

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sherrill K. Songer,	:	
Relator,	:	
v.	:	No. 11AP-599
Access Nursing Care, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on September 25, 2012

Mark R. Naegel, for relator.

Michael DeWine, Attorney General, and *John Smart*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Sherrill K. Songer, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her June 30, 2009 motion for readjustment of the start date for her award of permanent total disability ("PTD") compensation and to enter an order granting said motion.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(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. Noting that the commission is

exclusively responsible for weighing and interpreting medical reports, the magistrate found that the staff hearing officer ("SHO") did not abuse his discretion when he determined that Dr. Sachs' opinion did not support a readjustment of the start date for relator's PTD compensation. The magistrate pointed out that Dr. Sachs' opinion provided only a speculative timeframe for determining the requested readjustment start date and it failed to cite a specific incident or date when relator's symptoms increased to the point of rendering relator PTD. Given the absence of more specific information in Dr. Sachs' report, the magistrate determined that the SHO did not abuse his discretion. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed eight objections to the magistrate's decision. In her first two objections, relator contends the magistrate erred in his legal analysis when he noted that the SHO's June 11, 2009 order could be reopened only by the commission's exercise of continuing jurisdiction. According to relator, the magistrate's analysis is contrary to the expressed policy set forth in memo 63 of the commission. Relator's argument is of no consequence because the merits of relator's argument regarding the readjustment of her PTD start date was decided in the SHO's November 4, 2009 order. Although the magistrate noted that there may have been an issue regarding the exercise of continuing jurisdiction following the SHO's June 11, 2009 decision, that issue played no part in the SHO's November 4, 2009 order, nor the subsequent appeal of that order. Therefore, we overrule relator's first two objections.

{¶ 4} In her third and fourth objections, relator argues the magistrate failed to address her argument that the SHO's June 11, 2009 order granting relator PTD beginning on the date of Dr. Sachs' report violated *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1990). Relator is correct that the magistrate did not specifically address this issue. Nevertheless, we fail to see how the SHO's June 11, 2009 order violates *Noll*.

{¶ 5} In that order, the SHO used the date of Dr. Sachs' report as the start date for PTD. The record reflects that Dr. Sachs' report was the first evidence indicating that relator was PTD. The date of the report itself is some evidence supporting the SHO's order and does not require further explanation. What relator really objects to is the SHO's rejection of her argument for an earlier start date in his June 11, 2009 order. The SHO's November 4, 2009 order explains the reasons for rejecting relator's argument for

an earlier start date for PTD compensation. Therefore, we see no basis for a *Noll* violation. For these reasons, we overrule relator's third and fourth objections.

{¶ 6} In her fifth objection, relator makes a similar argument to that advanced in her third and fourth objections except that she adds a reference to Dr. Sachs' November 20, 2009 letter in which Dr. Sachs attempts to explain what he meant in his October 23, 2008 report. Relator seems to argue that the magistrate erred when he found the commission did not abuse its discretion by refusing to exercise continuing jurisdiction over the SHO's November 4, 2009 order. We find this argument unpersuasive.

{¶ 7} As noted by the magistrate, Dr. Sachs' November 20, 2009 letter is not newly discovered evidence because he could have provided this "explanation" at the time he prepared his October 23, 2008 report. Nor did the commission abuse its discretion by failing to exercise continuing jurisdiction based upon an alleged clear mistake of fact, a clear mistake of law or error by inferior tribunal. The issue here involves the interpretation of a medical report, not a mistake of fact, mistake of law or other error. As noted by the magistrate, the commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.* 31 Ohio St.3d 18 (1987). Therefore, we overrule relator's fifth objection.

{¶ 8} In her sixth and seventh objections, relator contends the magistrate erred by failing to find that the SHO's November 4, 2009 order constitutes an abuse of discretion because the SHO is not a medical expert, and therefore, could not properly have rejected Dr. Sachs' opinion regarding the start date for PTD. We disagree.

