2024 ACO #11

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

SUSAN TORRES-HICKS,
PLAINTIFF,

V DOCKET #22-0010

O D L, INCORPORATED,
SELF-INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE SLATER.

PLAINTIFF, IN PRO PER,
JAMES J. HELMINSKI FOR DEFENDANT.

OPINION

ROYAL, CHAIRPERSON

This matter came before the Workers' Disability Compensation Appeals Commission ("WDCAC") [1] on the filing by plaintiff Susan Torres-Hicks of a claim for review from the decision of Magistrate Chris Slater mailed August 1, 2022. In his order, the magistrate granted defendant ODL, Incorporated's motion to dismiss plaintiff's application on res judicata grounds, and further found that plaintiff did not suffer from any conditions related to her 2003 work injury.

Prior Proceedings

This case has a lengthy and complex history. It began with plaintiff's filing of an application for hearing in April 2005, alleging disability involving her bilateral upper extremities and claiming several injury dates. In an order mailed October 15, 2007, Magistrate G. Jay Quist found that plaintiff had established ongoing disability from complex regional pain syndrome ("CRPS") resulting from a March 27, 2003, injury to her left upper extremity. Magistrate Quist based that finding upon the testimony of plaintiff's treating physician, Dr. Sean Growney. He granted plaintiff an open award, while noting that "[t]here are reasons to question the plaintiff's credibility." The Workers' Compensation Appellate Commission ("WCAC") affirmed in an order dated July 17, 2008. *Hicks v*

[1] This matter is being decided by a two-member panel pursuant to Paragraph 4(b) of Executive Order 2019-13, which states that "[t]he Workers' Disability Compensation Appeals Commission shall act by the vote of two or more members."

ODL, Incorporated, 2008 Mich ACO #144. Defendant's subsequent applications for leave to appeal to the Court of Appeals and then the Supreme Court were denied.[2]

While defendant's appeal of the initial award was pending before the WCAC, defendant filed an application for mediation or hearing alleging that plaintiff no longer suffered from residuals from her prior work-related injury and requesting that her benefits be stopped. Magistrate Quist rendered an order and opinion mailed December 19, 2008, finding that plaintiff had recovered from her work-related CRPS as of February 7, 2008, the date of an examination by Dr. Stanley Sczecienski. Magistrate Quist expressly found Dr. Sczecienski more credible than Dr. Gromney, who testified a second time in connection with the petition to stop. Defendant was permitted to recoup wage loss benefits paid after plaintiff's recovery date, although reimbursement for medical expenses was denied. Plaintiff filed an appeal with the WCAC, after which defendant cross-appealed. In an order mailed on August 14, 2009, the WCAC affirmed Magistrate Quist's order terminating plaintiff's benefits, but reversed his finding that defendant could not recoup medical expenses. *Hicks v ODL, Incorporated,* 2009 Mich ACO #153. No further appeal was taken.

A dispute subsequently arose as to the fee due plaintiff's initial attorney, Frederick Bleakley. As a result, attorney Bleakley filed an application for mediation or hearing, requesting that a magistrate fix fees and costs. Magistrate Quist issued an order mailed on March 10, 2010, resolving that dispute. No appeal was taken from that order.

Current Proceedings

Plaintiff filed a new application for mediation or hearing on February 20, 2020. She was no longer represented by counsel at this point. Her application alleged that she "suffered a life, long nerve condition (CRPS) to my left extremit[y], often traveling to the right extremit[y] at times." She alleged a March 3, 2003, date of injury.

Defendant subsequently filed a motion to dismiss plaintiff's application on June 21, 2021, arguing that her claim was barred by res judicata. Plaintiff thereafter filed an amended application on July 15, 2021, alleging the same date of injury with no indication of the nature of disability or manner of injury claimed. She later filed a second amended application on August 19, 2021, stating, "I have been diagnosed with CRPS (RSD), since 2005, from an workplace injury in 2003, and now the psychological overlay of the condition has begun." Plaintiff subsequently filed a response to the motion to dismiss, after which a hearing on defendant's motion was held on April 27, 2022. At that hearing, the parties stated their respective positions, but no decision was rendered.

