[Cite as *State ex rel. Phillips v. Indus. Comm.*, 2012-Ohio-5148.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State of Ohio ex rel.] Judson E. Phillips,	:	
Relator,	:	No. 11AP-829
v.	:	(REGULAR CALENDAR)
Hoover Ball and Bearing Co., Stanley Tools, and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on November 6, 2012

Michael J. Muldoon, for relator.

Squire Sanders & Dempsey, *Steven M. Lowengart* and *Kevin E. Hess*, for respondent Stanley Tools.

Michael DeWine, Attorney General, *Derrick L. Knapp* and *Corinna Efkeman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Judson E. Phillips, seeks a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying relator's application for permanent total disability ("PTD") compensation and to find that relator is entitled to said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth Appellate District, 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 relator failed to demonstrate that the commission abused its discretion in denying his application for PTD compensation. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator has filed an objection to the magistrate's decision. Without disputing the magistrate's findings of fact, relator challenges the magistrate's legal conclusion that the commission did not abuse its discretion in its analysis of various nonmedical factors. This objection simply reargues the contentions that were presented to, and sufficiently addressed by, the magistrate and do not raise any new issues. Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶ 4} Accordingly, relator's objection to the magistrate's decision is overruled, and the requested writ of mandamus is hereby denied.

Objection overruled; writ of mandamus denied.

TYACK and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State of Ohio ex rel.] Judson E. Phillips,	:	
Relator,	:	No. 11AP-829
v.	:	(REGULAR CALENDAR)
Hoover Ball and Bearing Co., Stanley Tools, and Industrial Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on May 31, 2012

Michael J. Muldoon, for relator.

Squire Sanders & Dempsey, *Steven M. Lowengart* and *Kevin E. Hess*, for respondent Stanley Tools.

Michael DeWine, Attorney General, *Derrick L. Knapp* and *Corinna Efkeman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 5} Relator, Judson E. Phillips, 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 relator's application for permanent total disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 6} 1. Relator has sustained two work-related injuries, and his workers' compensation claims have been allowed for the following conditions: "low back strain; depressive neurosis," and "strain right shoulder; tear right shoulder; degenerative joint disease, right shoulder."

{¶ 7} 2. On May 6, 2010, relator filed his application for PTD compensation. At the time, relator was 63 years of age, indicated that he had finished the seventh grade in 1964, could read, write, and perform basic math, but not well, and that he had not participated in any rehabilitation.

{¶ 8} 3. In support of his application, relator filed the March 27, 2010 report of Michael Glenn Drown, Ph.D. Dr. Drown indicated that the results of psychometric testing indicated that relator suffered from severe depression, that he was generally maladaptive regarding his mood, anxiety, pain, and self-image and that he was an apprehensive and intensely worrisome person. Dr. Drown concluded his report by stating:

> Considering his age, education, lack of marketable skills, diminished overall adaptiveness, and his work injury, it is within reasonable certainty that Mr. Judson Phillips's psychiatric disability is permanent total. In reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral Disorders, his psychiatric impairment falls within the extreme range.

{¶ 9} 4. The commission had relator examined by Earl F. Greer, Jr., Ed.D., for his allowed psychological condition. In his July 29, 2010 report, Dr. Greer noted the following in his mental status exam:

> * * * His mood and affect appeared mildly depressed with indications of self-devaluation and significant unresolved anger in the content of his thoughts. His stream of thought was sequential with no present indication of hallucinations or delusions and he was oriented to time, place, and circumstances. His general intellectual level of functioning presently appeared to be in the average to low average range of functioning. His activities of daily living (self-care appeared appropriate), social functioning, (interaction was also appropriate during the evaluation), concentration and persistence (he was able to maintain focus during the evaluation), pace and adaptation was also appropriate (demonstrated in his ability to handle the stressor of a

> psychological evaluation); assessed while the injured worker shared his life history.

{¶ 10} 5. Dr. Greer concluded that relator was experiencing mild psychological symptoms, and that he had reached maximum medical improvement ("MMI"), assessed a 10-percent impairment, and opined that relator had no work limitations as a result of his allowed psychological condition and that work would be therapeutic.

{¶ 11} 6. William R. Fitz, M.D., examined relator for his allowed physical conditions. In his October 15, 2010 report, Dr. Fitz identified the information which he reviewed, noticed physical findings upon examination, and concluded that relator's allowed physical condition had reached MMI, that he had a 30-percent impairment, and that he was capable of performing at a sedentary work level.

