[Cite as *State ex rel. Franklin Cty. Bd. of Commrs. v. Indus. Comm.*, 2012-Ohio-3438.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cheryl J. Nicholson,	:	
Relator,	:	
v.	:	No. 11AP-436
Industrial Commission of Ohio and W.C. National Mailing Corporation,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 31, 2012

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

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

SADLER, J.

{¶1} Relator, Cheryl J. Nicholson, commenced this original action requesting this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying an award of permanent total disability ("PTD") compensation and to enter an order granting PTD compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate examined and discussed two issues: (1) whether the reports of Dr. Boyd W.

Bowden constitutes some evidence that relator is medically able to perform some types of sedentary work given the commission's definition of sedentary work, and (2) whether the commission abused its discretion in its consideration of the nonmedical factors. The magistrate determined that the commission did not abuse its discretion in its consideration of the nonmedical factors, and that the reports of Dr. Bowden do constitutes some evidence upon which the commission can and did rely. Accordingly, the magistrate recommended this court deny the requested writ of mandamus.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, the requested writ of mandamus is denied.

Writ of mandamus denied.

KLATT and CONNOR, JJ., concur.

A P P E N D I X

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Industrial Commission of Ohio and W.C. National Mailing Corporation,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on March 19, 2012

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

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 5} In this original action, relator, Cheryl J. Nicholson, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶ 6} 1. On March 15, 1994, relator sustained an industrial injury while employed as a "sorter" for respondent, W.C. National Mailing Corporation, a state-fund employer. The industrial claim (No. 94-351306) is allowed for:

> Ulnar neuropathy left arm; tenosynovitis left wrist; reflex sympathetic dystrophy left hand.

{¶ 7} 2. On December 10, 2009, at relator's own request, she was examined by orthopedic surgeon Richard M. Ward, M.D. In his two-page narrative report, Dr. Ward concludes:

> As a result of the history and my examination, I believe Cheryl Nicholson was injured as described on 3-15-1994. As a direct result of that injury Cheryl Nicholson has the allowances of left arm ulnar neuropathy, left wrist tenosynovitis, and left hand reflex sympathetic dystrophy. The significance is that after I saw her on 1-17-2005, she was awarded 41% impairment. At the time I saw her in January of 2005, she did have 17 kg of grip strength in her non dominant left hand. This is severely reduced now to only 9 kg of grip strength and this is evidence of substantial worsening of her condition and because of this, she should be entitled to an additional 5% impairment. That would bring her current impairment rating to 46%.

{¶ 8} 3. On March 12, 2010, relator filed an application for PTD compensation. In support, relator submitted the December 10, 2009 report of Dr. Ward.

{¶ 9} 4. Under the "Education" section of the PTD application, relator was asked "What is the highest grade of school you completed?" In response, relator wrote "12." However, relator also checked the "no" box to indicate that she did not graduate from high school. Her schooling ended because "father broke back had to work." She has not attended a trade or vocational school nor has she had any special training. She has not obtained a certificate for passing the General Educational Development test ("GED").

{¶ 10} 5. The application form posed three questions to relator: (1) "Can you read?" (2) "Can you write?" and (3) "Can you do basic math?" Given the choice of "yes," "no," and "not well," relator selected the "yes" response for all three queries.

{¶ 11} 6. Under the "Work History" section of the application, relator indicated that she has worked "odd jobs" in "car sales." She also worked as a "waitress."

{¶ 12} 7. On April 20, 2010, at the commission's request, relator was examined by Boyd W. Bowden, M.D. In his three-page narrative report dated April 21, 2010, Dr. Bowden wrote:

> OBJECTIVE FINDINGS:
>
> She was examined for ulnar neuropathy, tenosynovitis of the left wrist, reflex sympathetic dystrophy. At the time of the examination, there was no sign of tenosynovitis of the left wrist. There is no sign of a reflex dystrophy of the left hand. There is a sign of ulnar neuropathy. In examining the hand, all reflexes are in and all extensors are in. A 2 point discrimination was noted greater than 25 millimeters. On the left hand, all nerves involved, both median and ulnar. No thenar atrophy was noted. A good sweat pattern was noted. Pinch on the left hand was 2.5 kilograms and on the right was 15 kilograms. Grip strength, utilizing the J.M.R. Grip Strength, at Position 1 being the narrowest, 25 kilograms right for left; at Position 2, 24 right and 11 left; at Position 3, 24 right and 8 left; at Position 4, 24 right and 10 left; at Position 5, 21 right and 4 left.
>
> Sensitivity was noted over the ulnar incision from a decompression of the ulnar nerve. Also a slight scar from a carpal tunnel release was noted.
>
> Since the allowed condition is in the ulnar nerve, for the tenosynovitis of the left wrist, there is a 0% impairment and for the reflex sympathetic dystrophy, no sign, there is a 0% impairment. For the ulnar neuropathy, utilizing Page 492, Figure 16-15, Guides to the Evaluation of Permanent Impairment, 5th Edition, a 14% impairment was noted. Utilizing Figure 16-3 on Page 439, converting upper extremity to whole person, an 8% whole person impairment is established.
>
> DISCUSSION:
>
> 1. Has the Injured Worker reached maximum medical improvement with regard to each specified condition?:

