[Cite as *State ex rel. Little v. Indus. Comm.*, 2013-Ohio-282.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sonny Little,	:	
Relator,	:	
v.	:	No. 11AP-1110
The Industrial Commission of Ohio and Clarence R. Clagg, dba Clagg's Pallet Shop,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 31, 2013

Angela D. Marinakis, for relator.

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

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Sonny Little, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his application for permanent total disability ("PTD") compensation.

I. BACKGROUND

{¶ 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's staff hearing officer ("SHO") misstated relator's age in its order and, according to the magistrate, necessarily failed to consider relator's correct age in contravention of Ohio Adm.Code 4121-3-34(B)(3)(a). Accordingly, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate the SHO's order and enter a new order adjudicating the PTD application.

II. DISCUSSION

{¶ 3} The commission has filed an objection to the magistrate's decision. Without disputing the magistrate's factual findings, the commission poses the following objection to the magistrate's conclusions of law:

> The magistrate erred in rejecting the commission's argument that the SHO's mistake is a harmless error because, even if age is a negative factor to reemploying [relator], he still would not be entitled to PTD compensation.

{¶ 4} To be entitled to extraordinary relief in mandamus, a relator must show that it has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, ¶ 14. "To show the clear legal right, relator must demonstrate that the commission abused its discretion by entering an order unsupported by some evidence in the record." *State ex rel. Hughes v. Goodyear Tire & Rubber Co.*, 26 Ohio St.3d 71, 73 (1986). When the record contains "some evidence" to support the commission's factual findings, a court may not disturb the commission's findings in mandamus. *State ex rel. Fiber-Lite Corp. v. Indus. Comm.*, 36 Ohio St.3d 202 (1988), syllabus. "The burden on relator is a heavy one." *State ex rel. Stevens v. Indus. Comm.*, 10th Dist. No. 10AP-1147, 2012-Ohio-4408, ¶ 7.

{¶ 5} Relator filed this mandamus action on the ground that the commission's SHO misstated that relator was 51 rather than 57 when discussing relator's vocational factors. The magistrate agreed, finding that the SHO's misstatement indicated that the SHO erroneously analyzed the nonmedical factors without considering relator's age as of the date of the hearing. We find this position to be without merit for several reasons.

{¶ 6} At the outset, the record reveals that the SHO was aware of relator's correct age. The beginning of the SHO's order correctly recognizes relator's correct age by stating, "Claimant is a 57 year old male who is a high school graduate and possesses a relevant work history comprised of the following positions." (Stip. 1.) Although a subsequent passage in the SHO's order mistakenly refers to relator's "age of 51" in discussing positive factors, a complete reading of the SHO's order (as well as the evidence supporting the SHO's decision) indicates that this was a typographical error rather than a failure to consider relator's age. In our view, such an inadvertent and harmless misstatement is not grounds for mandamus relief. *See State ex rel. Wyrick v. Indus. Comm.*, 10th Dist. No. 08AP-275, 2009-Ohio-635, ¶ 4.

{¶ 7} Nevertheless, even if the SHO truly misunderstood relator's correct age, such an error would not be outcome determinative. "A claimant may not be granted permanent total disability compensation due solely to his age." *State ex rel. Blue v. Indus. Comm.*, 79 Ohio St.3d 466, 470 (1997). Moreover, "there is not an age-ever-at which reemployment is held to be a virtual impossibility as a matter of law." *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 417 (1996). The SHO also found PTD to be inappropriate based on the medical evidence presented and because relator's remaining vocational factors were positive and weighed in favor of reemployment. Therefore, " '[a]ny order to the commission to further consider [relator's] claim would be a vain act, since the same result would be inevitable.' " *State ex rel. Menough v. Indus. Comm.*, 10th Dist. No. 01AP-1031, 2002-Ohio-3253, ¶ 4, quoting *State ex rel. Carter v. Penske Truck Leasing, Inc.*, 94 Ohio St.3d 208, 209 (2002).

{¶ 8} For the above reasons, we find that relator has failed to demonstrate an abuse of discretion in the commission's denial of his PTD application. Accordingly, the commission's objection is sustained.

III. CONCLUSION

{¶ 9} Upon review of the magistrate's decision, an independent review of the record, and due consideration of the commission's objection, we find that the magistrate has properly determined the pertinent facts and adopt them as our own. However, in accordance with our decision, we sustain the commission's objection to the magistrate's

conclusions of law, and reject the magistrate's recommendation to issue a writ of mandamus. Accordingly, the requested writ of mandamus is denied.

Objection sustained;
writ of mandamus denied.

