

THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gary W. Roberts,	:	
Relator,	:	
v.	:	No. 12AP-298
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Stephens Pipe & Steel LLC,	:	
Respondents.	:	

D E C I S I O N

Rendered on January 31, 2012

Agee, Clymer, Mitchell, & Laret, and Robert M. Robinson,
for relator.

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, Gary W. Roberts, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying him permanent total disability ("PTD") compensation and enter an order granting said 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 found that the commission

misread the medical report of psychologist Ralph E. Skillings, Ph.D., and, as a result, failed to properly determine relator's residual functional capacity in light of relator's allowed conditions. Accordingly, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate the July 23, 2009 order of its staff hearing officer ("SHO") and enter an order adjudicating relator's application for PTD compensation.

II. DISCUSSION

{¶ 3} The commission has filed objections to the magistrate's decision. The commission does not object to the magistrate's findings of fact, and, upon an independent review of the record, we adopt them as our own. The commission objects to (1) the magistrate's conclusion that the commission's SHO misread the reports of Dr. Skillings, and (2) the magistrate's recommendation to issue a writ of mandamus without determining whether "some evidence" supports the commission's order.

{¶ 4} To obtain a writ of 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.

{¶ 5} PTD is defined as "the inability to perform sustained remunerative employment due to the allowed conditions in the claim." Ohio Adm.Code 4121-3-34(B)(1); *see also State ex rel. Guthrie v. Indus. Comm.*, 133 Ohio St.3d 244, 2012-Ohio-4637, ¶ 8. In determining the ability to perform sustained remunerative employment, the commission must first consider the medical evidence and determine the claimant's residual functional capacity. Ohio Adm.Code. 4121-3-34-(B)(4). If the commission finds that the claimant is able to engage in sustained remunerative employment, the commission must then consider nonmedical and vocational factors, known as the

Stephenson factors, found at Ohio Adm.Code 4121-3-34(B)(3). See Ohio Adm.Code 4121-3-34(D)(2)(b) and (c); *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987).

{¶ 6} In his mandamus action, relator primarily challenged the SHO's statement that, based on the report of Dr. Skillings, the allowed psychological condition does not "preclude, *nor restrict*, employment." (Emphasis added.) (Stip. 2.) According to relator, this statement is incorrect because Dr. Skillings' report did identify specific restrictions based on the allowed psychological condition. The magistrate agreed and recommended that this court issue a writ of mandamus ordering the commission to "enter a new order that adjudicates the PTD application." (Magistrate's Decision, ¶ 37.)

{¶ 7} In its objections, the commission argues that the SHO's alleged misstatement does not rise to the level of an abuse of discretion warranting mandamus relief. The commission asserts that the SHO's misstatement was harmless because the SHO did consider the restrictions identified by Dr. Skillings and because there is some evidence in the record supporting the SHO's determination that relator is capable of sedentary work within the restrictions identified by Drs. Robert Whitten, M.D., Steven Wunder, M.D., and Skillings. It would be a vain act, relator maintains, to order the commission to correct the claimed misstatement. We agree.

{¶ 8} Initially, it is unclear whether the SHO did in fact misstate Dr. Skillings' report. Although the SHO stated that Dr. Skillings' report indicates that the psychological condition does not restrict employment, the context of the SHO's order suggests that the SHO was referring to *sedentary* employment—not any and all forms of employment. The sentence immediately preceding the alleged misstatement states that "the allowed physical conditions restrict [relator] to employment of a *sedentary* nature that includes the opportunity to alternate sitting and standing as needed." (Stip. 1-2.) In context, the SHO's statement regarding Dr. Skillings' report can reasonably be interpreted to an acknowledgement that relator's conditions limit him to performing sedentary work.

{¶ 9} Regardless, even if the SHO's order does misstate the portion of Dr. Skillings' report, it does not necessarily follow that the SHO incorrectly considered, or failed to consider, that portion of the report. Dr. Skillings' report unambiguously indicates that relator was capable of performing work within the psychological

restrictions. In fact, Dr. Skillings opined that the majority of relator's pacing limitations were due to physical pain "rather than psychological causation." (Stip. 24.)

{¶ 10} In a similar case, this court recognized that, where the SHO merely misstates a portion of a medical report, mandamus relief is not justified if the report plainly indicates that the claimant is capable of sedentary work. *See State ex rel. Wyrick v. Indus. Comm.*, 10th Dist. No. 08AP-275, 2009-Ohio-635, ¶ 4 ("[E]ven if the commission misstated part of Dr. Turner's opinion, this error is irrelevant because the portion of Dr. Turner's report upon which the commission relied is the doctor's unambiguous opinion that relator is capable of sedentary work."). Moreover, " '[t]he commission is not required to list or cite evidence that has been considered and rejected or explain why certain evidence was deemed unpersuasive.' " *State ex rel. Lucas v. Indus. Comm.*, 10th Dist. No. 11AP-93, 2012-Ohio-1843, ¶ 20, quoting *State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915, ¶ 16, citing *State ex rel. DeMint v. Indus. Comm.*, 49 Ohio St.3d 19, 20 (1990).

