[Cite as *State ex rel. Foster v. Indus. Comm.*, 2012-Ohio-1067.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Forresta L. Foster,	:	
Relator,	:	
v.	:	No. 10AP-1097
Industrial Commission of Ohio and Adams County Ohio Valley School,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 15, 2012

Copp Law Offices, and *Shawn M. Wollam*, for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Forresta L. Foster, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that because the reports of Drs. Frank and Koppenhoefer are some evidence supporting the commission's decision, the commission did not abuse its discretion in denying relator PTD compensation. Both Drs. Frank and Koppenhoefer opined that relator could

perform sedentary work. Although relator's ability to walk or stand was limited, the magistrate found that sedentary work does not require the ability to walk or stand. Therefore, the commission did not abuse its discretion in finding that relator could perform some sedentary work even though for all practical purposes she could not stand or walk. For these reasons, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision. In her first objection, relator contends that the magistrate improperly relied on *State ex rel. Wainer v. Indus. Comm.*, 10th Dist. No. 05AP-86, 2005-Ohio-6212, in concluding that sedentary work as defined Ohio Adm.Code 4121-3-34 does not require the ability to stand or walk. We disagree.

{¶ 4} Relator attempts to distinguish *Wainer* on its facts. There are some factual differences between *Wainer* and the case at bar. Nevertheless, the *Wainer* decision is quite clear that the ability to perform sedentary work as defined in Ohio Adm.Code 4121-3-34 does not require the ability to stand or walk. *Id.* at ¶ 5. A person confined to a wheelchair may still be capable of performing sedentary work. The magistrate properly relied on *Wainer* in addressing relator's challenge to her ability to perform sedentary work. Therefore, we overrule relator's first objection.

{¶ 5} In her second objection, relator contends that the definition of sedentary work in Ohio Adm.Code 4121-3-34 requires an ability to stand or walk, at least occasionally. Again, we disagree. For the reasons articulated in *Wainer*, sedentary work does not require an ability to stand or walk. *Id.* Consequently, we overrule relator's second objection.

{¶ 6} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

FRENCH and TYACK, JJ, concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Forresta L. Foster,	:	
Relator,	:	
v.	:	No. 10AP-1097
Industrial Commission of Ohio and Adams County Ohio Valley School,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 6, 2011

Copp Law Offices, and *Shawn M. Wollam*, for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 7} In this original action, relator, Forresta L. Foster, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her permanent total disability ("PTD"), and to enter an order awarding the compensation.

Findings of Fact:

{¶ 8} 1. On March 5, 1996, relator sustained an industrial injury while employed as a teacher for respondent Adams County Ohio Valley School. Her industrial claim (No. 96-460530) is allowed for:

> 5th metatarsal foot fracture; left medial malleolar fracture; arthropathy left ankle; ulcer left ankle; acquired deformity left ankle-foot; congestive heart failure episode; discogenic spondylosis L4-5, L5-S1; unspecified mechanical complications of internal orthopedic device; non-union fracture.

{¶ 9} 2. On July 12, 2008, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by Robert E. Frank, Jr., M.D. In his three-page narrative report, Dr. Frank opined:

> **Discussion:** This individual with diabetes mellitus and diabetic peripheral neuropathy suffered an injury to her left foot in 1996. This was followed by numerous complications. She finally had fusion surgery of the left ankle in April 2005. This fusion itself was also complicated by nonunion. She has a stable degree of discomfort in the ankle over the past several years. She uses a left AFO[.] [T]he maximum that she can be up and walking is 10-15 minutes. Regarding the leg length discrepancy, this is being addressed by her therapist with adjustment of her special shoe. Currently minor adjustments are still being made. The heart is stable. She has a stable degree of low back discomfort, which overall is not as bothersome as the pain in her ankle. The pain seems to be controlled on simple analgesics. Examination discloses significant deformity of the left ankle along with lack of movement from the fusion. She appears to have significant diabetic peripheral neuropathy with absent DTRs in the lower extremities and loss of sensation in both feet.
>
> To specifically answer the questions asked, has the injured worker reached a treatment plateau where she can be considered static, well-stabilized and MMI? I believe the answer is yes. The pain is stable. The fusion is now more than 3 years old. No further surgery can be given. The only change in her ongoing treatment at the present time are minor adjustments being made to her lift shoe on the left,

> but these adjustments are quite minor and are not considered significant enough to make her not at MMI.
>
> This injured worker is permanently disabled from her previous employment. She would be capable of a sedentary job in which she sits all of the time. Apparently she is retired and does not intend to return to work. Regarding her limitations, she cannot stand at all; she cannot walk for more than 10 minutes at a time. She cannot squat and arise; she cannot go up and down stairs. She has normal use of her upper extremities.
>
> I do feel that her current medications are medically necessary for her condition. They should be continued in the future on an indefinite basis. She will also need to see the therapist for occasional minor adjustments in her left lift shoe, but otherwise no other significant type of treatment is necessary. Overall, her pain is stable; nothing more can be done to make this foot and ankle any better, and I do feel that she is MMI.

{¶ 10} 3. On July 30, 2008, citing Dr. Frank's report, the bureau moved to terminate temporary total disability ("TTD") compensation.

{¶ 11} 4. On August 12, 2008, attending physician Sandra Eisele, M.D., wrote:

> I have seen Forresta Foster in my office today. I think at this point, she has reached maximum medical improvement, and I have recommended that she is permanently and totally disabled. This is as a result of the allowed conditions in her claim, and she needs to transition to that status.

{¶ 12} 5. Following an August 28, 2008 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation effective August 12, 2008 based upon the reports of Drs. Eisele and Frank.

{¶ 13} 6. On October 28, 2008, relator filed an application for PTD compensation.

{¶ 14} 7. On December 22, 2008, at the commission's request, relator was examined by Ron M. Koppenhoefer, M.D. In his four-page narrative report dated December 24, 2008, Dr. Koppenhoefer opines:

> It is noted from the medical records reviewed that Ms. Foster is status post numerous fractures related to the Charcot joint secondary to her diabetes mellitus. It was also noted that she has had problems with her diabetic polyneuropathy in the past.
>
> As it relates to the allowed conditions in this claim, she is at maximum medical improvement.
>
> When using the AMA Guides 5th edition, she would have the following degree of impairment:
>
> 1. Congestive heart failure episode 0% impairment.
> 2. Discogenic spondylosis L4-L5, L5-S1 would equal to a DRE category 2 degree of impairment or a 5% impairment.
> 3. 5th metatarsal foot fracture 0% impairment.
> 4. Left medial malleolar fracture, arthropathy left ankle, acquired deformity left ankle-foot, unspecified mechanical complications of internal orthopedic device, non-union fracture would equal to a 14% impairment to the body as a whole when taking into affect the failed fusion which was performed. Table 17-31 was consulted in this regard.
>
> In summary, she would have an 18% impairment to the body as a whole.
>
> When taking into affect the allowed conditions in this claim, Ms. Foster would be limited to sedentary work. For ambulation she would need the use of a wheelchair or a motorized scooter. She would only be able to stand for a very brief period of time.

{¶ 15} 8. Following a February 17, 2009 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

> The Injured Worker was born on 08/17/1951 and is a college graduate having received a Bachelor of Science from the University of Cincinnati. She has previously worked as an elementary school teacher for 31 years. She sustained an injury on 03/05/1996 resulting in the allowed conditions as listed above. For this injury, the Injured Worker has undergone an arthrodesis (fusion) of the left ankle on 04/07/2005, followed by a screw removal on 12/07/2006. The Injured Worker last worked in September 2002. Finally, the Injured Worker has not participated in any form of

vocational rehabilitation, retraining or reeducation since she last worked.

The Staff Hearing Officer accepts and relies on the 07/12/2008 report of Robert E. Frank, M.D., and the 12/24/2008 report of Ron M. Koppenhoefer, M.D., who both opine that the Injured Worker is not capable of performing her former position of employment, but is capable of performing some alternative sedentary sustained remunerative employment activities. The Staff Hearing Officer finds that although the physicians do not permit the Injured Worker to perform a full range of sedentary activities full-time, it is also noted that case law indicates that such is not necessary, but rather even part-time employment at less than a sedentary level is permissible to deny the application so long as it is reasonable. Therefore, based on these reports, the Staff Hearing Officer finds that an analysis of the Injured Worker's disability factors is in order.

The Staff Hearing Officer finds that the Injured Worker's age is a neutral vocational factor as she has not yet reached the generally accepted age of retirement (65) and her age does not enhance nor prohibit her ability to perform sustained remunerative employment. Additionally, her education is a positive vocational asset as she has completed her secondary and collegiate levels successfully. Finally, the Injured Worker's work history is also found to be a positive vocational asset as she was able to perform 31 years of elementary teaching, the last several in a wheelchair. The Staff Hearing Officer finds that the Injured Worker is capable of reading, writing and performing basic mathematics and has limited computer skills. In addition, her prior work experience has demonstrated her abilities in organizational skills, behaving appropriately in a business setting, time-management and leadership, all qualities that any Employer would covet in an otherwise qualified candidate. Finally, it is noted that the Injured Worker has not made any attempts at any forms of vocational rehabilitation, retraining or reeducation since she last worked in 2002 at the age of 51. Overall, the Staff Hearing Officer finds that the Injured Worker retains the skills, abilities and vocational assets as well as the physical ability pursuant to the above cited reports of Drs. Frank and Koppenhoefer, to perform alternative sedentary sustained remunerative employment activity and therefore, her application for permanent total disability compensation is denied.

{¶ 16} 9. On November 17, 2010, relator, Forresta L. Foster, filed this mandamus action.

Conclusions of Law:

{¶ 17} The commission, through its SHO, relied exclusively upon the reports of Drs. Frank and Koppenhoefer in determining relator's residual functional capacity.

{¶ 18} The issue is whether the reports of Drs. Frank and Koppenhoefer provide some evidence upon which the commission can and did rely to support its determination of residual functional capacity.

{¶ 19} Finding that the reports do provide the some evidence supporting the commission's determination, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 20} Again, in his report, Dr. Frank opines that relator "is permanently disabled from her previous employment" but is "capable of a sedentary job in which she sits all of the time." She has normal use of her upper extremities. Again, according to Dr. Frank, further limitations are:

> [S]he cannot stand at all; she cannot walk for more than 10 minutes at a time. She cannot squat and arise; she cannot go up and down stairs.

Again, in his report, Dr. Koppenhoefer opines that relator:

> [W]ould be limited to sedentary work. For ambulation she would need the use of a wheelchair or a motorized scooter. She would only be able to stand for a very brief period of time.

{¶ 21} Indicating acceptance of the reports of Drs. Frank and Koppenhoefer, the SHO concludes that relator:

> [I]s capable of performing some alternative sedentary sustained remunerative employment activities.

{¶ 22} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

{¶ 23} Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the rules.

{¶ 24} Ohio Adm.Code 4121-3-34(B)(2) sets forth the classification of the physical demands of work. Thereunder, Ohio Adm.Code 4121-3-34(B)(2)(a) provides:

> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶ 25} According to relator, she cannot perform any sedentary work as defined by the rule. This is so, according to relator, because the definition of sedentary work "contemplates walking and standing 'occasionally,' which is defined as 'up to one-third of the time.' " (Relator's brief at 12.) Relator further posits that "considering that there are 480 minutes in a typical eight-hour day, the rule provides that sedentary work requires walking and/or standing up to 160 minutes a day." (Relator's brief at 12.)

{¶ 26} The magistrate disagrees with relator's interpretation of the rule's definition of sedentary work. To begin, the rule states that sedentary work "<u>may</u> involve walking or standing for brief periods of time." (Emphasis added.) Thus, the ability to walk or stand is not a requirement for the performance of all sedentary work. Relator's interpretation of the rule simply ignores that sedentary work "<u>may</u> involve walking or standing for brief periods of time." (Emphasis added.)

{¶ 27} Under the rule, a job is not sedentary if walking and standing are required more than one-third of the time. Again, contrary to relator's assertion, sedentary work does not "require" the ability to walk or stand.

{¶ 28} The magistrate's analysis comports with this court's interpretation of the rule in *State ex rel. Wainer v. Indus. Comm.*, 10th Dist. No. 05AP-86, 2005-Ohio-6212. In *Wainer*, this court held that the definition of sedentary work does not require a worker to stand and walk occasionally and that the definition permits sedentary work even if a claimant is confined to a wheelchair.

{¶ 29} In short, relator's interpretation of the rule's definition of sedentary work has been previously rejected by this court in *Wainer*, a case not cited by the parties to this action.

{¶ 30} 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).