

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Brian K. Hursey,	:	
Relator,	:	
v.	:	No. 04AP-292
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Village of Newcomerstown,	:	
Respondents.	:	
	:	

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D E C I S I O N

Rendered on January 20, 2005

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*Charles Zamora, LLC*, and *Charles Zamora*, for relator.

*Jim Petro*, Attorney General, and *Kevin J. Reis*, for  
respondent Industrial Commission of Ohio.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Brian K. Hursey, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for permanent total disability ("PTD") compensation and to enter an order finding that relator is entitled to such compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.) Relator has filed objections to the magistrate's decision.

{¶3} Relator asserts that the magistrate erred in failing to find the September 15, 2003 opinion of Dr. Timothy J. Fallon, M.D., to be equivocal, contradictory, ambiguous, and/or unclear. The commission relied upon Dr. Fallon's report, in which he assessed a 42 percent whole-person impairment and concluded that relator would be capable of performing sedentary work. However, relator contends that the following paragraph from Dr. Fallon's report renders contradictory conclusions:

At this time, this gentleman is currently on retirement benefits as of a week ago from the Police & Fire program. His condition is one which would preclude his ever returning to work activity given the severity of his problems at this point in time. In that this has continued since the early 90's, there does not appear to be any real likelihood of considerable improvement such that he could ever return to his work activity. He would be capable only of sedentary types of work activity in a strength rating.

{¶4} Relator asserts that Dr. Fallon's opinion was inconsistent in this paragraph because he stated that relator's condition would preclude his "ever returning to work activity" and that there was little chance that he would improve enough to "ever return to his work activity," but then went on to state that he would be capable of sedentary work activity. The magistrate found that this opinion was not inconsistent because, in using the phrase "work activity," Dr. Fallon was referring only to relator's work activity as a police officer and not "any" work activity whatsoever.

{¶5} After reviewing the above paragraph, we agree with relator that Dr. Fallon's opinion was ambiguous and equivocal. Although the magistrate's view that the passages at issue could be reconciled in such a way as to render them consistent, to do so would necessitate adding words and applying meaning that is not apparent on the face of the report. A plain reading of the wording used by Dr. Fallon renders his opinion conflicting and ambiguous. Considering the passages as written, Dr. Fallon's statements that relator's condition was one that would "preclude his ever returning to work activity" and that there was little chance of considerable improvement "such that he could ever return to his work activity" appear inconsistent with one another and with his ultimate conclusion that relator would be capable of sedentary work. Medical or vocational reports that are so internally inconsistent that they are unreliable will not constitute some evidence of relator's employability. *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445; *State ex rel. Taylor v. Indus. Comm.* (1995), 71 Ohio St.3d 582. Because we disagree with the magistrate's conclusion with respect to the consistency of Dr. Fallon's report, we find the magistrate erred in concluding that Dr. Fallon's report could constitute some evidence. Therefore, relator's objections to the magistrate's decision are sustained.

{¶6} Following an independent review of the record pursuant to Civ.R. 53, we find that the magistrate erred in her conclusions of law. Therefore, although we adopt the magistrate's findings of fact, we do not adopt the conclusions of law contained in the decision. Having sustained relator's objections to the magistrate's decision, a limited writ of mandamus will issue ordering the commission to vacate its order denying relator's PTD application, to eliminate Dr. Fallon's report from further evidentiary consideration, and to issue a new order that either grants or denies the PTD application.

*Objections sustained; limited writ of mandamus granted.*

KLATT and SADLER, JJ., concur.

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## APPENDIX A

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. Brian K. Hursey,	:	
Relator,	:	
v.	:	No. 04AP-292
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Village of Newcomerstown,	:	
Respondents.	:	

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### MAGISTRATE'S DECISION

Rendered on August 20, 2004

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*Charles Zamora, LLC, and Charles Zamora, for relator.*

*Jim Petro, Attorney General, and Kevin J. Reis, for  
respondent Industrial Commission of Ohio.*

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### IN MANDAMUS

{¶7} Relator, Brian K. Hursey, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for permanent total disability ("PTD") compensation, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶8} 1. Relator sustained three work-related injuries during the course of his employment with the Village of Newcomerstown as a police officer. Relator was injured on August 20, 1988, and his claim was allowed for "acute soft tissue injury left thigh and leg; aggravation of pre-existing left deep vein thrombosis." Relator retired from the workforce on April 22, 2003, when the effects of this injury became work-prohibitive. Relator was also injured on October 27, 1992, and that claim was allowed for "sprain lumbar region; sprain of knee and leg NOS; left." Relator also sustained a work-related injury on December 14, 1997, and his claim has been allowed for "[c]ontusion of chest wall – left; sprain shoulder/arm NOS – left shoulder; sprain shoulder/arm NOS – left upper arm; \* \* \* sprain of neck."