> It is the feeling of this examiner that the claimant has reached maximum medical improvement.
>
> 2. Based on the A.M.A. Guides, 5th Edition, please provide the estimated percentage of whole person impairment arising from each of the allowed conditions. Please indicate 0 if there is no impairment for a given allowance.:
>
> An 8% whole person impairment is established for the ulnar nerve.
> 3. Complete the enclosed Physical Strength Rating.:
>
> The activity chart has been filled out.
>
> She does have median nerve signs but this is not on her claim.

{¶ 13} 8. On April 20, 2010, Dr. Bowden completed a Physical Strength Rating form. On the form, Dr. Bowden indicated by his checkmark that relator is capable of "sedentary work."

{¶ 14} Beneath the definition of sedentary work, the form asks the physician "[f]urther limitations, if indicated." In response, Dr. Bowden wrote:

> Full use of Dominant [Right]. [Left] limit grip + pinch to 5 lbs.

{¶ 15} 9. Following a July 16, 2010 hearing, a staff hearing officer ("SHO") issued an order denying relator's application for PTD compensation. The order explains:

> The Injured Worker was examined on behalf of the Industrial Commission by Dr. Bowden on 04/20/2010. Dr. Bowden in his report of 04/21/2010 states that the Injured Worker has no current impairment related to the allowed condition of REFLEX SYMPATHETIC DYSTROPHY LEFT HAND. As regards the rest of the allowed conditions of ULNAR NEUROPATHY LEFT ARM; TENOSYNOVITIS LEFT WRIST, Dr. Bowden states the Injured Worker has an 8 % permanent partial impairment and that she is limited to sedentary work.
>
> The claim allowance is limited to the left arm. Although Dr. Bowden limited the Injured Worker to sedentary work, there are no allowances to other parts of the body. The Injured Worker has no allowance related to her dominant right arm.

She has no allowance to her back or the body parts that would limit her mobility.

The Injured Worker is currently 62 years of age. She testified at hearing that she has a limited education of 10 years. She also testified at hearing that she left school early to work because of her Father's illness. In her application, it appears that she has 12 years of education. Dr. Bowden in his report states Injured Worker has a high school education. For the purposes of this application, it will be accepted that she attended school only through the 10th grade.
She did indicate on her application that she can read, write and perform basic math. She confirmed at hearing that she can read, write and perform basic math.

The Injured Worker has a spotty work history or at least she testified at hearing to a spotty work history. She testified to working part time as a waitress at Scioto Downs in 1970 and 1971. She stated the race track was only open in the warmer parts of the year and that she only worked about 100 days of the year. She testified that she did not work again, at least for an employer, until the job with the Employer of record in 1994. She testified that she only worked at this job for a few months before she was injured. She testified that she then worked as a phone solicitor for a realtor for 3 to 4 months. She then stated she began to work for Ricart. She says she worked for Ricart in a position of Customer Relations Manager. She said she worked this job for between 3 and 7 years. Her testimony regarding dates and times worked was vague and unclear. She stated that she was fired from the job with Ricart because she failed to meet sales quotas. She was vague regarding what this requirement entailed in her testimony.

She testified that she was contacted by rehabilitation services in 2008. She stated that she declined services at that time because she was caring for her sick husband.

The Injured Worker is currently 62 years of age. She can read and write and perform basic math. Based on her application, it appears she has the ability to communicate in writing. Although she seemed evasive with her answers at hearing, she demonstrated that she had the ability to speak clearly and with proper English. She has a spotty work history, but she does have some sedentary work experience.

