

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Hubert Jackson,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-465
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Evans Landscaping,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on July 21, 2011

Crowley, Ahler & Roth Co., L.P.A., and Neil J. Roth, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Hubert Jackson filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to enter an order granting him permanent total disability ("PTD") 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 which contains detailed findings of fact and conclusions of law and is appended to this decision. The magistrate's decision includes a recommendation that we refuse to grant the requested writ.

{¶3} Counsel for Jackson has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Jackson was originally injured on November 7, 1990. The physical condition for which his claims have been recognized are "herniated disc L5-S1" and "arthritic changes at L5-S1." He apparently was able to continue working for 14 years after his injury.

{¶5} In 2007, his claim was recognized for "major depressive disorder, single episode" and "inhibited sex excitement." Based upon these new allowances, he drew temporary total disability ("TTD") compensation until he was adjudicated to have reached maximum medical improvement.

{¶6} In October 2009, Jackson filed for PTD compensation and supported it with reports from Barbara King, Ph.D., and James K. Mulderig, M.D., both of whom indicated that his major depression rendered him incapable of sustained remunerative employment.

{¶7} The commission had Jackson examined by Norman L. Berg, Ph.D. Dr. Berg provided an extended report which described various limitations on Jackson's ability to function and ultimately concluded that "the injured worker is incapable of work."

{¶8} The commission had Jackson's physical limitations evaluated by Steven S. Wunder, M.D., who concluded that Jackson was physically capable of light work.

{¶9} A staff hearing officer ("SHO") addressed the merits of Jackson's application for PTD compensation in March 2010. The SHO relied on Dr. Wunder's opinion with respect to Jackson's physical condition and relied upon a report of Donald J. Tosi, Ph.D., with respect to the psychological conditions. Dr. Tosi evaluated Jackson with respect to Jackson's psychological conditions in 2008, before the application of PTD compensation was filed. The issues then were issues regarding Jackson's entitlement to TTD compensation.

{¶10} Dr. Tosi's report suffers from some flaws. First, he notes guidelines which indicate the injured worker who suffers from depressive disorder returns to work on average after 53 days. These guidelines clearly do not apply to a claimant whose psychological conditions were not recognized until 17 years after the physical injuries.

{¶11} Dr. Tosi seems to be much affected by the fact that Jackson drinks three to four beers a day and five to six beers on occasion. This is so despite Dr. Tosi's testing which showed Jackson not to be alcohol dependant.

{¶12} Dr. Tosi reported "[f]rom a psychological standpoint, this Injured Worker is not clinically impaired in his daily activities, cognitive or social functioning." At the same time, Dr. Tosi's test scores showed Jackson has indications of "significant schizoid, avoidant, and passive-aggressive features that are likely to affect daily functioning." The testing also showed that Jackson wished to be left alone and that due to a lack of self-confidence, Jackson could be indecisive and have problems with decision-making.

{¶13} These observations by Dr. Tosi cannot be reconciled, making Dr. Tosi's report internally inconsistent. Because of these inconsistencies, Dr. Tosi's report cannot constitute some evidence in support of a denial of PTD compensation, especially in light of the required psychological report of Dr. Berg, a commission expert, finding Jackson incapable of sustained remunerative employment. Dr. Berg's report was prepared for the commission specifically to assist it in addressing the merits of this application for PTD compensation, whereas Dr. Tosi's report was prepared for other purposes before Jackson claimed to be entitled to PTD compensation.

{¶14} We, therefore, sustain the objection to the magistrate's decision. We adopt the findings of fact in the magistrate's decision, but not the conclusions of law. As a result, we issue a writ of mandamus compelling the commission to vacate the order of its SHO denying PTD compensation and further compelling the commission to adjudicate Jackson's application for PTD compensation without consideration of the December 16, 2008 report of Dr. Tosi.

Objections sustained; writ granted.

CONNOR, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶15} Because I believe the commission did not abuse its discretion when it denied Jackson's application for PTD benefits, I respectfully dissent.

