[Cite as *State ex rel. Casto v. Indus. Comm.*, 2013-Ohio-1017.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. William E. & Garry Casto, Etc., Casto Health Care,	:	
Relator,	:	
v.	:	No. 12AP-205
Industrial Commission of Ohio and Theresa L. Casto,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 19, 2013

Calfee, Halter & Griswold LLP, William L. S. Ross and *William B. McKinley*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Craig T. Lelli, for respondent Theresa L. Casto.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, William E. & Garry Casto, Etc., Casto Health Care ("relator"), filed an original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order granting permanent total disability ("PTD") compensation to respondent Theresa L. Casto ("claimant") and to enter an order denying PTD benefits based on voluntary abandonment of the workforce or, in the alternative, to hold a new hearing on claimant's PTD application and issue an order that addresses the question of voluntary abandonment. Because we find that relator has

failed to meet its burden for mandamus relief, we adopt the magistrate's findings of fact only and we deny the requested writ of mandamus.

{¶ 2} Relator employed claimant as a certified nursing assistant. On November 25, 1992, claimant suffered an injury while working. She submitted a workers' compensation claim, which was initially allowed for a lumbar sprain. Between 1993 and 2011, claimant submitted applications for various additional claims related to her original injury; some of these claims were granted and others were denied. Claimant also filed three applications for PTD between 1999 and 2008; each of these applications was denied. In 2011, claimant filed a fourth application for PTD. In each of claimant's PTD applications, she disclosed that she received Social Security Disability ("SSD") benefits and that she had begun receiving these benefits in May or June of 1993. Following a hearing, a commission staff hearing officer ("SHO") issued an order granting claimant's application for PTD compensation.

{¶ 3} This court referred the matter to a magistrate pursuant to Civ.R. 53(D) 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 grant the requested writ and order the commission to vacate its order granting PTD compensation to claimant and enter a new order adjudicating the issue of voluntary abandonment.

{¶ 4} Claimant filed two objections to the magistrate's decision:

> 1. Claimant objects to the Magistrate's conclusion that the Relator-employer appropriately brought into issue evidence that the claimant voluntarily removed herself from the workforce requiring a Staff Hearing Officer adjudication on said issue based upon facts contained in the record pursuant to Ohio Administrative Code §4121-3-34(D)(1)(d).
>
> 2. Claimant objects to the Magistrate's conclusion that the Relator asserted in [sic] an affirmative defense and produced evidence in the record that supported such a defense.

{¶ 5} The commission also filed four objections to the magistrate's decision:

> (1) [The magistrate erred in finding that] [t]he court can assume that the Relator raised the defense of voluntary abandonment when nothing in the stipulated record supports that finding;

> (2) [The magistrate erred in finding that] [t]he employer raised voluntary abandonment despite failing to submit supporting law or any factual evidence;
>
> (3) The employer's conjecture that the claimant "must have applied" for social security disability before her industrial injury based on when she began receiving benefits is not evidence of voluntary abandonment;
>
> (4) The commission has no legal duty to address an employer's voluntary abandonment suggestion when the "judicial notice" urged by the employer is contrary to the federal statutes and regulations regarding social security disability benefits.

{¶ 6} Pursuant to Civ.R. 53(D)(4)(d), we undertake an independent review of the objected matters "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." None of the parties have objected to the magistrate's findings of fact, and we adopt them as our own.

{¶ 7} As explained in the magistrate's decision, relator asserts that it raised the issue of voluntary abandonment of the workforce before the SHO by arguing that, based on the date when claimant began receiving SSD benefits, she must have applied for those benefits prior to her November 1992 injury date. The SHO's order did not address the issue of voluntary abandonment. Relator argues that, under Ohio Adm.Code 4121-3-34(D)(1)(d), the SHO was required to adjudicate the issue of voluntary abandonment and abused her discretion by failing to do so.

{¶ 8} There was no transcript of the hearing conducted before the SHO. Further, as the magistrate noted in his decision, relator did not file any written memoranda on the administrative level raising the issue of voluntary abandonment. Therefore, we are faced with an incomplete record supporting relator's mandamus request. Although relator asserted in its brief before the magistrate that it raised the issue of voluntary abandonment, it cannot point to any specific item of evidence in the record to support this assertion. The commission's first and second objections to the magistrate's decision, along with claimant's two objections raise the issue of the incomplete record by arguing that the magistrate erred in concluding that relator raised the issue of voluntary abandonment. Therefore, we will consider these objections together.