{¶ 9} Although a SHO is not a medical expert, the commission is exclusively responsible for weighing and interpreting medical reports. *Burley*. As we previously noted, Dr. Sachs' October 23, 2008 report is some evidence supporting the SHO's June 11, 2009 order. Nor did the SHO abuse its discretion when in his November 4, 2009 order he rejected relator's request to readjust the PTD start date based upon the lack of specific evidence regarding when the depressive symptomatology increased to the point where relator became PTD. In essence, the SHO found the lack of sufficient medical evidence to support an adjustment in the start date. Given the lack of specificity in Dr. Sachs' report, the SHO did not abuse his discretion. For this reason, we overrule relator's sixth and seventh objections.

{¶ 10} In her eighth and final objection, relator contends that the magistrate should have noted that the commission entered an interlocutory order on February 4, 2010 that set a hearing on relator's request for reconsideration based upon an alleged mistake of law. We note that the commission held a hearing pursuant to relator's request, and in an order dated April 6, 2010, it declined to exercise continuing jurisdiction. The magistrate's failure to note the basis for scheduling the hearing is of no consequence. Therefore, we overrule relator's eighth objection.

{¶ 11} 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 of law contained therein. In accordance with the magistrate's decision, we deny relator's request for writ of mandamus.

Objections overruled; writ of mandamus denied.

SADLER and CONNOR, JJ., concur.

APPENDIX**IN THE COURT OF APPEALS OF OHIO****TENTH APPELLATE DISTRICT**

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Relator,	:	
v.	:	No. 11AP-599
Access Nursing Care, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

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

Rendered on March 28, 2012

Mark R. Naegel, for relator.

Michael DeWine, Attorney General, and *John Smart*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} In this original action, relator, Sherrill K. Songer, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her June 30, 2009 motion for readjustment of the start date of her award of permanent total disability ("PTD") compensation and to enter an order granting her motion.

Findings of Fact:

{¶ 13} 1. Relator has three industrial claims.

{¶ 14} 2. On June 15, 1985, relator sustained an industrial injury while employed as a barkeeper. The industrial claim (No. 85-54393) is allowed for injuries to her left foot, left knee, and left leg.

{¶ 15} 3. On August 16, 1989, relator sustained an industrial injury while employed as a "charge nurse" at a nursing home. The industrial claim (No. 89-30801) is allowed for injuries to her right knee and right ankle. The claim is also allowed for "recurrent depression and psychosis unspecified."

{¶ 16} 4. On July 13, 1991, relator sustained an industrial injury while employed as a "staff nurse" at a nursing home. The industrial claim (No. 91-35035) is allowed for injuries to her head, neck, and left arm and hand. The claim is also allowed for conditions of the cervical and lumbosacral spine and for "reflex sympathetic dystrophy."

{¶ 17} 5. On October 17, 2008, Douglas C. Gula, D.O., wrote:

There is no question that the allowed conditions in the claims and the accumulative nature of such have led to significant difficulties with regards to function as related to the upper and lower extremities. The combination of both makes it extremely difficult for her to function on anywhere near a normal basis. Unfortunately, there is a cumulative trauma effect as related to the multiplicity of conditions, as related to the lower extremities and such as related to the upper extremities. It is very much impossible for the injured worker to engage in any substantial remunerative employment for at least 24 months. It is extremely unlikely that the injured worker and her physical status would change in the foreseeable future.

It is also noted that she does receive a significant amount of assistance from her daughter because of the difficulty she does indeed manifest as related to personal hygiene and normal activities associated with running a household.

{¶ 18} 6. On October 23, 2008, treating psychiatrist, Ronald A. Sachs, M.D., wrote:

Sherrill Songer has been in treatment with me since August 4, 1997 for a severe chronic depression (DSM#296.30). Her inability to perform at work, up to her expectations, worsened her depression, requiring increases in medication. In October 1998, she became completely unable to work due to her pain syndromes, resulting in dramatic worsening of her depression. I believe this was due

to her self-esteem being directly related to her ability to be productive and earn a living. Since that time, her condition has continued to worsen, with recurrent injuries to her right knee. These are related to her old right knee injury of August 16 1989 (claim # 89-30801). These injuries have resulted in severe pain, markedly restricting her activities, and worsening her depression further. She has had multiple surgeries on this knee as well as her other knee now due to over compensation.

