

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Denise Schaeffer,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-913
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on July 7, 2009

Plevin & Gallucci, Frank Gallucci, III, and Bradley E. Elzeer, II; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for relator.

Richard Cordray, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

Richard Cordray, Attorney General, Lisa R. Miller and Lee M. Smith, for respondent Ohio Department of Transportation.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} In this original action, relator, Denise Schaeffer, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her permanent total disability ("PTD") compensation, and to enter an order granting her the requested PTD compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision (attached as Appendix A), including findings of fact and conclusions of law. Therein, the magistrate concluded that relator has not demonstrated that the commission abused its discretion in denying her request for PTD compensation and, therefore, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} Though she does not delineate specific objections to the magistrate's decision, relator incorporates her arguments made to the magistrate, and in essence, makes the following arguments: (1) the magistrate erred by relying on the reports of experts who had never been cited with approval by the staff hearing officer ("SHO"); (2) the record contains no evidence that she was able to raise her children properly, despite her disabilities; (3) neither the SHO nor the magistrate cited statistics of jobs or identified occupations she could perform; and (4) she was denied her statutory right to a fair hearing because the decision rendered was based on beliefs and assumptions never established in the record.

{¶4} Upon review and for reasons set forth in the magistrate's decision, we do not find relator's objections to be well-taken. First, there is no evidence the magistrate relied on the reports of experts not cited with approval by the SHO because the magistrate stated specifically in her decision, "the SHO relied upon the medical reports of Drs. Flanagan and Byrnes." (Magistrates Decision, ¶18.) Second, the relator's contention that the record lacks evidence she was able to raise her children despite her disabilities is irrelevant because the magistrate determined that the SHO's reference to child bearing

and child rearing was made only to demonstrate relator could have attempted vocational rehabilitation. Third, while the commission is not obligated to suggest specifically which occupations the claimant can perform, or whether these occupations are widely available locally, *State ex rel. Finucan v. Indus. Comm.*, 10th Dist. No. 07AP-391, 2008-Ohio-1836, ¶9, the relator has not cited any cases where a magistrate is required to identify jobs or occupations for a claimant. Finally, the relator was not denied her statutory right to a fair hearing because the commission based its decision on specific medical reports and properly considered nonmedical disability factors.

{¶5} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and 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 the requested writ of mandamus.

Objections overruled; writ denied.

FRENCH, P.J., and SADLER, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Denise Schaeffer,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-913
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on March 23, 2009

Plevin & Gallucci, Frank Gallucci, III, and Bradley E. Elzeer, II; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for relator.

Richard Cordray, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

Richard Cordray, Attorney General, Lisa R. Miller and Lee M. Smith, for respondent Ohio Department of Transportation.

IN MANDAMUS

{¶16} Relator, Denise Schaeffer, 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 her application for permanent total

disability ("PTD") compensation, and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶17} 1. Relator sustained a work-related injury on August 11, 1988, and her workers' compensation claim has been allowed for "cut left eye; bruised left shoulder; headaches; bruised left arm; swollen left side of face; multiple bruises upper body; post traumatic thoracic outlet syndrome; lumbar disc root radiculopathy; major depression."

{¶18} 2. Relator has not worked since the date of her injury and she was 26 years old at that time.

{¶19} 3. Relator filed an application for PTD compensation on August 27, 2007. At that time, she was 45 years old.

{¶10} 4. In support of her application, relator filed the December 7, 2006 report of M.P. Patel, M.D., who opined that she was permanently and totally disabled from engaging in any gainful employment.

{¶11} 5. Relator also attached the August 11, 1988 report of Michael B. Leach, Ph.D., who opined that, from a psychological perspective, relator was suffering significant impairments due to her allowed psychological conditions and she was permanently and totally disabled.

{¶12} 6. At the request of the Ohio Department of Transportation ("employer"), relator was examined by Ira J. Ungar, M.D. On October 21, 2007, after setting out her allowed conditions, the medical records reviewed, and the physical findings upon examination, Dr. Ungar concluded that, considering only the allowed physical conditions, relator could return to work at her previous level of employment without restrictions. Dr.