> At age 62 with a limited work history, the Injured Worker's desire to return to any type of work is questionable. Her lack of employment over the years appears to be primarily a personal choice. She does have limitations in the use of her left arm, but she has the complete and total ability to use her dominant right hand. She has never participated in a rehabilitation program. She stated that she made some attempt when she was young to obtain her G.E.D. and attend classes, but she quit because she was too busy raising her children.
>
> Permanent total disability is an award of last resort. An Injured Worker is required before receiving this award to make a good faith effort to return to work. The Injured Worker has not established any good faith effort to return to work or to rehabilitate herself for employment. Pursuant to Dr. Bowden she retains the ability to work. She would appear to have the intellectual ability, if motivated, to work in some capacity within the limitations related to her left arm injury.

(Emphasis sic.)

{¶ 16} 10. On May 11, 2011, relator, Cheryl J. Nicholson, filed this mandamus action.

Conclusions of Law:

{¶ 17} Two issues are presented: (1) whether the reports of Dr. Bowden constitutes some evidence that relator is medically able to perform some types of sedentary work given the commission's definition of sedentary work, and (2) whether the commission abused its discretion in its consideration of the nonmedical factors.

{¶ 18} The magistrate finds: (1) the reports of Dr. Bowden do constitute some evidence that relator is medically able to perform some types of sedentary work, and (2) the commission did not abuse its discretion in its consideration of the nonmedical factors.

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

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

{¶ 21} Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the adjudication of PTD applications.

{¶ 22} Ohio Adm.Code 4121-3-34(B)(2) is captioned "Classification of physical demands of work."

{¶ 23} Thereunder, the following definition is set forth in Ohio Adm.Code 4121-3-34(B)(2)(a):

> "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.

{¶ 24} In *State ex rel. Howard v. Millennium Inorganic Chems.*, 10th Dist. No. 03AP-637, 2004-Ohio-6603, ¶9, this court had occasion to review basic law pertinent here:

> [*State ex rel. Libecap v. Indus. Comm.*, 10th Dist. No. 96APD01-29 (Sept. 5, 1996), *affirmed*, 83 Ohio St.3d 178 (1998)] has been cited for the proposition that, "where a physician places the claimant generally in the sedentary category but has set forth functional capacities so limited that no sedentary work is really feasible * * * then the commission does not have discretion to conclude based on that report that the claimant can perform sustained remunerative work of a sedentary nature." *State ex rel. Owens Corning Fiberglass v. Indus. Comm.*, 10th Dist. No. 03AP-684, 2004-Ohio-3841, ¶ 56. The "commission cannot rely on a physician's 'bottom line' identification of an exertional category but must base its decision on the specific restrictions imposed by the physician in the body of the report." Ibid. The court in *Owens Corning* went on to explain:
>
> > In *Libecap*, the problem was not that the doctor's report was defective because claimant was placed in the sedentary category. Doctors may be unaware of legal criteria and the doctor in that case had set forth

> clear and unambiguous functional restrictions in his discussion that would permit short periods of sedentary activity. Rather, the problem was with the *commission's* finding of capacity for sedentary, sustained remunerative employment based on a report that, read in its entirety, clearly precluded sustained remunerative employment of a sedentary nature.
>
> Conversely, where a physician's checklist states that the claimant is medically precluded from performing any sustained remunerative employment but where the narrative report, read in its entirety, clearly and unambiguously sets forth a capacity for sustained remunerative employment, then the commission lacks discretion to rely on that report for a finding of medical inability to perform any sustained remunerative employment.

Id. at ¶ 56-57. (Emphasis sic.)

{¶ 25} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions or fails to clarify an ambiguous statement. *Id.*

{¶ 26} A physician's report can be so internally inconsistent that it cannot be some evidence supporting the commission's decision. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445, 449 (1994); *State ex rel. Taylor v. Indus. Comm.*, 71 Ohio St.3d 582, 585 (1995).

{¶ 27} Citing *Howard* and the cases discussed therein, as well as *Eberhardt*, *Lopez*, and *Taylor*, relator contends that Dr. Bowden's opinion that the industrial injury permits restricted sedentary work is inconsistent with Dr. Bowden's restrictions which relator claims preclude all sustained remunerative employment. The magistrate disagrees.

{¶ 28} As earlier noted, Dr. Bowden indicated that, while relator retains the full use of her dominant right hand, her grip and pinch is limited to five pounds on the left hand.

{¶ 29} Relator focuses on the part of the definition stating that sedentary work means exerting up to ten pounds of force occasionally, where occasionally means that the activity exists up to one-third of the time. According to relator, because she cannot exert ten pounds of force with her left hand, she cannot perform any sedentary work.

