

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. James E. Gossett,	:	
Relator,	:	
v.	:	No. 11AP-456
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Container Management Company LLC,	:	
Respondents.	:	

D E C I S I O N

Rendered on May 24, 2012

Philip J. Fulton Law Office, and Ross R. Fulton, for relator.

*Michael DeWine, Attorney General, and Cheryl J. Nester, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS

TYACK, J.

{¶ 1} James E. Gossett filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio to grant him permanent total disability 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 decision, attached hereto, which contained detailed findings of fact and conclusions of law. 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 contained in the magistrate's decision and deny the request for a writ of mandamus.

Writ of mandamus denied.

BRYANT and KLATT, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. James E. Gossett,	:	
Relator,	:	
v.	:	No. 11AP-456
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Container Management Company LLC,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 22, 2012

Philip J. Fulton Law Office, and Ross R. Fulton, for relator.

*Michael DeWine, Attorney General, and Cheryl J. Nester, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS

{¶ 5} Relator, James E. Gossett, 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 his application for permanent total disability ("PTD") compensation and ordering the commission to find that he is entitled to that award.

Findings of Fact:

{¶ 6} 1. Relator sustained a work-related injury on May 31, 2005 and his workers' compensation claim has been allowed for the following conditions:

{¶ 7} Sprain left shoulder; sprain of neck, left; contusion of back; aggravation of pre-existing cervical disc protrusion at C6-C7; aggravation of pre-existing cervical spondylosis C6-C7.

{¶ 8} 2. Relator was 43 years old when he was injured.

{¶ 9} 3. In January 2010, relator was referred for vocational rehabilitation. As part of the vocational evaluation, relator was referred for a functional capacity evaluation ("FCE").

{¶ 10} 4. Relator was evaluated on March 11, 2010. In the FCE report, under the heading reliability and consistency of effort, the evaluator noted that "the results of this evaluation suggest that Mr. Gossett gave a marginally effort, with 11 of 15 consistency measures within expected limits." Specifically, the evaluator noted that testing was unreliable for walking and stooping as well as during grip testing. In conclusion, regarding relator's effort during the evaluation, the evaluator stated:

Test data and clinical observation indicate that the injured worker demonstrated marginally reliable effort during this functional capacity evaluation. Although the results of this evaluation represent the injured worker's safe physical abilities, objective data suggests that his actual abilities may be slightly higher than demonstrated in this FCE.

{¶ 11} Based on the testing, the evaluator set forth relator's functional limitations as follows:

The injured worker exhibits significant functional limitations with tasks that require dynamic flexion and extension of the spine or with tasks that require significant leg strength. He did not demonstrate ability to perform the following activities: Carry – 50 Lb, Crouch, Kneel, Climb Stairs.

Testing data and close observation indicate the injured worker is currently functioning in the Sedentary Physical Demand Category (PDC), which is restricted by his inability to carry on more than an occasional basis. He demonstrated lifting abilities within the Light Range, which includes the

ability to frequently lift 10 lb and occasionally lift 20 from floor to knuckle and from knuckle to shoulder. He demonstrated the ability to occasionally carry up to 20 lb and to push up to 31 lb. Cardiac recovery rates were normal, indicating average cardiovascular conditioning currently exists.

For reasons stated above the injured worker's job search should be within the Sedentary PDC. However, he is able to perform multiple tasks within the Light PDC. Additionally, consideration should be given to his positional tolerances which will also present significant functional restrictions.

{¶ 12} 5. Work Ready Services Ltd. provided a vocational evaluation report which incorporated the results of the FCE. According to the March 15, 2010 report, although relator was only 48 years old and a high school graduate, his reading and math skills were at a third-grade level. It was noted that relator attempted vocational rehabilitation approximately one year ago, but that his file was closed because he did not think he could do it. With regards to dexterity, testing indicated that his results were poor for both hands.¹ The evaluator also found that relator was severely depressed and anxious. The primary barriers to future work included his work history, functional abilities/limitations, the severity of his injury/pain, lack of transportation, his financial situation, his past legal history, the length of time from the date of injury to his referral for vocational rehabilitation, the last day worked, the local labor market, and employer/employee relationships. The evaluator further determined that relator had no transferable skills to sedentary work.

