

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 deny the request for a writ of mandamus.

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

{¶4} No error of law or fact is present on the face of the magistrate's decision. We therefore adopt the findings of fact and conclusions of law presented in the magistrate's decision and deny the request for a writ of mandamus.

Writ of mandamus denied.

BRYANT, P.J., and BROWN, J., concur.

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

State of Ohio ex rel. James Caldwell,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-1068
	:	
New Boston Coke Corporation 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 July 14, 2011

Marinakis Law Office, and Angela D. Marinakis, 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

{¶5} Relator, James Caldwell, 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 relator's request for temporary total

disability ("TTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on February 22, 2001 and his workers' compensation claim was originally allowed for "sprain subscapularis right shoulder."

{¶7} 2. Some time in March 2002, relator's employer, New Boston Coke Corporation, shut down its operation. From March until September 2002, relator was self-employed.

{¶8} 3. In a letter dated October 29, 2003, Rex Dinsmore, D.O., provided his physical findings upon examination and opined that relator had a nine percent whole person impairment.

{¶9} 4. In a letter dated December 11, 2003, Jeffrey J. Thompson, D.C., noted physical findings upon examination and opined that relator had a 15 percent whole person impairment for his right shoulder injury.

{¶10} 5. Relator applied for permanent total disability ("PTD") compensation in April 2006. On that application, relator indicated that he began receiving Social Security disability payments in 2004. Relator further indicated the last date he worked was September 2002.

{¶11} 6. Relator was examined by William Reynolds, M.D. In his June 29, 2006 report, Dr. Reynolds noted that relator complained of pain in his right shoulder with all motion. Dr. Reynolds found that relator had a 50 percent whole person impairment for all

his claims and attributed 10 percent of that impairment to his shoulder. Dr. Reynolds opined that relator was capable of sedentary work.

{¶12} 7. Relator's application for PTD compensation was denied.

{¶13} 8. Relator continued to receive treatment for his right shoulder.

{¶14} 9. T. Robert Love, M.D., evaluated relator and, in a report dated November 20, 2006, Dr. Love noted relator's medical history, provided his physical findings upon examination, indicated that he was going to seek authorization for a shoulder MRI and noted that treatment would consist of cortisone injections and possibly surgery.

{¶15} 10. Dr. Love did request a right shoulder MRI; however, that request was denied in November 2006. Relator continued to have chronic right shoulder pain as evidenced by the medical record.

{¶16} 11. In April 2009, Dr. Love again requested a right shoulder MRI; however, that request was also denied.

{¶17} 12. Relator was examined by Kimberly S. Umhoefer, D.O. In her May 22, 2009 report, Dr. Umhoefer noted the history of relator's right shoulder condition and the treatment he had received, provided her physical findings upon examination, and opined that relator's request for an MRI was justified and should be permitted.

{¶18} 13. The MRI of relator's right shoulder was performed on September 19, 2009, and the following findings and impressions were noted:

FINDINGS: Complete disruption of supraspinatus and infraspinatus tendon with retraction and effusion. Very large bulky spurs about the AC joint with associated fluid consider arthrosis. Irregularity of the superior labrum probable superior labral tear. Probable intrasubstance biceps tendon tear

though its anchor shows no obvious displacement. Atrophy of the supraspinatus and subscapularis muscle.

IMPRESSION: Rotator cuff tear, muscle atrophy. Additional findings as described.

{¶19} 14. Dr. Love submitted a C-9 form requesting acromioplasty of relator's right shoulder in order to repair his right rotator cuff.

{¶20} 15. In an order mailed December 9, 2009, the Bureau of Workers' Compensation ("BWC") additionally allowed relator's claim for "tear rotator cuff, right."

{¶21} 16. Relator's request for surgery was heard before a district hearing officer ("DHO") on March 16, 2010 and was granted.

{¶22} 17. Surgery on relator's right shoulder was performed on April 13, 2010. Both the pre- and post-operative diagnoses were impingement syndrome right shoulder. The operative report also provides the following description:

There was marked thickening of underlying bursa. Complete bursectomy was performed. There was a chronic tear of the rotator cuff involving the entire lateral half of the rotator cuff lateral to the long head of the biceps. The long head of the biceps was intact. The fraying of the rotator cuff was debrided. There were large osteophytes on the undersurface of the AC joint. These were removed with a rongeur and smoothed with a rasp.

