

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard May, c/o Debra C. May[,] Spouse,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-171
	:	
Industrial Commission of Ohio and M & R TV Sales & Services,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on October 29, 2009

Philip J. Fulton Law Office, Michael P. Dusseau and William A. Thorman, III, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

TYACK, J.

{¶1} Richard May, c/o Debra C. May, spouse, filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its

order denying him permanent total disability ("PTD") compensation and to compel the commission to conduct additional proceedings to consider his eligibility for the compensation.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we grant the requested writ.

{¶3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶4} No error of fact or law is present on the face of the magistrate's decision. We therefore adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we grant a writ of mandamus compelling the commission to vacate its order denying PTD compensation for the late Richard May and to conduct new proceedings to determine his widow's entitlement to PTD compensation from October 2002 until the date of Richard May's death.

Writ of mandamus granted.

BROWN and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard May,	:	
c/o Debra C. May[,] Spouse,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-171
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and M & R TV Sales & Services,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on July 20, 2009

Philip J. Fulton Law Office, Michael P. Dusseau and William A. Thorman, III, for relator.

Richard Cordray, Attorney General, and Elise Porter, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} Relator, Richard May, c/o Debra C. May, Spouse, 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 him

permanent total disability ("PTD") compensation and asking that the commission reconsider his application.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on August 19, 1974 and his workers' compensation claim has been allowed for the following conditions: "Injured lumbar spine; peptic ulcer (NOS); duodenal ulcer (NOS); atrophic gastritis, no hemorrhage; thoracic/lumbar disc displacement at L4-5, L5-S1; disc displacement (NOS); lumbago; lumbosacral neuritis (NOS); sprain of lumbar region."

{¶7} 2. Relator filed an application for PTD compensation on October 20, 1987.

In an order mailed August 22, 1990, the application was denied:

* * * This order is based particularly upon the report of Dr. H. T. Reynolds. It is specifically noted that claimant has had sixteen (16) years of self-employment; that he is a high-school graduate, and he has refused the offer of a weight-loss program from the Rehabilitation Division. This finding and order is further based upon a 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.

{¶8} 3. Relator filed a second application for PTD compensation in October 2004. According to that application, relator graduated from high school in 1968, could read, write, and perform basic math, was receiving social security disability compensation, had last worked in 1983, and had worked as a farmer, mechanic, service station attendant, and antenna and television technician.

{¶9} 4. Relator's application was supported by the July 27, 2004 report of his treating physician Boyd C. Hoddinott, M.D., who opined that relator had been permanently and totally disabled since January 1997.

{¶10} 5. Relator was examined by John W. Cunningham, M.D. In his December 3, 2004 report, Dr. Cunningham set forth the allowed conditions as follows: "Injured lumbar spine; peptic ulcer NOS; duodenal ulcer NOS; atrophic gastritis, no hemorrhage." Dr. Cunningham concluded that relator had a 15 percent whole person impairment and was capable of performing light-duty work.

{¶11} 6. A vocational report was prepared by Meleesa A. Hunt, Ph.D. In her January 25, 2005 report, Dr. Hunt noted that, based upon the results of the Wonderlic Personnel Test, relator had the ability to perform a variety of clerical and/or clerk positions or work as a foreman or other related supervisory positions. She noted that relator lacked the physical ability to perform any of his prior job activities; however, she noted that he could transfer some of his skills to a supervisory role in the same industry provided it did not entail as many physical demands. Dr. Hunt also noted that relator had significant functional limitations imposed by the injury, had gained an excessive amount of weight, was taking excessive medications, had decreased mobility and used a wheelchair, lacked the ability to care for himself, and had not worked for approximately 22 years. Ultimately, Dr. Hunt concluded that relator was not capable of performing sustained remunerative employment and that rehabilitation was not feasible.

{¶12} 7. Relator's application for PTD compensation came before a staff hearing officer ("SHO") on February 16, 2005. At that time, the SHO concluded that Dr.

Cunningham had not considered all relator's allowed conditions and ordered that the hearing be held in abeyance until relator had another examination or Dr. Cunningham issued an addendum to his earlier report.

