

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Anthony Walker,	:	
Relator,	:	
v.	:	No. 10AP-1095
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Minute Men, Inc.,	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on February 14, 2012

Shapiro, Shapiro & Shapiro, Alan J. Shapiro and Leah P. VanderKaay, for relator.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

Robert Shepard, for respondent Minute Men, Inc.

IN MANDAMUS

TYACK, J.

{¶1} Anthony Walker filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio to grant him permanent total disability compensation.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and

conclusions of law, which is appended hereto. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶4} No error of law or fact is present on the face of the magistrate's decision. We, therefore, adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Writ of mandamus denied.

KLATT and FRENCH, JJ., concur.

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

State of Ohio ex rel. Anthony Walker,	:	
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Relator,	:	No. 10AP-1095
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
Minute Men, Inc.,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION**Rendered on September 27, 2011**

*Shapiro, Shapiro & Shapiro, Alan J. Shapiro and Leah P. VanderKaay, for relator.**Michael DeWine, Attorney General, and Allan K. Showalter, for respondent Industrial Commission of Ohio.**Robert Shepard, for respondent Minute Men, Inc.*

IN MANDAMUS

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

Findings of Fact:

{¶6} 1. On September 11, 1997, relator severely injured both arms while employed as a sand blaster for respondent Minute Men, Inc., a state fund employer. The industrial claim (No. 97-516282) was allowed for:

1-2 Degree Burns to Bilateral Arms TBSA 1-2 % Subluxing Ulnar Nerve with Paresthesias; Lesion Left Ulnar Nerve; Right Ulnar Nerve Lesion; Bilateral Lateral Epicondylitis; Bi-Lateral Olecranon Bursitis; Dysthemic Disorder.

{¶7} 2. On September 28, 2009, at relator's request, he was examined by chiropractor, Samuel F. Salas, D.C. In his four-page narrative report, Dr. Salas opines:

Mr. Walker injured both elbows during the course of his employment. After an optimal period for physiologic recovery, surgical repair, and rehabilitation, an examination disclosed the above impairment ratings for the injuries sustained. These impairments have a significant affect on Mr. Walker's Activities of Daily Living. These losses were stable and determined as permanent impairments.

Based upon the history and exam findings of September 28, 2009, and how these findings correlate with the "A.M.A. Guides to the Evaluation of Permanent Impairment, 5th edition", it is my professional opinion to a reasonable degree of medical certainty that the above named IW claim #: **97-516282** demonstrates a calculated total **whole person impairment of 13%WP but with a more accurate total pain-related impairment score of 43%** for the allowed conditions in this claim.

Due to the severity of impairment it is my opinion and medically justified that Mr. Walker is unable to perform substantial, gainful employment and therefore is permanently and totally disabled.

(Emphasis sic.)

{¶8} 3. On December 7, 2009, relator filed an application for PTD compensation. In support, relator submitted the September 28, 2009 report from Dr. Salas. Apparently, at the time of the filing of the PTD application, the claim was disallowed for a "dysthymic disorder." However, subsequent to the filing of the PTD application, the claim became

allowed for dysthymic disorder. Relator did not file a report from a psychologist or psychiatrist to support his PTD application.

{¶9} 4. On February 8, 2010, at the employer's request, relator was examined by psychologist Robert F. Dallara, Jr., Ph.D. In his four-page narrative report, Dr. Dallara opines:

In response to the specific referral questions, the following opinions are offered with a reasonable degree of psychological certainty:

1.) Has the claimant reached maximum medical improvement for the allowed psychological condition in this claim?

No. Anthony continues to suffer with mild depressive symptoms. Additionally, based on the records he has not had psychological intervention for his Dysthymic disorder. Anthony reports he has seen Dr. Medling "a few times" but could not provide other details. Anthony has either not had treatment for his Dysthymic disorder or has experienced very brief treatment. In either case, there would be insufficient evidence to indicate that he has reached maximum medical improvement with respect to his allowed Dysthymic disorder.

