[Cite as *State ex rel. Naso v. Indus. Comm.*, 2012-Ohio-5857.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Lori S. Naso,	:	
Relator,	:	
v.	:	No. 12AP-36
The Industrial Commission of Ohio and Fineline Graphics,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 11, 2012

Malek & Malek, and *Douglas C. Malek*, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

FRENCH, J.

{¶ 1} Relator, Lori S. Naso, filed an original action, which asks this court to 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 she is entitled to that compensation.

{¶ 2} This matter was referred to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision,

which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ because relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation. No objections to the magistrate's decision have been filed.

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

Writ of mandamus denied.

BRYANT and KLATT, JJ., concur.

A P P E N D I X

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Relator,	:	
v.	:	No. 12AP-36
The Industrial Commission of Ohio and Fineline Graphics,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 15, 2012

Malek & Malek, and *Douglas C. Malek*, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 4} Relator, Lori S. Naso, 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 she is entitled to that compensation.

Findings of Fact:

{¶ 5} 1. Relator sustained a work-related injury on May 8, 2003 and her workers' compensation claim has been allowed for the following conditions: "Sprain lumbosacral; disc protrusion L5-S1; cervical sprain/strain; cervical disc protrusion at C5-6; depressive disorder; protruding disc L4-L5."

{¶ 6} 2. Relator participated in vocational rehabilitation services and was able to find a job as a retail sales clerk. Being limited to light-duty work, this job was within her restrictions.

{¶ 7} 3. Relator filed her first application for PTD compensation on October 21, 2009. At the time that she filed her application, relator was 48 years of age and was receiving Social Security Disability Benefits. On her application, relator indicated that she completed the 10th grade and ended her schooling to go to work. Relator did not receive her GED. Relator indicated that she could read, write, and perform basic math, but not well.

{¶ 8} 4. Relator's first application for PTD compensation was heard before a staff hearing officer ("SHO") on February 23, 2010 and was denied. The SHO relied on medical reports from William Reynolds, M.D., and Michael T. Ferrell, Ph.D. Dr. Reynolds concluded that relator could perform sedentary work activities and Dr. Ferrell opined that relator's allowed psychological condition would not prevent her from returning to her previous position of employment or other employment. Dr. Ferrell did note that relator would benefit from continuing psychological treatment. Thereafter, the SHO addressed the non-medical disability factors. Specifically, the SHO determined that relator's age of 48 years was a positive factor and provided her with sufficient time to acquire new job skills. The SHO noted that relator had successfully participated in vocational rehabilitation in 2004, but noted that, following her March 2008 surgery, relator had not attempted any rehabilitation. Concerning her education, the SHO noted that, despite limitations arising from her lack of formal education and literacy skills, relator had demonstrated the capacity to learn the skills necessary to perform both semi-skilled and skilled work activities successfully. The SHO determined that relator

had sufficient intellect and skills acquisition ability to obtain and perform jobs consistent with her functional limitations.

{¶ 9} 5. Relator filed her second application for PTD compensation on January 3, 2011. However, prior to any discussion on the merits, relator requested that her application be dismissed.

{¶ 10} 6. Relator filed her third application for PTD compensation on July 27, 2011. In addition to medical reports which relator had already filed in support of her prior applications for PTD compensation, relator filed the October 1, 2009 report of Richard M. Ward, M.D., who opined that she could not return to substantial gainful employment; the November 24, 2009 report of Caroline T. Lewin, Ph.D., who opined that her allowed psychological condition had not reached maximum medical improvement ("MMI"); and an employability assessment dated January 10, 2010 completed by Beal D. Lowe, Ph.D., who opined that relator was permanently and totally disabled.

{¶ 11} 7. Relator also submitted the April 1, 2011 report of Keli A. Yee, Psy.D. Following her examination of relator, Dr. Yee opined that relator was permanently and totally disabled, stating:

> In conclusion, she is reporting, measuring, and demonstrating ongoing symptoms of depression with a poor prognosis for return to work due to long-term psychological/physical limitations, and motivational problems. Her basic academic scores are somewhat limited, suggesting that she would likely have problems with retraining. Vocational interest are inconsistent with academic, physical, and psychological capacities. Today's evaluation suggest her mood symptoms alone continue to restrict her ability to sustain work related tasks. Ms. Naso is permanently and totally disabled from her previous job as a printer operator, and she lacks the capacity to sustain any other remunerative employment at this time.

{¶ 12} 8. Relator also included office notes from Francisco Garabis, M.D. In his July 7, 2011 office note, Dr. Garabis opined that relator was permanently and totally disabled and that it would be futile for her to attempt further vocational rehabilitation.

