

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sandra A. Fontaine,	:	
Relator,	:	
v.	:	No. 11AP-503
Saint Margaret Hall and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 12, 2012

Becker & Cade, and *Dennis A. Becker*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Sandra A. Fontaine, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her application for permanent total disability ("PTD") compensation and to enter a new order granting said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings

of fact and conclusions of law, which is appended hereto. The magistrate concluded that the commission did not abuse its discretion in denying relator's application for PTD compensation. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision. While not challenging any of the magistrate's findings of fact, relator does challenge the magistrate's legal conclusions that (1) the commission's order complies with the requirements of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), (2) the commission relied on some evidence, (3) the analysis of non-medical factors met the requirements of the law, and (4) relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation.

{¶ 4} Relator's objections, however, fail to raise any new issues and simply reargue the contentions that were presented to and addressed by the magistrate. For the reasons set forth in the magistrate's decision, we do not find relator's objections well-taken.

{¶ 5} Accordingly, we overrule relator's objections to the magistrate's decision.

{¶ 6} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

FRENCH and CONNOR, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sandra A. Fontaine,	:	
Relator,	:	
v.	:	No. 11AP-503
Saint Margaret Hall and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 28, 2012

Becker & Cade, and Dennis A. Becker, for relator.

Michael DeWine, Attorney General, and Kevin J. Reis, for respondent.

IN MANDAMUS

{¶ 7} Relator, Sandra A. Fontaine, 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 her application for permanent total disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶ 8} 1. Relator sustained a work-related injury on March 13, 2003 and her workers' compensation claim has been allowed for the following conditions: "sprain lumbar region; herniated nucleus pulposus L4-5 and L5 radiculopathy; major depressive

disorder, single episode moderately severe, without psychotic features. Disallowed: aggravation of lumbar facet degenerative changes at L4-5 and L5-S1." The allowed psychological condition was allowed following a hearing before a district hearing officer ("DHO") on August 21, 2009.

{¶ 9} 2. According to her PTD application, relator was 54 years of age when she was injured. Relator graduated high school and obtained two bachelor of science degrees: a degree in education and in health education. Relator was trained as a licensed practical nurse and was working in a nursing position at the time she was injured. Relator indicated on her application that she was able to read, write, and perform basic math and indicated that she had not participated in any rehabilitation services. Relator did indicate, however, a willingness to participate in rehabilitation services if deemed appropriate and if the rehabilitation could return her to similar work.

{¶ 10} 3. Relator was referred for consideration of vocational services. However, because her physician of record indicated that she was not medically stable, she was deemed not feasible and no services were provided.

{¶ 11} 4. Relator submitted the July 16, 2010 report of Bruce F. Siegel, D.O., in support of her application. Dr. Siegel noted that relator had undergone two surgical interventions, a lumbar fusion in 2006, and the removal of the metal hardware in 2007. After providing his physical findings upon examination, Dr. Siegel opined that relator was incapable of engaging in sustained remunerative employment and was permanently and totally disabled.

{¶ 12} 5. elator also submitted the August 2, 2010 report from William C. Melchior, Ed.D., a licensed psychologist. Dr. Melchior noted that relator was receiving psychological treatment consisting of individual psychotherapy with a focus on pain and stress management, learning to accept limitations, decreasing her depressive symptomatology, and that she was currently being seen on a biweekly basis. He opined that relator's allowed psychological condition had reached maximum medical improvement ("MMI") in June 2010. Dr. Melchior noted the following symptoms, including:

[I]mpaired cognitive skills (concentration, attention and short-term memory), a low stress/frustration tolerance,

emotional liability, fatigue, impaired sleep, anxiety, social withdrawal and chronic pain.

Thereafter, Dr. Melchior noted that relator had a number of restrictions or limitations, such as difficulty with:

[R]emembering and following instructions, maintaining attention for extended periods of time, accepting criticism appropriately, working without being distracted by others, and attending work on a regular, prompt schedule. Additional results from the side effects of her pain medications which further impair her ability to concentrate.

Dr. Melchior concluded that vocational rehabilitation was prohibited due to relator's impaired cognitive skills and chronic pain and that, given the combination of her restrictions, she was permanently and totally disabled from gainful employment.

{¶ 13} 6. Relator was examined by Richard T. Sheridan, M.D. In his October 13, 2010 report, Dr. Sheridan identified the medical records which he reviewed, provided his physical findings upon examination, opined that relator's allowed physical conditions had reached MMI, assessed a 21 percent whole person impairment, and concluded that she could perform sedentary work.