{¶ 30} But relator ignores the part of the definition stating that sedentary work can mean the exertion of a "negligible amount of force frequently" where frequently means the activity exists from one-third to two-thirds of the time.

{¶ 31} Alternatively, relator seems to suggest that, to be capable of any sedentary work, the claimant must be able to exert up to ten pounds of force occasionally and be able to exert a negligible amount of force frequently.

{¶ 32} Relator simply misreads the clear meaning of the language of the rule defining sedentary work.

{¶ 33} Undisputedly, even with the left-hand limitation of five pounds of grip and pinch, relator is fully capable of exerting a negligible amount of force frequently with either hand. For example, relator is capable of typing or keystroking with her fingers on a typewriter or keyboard.

{¶ 34} In short, Dr. Bowden's reports are indeed some evidence that relator is medically able to perform some types of sedentary work.

{¶ 35} As earlier noted, the second issue is whether the commission abused its discretion in its consideration of the nonmedical factors.

{¶ 36} The Supreme Court of Ohio has repeatedly addressed the obligation of a PTD claimant to undergo opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525 (1995); *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148 (1996); *State ex rel. Wood v. Indus. Comm.*, 78 Ohio St.3d 414 (1997); *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250 (1997); *State ex rel. Cunningham v. Indus. Comm.*, 91 Ohio St.3d 261 (2001).

{¶ 37} In *B.F. Goodrich* at 529, the court states:

> The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forgo retraining opportunities that could enhance re-employment opportunities. An award

> of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

{¶ 38} In *Wilson* at 253-54, the court states:

> We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

{¶ 39} Early in the order, the SHO characterizes relator's work history as spotty.

{¶ 40} In the fourth to the last paragraph of the order, the SHO indicates that relator testified that she was contacted by rehabilitation services in 2008, but she declined services at that time because she was caring for her sick husband.

{¶ 41} The last two paragraphs of the order appear to be a continuing discussion or analysis of the rehabilitation issue:

> At age 62 with a limited work history, the Injured Worker's desire to return to any type of work is questionable. Her lack of employment over the years appears to be primarily a personal choice. She does have limitations in the use of her left arm, but she has the complete and total ability to use her dominant right hand. She has never participated in a rehabilitation program. She stated that she made some attempt when she was young to obtain her G.E.D. and attend classes, but she quit because she was too busy raising her children.
>
> Permanent total disability is an award of last resort. An Injured Worker is required before receiving this award to make a good faith effort to return to work. The Injured Worker has not established any good faith effort to return to work or to rehabilitate herself for employment. Pursuant to Dr. Bowden she retains the ability to work. She would appear to have the intellectual ability, if motivated, to work

> in some capacity within the limitations related to her left arm injury.

{¶ 42} Within the last two paragraphs of the order, relator characterizes the following as an "incorrect legal statement" (relator's brief, 16):

> An Injured Worker is required before receiving this award to make a good faith effort to return to work. The Injured Worker has not established any good faith effort to return to work.

{¶ 43} It seems clear to this magistrate that the SHO viewed a good faith rehabilitation effort as a "good faith effort to return to work." Thus, relator's suggestion that the SHO applied an incorrect legal standard lacks merit.

{¶ 44} Relator asserts that all of the nonmedical factors are negative, and thus, rehabilitation efforts or the lack thereof, are "irrelevant." (Relator's brief, 16.) Relator is mistaken. Not all of the nonmedical factors are undisputedly negative, as relator claims. Relator can read, write, and perform basic math well. *State ex rel. West v. Indus. Comm.*, 74 Ohio St.3d 354 (1996) (the claimant's selection of the "not well" response to the three queries need not be interpreted negatively).

{¶ 45} Also, the SHO determined that relator appears to have "intellectual ability." That would clearly be a positive factor.

{¶ 46} Moreover, relator incorrectly suggests that the order is flawed because the SHO did not specifically find transferrable skills.

{¶ 47} Ohio Adm.Code 4121-3-34(B)(3)(c)(iv) provides:

> "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

{¶ 48} Lack of transferrable work skills does not mandate a PTD award. *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 142 (1996).

{¶ 49} Clearly, contrary to relator's suggestion, the order is not flawed for the absence of a discussion regarding the existence or nonexistence of transferrable skills. *Id*.

{¶ 50} In short, the commission did not abuse its discretion in its consideration of the nonmedical factors.

{¶ 51} Accordingly, 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).