However, in that same office note, Dr. Garabis appears to indicate that relator could perform some work:

> It is my opinion that although Ms. Naso may be able to return to sedentary employment, nonetheless, as she would not be able to sit for more than 15 minutes continuously, and would not be able to sit in one place for more than four hours in a given workday, there is then no combination of sit/stand/walk options that would add up to an eight hour work day. She absolutely would not be able to work in either her former position of employment, her position as a cashier, or in any other position that required her to be on her feet and/or walking for more than five to ten minutes at a time. Additionally, Ms. Naso would be prevented from lifting up to give pounds, only occasionally, and would be completely restricted from stooping or bending below the knees. Finally, as she has right-sided number [sic] and tingling in her thumb and index fingers, she would have difficulties in finger dexterity and grasping/manipulating objects.

{¶ 13} 9. Relator was examined by Richard H. Clary, M.D. In his February 15, 2011 report, Dr. Clary concluded that relator's allowed psychological condition had reached MMI, she had a class 1 level of impairment concerning her activities of daily living and sustained concentration and memory, and a class 2 impairment concerning her social interaction and her ability to adapt to stress. Ultimately, he concluded that she had a ten percent whole person impairment and no work limitations.

{¶ 14} 10. Relator was also examined by James H. Rutherford, M.D. In his March 2, 2011 report, Dr. Rutherford provided his physical findings upon examination, concluded that relator's allowed physical conditions had reached MMI, and that she had a 35 percent permanent partial impairment. Concerning her ability to work, Dr. Rutherford opined that relator could perform sedentary work activities as follows:

> Based only on the orthopedic claim allowances, which are part of Claim #03-356250, and the functional limitations related to those claim allowances, it is my medical opinion that Ms. Lori S. Naso is capable of work activity, but she's limited to sedentary work activities, with additional restrictions of no stooping or bending below knee level for regular work activity. She can drive for her own transportation, but she cannot drive heavy equipment. She

> can do occasional standing and walking, and she can occasionally lift and carry up to 10 lbs.

{¶ 15} 11. An employability assessment was prepared by Joseph M. Cannelongo, MS, CRC, LPC-S. In his March 29, 2011 report, Mr. Cannelongo determined that relator's age of 49 years allowed her approximately 17 years to re-engage in the workforce and would permit a variety of short or long-term retraining options. He also concluded that her work history suggests that she was functioning at the average level and was capable of performing work at the semi-skilled level. Concerning her education, Mr. Cannelongo noted that, despite her lack of formal education or completion of high school, relator had been able to obtain and maintain employment at the semi-skilled level for over 20 years. Mr. Cannelongo ultimately opined that relator had the transferable skills necessary to perform entry-level remunerative employment at the sedentary level and that employment opportunities which did not require retraining or skills remediation existed in the Columbus area. Mr. Cannelongo also noted that relator might reconsider vocational rehabilitation services to improve her marketability and employability.

{¶ 16} 12. Relator's latest application for PTD compensation was heard before an SHO on October 3, 2011 and was denied. The SHO relied on the medical reports of Drs. Clary and Rutherford and found that relator was capable of performing sedentary work activities. Thereafter, the SHO listed several jobs which were within relator's restrictions. Thereafter, the SHO considered relator's non-medical disability factors. The SHO specifically found that relator's age of 50 years was a positive vocational asset, that her age, in and of itself, would not prevent her from obtaining and performing sustained remunerative employment, and that there were approximately 15 years left before the standard retirement age of 65 years. The SHO also determined that relator's education was a positive vocational factor in spite of the fact that she indicated that she could read, write, and perform basic math, but not well. First, the SHO noted that her educational limitations did not prevent her from obtaining and performing semi-skilled work in the past. Second, the SHO concluded that her educational level would assist her in obtaining and performing entry-level, unskilled type of employment previously

identified. With regard to her work history, the SHO noted that relator had demonstrated the ability to perform semi-skilled work and was overall viewed as a positive vocational factor. The SHO also relied on the report of Mr. Cannelongo who found that relator had transferable skills necessary to perform entry-level remunerative employment at the sedentary level.

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

Conclusions of Law:

{¶ 18} Relator makes two arguments: (1) the SHO did not properly consider the medical evidence and did not properly consider the non-medical disability factors; and (2) even if there was some evidence to support the commission's decision, relator argues that there is a substantial likelihood that she is permanently and totally disabled and that this court should order the commission to grant her application based on *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994).

{¶ 19} For the reasons that follow, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and this court should deny her application for a writ of mandamus.