An evidentiary admissibility hearing was subsequently held on May 17, 2022. At that hearing, plaintiff submitted and Magistrate Slater admitted various exhibits, only one of which involved periods after Magistrate Quist's 2008 order – treatment records from Dr. Growney. Defense counsel

[2] Plaintiff notes that Magistrate Slater erroneously indicated that plaintiff filed those applications, and he did. However, this error is harmless and immaterial to the ultimate result.

asked that Magistrate Slater take judicial notice of all prior decisions regarding plaintiff's claim. He also submitted two medical depositions taken in 2022, as well as a report and video from a private investigator, William DeLong.

A hearing on the merits was subsequently held on June 22, 2022. At that hearing, plaintiff's husband, Leonard Hicks, testified that his wife continued to suffer from CRPS which affected her life "mentally and physically." (Trial transcript at 28.) He explained that plaintiff suffered from what he termed "brain spasms" which left her in shock for five or six days, unable to sleep, eat, or drink. (*Id.* at 28-29.) Mr. Hicks testified that he took family medical leave from his job during one such event so that he could care for his wife. (*Id.* at 30.) His FMLA certificate was dated January 22, 2008. (Plaintiff's Exhibit #6.) Mr. Hicks also acknowledged that plaintiff was using her left hand to scroll on a computer screen during the hearing. (*Id.* at 35-36.)

Plaintiff herself described one "brain spasm" that lasted for six days, which she said led her to consider suicide. (Trial transcript at 74-75). This occurred less than five years prior to the hearing. (*Id.* at 76-77.) She offered no specifics as to any other such "spasms."

Private investigator William DeLong also testified, indicating that defendant retained his company to conduct surveillance of plaintiff, which he did on four occasions during March and May of 2021. (Trial transcript at 61.) Video evidence of his observations was admitted with his report. The video showed plaintiff using her left hand and arm on several occasions, engaging in such activities as opening and closing doors on two different SUVs, lifting small children in and out of the vehicle, lifting a child out of a cart and placing that child in the vehicle, pushing a child in a stroller with both hands, and carrying large bags. (Defendant's Exhibit C.) Mr. DeLong observed no signs of discomfort, pain, or limitation. (Trial transcript at 65.)

In an order and opinion mailed on August 1, 2022, Magistrate Slater denied plaintiff's claim for relief in its entirety. The magistrate held that plaintiff's claim of ongoing disability as the result of CRPS was barred by res judicata, given Magistrate Quist's previous finding that she had recovered from that condition in 2008. (Magistrate Quist's December 19, 2008, opinion at 27.) Magistrate Slater further held that plaintiff's claim of "psychological overlay" could have been brought during prior proceedings and was also barred. (*Id.* at 27-28.) Magistrate Slater further found that plaintiff had not proven that she continued to suffer from CRPS or psychological overlay related to her 2003 work injury. (*Id.* at 28-30.) Finally, Magistrate Slater held that he lacked authority to revisit Magistrate Quist's prior orders. (*Id.* at 30-31.)

Plaintiff filed a timely claim for review with the WDCAC, which indicated regarding Magistrate Slater's decision the following: "IT IS NOT CONTRARY TO FACTS & LAW." The panel has read the parties' briefs and reviewed the record, and now affirms the magistrate's order.

Standard of Review

Findings of fact made by a magistrate are conclusive upon the WDCAC if supported by competent, material, and substantial evidence on the whole record. Substantial evidence is that which, considering the whole record, a reasonable mind would accept as adequate to justify the conclusion. MCL 418.861a(3) and (4); *Mudel v Great Atlantic & Pacific Tea Company,* 462 Mich 691, 699-700; 614 NW2d 607 (2000). We review the magistrate's conclusions of law de novo. *Abbey v Campbell, Wyant & Cannon Foundry (On Remand),* 194 Mich App 341, 351; 486 NW2d 131 (1992). "[T]he application of a legal doctrine, such as res judicata, presents a question of law that we review de novo." *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). However, we review decisions as to the admissibility of evidence solely for abuse of discretion. *Thompson v Pollard Banknote, Limited,* 2011 Mich ACO #101 at 4; *Department of Transportation v Haggerty Corridor Partners Limited. Partnership*, 473 Mich 124, 133–134; 700 NW2d 380 (2005). We consider "only those specific findings of fact and conclusions of law that the parties have requested be reviewed." MCL 418.861a(11); *Cane v Michigan Beverage Company*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000).