{¶ 13} 6. The BWC closed relator's file on March 18, 2010. The closure report indicates that relator was morbidly obese and had hypertension and depression. Relying on the FCE, it was noted that relator was limited to sedentary work, could not type, was unfamiliar with computers, was not able to relocate, wanted a job paying between \$13 and \$14 per hour in wages, had a valid driver's license, insurance and driving privileges, and a dependable car; however, he needed \$3,000 to get the car released to him. It was further

¹ However, according to the functional capacity evaluation, relator's bi-manual handling skills were near the national average and his bi-manual fingering skills were above the national average.

noted that relator could not work an eight-hour day, did not have the academic abilities to benefit from training, and had no transferable skills. In closing his file, it was concluded:

["]At the age of 48 with his barriers he would have trouble finding work. He does not have the ability to obtain and sustain remunerative employment." Both the MCO and BWC believe that he is not appropriate or feasible for vocational rehabilitation. Feasibility as defined by the BWC Chapter 4 guidelines states, "feasibility for vocational services means that there is a reasonable probability that the injured worker will benefit from services at this time and return to work as a result of these services." In short he can not obtain and sustain remunerative employment to which this case manager agrees.

{¶ 14} 7. Karen Gade-Pulido, M.D., examined relator on December 14, 2009. Relator self-reported that he continues to have pain in his neck, back, and left shoulder, at times he has headaches, occasional numbness and paresthesias in his neck, shoulder, and back. Relator uses a cane and rates his pain as a 9/10. Relator indicated that he is independent with his activities of daily living, but that long standing or sitting aggravates the pain in his back, neck, shoulder, and knee. Relator denied any trouble grasping or holding with his upper extremities. Relator indicated that he had not worked since the date of injury and had not tried vocational rehabilitation. Thereafter, Dr. Gade-Pulido identified the records which she reviewed, noted that relator was morbidly obese, but was in no acute distress. She noted that relator's cervical spine range of motion was guarded and mildly reduced in all directions and that his lumbar spine was similarly reduced in all directions. She noted that the range of motion of relator's left shoulder was full. Thereafter, Dr. Gade-Pulido opined that relator had reached maximum medical improvement ("MMI"), could not return to his former position of employment, but was capable of a sedentary to light-duty physical demand category of work. She noted that vocational rehabilitation had been attempted in the past, but that it had been unsuccessful because of a "lack of response from the injured worker."

{¶ 15} 8. Richard M. Ward, M.D., examined relator and, in a report dated August 23, 2010, Dr. Ward concluded that relator was incapable of returning to sustained remunerative employment due to his problems with his neck, back, and left shoulder. Dr. Ward completed a physical capacity evaluation wherein he noted that during an eight-

hour workday, relator could stand and walk less than one hour each, sit for four hours, occasionally lift up to ten pounds, could use his hands for repetitive simple grasping and fine manipulation, but not for pushing and pulling, could not use his feet for repetitive movements, was precluded from bending, squatting, crawling, and climbing ladders, but could occasionally climb stairs, and was not able to reach above shoulder level. In response to the question of whether relator's condition would likely deteriorate if he was placed under the stress associated with a job, Dr. Ward opined that it would not.

{¶ 16} 9. Relator was examined by James H. Rutherford, M.D. In his November 29, 2010 report, Dr. Rutherford identified the medical records which he reviewed, provided his physical findings upon examination, noted that relator's allowed conditions had reached MMI, assessed a 21 percent permanent partial impairment, and concluded that relator was capable of sedentary work activity with the additional restrictions of no overhead work activity for the left shoulder and no driving heavy equipment.

{¶ 17} 10. After the above-medical evaluations were completed, Beal D. Lowe, Ph.D., evaluated relator. His vocational assessment report is dated January 6, 2011. Dr. Lowe performed a file review and a telephone interview. Ultimately, Dr. Lowe concluded:

This assessment finds Mr. Gossett to be permanently and totally disabled as a result of his physical functional restriction, at best, to Sedentary employment and with consideration given to his history of Special Education and his lack of demonstrated clerical aptitude and other abilities and temperaments required to perform Sedentary employment.

Dr. Rutherford found Mr. Gossett to have residual physical capacity for Sedentary work.