{¶9} 2. On June 20, 2003, relator filed his application for PTD compensation. Relator's application was supported by the reports of his treating physician, Dr. Sherman A. Katz, who noted that relator has a history of deep venous thrombosis, that he has suffered from many venous ulcerations over the years, and that currently he needs to keep his legs elevated in order that the ulcers will heal. Dr. Katz opined that relator could stand, walk, and sit for less than one hour in an eight-hour day and could never bend, squat, crawl, climb stairs, or climb ladders. Dr. Katz also noted that relator was extremely limited in his ability to travel in an automobile to visit physicians, as it forces him to have his legs in a dependent position and not elevated. In large part, Dr. Katz noted that relator needs to remain in bed.

{¶10} 3. Relator was examined by Dr. Timothy J. Fallon, who issued a report dated September 15, 2003. Dr. Fallon listed the following claim allowances: "Sprain

lumbar region; sprain of knee and leg NOS; left. \* \* \* Acute soft tissue injury, left thigh and leg; aggravation of pre-existing left deep vein thrombosis." Within the body of his report,

Dr. Fallon noted the following injuries:

This gentleman had had several industrial injuries. In 1988 he had an injury which involved an aggravation of a pre-existing left deep vein thrombosis. He has subsequently continued to have problems and currently is being treated for an open ulcer.

He had also, in October, 1992, had an injury that involved the lumbar region, and a sprain of the knee and leg on the left side but he indicates no significant problems in that regard. He had had a prior neck and shoulder injury as well and this was in 1997 when he was struck by a truck driven by a fleeing individual.

{¶11} Within the body of his report, Dr. Fallon noted that relator does not have any significant problems with his back in the low back area but does continue to have problems with his left shoulder and uses Arthrotec for that. Furthermore, Dr. Fallon indicated that he was aware that relator was going to be having physical therapy for his shoulder but that no surgery had been performed. He noted further that relator has pain in the left neck and left shoulder without any pain radiating or paresthesia. Dr. Fallon noted that relator's cervical range of motion was full, and that his shoulder range of motion was also full. With regard to his conditions, Dr. Fallon assessed a five percent whole person impairment for the contusion of the chest wall, sprain of the shoulder and neck, a zero percent whole person impairment for the sprain of the lumbar region, knee and leg, and a 39 percent whole person impairment for the soft tissue injury and aggravation of pre-existing left deep vein thrombosis. As such, he assessed a 40 percent whole person impairment and indicated that relator would be capable of performing sedentary work.

{¶12} 4. An employability assessment report was prepared by Ted S. Macy, M.S., dated October 27, 2003. Based upon the medical report of Dr. Katz, Mr. Macy concluded that relator was not employable; however, based upon the report of Dr. Fallon, Mr. Macy concluded that relator could immediately perform the following jobs: "Table Worker, Electronics Worker, Photo Mounter, Wire-worker, Assembler, Security Guard." Following brief remediation for skill training, Mr. Macy concluded that relator could perform the following additional jobs: "Charge Account Clerk, Cashier, Order Clerk, Routing Clerk, Document Preparer, Gate Tender, and Information Clerk are options with or Possibly without academic remediation to 7-8 grade levels, depending on actual functional levels."

{¶13} 5. Relator's application was heard before a staff hearing officer ("SHO") on January 21, 2004, and resulted in an order denying the application. The SHO relied upon the medical report of Dr. Fallon and concluded that relator would be able to perform certain sedentary work, such as those identified in the employability assessment prepared by Mr. Macy. The SHO then analyzed the nonmedical vocational factors and stated as follows:

Claimant's age of 43 is held to be an asset in that it permits both significant training as well as allowing him to offer over 20 years of normal working life to a perspective employer. Claimant's 9<sup>th</sup> grade education is a deficit; which however is offset by his GED resulting in the Staff Hearing Officer finding claimant's education to be a neutral factor in that it is found to be sufficient for the types of work listed without necessarily qualifying him to other more intellectually based jobs. Finally, claimant's work experience as a dog warden, police officer and sergeant, and finally four years as Police Chief are found to be assets in that they indicate personal qualities of reliability, trustworthiness and dependability, as well as supervisory and administrative talents which would make claimant a desirable employee for not only the listed jobs but



for any other employment situation for which he may retain (or develop) the capacity to perform.

Accordingly, claimant is found not to be removed from all sustained remunerative employment and is held not to be permanently and totally disabled.

(Emphasis sic.)

{¶14} 6. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶15} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶16} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments but, also, the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson*

*v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

{¶17} In this mandamus action, relator contends that the commission abused its discretion by relying upon the medical report of Dr. Fallon. Relator contends that Dr. Fallon failed to acknowledge and accept all of relator's claims and allowed conditions, and that his report is internally inconsistent and cannot constitute some evidence upon which the commission could rightfully rely. For the reasons that follow, this magistrate disagrees.