{¶ 20} 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).

{¶ 21} 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. *Gay*. 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).

{¶ 22} In criticizing the medical evidence, relator contends that Dr. Rutherford actually opined that she could perform less than sedentary work. For the reasons that follow, the magistrate disagrees.

{¶ 23} Ohio Adm.Code 4121-3-34(B)(2)(a) identifies sedentary work as follows:

> "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} As noted previously, Dr. Rutherford opined that relator could perform sedentary work as follows:

> Based only on the orthopedic claim allowances, which are part of Claim #03-356250, and the functional limitations related to those claim allowances, it is my medical opinion that Ms. Lori S. Naso is capable of work activity, but she's limited to sedentary work activities, with additional restrictions of no stooping or bending below knee level for regular work activity. She can drive for her own transportation, but she cannot drive heavy equipment. She can do occasional standing and walking, and she can occasionally lift and carry up to 10 lbs.

{¶ 25} First, Dr. Rutherford indicated that relator could occasionally lift and carry up to ten pounds. This clearly falls within the definition of sedentary work above. Second, the only other restrictions Dr. Rutherford provided were that relator could not drive heavy equipment and she should avoid stooping and bending below knee level. These additional restrictions do not limit her ability to perform sedentary work. Inasmuch as sedentary work involves sitting most of the time, but may involve walking and standing for brief periods of time, stooping or bending below knee level is not necessarily contemplated. Further, an inability to drive heavy equipment has no bearing on whether or not she can perform at a sedentary work level. Relator's argument that Dr. Rutherford's limitations preclude her from performing some sustained remunerative employment lacks merit.

{¶ 26} Relator also criticizes Dr. Clary's report because he finds that she has a ten percent impairment and yet also states that she had no work limitations. Relator seems to contend that a ten percent whole person impairment necessarily implies that Dr. Clary also finds that she had limitations.

{¶ 27} In *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994), the Supreme Court of Ohio summarized the distinction between the ambiguous, equivocal and repudiated reports as follows:

> [E]quivocal medical opinions are not evidence. See also *State ex rel. Woodard v. Frigidaire Div., Gen. Motors Corp.* (1985), 18 Ohio St.3d 110 * * *. Such opinions are of no probative value. Further, equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. [*State ex rel. Paragon v. Indus. Comm.*, 5 Ohio St.3d 72 (1983).] Thus, once clarified, such statements fall outside the boundaries of [*State ex rel. Jennings v. Indus. Comm.*, 1 Ohio St.3d 101 (1982)], and its progeny.
>
> Moreover, ambiguous statements are inherently different from those that are repudiated, contradictory or uncertain. Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable. Such statements relate to the

> doctor's position on a critical issue. Ambiguous statements, however, merely reveal that the doctor did not effectively convey what he meant and, therefore, they are not inherently unreliable. Such statements do not relate to the doctor's position, but to his communication skills. If we were to hold that clarified statements, because previously ambiguous, are subject to *Jennings* or to commission rejection, we would effectively allow the commission to put words into a doctor's mouth or, worse, discount a truly probative opinion. Under such a view, any doctor's opinion could be disregarded merely because he failed on a single occasion to employ precise terminology. In a word, once an ambiguity, always an ambiguity. This court cannot countenance such an exclusion of probative evidence.

{¶ 28} The magistrate finds that Dr. Clary's report is neither ambiguous, equivocal or inconsistent. Dr. Clary found that her allowed psychological condition was mildly impairing and that it would not negatively affect her ability to obtain and perform some sustained remunerative employment. Further, to the extent that relator points to other reports in the record, those reports were not relied on by the commission. Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *Teece*. Further, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *Pass*.

{¶ 29} The magistrate finds that the medical reports of Drs. Rutherford and Clary do constitute some evidence upon which the commission can rely.

{¶ 30} In arguing that the commission's analysis of the non-medical disability factors was insufficient, relator argues: (1) that the SHO failed to explain how her age was a positive vocational asset; (2) because her educational level is almost the same as the educational level of the claimant in *Gay*, relator argues her education should not be found to be a positive factor, and (3) the employability assessment of Dr. Lowe concluded that her work history was not positive.