{¶13} 8. Before a new exam could be conducted, relator died of congestive heart failure in April 2005.

{¶14} 9. Relator's widow filed an application for accrued PTD compensation from October 2002 until the date of his death.

{¶15} 10. A file review was prepared by Andrew Freeman, M.D. In his August 28, 2007 report, Dr. Freeman specifically identified the medical records he reviewed, concluded that relator had 20 percent whole person impairment and that he was capable of performing at a sedentary work level.

{¶16} 11. Thereafter, an SHO determined that the request for accrued PTD compensation be denied based on the fact that relator's residual functional capacity, when considered with his disability factors, did not render him permanently and totally disabled. Specifically, the commission relied almost exclusively upon the report of Dr. Cunningham:

The Staff Hearing Officer relies upon the 12/3/04 examination report from Dr. Cunningham to find that Mr. May was capable of light work. Dr. Cunningham examined Mr. May five months prior to his death. Dr. Cunningham's conclusion that the allowed conditions did not preclude light work was not dissimilar from the opinion reached sixteen years earlier by Dr. Reynolds.

* *

Accordingly, the SHO finds that Mr. May was vocationally qualified to perform work within the restrictions outlined by Dr. Cunningham. * * *

Thereafter, the SHO analyzed the nonmedical disability factors as follows:

Mr. May last worked in 1983 at the age of 34. He was 41 years old when he refused the weight loss program offered by the rehabilitation division on 1/31/90. Mr. May was 55 at the time of his passing. Mr. May graduated from high school, he attended truck driving school and vocational education courses in auto mechanics, and he worked as a farmer, mechanic, service station attendant, and antenna and television technician.

The SHO finds that Mr. May's age, work history, and education were vocational assets. He was a person of middle age. Although the Staff Hearing Officer does not agree with her ultimate opinion, the 1/25/05 vocational assessment by Dr. Hunt found Mr. May intellectually capable of clerical, foreman, or supervisory jobs. Dr. Hunt also opined that Mr. May's work experience resulted in job skills transferable to supervisory positions in his expertise.

{¶17} The SHO also denied relator's application based upon his failure to seek rehabilitation as follows:

* * * The Dictionary of Occupational Titles describes various light jobs such as cashier, electronics mechanic, and business machine mechanic, which would be consistent with Mr. May's work history. None of these positions require more than on the job training. Finally, the SHO relies upon the Supreme Court decisions that set out the rule of law regarding rehabilitation and an injured worker's lack of participation in such. See *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App. 3d 757; *State ex rel. Bowling v. National Can Corp.* (1996), 77 Ohio St. 3d 148; and *State ex rel. Cunningham v. Indus. Comm.* (2001), 91 Ohio St. 3d 261. Mr. May was 34 years old when he last worked. He did not work for the next twenty-two years. An extensive rehabilitation plan was developed and offered to him, however he refused such services on 1/31/90. Thereafter, Mr. May made no other attempt to obtain work consistent

with the limitations arising from the allowed conditions in the claim.

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

Conclusions of Law:

{¶19} 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.

{¶20} The relevant inquiry in a determination of permanent total disability is the 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.

{¶21} In its brief, the commission acknowledges that it abused its discretion by relying upon the report of Dr. Cunningham when, in fact, his report did not address all the allowed conditions. This magistrate agrees and finds that this court should issue a writ of mandamus ordering the commission to vacate its order denying PTD compensation and ordering the commission to issue a new order after considering all the allowed conditions.

{¶22} Relator also contends that the commission abused its discretion in denying compensation on alternate grounds that relator had not adequately pursued vocational rehabilitation. Recognizing that different hearing officers could reach different conclusions with regards to the vocational evidence, the magistrate finds that this issue should be considered again after the commission considers all the relevant medical information concerning all relator's allowed conditions. Inasmuch as the magistrate finds that the commission's order should be vacated, the finding with regards to vocational rehabilitation is essentially vacated as well.

{¶23} It is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate, in its entirety, its order denying relator's PTD compensation and reconsider the issue after considering medical reports that address all the allowed conditions, considering the nonmedical disability factors, and reaching a conclusion as to the rehabilitation issue.

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).