Ungar noted substantial exaggerated pain behavior and indicated that all seven of the Waddell signs of symptom amplification were positive.

{¶13} 7. Donald J. Tosi, Ph.D., also examined relator at the request of the employer. In his September 28, 2007 report, Dr. Tosi identified the medical records which he reviewed and set out his findings. Dr. Tosi concluded that relator was mildly impaired in the areas of daily activities, social interaction, adaptation, concentration, persistence, and pace. He concluded that relator was capable of returning to work in any capacity, including her former position of employment.

{¶14} 8. Relator was also examined by Kirby J. Flanagan, M.D. In his January 15, 2008 report, Dr. Flanagan listed the allowed conditions, provided his physical findings upon examination, concluded that relator had an 11 percent whole person impairment for all her allowed physical conditions, and concluded that relator could perform at a sedentary work level.

{¶15} 9. Relator was also examined by Robert L. Byrnes, Ph.D., for her allowed psychological conditions. In his January 15, 2008 report, Dr. Byrnes concluded that relator had an 11 percent whole person impairment for her allowed mental conditions only and that those conditions, in and of themselves, would not prevent her return to work in low to moderate stress positions for which she was otherwise qualified.

{¶16} 10. Two vocational reports are in the record. In his November 20, 2007 report, Robert Sproule, M.A., CDMS, reviewed the medical evidence in the record, relator's education, work history, and ultimately concluded:

It is this reviewer's professional opinion that based on the weight of the medical evidence for the allowed conditions of the claim, this claimant has occupational work capacities,

positive vocational factors, and transferable skills from her previous work experience. This claimant would not be precluded from sustained remunerative employment in her previous occupation as a clerk, or in other occupations identified in the transferable skills analysis. The claimant has not participated in vocational rehabilitation and this may be of benefit if there is a desire to pursue employment. A vocational rehabilitation professional can assist in further identifying and securing appropriate occupations, by utilizing or enhancing work capabilities and skills from her previous occupations. The labor market survey documents that employment opportunities exist that this claimant can perform.

{¶17} 11. Daniel L. Simone, M.Ed., CRC, CDMS, also prepared a vocational report dated March 3, 2008. After reviewing the medical evidence, relator's age and work history, Simone concluded that, from a physical standpoint, claimant would be unable to meet the demands of even sedentary work on a sustained basis. He further concluded that, in spite of her age, relator would not be considered a realistic candidate for additional education or vocational training and that the jobs identified in the report of Sproule were not realistic vocational goals for relator.

{¶18} 12. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on May 15, 2008 and was denied. The SHO relied on the medical reports of Drs. Flanagan and Byrnes and concluded that relator was capable of performing sedentary work in low to moderate stress positions. Thereafter, the SHO considered the nonmedical disability factors and stated:

The injured worker is a 45 year old high school graduate who last worked in 1988. The injured worker indicates she can read and write but cannot do math well. After graduating from high school from 1980 the injured worker obtained employment as a retail clerk. While working as a retail clerk the injured worker operated a cash register and was responsible for performing enough math to compute the

customer's discounts. After leaving the retail clerk position the injured worker got a job as a nanny and was responsible for caring for two small children. The injured worker's last position of employment was with the Department of Transportation as a highway worker. While employed as a highway worker the injured worker drove [a] truck, plowed snow, flagged traffic, and calculated the amount of material hauled.

The Staff Hearing Officer finds that the injured worker's age of 45 years is a positive employment factor. The Staff Hearing Officer arrives at this decision based upon the fact that there is no evidence that the injured worker's age prevents her from doing work in competition with others. Assuming the injured worker retired at age 65 she would still have 20 years left in the job market. With 20 years left to work retraining from a sedentary position would still be a viable option.