{¶16} The majority concludes Dr. Tosi's report cannot constitute some evidence upon which the commission can rely because the majority sua sponte determined that Dr. Tosi's report contains internal inconsistencies. There is no evidence in the record that

relator challenged, either administratively or in this mandamus action, Dr. Tosi's report as being internally inconsistent. Thus, this court is barred from addressing this issue de novo, and we cannot use this issue as a basis for granting a writ of mandamus in the matter herein. *State ex rel. Burns Internatl. v. Smith*, 10th Dist. No. 05AP-488, 2006-Ohio-6731, ¶3 (failure to pursue administratively whether a physician's report was internally inconsistent bars this court from considering it de novo); *State ex rel. Tussing v. Indus. Comm.*, 10th Dist. No. 05AP-178, 2006-Ohio-703, ¶4 (issue of internal inconsistencies in medical report raised for the first time in objections and not pursued administratively bars this court's review of the same); *State ex rel. Berman Industries, Inc. v. Indus. Comm.*, 10th Dist. No. 04AP-1254, 2005-Ohio-5083, ¶3.

{¶17} In my view, the magistrate sufficiently addressed the challenge to Dr. Tosi's report advanced by relator, and, therefore, I would conclude the commission did not abuse its discretion in relying on the report of Dr. Tosi. I would also address the remaining objections to the magistrate's decision, and for the reasons set forth in the magistrate's decision, overrule relator's objections, adopt the decision of the magistrate and deny the requested writ of mandamus.

A P P E N D I X
 IN THE COURT OF APPEALS OF OHIO
 TENTH APPELLATE DISTRICT

State of Ohio ex rel. Hubert Jackson,	:	
Relator,	:	
v.	:	No. 10AP-465
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Evans Landscaping,	:	
Respondents.	:	

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

Rendered on March 31, 2011

Crowley, Ahler & Roth Co., L.P.A., and Neil J. Roth, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

I N M A N D A M U S

{¶18} In this original action, relator, Hubert Jackson, 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 the compensation.

Findings of Fact:

{¶19} 1. On November 7, 1990, relator sustained an industrial injury while employed as a laborer for respondent Evans Landscaping, a state-fund employer. The industrial claim (No. 90-67886) is allowed for "herniated disc L5-S1; arthritic changes at L5-S1; major depressive disorder, single episode; and inhibited sex excitement."

{¶20} 2. The psychological claim allowance "major depressive disorder, single episode" was allowed by the Ohio Bureau of Workers' Compensation ("bureau") in December 2007. Apparently, following the psychological claim allowance, relator received temporary total disability ("TTD") compensation from the bureau based upon that claim allowance.

{¶21} 3. The bureau scheduled relator for a mandatory examination which was performed by Donald J. Tosi, Ph.D., on December 16, 2008.

{¶22} 4. Prior to the examination, the bureau issued instructions to Dr. Tosi in its referral letter of November 2008:

The injured worker's extent of psychological disability and the medical necessity and appropriateness of current treatment and/or potential to return to work require your opinion. * * *

Please address the questions as specifically asked below.

1. Has the injured worker reached a treatment plateau that is static or well stabilized at which you can expect no fundamental, functional or psychological change within reasonable medical probability in spite of continuing medical or rehabilitation procedures (maximum medical improvement)? Include rationale for your decisions.

2. Can the injured worker return to his/her former position of employment? If yes, are there any restrictions or modifications?

3. Please provide a summary of any functional limitations solely due to the psychological condition(s) in this claim(s). In other words, please indicate the type of work the injured worker can perform and supportive rationale for your opinion.

4. Are there any recommendations for vocational rehabilitation?

5. Is the current treatment necessary and appropriate for the psychological condition(s)?

6. What are the recommendations for any proposed plan of treatment including the expected length of treatment and results?

5. Also on November 20, 2008, the bureau informed relator by letter:

The Ohio Bureau of Workers' Compensation (BWC) has scheduled you for a medical examination with an independent physician. You are required to attend. The purpose of this exam is to determine the status of your work-related disability and to ensure that you are receiving quality medical care. BWC's goal is to make certain you are receiving the care necessary to enable you to return to work as safely and quickly as possible.

* * *

It is important for you to understand that if you do not appear for this examination, it may result in suspension of your benefits. * * *

A possible outcome of this exam is that BWC will determine you have reached maximum medical improvement (MMI). MMI means your condition has stabilized and no fundamental, functional, physiological or psychological changes can be expected in your condition despite continued medical treatment and/or rehabilitation. This examination will help in making that determination. You are

not entitled to temporary total disability benefits if you have reached MMI.

{¶23} 6. On December 16, 2008, relator was examined by Dr. Tosi. In his eight-page narrative report, Dr. Tosi opined:

Opinion: The following opinion is based on a reasonable degree of psychological certainty

Question 1: Has the Injured Worker reached a treatment plateau that is static and well-stabilized, at which no fundamental, functional, or psychological change can be expected within reasonable medical probability in spite of continuing medical treatment or rehabilitative procedures (maximum medical improvement)? Include rationale for your decisions.