{¶ 9} In order to be entitled to a writ of mandamus, a relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 34; *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶ 8. The relator bears a heavy burden in a mandamus case and must submit facts and produce proof that is plain, clear, and convincing. *State ex rel. Stevens v. Indus. Comm.*, 10th Dist. No. 10AP-1147, 2012-Ohio-4408, ¶ 7. "The elements required for mandamus relief reflect this heightened standard in two ways—by requiring 'a "clear" legal right to the requested extraordinary relief and a corresponding "clear" legal duty on the part of the respondents to provide it.' " *Id.*, quoting *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 56.

{¶ 10} This court recently considered a similar case involving a mandamus claim based on an incomplete record in *Stevens*. In that case, following an unrecorded hearing, a commission SHO granted the relator's PTD application. *Stevens* at ¶ 5. The full commission then exercised continuing jurisdiction over the claim based on its conclusion that the issue of voluntary abandonment had been raised at the hearing and that the SHO abused its discretion by not addressing voluntary abandonment. *Id*. The full commission then reversed the PTD award. *Id*. The relator filed a mandamus complaint, asserting that there was no evidence in the record to demonstrate that voluntary abandonment had been raised before the SHO and that the commission abused its discretion by exercising continuing jurisdiction. *Id*. We concluded that, by relying on the absence of evidence in the record, the relator attempted to effectively shift the burden to the respondents to establish that voluntary abandonment had been raised and that the relator had no right to mandamus relief. *Id*. at ¶ 8. However, due to the deficiency in the record, we concluded that the relator failed to meet her burden of proof and denied the mandamus claim. *Id*. at ¶ 11.

{¶ 11} Similarly, in this case, there is no evidence in the record to support relator's claim that it raised the issue of voluntary abandonment before the SHO. However, by asserting in its brief that it raised the issue at the hearing, relator seeks to shift the burden

to claimant and the commission to prove that voluntary abandonment was not raised. It appears that relator did not take any steps to complete the record, such as requesting an admission regarding what transpired at the hearing, filing an affidavit with respect to what transpired at the hearing, or taking a deposition of someone who was present at the hearing and could describe what transpired. *See Stevens* at ¶ 10-11. A silent record does not change the applicable burden of proof in this case. Relator, not respondent, bears the burden of proving that it is entitled to mandamus relief by clear and convincing evidence. Absent clear and convincing proof that relator raised the issue of voluntary abandonment before the SHO, relator cannot establish that the SHO had a clear legal duty to address that issue in her opinion. A mere assertion in its brief that it raised the issue of voluntary abandonment is insufficient to meet the standard of clear and convincing evidence. Accordingly, we sustain the commission's first and second objections to the magistrate's decision, as well as claimant's two objections.

{¶ 12} The commission's third and fourth objections address the merits of relator's voluntary abandonment claim. Because we find a lack of evidence that the SHO abused her discretion by failing to address the issue of voluntary abandonment, these two objections are moot.

{¶ 13} Following an independent review of the record, we find that the magistrate has properly determined the facts, but did not apply the appropriate legal standard. Therefore, we sustain the commission's first and second objections to the magistrate's decision and claimant's two objections to the magistrate's decision. We find that the commission's third and fourth objections are moot. Accordingly, we adopt only the magistrate's findings of fact as our own and deny relator's requested writ of mandamus.

Objections sustained; writ denied.

TYACK and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. William E. & Garry Casto, Etc., Casto Health Care,	:	
Relator,	:	
v.	:	No. 12AP-205
Industrial Commission of Ohio and Theresa L. Casto,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on September 27, 2012

Calfee, Halter & Griswold LLP, William L. S. Ross and *William B. McKinley*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Craig T. Lelli, for respondent Theresa L. Casto.

IN MANDAMUS

{¶ 14} In this original action, relator, William E. & Garry Casto, Etc., Casto Health Care, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the March 16, 2011 order of its staff hearing officer ("SHO") that awards permanent total disability ("PTD") compensation to respondent Theresa L. Casto

("claimant") and to enter an order that adjudicates whether claimant voluntarily abandoned the workforce prior to becoming permanently and totally disabled.

Findings of Fact:

{¶ 15} 1. On November 25, 1992, claimant suffered a lumbar sprain while employed as a nursing assistant at the Woodside Village Care Center operated by relator, a state-fund employer. The injury occurred when claimant lifted a patient from a bed.

{¶ 16} 2. The industrial claim (No. 92-76831) was initially allowed for "lumbar sprain."

{¶ 17} 3. In April 1994, the Ohio Bureau of Workers' Compensation ("bureau") additionally allowed the claim for "aggravation of somatoform pain disorder" based on a report from psychologist Earl Greer regarding a February 7, 1994 examination. The bureau's order was not administratively appealed.