The Staff Hearing Officer finds that the injured worker's education is a positive vocational factor. The Staff Hearing Officer's finding is based upon the fact that most people with a high school education are able to be retrained for semi-skilled to skilled work. The injured worker's ability to be retrained makes it [sic] possible for her to learn to do a job within the sedentary strength range. The Staff Hearing Officer notes that the injured worker's past work history did not include jobs that were sedentary in nature or that provided many skills that could be transferred to sedentary work. However the absence of transferable skills is not a complete bar to reemployment so long as the injured worker has the ability to be retrained to do some other work. Based on the injured worker's high school education and her young age of 45 years the Staff Hearing Officer finds she has the ability to be retrained to do sedentary work. * * *

{¶19} The SHO also considered her rehabilitation efforts and stated:

* * * The injured worker's chief bar to retraining appears to be the fact that she has not made a reasonable effort to engage in rehabilitation. In the 20 years that the injured worker has been disabled there have been periods of medical instability that have prevented her from engaging in rehabilitation. However, the evidence in file does not show that the injured worker has never had the ability to engage in

rehabilitation. The evidence shows that the injured worker has three children who range in age from 21 to 9 years. Surely, the injured worker has the ability to do some form of rehabilitation if she had the ability to bear and rear three children.

{¶20} 13. Relator's request for reconsideration was denied by order of the commission mailed July 10, 2008.

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

Conclusions of Law:

{¶22} 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.

{¶23} 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.

{¶24} For the reasons that follow, it is this magistrate's conclusion that this court should deny relator's request for a writ of mandamus.

{¶25} Relator makes the following three arguments: (1) the SHO needed vocational evidence to evaluate the nonmedical disability factors; (2) the SHO held it against relator that she had raised three children; and (3) the SHO's order is arbitrary and irrational.

{¶26} The commission is the expert on nonmedical evidence, may choose and reject vocational reports that are submitted and set forth its own vocational opinion, and is free to reject all vocational reports and set forth its own vocational opinion. See *State ex rel. Ellis v. McGraw Edison Co.* (1993), 66 Ohio St.3d 92, and *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. As such, the commission does not have to cite or rely on any submitted vocational evidence.

{¶27} Relator contends that the commission held the fact that she had raised three children against her. This magistrate disagrees. The SHO specifically stated: "The evidence shows that the injured worker has three children who range in age from 21 to 9 years. Surely, the injured worker has the ability to do some form of rehabilitation if she had the ability to bear and rear three children." The SHO was addressing whether or not

relator was capable of some vocational retraining and concluded that her ability to raise three children was some evidence that she had the ability to engage in and benefit from rehabilitation. It was not an abuse of discretion for the commission to consider the activities in which relator had been involved during the 20 years since her date of injury and using that in the determination of whether or not she could be retrained for other employment.

{¶28} The magistrate finds that the commission's order is not arbitrary and irrational. First, the commission relied upon the medical reports of Drs. Flanagan and Byrnes. Those doctors opined that relator was capable of performing at a sedentary work level in low to moderate stress positions. Relator does not challenge those reports. As such, the reports of Drs. Flanagan and Byrnes constitutes some evidence upon which the commission properly relied to determine that relator was capable of working at a sedentary level in mild to moderate stress positions.

{¶29} Thereafter, the SHO addressed the nonmedical disability factors. Specifically, the commission noted that relator was 45 years old and considered this to be a positive factor to her ability to retrain and become employed. The SHO also considered relator's high school education to be a positive factor. The SHO noted that most people with a high school education are capable of retraining for semi-skilled to skilled work. Based upon this, the SHO concluded that relator had the ability to be retrained to do a job within the sedentary strength range. Further, the SHO did note that relator likely had no transferable skills; however, given her young age and high school education, the SHO concluded that she could be retrained to perform sedentary work.

{¶30} Lastly, the SHO considered the fact that relator had not engaged in any rehabilitation efforts. The commission is permitted to consider not only a claimant's current abilities, but also the abilities which might be developed through retraining. A claimant's lack of participation in retraining is not the equivalent of the inability to be retrained. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525, and *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139. The magistrate finds that the commission's analysis of the nonmedical disability factors was not arbitrary, and it complied with the requirements of *Noll*.

{¶31} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).