Analysis

Plaintiff's briefs include arguments frequently citing inapplicable authority and requesting relief we are not able to provide. Some of this is no doubt the result of her unrepresented status. However, litigants without attorneys are generally held to the same standards as those with attorneys. *Baird v Baird*, 368 Mich 536, 539; 118 NW2d 427 (1962); *Kim v Magna Mirrors of America, Incorporated,* 2022 Mich ACO #3 at 5.

1. Finality of Magistrate Quist's 2008 Order.

Plaintiff asserts that, after his original order granting plaintiff an open award, Magistrate Quist had no authority to revisit her claim and her attorney should have invoked the doctrine of res judicata. However, res judicata does not prevent defendant from filing a petition to stop plaintiff's benefits based upon a claim that her condition had changed. "…[A] compensation award is an adjudication as to the condition of the injured work[er] at the time it is entered, and conclusive of all matters adjudicable at that time, but *it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed*." *Pike v City of Wyoming*, 431 Mich 589, 595–596; 433 NW2d 768 (1988) (emphasis added). See also *White v Michigan Consolidated Gas Company*, 352 Mich 201; 89 NW2d 439 (1958).[3] Consequently, defendant was within its rights in

[3] A workers' compensation claimant may also file an application alleging a change in their condition or circumstances. However, Magistrate Slater held that plaintiff had failed to prove any such change.

filing its petition to stop. That is the case even though its appeal of the original award was still pending when it filed that petition. The Court of Appeals so held in *Barham v Workers' Compensation Appeal Board,* 184 Mich App 121, 134–135; 457 NW2d 349 (1990):

> The conclusion drawn from the aforementioned cases is that an employer may seek to stop payment of benefits if the claimant's disability has changed. There is absolutely no reason an employer should be required to continue compensation to a recovered claimant simply because an appeal is pending.

Plaintiff's argument that Magistrate Quist's original order granting her an award was "unripe" for future consideration once the Supreme Court denied defendant's application for leave to appeal is simply not correct.

Plaintiff also contends that her prior attorney "committed legal malpractice" by failing to object to defense independent medical evaluations. However, counsel could not have prevented those evaluations, because MCL 418.385 expressly permits them "from time to time":

> After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier. (MCL 418.385.)

Plaintiff suggests that defendant's petition to stop was "frivolous," citing MCL 600.2591(3)(a), but that provision from the Revised Judicature Act is not applicable to a workers' compensation action. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 360; 459 NW2d 279 (1990). The only "frivolous" proceeding language in the Worker's Disability Compensation Act applies solely to appeals. MCL 418.861b. Furthermore, the fact that Magistrate Quist granted defendant's petition to stop suggests that it was anything but frivolous.

As a result, defendant had the right to return to the Workers' Disability Compensation Agency ("Agency") after Magistrate Quist's initial order awarding benefits.

2. Res judicata.

The doctrine of res judicata provides that, once a trial has been held and a final resolution has been rendered on a particular issue, neither party may file a new lawsuit over the same issue. In Michigan workers' compensation jurisprudence, a broad form of res judicata is applied to bar not only those claims actually litigated, but also those which could have been brought but were not. *Gose v Monroe Auto Equipment Company*, 409 Mich 147; 294 NW2d 165 (1980). The elements of *res*

judicata were set forth by the Supreme Court in *Paige v City of Sterling Heights*, 476 Mich 495, 521, n 46; 720 NW2d 219 (2006):

> The doctrine of res judicata applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies.

Magistrate Slater found that this case met all three elements and was therefore barred by res judicata. We agree.

