[Cite as *State ex rel. Mays v. Ohio Disposal Sys. Inc.*, 2009-Ohio-6322.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. John F. Mays,	:	
Relator,	:	
v.	:	No. 09AP-159
Ohio Disposal Systems Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 3, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, John F. Mays ("relator"), 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 relator permanent total disability ("PTD") compensation, and to enter a new order granting said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission did not abuse its discretion. Relator filed an objection to the magistrate's decision and the commission filed a memorandum contra to relator's objection. This cause is now before the court for a full review.

{¶3} Relator was injured in 1985 and that claim was allowed for inguinal hernia. Relator was again injured in 1993, and that claim was allowed for umbilical hernia and major depression – single episode. Relator has not worked since 1993 when he was 55 years old.

{¶4} This is relator's fourth application for PTD compensation. In denying relator's first application, filed in 2000 when he was 61 years old, the commission noted that the medical evidence showed relator had very little physical impairment and the psychological evidence indicated that he could return to his former position or any other. In denying relator's third PTD application in 2007, the commission noted that the medical and psychological reports indicated relator was capable of sustained remunerative employment, and also noted that relator had never sought rehabilitation or skills training.

{¶5} Roughly one year after the commission denied his third application, relator filed his fourth application, which is the subject of this action. He supported the application with evidence indicating he is permanently and totally disabled. However,

independent physical and psychological examinations revealed that relator is physically capable of sedentary work and, although he has a five percent impairment due to his psychological condition, this condition places no restrictions on his ability to work.

{¶6} In denying relator's fourth PTD application, the commission staff hearing officer ("SHO") acknowledged that relator's age of 70 and his ninth grade education are not positive factors, but noted that relator never took advantage of vocational rehabilitation opportunities available to him from age 55 (when he stopped working) until the present time. Citing *State ex rel. B.F. Goodrich Co. v. Indus. Comm*., 73 Ohio St.3d 525, 1995-Ohio-291, *State ex rel. Bowling v. Natl. Can Corp*., 77 Ohio St.3d 148, 1996-Ohio-200, and *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, the SHO reasoned that it is permissible to expect relator to have at least attempted to take advantage of rehabilitation and/or vocational training opportunities. The SHO concluded that because he failed to do so and instead waited until his non-work-related physical conditions worsened with age and rendered him unemployable, he is not entitled to PTD compensation. Citing *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 1996-Ohio-306, and *State ex rel. DeZarn v. Indus. Comm.*, 74 Ohio St.3d 461, 1996-Ohio-143, the SHO observed that PTD compensation was never meant to compensate someone for growing older.

{¶7} Before the magistrate, relator did not challenge the medical and psychological reports upon which the commission relied. Rather, he challenged only the commission's analysis of the non-medical factors. He argued that because he is currently unemployable and cannot be rehabilitated, he is entitled to PTD compensation. He

argued that he should not be penalized for not seeking vocational rehabilitation because, in 1999, when relator was 60 years old, he was declared to have reached maximum medical improvement ("MMI") and, as such, no rehabilitation agency would have taken him at that time. He did not explain why he had failed to seek vocational rehabilitation or skills training between 1993, when he stopped working at age 55, and 1999, when he was found to be at MMI.

{¶8} The magistrate rejected relator's arguments, finding that the record supports the commission's determination that relator last worked at the age of 55, but never attempted to enhance his employability by learning new skills. The magistrate found it is irrelevant that relator is *now* unemployable, given his age, because he had failed to take advantage of earlier opportunities to enhance his employability.

{¶9} In his objections, relator again urges that he is entitled to PTD compensation because he is *presently* unemployable. However, we agree with the magistrate's conclusion. Upon a review of all of the evidence and the applicable law, we agree that, pursuant to the case law that the commission cited, it was not an abuse of discretion to expect relator to have attempted to improve his employability when he was still young and healthy enough to do so. It was likewise not an abuse of discretion to deny PTD compensation to relator when he had failed to take advantage of opportunities to help him return to work, and instead waited until he grew older and unemployable.

{¶10} Having undertaken an independent review of the record, we find that the magistrate has properly determined the facts and the applicable law. Accordingly, we

overrule relator's objections, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and we deny the requested writ of mandamus.

Objections overruled;
requested writ of mandamus denied.