DORRIAN, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 10} I respectfully dissent. Sonny Little was 57 when his application for permanent total disability ("PTD") compensation was reviewed by a staff hearing officer ("SHO") for the commission. The SHO incorrectly listed his age as being 51 when weighing the positives and negatives of the nonmedical disability factors in Little's situation. Our magistrate indicated that these mistakes called for the commission's denial of PTD compensation to be reviewed.

{¶ 11} Counsel for the commission in its objections on behalf of the commission asserts:

> The magistrate erred in rejecting the commission's argument that the SHO's mistake is a harmless error because, even if age is a negative factor to reemploying Little, he still would not be entitled to PTD compensation.

{¶ 12} Counsel for Little argues that for purposes of retraining and employability, the mistake in age in the SHO's order and the potential impact on the order might be significant and a different outcome is foreseeable.

{¶ 13} Little's claims has been recognized for:

> Lumbosacral sprain; mild degenerative changes L3-4, 4-5, lumbosacral spondylosis; depressive psychosis-severe; chronic pain syndrome and chronic pain disorder with both psychological factors and medical conditions.

{¶ 14} The evidence before the commission as to Little's psychological conditions could have supported either a finding that he was capable of sustained remunerative employment (commission experts) or that he was not (Little's experts). The SHO relied upon the commission's experts, making consideration of the nonmedical disability factors necessary, even critical.

{¶ 15} Little is now apparently 64 years of age, making the impact of his age on the merits of his application for PTD compensation even more critical.

{¶ 16} I do not choose to make the final finding as to the merits of Little's application for PTD compensation by making the factual findings that the age mistake is insignificant. I would overrule the objections to the magistrate's decision. As a result, I would adopt the findings of fact and conclusions of law in the magistrate's decision. I would therefore grant a writ of mandamus compelling the commission to vacate its denial of PTD compensation for Little and to reconsider the merits of the application with a proper understanding of his age on the date of the hearing. Since the majority of this panel does not, I respectfully dissent.

A P P E N D I X

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Respondents.	:	

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

Rendered on August 24, 2012

Angela D. Marinakis, for relator.

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

IN MANDAMUS

{¶ 17} In this original action, relator, Sonny Little, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶ 18} 1. On June 28, 1993, relator sustained an industrial injury while employed as a laborer for respondent Clarence R. Clagg, dba Clagg's Pallet Shop, a state-fund employer.

{¶ 19} 2. The industrial claim (No. 93-19552) is allowed for:

> Lumbosacral sprain; mild degenerative changes L3-4, 4-5, lumbosacral spondylosis; depressive psychosis-severe; chronic pain syndrome and chronic pain disorder with both psychological factors and medical conditions.

{¶ 20} 3. On March 26, 2003, psychologist Robert G. Medlin, wrote:

> As far as either the Major Depressive Disorder or the Chronic Pain disorder is concerned, I do not believe that Mr. Little is capable of participating in any type of employment due to these allowed conditions.

{¶ 21} 4. On August 2, 2004, at his own request, relator was examined by Nancy Renneker, M.D. In her three-page narrative report, Dr. Renneker opined:

> Based on the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment, Sonny Little has the following permanent job restrictions related to this work injury of 06-28-93: (1) able to sit or stand for a maximum interval of 30 minutes, able to walk a maximum distance of 50 yards (2) no floor to waist bending, no overhead work, no twisting, and no repetitive use of left ankle and foot for any tasks (3) unable to operate motorized equipment if Mr. Little has taken Lorcet within 2 hours of that task and (4) able to occasionally lift at waist height and carry a distance of no more than 30 yards, an object weighing up to 5 lbs. As such, it is my medical opinion that Sonny Little is permanently and totally disabled from sustained remunerative employment due to residual impairments related to his work injury of 06-28-93.

{¶ 22} 5. On November 12, 2004, relator filed an application for PTD compensation. In support, relator submitted the reports of Drs. Medlin and Renneker.

{¶ 23} 6. On the last page of the PTD application form, there are lines for the signatures of the claimant and the person completing the form. There is also a line for the application date. Apparently, relator signed the application that someone else completed. The application is dated November 4, 2004. All the responses to the application queries are typewritten.

{¶ 24} 7. On the first page of the PTD application form, the applicant is asked to provide his date of birth. In the space provided, "03/09/49" is typed.

{¶ 25} 8. On January 27, 2005, at the commission's request, relator was examined for the allowed physical conditions of the claim by James K. Ross, M.D. In his three-page narrative report, Dr. Ross opined: "This claimant can work in any sedentary position."

{¶ 26} 9. "D.O.B.: 3/9/1948" is type written at the top portion of the first page of Dr. Ross' narrative report.

{¶ 27} 10. In February 2005, Dr. Ross completed a physical strength rating form on which he indicated by his mark that relator is capable of "sedentary work."