{¶ 18} 4. On December 15, 1999, claimant filed her first of four applications for PTD compensation.

{¶ 19} 5. The PTD application form asks the applicant: "Have you filed for Social Security Disability benefits?" In response, claimant indicated by her mark that the answer is "Yes." She also indicated by her mark that "I am * * * receiving Social Security Disability benefits."

{¶ 20} The application form instructs the applicant:

> If you are now, or ever have, received Social Security Disability payments complete the following section.

{¶ 21} In the space provided, claimant indicated that June 1993 was the "starting date" for her receipt of Social Security Disability ("SSD") benefits.

Immediately below, the PTD application form states:

> I acknowledge that, in the event the motion for permanent total disability is granted, it shall be my obligation to provide official certification by the Social Security Administration before compensation payments are begun.

{¶ 22} 6. Following a November 1, 2000 hearing, an SHO issued an order denying the PTD application filed December 15, 1999. On the date of hearing, the industrial claim was only allowed for the lumbar sprain and "aggravation of somatoform pain disorder."

Based upon two medical reports, the SHO found that claimant was capable of resuming her former position of employment. In the order, the SHO states:

> Unrelated to the allowed conditions of these claims, the claimant has had a right knee injury, which required arthroscopic surgery, a left ankle injury, has undergone an appendectomy and a cholecystectomy, and suffers from asthma, diabetes and heart disease.

{¶ 23} 7. On October 16, 2002, claimant filed her second application for PTD compensation. On the application, pursuant to the pre-printed queries, claimant again indicated by her mark that she has filed for SSD benefits. She further indicated that May 1993 was the starting date of SSD benefits.

{¶ 24} 8. Following a May 1, 2003 hearing, an SHO issued an order denying the PTD application filed October 16, 2002.

{¶ 25} 9. Following a March 10, 2005 hearing, the industrial claim was additionally allowed for "Dysthymic disorder."

{¶ 26} 10. Following an October 17, 2005 hearing, an SHO issued a "corrected order" awarding temporary total disability ("TTD") compensation from August 24, 2004 through March 9, 2005 inclusive. The award was based upon an August 24, 2004 report from psychologist John M. Malinky, Ph.D.

{¶ 27} 11. Following an April 4, 2006 hearing, a district hearing officer ("DHO") found that the allowed psychological conditions have reached maximum medical improvement ("MMI"). Consequently, TTD compensation was terminated effective the hearing date.

{¶ 28} 12. On January 8, 2008, claimant filed her third PTD application. On the application, pursuant to the pre-printed queries, claimant again indicated by her mark that she has filed for SSD benefits. She further indicated that May 1993 was the starting date for SSD benefits.

{¶ 29} 13. Following a December 10, 2008 hearing, an SHO issued an order denying claimant's application filed January 8, 2008.

{¶ 30} 14. On August 4, 2010, claimant moved for additional claim allowances.

{¶ 31} 15. On August 10, 2010, the bureau mailed an order additionally allowing the claim for agoraphobia with panic disorder, major depressive disorder, single (episode) and generalized anxiety disorder.

{¶ 32} 16. On March 16, 2011, claimant filed her fourth PTD application.

{¶ 33} 17. On September 26, 2011, claimant's March 16, 2011 PTD application was heard by an SHO. The hearing was not recorded.

{¶ 34} 18. Following the hearing, the SHO issued an order awarding PTD compensation beginning February 24, 2011. The SHO's order of September 26, 2011 explains:

> Permanent and total disability compensation is awarded from 02/24/2011 for the reason that it is the date of last payment of temporary total disability.
>
> The cost of this award is apportioned as follows: 100% in claim # 92-76831.
>
> Based upon the report(s) of Dr(s). Chapman, dated 05/05/2011, Stuck, dated 03/04/2011, and Lowe, dated (01/12/2011), the Staff Hearing Officer finds that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed psychological condition. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

{¶ 35} 19. On March 9, 2012, relator William E. & Garry Casto, Etc., Casto Health Care, filed this mandamus action.

Conclusions of Law:

{¶ 36} Because the commission failed to adjudicate an affirmative defense to the PTD application that relator apparently raised at the September 26, 2011 hearing, it is the magistrate's decision that this court issue a writ of mandamus as more fully explained below.