{¶ 12} 7. A vocational report was prepared by Jan Simonis. In her December 15, 2010 report, Ms. Simonis accepted the findings of Drs. Greer and Fitz. Ms. Simonis concluded that relator's age would not affect his ability to learn and successfully perform any occupation or compete with others. She accepted that relator had only completed the seventh grade; then, in discussing his work history, Ms. Simonis noted that relator had demonstrated that he was able to clearly and concisely follow instructions, perform basic math, and had reading skills. She also concluded that his prior work demonstrated that he had the ability to pay close attention to detail and maintain an accurate accounting of work performed. Ms. Simonis identified several jobs within the sedentary range, which, in her opinion, relator could perform and also noted that relator should be considered for vocational rehabilitation.

{¶ 13} 8. The record contains the December 23, 2010 deposition of Steven Rosenthal, a vocational expert. Based on Dr. Fitz's conclusion that relator could perform at a sedentary work level, Mr. Rosenthal identified a number of jobs which relator could perform:

> Q. And given Dr. Fitz's report, what type of jobs do you believe that he would be capable of performing?
>
> A. I know there are several areas of options for sedentary work that are consistent with what we're talking about here. Some of the examples of what sedentary unskilled work would be would include order clerks, security monitors, addresser positions, stuffer positions, telephone quotation clerks, information clerks, routing clerks, reservation clerks. Those

> are some examples of what types of sedentary jobs are consistent.
>
> Q. You indicated just a moment ago that these are unskilled jobs. What within the records you reviewed, why do you choose only unskilled jobs?
>
> A. Well, for a couple different reasons. Number one, he's got a limited education at the seventh grade level. It does appear that he does have the ability to write. He's able to perform basic academic needs in terms of reading, writing, and basic math.
>
> His jobs have maintained for physical kinds of activities, although the forklift operation is a job that involved some lifting, some pushing, pulling, using pedals, and there are some things – and that particular job is found at a medium exertion level. So I don't see him going back to that job as a forklift operator. But it tells me that there are a number of different things that he would be able to do, but that he has no other particular skills where he has to perform much in the way of writing, in terms of reading, in terms of a lot of decision making, and that's where his experiences have been as well as his education.
>
> Q. So the positions that you just outlined take into account his educational level and his previous work experience?
>
> A. Yes. Yes, they do.

(Rosenthal Depo., 13-14.)

{¶ 14} 9. Relator's application was heard before a staff hearing officer ("SHO") on September 9, 2011 and was denied. The SHO relied upon the medical reports of Drs. Fitz and Greer and found that relator was capable of performing at a sedentary work level and that his allowed psychological condition would not keep him from returning to work. Thereafter, the SHO discussed relator's nonmedical disability factors. The SHO concluded that relator's age was an impediment to his potential for returning to the workforce but that it was not an insurmountable barrier. The SHO concluded that relator had sufficient time to learn new skills through short-term or on-the-job training. The SHO also concluded that relator's lack of a high school diploma was an impediment to his ability to return to work. However, the SHO determined that relator's prior ability to perform semi-skilled employment indicated that he had the ability to learn the skills

necessary to perform semi-skilled work in spite of any limitations in his education and literary levels. Specifically, the SHO stated:

> The Staff Hearing Officer finds that while the Injured Worker's age is an impediment to his potential for returning to the workforce, it is not an insurmountable barrier to that potential. Individuals of the Injured Worker's age are in increasing numbers continuing their productivity in the workforce for years, and they have sufficient time to learn new skills, at least through informal means such as short-term or on-the-job training, that could enhance their chances for a return to suitable work activity.
>
> Also serving as an impediment to the Injured Worker's re-employment potential is his lack of a high school diploma or its equivalent, having left school after completing the seventh grade. The Injured Worker testified at hearing that he was 16 years of age when he quit school and that he had failed three grades during the course of his school years. He further indicated on his IC-2 Application that while he can read, write, and do basic math, he does not do any of them well. However, the Staff Hearing Officer finds that one of the Injured Worker's past work positions, the forklift operator position, is classified at the semi-skilled level of employment, according to the Dictionary of Occupational Titles. As such, by means of his work experience, the Injured Worker has demonstrated the ability to learn the skills necessary to perform semi-skilled work activity successfully, in spite of any limitations in his education and literacy levels, i.e. through informal means such as short-term or on-the-job training. Based on the specific findings cited above from Dr. Greer's report regarding the Injured Worker's intelligence, social functioning, concentration, persistence, pace, and adaptation, the Staff Hearing Officer finds that the Injured Worker retains his demonstrated capacity to learn new skills through informal methods. As such, the Staff Hearing Officer finds that the Injured Worker possesses sufficient education and skill-learning ability to obtain and perform jobs consistent with his claim-related functional limitations.
>
> Finally, the Staff Hearing Officer finds that the Injured Worker is currently vocationally qualified to obtain and perform jobs at the sedentary level as described by Dr. Fitz in his report, with the recognition that such jobs would necessarily be entry-level positions of an unskilled nature. The Staff Hearing Officer bases this finding on the deposition statement from Mr. Rosenthal, a vocational consultant, dated