This Injured Worker has been under psychological treatment for approximately one year. He is also consulting a psychiatrist. There is a major issue here with respect to this Injured Worker's long term use of alcohol. As well, he combines alcohol (3 to 4 cans of beer a day and more on weekends) with psychotropic medication, narcotic analgesics, and diazepam. Clearly, the effects of alcohol and prescription medication can produce psychomotor slowing and symptoms mimicking depression. This Injured Worker sustained an injury on 11/7/90. He worked up until 2004. From a psychological standpoint, this Injured Worker is not clinically impaired in his daily activities, cognitive or social functioning. In my opinion, this Injured Worker has reached Maximum Medical Improvement. The ODG Guidelines (2007, 12Ed) indicate that injured workers who suffer from depressive disorders return to work on the average after 53 days.

Question 2: Can the Injured Worker return to his/her former position of employment? If yes, are there any restrictions or modifications?

The Injured Worker has no restrictions and is able to return to his former position

Question 3: Please provide a summary of any functional limitations solely due to the psychological condition(s) in this claim(s). In other words, please indicate the type of work the Injured Worker can perform and supportive rationale for your opinion.

There are no functional limitations.

Question 4: Are there any recommendations for vocational rehabilitation?

Vocational rehabilitation is not indicated.

Question 5: Is the current treatment necessary and appropriate for the medical condition?

Treatment to date has been appropriate.

Question 6: What are the recommendations for any proposed plan of treatment including the length of treatment and results?

The Injured Worker should continue psychiatric monitoring over the next 5 to 6 months. Psychotherapy should be for purposes of maintenance over the next 4 to 5 months. Frequency of sessions should be once or twice a month over that time.

{¶24} 7. On January 2, 2009, the bureau referred the claim to the commission for adjudication of whether relator has reached maximum medical improvement ("MMI") based upon Dr. Tosi's report.

{¶25} 8. Following a February 9, 2009 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation as of the hearing date. The DHO determined that the psychological condition had reached MMI based upon Dr. Tosi's report.

{¶26} 9. Relator administratively appealed the DHO's order of February 9, 2009.

{¶27} 10. Following an April 7, 2009 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of February 9, 2009.

{¶28} 11. On October 21, 2009, clinical psychologist, Barbara King, Ph.D., wrote:

I do not think Mr. Jackson will ever be capable of sustained remunerative employment. His capacity to function in areas related to adequate occupational performance is seriously and permanently compromised by his Major Depression.

Mr. Jackson has no capacity to relate to co-workers, deal with the public, use good judgment, deal with authority figures, or handle work stress. He cannot remember complex or detailed instructions nor can he persist at a task due to fatigue and concentration problems.

He is emotionally unstable and frequently exhibits socially inappropriate behavior. He is very unpredictable and not likely to be a stable, reliable employee.

These limitations are the result of his allowable psychiatric condition.

{¶29} 12. On October 24, 2009, psychiatrist James K. Mulderig, M.D., wrote:

My patient, Hubert Jackson, has, as you know, three BWC approved conditions: Herniated Disc L5-S1, Lumbosacral Spondylosis and Major Depressive Disorder Single Episode. I have been treating him for the latter condition since March 28, 2008. His Major Depressive Disorder still causes him significant disability. He has continued disturbance of his mood, appetite, sleep, interest, and concentration. His Major Depressive Disorder is still of a severity as to prevent him from returning to sustained and gainful employment.

{¶30} 13. On October 30, 2009, relator filed an application for PTD compensation.

In support, relator submitted the reports of Drs. King and Mulderig.

{¶31} 14. On January 13, 2010, at the commission's request, relator was examined by clinical psychologist Norman L. Berg, Ph.D. In his eight-page narrative report, Dr. Berg opined:

These are my responses in regard to the specific questions posed by the Industrial Commission. In my opinion, claimant has reached maximum medical improvement in regard to his allowed condition of "Major Depressive Disorder, single episode." This is based on the fact that claimant sustained his industrial injury over 19 years ago. Claimant indicated that he did work after being off for a few years and also mentioned that his back problem became progressively worse to the point where in 2004 he had to quit working. Claimant mentioned that he became increasingly depressed as his back problem became worse. Claimant has been involved in mental health treatment (counseling and medication) for almost two years, and it appears that such treatment is necessary for maintenance purposes. Claimant indicated that he wants to continue with such treatment but is concerned if he will have medical coverage. Based on the AMA Guide, 5th Edition, I rate this claimant as having 55% permanent impairment based on the allowed condition of "Major Depressive Disorder, single episode."