Dr. Ward found him to lack capacity to perform even Sedentary work as a result of pain and cervical and upper extremity limitations.

As a result of his reported attendance in Special Education classes, and his presumed Below Average intelligence, in combination with only Below Average demonstrated clerical aptitude and his lack of demonstrated ability to Perform Exact and Accurate work and to Work in Close Contact with Other People, Mr. Gossett is found to lack capacity to

perform any entry level Sedentary clerical or retail occupation. On this basis, this assessment finds him to be permanently and totally disabled.

{¶ 18} 11. Relator's application was heard before a staff hearing officer ("SHO") on February 18, 2011. The SHO relied on the medical reports of Drs. Rutherford and Gade-Pulido and found that relator could engage in sustained remunerative employment. Although not required, the SHO identified jobs which fit within the unskilled, entry-level sedentary employee restrictions for individuals such as relator noting that these jobs do not require any transferable skills or a high school education. The SHO noted that the following jobs could be learned and performed while on the job in a matter of days, and that no rehabilitation programming was necessary:

Addresser, mailing house; assembler, small products; ampoule sealer; atomizer assembler; assembly press operator; batch assembler; bench hand; circuit board inspector; crate liner; cutter and paster; dowel inspector; election clerk; electrical accessories assembler; electronics worker; engraver; escort vehicle driver; final assembler; optical grids; food checker; gluer; greeter; hand packager; hand mounter; hand spreader; heat sealer; information clerk; inspector, eyeglass frames; lens inspector; machine engraver 1; microfilm document preparer; notch grinder; nut sorter; odd piece checker; order clerk, food and beverage; paint spray inspector; patcher; preparer; photo mounter; production inspector; semi-conductor bonder; semi-conductor inspector; small products assembler; small products inspector; soldering machine tender; sorter; sticker; stacker; surveillance system monitor; table worker; telephone solicitor; ticket seller; toggle-press folder and feeder; toy assembler; wire worker.

{¶ 19} In addressing the non-medical disability factors, the SHO specifically found that relator's age of 49 years was a positive vocational asset and that he still had 16 years of work life before reaching the standard retirement age of 65 years. The SHO also considered relator's high school education to be positive noting that, while relator self-reported that he attended special education classes, there was no evidence to corroborate that in the file. Instead, the SHO noted that, on his application, relator noted that he is able to read, write and perform basic math. The SHO determined that relator's educational level, in combination with the ability to read, write, and perform basic math,

would assist him in obtaining and performing entry-level, unskilled types of employment previously identified.

{¶ 20} The SHO identified relator's prior work history as a warehouse worker, drywall construction/driver for a construction company, dump truck driver, and cleaning and boarding houses. The SHO determined that these jobs demonstrated that relator had the ability to obtain and maintain steady employment, learn and perform the skills required of those jobs while on the job, as well as the ability to follow orders and work well with others. As such, the SHO determined that relator was not permanently and totally disabled and denied his application for PTD compensation.

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

Conclusions of Law:

{¶ 22} Relator asserts that he exhausted all avenues to gain re-employment and that the commission abused its discretion when it failed to consider his rehabilitation efforts as a factor in favor of awarding PTD compensation. Further, relator contends that there is no evidence to support the commission's finding that the non-medical factors permit him to engage in sustained remunerative employment.

{¶ 23} The magistrate finds that the commission was not required to consider his limited efforts at rehabilitation to be a positive factor and the commission's order finding that relator could perform some sustained remunerative employment is supported by some evidence.

{¶ 24} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 25} 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.*, 69 Ohio St.3d 693 (1994). 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.*, 31 Ohio St.3d 167 (1987). 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*, 68 Ohio St.3d 315 (1994). 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.*, 57 Ohio St.3d 203 (1991).

{¶ 26} PTD compensation is considered a compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. See *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250 (1997). Both courts and the commission demand a certain accountability of claimants who, despite the time and medical ability to do so, never try to further their education or to learn new skills. *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148 (1996).

{¶ 27} At the time relator was injured he was 43 years old. In terms of treatment, relator has received chiropractic treatment only. Although there is some discussion in the record that surgery has been or might be considered in the future, relator has only received conservative chiropractic treatment.