Plaintiff's current application asserts that she has suffered from CRPS continually since 2005, ignoring Magistrate Quist's prior and long-final finding that she had recovered from that condition in 2008. The evidence she submitted below primarily concerned the period before Magistrate's Quist's December 19, 2008, order embodying that finding of recovery. Such evidence obviously cannot demonstrate a change in her condition since that date.[4] In fact, the only evidence submitted by plaintiff concerning periods after the 2008 order consisted of records of Dr. Growney's treatment through 2021. (Plaintiff's Exhibit #7.) However, these records suggest that plaintiff has continually suffered from CRPS, and Magistrate Quist previously rejected that allegation while specifically deeming Dr. Growney's opinion not credible. (Magistrate Quist's December 18, 2008, opinion at 6.) Plaintiff's new application simply asks us to reweigh the same opinion from the same doctor previously deemed unreliable by Magistrate Quist. This argument is therefore precluded by res judicata.[5]

Plaintiff also now claims to suffer from a psychological overlay she contends is related to her CRPS, but as Magistrate Slater noted. . .

> There is no question that, as to the pending application alleging ongoing issues with CRPS in Plaintiff's bilateral upper extremities, these issues were actually resolved in Magistrate Quist's 2007 and 2008 decisions. With respect to the allegation of a "psychological overlay." This condition is intrinsically tied to the conditions which Magistrate Quist found Plaintiff to have fully recovered from over a decade ago. To the extent that Plaintiff actually suffers from a psychological overlay related to CRPS

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[4] That evidence included copies of plaintiff's original award from Magistrate Quist from 2007, the WCAC's opinion affirming the award, and orders from the Court of Appeals and Supreme Court denying defendant's applications for leave to appeal. Also admitted were a 2008 FMLA certificate, two depositions from Dr. Growney taken in 2006 and 2008, and a vocational evaluation report from Susan Rowe from 2008. Plaintiff also sought the admission of a Social Security disability award notice from 2008.

[5] As shall be further noted below, Magistrate Slater also reviewed the evidence presented to determine if plaintiff was experiencing CRPS as of the time of the hearing in 2022 and found that she had not so proven.

> in her upper extremities currently in existence, as a matter of fact and of law, that condition must have developed after Plaintiff was found to have recovered from the work-related iteration of this condition. (Magistrate Slater's opinion at 27.)

Magistrate Slater is correct. Plaintiff cannot currently prevail by claiming that she suffers from a work-related psychological overlay, when she was previously found to have recovered from the work-related condition (CRPS) from which her psychological issues purportedly stem.

Magistrate Slater further held that plaintiff could have alleged psychological problems arising from her CRPS during prior proceedings, but failed to do so:

> Could Plaintiff have, through reasonable diligence, brought this "psychological overlay" claim when the matter went to trial in 2007 and 2008? Dr. Growney's records answer that question in the affirmative. These records establish Plaintiff was experiencing an identical "psychological overlay" related to her CRPS when her claims were initially litigated as she was experiencing more recently. For instance, on July 5, 2006 Plaintiff reported she "remains very anxious and nervous...describes feeling shaky." She also "admit[ted] to poor sleep." Moreover, when summarizing Plaintiff's testimony at trial in his 2007 Opinion, Magistrate Quist noted the following: "The pain also affects her mentally" Opinion, p. 5. With respect to the "brain spasms," recall that Plaintiffs husband testified that this is the condition which prompted Dr. Growney to issue the Spouse's FMLA Certification on January 22, 2008. This predated by almost ten months the date Dr. Growney testified during his second deposition that he continued to treat her through; namely, November 13, 2018. In light of the certainty with which Mr. Hicks tied the issuance of this Certificate by Dr. Growney, it renders immaterial and excuses the absence of this specific condition in Dr. Growney's notes at this time. (Magistrate Slater's opinion at 27-28.)

This excerpt accurately summarizes the noted entries in Dr. Growney's records, and we adopt it as our own as permitted by MCL 418.861a(10). In addition, Mr. Hicks acknowledged at the hearing that the severe "brain spasm" concerning which he testified resulted in the family leave certificate admitted as Plaintiff's Exhibit #6, *which was dated in 2008*:

> MAGISTRATE SLATER: She was asking -- you were asked -- she asked about how her -- the CRPS affects her life. And she focused your attention on how it does mentally. You said psychological issues. And you were describing brain spasms, which are like a shock and the Plaintiff can't eat or sleep for five or six days at a time.
>
> THE WITNESS: Okay. She – she was in an incapacitated state. And that's why the exhibit of the FMLA certification had to be filled out, because I had to take care of her on a daily basis for basic needs because of her incapacitated state.