{¶23} 18. On June 30, 2010, Dr. Love completed a C-84 certifying that relator was temporarily totally disabled from February 9, 2009 to an estimated return to work date of September 15, 2010.

{¶24} 19. Relator's request for TTD compensation was heard before a DHO on September 2, 2010. The DHO denied relator's request for TTD compensation finding that

he had left the work force for reasons unrelated to his allowed workers' compensation claim. Specifically, the DHO stated:

Injured Worker had surgery in this claim on 04/13/2010. There is no contrary medical evidence.

However, in 2006, Injured Worker received Social Security Disability. Injured Worker testified that this was based upon high blood pressure, diabetes, low back, mid back, and neck problems. Injured Worker specifically stated that none of the disability award was based upon the shoulder conditions allowed in this claim.

Under Ohio law, if one leaves the workforce for reasons unrelated to this industrial injury, that person is not eligible for temporary total benefits.

Injured Worker failed to meet the burden of proof.

District Hearing Officer considered everything that was written in the file and said at the hearing before making this decision.

{¶25} 20. Relator appealed the DHO order and submitted the following statement in support:¹

- 1) I have had continual right shoulder problems from my February 21, 2001 work injury involving Claim No. 01-335948.
- 2) My job at the New Boston Coke Corporation involved shoveling, greasing equipment, repetition motion, heavy lifting and the like.
- 3) After my employment with the New Boston Coke Corporation in 2002, I went to work with a friend for a short while, but was not able to do the work physically.
- 4) There was some misunderstanding at the District Hearing of September 2, 2010.
- 5) At that hearing, I did not remember on the spot when I received social security disability, but now that I have gone back and checked my records, I see I filed for it on September 24, 2004 and the letter by Dr. Bolla to social security mentioned my right shoulder pain and problems.

¹ This statement was not notarized.

6) As my records show, I experienced pain and problems with my right shoulder from the work injury, and treated with Kings Daughters Hospital, Hughes and Hughes Physical Therapy and Lawyer Chiropractic Clinic. My pain got so bad I had to have surgery to repair [t]he rotator cuff in April, 2010.

7) When I saw my doctor on February 9, 2009, he told me not to lift with my arm anymore until it got better.

8) At the time I filed for social security disability, I was suffering from right shoulder pain and problems, in addition to neck, mid back and low back pain and my right shoulder condition is one of the reasons I was unable to work.

9) I filed for Permanent and total Disability benefits in my workers' compensation claim on April 13, 2006 and listed Claim No. 01-335948 as a disabling claim and described how my lifting ability was limited.

{¶26} 21. Relator did not submit any additional medical evidence or other evidence, besides his statement, at the hearing before the staff hearing officer ("SHO").

{¶27} 22. A physician review was performed by Akram Sadaka, M.D., on July 14, 2010. After reviewing and evaluating the medical evidence in the record, Dr. Sadaka noted that the operative report from the surgery did not show that there was a right rotator cuff tear to repair. Dr. Sadaka concluded that this surgery was performed for non-allowed conditions. Further, Dr. Sadaka noted that the physician of record's notes from the year 2008 did not mention that relator was unable to work at all. Ultimately, Dr. Sadaka opined that there was not sufficient medical evidence to support a period of TTD compensation on the basis of the allowed condition in the claim.

{¶28} 23. Relator's appeal was heard before an SHO on October 6, 2010. The SHO likewise denied relator's request because he had voluntarily left the workforce stating as follows:

The Injured Worker's request for temporary total benefits from 02/09/2009 to 09/02/2010 (the date of the District Hearing

Officer hearing) and continuing is denied. The Injured Worker had surgery in this claim on 04/13/2010, which was approved pursuant to District Hearing Officer order dated 03/16/2010.

