

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[State ex rel.] Gene G. Felty,	:	
Relator,	:	
v.	:	No. 12AP-130
General Motors Delco Chassis Division and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on January 24, 2013

Michael J. Muldoon, for relator.

Taft, Stettinius & Hollister, LLP, and *Jennifer Hann Harrison*, for respondent General Motors Delco Chassis Division.

Michael DeWine, Attorney General, and *Justine S. Casselle*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Gene G. Felty, 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 he 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 determined that the commission did not abuse its discretion by denying relator's PTD application without considering relator's allowed physical conditions because, according to the magistrate, relator failed to present any medical evidence of his allowed physical conditions. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision, in which he argues that the commission erroneously failed to consider his allowed orthopedic condition in denying his application for PTD compensation. This exact argument was presented to and sufficiently addressed by the magistrate, who determined that relator failed to present any medical evidence concerning his allowed physical conditions. Upon review of the magistrate's decision and an independent review of the record, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law in rejecting this argument.

{¶ 4} Relator also challenges the magistrate's conclusion that relator's latest application for PTD compensation was barred by the doctrine of res judicata. We decline to address this issue because it was an additional ground supporting the magistrate's recommendation and, therefore, superfluous for purposes of our analysis. *See State ex rel. McElroy v. Indus. Comm.*, 10th Dist. No. 11AP-391, 2012-Ohio-2267, ¶ 5. Accordingly, we delete paragraph 33 of the magistrate's decision in its entirety as it is unnecessary to our analysis. *See State ex rel. Scarborough v. Indus. Comm.*, 10th Dist. No. 09AP-1041, 2010-Ohio-4020, ¶ 4.

{¶ 5} Having conducted an independent review of this matter, and upon due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objections and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, except that we delete paragraph 33 in its

entirety for the reasons stated above. Accordingly, the requested writ of mandamus is denied.

*Objections overruled;
writ of mandamus denied.*

TYACK and DORRIAN, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

[State ex rel.] Gene G. Felty,	:	
Relator,	:	
v.	:	No. 12AP-130
General Motors Delco Chassis Division and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on August 13, 2012

Michael J. Muldoon, for relator.

Taft, Stettinius & Hollister, LLP, and Jennifer Hann Harrison, for respondent General Motors Delco Chassis Division.

Michael DeWine, Attorney General, and *Justine S. Casselle*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 6} Relator, Gene G. Felty, 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 his application for permanent total

disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 7} 1. Relator sustained a work-related injury on February 3, 1977 and his workers' compensation claim was ultimately allowed for the following conditions:

Head laceration; severely lacerated and fractured left arm; contusions and abrasions to torso; fractured left leg/ankle; adjustment disorder with mixed emotional features; traumatic degenerative joint disease-tricompartmental left knee; dysthymic disorder.

{¶ 8} 2. Relator filed his first application for PTD compensation in June 1999. At that time, his claim had not been allowed for the psychological condition of dysthymic disorder. Relator was 64 years old, had a high school education, and had specialized vocational training as a machine repairman. His work history involved employment as a maintenance mechanic. Further, relator indicated on his application that he was able to read, write, and perform basic math well. The commission relied upon medical reports finding that his physical conditions had reached maximum medical improvement ("MMI"), and that he was capable of performing employment activities which were sedentary to light in nature. The commission considered and relied on an employability assessment which identified several jobs which relator could immediately perform. The commission found that relator's age of 64 years was a moderate impairment, but that age alone is not a factor which would prevent him from returning to work. The commission found that his high school education, special vocational training, and skilled work history would be assets to his ability to return to work. The commission also found that his skilled work history was evidence that he possessed the intellectual capacity to perform at least unskilled and semi-skilled employment activities in the future.

{¶ 9} 3. Relator filed his second application for PTD compensation in March 2005, after his claim had been allowed for the psychological condition of dysthymic disorder. The commission determined that relator's allowed psychological condition did not prevent him from engaging in sustained remunerative employment. The commission did not consider his allowed physical conditions.

{¶ 10} 4. Relator filed his third application for PTD compensation in April 2007. The commission concluded that relator could perform restricted work at a light-duty level. The commission noted that relator was currently 73 years old. Comparing his third application with the prior two applications, the commission determined that there had been essentially no changes in his claim except for his age. After noting that a mere increase in age, rather than the allowed disability, may not be the sole causative fact to support an award of PTD compensation, the commission concluded that his twelfth grade education, significant Army experience in intelligence, and ability to presently engage in certain ministerial activities was further evidence that, if so motivated, relator could have participated in further retraining or education to perform light-duty activities. The commission also noted relator's testimony that he had refused to participate in any vocational rehabilitation on grounds that " 'if he could not return to his regular job duties that he was working in at the time of his injury, then he did not wish to return to any employment.' " *State ex rel. Felty v. Gen. Motors*, 10th Dist. No. 08AP-156, 2008-Ohio-5694. The commission inquired about relator's medical care and treatment since the denial of his second application, and relator testified that his pain had increased and that he had problems sleeping. Relator was unable to identify any specific further medical care, including physical therapy or medication since the denial of the second application, and none of the medical evidence submitted by relator addressed this issue. After noting that relator's increase in age, standing alone, could not be considered a bar to reemployment, the commission held relator accountable for his failure to participate in any vocational rehabilitation:

"It is further expected of an injured worker under Ohio's Workers' Compensation laws that he participate in a return to work effort to the best of his ability or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse an injured worker's nonparticipation in reeducation or retraining efforts, injured workers should not assume that a participatory role or lack thereof will go unscrutinized. *State ex rel. Cunningham v. Indus. Comm.* (2001), 91 Ohio St.3d 261, 744 N.E.2d 711.

* * *

At the time he retired, the injured worker was approximately 63 years old. He is now approximately 73 years old. During that interim 10-year period, the injured worker did not undertake any effort to seek additional employment or to engage in any activities that would permit him to perform any light duty activities within the restrictions identified by Drs. Duritsch and Wunder. The Staff Hearing Officer finds this was a voluntary decision on the part of the injured worker as reflected in his testimony today. As noted above, the injured worker testified that he was not interested in any work but his former position of employment."

Felty at ¶ 14.

{¶ 11} 5. Relator filed a mandamus action in this court arguing that the commission had erred when it determined that he had not demonstrated a change in his condition when, in fact, he had testified to the contrary and cited numerous cases from the Supreme Court of Ohio chastising the commission for always finding transferrable skills in every case. This court denied relator's request for a writ of mandamus finding that the commission did not abuse its discretion in finding that he had not established a change in circumstances other than his increase in age, determined that the commission had not indicated that relator had any transferrable skills, and that the commission's order complied with *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). This court, through its magistrate, discussed the commission's determination that relator's failure to pursue any vocational rehabilitation was another reason to deny his application stating:

After finding that relator was capable of performing light-duty work with restrictions, the commission acknowledged that relator's age was a barrier to his return to the workplace. However, the commission determined that relator's inability to return to work after his injury was a voluntary choice. Specifically, relator chose not to undertake any vocational rehabilitation or retraining which would enable him to return to light-duty work. Relator testified that he was not interested in returning to any work other than his former position of employment. Given his 12th grade education, his Army experience, and his current ability to engage in ministerial activities, the commission specifically determined that had he been so motivated, relator could have participated in further retraining or education to perform

light-duty activities. It is undisputed that the commission can demand accountability of claimants who, despite time and medical ability to do so, never tried to further their education or learn new skills. *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148, 672 N.E.2d 161; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, 685 N.E.2d 774; *State ex rel. Wood v. Indus. Comm.* (1997), 78 Ohio St.3d 414, 678 N.E.2d 569; *State ex rel. Ehlinger v. Indus. Comm.* (1996), 76 Ohio St.3d 400, 667 N.E.2d 1210; and *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 666 N.E.2d 1125. In the present case, the commission held relator accountable for his failure to take advantage of his opportunities for rehabilitation and retraining in spite of his ability to do so. This did not constitute an abuse of discretion.

Felty at ¶ 25.

{¶ 12} 6. Relator submitted his fourth application for PTD compensation on October 26, 2009. In support of his fourth application for PTD compensation, relator did not submit any evidence concerning his allowed physical conditions. The only medical report which relator submitted was the September 21, 2009 report of Michael Glen Drown, Ph.D. Dr. Drown administered two psychometric tests to relator and noted the following in his report:

The BDI-II reveals Mr. Felty to fall in the category of mild depression.

* * *

The ISB reveals Mr. Felty to be maladaptive regarding his mood, anxiety, pain and self-image.

{¶ 13} 7. Dr. Drown concluded that relator's allowed psychiatric conditions had clearly worsened over time and concluded by stating:

Considering his age, education, lack of marketable skills, diminished overall adaptiveness, and his (multiple) work injuries, it is within reasonable certainty that his psychiatric disability taking in the whole body is permanent total. In reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral disorders, his psychiatric impairment (taking in the whole body) falls within the extreme range.

{¶ 14} 8. Robert Madrigal, Ph.D., performed a psychological evaluation. In his January 15, 2010 report, Dr. Madrigal administered the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2") and interviewed relator. Dr. Madrigal noted the following results following the testing and interview:

The MMPI-2 was given and he responded in a sincere manner and with a good comprehension of the items. The profile obtained is a valid and reliable one.

* * *

This profile is not indicative of significant psychopathology. Individuals with this type of profile show some exaggerated concern about medical problems but there is no other significant trait that would indicate any psychopathological category.

During the interview he denied feelings of hopelessness, helplessness or worthlessness. He said that he has crying spells once a month. He denied the presence of suicidal thoughts. He is not anhedonic and is well motivated. He socializes well but has become irritable. His sleep is poor. Memory and concentration are erratic.

Dr. Madrigal concluded that relator's allowed psychological conditions had reached MMI, noted that he had not been in treatment for 12 years, concluded that he had a 1 percent impairment and that, from a psychological perspective, he could return to his former position of employment or any other employment for which he was qualified.

{¶ 15} 9. Giovanni M. Bonds, Ph.D., also evaluated relator for his allowed psychological condition. In his February 18, 2010 report, Dr. Bonds identified the medical evidence he reviewed, including evidence regarding relator's allowed physical conditions as well as his allowed psychological conditions. Dr. Bonds noted that relator explained his activity of daily living as follows:

Gene gets up at 5:00 a.m. on weekdays and gets dressed, then goes out to do his mission work. He works his way down to Third and Main Street in downtown Dayton between 7:00 and 8:00 a.m. and he passes out religious literature and talks to people. He goes home after a couple of hours and starts doing things around the house. He watches TV and studies the bible. He eats and takes a nap. Gene

drives and runs errands. He shops for groceries. He does not cook. He pays bills and takes care of business matters. He goes to church twice a week.

Dr. Bonds noted the following impairment: activities of daily living-Class I, zero impairment; social functioning-Class I, 5 percent impairment; concentration, persistence, and pace-Class I, zero impairment; and adaptation-Class I, 5 percent impairment. Dr. Bonds concluded that relator's allowed psychological condition had reached MMI, concluded that relator had a 6 percent whole person impairment, and he was capable of working at low-stress work that did not require a fast pace, dealing with frequent change or handling interpersonal conflicts and problems.

{¶ 16} 10. Paul T. Hogya, M.D., examined relator for his allowed physical conditions. In his March 9, 2010 report, Dr. Hogya set out the history of relator's claim, his current symptoms, as well as his physical findings upon examination. Dr. Hogya concluded that relator's allowed physical conditions had reached MMI, assessed a 15 percent whole person impairment, and, with regard to his physical abilities, Dr. Hogya stated:

In my medical opinion, the objective medical evidence and examination findings do not support Mr. Gene Felty to be permanently and totally disabled from all forms of sustained remunerative employment based solely on the allowed physical conditions in the above claim. This gentleman has been extremely functional over the years. After his 1977 injury, he returned to his normal machine repairman duties some two years later. He continued working through February 1998, at which time he underwent his knee replacement. He retired in 1999. The knee replacement had a good result. Mr. Felty is quite active. He is able to tolerate stairs. He walks up to a few miles by hi[s] description. He does a good amount of work around the house, including climbing ladders to work on his roof or gutters as needed. He works on his cars. Although he states he has some difficulties, he is still able to complete these projects. He is not using any type of brace, cane or other assist device. He did have a significant injury to the left forearm, wrist and hand with associated radial nerve impairment. However, he demonstrated a significant functional adjustment to that injury as demonstrated by his work as a repairman for some 20 years before retiring. Thus, he is readily capable of