> 12/23/2010 and the vocational assessment report from Ms. Simonis dated 12/10/2010; both Mr. Rosenthal and Ms. Simonis identify jobs the requirements of which match the restrictions from Dr. Fitz and for which the Injured Worker is either qualified or can qualify with minimal training. The report from Ms. Simonis indicates that the positions she had identified were sedentary and did not require a high school diploma, and Mr. Rosenthal's deposition testimony indicates he was identifying sedentary unskilled positions the Injured Worker could perform when his education and work history were considered. In addition, as referenced above, the Staff Hearing Officer finds that the Injured Worker retains his demonstrated capacity to learn new skills through informal means, an asset that could serve to widen the scope of employment options available to him.
>
> Therefore, because the Injured Worker has the residual functional capacity to perform sedentary employment when only the impairment arising from the allowed conditions of the two industrial claims is considered, because he is qualified by age, intelligence level, and demonstrated capacity for skill acquisition to obtain and perform jobs at that level, and because he retains the capacity to acquire new skills through informal means that could enhance his potential for re-employment, the Staff Hearing Officer finds that the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 application filed 05/06/2010 is denied.

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

Conclusions of Law:

{¶ 16} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 17} 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).

{¶ 18} 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 non-medical 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 non-medical 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).

{¶ 19} Relator does not challenge the commission's reliance on the medical reports of Drs. Fitz and Greer. Relator does challenge the commission's analysis of the nonmedical disability factors. Specifically, relator contends that the report of Ms. Simonis and the deposition testimony of Dr. Rosenthal are clearly prejudicial and that the commission has used those reports to create "legal fiction" that relator can actually work. Relator emphasizes his advanced age, marginal education, and the fact that he only performed heavy unskilled work his entire life as evidence that he is clearly permanently and totally disabled.

{¶ 20} First, considering that relator was 64 years of age, it must be remembered that the commission has repeatedly stated that there is not an age, ever, at which re-employment is held to be a virtual impossibility as a matter of law. *State ex rel. Pass v. C.S.T. Extraction Co., 74 Ohio St.3d 373* (1996) (age 64); *State ex rel. DeZarn v. Indus. Comm.*, 74 Ohio St.3d 461 (1996) (age 71); *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414 (1996) (age 78); and *State ex rel. Bryant v. Indus. Comm.*, 74 Ohio St.3d 458 (1996) (age 79).

{¶ 21} In the present case, the commission did recognize that relator's age was an impediment but found that it was not an insurmountable barrier to re-employment. The SHO's finding here is consistent with case law.

{¶ 22} Further, the SHO noted that relator's lack of a high school diploma and the fact that he left school after completing the seventh grade were impediments to becoming re-employed. However, the SHO indicated that relator did work as a forklift operator and that this position is classified as semi-skilled. As such, the SHO determined that relator's work experience demonstrated that he had the ability to learn the skills necessary to perform semi-skilled work activities successfully, in spite of any limitations in either his education or literacy levels.

{¶ 23} Relator argues that his education level is classified as marginal; however, relator is incorrect. The Ohio Administrative Code defines his seventh grade level of education as limited, and not marginal. Specifically, Ohio Adm.Code 4121-3-34(B)(3)(b) provides, in pertinent part:

> "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.
>
> * * *
>
> (ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.
>
> (iii) "Limited education" means seventh grade level though eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

{¶ 24} According to his application for PTD compensation, relator completed the seventh grade. By definition, his education is not marginal, it is limited. Further, by definition, relator's limited education provided him with ability in reasoning, math, and language skills, but not enough to allow him to perform more complex job duties needed in semi-skilled or skilled jobs. Relator's work history bears this out. Relator does have

experience as a forklift driver, which the commission identified as semi-skilled. However, the remainder of relator's work history was in unskilled, heavy work.