However, in 2006, the Injured Worker received Social Security Disability. The Injured Worker testified at the District Hearing Officer hearing that this was based upon high blood pressure, diabetes, low back, mid back, and neck problems. The Injured Worker specifically stated at the District Hearing Officer hearing that none of the disability award was based upon the shoulder conditions allowed in this claim.

At the Staff Hearing Officer hearing, the Injured Worker submitted a statement saying otherwise, but the Staff Hearing Officer, based on the testimony already provided at the District Hearing Officer hearing, is not persuaded by the Injured worker's statement dated 10/06/2010. In addition, the report of Dr. Bolla mentioned by the Injured Worker in his statement is not on file in this claim, nor is the finding of the Social Security Disability Board.

Under Ohio law, if one leaves the workforce for reasons unrelated to this industrial injury, that person is not eligible for temporary total benefits.

Alternatively, the Staff Hearing Officer denies this request for temporary total disability compensation, based on the Physician Review dated 07/14/2010 from Dr. Sadaka.

{¶29} 24. Relator filed an appeal to the commission and submitted a memorandum in support. With this memorandum, relator submitted a printout from Social Security and a copy of Dayna Bolla, D.C.'s November 11, 2004 report. Dr. Bolla considered all of relator's allowed conditions, both in the current claim and in previous claims and ultimately concluded that relator was permanently and totally disabled. While Dr. Bolla does note relator's subjective complaint of shoulder pain, Dr. Bolla does not provide any findings upon examination relative to relator's right shoulder condition.

Further, in listing relator's allowed condition, Dr. Bolla does not even mention relator's allowed right shoulder claim.

{¶30} 25. The commission refused relator's appeal.

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

Conclusions of Law:

{¶32} In this mandamus action, relator contends that the commission abused its discretion by not accurately remembering relator's testimony, by ignoring the evidence substantiating relator's problems and disability of his shoulder just prior to his application for Social Security disability benefits, by ignoring the fact that Social Security disability benefits were awarded to him in part due to his allowed right shoulder condition, and by refusing to consider Dr. Bolla's report.

{¶33} The magistrate finds that the commission did not abuse its discretion.

{¶34} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶35} 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.

{¶36} Relator's arguments all rely on evidence that either is not before this court for review or was not before the SHO for review. Specifically, relator argues that the SHO mischaracterized relator's testimony from the DHO hearing. However, without a copy of the transcript from those proceedings, this court cannot review relator's testimony. Without such evidence, this court cannot find an abuse of discretion here. See *State ex rel. Penn Traffic Co. v. Indus. Comm.*, 10th Dist. No. 03AP-324, 2004-Ohio-1213 (employer's failure to present evidence that employee violated a written work rule at the hearing before the SHO barred employer from presenting that evidence on appeal from the SHO's order).

{¶37} Relator also argues that the commission ignored the evidence that he had significant problems with his right shoulder before he filed his application for Social Security disability benefits.

{¶38} At the hearing before the DHO, the DHO noted that relator testified that his Social Security disability application was based upon "high blood pressure, diabetes, low back, mid back, and neck problems [and] that none of the disability award was based upon the shoulder conditions allowed in this claim."

{¶39} At the hearing before the SHO, the SHO specifically noted relator's prior testimony before the DHO. The SHO also noted that relator submitted a statement for review by the SHO which contradicted the testimony relator had made before the DHO. However, the SHO was not persuaded by this statement.

{¶40} In making this argument, relator asserts that his "sworn statement," which contradicts his prior testimony, accurately reflects the facts and proves that his shoulder was a significant factor for the granting of his Social Security disability. However, the magistrate specifically notes that relator's statement was not a "sworn statement." R.C. 2319.01 provides for the methods of taking testimony and it indicates "affidavit." Affidavit is defined in R.C. 2319.02 as "a written declaration under oath" and oath is defined as "a solemn * * * formal calling upon God or a god to witness to the truth of what one says or to witness that one sincerely intends to do what one says."

{¶41} Although relator argues that his statement carries as much weight as his prior sworn testimony, relator is incorrect. Even if his statement had been in an affidavit form, the commission was not required to find it credible. Credibility and the weight to be given evidence are within the discretion of the commission as fact finder. *Teece*. Further, the transcript is not part of the record for this court to review.