{¶18} In reviewing Dr. Fallon's report, relator is correct in noting that Dr. Fallon did not list all of the allowed conditions at the outset of his report. Specifically, Dr. Fallon did not note "contusion of chest wall - left; sprain shoulder/arm NOS - left shoulder; sprain shoulder/arm NOS - left upper arm; \* \* \* sprain of neck"; however, within the body of Dr. Fallon's report, he specifically notes the 1997 injury wherein relator sustained those injuries and further notes that relator indicates that he has pain in the left neck and left shoulder without any pain radiating or parasthesis. Upon physical examination, Dr. Fallon noted that relator's cervical range of motion was full and that his shoulder range of motion was full as well. Furthermore, in his opinion section, Dr. Fallon specifically noted as follows:

\* \* \* From the standpoint of his contusion of the chest wall, sprain of the shoulder and the neck, this is a DRE Cervicothoracic Category II which is a 5% whole person impairment. \* \* \*

{¶19} As such, although Dr. Fallon failed to list these conditions at the outset of his report, it is clear that he was aware of them and that he examined relator with regard to those conditions and found a certain percentage of impairment with regard to those conditions as well. As such, this magistrate finds that relator's argument that Dr. Fallon did not consider all the allowed conditions and that his report should be removed from evidence for this reason lacks merit.

{¶20} Relator also contends that the report of Dr. Fallon is equivocal, contrary and/or ambiguous and unclarified. As such, relator contends that Dr. Fallon's report cannot constitute some evidence in support of the commission's denial of his application for PTD compensation. Relator quotes from the discussion portion of Dr. Fallon's report as follows:

At this time, this gentlemen is currently on retirement benefits as of a week ago from the Police & Fire program. His condition is one which would preclude his ever returning to work activity given the severity of his problems at this point in time. In that this has continued since the early 90's, there does not appear to be any real likelihood of considerable improvement such that he could ever return to his work activity. He would be capable only of sedentary types of work activity in a strength rating.

{¶21} Relator contends that, in the above-cited paragraph, Dr. Fallon opined that relator would not be able to ever return to any work activity given the severity of his problems and that there is not a real likelihood of considerable improvement; therefore, relator contends that Dr. Fallon could not possibly conclude that relator could perform sedentary work.

{¶22} It is undisputed that equivocal medical opinions do not constitute "some evidence" upon which the commission can rely. *State ex rel. State ex rel. Eberhardt v.*

*Flxible Corp.* (1994), 70 Ohio St.3d 649; *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445. Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement.

{¶23} In reviewing Dr. Fallon's medical report in its entirety, this magistrate disagrees with relator's assessment. Specifically, Dr. Fallon's report notes that relator is 43 years old and that he recently retired after serving 20 years as a police officer. It is certainly clear from Dr. Fallon's report that he was of the opinion that relator could not return to his former position of employment as a police officer. Relator points to the above-cited portion of Dr. Fallon's report and argues that it is equivocal; however, this magistrate disagrees. In that paragraph, Dr. Fallon began by indicating that relator was currently on retirement benefits from the police department and that "his condition is one which would preclude his ever returning to work activity given the severity of his problems at this point in time." Within the body of the report, Dr. Fallon noted that relator is currently suffering with an ulcer on his leg which needs to heal. Dr. Fallon noted that relator had just finished eight weeks of treatment and that he was told he would likely require another course of treatment in order to heal the ulcer on his leg. Clearly, it was Dr. Fallon's opinion that relator could not return to work until the ulcer on his leg healed; however, there is every reason to believe that that particular ulcer would heal as it is a temporary condition caused by the greater condition of deep vein thrombosis. Dr. Fallon then noted that, inasmuch as relator's problems have gone on since the early 1990s, there is no real likelihood of considerable improvement which would enable him to return to his work activity. The only work activity which relator ever had was in the police department. As such, the statement that he would not be able to return to his work

activity does not mean that Dr. Fallon opined that he could not return to any work activity. Dr. Fallon concluded by noting that relator "would be capable only of sedentary types of work activity in a strength rating." Contrary to relator's assertions, this magistrate finds that Dr. Fallon's report is not equivocal. Relator is asking this court to reweigh the evidence and find the report of Dr. Katz to be more persuasive; however, matters of credibility and weight to be given evidence are clearly within the discretion of the commission as fact finder. *Teece, supra*. The magistrate finds no abuse of discretion. Given the current ulcerated state of relator's leg, Dr. Fallon indicated that he could not currently return to work activity "at this time"; however, it is apparent that, once the ulcer had healed, Dr. Fallon was of the opinion that relator could return to sedentary work activity. As such, this argument of relator's fails as well.

{¶24} Based on the foregoing, this magistrate finds that relator has not demonstrated that the commission abused its discretion in relying upon the medical report of Dr. Fallon as this magistrate finds that Dr. Fallon did consider all of the allowed conditions and finds that his report was not equivocal. As such, relator has not demonstrated that the commission abused its discretion and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE