

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Advance Stores Company, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-621
	:	
Arthur J. Derrico and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on May 16, 2013

Frost Brown Todd LLC, Christine L. Robek and Noel C. Shepard, for relator.

Stephen E. Bloom and William S. Leizman, for respondent Arthur J. Derrico.

Michael DeWine, Attorney General, and *Corinna V. Efke*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Advance Stores Company, Inc. ("Advance Stores") filed this action in mandamus seeking to compel the Industrial Commission of Ohio ("commission") to vacate its award of permanent total disability ("PTD") compensation to Arthur J. Derrico.

{¶ 2} In accord with Loc.R. 13, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate, in turn, issued a magistrate's decision, appended hereto, which contains

detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 3} Counsel for Advance Stores has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Derrico has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Advance Stores asserts three objections:

I. A Finding of PTD Should be Made Only as a "Last Resort" After a Clear Determination that the Claimant Cannot Return to Sustained Remunerative Employment.

II. Dr. Massien's Medical Report Does Not Support the Commission's Finding of PTD Because it is Based on Mr. Derrico's Conflicting Accounts of the Side Effects of Authorized and Unauthorized Medications.

III. Mr. Derrico is Not Entitled to PTD Compensation Because He Has Not Engaged in Any Job Training and There is No Evidence Such Efforts Would Be in Vain.

{¶ 5} All three of these objections are accurately and adequately addressed in the findings of fact and conclusions of law in the magistrate's decision. Derrico has significant pain as a result of his chest injury. His treating physicians have tried a significant range of medications to alleviate his pain. Some of the medications are opiates which carry a significant risk of causing addiction. The physicians need to avoid Derrico becoming addicted.

{¶ 6} All the medications cause drowsiness, which inhibit Derrico's ability to work and also inhibit his ability to profit from rehabilitation efforts. A pain-free Derrico no doubt could benefit from rehabilitation. The pain-ridden Derrico has been found by the commission to be incapable of sustained remunerative employment. That finding is supported by some evidence.

{¶ 7} The three objections are overruled. The request for a writ of mandamus is denied.

Objections overruled; writ denied.

KLATT, P.J., and BRYANT, J., concur.

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

State of Ohio ex rel.	:	
Advance Stores Company, Inc.,	:	
	:	
Relator,	:	No. 12AP-621
	:	
v.	:	(REGULAR CALENDAR)
	:	
Arthur J. Derrico and	:	
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 27, 2013

Frost Brown Todd LLC, Christine L. Robek and Noel C. Shepard, for relator.

Stephen E. Bloom and William S. Leizman, for respondent Arthur J. Derrico.

Michael DeWine, Attorney General, and Corinna V. Efkeman, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 8} Relator, Advance Stores Company, Inc., 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 awarded permanent total

disability ("PTD") compensation to respondent Arthur J. Derrico ("claimant"), and ordering the commission to find that he is not entitled to that compensation.

Findings of Fact:

{¶ 9} 1. On February 14, 2009, while working as a store manager, claimant was pushing a pallet of merchandise with a manual pallet jack when he felt shortness of breath and pain in his right shoulder.

{¶ 10} 2. That same day, claimant sought treatment at St. Vincent Charity Hospital Emergency Room where he was diagnosed with a spontaneous right pneumothorax, or collapsed lung. That same day, relator underwent a right lung thoracotomy. The surgery was successful.

{¶ 11} 3. Claimant completed a First Report of an Injury, Occupational Disease or Death ("FROI"); however, relator, as a self-insuring employer, rejected the claim as not being work related.

{¶ 12} 4. The contested claim came for hearing before a district hearing officer ("DHO") on May 21, 2009. At that time, it was noted that relator had now certified the claim for "spontaneous pneumothorax" and the DHO awarded claimant temporary total disability ("TTD") compensation beginning February 15, 2009.

{¶ 13} 5. Following the thoracotomy surgery, claimant began experiencing chronic pain.

{¶ 14} 6. Claimant was examined by David M. Rosenberg, M.D. In his August 4, 2009 report, Dr. Rosenberg identified the numerous medical records which he reviewed and explained as follows:

Mr. Derrico stated that he would be short of breath walking down the hall or just talking. * * * He would awaken at night with shortness of breath, without edema, hemoptysis or chest pains[.] * * * Since the surgery, he has been complaining of persistent chest discomfort, which is unrelieved by any of the medications that have been prescribed, including anti-inflammatories; nothing has helped. Because of the persistent pain, it has been requested that he see neurology and pain management. He feels that the pain worsens if he lifts his arm, and he continues to describe shortness of breath.

* * *

With respect to the allowed condition of spontaneous pneumothorax, one can appreciate that the various surgical interventions that Mr. Derrico underwent, including an eventual thoracotomy, have fully expanded his collapsed lung. This is evident on the X-ray obtained at the time of my evaluation. In addition, his total lung capacity (TLC) is normal, which correlates with resolution of the pneumothorax. However, specific to Mr. Derrico, the problem that has developed is the chronic pain after his thoracotomy. In fact, it is this pain which likely in part is responsible for his incomplete efforts on pulmonary function testing.

In regards to the chronic pain after thoracotomy, this has been described in the medical literature as an accepted complication of thoracic surgery (Gemer, Gottschalk). It is this pain which prevents Mr[.] Derrico from functioning normally consequent to the events of February 14, 2009 and is related to the allowed condition. In addition, because of this pain, he is not capable of returning to his previous employment. He likely could perform sedentary type work, but nothing that would require any bending or stretching of the upper torso for a duration of 3 months. These restrictions consequent the pain relate to the allowed condition. However, I do not feel that he has reached maximum medical improvement, because potentially nerve blocks or some other therapeutic intervention could help to relieve his symptoms.

{¶ 15} 7. Claimant was referred to Robert Kosmides, M.D., for a neurological evaluation. In his September 15, 2009 report, Dr. Kosmides noted as follows:

Right neuropathy along the superior and inferior suture margins of the thoracotomy previously performed on the patient. He is experiencing neuropathic pain, which has responded to Lyrica and Nabumetone. I recommend that we continue these regimens for the present time. I have also suggested over-the-counter capsaicin. Risks, benefits, and safety precautions regarding the use and administration of this medication will be reviewed in detail. The patient was advised to contact this office should his symptoms persist or sooner these symptoms arise. Additionally, another option as I know you have already discussed with the patient would be a block. At the present time, the patient does not wish to undergo a block. I concur with his thoughts and your recommendation not to proceed with this at that time[.] The patient shall return in two months[.]

{¶ 16} 8. Claimant was examined by Lawrence Martin, M.D., board-certified in pulmonary and sleep medicine. In his March 8, 2010 report, Dr. Martin defined and described neuropathy as follows:

This is a general term meaning pain or dysfunction f[ro]m nerve damage or injury. It is non-specific and could be from numerous conditions, such as diabetes, infection or direct injury to nerves. In Mr. Derrico's case it was the term used by neurologist Dr. Kosmides to describe Mr. Derrico's type of pain: constant, unremitting, and presumably due to nerve damage or injury at the time of the thoracotomy.

* * *

This terminology ("right neuropathy...") was used by Dr. Kosmides to explain the type of pain. It is non-specific but also consistent with the temporal onset of his pain from surgery and the continued symptoms. Thus I would have to agree with the diagnosis. There is nothing in the record to argue against it.

* * *

He did not have the pain before the injury and it was a consequence of the injury. Most likely the specific cause is from surgical manipulation of the chest wall. (Mr. Derrico told me this was an explanation given to him by the thoracic surgeon Dr. Khaddam.) Whatever the exact mechanism, the pain is directly related to the February 14, 2009 injury and treatment for that injury.

* * *

Chest wall pain is pain in the chest not due to the heart, lungs or other internal structures, but instead due to components of the chest wall: bones (ribs), muscles, nerves and connective tissue. When any of these structures are injured, pain (including chronic pain) can result. Shortness of breath is a sensation of "air hunger" that occur at rest or with exercise. It is most commonly from heart or lung disease. In Mr. Derrico's case it is from lung disease and the pain itself, since chest wall pain can make breathing difficult. Of note, Mr. Derrico does not have shortness of breath at rest, but only with exertion.

{¶ 17} 9. Following a hearing before a DHO on March 26, 2010, claimant's claim was additionally allowed for "right neuropathy along the superior and inferior suture margins of the previously performed thoracotomy."

{¶ 18} 10. The DHO relied on the March 8, 2010 report of Dr. Martin.

{¶ 19} 11. Claimant began treating with Scott L. Massien, M.D. In his August 23, 2010 office note, Dr. Massien identified the following medications currently being prescribed to claimant for his allowed conditions:

Vicodin
Neurontin
Albuterol nebs & MDI

{¶ 20} 12. Claimant was examined by R. Scott Krupkin, M.D. In his September 16, 2010 report, Dr. Krupkin identified the medical records which he reviewed and concluded that claimant needed continuing medical treatment directed towards management of his pain and neuropathic symptoms. Dr. Krupkin recommended continuing claimant on his medications but indicated that claimant should be tapered off opioid analgesics at this point in time. Dr. Krupkin also opined that claimant had reached maximum medical improvement ("MMI").

{¶ 21} 13. Relator filed a motion to terminate claimant's TTD compensation and the matter was heard before a DHO on November 1, 2010. Relying on the report of Dr. Krupkin, the DHO determined that claimant had indeed reached MMI and terminated his TTD compensation.

{¶ 22} 14. The DHO's decision to terminate TTD compensation was affirmed on appeal.

{¶ 23} 15. The record contains an office note from Dr. Massien dated December 2, 2010. In that office note, Dr. Massien lists the following medications which claimant was taking:

Neurontin
Albuterol
Zoloft
Vicodin

{¶ 24} 16. Dr. Massien noted that claimant had developed a rash which he believed might be caused by the Vicodin. As such, Dr. Massien discontinued the Vicodin and instead, placed claimant on the following synthetic narcotic: "Dilaudid."

{¶ 25} 17. On December 6, 2010, claimant filed a MEDCO-31 request for hydrocodone to treat his pain.

{¶ 26} 18. On February 1, 2011, claimant's motion concerning medication was heard before a DHO who determined that, based on the September 16, 2010 medical report of Dr. Krupkin, claimant's request for hydrocodone should be denied.

{¶ 27} 19. Claimant appealed and submitted the March 4, 2011 report of Dr. Massien who stated:

I am writing on behalf of my patient, Arthur Derrico, who has chronic chest wall pain from neuropathy and chest wall injury. It was documented in our notes that he requires hydrocodone for pain relief. This is a valuable part of his pain control regimen which is why I have been prescribing it. I ask that you please allow this patient to have appropriate pain relief for his work related injury.

{¶ 28} 20. Claimant's appeal was heard before a staff hearing officer ("SHO") on March 22, 2011. The SHO vacated the prior DHO order and authorized the continued use of Neurontin, bronchodilators, and hydrocodone. Specifically, the SHO stated:

It is the order of the Staff Hearing Officer that the Injured Worker's C-86 filed 01/13/2011 is granted in part and denied in part, as follows. Based on the 09/16/2010 report and opinions of Dr. Krupkin, authorization is given for the continued use and payment for the prescription Neurontin. Authorization is given for the continued use of bronchodilators, pending the recommended pulmonary reevaluation with regard to same. Reimbursement of payment for opioid analgesics, including but not limited to Hydrocodone, is granted through to 01/01/2011, based on Dr. Krupkin's recommendation that said prescriptive medication be tapered off and not discontinued for payment abruptly. No further authorization for opioids is given past 01/01/2011 as this medication is then no longer deemed necessary and/or appropriate for use in the treatment of the allowed conditions in this claim.