MAGISTRATE SLATER: And just so the record is clear, that was Plaintiff's Exhibit 6.

THE WITNESS: I can't recall. Sure. (Trial transcript at 30.)

The FMLA certificate was dated January 22, 2008, (Plaintiff's Exhibit #6), nearly 10 months before Dr. Growney's 2008 deposition and 11 months before the hearing on defendant's petition to stop. As a result, Magistrate Slater correctly held that plaintiff could have raised allegations of psychological problems related to her CRPS in prior proceedings but failed to do so. As a result, that claim is barred by res judicata as well.

Plaintiff, however, argues that res judicata does not apply "due to the plaintiff-appellant not being a privy to their plan." (Plaintiff's brief at 4.) Plaintiff's prior pleadings somewhat flesh out that argument, indicating that she is arguing that the current parties are not in privity with those in the prior actions because she was no longer represented by her prior counsel and defendant had a new servicing agent/third party administrator. However, employee and employer are precisely the same in both actions, and that is the critical fact:

> "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v Michigan,* 470 Mich 105, 122; 680 NW2d 386 (2004). (*Moses v Department of Corrections*, 274 Mich App 481, 503; 736 NW2d 269 (2007).)

Clearly, each of the litigants in this case represent the same legal right the prior litigants were asserting.

Res judicata therefore applies to bar plaintiff's current application, because the issues plaintiff now seeks to assert either were or could have been resolved in those proceedings, and both actions were between the same parties. *Paige*, 476 Mich at 522. Magistrate Slater therefore correctly dismissed plaintiff's application on res judicata grounds.

3. Plaintiff's Current Condition.

Even if res judicata did not bar plaintiff's current claims, Magistrate Slater's conclusion that she had not proven that she currently experiences either CRPS or psychological overlay related to her March 27, 2003, date of injury would preclude an award of any further benefits. That finding is supported by competent, material, and substantial evidence, and is therefore binding on us pursuant to MCL 418.861a(3).

As Magistrate Slater correctly held, to justify an award of benefits plaintiff "needs to establish that she has a condition subject to diagnosis which provides an explanation for her current physical complaints and/or her psychological overlay which is causally related to this injury. The obvious

complicating factor in this case is that Magistrate Quist has already concluded that Plaintiff recovered from this work-related condition in 2008." (Magistrate's opinion at 29.) Magistrate Slater reviewed the evidence presented in this matter and found that it did not support a finding of ongoing problems of either a physical or psychological nature.

With regard to plaintiff's claim of CRPS, Magistrate Slater noted that "Dr. Growney's office notes lack consistent objective clinical findings to support this diagnosis" (Magistrate Slater's opinion at 29), summarizing those notes as follows:

> On cross-examination, Dr. Growney revealed that he was the one who sent Plaintiff to the University of Michigan for a second opinion. He was unable to verify whether he monitored the temperature of Plaintiff's upper extremities while treating her with these nerve blocks. He agreed that there was a subjective component in terms of assessing the veracity of Plaintiff's pain complaints and the clinical finding of allodynia. He also agreed that he did not see any atrophy in her left upper extremity. He did not perform the Hedler Alcohol test because he did not believe it had any diagnostic value. He also disagreed hair loss (which he did not observe) was a hallmark sign of CRPS. He also agreed that there were periods of time when he was uncertain whether she continued to have CRPS as opposed to sympathetically maintained pain. He also agreed that he was concerned at times that "she was more interested in making sure that she obtained her narcotic pain relievers versus following through with any of the other treatment that you recommended, such as stellate blocks" (p 33). He also agreed that there was an inconsistency in the pain levels Plaintiff reported to him versus those reported when engaging in physical therapy the following day. He also agreed that she rarely responded favorably to the sympathetic blocks that were administered throughout 2008. He also noted that Plaintiff was wearing rings on the fourth digit of her left hand, which would be inconsistent with someone suffering from severe allodynia. He also stated that Plaintiff reported that her symptoms waxed and waned from day to day. He also agreed that the University of Michigan reporting was notable for "marked nonorganic behavior"... which "made any type of clear diagnosis unobtainable for them" (p 42). He also agreed repeatedly that a diagnosis of CRPS was dependent upon the veracity of Plaintiff when she reported pain complaints. (Magistrate Slater's opinion at 19-20.)