TYACK and KLINE, JJ., concur.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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Relator,	:	
v.	:	No. 09AP-159
Ohio Disposal Systems Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on August 25, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, John F. Mays, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶12} 1. Relator has two industrial claims arising out of his employment as a truck driver for respondent Trash Collection Co., Inc. His March 12, 1985 injury (claim No. 85-2614) is allowed for "inguinal hernia." His October 4, 1993 injury (claim No. L10322-27) is allowed for "umbilical hernia; major depressive disorder, single episode."

{¶13} 2. Relator last received temporary total disability ("TTD") compensation in March 1999. This occurred in claim No. L10322-27 for the October 4, 1993 injury.

{¶14} 3. On March 20, 2000, at age 61, relator filed his first PTD application.

{¶15} 4. Following a December 5, 2000 hearing, a staff hearing officer ("SHO") issued an order denying relator's first PTD application. In determining residual functional capacity, the SHO relied upon a May 23, 2000 report from Dr. Timothy Fallon and a May 22, 2000 report from psychologist Dr. Michael Murphy. In his order, the SHO summarizes those reports and renders a finding on residual functional capacity:

> The claimant was examined on 05/23/2000 by Dr. Timothy Fallon on the allowed physical conditions in his industrial claims (umbilical and inguinal hernias). He found the "only" restriction was lifting, carrying, pushing, pulling or otherwise moving objects weighing 20 lbs. to 50 lbs. for 3 – 5 hours a working day. All other lifting of objects under 20 lbs., climbing stairs, using foot controls, handling objects, reaching, crouching, stooping and bending was "un-restricted." Dr. Fallon found very little residual impairment as reflected in his recommendations.
>
> The claimant was examined on 05/22/2000 by Dr. Michael Murphy (psychologist) on the allowed psychological condition. He found the allowed psychological condition would not interfere with the claimant's day-to-day responsibilities. He indicated the claimant could psycho-logically return to his former position of employment or many other forms of sustained remunerative employment.

> The Staff Hearing Officer hereby accepts and adopts the reports from Dr. Fallon and Dr. Murphy and finds the claimant is not permanently and totally disabled. Both the physical and psychological return-to-work guidelines indicate the claimant is almost "unrestricted" for returning to work. He could lift objects weighing 20 – 50 lbs. for 3 – 5 hours. He is unrestricted on other physical activities including lifting objects weighing less than 20 lbs. He can return to his former position of employment based on his current allowed psychological condition.

{¶16} 5. On August 12, 2003, at age 65, relator filed his second PTD application. This application was denied by an SHO following a February 25, 2004 hearing. The stipulated record does not contain the February 25, 2004 order.

{¶17} 6. On April 6, 2006, relator filed his third PTD application. Following a May 10, 2007 hearing, an SHO issued an order denying the third PTD application. In his order, the SHO stated reliance upon a July 13, 2006 report from John W. Cunningham, M.D., an occupational medicine specialist. Dr. Cunningham concluded that relator was only capable of performing sedentary work. The SHO also relied upon a July 11, 2006 report from psychologist Ralph E. Skillings, Ph.D., who, according to the SHO, concluded "that adaptations to learn new procedures are mildly to moderately limited based upon advancing age, but that the claimant does have difficulty with change or new routine, and is expected to have difficulty dealing with stressful situations."

{¶18} The SHO's order of May 10, 2007 analyzes the nonmedical factors. Following a review of relator's age and educational status, the order presents two grounds for denial of the application. The first ground is as follows:

> First, as found by the previous order of denial of permanent total disability compensation, claimant did not avail himself of

> the opportunities to acquire new skills at the time when he might have done so. Claimant was 55 when he last worked, before several of the non-industrial medical conditions from which he now suffers became significantly disabling. At that time his age would not have substantially prevented or interfered with the acquisition of skills consistent with his physical capacities. Claimant did not seek rehabilitation at that time.

{¶19} 7. On March 31, 2008, relator filed his fourth PTD application, the adjudication of which is directly at issue in this action.

{¶20} 8. In support of his PTD application, relator submitted a report, dated March 11, 2008, from James E. Lundeen, Sr., M.D., who opined:

> * * * [I]t is my opinion that the claimant, John Frederick Mays, is permanently and totally disabled as a direct result of the injuries in these industrial claims. There is no reasonable expectation of recovery from these injuries. The natures [sic] and extents [sic] of injuries sustained in these industrial accidents are more than sufficient to permanently remove this claimant from the industrial workplace setting. Furthermore, I opine that he has no potential for retraining.