{¶ 28} 11. On January 28, 2005, at the commission's request, relator was examined by clinical psychologist Michael A. Murphy, Ph.D. In his seven-page narrative report dated February 4, 2005, Dr. Murphy opined: "The Injured Worker's psychological condition is not work-prohibitive."

{¶ 29} 12. "3/9/48" is given as relator's date of birth at the top portion of the first page of Dr. Murphy's narrative report.

{¶ 30} 13. A commission employee prepared a "statement of facts" for use at the hearing of the PTD application. The document lists March 9, 1948 as relator's date of birth.

{¶ 31} 14. Following a May 4, 2005 hearing, an SHO mailed an order on May 6, 2005 denying the PTD application. The SHO's order explains:

> The following order is predicated upon those reports incorporated by the reference within the text of the order.
>
> Claimant is a 57 year old male who is a high school graduate and possesses a relevant work history comprised of the following positions: general laborer at a golf course, off bearer (stacking and lifting lumber) at a sawmill, coalminer (operating various machines), diesel mechanic, truck driver for a furniture company. Claimant's injury occurred on 06/28/1993 when he was moving a stack of lumber and injured his right hip. Injuries recognized under this claim (93-19552) have been treated strictly with conservative care. Claimant last worked on 09/18/1999 at the age of 51. This means the claimant was able to work for [an] additional six years following his industrial injury. Furthermore, the SHO notes that the claimant indicates that he failed the 5th grade, however, as noted above he did complete the 12th grade and

graduated and per his IC-2 application he can read, write and do basic math.

Claimant was examined on behalf of the Industrial Commission from a physical standpoint by Dr. James K. Ross, MD, a specialist in occupational and internal medicine. In his report dated 01/27/2005 Dr. Ross opines that the claimant retains the residual physical ability to engage in sedentary work. He also opines that claimant's recognized physical conditions result in a 5% impairment. In his attached physical strength rating form dated 02/04/2005 Dr. Ross reiterates his opinion that the claimant is capable of doing sedentary level of employment. The SHO relies upon these reports to find that the claimant does in fact, retain the residual physical ability to engage in sedentary employment.

The claimant was also examined on behalf of the Industrial Commission from a psychological standpoint by Dr. Michael Murphy, Ph.D., a Psychologist. In his report dated 02/04/2004 Dr. Murphy opines that the claimant sustained a 25% permanent partial impairment secondary to claimant's recognized psychological conditions. However, he goes on to indicate that "the injured worker's psychological condition is not work prohibitive." Dr. Murphy reiterates this opinion in the attached Occupational Activity Assessment dated 02/15/2005 wherein he clearly indicates that the claimant retains the ability from a psychological standpoint to return to any former position of employment and that he can perform any sustained remunerative employment. The SHO finds this report persuasive and therefore relies upon it to conclude that the claimant psychologically is capable of returning to any position of employment. Therefore, when considering Dr. Murphy's report together with Dr. Ross's [sic] opinion the SHO finds that the claimant is capable of returning to sedentary employment both from a physical and psychological standpoint.

Vocationally, the SHO finds that claimant's age of 51 would not be a barrier to reemployment. Claimant still has ample opportunity to reenter the workforce and/or pursue employment enhancing activity to increase his success in securing employment.

Furthermore, the SHO finds claimant's level of education (high school graduate) to be a distinct asset to

> reemployment. A high school level of education is adequate for most entry level sedentary positions.
>
> The SHO also finds claimant's work history to be an asset in that it shows an ability to adapt to diverse work environments and job requirements. Several of those positions (coalminer, diesel mechanic, truckdriver) involved semi-skilled to skilled work. Claimant testified at hearing today that he learned most of his jobs by being shown what to do. This demonstrated ability to learn/acquire new job skills via on the job training is an additional asset to reemployment.
>
> When considering claimant's retained abilities from a physical and psychological standpoint to engage in sedentary employment together with his sufficiently young age, adequate level of education plus demonstrated ability to acquire new job skills at the very least through on the job training, the SHO concludes that the claimant is not permanently and totally disabled. Accordingly, the claimant's IC-2 application is denied.

{¶ 32} 15. On December 16, 2011, over six and one-half years after the commission mailed its order denying the PTD application, relator filed this mandamus action.

Conclusions of Law:

{¶ 33} In his May 4, 2005 order, the SHO initially states that relator "is a 57 year old male." In that same paragraph, the order states, "[c]laimant last worked on 09/18/1999 at the age of 51." Later, the order states that relator is 51 years old when the order finds that, vocationally, age would not be a barrier to reemployment, and that relator "still has ample opportunity to reenter the workforce and/or pursue employment enhancing activity."

{¶ 34} Both relator and the commission agree here that relator was 57 years of age on the hearing date. Thus, the commission concedes that the SHO factually erred when he stated that relator is 51 years of age.