{¶ 28} In December 2009, when he was examined by Dr. Gade-Pulido, relator informed her that he had not tried any vocational rehabilitation. Relator was 48 years of age when Dr. Gade-Pulido examined him. Further, according to his PTD application which he completed on March 13, 2010, he had not sought any vocational rehabilitation at that time. His vocational effort was made after he completed an application for PTD compensation and before he filed it.

{¶ 29} Relator made one attempt at vocational rehabilitation and that was in March 2010 after he had decided to apply for PTD compensation. Before he began the

vocational rehabilitation, an FCE was conducted. As noted in the findings of fact, the examiner specifically indicated that relator gave marginal effort during the majority of the testing. Relator is a high school graduate who indicated on his PTD application that he could read, write, and perform basic math. However, the results of testing conducted in March 2010 revealed relator reads and performs basic math at the third-grade level. Although relator did not indicate on his PTD application that he was in special education classes in high school, he informed the evaluator that he had.

{¶ 30} In arguing that he exhausted all reasonable avenues at rehabilitation, relator quotes the following portion of the BWC vocational rehabilitation closure report:

["]At the age of 48 with his barriers he would have trouble finding work. He does not have the ability to obtain and sustain remunerative employment." Both the MCO and BWC believe that he is not appropriate or feasible for vocational rehabilitation. Feasibility as defined by the BWC Chapter 4 guidelines states, "feasibility for vocational services means that there is a reasonable probability that the injured worker will benefit from services at this time and return to work as a result of these services." In short he can not obtain and sustain remunerative employment to which this case manager agrees.

{¶ 31} Thereafter, relator cites this court's decision in *State ex rel Ramsey v. Indus. Comm.*, 10th Dist. No. 99AP-733 (Mar. 30, 2000), specifically pointing to the following sentence: "[W]here an injured workers [*sic*] has made serious efforts at rehabilitation but has not succeeded should be considered as a factor in favor of granting PTD compensation, especially where * * * the Bureau of Workers' Compensation's own reports demonstrated a failure to be rehabilitated despite the injured worker's best efforts."

{¶ 32} Robert Ramsey sustained a work-related injury in June 1994 while employed as a salesperson for a car dealership. Ramsey was 48 years of age and had a high school education.

{¶ 33} After his first application for PTD compensation was denied, Ramsey submitted to multiple evaluations performed by the commission's professional staff at the J. Leonard Camera Rehabilitation Center in January 1997. Julie Weinerman, M.D., indicated that Ramsey would benefit from a pain and stress management program where

he could receive reconditioning to improve his strength and endurance. At that time, Ramsey indicated that he was not interested in returning to work, but felt that the rehabilitation program might improve his quality of life and help him decide if he was interested in part-time work.

{¶ 34} Psychologist, Nancy Noble, Ph.D., evaluated Ramsey and indicated that he did not appear to be ready for a full-time rehabilitation program due to his chronic pain syndrome and that, in her opinion, his prognosis was poor.

{¶ 35} Following the evaluations, it was determined that Ramsey was an appropriate candidate for rehabilitation services in spite of the fact that the probability of successful rehabilitation and return to work was low. Noting that Ramsey was receiving Social Security Disability Benefits, had applied for PTD compensation, and that he did not consider himself able to return to full-time employment, it was noted that the most likely outcome of a successful rehabilitation program would be to accomplish substantial improvements in his quality of life.

{¶ 36} In December 1997, Ramsey's rehabilitation case manager indicated that Ramsey had completed all phases of the rehabilitation process, that he had been declared MMI, and that his rehabilitation case was being closed.

{¶ 37} In March 1998, when he was 52 years old, Ramsey submitted his second application for PTD compensation. Ramsey was examined by Robert Turner, M.D., who opined that he could return to his former position of employment as an automobile salesperson.

{¶ 38} Ramsey submitted a vocational report from Beal D. Lowe, Ph.D., who opined that Ramsey was employable only if found to retain the residual capacity for full-time sedentary employment.

{¶ 39} The commission requested an additional employability assessment from vocational expert Laurett M. Walther who listed several jobs which, in her opinion, Ramsey could perform.