She has now been in treatment with me for over ten years. The major issues worsening her depression are her inability to work and increasing dependency on family members who she cannot trust to take care of her. She is unable to walk any real distance or stand for any length of time. Her depression has continued to be treatment resistant in spite of various changes in medication and continued psychotherapy, due to her chronic pain and lack of independence. Her depression also affects her sleep, concentration, and frustration tolerance to such an extent that even a physically sedentary job would be impossible for her to maintain.

Based on my ongoing analysis of her condition and treatment over ten years, it is my opinion within a reasonable degree of psychiatric certainty, that due to symptoms arising solely from the allowed condition of "Recurrent Depressive Psychosis-unspecified" (296.30) which significantly affect her work-related mental abilities such as her ability to concentrate on the task at hand and interact with others in an appropriate manner, and her activities of daily living including her ability to function with others and stay on task in the home engaging in simple household activities, that Sherrill has, for over twenty four months prior to the date of this letter, been unable to perform any substantially remunerative employment on either a full or part time basis and that such condition is likely to continue for an indefinite time into the future with no indication of recovery.

{¶ 19} 7. On November 10, 2008, relator filed an application for PTD compensation. In support, relator submitted the October 17, 2008 report of Dr. Gula and the October 23, 2008 report of Dr. Sachs.

{¶ 20} 8. On December 22, 2008, at the commission's request, relator was examined by psychologist Jennifer J. Stoeckel, Ph.D. In her six-page report, Dr. Stoeckel opined:

Overall, the allowed recurrent depression with psychosis-NOS represents a 25% permanent partial impairment to the body as a whole (referencing the AMA Guides to the Evaluation of Permanent Impairment-5th Edition). I have not considered the physical allowances in her claim. She is permanently and totally disabled based solely on the psychological condition.

{¶ 21} 9. Following a June 11, 2009 hearing, a staff hearing officer ("SHO") issued an order awarding PTD compensation beginning October 23, 2008, the date of Dr. Sachs' report. The SHO also relied upon the report of Dr. Gula. Because the relied upon medical evidence alone supports the PTD award, the SHO did not consider the vocational factors.

{¶ 22} 10. On June 30, 2009, relator moved that her PTD start date be readjusted to November 10, 2006, which is two years prior to the filing of her PTD application.

{¶ 23} 11. Relator's June 30, 2009 motion was supported by a written memorandum. In the memorandum, relator's counsel pointed out that, in his October 23, 2008 report, Dr. Sachs states:

[T]hat Sherrill has, for over twenty four months prior to the date of this letter, been unable to perform any substantially remunerative employment on either a full or part time basis and that such condition is likely to continue for an indefinite time into the future with no indication of recovery.

{¶ 24} 12. Also, in the memorandum, relator's counsel pointed out that, in her December 22, 2008 narrative report, Dr. Stoeckel opined:

In response to specific referral questions, it is my professional opinion within reasonable psychological certainty that Ms. Songer's recurrent depression with psychosis unspecified is certainly maximum medically improved and permanent in nature. Ms. Songer has had the benefit of rather extensive outpatient psychiatric care. Again, she has been treating with Dr. Sachs on a weekly basis for at least ten years. Dr. Sach's [sic] records reflect very minimal, if any, improvement as she is described as depressed and having significant impairment. There is no indication that any additional treatment would result in remittance [sic] of her depressive disorder.

{¶ 25} 13. Relator's June 30, 2009 motion was heard on November 4, 2009 by another SHO. Following the November 4, 2009 hearing, the SHO mailed an order on November 18, 2009 that denies relator's June 30, 2009 motion. The SHO's order explains:

The Injured Worker's motion requesting that the start date for the award of permanent total disability compensation be amended from 10/23/2008 to 11/10/2006 is denied.

Specifically, the Injured Worker requests that her start date be amended to 11/10/2006, two years prior to the date her [PTD] Application was filed.

In support of this position, the Injured Worker relies upon the reports of Dr. Jennifer Stoeckel dated 12/22/2008 and Dr. Ronald Sachs dated 10/23/2008.

The [SHO] finds that the [SHO] order awarding the Injured Worker [PTD] compensation was predicated upon the reports of Dr. Sachs dated 10/23/2008 and Dr. Gula dated 10/17/2008.