In regard to activities of daily living, claimant is rated as having Class 3, moderate impairment. Claimant's depression reduces his motivation to engage in route activities. Claimant does attend to his personal hygiene needs but mentioned that he does so slowly and with pain. Claimant does not go shopping because he has little patience. His depression contributes to his having low stress tolerance.

In regard to social functioning, claimant is rated as having Class 4, marked impairment. Claimant's depression significantly reduces his desire to be around others, although friends and relatives occasionally call and visit. Claimant easily becomes angry and agitated around others, and this is related to his depression.

In regard to concentration, persistence and pace for task completion, claimant is rated as having Class 4, marked

impairment. His depression interferes with concentration and in his being persistent. Cognitively, claimant appears to function in a moderate to moderately slow manner, and this is related to his depression.

In regard to claimant's adaption to change in life circumstances, claimant is rated as having Class 4, marked impairment. His depression limits his motivation for change or to engage in different activities.

{¶32} 15. On January 13, 2010, Dr. Berg completed a form "Occupational Activity Assessment, Mental and Behavioral Examination." On the form, Dr. Berg indicated by his mark "[t]his Injured Worker is incapable of work."

{¶33} 16. On January 20, 2010, at the commission's request, relator was examined by Steven S. Wunder, M.D. Dr. Wunder examined only for the allowed physical conditions in the claim.

{¶34} 17. In his six-page narrative report, Dr. Wunder opines:

1. Has the injured worker reached maximum medical improvement with regard to each specified allowed condition? Briefly describe the rationale for your opinion. If "yes" then please continue to items #2 and #3.

He has reached maximum medical improvement for each recognized and allowed condition. There are no further interventions being planned. He has had surgery performed. Treatment is just maintenance care at this point in time.

2. Based on the AMA Guidelines to the Evaluation of Permanent Impairment, 5th Edition, and with reference to the Industrial Commission Medical Examination Manual, provide the estimated percentage of whole person impairment arising from each allowed condition. Please list each condition and whole person impairment separately, and then provide a combined whole person impairment. If there is no impairment for an allowed condition, indicate zero (0) percent.

For the recognized and allowed conditions of herniated disc L5-S1 and arthritic changes L5-S1, he has had a DRE Category IV impairment from page 384, table 15-3. This is 20% to the whole person.

For allowances of inhibited sexual excitement, from page 156, table 17-5, he would have an additional 5% whole person impairment.

Using the Combined Values Table, the 20% combines with the 5% for a 24% whole person impairment for this claim.

3. Complete the enclosed Physical Strength Rating. In your narrative report provide a discussion setting forth physical limitations resulting from the allowed condition(s).

The physical strength rating form has been completed. His spinal fusion has been stable. There have been no complicating factors. He should be capable of light types of occupations.

{¶35} On January 20, 2010, Dr. Wunder completed a physical strength rating form. On the form, Dr. Wunder indicated by his mark that relator is capable of "light work."

{¶36} Following a March 17, 2010 hearing, a SHO issued an order denying the PTD application. The SHO's order states in part:

It is the finding of the Staff Hearing Officer that the Injured Worker was examined on behalf of the Industrial Commission of Ohio by Dr. Wunder. Dr. Wunder examined the Injured Worker's allowed physical conditions and found that the Injured Worker had reached maximum medical improvement. Dr. Wunder's exam occurred on 01/20/2010. Dr. Wunder also found that the Injured Worker was unable to return to his former position of employment as a Landscaper, which was the Injured Worker's position of employment at the time of the allowed industrial injury. Dr. Wunder found that the Injured Worker's spinal fusion that occurred in March of 2007 was stable and had no complicating factors. Dr.

Wunder opined that the Injured Worker was capable of light work activities.

It is the finding of the Staff Hearing Officer that the Injured Worker was examined by Dr. Tosi on 12/16/2008. Dr. Tosi examined the Injured Worker on behalf of the Bureau of Workers' Compensation to determine the Injured Worker's extent of disability for the allowed psychological condition. Dr. Tosi found that the Injured Worker's allowed psychological condition had reached maximum medical improvement. Dr. Tosi also found that the Injured Worker had no restrictions as a result of the allowed psychological condition and was able to return to his former position of employment when only considering the allowed psychological condition. Dr. Tosi found that from a psychological standpoint, the Injured Worker is not clinically impaired in his daily activities, cognitive or social functioning.