{¶ 29} 21. Claimant filed a motion seeking to have his claim additionally allowed for certain psychological conditions; however, the commission denied claimant's request.

{¶ 30} 22. On October 28, 2011, claimant filed an application for PTD compensation. At the time, claimant was 47 years of age, indicated that he had completed the 10th grade, that he quit school in order to help his mother, and that he had received specialized training as an auto mechanic/auto parts. Claimant indicated that he could read, write, and perform basic math. On his application, claimant also indicated that he had filed for Social Security Disability Benefits and that he was receiving disability benefits other than Social Security.

{¶ 31} 23. Claimant attached a document to his application for PTD compensation listing the medications which he was taking and their effects:

Gabapentin [Neurontin]—for burning stabbing aching pain;
Tramadol—for chronic pain;
ProAir Inhaler—inhaler;
Albuteral—Inhalation Solution used in a Nebulizer for
shortness of breath, Asthma, 4 x a day for 15 to 20 min.
(never used prior to 02/14/2009); and
Zoloft—Depression

Medications have various side effects:

Dizziness, 4 to 5 episodes of dizziness through out the day
which requires him to sit while this sensation passes;

Insomnia—difficulty in falling or staying asleep, the absence
of restful sleep and poor quality of sleep; and

Chronic pain—exacerbated by minimal activity

{¶ 32} 24. In support of his application, claimant included the October 25, 2011 report of Dr. Massien who determined that he was unable to perform any sustained remunerative employment. Specifically, Dr. Massien stated:

Since that wedge resection he has had chronic, debilitating right chest wall pain, which is neuropathic in origin, along the superior and inferior suture margin lines from his thoracotomy during the wedge resection. Unfortunately, for Mr. Derrico, the pain is on a daily, constant basis. It is chronic, severe, debilitating pain and he has exhausted all treatment options, which is why I had found him MMI. Because of his chronic, debilitating pain and the high levels of medications required to keep him comfortable, he has been completely unable to perform any kind of work. He currently uses Lyrica and [T]ramadol for management of his

chronic, debilitating right chest wall pain. These medicines have a hard time even really keeping him comfortable, so he has chronic pain despite the medicines, and their side effects both produce significant sedation and drowsiness as such. Because of the debility he sustains on a daily, constant basis with the right chest wall pain and the medications used to even keep him remotely comfortable, I find him totally unable to perform any meaningful work in any capacity, including simple, unskilled work. I find this to be a permanently disabling condition, as I do not see any further improvement in his symptoms or his ability to get off of these pain medicines down the line, unfortunately, which is again why I found him to be permanently and totally disabled and industriously useless, in my medical opinion, to a reasonable degree of medical certainty, based upon my continued clinical examinations and working with Mr. Derrico, I find him unable to perform any sustained remunerative employment, and I find him unable to ever return to his former position at Advanced Auto Parts, unfortunately.

{¶ 33} 25. Dr. Krupkin examined claimant again. In his December 2, 2011 report, Dr. Krupkin identified the medical records which he reviewed and provided his physical findings upon examination. Thereafter, Dr. Krupkin opined that claimant had a 14 percent whole person impairment and was capable of performing at a sedentary work level.

{¶ 34} 26. Jon A. Elias, M.D., performed an independent medical examination. In his February 22, 2012 report, Dr. Elias noted that claimant was currently taking several medications, "including rotating Vicodin and Tramadol, taking up to six to eight a day of either. He also uses Lyrica, Cyclobenzaprine, and Albuterol. He is also being treated for depression with Sertraline and Trazodone." Dr. Elias opined that claimant had a 6 percent whole person impairment and could perform at a sedentary work level.