We find this summary to be accurate and adopt it as our own. MCL 418.861a(10).

Magistrate Slater also held that plaintiff's claims of ongoing CRPS were inconsistent with her presentation at the hearing and in the surveillance videos produced by investigator DeLong. With regard to the hearing, the magistrate wrote:

> The Court carefully observed Plaintiff's behavior at trial and during other court appearances. She did not exhibit any overt signs that she was experiencing any significant level of pain in her left upper extremity during any of these hearings. More

> importantly, she did not exhibit any functional deficits with regard to the use of her upper extremity. She was observed carrying things with her left upper extremity, touching things such as notepads and laptop computer and rearranging her hair with her left hand. This is simply inconsistent with the reporting of severe pain and functional limitations to her doctor and to the various medical examiners. (Magistrate Slater's opinion at 25.)

As the WCAC held in *Titus v Safway Steel Products,* 2005 Mich ACO #192 at 7, the magistrate is in the best position to judge a claimant's credibility given his opportunity to observe plaintiff's demeanor and behavior while testifying:

> A magistrate's determination pertaining to the credibility of witnesses, including that of the plaintiff, is entitled to respect because the magistrate will observe the witnesses as they testify and she or he is in a far better position than this Commission to make credibility determinations based on the claimants verbal and non verbal responses to questions asked. The magistrate is able to observe the claimants' display of emotion and factor such into the credibility equation.

See also *Isaac v Masco Corporation,* 2004 Mich ACO #81 at 4 ("The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses.") As a result, we defer to Magistrate Slater's reasonable finding that plaintiff's behavior at trial was not consistent with her claims of ongoing CRPS.

Magistrate Slater also observed:

> When these serious deficits regarding the credibility of Plaintiff's purported severe pain complaints and functional limitations is compared against the surveillance activities obtained by the private investigator, William DeLong, there is simply no way a discerning finder of fact could conclude that Plaintiff is experiencing anything close to the level of pain and functional limitation she has reported over the years to medical providers and medical examiners. (Magistrate Slater's opinion at 25.)

The panel agrees that the physical activity in which plaintiff engaged on those videos is quite inconsistent with her hearing testimony.

That conclusion is also supported by the testimony of Dr. Sczecienski, found to be "highly credible" by Magistrate Slater. (Magistrate Slater's opinion at 29.) The doctor most recently examined plaintiff in September 2021 and reported that plaintiff's clinical examination was "highly inconsistent with CRPS." (Dr. Sczecienski 2022 deposition at 8, 19.) During his deposition, he testified that Dr. Growney's records indicate a lack of allodynia, "the hallmark symptom of CRPS." (*Id.* at 24). Dr. Sczecienski also reported findings from his own examination that were inconsistent with CRPS, including a lack of atrophy, full range of motion in the affected extremity, normal strength, negative tactile testing, negative Hendler alcohol drop testing, no nail changes, no swelling, no motor changes,

and no difference in temperature between the affected and the unaffected limb. (*Id.* at 25-28.) Magistrate Slater accepted this testimony, and we find that reliance to be reasonable given the doctor's well-reasoned opinion. We defer to the magistrate's choice between the competing medical evidence accordingly. *Isaac,* 2004 Mich ACO #81 at 4.