(Emphasis sic.)

{¶21} 9. On May 22, 2008, at the commission's request, relator was examined by Stephen Altic, D.O., who was asked to evaluate only the allowed physical conditions of the two industrial claims. In his four-page narrative report dated June 11, 2008, Dr. Altic wrote:

> * * * I have been requested to complete a Physical Strength Rating Form which I have done so. I have indicated that in my opinion, this gentleman is capable of working but only of sedentary work referable to the claim allowances in these two claims for umbilical hernia and inguinal hernia.

{¶22} 10. On June 4, 2008, Dr. Altic completed a physical strength rating form. On the form, Dr. Altic indicated by his mark that relator is capable of "sedentary work."

{¶23} 11. Earlier, on May 6, 2008, at the commission's request, relator was examined by psychiatrist Richard H. Clary, M.D. In his report, dated May 7, 2008, Dr. Clary opined:

> In my medical opinion, the allowed psychiatric condition causes a 5 percent permanent partial impairment of the whole person based on the AMA Guides Fifth Edition. In my medical opinion, his psychiatric condition would not cause permanent total disability. In my medical opinion, his psychiatric condition would not cause any limitations or restrictions in his ability to work.

{¶24} 12. On May 6, 2008, Dr. Clary completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Clary indicated by his mark: "This injured worker has no work limitations."

{¶25} 13. Following a November 5, 2008 hearing, an SHO issued an order denying relator's fourth PTD application. The SHO's order explains:

> The injured worker is now 70 years old, has a 9th grade education, and a work history as trash truck driver, furniture mover, front end loader/operator, and laborer. He had several surgeries to correct his hernias many years ago, but his recent treatment has been minimal and conservative. He last performed any work in 1993, at which time he was 55 years old. He has never attempted to participate in any type of vocational rehabilitation.
>
> Commission psychiatric specialist Dr. Clary has indicated that the injured worker has a minimal 5 percent impairment, which would not preclude him from performing any type of sustained remunerative employment. Commission medical specialist Dr. Altic has indicated that the injured worker has an 18 percent impairment, that he could not detect any palpable or frank hernia on examination, and that he would currently be limited to performing sedentary work. Based on the reports of Drs. Clary and Altic it is found that the injured worker has the residual functional capacity to perform sedentary work at the present.

> None of the injured worker's current non-medical disability factors are considered to be positive. However, as noted by several prior application denials on 12-05-2000, 02-25-2004, and 05-10-2007, the injured worker was 55 years old when he last worked, and never has attempted to participate in any type of vocational rehabilitation program, when he was young enough to do so, contrary to the requirements enunciated in the [*State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525, *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 1996-Ohio-200, and *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250] line of cases. The only difference in the injured workers' situation between now and 05-10-2007 is that he is one year older. At the time of the first denial on 12-05-2000 the injured worker's residual functional capacity was light to medium. As the last hearing officer pointed out on 05-10-2007 it is not unexpected that a 70 year old individual, who also has significant heart, hearing and vision problems, would for all intents and purposes be unemployable. As the [*State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414] and [*State ex rel. DeZarn v. Indus. Comm.* (1996), 74 Ohio St.3d 461] cases pointed out, permanent total disability compensation was never intended to compensate someone for simply growing old. Based on these facts the present application is not well received, and is not appropriate for approval.
>
> Therefore, based on the conclusions of Drs. Clary and Altic, and the above discussion of the injured worker's failure to attempt to participate in vocational rehabilitation over the last 15 years, and the relevant case law in that regard, it is found that the injured worker has not been permanently precluded from performing any type of sustained remunerative employment.

{¶26} 14. On February 13, 2009, relator, John F. Mays, filed this mandamus action.

Conclusions of Law:

{¶27} For its determination of residual functional capacity, the commission, through its SHO's order of November 5, 2008, relied upon the reports of Drs. Altic and Clary. Based upon those reports, the commission determined that relator is capable of

sedentary work. Here, relator does not challenge the commission's determination of his residual functional capacity nor does he challenge the reports of Drs. Altic and Clary. However, relator does challenge the commission's analysis of the nonmedical factors.