Significantly, the [SHO] finds that the report of Dr. Stoeckel dated 12/22/2008 was not relied upon. The [SHO] finds the report of Dr. Stoeckel flawed for the reason that Dr. Stoeckel indicates that the Injured Worker is both permanently totally disabled and capable of returning to work with limitations in her report.

Accordingly, the [SHO] rejects the report of Dr. Stoeckel.

The Injured Worker further requests that her start date be amended based upon the report of Dr. Sachs. Specifically, Dr. Sachs indicates that: "... Sherrill has, for over 24 months prior to the date of this letter, been unable to perform any substantially remunerative employment on either a full or part time basis..."

The [SHO] finds this language of Dr. Sachs insufficient to warrant an adjustment of the state date of [PTD] because Dr. Sachs provides only a speculative time frame at which the Injured Worker became permanently totally disabled. Specifically, Dr. Sachs does not cite to any specific incident or any specific date on which the Injured Worker's

depressive symptomatology increased to the point where the Injured Worker became permanently totally disabled.

Accordingly, the [SHO] finds that the correct date to start [PTD] compensation is 10/23/2008, the date of Dr. Sachs' report.

{¶ 26} 14. On November 25, 2009, relator, through counsel, filed a "Notice of Appeal" from the SHO's order of November 4, 2009. Relator also filed a "Memorandum in Support of Appeal."

{¶ 27} 15. Treating relator's "Notice of Appeal" as a request for reconsideration of the SHO's order of November 4, 2009, the three-member commission, on February 4, 2010, mailed an interlocutory order stating:

The Injured Worker's request for reconsideration, filed 11/25/2009, from the [SHO] order, issued 11/18/2009, is referred to the Commission Level Hearings Section to be docketed before the Members of the Industrial Commission. The issues to be heard are:

1. The Injured Worker's request for the Industrial Commission to invoke its continuing jurisdiction pursuant to R.C. 4123.52, and
2. Issue:
 - 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
 - 2) PTD START DATE/ALLOCATION ADJUSTMENT – READJUST PT START DATE

It is the finding of the Industrial Commission that the Injured Worker has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged that the [SHO] erroneously used the date of a report as the start date for [PTD] benefits whereas the report indicated that the Injured Worker had been permanently and totally disabled for at least twenty-four months prior to the date of the report.

Based on these findings, the Industrial Commission directs that the Injured Worker's request for reconsideration, filed 11/25/2009, is to be set for hearing to determine whether the

alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.

{¶ 28} 16. On April 6, 2010, the commission heard relator's November 25, 2009 request for reconsideration. Following the hearing, the commission mailed an order on April 17, 2010 stating:

After further review and discussion, it is the finding of the Industrial Commission that it does not have authority to exercise continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm., 103 Ohio St.3d 585, 2004-Ohio-5990. The Injured Worker has failed to meet her burden of proving that sufficient grounds exist to justify the exercise of continuing jurisdiction. Therefore, the Injured Worker's request for reconsideration, filed 11/25/2009, is denied, and the [SHO] order, issued 11/18/2009, remains in full force and effect.

{¶ 29} 17. On July 12, 2011, relator, Sherrill K. Songer, filed this mandamus action.

Conclusions of Law:

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

{¶ 31} Analysis begins with the observation that the SHO's order of June 11, 2009 awarding PTD compensation was a final commission order that could be reopened only through the commission's exercise of continuing jurisdiction. *State ex rel. Poneris v. Indus. Comm.*, 111 Ohio St.3d 264, 2006-Ohio-5702. That, in turn, could occur only if one of five prerequisites had been met: (1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law or (5) error by an inferior tribunal. *Id.*

{¶ 32} Relator's June 30, 2009 motion for a readjustment of the PTD start date was, in effect, a motion that the commission exercise continuing jurisdiction over the SHO's order of June 11, 2009 that starts PTD compensation effective the date of Dr. Sachs' October 23, 2008 report. However, relator's June 30, 2009 motion fails to allege any prerequisite for the exercise of continuing jurisdiction. The motion merely requests a readjustment of the start date based upon Dr. Sachs' opinion in his October 23, 2008 report that relator has "for over twenty-four months prior to the date of this letter, been unable to perform any substantially remunerative employment."