Plaintiff produced no opinion testimony with respect to her claims of "psychological overlay." However, defendant submitted the deposition of Dr. Norman Miller, a psychiatrist who examined plaintiff in December 2021. (Dr. Miller deposition at 4, 5.) The doctor recorded no history of anxiety or depression, but instead noted that plaintiff complained only of "spasms in her mind," apparently the brain spasms testified about at the hearing. (Dr. Miller deposition, Defendant's Dep Exhibit #2 at 2.) Following his examination, Dr. Miller reported, "I do not believe there is evidence of any psychological or psychiatric condition attributable to her alleged injury of March 27, 2003." (*Id.,* Defendant's Dep Exhibit #2 at 5.) Again, Magistrate Slater adopted this testimony, writing, "Dr. Miller did not diagnose Plaintiff with either depression, anxiety or any related disorder either in his reporting or during his deposition. Taking into consideration all of the other evidence presented to me, this opinion is sound, and I adopt it." (Magistrate Slater's opinion at 30.) We defer to that choice as reasonable. *Isaac,* 2004 Mich ACO #81 at 4.

Magistrate Slater further offered the following cogent observation:

> In any event, there is no credible expert testimony tying these symptoms of anxiety and depression to her alleged CRPS. To the extent that these symptoms are arguably related to CRPS, that claim must fail as the underlying claim that Plaintiff currently carries the diagnosis of CRPS has not been proven; much less that this non-existent condition is causally related to an ancient injury Plaintiff was determined to have fully recovered from over a decade ago.
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> * * *
>
> For these reasons, I find that Plaintiff has failed to establish her burden of proof to establish that she currently experiences CRPS and/or a psychological overlay related to her March 27, 2003 date of injury. (Magistrate Slater's opinion at 30.)

This analysis is well-supported by the record, and we affirm it. MCL 418.861a(3).

4. Alleged bias.

Plaintiff suggests that Magistrate Slater acted with bias towards her during the hearing below. However, a review of the transcript below demonstrates the magistrate's appropriate and evenhanded approach to the handling of the issues raised before him.

While plaintiff asserts that Magistrate Slater directed "rude language" towards her and her husband, she has not pointed us to any specific "rude" remarks, as required by MCL 418.861a(8) ("A party filing a claim for review under section 859a shall specify to the commission those portions of

the record that support that party's claim and any party opposing such claim shall specify those portions of the record that support that party's position.") Without any further direction, plaintiff has failed to preserve this argument**.** *Brzuszek v L. M. Gear Company, Incorporated,* 2004 Mich ACO #40 at 4-5; *Quigg v Mona Shores School District,* 2004 Mich ACO #298 at 12.

Plaintiff further suggests some bias might exist because a member of Magistrate Slater's former firm may have been involved during prior proceedings, without clearly explaining how or when this may have occurred. In any event, Magistrate Slater could not have been a member of his prior firm after January 31, 2011, the date he was appointed as a magistrate and a date over a decade prior to the hearing below. The administrative rule applicable to disqualification of magistrates provides for recusal of a magistrate who was part of a firm representing a party within the prior *two years*, R 418.86(2)(d), a period which expired several years prior to the hearing in this matter. As a result, any connection, if actually proven, would be irrelevant.

Plaintiff would also have us find bias on the part of Magistrate Slater because he purportedly did not "identify[] the plaintiff-appellant exhibits. . ." (Plaintiff's brief at 3.) However, Magistrate Slater included a list of those exhibits on page 11 of his opinion. (Magistrate Slater's opinion at 11.) As a result, this contention is groundless.

Plaintiff also claims that Magistrate Slater was biased based upon his exclusion from evidence of her proposed Plaintiff's Exhibit #5, which consisted of a notice that she had been granted an award of Social Security disability benefits. As Magistrate Slater correctly pointed out, the award notice did not set forth the condition or conditions for which the award was granted, the standard applied in making the determination that an award was appropriate, or the evidence underlying the award. As a result, he did not abuse his discretion in sustaining defendant's objection as to relevance. "To be relevant, evidence must tend ' "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ' " *Hardrick v Auto Club Insurance Association*, 294 Mich App 651, 668; 819 NW2d 28 (2011), quoting from *People v Crawford*, 458 Mich 376, 389–390; 582 NW2d 785 (1998). The exhibit plaintiff sought to admit contained no information that would make the existence of any fact more probable. Instead, with the exception of the fact that an award was granted, this exhibit is *devoid* of facts. As a result, plaintiff's suggestion that this exhibit "lays foundation in why the plaintiff is declared disabled" (plaintiff's brief at 3) is at odds with a document that lacks any explanation as to why she was declared disabled, and Magistrate Slater neither abused his discretion nor demonstrated bias in appropriately excluding it.