{¶ 35} The issue here is whether the SHO's error in stating that relator is 51 years of age fatally flaws the order and thus requires this court to issue a writ of mandamus.

{¶ 36} Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications.

{¶ 37} Ohio Adm.Code 4121-3-34(B) sets forth definitions.

{¶ 38} Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors."

{¶ 39} Thereunder, Ohio Adm.Code 4121-3-34(B)(3)(a) states:

> "Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others.

{¶ 40} In *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 417 (1996), the court states:

> It is not enough for the commission to just acknowledge claimant's age. It must discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects.

{¶ 41} In *Moss,* the commission denied the PTD application of a 78-year-old applicant with an eighth grade education and an ability to read, write, and do basic math. The claimant had worked as a housekeeper. The *Moss* court stated:

> Our analysis of the commission's order reveals [*State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203] compliance. In so holding, we recognize the significant impediment that claimant's age presents to her reemployment. Workers' compensation benefits, however, were never intended to compensate claimants for simply growing old.
>
> Age must instead be considered on a case-by-case basis. To effectively do so, the commission must deem any presumptions about age rebuttable. Equally important, age must never be viewed in isolation. A college degree, for example, can do much to ameliorate the effects of advanced age.

Id. at 416-17.

{¶ 42} In *State ex rel. Rothkegel v. Westlake,* 88 Ohio St.3d 409, 411-12 (2000), the court states:

> Claimant also proposes that the commission's treatment of his age warrants a return of the cause for further consideration. The commission concedes that it mentioned claimant's age only in passing, but argues that the defect does not compel a return of the cause.
>
> Claimant relies on *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 662 N.E.2d 364, in which we held:
>
> "[The commissions has a] responsibility to affirmatively address the age factor. It is not enough for the commission just to acknowledge claimant's age. It must discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects." *Id.* at 417, 727 N.E.2d 869, 662 N.E.2d at 366.
>
> Since that time, we have declared that the absence of an age discussion is not necessarily a fatal flaw, nor does it, in some cases, even compel a return of the cause. In *State ex rel. Blue v. Indus. Comm.* (1997), 79 Ohio St.3d 466, 683 N.E.2d 1131—relied on by both the commission and the court of appeals—we wrote:
>
> "As another *Noll* flaw, claimant assails the commission's cursory mention of his age. While the commission did not 'discuss' this factor, that flaw, in this instance, should not be deemed fatal. Claimant was fifty-seven when permanent total disability compensation was denied. While not a vocational asset, claimant's age is also not an insurmountable barrier to re-employment. If claimant's other vocational factors were all negative, further consideration of his age would be appropriate, since age could be outcome-determinative—the last straw that could compel a different result. All of claimant's other vocational factors are, however, positive. A claimant may not be granted permanent total disability compensation due solely to his age. Therefore, even in the absence of detailed discussion on the effects of claimant's age, the commission's explanation satisfies *Noll*."

{¶ 43} Initially, the magistrate notes that the PTD application indicates that relator was born in 1949 while the commission's statement of facts and the reports of Drs. Ross and Murphy indicate that relator was born in 1948. If relator was indeed 57 years of age on the hearing date as the parties seem to agree, then the PTD application

incorrectly states the year of birth. This discrepancy was not addressed by the SHO nor do the parties address it here.

{¶ 44} In any event, for the purpose of discussion here, the magistrate shall assume that relator's date of birth is March 9, 1948 which made him 57 years old on the hearing date.

{¶ 45} Here, the commission contends that it was harmless error for the SHO to state that relator was 51. According to the commission, the order indicates initially that the SHO correctly knew that relator was 57 years of age on the hearing date and that he was 51 years of age on the date he last worked. The commission then asserts that the SHO mistakenly used age 51 rather than age 57 when he found that, vocationally, relator's age would not be a barrier to reemployment.

{¶ 46} The commission's argument may show that the SHO correctly understood relator's age as of the hearing date and his age as of the date he last worked. But the argument fails to resolve the concern that the SHO may have failed to understand his duty under Ohio Adm.Code 4121-3-34(B)(3)(a) which requires that age shall be determined at the time of the adjudication.

{¶ 47} Thus, even if we agree that the order clearly indicates that the SHO understood that 51 was the age at which relator last worked, we can only speculate whether the SHO correctly understood that it is age 57 that he must consider in determining how the non-medical factors impact the residual functional capacity. The SHO's order, on its face, indicates that the SHO used the date last worked to determine the relevant age for analysis of the non-medical factors in contravention of Ohio Adm.Code 4121-3-34(B)(3)(a).

{¶ 48} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the SHO's order of May 4, 2005 and, in a manner consistent with this magistrate's decision, enter a new order that appropriately adjudicates the PTD application.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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