functioning in a medium industrial demand capacity with respect to his right upper extremity. He is capable of using the left upper extremity in a supportive role, primarily consisting of sedentary work. He still has demonstrable functional grip and pinch with the left hand. He should avoid use of hand tools and vibrating tools with the left hand. He is right hand dominant, so that is not an issue with regard to functional use for most activities. He should avoid crawling. He is capable of occasional squat and kneel as demonstrated. Sitting, standing and walking may be up to two hours at a time with standard breaks. He may occasionally climb stairs and ramps. He is capable of using step stools and ladders should generally be under four feet, despite the fact that he climbs higher at home. He is capable of driving cars and light trucks with automatic transmission, generally up to one hour at a time with an opportunity to exit the vehicle and stretch.

Dr. Hogya limited relator to sedentary work for his left upper extremity and medium work for his right upper extremity.

{¶ 17} 11. Dr. Hogya completed an addendum to his March 9, 2010 report. In a December 6, 2010 report, Dr. Hogya noted that there were no allowed conditions for relator's right upper extremity, and that he did not consider any allowed conditions for the right upper extremity in his report. He completed an additional physical strength rating form indicating that relator was limited to sedentary work for the left upper extremity.

{¶ 18} 12. There are two vocational reports in the record. The first is from Molly S. Williams, a vocational consultant. In her April 11, 2010 report, she concluded that relator was permanently and totally disabled stating:

I have reviewed and formally adopt the factual findings as previously stated above. However, when all of the disability factors are correctly identified, stated, and considered: an individual unable to perform his customary past relevant work as a Machine Repairer, both as he performed it and as it is normally performed within the national economy; an individual of advanced age (age fifty-five or over); an individual with a high school education completed in the remote past (1955); an individual with no transferable skill(s); and an individual not expected to make a vocational adjustment to other work based upon the allowed physical

impairments as assessed by The Industrial Commission's Specialist, Paul T. Hogya, M.D., it is obvious that the claimant is permanently and totally disabled.

{¶ 19} 13. Harold L. Caston, Ph.D., submitted a vocational report dated April 20, 2010. Dr. Caston noted the following in his summary and opinion portion of his report:

There is no medical information in the documents reviewed or referenced in the hearing that precludes all employment for Mr. Felty. The psychological component of his allowed claim is minimal relative to the vocational impairment. The records indicate that he is capable of performing sedentary and possibly some medium work activity. There are references to non-allowed medical conditions of COPD and osteoarthritis.

Mr. Felty has worked primarily as a machine repair person for General Motors. He was involved in traffic analysis which is a desk job that involves analyzing communications that was generated by other countries and intercepted by the National Security Agency (NSA). Mr. Felty worked until he retired in 1998. Mr. Felty has a 12th grade education and some training in TV repair.

The record indicates that Mr. Felty is fully capable of the routine activities of daily living. He is not under psychological treatment and does not take psychotropic medications.

Mr. Felty has demonstrated the ability to perform machine repair, assembly, machine operating, and related tasks. While it has been many years since he has performed any clerical work, Mr. Felty has demonstrated the ability to read understand and analyze written data.

In addition to being able to perform work activity related to his prior occupations, Mr. Felty has demonstrated the ability to learn new tasks, given his level of education and complex level of his prior work.

The vocational limitations of Mr. Felt[y] include his age which is 74 years old at this time, having retired in 1998 and apparently has not worked since that time, a remote history of an industrial injury, non-industrial related problems of COPD and osteoarthritis, the possibility of adjustment to a different work setting from his prior employment, a recent

downturn in the economy, and having developed a retired lifestyle. His vocational strengths include a long and successful work history with one employer, no significant limitations of his activities of daily living, no evidence of chronic pain, having worked for 19 years post injury without restrictions, an active social life that includes regular volunteer work with his church.

Therefore taking into consideration all of the vocational, psychological, and medical information, it is my opinion that Mr. Felty is not removed from employment based on the effects of the allowed claim. The injuries that are related to his claim do not remove him from employment. Mr. Felty was able to work in his heavy job for approximately 19 years after his injury. His current status of not working is due to retirement and not because of the injuries that occurred 33 years ago.

{¶ 20} 14. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on March 7, 2011. The SHO first noted that relator had not presented any new medical evidence concerning his allowed physical conditions and that his fourth application for PTD compensation was supported solely by the September 21, 2009 report of Dr. Drown. Thereafter, the SHO relied on the medical reports of Drs. Madrigal and Bonds, found that relator was capable of returning to his former position of employment based solely on the allowed psychological condition, and denied his application for PTD compensation.

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

Conclusions of Law:

{¶ 22} Relator's entire argument focuses on his assertion that the commission abused its discretion by denying his fourth application for PTD compensation without considering the impact of his allowed physical conditions on his ability to perform some sustained remunerative employment. Despite the fact that relator did not present any contemporaneous medical evidence concerning his allowed physical conditions with his application for PTD compensation, relator argues that the commission was, nevertheless, required to consider his allowed physical conditions and their impact on his ability to perform some sustained remunerative employment.

{¶ 23} In response, the commission and relator's former employer, General Motors Delco Chassis Division ("General Motors"), make the following arguments: (1) Ohio Adm.Code 4121-3-34(C)(1) required that relator submit medical evidence from a physician, psychologist or a psychiatric specialist supporting his application for PTD compensation, and that he specifically omitted time-relevant evidence as his allowed physical conditions, and (2) the commission's prior finding that relator's inability to work was a voluntary choice occasioned by his retirement and not the allowed conditions in his claim was res judicata and precluded him from relitigating that issue.

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

{¶ 25} Ohio Adm.Code 4121-3-34 provides, in relevant part:

(C) Processing of applications for permanent total disability

* * *

(1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation.

* * *

(4)

(a) The injured worker shall ensure that copies of medical records, information, and reports that the injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the injured worker that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.

{¶ 26} Relator submitted one medical report in support of his fourth application for PTD compensation—the September 21, 2009 report of Dr. Drown who opined:

Considering his age, education, lack of marketable skills, diminished overall adaptiveness, and his (multiple) work injuries, it is within reasonable certainty that his psychiatric disability taking in the whole body is permanent total. In reference to the AMA Guide (Fourth Edition) regarding Mental and Behavioral disorders, his psychiatric impairment (taking in the whole body) falls within the extreme range.

{¶ 27} Ohio Adm.Code 4121-3-34(C)(1) and (4)(a) required that relator's application for PTD compensation be supported by medical reports upon which he intended to rely and that those reports must be based on evaluations or examinations which occurred within 24 months prior to the date of the filing of the application. Relator did not submit any medical reports concerning his allowed physical condition; as such, it appears that relator did not intend to rely on his allowed physical conditions to support his application for PTD compensation. Further, his last application was specifically denied, in part, on relator's failure to demonstrate that his allowed conditions had worsened.

{¶ 28} The medical evidence relator presented in support of his application for PTD compensation demonstrates that he intended to only rely on his allowed psychological conditions to support his application for PTD compensation. In considering relator's brief, it appears that his real argument is not that the commission did not consider his allowed physical conditions but that the commission relied on medical reports indicating that, solely from a psychological perspective, he could return to his former position of employment. Relator contends that the medical evidence of his physical conditions submitted with his prior applications for PTD compensation clearly demonstrate that he is not physically able to return to his former position of employment; therefore, relator contends that the commission abused its discretion by relying on medical reports that he could return to his former position of employment.

{¶ 29} The magistrate finds this argument to be particularly disingenuous. Dr. Bonds opined that relator had a 6 percent impairment as a result of the allowed psychological conditions and that he could perform low-stress work that did not require a fast pace, dealing with frequent changes or handling interpersonal conflicts and problems. Dr. Madrigal opined that relator had a 1 percent impairment for his

psychological condition, and that his allowed psychological conditions would permit him to return to his former position of employment or engage in any other remunerative employment for which he was otherwise qualified.

{¶ 30} Additionally, the magistrate specifically finds that, in denying relator's first, second, and third applications for PTD compensation, the commission specifically relied on psychological reports from physicians who found that his allowed psychological conditions would not prevent him from returning to his former position of employment. Specifically, in denying his first application for PTD compensation, the commission relied on the September 3, 1999 report of Dr. Earl Greer, who opined that relator's then recognized allowed psychiatric condition of adjustment disorder with mixed emotional features "would not prevent [him] from returning to his former position of employment or from performing other sustained remunerative employment." In denying his second application for PTD compensation, after his claim had additionally been allowed for dysthymic disorder, the commission relied on medical reports from Drs. Tosi and Howard, who both opined that relator's allowed psychiatric conditions would not prevent him from returning to his former position of employment. Apparently, relator's second application was supported solely by evidence of his newly allowed psychological conditions. In denying his application, the commission did not consider his allowed physical conditions. Furthermore, in denying his third application for PTD compensation, the commission again relied on psychiatric reports which indicated that relator had no work limitations due to the allowed psychological conditions. Here, in denying his fourth application for PTD compensation, the commission again relied on psychiatric reports indicating that his allowed psychological conditions did not prohibit him from returning to his former position of employment. As the commission found in denying his third application for PTD compensation, nothing has really changed except that relator has aged. If relator intended for the commission to consider his allowed physical conditions, then relator should have included medical evidence that his allowed physical conditions had worsened. The commission had previously relied on medical reports that relator's allowed physical conditions permitted him to perform sedentary to light-duty work. The only time-relevant medical report in the record addressing relator's allowed physical conditions is

from Dr. Hogya, who found that he could perform at a medium work level with his right upper extremity and at a sedentary work level with his left upper extremity. Further, according to Dr. Hogya's report, relator has continued to remain very active. Dr. Hogya noted relator's self-report of his daily activities as follows:

Mr. Felty complains of daily pain about his left knee. He states he is able to go up and down stairs well, although the knee "won't fully bend." He describes stiffness and variable leg cramps. There is no frank buckling, stumbling or locking. He is not using a brace, TENS Unit or cane. He indicates he is able to walk a few miles for exercise. He does not use any orthotics. He reports no pain about the left arm or hand, although it feels chronically numb with variable tingling "since the nerve damage." He states sometimes his left wrist and hand will "just quit." He has experienced mild cramps such as when driving or using the arm more. He does not use a brace. He indicates he does stay active around the house as he has limited help. He will climb ladders such as working on his roof and gutters. He does maintenance work on his cars with some difficulty. He does not participate in any other sports or specific hobbies.

{¶ 31} Based on relator's own statements, relator can stand and walk a few miles. From that standpoint, relator is able to perform well above the sedentary level. Dr. Hogya's only limitation concerns his left upper extremity. As Dr. Hogya noted, relator is right-handed and retains functional grip and pinch with his left hand.

{¶ 32} There is no evidence in the record to demonstrate that relator's allowed physical conditions have worsened. By failing to file any medical evidence concerning his allowed physical conditions, relator has not demonstrated that those conditions worsened. Relator simply has not demonstrated the commission abused its discretion by not considering evidence which relator chose not to submit.

{¶ 33} There is another reason why the commission did not abuse its discretion in denying relator's application for PTD compensation. Specifically, the commission has already determined that relator voluntarily retired from his employment with General Motors, and relator has testified that he never participated in vocational rehabilitation because, if he could not return to his former position of employment, he did not want to work at all. Having made this determination in denying relator's third application for

PTD compensation, the magistrate finds that determination constitutes *res judicata* and that the record here is clear: relator's inability to return to some sustained remunerative employment is not due to the allowed conditions in his claim; instead, his inability to return to some sustained remunerative employment is due to the fact that he does not want to. Relator is not now nor will he ever be entitled to an award of PTD compensation because he will never be able to establish that his allowed conditions prevented him from returning to some sustained remunerative employment. *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994); *State ex rel. Mackey v. Dept. of Edn.*, 10th Dist. No. 09AP-966, 2010-Ohio-3522.

{¶ 34} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion 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).