{¶42} Relator also contends that the commission ignored the evidence that Social Security disability benefits were paid to him in part because of his right shoulder. However, except for relator's statement, there is no evidence in the record that relator's Social Security disability benefits were provided in part for his right shoulder condition. The fact that he continued to have problems with his right shoulder does not substantiate

that he left the workforce and applied for Social Security disability benefits because of his right shoulder.

{¶43} Relator contends further the commission abused its discretion by failing to consider the report of Dr. Bolla. As relator indicates in his brief, the idea that new evidence cannot be presented in an appeal from an order of an SHO renders the act of appealing futile. This magistrate disagrees.

{¶44} In *Penn Traffic Co.*, this court considered a similar argument and rejected it as follows:

Pursuant to R.C. 4123.511, appeals from an order of an SHO are discretionary. Commission Resolution No. R94-1-6 provides three grounds for the granting of a **discretionary appeal** pursuant to R.C. 4123.511: (1) appeal presents unusual medical, legal or factual question or the commission desires to set policy or precedent; (2) there exists newly discovered **evidence** which, by due diligence, could not have been discovered and filed prior to the hearing; or (3) there is the possible existence of fraud.

(Emphasis sic.)

{¶45} Relator did not present any evidence warranting the granting of a discretionary appeal. The fact that the SHO mistakenly noted that Social Security disability benefits were paid beginning in 2006 instead of 2004 is immaterial especially in light of the fact that relator acknowledges that he left the workforce in 2002.

{¶46} Relator also contends that the commission abused its discretion by relying on the report of Dr. Sadaka. According to relator, because Dr. Sadaka did not acknowledge that relator had a rotator cuff tear, his report does not constitute some evidence.

{¶47} It is undisputed that a physician conducting a file review must accept all the allowed conditions as well as the objective findings of the examining physician. *State ex rel. Lampkins v. Dayton Malleable, Inc.* (1989), 45 Ohio St.3d 14. However, while the reviewing physician is required to accept the factual findings of other examining physicians, the reviewing physician is not required to accept their conclusions based upon such findings. See, for example, *State ex rel. Frederick v. Galion Country Club* (1986), 25 Ohio St.3d 364.

{¶48} In the present case, after reviewing the operative report, Dr. Sadaka noted that there was no mention of any repair actually being made to relator's rotator cuff. For the following reasons, this magistrate disagrees.

{¶49} A review of the operative report from April 13, 2010 reveals the following:

There was a chronic tear of the rotator cuff involving the entire lateral half of the rotator cuff lateral to the long head of the biceps. * * * The fraying of the rotator cuff was debrided.

{¶50} Clearly, repairs were made to the rotator cuff. Dr. Sadaka's statements to the contrary were incorrect. As such, because his opinion was premised largely on his conclusion that there had been no surgical repair of relator's rotator cuff tear, the magistrate finds that his report does not constitute some evidence to support the commission's decision.

{¶51} While the commission is permitted to provide alternative reasons² for granting or denying benefits, the fact that the commission's alternative reason is not supported by the record does not constitute grounds for the granting of a writ of

² See, for example, *State ex rel. Smith v. Indus. Comm.*, 10th Dist. No. 09AP-214, 2009-Ohio-6661, and *State ex rel. Bennett v. Indus. Comm.*, 10th Dist. No. 07AP-139, 2007-Ohio-6854.

mandamus. As such, the removal of Dr. Sadaka's report does not warrant the granting of a writ of mandamus because the commission relied on that report as an alternative reason for denying TTD compensation. The commission's determination that relator voluntarily abandoned the workforce is a valid reason to deny him TTD compensation.

{¶52} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment.

{¶53} In order to prove entitlement to TTD compensation, claimants must show that there is a direct and proximate causal relationship between the industrial injury and the claimed period of temporary total disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. If the claimant leaves the workforce for reasons unrelated to the industrial injury, the claimant has voluntarily abandoned not only their employment but also their right to receive TTD compensation. *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376, 2000-Ohio-168.

{¶54} Because there is some evidence to support the commission's determination, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his request for TTD 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).