{¶ 37} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(d) states:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and

> totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶ 38} Paragraphs two and three of the syllabus of *State ex rel. Baker Material Handling Corp. v. Indus. Comm.* 69 Ohio St.3d 202 (1994) state:

> [Two] An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market.
>
> * * *
>
> [Three] An employee who retires subsequent to becoming permanently and totally disabled is not precluded from eligibility for permanent total disability compensation regardless of the nature or extent of the retirement.

{¶ 39} "The claimant's burden is to persuade the commission that there is a proximate causal relationship between his work-connected injuries and disability, and to produce medical evidence to this effect." *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83 (1997).

{¶ 40} If the claimant produces medical evidence linking his disability with the allowed conditions of the industrial claim, he has established a prima facie causal connection. "The burden should then properly fall upon the employer to raise and produce evidence on its claim that other circumstances independent of the claimant's allowed conditions caused him to abandon the job market." *Id.* at 84.

{¶ 41} In *Quarto,* the employer did not deny that it had failed to raise the retirement issue administratively as a defense to the PTD application. The employer, in effect, argued that "the issue raises itself by virtue of being manifest in the record." *Id.* at 81. The *Quarto* court soundly rejected that argument.

{¶ 42} However, where the employer does administratively raise an issue as to the voluntariness of the retirement as a defense to a PTD application, but the commission awards PTD compensation without adjudicating the employer's affirmative defense, a limited writ shall issue ordering the commission to vacate its order to adjudicate the

employers defense, and to issue an amended order. *State ex rel. Cinergy Corp./Duke Energy v. Heber*, 130 Ohio St.3d 194, 2011-Ohio-5027.

{¶ 43} In *State ex rel. Staton v. Indus. Comm.*, 91 Ohio St.3d 407 (2001), the court upheld the commission's decision denying TTD compensation on grounds that the claimant's retirement from his former position of employment was due solely to a non-allowed condition. The *Staton* court states:

> [T]he claimant who vacates the work force for non-injury reasons not related to the allowed condition and who later alleges an inability to return to the former position of employment cannot get TTD. This, of course, makes sense. One cannot credibly allege the loss of wages for which TTD is meant to compensate when the practical possibility of employment no longer exists.

Id. at 410.

{¶ 44} Thus, even though it can be said that one does not ordinarily voluntarily acquire a non-allowed health condition, under *Staton*, if that non-allowed condition motivates job abandonment, the job abandonment can bar TTD compensation. In that situation, the job abandonment can be viewed as voluntary because it is unrelated to an allowed condition of an industrial claim. *See State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988).

{¶ 45} While *Staton* involved eligibility for TTD compensation, its rationale has been applied to support PTD ineligibility. *State ex rel. Bartley v. Fahey Banking Co.*, 10th Dist. No. 06AP-980, 2007-Ohio-3623.

{¶ 46} Here, the main inquiry is whether relator actually raised the affirmative defense administratively.

{¶ 47} As earlier noted, the September 26, 2011 hearing was not recorded. Moreover, administratively, relator did not file any written memoranda raising the affirmative defense. The SHO's order does not address the issue at all. In short, there is nothing in the stipulated record before this court to indicate that relator administratively raised the issue of workforce abandonment.

{¶ 48} However, in its brief, relator asserts in its "Statement of the Facts":

> At the September 26, 2011 merit hearing on Claimant's fourth attempt at PTD compensation, Relator relied

> primarily upon a "voluntary abandonment" argument centered on Claimant's filing for and receiving SSD benefits dating back to May or June 1993 (depending on which of Claimant's PTD applications one is looking at). The argument was that SSD benefits collected in the Spring of 1993 would have been applied for before Claimant's injury of November 1992 and, even if somehow not, it was not likely to have been awarded based on the mild claim allowance of lumbar sprain. Therefore, Claimant's departure from employment was for a non-claim-related reason.

(Relator's brief, at 4-5.)

{¶ 49} In claimant's brief which was authored by counsel who was present at the September 26, 2011 hearing, there is no denial of relator's assertion that the issue was raised as described in relator's brief.

{¶ 50} Moreover, in the commission's brief filed in this action, the commission does not deny that relator argued at the hearing that claimant had abandoned the workforce.

{¶ 51} Under these circumstances, the magistrate must conclude that relator did administratively raise workforce abandonment as an affirmative defense to the PTD application filed March 16, 2011, and that the commission, through its SHO, unjustifiably failed to adjudicate the issue.

{¶ 52} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of September 26, 2011 that awards PTD compensation to the claimant, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates relator's affirmative defense. If the commission determines that claimant did not voluntarily abandon the workforce prior to becoming PTD, the commission shall reinstate the PTD award.

/S/ MAGISTRATE
KENNETH MACKE

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).