{¶ 31} At the time her recent application for PTD compensation was heard, relator was 50 years of age. There is not an age, ever, at which re-employment is held to be a virtual impossibility as a matter of law. *See State ex rel. Ellis v. McGraw Edison*

Co., 66 Ohio St.3d 92 (1993)—claimant 51 years; *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996)—claimant 64 years; *State ex rel. DeZarn v. Indus. Comm.*, 74 Ohio St.3d 461 (1996)—claimant 71 years; *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414 (1996)—claimant 78 years; and *State ex rel. Bryant v. Indus. Comm.*, 74 Ohio St.3d 458 (1996)—claimant 79 years. The magistrate finds that the commission did not abuse its discretion in finding that her age would not, in and of itself, prevent her from obtaining and performing sustained remunerative employment consistent with the jobs which the SHO identified.

{¶ 32} Further, the magistrate finds that the commission did not abuse its discretion by finding that her age was a positive factor despite the fact that she only had a tenth grade education and that she indicated she could read, write, and perform basic math, but not well.

{¶ 33} Relator asserts that her situation is analogous to the situation of the claimant in *Gay*. George V. Gay was 59 years of age, had a ninth grade education, and had spent 29 years as a construction laborer. In finding that Gay was capable of performing some sustained remunerative employment at a sedentary level, the commission addressed the non-medical disability factors stating:

> ["]Claimant is 61 years of age and has a 9th grade education. He has worked for the water department for 29 years rising to the position of maintenance crew leader, indicating supervisory potential. Dr. Amendt, orthopedic specialist, states that claimant is capable of sedentary work and has [a] 38% * * * [permanent partial disability]. Based upon the above cited factors claimant is found not to be * * * [permanently totally disabled]."

Id. at 318.

{¶ 34} In granting a writ of mandamus, the Supreme Court of Ohio found that the commission had failed to explain how a "sixty-one-year-old medically impaired claimant with a ninth grade education, who has worked as a construction laborer his entire life, who has absolutely no special training or vocational skills, and who has a severely limited vocational aptitude, can realistically return to the job market to do work of a strictly sedentary nature." *Id*. at 321.

{¶ 35} The situation presented here is not analogous to the situation presented in *Gay*. First, relator is 11 years younger than Gay was at the time his application was denied. Further, although their education levels are similar, their work history is not. Gay had spent 29 years as a construction laborer, while relator spent 20 years performing semi-skilled work. An ability to perform semi-skilled work would allow relator to perform more sedentary jobs than Gay could have performed. The fact patterns simply are not analogous and the concerns present in *Gay* are not present in relator's situation. Here, the commission not only identified specific jobs which relator could perform, the commission specifically noted that any limitations in her formal education and literacy abilities had not prevented her from obtaining and performing semi-skilled work and that, the fact that she had performed such work in the past, her education and work history would permit her to obtain and perform entry-level, unskilled types of employment. Here, the commission did provide an explanation.

{¶ 36} At oral argument, counsel for relator argued that Mr. Cannelongo's vocational report should not have been relied upon because it was written before Dr. Garabis opined that she was permanently and totally disabled and vocational rehabilitation would be futile. It appears that counsel is arguing that if Mr. Cannelongo would have had a copy of Dr. Garabis' report, he would have concluded that relator would not be able to return to any employment. The magistrate disagrees.

{¶ 37} First, the commission did not rely on Dr. Garabis' report. Second, vocational experts generally provide opinions based on the different medical reports. For example, if some doctors opine that a claimant cannot work, then the vocational expert would indicate that, based on those reports, the claimant could not work. Vocational experts do not offer an opinion regarding the credibility of the medical reports. Instead, vocational experts provide opinions based on the different reports. Here, when considering the reports of Drs. Rutherford and Clary, the same physicians upon which the commission ultimately relied, Mr. Cannelongo opined that relator could work.

{¶ 38} Relator also argues that, in the event this court finds there is some evidence upon which the commission could rely and that the commission did properly

analyze the non-medical disability factors, because there is a substantial likelihood that she is actually permanently and totally disabled, this court should grant her relief pursuant to *Gay*. For the reasons that follow, this magistrate disagrees.

{¶ 39} In making this argument, relator points to the medical reports of Drs. Ward and Lewin who concluded that she was permanently and totally disabled. She also points to the employability assessment of Dr. Lowe who found that she lacked the capacity for rehabilitation. Relator also points to the office note of Dr. Garabis who opined that she was permanently and totally disabled.

{¶ 40} Relator argues that her medical evidence should have been relied upon; however, that is not the law. As noted previously, credibility and the weight to be given evidence are clearly within with discretion of the commission as fact finder and it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *Teece*; *Pass*.

{¶ 41} The magistrate finds that the medical reports upon which the commission relied do constitute some evidence and that the commission's analysis of the non-medical disability factors was sufficient. As such, the magistrate finds that relator has not demonstrated that she has a clear legal right to a writ of mandamus.

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

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).