{¶ 40} Following a hearing in January 1999, an SHO denied Ramsey's second application for PTD compensation after finding that he was capable of performing work within the restrictions set forth by Dr. Turner. The SHO concluded that Ramsey could perform the jobs identified in the Walther report. Thereafter, the SHO concluded:

The worker is fifty-two years of age (D.O.B. 01/07/1946), has completed High School, certifies himself as fully literate, has worked fourteen years as an automobile salesman, automobile parts store owner, and various other sales and manufacturing jobs. His sales experience is held to be transferable to the sedentary work for which Dr. Turner states that he is qualified.

* * *

This workers [*sic*] has the residual functions and skills to qualify for sustained employment, and the experience and education at the age of fifty-two to improve his position if he chooses to do so.

{¶ 41} Ramsey filed a mandamus action in this court and, after citing *Wilson* and acknowledging that a failure to participate in return-to-work activities can be considered a negative factor weighing against an award of PTD compensation, this court noted that it did not appear that the SHO had given any weight to Ramsey's efforts at rehabilitation. This court determined that:

[W]here an injured workers [*sic*] has made serious efforts at rehabilitation but has not succeeded should be considered as a factor in favor of granting PTD compensation, especially where, as here, the Bureau of Workers' Compensation's own reports demonstrated a failure to be rehabilitated despite the injured worker's best efforts.

Ramsey, 10th Dist. No. 99AP-733. However, this court did not provide Ramsey with *Gay* relief. *Id.*, 68 Ohio St.3d 315. Instead, the commission was ordered to issue an order which reflected appropriate consideration of Ramsey's rehabilitation efforts.

{¶ 42} Ramsey had participated in a vocational rehabilitation program which lasted one year. The program was coupled with a pain management program and the evidence indicated that, in spite of his positive factors towards re-employment, his chronic pain which followed two failed back surgeries was a significant barrier. In the present case, relator was evaluated; however, he did not participate in any rehabilitation—he was only evaluated. Further, the FCE which was relied upon by the evaluators indicated that relator only gave marginal effort during the testing. The magistrate finds that relator's case is distinguishable from *Ramsey* and that, contrary to relator's

arguments, the evidence does not show that the commission should have considered his efforts at rehabilitation as his best efforts to improve his abilities in order to return to work.

{¶ 43} Relator's second argument is that there was no evidence in the record to support the commission's finding that the non-medical factors permitted him to engage in sedentary employment. This magistrate disagrees.

{¶ 44} After finding that he was capable of performing sedentary work with no overhead lifting, the SHO listed several jobs which did not require any transferable skills and which did not even require a high school education. Relator's age of 49 years was considered to be a positive factor. The SHO also found his high school education to be a positive factor and noted that, although relator indicated that he had attended special education classes, there was no evidence in the record to substantiate that statement. Further, as the SHO noted, the jobs listed did not require a high school education.

{¶ 45} Lastly, the commission noted that his work history was positive as it demonstrated that he had the ability to obtain and maintain steady employment, the ability to learn and perform the skills required while on the job, as well as the ability to follow orders and work well with others. The SHO again referenced the jobs which were listed and indicated that relator could learn how to perform those jobs during on-the-job training.

{¶ 46} The commission is considered to be the exclusive evaluator of non-medical vocational factors. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997). The commission does not abuse its discretion by conducting its own non-medical analysis without reference to any of the other vocational evidence in the record. *Id.* In fact, the commission is free to accept or reject the vocational conclusions of its own vocational expert. *State ex rel. Ellis v. McGraw Edison Co.*, 66 Ohio St.3d 92 (1993); *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139 (1996). Further, pursuant to *Noll*, the commission is not required to list the evidence it considered nor is the commission required to explain why it did not rely on certain evidence. *Id.*, 57 Ohio St.3d 203.

{¶ 47} Further, with regard to relator's argument that the commission was required to discuss his rehabilitation potential, case law indicates otherwise. *See State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579 (1997). In that case, the Supreme Court

of Ohio determined that where the commission finds that the claimant can perform sustained remunerative employment on a sedentary or light-duty basis regardless of any rehabilitation efforts, such factor is not determinative to eligibility and the commission is not required to discuss it. As indicated previously, the SHO determined that there were a number of jobs which relator could perform immediately with no transferable skills and without a high school education. The magistrate finds that the commission's analysis was sufficient.

{¶ 48} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by denying his application for PTD compensation and this court should deny his request for a writ of mandamus.

/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).