2.) Is the claimant capable of performing sustained remunerative employment based on the allowed psychological condition in this claim?

Yes. It is this examiner's opinion that this injured worker would be capable of sustained remunerative employment. Although he has experienced a Dysthymic disorder, his symptoms fall in the mild range. He may have some mild difficulties relating to others including fellow workers and supervisors as a result of his depression. He may also have mild impairment to his ability to withstand stress and pressure as a result of the allowed Dysthymic disorder. His ability to understand, remember, and follow instructions does not appear impaired as a result of the allowed psychological condition. His ability to maintain attention and concentration did not appear impaired during the examination.

3.) What are the claimant's permanent restrictions based on the allowed psychological condition in this claim?

It is this examiner's opinion that there is insufficient evidence to conclude that Anthony is experiencing permanent restrictions based on his allowed Dysthymic disorder. There is insufficient evidence to conclude that his symptoms are permanent. It is this examiner's opinion that this injured worker is capable of performing sustained remunerative employment.

{¶10} 5. On March 2, 2010, at the employer's request, relator was examined by Bina Mehta, M.D., who specializes in physical medicine and rehabilitation. Dr. Mehta examined only for the allowed physical conditions in the claim. In his six-page narrative report, Dr. Mehta opines:

I feel the injured worker has reached maximum medical improvement for the allowed physical conditions in this claim. He has undergone bilateral ulnar nerve release and has undergone extensive amounts of therapy to the bilateral upper extremities over the years. He has changed physicians many times and is currently on pain medications. I do not feel there are any further medical nor rehabilitative procedures which would provide a significant change in his current allowed conditions which occurred approximately 13 years ago.

* * *

Within a reasonable medical certainty, I feel the claimant is capable of performing sustained remunerative employment based on the allowed physical conditions in his claim * * * [.]

* * *

The claimant's permanent restrictions, based solely on the allowed physical conditions of this claim, would include limiting lifting to 20 pounds and carrying to 10 pounds. He would be unable to perform any sustained repetitive motions with the bilateral upper extremities. Based upon the functional capacity evaluation which was performed on 03/29/2007 as well as the medical records from his treating physicians and my physical examination today, I feel the claimant could perform work within the sedentary to light duty work capacity category.

{¶11} 6. On April 12, 2010, at the commission's request, relator was examined by Daniel J. Leizman, M.D., who specializes in physical medicine and rehabilitation. Dr. Leizman examined only for the allowed physical conditions of the claim. In his five-page narrative report, Dr. Leizman opined:

The individual whole person impairments for the right and left upper limb were combined using the Combined Values Chart, page 604 of the *Guides*. This equaled 12% total whole person impairment.

* * *

My opinion is that the Claimant is capable of performing sedentary type work with restriction from participating in repetitive work related tasks involving the right and left upper limbs. The Physical Strength Rating form has been completed indicating the patient's capability of performing sedentary type work with restriction from repetitive work related tasks involving the right and left upper limbs.

{¶12} 7. On April 12, 2010, Dr. Leizman completed a physical strength rating form on which he indicated by his mark that relator is capable of sedentary work. In the space provided, Dr. Leizman indicated further limitation by writing in his own hand, "restricted from repetitive work related tasks involving right and left upper limbs."

{¶13} 8. On August 10, 2010, at the commission's request, relator was examined by psychologist Marian Chatterjee, Ph.D. In a six-page narrative report, Dr. Chatterjee opines:

OPINION: In response to the specific questions raised by the Industrial Commission of Ohio:

1. Has the claimant reached maximum medical improvement?

A. Yes. The IW had been in treatment with a psychologist and psychiatrist and has reached MMI.

2. What is the percentage of permanent impairment arising from each of the allowed conditions within your specialty in each claim? If there is none, please indicate.

A. For the condition of Dysthymic Disorder the IW has a Class 2, Mild impairment; 15%, AMA 5, Ch. 14. (15%+15%+15%+15%=60%/4=15%)

{¶14} 9. On August 12, 2010, Dr. Chatterjee completed a form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the form, Dr.