{¶ 35} 27. The record contains two vocational evaluations: (a) In his February 6, 2012 report, Daniel L. Simone, M.Ed., CRC, LPC, determined that claimant did not have any skills that would transfer into other occupations and concluded that he would not be capable of performing sustained remunerative employment, stating:

The preponderance of information reviewed indicates that Mr. Derrico is experiencing marked physical limitations as a direct result of his compensable injury. He experienced an

injury to his chest wall which has not resolved despite surgical intervention, physical therapy and medication management. The claimant continues to have significant levels of pain with even minor exertion or with any kind of extended reaching. His treating internist concluded that as a result of this pain Mr. Derrico would be unable to perform any sustained remunerative employment. Mr. Derrico worked as a General Manager at two different types of automotive centers. However, in both cases he was a working manager who was required to perform the same physical activities as were the other employees. He is unable to return to this type of work activity. The skills he developed would not transfer into other occupations given the extent of his functional limitations. He has not worked in any other type of job setting in the past 25 to 30 years. Furthermore, Mr. Derrico does not have a diploma or a GED which would impose additional vocational barriers. Therefore as a result of these factors and the current labor market Mr. Derrico would be unable to perform substantial gainful activity on a sustained basis.

(b) In her April 16, 2012 vocational report, J. Kilbane, M.Ed., C.R.C., opined that claimant did have transferrable skills and was capable of both participating in vocational rehabilitation and performing some sustained remunerative employment, stating:

The consensus of the medical evaluators opined that Mr. Derrico is capable of sedentary work based on the allowed conditions of the claim. He has direct transferable skills in the sedentary work capacity and is capable of unskilled work in the sedentary work capacity. He is capable of participating in vocational rehabilitation services, and his age of 47 years old is not a barrier to employment. He has several unrelated medical and psychological conditions that may impact his function; however, it is my opinion, based on his residual physical capabilities, age, education, work history and skills, that Mr. Derrico is capable of sustained remunerative employment based on the allowed conditions of the claim.

{¶ 36} 28. Claimant's application for PTD compensation was heard before an SHO on May 10, 2012. The SHO determined that claimant was unable to perform some sustained remunerative employment and was not a candidate for vocational rehabilitation, stating:

After full consideration of the issue it is the order of the Staff Hearing Officer that the Injured Worker's IC-2 Application

for Permanent Total Disability Compensation is granted. Permanent total disability compensation is awarded from 10/25/2011 (Dr. Massien report) (less any compensation that previously may have been awarded over the same period), and to continue without suspension unless future facts or circumstances should warrant the stopping of the award. Such payments are to be made in accordance with R.C. 4123.58(A).

Based upon the report(s) of Dr(s). Massien (10-25-2011), it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). 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.

The Staff Hearing Officer finds that the weight of the medical evidence on file demonstrates that the injured worker has suffered from significant and unrelenting pain since his thoracotomy surgery of 02/14/2009. The combination of this ongoing level of pain, together with the deleterious side effects of his pain medications, render the injured worker unable to return to any type of sustained employment. Referral for vocational rehabilitation or skill enhancement training would be futile given the limitations on sustained activities.

{¶ 37} 29. Relator appealed, specifically arguing that the SHO's order contained clear mistakes of fact and law. Relator argued that, to the extent claimant was experiencing side effects from medications, the side effects were caused by medications he was taking for conditions unrelated to the allowed conditions in his claim and that the SHO should have considered the non-medical disability factors and denied claimant's request for PTD compensation inasmuch as claimant had not attempted any vocational rehabilitation.

{¶ 38} 30. Relator's request for reconsideration was denied by order of the commission mailed June 28, 2012.

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

Conclusions of Law:

{¶ 40} In this mandamus action, relator contends that the commission abused its discretion by relying on the medical report of Dr. Massien and by failing to hold claimant accountable for his failure to participate in vocational rehabilitation. Specifically, relator argues that there is conflicting medical evidence in the record concerning what medications claimant was actually taking and no reliable evidence concerning any side effects claimant is experiencing from medications designed to help with his allowed conditions. Further, relator contends that claimant did not meet his burden of proving that he had attempted vocational rehabilitation.