{¶ 25} Further, Ohio Adm.Code 4121-3-34(B)(3)(c)(ii) defines semi-skilled work, as follows:

> "Semi-skilled work" is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

{¶ 26} The magistrate finds that the commission did not incorrectly classify relator's education and did not incorrectly characterize his prior work history. Based on the definition of marginal education and semi-skilled work, the magistrate finds that the commission did not abuse its discretion by finding that his education and work history demonstrated that he had the ability to perform work which requires short-term or on-the-job training. The commission's findings are clearly in line with the definitions defined in the Ohio Administrative Code.

{¶ 27} Relator cites several cases wherein the Supreme Court of Ohio has criticized the commission's finding that certain jobs had provided claimants with transferable skills. Relator relies on the following quote from *State ex rel. Bruner v. Indus. Comm.*, 77 Ohio St.3d 243, 245 (1997):

> We are disturbed by the increasing frequency with which the commission has denied permanent total disability compensation based on "transferable skills" that the commission refuses to identify. This lack of specificity is even more troubling when those "skills" are derived from traditionally unskilled jobs. As such, we find that the commission's explanation of claimant's vocational potential in this case is too brief to withstand scrutiny.

{¶ 28} Relator also cites the following from the Supreme Court of Ohio's decision in *State ex rel. Pierce v. Indus. Comm.*, 77 Ohio St.3d 275 (1997):

> The commission's discussion of claimant's work history is also inadequate. With increasing, and disturbing, frequency we are finding that no matter what claimant's employment background is, the commission finds skills—almost always unidentified—that are allegedly transferable to sedentary work. In some cases, depending on the claimant's background, these skills are self-evident. In many cases, they are not.
>
> In *State ex rel. Haddix v. Indus. Comm.* (1994), 70 Ohio St.3d 59, 61, 636 N.E.2d 323, 324, we held:
>
> "The commission determined that claimant's prior work as a gas station attendant and press operator provided him with skills transferable to sedentary employment. The commission's order, however, does not identify what those skills are. Such elaboration is critical in this case, since common sense suggests that neither prior work is, in and of itself, sedentary."
>
> The present claimant was an ironworker—a position that is neither sedentary nor light duty. Again, however, the commission found skills transferable to light work, without specifying what those skills were. The reference to supervisory skills, without more, is not enough in this case, given claimant's tenure as a working, as opposed to purely administrative, supervisor.

Id. at 277-78; *see also State ex rel. Haddix v. Indus. Comm.*, 70 Ohio St.3d 59 (1994).

{¶ 29} In the present case, the commission never determined that relator had any transferable skills. As such, relator's reliance on the above cases where the commission had determined that the claimants had unidentified transferable skills is misplaced.

{¶ 30} Relator also challenges the commission's adoption of the jobs which Ms. Simonis and Dr. Rosenthal indicated he could perform. Specifically, out of the ten sedentary jobs which Ms. Simonis identified, relator argues that he does not have the education to perform one of those jobs: a library assistant. As such, relator contends that the commission abused its discretion by relying on Ms. Simonis's report. Concerning Dr. Rosenthal's opinion, relator argues that it is clear that he could not perform the job of a reservation clerk.

{¶ 31} Both Ms. Simonis and Dr. Rosenthal identified several jobs which, in their opinion, relator could perform. The fact that each of them identified one job which relator

may or may not be able to perform is immaterial. The commission is not obligated to suggest specifically which occupations a claimant can perform. *See* for example *State ex rel. Speelman v. Indus. Comm.*, 73 Ohio App.3d 757 (10th Dist.1992); *State ex rel. Mann v. Indus. Comm.*, 80 Ohio St.3d 656 (1998); *State ex rel. Finucan v. Indus. Comm.*, 10th Dist. No. 07AP-391, 2008-Ohio-1836; and *State ex rel. Schaeffer v. Indus. Comm.*, 10th Dist. No. 08AP-913, 2009-Ohio-3354.

{¶ 32} Lastly, relator contends that the commission's order is nothing more than boilerplate and that the commission provided no explanation as to how he could return to work. The magistrate disagrees.

{¶ 33} As stated previously, the commission recognized that relator's then age of 64 years was an impediment; however, as noted previously, there is no age at which re-employment is a virtual impossibility.

{¶ 34} The commission was well aware that relator had only finished the seventh grade and that he could read, write, and perform basic math, but not well. The commission noted that, in spite of his limited education, relator had been able to perform the semi-skilled job of a forklift operator. As defined in the Ohio Administrative Code, a limited education and semi-skilled job performance does indicate that a claimant has the ability to learn and certainly perform unskilled work as indicated by the commission.

{¶ 35} After a review of the record and considering relator's arguments, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in 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).