Chatterjee indicated by a mark "This Injured Worker is capable of work with the limitation (s) /modification (s) noted below[.]"

In the space provided, Dr. Chatterjee wrote by hand:

The injured worker would be capable of low stress work within his limitations. His cognitive limitations are very significant and will be a factor in [return to work].

{¶15} 10. Following a September 30, 2010 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

All reports in the record and referenced at hearing have been reviewed and considered in making this determination. This order is based particularly on the reports of Dr. Robert Dallara, 2/08/2010, Dr. Marian Chatterjee, 8/10/2010, Dr. Bina Mehta, 3/05/2010, and Dr. Daniel Leizman, 4/15/2010.

Dr. Leizman examined the Injured Worker 4/15/2010 at the request of the Industrial Commission relative to the allowed physical conditions. He indicates that Injured Worker has objective functional limitations consistent with evidence of bilateral nerve decompressions at the medial elbows. Right elbow impairment was determined in totality with claim allowances of burns of the right arm, subluxing right ulnar nerve with paresthesias, right ulnar nerve lesion, right lateral epicondylitis and right olecron bursitis. Left elbow impairment was determined in totality in a similar fashion to that on the right using AMA Guide Chapter 16 information, Tables and methodology. The examiner rated whole person impairment at 6% for each upper extremity; a total whole person impairment of 12% for the allowed physical conditions in the claim. He opined that maximum medical improvement in respect to allowed physical conditions has been achieved. He stated that Injured Worker is capable of performing sedentary type work with restriction from participating in repetitive work related tasks involving the right and left upper limbs.

The report of Dr. Bina Mehta, who examined Injured Worker at the request of employer 3/02/2010, concludes that Injured Worker is capable of performing work within the sedentary to light duty work capacity category. Dr. Mehta notes that the treating orthopedic surgeon, Dr. Michael Keith, has indicated that Injured Worker has a 20 pound lifting restriction and that

his medical records note that Injured Worker is retrainable and is capable of gainful employment. At no time does Dr. Keith state that Injured Worker is not capable of performing sustained remunerative employment. Dr. Mehta also lists that the other treating physicians: Dr. Fatil, Dr. Harris, nor Dr. Massien, never indicated that Injured Worker was incapable of any type of sustained remunerative employment. Dr. Massien is noted to report good upper extremity strength. Dr. Mehta finds the result of the 3/29/2007 Functional Capacity exam which found Injured Worker capable of gainful employment ranging from the sedentary to medium physical demand category to be significant. Dr. Mehta indicates that upon examination Injured Worker does have signs of ulnar neuropathy bilaterally, but he also finds fairly good strength bilaterally and essentially 5/5 strength in the bilateral upper extremities. He finds full range of motion in the fingers with no muscular atrophy noted. Dr. Mehta also questioned the appropriateness of Dr. Salas, 9/28/2009 report, attributing 13% whole person physical impairment and then 43% whole person impairment factoring in a component for pain.

Dr. Chatterjee examined the Injured Worker at the request of the Ohio Industrial Commission regarding residual impairment in respect to the allowed Dysthmic Disorder. The psychologist concluded after interview, records review, and testing result analysis, that Injured Worker displayed mild impairments in Activities of Daily Living, Social Functioning, Adaptation to Stress, and Concentration, Persistence, and Pace and rated whole person impairment at 15%. Injured Worker was found to be capable of low stress work within his cognitive limitations which were noted to be very significant and a factor in returning to work.

Dr. Dallara examined Injured Worker at the request of employer in respect to a psychological evaluation for the allowed Dysthmic Disorder. After examination, records review and administration of the Beck Depression Inventory-2 (BDI-2), he opined that Injured Worker would be capable of sustained remunerative employment. He found display of symptoms of depression in the mild range, with mild impairments in ability to relate to supervisors and other workers, and in abilities to withstand stress or pressures. Abilities to understand, remember, and follow instructions, and to maintain attention and concentration did not appear to be impaired. He found insufficient evidence to conclude that

permanent restrictions are being experienced due to dysthymic disorder or that Injured Worker is incapable of performing sustained remunerative employment.