{¶ 14} 7. James R. Hawkins, M.D., examined relator for her allowed psychological condition. In his October 29, 2010 report, Dr. Hawkins identified the medical records which he reviewed and opined that relator had a "Class 2" or mild impairment with regards to the activities of daily living and social function and that she had a "Class 3" moderate impairment with regards to concentration and adaptation. Dr. Hawkins opined that relator's allowed psychological condition had reached MMI, assessed 25 percent whole person impairment, and concluded that relator was capable of working in a simple, low-stress job provided that she had the ability to move about.

{¶ 15} 8. The record also contains a vocational assessment prepared by William T. Cody dated December 15, 2010. Mr. Cody opined that, when considering her age of 62 years, her work history and jobs to which she could not physically return, as well as her significant physical impairments and psychological limitations, she was an inappropriate candidate for participating in a vocational rehabilitation program and was permanently and totally occupationally disabled.

{¶ 16} 9. Relator's application was heard before a staff hearing officer ("SHO") on March 2, 2011. The SHO relied on the medical reports of Drs. Sheridan and Hawkins and concluded that relator could perform work within the following restrictions:

The Hearing Officer finds that the Injured Worker has reached maximum medical improvement for the recognized conditions in this claim. The Hearing Officer finds that the Injured Worker is unable to return to her former position of employment when considering both the physical conditions in the claim and the allowed psychological condition in the claim. The Hearing Officer finds that the Injured Worker retains the residual functional capacity to perform sedentary work activity when considering the physical conditions in the claim. In addition, the Hearing Officer finds that the Injured Worker retains the capacity to return to some type of employment when considering the psychological condition in the claim provided that the employment involves a low amount of stress.

Thereafter, the SHO considered the nonmedical disability factors. The SHO acknowledged that the fact that relator was 62 years of age was not a positive factor. However, recognizing that age alone is not an absolute barrier to re-employment, the SHO considered her education and work history to be positive factors which rendered her not permanently and totally disabled. Specifically, the SHO stated:

The Hearing Officer finds that the Injured Worker's education and prior work history both are positive vocational factors when evaluating her ability to return to the work force. The Injured Worker has demonstrated the intellectual ability to obtain college degrees and undergo the licensing requirements to work as a licensed practical nurse. She has demonstrated the drive to return to school after a period in the work force to better herself and develop new skills. In addition, she worked as an instructor training nurse aides, a position which involved communication skills and the ability to demonstrate jobs to others. She indicated on her application that she was required to demonstrate to prospective aides all aspects of nursing care, including use of equipment and the procedures of the nursing facility. She also was required to ensure that the facility was adhering to state laws regarding nursing guidelines. In addition, part of the training job involved following up to make sure that the aides had learned what was required. The injured worker also supervised nurse aides in her employment as a licensed

practical nurse. The injured worker has demonstrated communication and teaching skills, the ability to complete required paperwork and monitor compliance with nursing policies and laws, and supervisory skills. The Hearing Officer finds that these skills would be an asset to the injured worker in an attempt to re-enter the workforce. Even with her limitation to low stress jobs, the Hearing Officer finds her wide and varied array of skills obtained from her work as a nurse and instructor would transfer to entry level sedentary work. The Hearing Officer finds that the Injured Worker has the intellect to re-enter the work force at a sedentary job and learn the new work rules and procedures which may be required.

{¶ 17} 10. Relator's request for reconsideration was denied by order of the commission mailed April 16, 2011. (p 16)

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

Conclusions of Law:

{¶ 19} Relator contends that the commission's order denying her PTD compensation does not comply with the requirements of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). Relator does not challenge the commission's reliance on the reports of Drs. Sheridan and Hawkins; however, relator contends that the commission's vocational analysis failed to explain how, given her restrictions, she could perform some sustained remunerative employment.

{¶ 20} The magistrate finds that the commission's order complies with the requirements of *Noll*, that the commission relied on some evidence, that the analysis of the non-medical factors met the requirements of the law, and that relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation.

{¶ 21} 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).

{¶ 22} The relevant inquiry in a determination of permanent total disability is 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).

{¶ 23} To the extent that relator challenges the medical evidence at all, relator contends that the commission did not properly consider her restrictions. Specifically, relator contends that the commission relied upon the reports of Drs. Sheridan and Hawkins and summarily concluded that relator was capable of performing sedentary employment of a low stress nature "without commenting upon the restrictions that such work not only be low stress, but be simple, with the ability to move about, and meaningfully discuss how the restrictions of a moderate impairment in the ability of concentration and adaptation would impact the ability to perform sedentary occupations." (Relator's brief at 7.) According to relator, the commission's failure to specifically indicate the restrictions in the same manner in which the doctors did, indicates that the commission did not properly consider those restrictions. For the reasons that follow, this magistrate disagrees.