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

{¶ 42} 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).

{¶ 43} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693 (1994). Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). The commission must also specify in its order

what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 44} In its first argument, relator points to the October 25, 2011 report of Dr. Massien and argues that Dr. Massien indicated that the only medications claimant was taking for his allowed conditions were Lyrica and Tramadol. Relator then indicates that, with his application for PTD compensation, claimant indicated that he was taking Gabapentin (Neurontin), Tramadol, ProAir Inhaler, Albuteral, and Zoloft. Relator argues further that claimant told Dr. Krupkin that he was taking Vicodin, ProAir Inhaler, and Albuteral, and told Dr. Elias that he was taking Vicodin, Tramadol, Lyrica, Cyclobenzaprine (Flexeril), and Albuteral. Relator contends that, since claimant reported that he was taking so many different medications, it is impossible to know what medications Dr. Massien was actually discussing when he stated that claimant's pain and the effects of the medications he was taking render him permanently and totally disabled. Relator asserts that the contradiction between Dr. Massien's report and claimant's various descriptions of his medications renders Dr. Massien's report invalid.

{¶ 45} In his October 25, 2011 report, Dr. Massien indicated that claimant was using "Lyrica and [T]ramadol for management of his chronic, debilitating right chest wall pain. These medicines have a hard time even really keeping him comfortable, so he has chronic pain despite the medicines, and their side effects both produce significant sedation and drowsiness as such. Because of the debility he sustains on a daily, constant basis with the right chest wall pain and the medications used to even keep him remotely comfortable, I find him totally unable to perform any meaningful work in any capacity, including simple, unskilled work. If find this to be a permanently disabling condition, as I do not see any further improvement in his symptoms or his ability to get off of these pain medicines down the line."

{¶ 46} It is clear that Dr. Massien is opining that, in his opinion, the side effects of the Lyrica and Tramadol cause significant sedation and drowsiness and that, those side effects, in combination with the pain claimant was experiencing, render him unable to perform any meaningful work. Further, a review of the record indicates that doctors, including Dr. Massien, were trying to find the most effective combination of medications to help alleviate claimant's pain. Claimant had also been prescribed Neurontin and

Albuteral for the allowed conditions in his claim. The magistrate notes that side effects of both Tramadol and Lyrica include drowsiness, dizziness, and difficulty sleeping. As such, those two medications, in and of themselves, cause the side effects noted in Dr. Massien's report, specifically "significant sedation and drowsiness as such." Also, side effects of both Neurontin and Albuteral include drowsiness, dizziness, trouble sleeping, and sluggishness.¹

{¶ 47} The magistrate notes that relator's current argument, that Dr. Massien's report cannot constitute some evidence because it is unclear what medicines claimant was still taking, is not the argument relator raised in its motion for reconsideration. At the time, relator argued:

The SHO misapplied *Speelman* because he cites "[C]ombination of ongoing level of pain together with deleterious side effects of pain medications, render injured worker unable to return to any type of sustained employment." * * * The medications listed in the application are unrelated to the workers' compensation claim per SHO order of March 22, 2011. * * * The only medication supported under the claim is Tramadol. * * * The other medications referenced are not part of the workers' compensation claim.

* * *

Because effect of medications are due to unrelated conditions, the SHO made clear mistakes of fact, clear mistakes of law, and error of inferior tribunal by failing to address the *Stephenson* factors.

{¶ 48} It appears that the argument relator is making here is not the same argument relator made before the commission. Reviewing courts do not have to consider an error which the complaining party could have called, but did not call, to the attention of the lower tribunal when it could have been avoided or corrected. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78 (1997); *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319 (1988).