{¶28} Following the determination of residual functional capacity, the SHO's order briefly reviews relator's age, education, and work history. Conceding that "[n]one of the injured worker's current non-medical disability factors are considered to be positive," the SHO, nevertheless, denied PTD compensation based upon his finding of a "failure to attempt to participate in vocational rehabilitation over the last 15 years." Relator challenges that finding regarding vocational rehabilitation.

{¶29} In his brief, relator argues:

> In the instant case, the Relator's temporary total compensation terminated in January 1999 finding that he had reached maximum medical improvement. The Relator would have been 60 years of age. No rehabilitation agency would accept a 60 year old individual with a 9th grade education. Therefore, the Relator was found to be permanently and totally disabled by the Social Security Administration under their Federal Guidelines. Therefore, the Relator would submit that the evidence in this case does not support a denial of permanent and total disability. The evidence does support the fact that the Relator is permanently and totally disabled.

(Id. at 9-10.)

{¶30} In his reply brief, relator argues:

> The Staff Hearing Officer is required to rely upon probative evidence to make a determination. There is no evidence on file that indicates that the Relator is able to be rehabilitated. As previously indicated, when the Relator was found to have reached maximum medical improvement from his injury he was sixty years of age. No rehabilitation agency is going to accept a sixty year old individual with a ninth grade education. No agency is going to invest resources trying

> to rehabilitate such an individual. The Social Security Administration determined that the Relator was permanently and totally disabled under their guidelines.

(Id. at 3.)

{¶31} Relator's argument lacks merit.

{¶32} In *State ex rel. Bowling v. Natl. Can Corp.,* 77 Ohio St.3d 148, 1996-Ohio-200, on the third PTD application filed by Earl Bowling, the commission again denied PTD compensation. In its order, the commission determined that, medically, the allowed conditions restricted Bowling to the performance of light and sedentary work. The commission then analyzed the nonmedical factors. In so doing, the commission found in part:

> * * * He has now had 19 years in which to improve his educational skills and retrain for light or sedentary work. There is no evidence of any attempts to do so. Nor is there any evidence on file that he lacked the ability to further educate himself or retrain. * * *

Id. at 152.

{¶33} In denying the writ of mandamus, the *Bowling* court explained:

> We note with interest that claimant's allowed conditions did not remove him from sustained remunerative employment. Claimant was working until the plant closed in 1974. Claimant never worked again, despite the lack of any medical prohibition. Claimant's paucity of treatment suggests that his medical condition has changed little, if any, since that time. This, in turn, implies that the allowed conditions were not work-prohibitive then, nor are they now.
>
> In the nonmedical analysis that followed, the commission discounted Dr. Riccio's vocational report after finding that his review of claimant's work history was incomplete. This determination was within the commission's prerogative and not an abuse of discretion.

> The commission's independent review of claimant's non-medical factors determined that claimant's age, education, and work history, while not entirely favorable, were not insurmountable barriers to re-employment. The commission stressed the claimant's failure to make any effort to enhance his re-employment prospects.
>
> The commission—as do we—demands a certain accountability of this claimant, who, despite the time and medical ability to do so, never tried to further his education or to learn new skills. There was certainly ample opportunity. At least fifteen years passed between the plant closure and claimant's application for permanent total disability compensation, and claimant was only age forty-seven when the plant shut down. Under these circumstances, we do not find that the commission's decision constituted an abuse of discretion.

Id. at 153.

{¶34} The SHO's order of November 5, 2008 at issue here cites to prior commission orders for support of the determination that relator "was 55 years old when he last worked, and never has attempted to participate in any type of vocational rehabilitation program, when he was young enough to do so." The SHO's order of May 10, 2007 supports that determination of the SHO's order of November 5, 2008.

{¶35} Relator does not challenge or even mention the finding of the SHO's order of May 10, 2007 that supports the finding of the SHO's order of November 5, 2008 at issue here. In fact, the SHO's order of May 10, 2007, essentially answers relator's challenge here.

{¶36} As earlier noted, relator claims that there is no evidence in the record that he "is able to be rehabilitated." (Relator's reply brief, at 3.) This claim misses the mark. It is largely irrelevant that relator may be currently unable to undergo vocational rehabilitation at age 70 if, in the past, he has foregone the opportunity to do so.

{¶37} Moreover, relator's suggestion that an individual at the age of 60 or above cannot find vocational rehabilitation opportunities does not make it so.

{¶38} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ Kenneth W. Macke

KENNETH W. MACKE
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).