Injure[d] Worker is is [sic] currently 40 years of age. His age is not an impediment to employment. Access to the labor market may be limited by his current low level of education (reported 7th or 9th grade level/special ed), however Injured Worker is young enough to participate in additional education or rehabilitation to improve his education experience and explore development of further skills, if needed to access the labor market. He has performed a variety of labor jobs and has demonstrated abilities to adapt to various work situations. He maintains the ability to drive and indicates he was able to transport himself to this hearing and the underlying examinations. Counsel for Injured Worker pointed to the low level IQ in the 70 range as documented from Cleveland Public School records. Low borderline intelligence may be an impediment to accessing skilled jobs, but Injured Worker is also noted to possess sufficient cognitive abilities and social skills to play cards, bingo and darts, attend festivals, sales and other social functions, and play video games and pool. Re-employment at the sedentary level in a non-repetitive use of the upper extremities job is still a possibility. Injured Worker is young enough that he should be able to access rehabilitation or other social services if needed to develop further skills to access the labor market. Disability at this juncture is found to be partial, not total. Staff Hearing Officer finds that in reliance on the medical and psychological reports as listed in the order above, Injured Worker is capable of performing sustained remunerative employment in a sedentary capacity. The application for permanent total disability compensation is therefore denied.

{¶16} 11. On November 16, 2010, relator, Anthony Walker, filed this mandamus action.

Conclusions of Law:

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

{¶18} Initially, the SHO's order states reliance upon the reports of Drs. Dallara, Chaterjee, Mehta, and Leizman. In the succeeding paragraphs of the order, the reports of

each of those four doctors are separately discussed. Thus, residual functional capacity was determined from the relied-upon medical reports.

{¶19} Here, relator does not challenge residual functional capacity, nor does he challenge any of the reports of the four doctors as evidence upon which the commission can rely. Rather, relator is seemingly focused upon the commission's nonmedical analysis and the evidence he believes should have compelled a finding of PTD.

{¶20} Because the commission is the expert on the nonmedical factors, it need not rely upon any vocational report of record in rendering its nonmedical analysis. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 271, 1997-Ohio-152.

{¶21} Here, the commission's order does not state reliance upon any vocational report of record. The commission essentially rendered its own nonmedical analysis.

{¶22} The record contains a six-page vocational report authored by Denise L. Nutter, who is a rehabilitation counselor. According to relator, the medical report must be removed from evidentiary consideration on several grounds that need not be explained here.

{¶23} Relator's challenge to the Nutter report is irrelevant to the commission's order at issue. Because the commission did not rely upon the Nutter report, there is no need to review relator's challenge to the Nutter report.

{¶24} According to relator, documents of record from the Cleveland Public Schools show that, at about age 12, testing disclosed that relator was developmentally handicapped. Also, relator points to several sources in the record indicating that he is functionally illiterate. Apparently, relator suggests that this information compels the conclusion that the nonmedical factors render him permanently and totally disabled. The magistrate disagrees with relator's suggestion.

{¶25} In fact, the commission, through its SHO, addressed the evidence of record relating to relator's intelligence and his participation in the special education program. The SHO determined that other evidence of record shows that relator can overcome the obstacles that his intelligence may bring. The SHO found that relator does "possess sufficient cognitive abilities and social skills to play cards, bingo and darts, attend

festivals, sales and other social functions, and play video games and pool." Here, relator asserts that "this line of reasoning is simply absurd." This magistrate does not find it so.

{¶26} In *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 142, 1996-Ohio-316, the court states:

The freedom to independently evaluate nonmedical factors is important because nonmedical factors are often subject to different interpretation.

{¶27} So it is here. The commission weighed the evidence indicating relator may be intellectually challenged with evidence of relator's daily activities indicating he possesses significant cognitive abilities to socialize and play games. It was within the commission's discretion to do so.

{¶28} 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/ 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).