Plaintiff also claims that some nefarious intent motivated the reassignment of this case from Magistrate Timmons to Magistrate Slater. However, the explanation is not nefarious at all: The case was reassigned to Magistrate Slater when Magistrate Timmons left the Board of Magistrates. Plaintiff has not alleged any prejudice because she was not given a reason for the reassignment, and therefore has not preserved any claim of error in that regard.

As a result, plaintiff has failed to demonstrate bias on the part of Magistrate Slater. Even if she had, the appropriate vehicle for alleging bias is a motion to disqualify the magistrate. However, the Board of Magistrates' administrative rules place strict time limits on the filing of such a motion: "A party shall file a motion to disqualify within 30 days after the case has been assigned to a magistrate, or within 30 days after the movant discovers, or with reasonable diligence could have discovered, the information that is the basis for the motion, whichever is later." R 418.86(3). Even if we found plaintiff's complaints to have validity, which we do not, her complaints come too late.

5. Other issues.

The doctrine of res judicata also blocks plaintiff's attempts to relitigate defendant's right to recoup benefits paid pursuant to the original award, as ordered by Magistrate Quist in his 2008 opinion. Plaintiff argues that absent fraud, benefits voluntarily made may not be recouped, citing *Whirley v J. C. Penney Company, Incorporated,* 1997 Mich ACO #247. However, benefits were *not* voluntarily paid in this matter but were instead paid pursuant to the "70%" provisions of MCL 418.862(1). As a result, *Whirley* would be inapplicable even if it had not been overturned by the Court of Appeals in *Fisher v Kalamazoo Regional Psychiatric Hospital,* 329 Mich App 555; 942 NW2d 706 (2019). In any event, plaintiff raised the same argument in her appeal of Magistrate Quist's 2008 order, and the WCAC affirmed his conclusion that recoupment was appropriate. *Hicks v ODL, Incorporated,* 2009 Mich ACO #153 at 8. No further appeals were taken, and plaintiff is barred from now raising the issue anew as if it had never been previously resolved. Res judicata precludes it. *Paige,* 476 Mich at 521, n 46; *Gose,* 409 Mich at 162.

The same may be said for plaintiff's allegations of purported misconduct by her prior attorney. She could have brought forward these assertions during the hearing held on prior counsel's 2009 petition to fix fees, which resulted in Magistrate Quist's opinion of March 10, 2010, resolving the fee dispute. Her failure to raise these issues during the prior hearing precludes her attempts to litigate them at this late date by virtue of the doctrine of res judicata. *Paige; Gose*.

Plaintiff also contends that defendant violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), because it sent through the mail two medical reports she considers to be "false." We see no evidence of such falsity but, in any event, plaintiff failed to make such allegations at the hearing level. She has waived the issue accordingly. *Hutchinson v Lakeview Lutheran Manor,* 2005 Mich ACO #46 at 5; *Brown v Baker Concrete Construction, Incorporated,* 2002 ACO #120 at 3.

Conclusion

After reviewing the record and the briefs of the parties, the WDCAC finds that Magistrate Slater's order should be affirmed in its entirety.

Commissioner McMillan concurs.

Daryl Royal — Chairperson

Duncan A. McMillan — Commissioner

STATE OF MICHIGAN
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SELF-INSURED,
DEFENDANT.

This matter came before the Workers' Disability Compensation Appeals Commission ("WDCAC")[1] on the filing by plaintiff Susan Torres-Hicks of a claim for review from the decision of Magistrate Chris Slater, mailed August 1, 2022. The WDCAC has considered the record and the parties' briefs and concludes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is AFFIRMED.

No appeals pend.

Daryl Royal Chairperson

Duncan A. McMillan Commissioner

[1] This matter is being decided by a two-member panel pursuant to Paragraph 4(b) of Executive Order 2019-13, which states that "[t]he Workers' Disability Compensation Appeals Commission shall act by the vote of two or more members."