{¶ 49} The issue relator raises here is essentially an evidentiary one. Relator is asserting that Dr. Massien's report should be removed from evidentiary consideration

¹ The magistrate consulted WebMD for the side effects of those medications.

because claimant may or may not be taking Lyrica and it is unclear exactly what medications he was taking at the time his PTD application was adjudicated.

{¶ 50} Relator cites *State ex rel. Caldwell v. New Boston Coke Corp.*, 10th Dist. No. 10AP-1068, 2011-Ohio-6053, and argues that a medical opinion based on incorrect facts cannot constitute some evidence to support a commission award. In that case, Dr. Sadaka, a non-examining physician did not acknowledge that the claimant had a rotator cuff tear when in fact he did. The doctor determined that there was not sufficient medical evidence to support a period of TTD compensation due to a shoulder sprain. This court determined that Dr. Sadaka's report did not constitute some evidence because his opinion was based on incorrect facts.

{¶ 51} The current case differs in several respects. First, at the time of Dr. Massien's report, claimant was taking Tramadol and Lyrica. As such, his opinion was based on correct facts. Second, relator did not and has not demonstrated that claimant was not still taking those medications at the time of the hearing. The record contains evidence that different medications were being rotated. Third, there is no evidence relator raised this issue at a time when Dr. Massien could have written a follow-up report. And fourth, the inaccuracy in Dr. Sadaka's report was clear and easily verified. Here it is not.

{¶ 52} As such, the magistrate finds that, contrary to relator's arguments, Dr. Massien's report does constitute some evidence upon which the commission could rely because he indicated that the side effects claimant experienced from his two pain medications, Lyrica and Tramadol, caused significant sedation and drowsiness and that, in combination with his significant pain, rendered him unable to perform sustained remunerative employment.

{¶ 53} Relator's second argument is that the commission abused its discretion by awarding PTD compensation without considering relator's failure to engage in any job retraining or other vocational rehabilitation. Relator points to the vocational report of Ms. Kilbane who found that claimant had transferrable skills and was both a candidate for vocational rehabilitation and could return to some form of sustained remunerative employment which was sedentary in nature.

{¶ 54} For the reasons that follow, the magistrate disagrees with relator's argument.

{¶ 55} Awards of PTD compensation should be reserved for the most severely disabled workers and should be allowed only where there is no possibility for reemployment. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525 (1995). PTD compensation is considered compensation of last resort to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250 (1997).

{¶ 56} Pursuant to R.C. 4123.58(C)(2), PTD compensation shall be awarded only when the "impairment resulting from the employee's injury * * * prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop." In the present case, there is no evidence that claimant attempted any vocational rehabilitation. Further, relying on the report of Dr. Massien, the SHO determined that, given claimant's significant and unrelenting pain as well as the deleterious side effects of the pain medications rendered claimant unable to return to any type of sustained employment and further that it would be futile to refer claimant for vocational rehabilitation given his limitations.

{¶ 57} In making its argument, relator points to the vocational report of Ms. Kilbane who opined that claimant was capable of participating in vocational rehabilitation services and capable of performing sustained remunerative employment.

{¶ 58} It must be remembered that the commission has the discretion to accept or reject vocational reports. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266 (1997). Binding the commission to the conclusions found in a rehabilitation report would make the rehabilitation division, and not the commission, the ultimate evaluator of disability contrary to the mandates of *Stephenson*, citing *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117 (1994). As the vocational expert, the commission was not required to rely on the vocational report of Ms. Kilbane. Further, as the magistrate has already explained, Dr. Massien's report does constitute some evidence upon which the commission could rely. As such, there is evidence in the record to support the commission's determination that claimant's pain and the side effects of the medications which he is taking render him not only unable to engage in any sustained remunerative employment, but also would make participation in vocational rehabilitation futile. In the

present case, the commission has cited the evidence upon which it relied and has provided a brief explanation for its decision. As such, the magistrate finds that the commission has not abused its discretion.

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

/S/ MAGISTRATE

STEPHANIE BISCA BROOKS

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).