{¶ 24} Relator contends that there are no low stress, simple sedentary jobs available that would provide relator with the ability to move about. It appears that relator is asking the commission to specifically identify simple, low stress sedentary jobs that

would provide her with the ability to move about; however, the commission is not required to provide a list of possible jobs which a claimant could perform. *State ex rel. Mann v. Indus. Comm.*, 80 Ohio St.3d 656 (1998). The fact that the commission did not identify any specific jobs does not constitute an abuse of discretion.

{¶ 25} Relator also contends that the commission was required to specifically discuss how the fact that she was moderately impaired in her ability to concentrate and adapt would impact her ability to perform sedentary occupations.

{¶ 26} Again, the magistrate disagrees with relator's argument. Dr. Hawkins concluded that relator had a 25 percent whole person impairment and that she could work despite the fact that she was moderately impaired in her ability to concentrate and adapt. Relator again appears to argue that no such jobs exist; however, the magistrate notes that relator has offered no proof of this assertion. Both Drs. Siegel and Hawkins concluded that relator was able to perform work with certain restrictions. The restrictions noted by Drs. Siegel and Hawkins are rather minimal and ultimately the commission found that, given her education and work history, relator could perform some sustained remunerative employment. This is not like the situation in *Mann* where the Ohio Supreme Court found that the commission's reference to " 'sedentary low stress positions in the food service industry' " merited further explanation because the food service industry is "traditionally considered neither low stress nor sedentary." *Id.* at 659. The magistrate finds that the commission's discussion was sufficient, especially when considering the commission's analysis of the non-medical disability factors.

{¶ 27} Relator earned two college degrees and was able to complete the licensing requirements to work as a licensed practical nurse. The commission noted that this demonstrated that relator had the drive to return to school after a period in the workforce in order to better herself and develop new skills. Further, the commission noted that relator worked as an instructor training nurses' aides in all aspects of nursing care and was also required to demonstrate jobs to others which included the use of equipment. The commission noted further that relator was required to ensure that faculty was adhering to state laws regarding nursing guidelines, was required to follow-up and make sure that aides had learned what was required, and that she supervised aides as part of her employment as a licensed practical nurse. The commission concluded that relator's

past jobs had provided her with communication and teaching skills, demonstrated an ability to complete required paperwork and monitor compliance, and supervisory skills. The commission determined that these transferable skills were an asset that would permit her to return to work.

{¶ 28} Pursuant to Ohio Adm.Code 4121-3-34(B)(3)(b)(iv), a high school education or above means that a claimant has abilities in reasoning, arithmetic, and language skills at a 12th grade education level or above and can perform semi-skilled through skilled work. Further, Ohio Adm.Code 4121-3-34(B)(3) specifically notes that transferable skills which an individual has obtained may qualify that individual for some other type of employment.

{¶ 29} Relator does not dispute that education is a positive vocational factor nor does she dispute that her work history is a positive vocational work factor. The magistrate finds that the commission did not abuse its discretion in finding that her education and work history were positive factors. The commission did note that relator's age of 62 years was not a positive factor. However, the Ohio Supreme Court has stated on numerous occasions that there is no age, ever, at which re-employment is held to be a virtual impossibility as a matter of law. *State ex rel. Ellis v. McGraw Edison Co.*, 66 Ohio St.3d 92 (1993).

{¶ 30} Relator also cites *State ex rel. Libecap v. Indus. Comm.*, 83 Ohio St.3d 178 (1998), and *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. No. 03AP-684, 2004-Ohio-3841, and argues that the commission abused its discretion by relying on a physician's "bottom line" identification of work capacity. She argues that her limitations are such that there is no sedentary work which she can perform. Relator states that, where a claimant's "functional abilities [are] so limited that only brief periods of work activities would be possible," that claimant is not capable of performing some sustained remunerative employment. *State ex rel. Clevite Elastomers v. Torok*, 10th Dist. No. 02AP-116, 2002-Ohio-4770, ¶ 20.

{¶ 31} Contrary to her assertions, relator's functional limitations are not substantial. Relator's only limitations are that the work be sedentary, relatively simple, and that she have the ability to move about. While she is moderately limited in

concentration and adaptation, relator has not established that there are no simple jobs that meet that definition.

{¶ 32} Relator is asking this court to reweigh the evidence; however, that is not the province of this court. Instead, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder and it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *Teece*, 68 Ohio St.2d 165, and *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996).

{¶ 33} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation and this court should deny her 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).