total disability (PTD) proceedings, determining the true cause of an employee's disability can be difficult. This is particularly true when conditions that arise after an application is filed contribute to the claimant's inability to work. The Tenth District Court of Appeals recently decided a *mandamus* action which presented this issue, as well as the question of whether it was error for a hearing officer to fail to mention medical evidence which was contained in the claim file that arguably weighed against a grant of PTD.

*State ex rel. Caretenders of Cleveland v. Indus. Comm.*, 2016-Ohio-1030, involved a home health aide who was injured in 2006. A workers' compensation claim was filed, which was allowed for "sprain of neck." Shortly thereafter, the claimant moved to have the claim additionally allowed for "aggravation of pre-existing degenerative disc disease at C2-C7," but this motion was withdrawn. In May, 2007, the claimant re-requested and received the additional allowance, but only at the C5-6 and C6-7 levels. After TTD was terminated in 2009, the claimant underwent a functional capacity evaluation (FCE) which classified her work ability as "less than sedentary." In August, 2011, a chiropractor opined that she was incapable of sustained remunerative employment, prompting the claimant to move for PTD. An orthopedic surgeon retained by the BWC concluded she was capable of sedentary work, and the matter should have been set for a hearing. For reasons that are unclear, the PTD application was not heard by the Industrial Commission for nearly three years, and in the interim the claimant underwent an MRI and sought treatment for complaints for the other, non-allowed degenerative discs. (At least some of this evidence, including the MRI report, was never filed with the BWC.) As a result of the PTD hearing, PTD was granted over the objection of the employer, who contended that the medical evidence had become "stale," non-allowed conditions were the source of disability, and that the SHO did not even mention contrary medical evidence. After the Commission affirmed the Order, the employer was left with no option but to pursue a *mandamus* action in the Tenth District.

The Tenth District affirmed the grant of PTD. Citing the findings of a magistrate, the Court rejected the employer's argument that the medical evidence was "stale," citing the fact that the medical evidence submitted with the application was less than two (2) years old on the date of filing of the application, and therefore complied with the statute. *OAC 4121-3-34(C)*. Although old by the time the request was heard, the claimant should not be punished by the unexplained delay. The Court also dismissed the subsequent medical treatment to non-allowed conditions, noting that under Ohio law, it is established that the presence of non-allowed conditions, even when disabling, does not necessarily defeat a claim for compensation for an allowed condition. *State ex rel. Waddle v. Indus Comm.*, 67 Ohio St.3d 452. The claimant must only meet her burden of showing that an allowed condition independently caused disability, and even if non-allowed conditions are severe, they are irrelevant. Finally, the Court dismissed arguments concerning the hearing officer's failure to mention the subsequent medical evidence, noting that

there is a presumption that an SHO considered evidence before her, even if it was not referenced in the Order.

*Caretenders* reaffirms the law in Ohio that the presence of substantial, even disabling, non-allowed conditions does not preclude an award of PTD. In *Caretenders*, the decision was likely aided in large part by substantial other factors (the claimant did not speak English, did not drive, and had a third grade education) that weighed in favor of an award of PTD. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist  
GALLAGHER SHARP  
1501 Euclid Avenue - 6th Floor  
Cleveland, OH 44115  
Direct Dial: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)