Based upon the reports of Dr. Wunder and Tosi, it is the finding of the Staff Hearing Officer that the Injured Worker has reached maximum medical improvement for the allowed conditions in the claim. Further, it is the finding of the Staff Hearing Officer that the Injured Worker is physically capable of light work activities. Further, the Injured Worker has no restrictions as a result of the allowed psychological condition that would prevent him from returning to and performing the duties of his former position of employment.

{¶37} 20. On May 17, 2010, relator, Hubert Jackson, filed this mandamus action.

Conclusions of Law:

{¶38} Three issues are presented: (1) whether the commission abused its discretion when it failed to rely upon the medical report of its own examining physician, Dr. Berg, or, in the alternative, failed to explain in its order why Dr. Berg's report was rejected, (2) whether the commission abused its discretion by relying upon the report of Dr. Tosi, and (3) whether the commission violated Ohio Adm.Code 4121-3-34(D)(3)(i) by allegedly failing to consider whether the allowed psychiatric condition in combination with

the allowed physical conditions prevent relator from engaging in sustained remunerative employment.

{¶39} The magistrate finds: (1) the commission did not abuse its discretion when it failed to rely upon the medical report of Dr. Berg and failed to explain in its order why Dr. Berg's report was rejected, (2) the commission did not abuse its discretion by relying upon the report of Dr. Tosi, and (3) the commission did not violate Ohio Adm.Code 4121-3-34(D)(3)(i).

{¶40} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶41} The first issue is easily answered. The commission has exclusive authority to evaluate evidentiary weight and credibility. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18. The reports of commission physicians do not "warrant heightened deference" by the commission, and those reports are also subject to the commission's authority to evaluate evidentiary weight and credibility. *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 1995-Ohio-121. The commission is under no duty to explain why it finds one report more persuasive than another, even when it has rejected the report of its own physician. *Id.*

{¶42} Here, the commission had no duty to either rely upon the report of Dr. Berg or to explain why it did not find Dr. Berg's report persuasive. *Id.*

{¶43} The second issue is whether the commission abused its discretion in relying upon the report of Dr. Tosi when that report was not generated pursuant to the commission's rules applicable to the adjudication of PTD applications. See Ohio

Adm.Code 4121-3-34(C)(5)(iii) which authorizes the claims examiner to schedule appropriate medical examinations following the filing of a PTD application.

{¶44} Here, the report upon which the commission relied, i.e., Dr. Tosi's report, was generated primarily by the bureau's desire to obtain a medical evaluation of relator's continued entitlement to TTD compensation.

{¶45} In examining relator at the bureau's request, Dr. Tosi concluded in his report that the psychological condition did not prevent a return to the former position of employment. That opinion was later adopted by the commission in its adjudication of the PTD application.

{¶46} Here, relator argues that Dr. Tosi's report cannot be relied upon by the commission in its PTD adjudication simply because Dr. Tosi's report was generated over the issue of TTD compensation rather than the issue of PTD compensation. This court has repeatedly rejected similar arguments in prior cases. *State ex rel. Baker v. Indus. Comm.*, 10th Dist. No. 09AP-373, 2010-Ohio-2727; *State ex rel. Bray v. Hamilton Fixture Co.*, 10th Dist. No. 05AP-821, 2006-Ohio-4459.

{¶47} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applicants. Thereunder, Ohio Adm.Code 4121-3-34(D)(1)(c) provides:

If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled.

{¶48} Thus, Dr. Tosi's opinion as to relator's medical ability to return to his former position of employment was indeed relevant to the adjudication of the PTD application.

{¶49} Turning to the third issue, Ohio Adm.Code 4121-3-34(D)(3)(i) provides:

In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

{¶50} According to relator, the commission violated the above rule because allegedly the SHO's order fails to explain how it was considered that the allowed psychiatric condition in combination with the allowed physical conditions do not prevent sustained remunerative employment. Relator's argument lacks merit.

{¶51} Here, the SHO relied upon the reports of Drs. Tosi and Wunder to determine relator's residual functional capacity based upon the psychiatric condition and the allowed physical conditions. From those reports, the SHO concluded that relator is "physically capable of light work activities" and "has no restrictions as a result of the allowed psychological condition." Thus, the SHO's order complies with the rule. *State ex rel. Guy v. Indus. Comm.*, 10th Dist. No. 08AP-711, 2009-Ohio-2553.

{¶52} 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).