{¶ 33} On November 4, 2009, another SHO heard relator's June 30, 2009 motion. In denying the motion, the SHO explained that Dr. Sachs' opinion that PTD had begun for over 24 months prior to the date of the letter was unpersuasive. The SHO found that Dr. Sachs "provides only a speculative time frame" and that Dr. Sachs "does not cite to any specific incident or any specific date on which [relator's] depressive symptomatology increased to the point where [relator] became permanently and totally disabled."

{¶ 34} The SHO's order of November 4, 2009 fails to address whether a prerequisite for continuing jurisdiction exists. In effect, the SHO's order of November 4, 2009 proceeds with the exercise of continuing jurisdiction by reviewing the SHO's order of June 11, 2009 and Dr. Sachs' report upon which the first SHO relied.

{¶ 35} Perhaps it can be argued that the SHO's order of June 11, 2009 contained a clear mistake of law upon which the second SHO could have premised the exercise of continuing jurisdiction. That is, the SHO's order of June 11, 2009 simply adopts the date of Dr. Sachs' report as the PTD start date without addressing why Dr. Sachs' opinion regarding an earlier PTD start date was rejected or ignored. It is at least arguable that the SHO's order of June 11, 2009 fails to address a critical issue raised by the SHO's reliance upon Dr. Sachs' October 23, 2008 report.

{¶ 36} In any event, assuming the existence of a clear mistake of law in the SHO's order of June 11, 2009, the SHO's order of November 4, 2009 became a final commission order that could be reopened only through the exercise of continuing jurisdiction. *Poneris*.

{¶ 37} In challenging the SHO's order of November 4, 2009, relator filed a notice of appeal instead of a motion or request for the exercise of the commission's continuing jurisdiction over the November 4, 2009 SHO's order. The commission appropriately treated the notice of appeal as a request for reconsideration even though relator alleged no prerequisite for the exercise of continuing jurisdiction.

{¶ 38} In its order of April 6, 2010, the commission properly held that it did not have continuing jurisdiction over the SHO's order of November 4, 2009 that denies relator's motion for readjustment of the PTD start date.

{¶ 39} Given the above scenario, the true issue before this court is whether the SHO's order of November 4, 2009 contains an abuse of discretion in determining that Dr. Sachs' opinion of a start date earlier than the date of his report is unpersuasive.

{¶ 40} As earlier noted, the SHO's order of November 4, 2009 provides the following explanation for rejecting Dr. Sachs' opinion that a start date earlier than the date of his letter should be entered:

The Injured Worker further requests that her start date be amended based upon the report of Dr. Sachs. Specifically, Dr. Sachs indicates that: "... Sherrill has, for over 24 months prior to the date of this letter, been unable to perform any substantially remunerative employment on either a full or part time basis..."

The [SHO] finds this language of Dr. Sachs insufficient to warrant an adjustment of the state date of [PTD] because Dr. Sachs provides only a speculative time frame at which the Injured Worker became permanently totally disabled.

Specifically, Dr. Sachs does not cite to any specific incident or any specific date on which the Injured Worker's depressive symptomatology increased to the point where the Injured Worker became permanently totally disabled.

{¶ 41} The magistrate notes that R.C. 4123.52 provides in part:

The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor.

{¶ 42} It can be further noted that Dr. Sachs' October 23, 2008 letter is addressed to relator's counsel. Dr. Sachs' opinion for a start date 24 months prior to the date of the letter appears to be premised upon the R.C. 4123.52 two-year limitation period.

{¶ 43} Thus, while Dr. Sachs' opinion for an earlier start date appears to track the statutory limitation period in order to maximum the PTD award, as the SHO's order explains, Dr. Sachs offers no "specific incident" as medical evidence supporting an earlier start date.

{¶ 44} Under these circumstances, the SHO was well within his discretion to reject Dr. Sachs' opinion for a start date that covers the two-year statutory limitation period.

{¶ 45} After all, the commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987).

{¶ 46} 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/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).