

OPINIONS OF THE SUPREME COURT OF OHIO

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The State ex rel. Blake, Appellant, v. Industrial Commission of Ohio et al., Appellees.

[Cite as State ex rel. Blake v. Indus. Comm. (1992), Ohio St.3d .]

Workers' compensation -- R.C. 4121.32(C)(12) requires commission to "develop, adopt and use a policy manual setting forth the guidelines and bases for decision-making" in permanent total disability compensation application cases -- Summary of recent Supreme Court decision setting forth permanent total disability criteria.

(No. 91-1575 -- Submitted September 22, 1992 -- Decided December 11, 1992.)

Appeal from the Court of Appeals for Franklin County, No. 90AP-938.

Appellant-claimant, Willard A. Blake, in 1978 and 1980, respectively, sustained two back injuries in the course of and arising from his employment with respondent Highway Equipment Company. His workers' compensation claims were allowed and he received temporary total disability compensation.

In 1987, claimant requested permanent total disability compensation, submitting reports from Dr. Michael J. Rozen and the Cincinnati Evaluation Center. Dr. Rozen described claimant as "100% totally disabled" and stated that his patient would never return to work. Dr. Rozen, however, also attributed approximately fifty percent of claimant's impairment to a nonallowed condition--degenerative arthritis. The Cincinnati Evaluation Center concluded that claimant did "not demonstrate the physical capacity equivalent to the demands of any sustained competitive employment," and that he presented "psychological symptoms or factors that would prohibit him from sustained competitive employment."

Claimant was examined on appellee Industrial Commission's behalf by Dr. Richard T. Sheridan. Dr. Sheridan found that claimant could never return to his previous job as a truck driver, but that his permanent impairment was partial, not total, at thirty-five percent. The commission's rehabilitation division closed claimant's file because claimant was

"functioning at a below entry competitive level of vocational competency. Prognosis for successfully completing a vocational rehabilitation evaluation plan appears to be poor * * *."

The commission, by a three-to-two vote, denied claimant's application, stating:

"The reports of Doctors Rozen and Sheridan were reviewed and evaluated.

"This order is based particularly upon the reports of Doctors [sic] Sheridan, consideration of the claimant's age, education, work history and other disability factors including physical, psychological and sociological, that are contained within the Statement of Facts prepared for the hearing on the instant Application, the evidence in the file and the evidence adduced at the hearing."

Claimant filed a complaint in mandamus in the Court of Appeals for Franklin County, alleging that the commission abused its discretion in denying him permanent total disability compensation. The appellate court vacated the order and returned it to the commission for amendment after finding that the order did not satisfy *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St. 3d 203, 567 N.E.2d 245.

This cause is now before this court upon an appeal as of right.

Stewart Jaffy & Associates Co., L.P.A., Stewart R. Jaffy, Marc J. Jaffy and Anthony Dittmeier, for appellant.

Lee I. Fisher, Attorney General, Dennis L. Hufstader and Cordelia A. Glenn, Assistant Attorneys General, for appellees.

Per Curiam. *State ex rel. Noll*, supra, reiterated the commission's "responsibility to prepare fact-specific orders which will be meaningful upon review." *Id.* at 206, 567 N.E.2d at 248. The commission's boilerplate recitation of the nonmedical disability factors set forth in *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 31 OBR 369, 509 N.E.2d 946, would no longer suffice. Instead, the order "must specifically state what evidence has been relied upon to reach its conclusion and, most important, briefly explain the basis of its decision." *Noll* at 206, 567 N.E.2d at 249.

The parties agree that *Noll* has been violated, warranting a return to the commission for amended order. A return will also resolve some of claimant's ancillary complaints--his claim, for example, that the commission allegedly failed to consider vocational and rehabilitation reports in his file. Claimant has appealed nonetheless, alleging that a return to the commission will only perpetuate an ongoing commission abuse of discretion. Claimant maintains that contrary to R.C. 4121.32(C)(12), the commission has not created guidelines for evaluating permanent total disability compensation applications. As a result, claimant contends, permanent total disability is arbitrarily adjudicated and due process is denied.

Claimant's contention that there are no standards for determining permanent total disability ignores numerous judicial decisions that have set forth permanent total disability criteria. Recent cases have, for example:

(1) Defined "permanent total disability" as an inability

to perform sustained remunerative employment due to allowed conditions, State ex rel. Jennings v. Indus. Comm. (1982), 1 Ohio St.3d 101, 1 OBR 135, 438 N.E.2d 420;

(2) reiterated the commission's exclusive responsibility for deciding disability, State ex rel. Stephenson, supra;

(3) ordered the commission to consider nonmedical disability factors, id. (The court has since held that failure to consider these factors is excused where the commission has based an award for benefits for permanent total disability on medical evidence of permanent total impairment, State ex rel. Galion Mfg. Div., Dresser Industries, Inc. v. Haygood [1991], 60 Ohio St.3d 38, 573 N.E.2d 60.);

(4) held that participation in the commission's rehabilitation program was not a prerequisite to consideration of a claim for permanent total disability compensation, State ex rel. Wilcox v. Ashtabula Cty. Hwy. Dept. (1992), 64 Ohio St.3d 190, 593 N.E.2d 1390;

(5) made voluntary retirement a bar to permanent total disability benefits, State ex rel. Chrysler Corp. v. Indus. Comm. (1991), 62 Ohio St.3d 193, 580 N.E.2d 1082;

(6) instructed the commission to implement measures responsive to applicants for permanent total disability compensation who were already receiving temporary total disability compensation, State ex rel. Eaton Corp. v. Lancaster (1988), 40 Ohio St.3d 404, 534 N.E.2d 46 (The commission has since adopted hearing procedures that have eliminated the gap between termination of temporary total disability compensation due to a condition's permanency, and the commencement of permanent total disability benefits. See State ex rel. Ford Motor Co. v. Indus. Comm. [1992], 65 Ohio St.3d 17, 599 N.E.2d 261, which should be read to approve the commission's policy in this regard.);

(7) reaffirmed an absentee commissioner's duty to review evidence of permanent total disability evidence in some meaningful manner before voting, State ex rel. Ormet Corp. v. Indus. Comm. (1990), 54 Ohio St.3d 102, 561 N.E.2d 920.

R.C. 4121.32(C)(12), as it read at the times relevant herein, and now, requires the commission to "develop, adopt, and use a policy manual setting forth the guidelines and bases for decision-making" in cases of permanent total disability. The commission concedes that no such policy manual exists. While we do not find that the absence of a manual offends due process, we remind the commission that R.C. 4121.32(C)(12)'s directive is mandatory, not discretionary. We strongly believe that creation of such guidelines can only serve to ensure that permanent total disability compensation applications are adjudicated in a fair and consistent manner. The commission should now implement the requirement set forth in R.C. 4121.32(C)(12).

We conclude that any deficiencies in the commission's order will be remedied once it is returned to that body and amended. Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

Moyer, C.J., Sweeney, Holmes, Douglas, Wright, H. Brown and Resnick, JJ., concur.