{¶ 11} " 'Any 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). The medical reports from Drs. Whitten and Wunder fully support the SHO's conclusion that relator's allowed physical conditions do not preclude sedentary work, and Dr. Skillings' findings regarding relator's psychological condition correspond with the reports from Drs. Whitten and Wunder. The SHO also found relator qualified for sedentary work based on nonmedical and vocational factors, including relator's age, high school degree, and history of semi-skilled employment. Because Dr. Skillings' report fully supports the SHO's determination that relator is capable of performing sedentary work, it would be futile to grant a writ ordering the commission to re-read that report and arrive at the very same determination.

{¶ 12} Based on the above, we find that the SHO's alleged misstatement regarding Dr. Skillings' report does not justify extraordinary relief in mandamus because the reports of Drs. Whitten, Wunder, and Skillings constitute "some evidence" supporting the commission's denial of relator's PTD application. Accordingly, the commission's objections are sustained.

III. CONCLUSION

{¶ 13} 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 adopt them as our own. However, in accordance with our decision, we sustain the commission's objections 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.

*Objections sustained;
writ of mandamus denied.*

CONNOR, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 14} I respectfully dissent. I think the magistrate was correct to ask the commission to review the order of its staff hearing officer which relied upon a psychological report which contains restrictions and then includes a provision which states there are no restrictions.

{¶ 15} I would adopt the magistrate's decision in toto and grant a limited writ of mandamus.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gary W. Roberts,	:	
Relator,	:	
v.	:	No. 12AP-298
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Stephens Pipe & Steel LLC,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on October 26, 2012

Agee, Clymer, Mitchell, & Laret, and Robert M. Robinson,
for relator.

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

IN MANDAMUS

{¶ 16} In this original action, relator, Gary W. Roberts, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting the compensation.

Findings of Fact:

{¶ 17} 1. In 2003, relator injured his lower back while employed as a truck driver for a state-fund employer.

{¶ 18} 2. The industrial claim (No. 03-407838) is allowed for:

Lumbosacral ligamentous sprain/strain; right sciatic neuritis; herniated disc at L4-5; L3-L4 protruding disc; aggravation of pre-existing degenerative disc disease L3-S1; depression; annular tear at L5-S1 by flow through causation; degenerative joint disease (facet arthritis) L3, L4, L5 and S1 by flow through causation; spondylosis L3, L4, L5 and S1 by flow through causation.

{¶ 19} 3. On February 13, 2009, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by Robert R. Whitten, M.D., for the allowed physical conditions of the industrial claim. In his eight-page narrative report, Dr. Whitten opined that relator had reached maximum medical improvement ("MMI"). Dr. Whitten further opined:

[Two] Can the injured worker return to his former position of employment?

He is unable to return to his former position of employment as a truck driver, loader and unloader and it is my medical opinion within a reasonable degree of medical certainty that he will not be able to return to this employment.

[Three] Please provide a summary of any functional limitations solely due to the allowed physical conditions of the claim.

He is currently limited to light duty only, with maximum lift of 20 pounds, frequent lift of 10 pounds. No ladders, raised platforms, unguarded heights or crawling. Standing is not to exceed more than four hours out of an eight-hour shift and not more than thirty minutes continuously. Sitting would be unrestricted, but he must be given the ability to go from sit to stand as needed for relief of discomfort. Bending, twisting, stooping, squatting and kneeling are only occasionally. There are no additional restrictions on the use of hands or feet. These restrictions are permanent.

{¶ 20} 4. By letter dated March 16, 2009, GatesMcDonald HealthPlus informed relator:

This letter is to inform you that your rehabilitation file will be closed effective March 16, 2009 by G. Fox, RN for the following reasons:

You have been found eligible for Vocational rehabilitation. However, in order to participate, an injured worker must be both eligible and feasible.

A review of your medical indicates high levels of chronic pain, decreased tolerance for activity and disturbed sleep patterns.

You do not appear to be medically stable due to severe chronic pain and are not a feasible candidate at this time. This referral is now closed.

(Emphasis sic.)

{¶ 21} 5. On March 30, 2009, relator filed an application for PTD compensation.

{¶ 22} 6. On May 28, 2009, at the commission's request, relator was examined by Steven S. Wunder, M.D., for the allowed physical conditions of the industrial claim. In his seven-page narrative report, Dr. Wunder opined:

He should be functionally capable of a full range of sedentary occupations. I do not believe he could repetitive bend at the waist during the course of the workday. He would have the opportunity to alternate sitting and standing.

{¶ 23} 7. On May 28, 2009, Dr. Wunder completed a Physical Strength Rating form. On the form, Dr. Wunder indicated by his mark that relator can perform "sedentary work."

{¶ 24} 8. Earlier, on May 6, 2009, at the commission's request, relator was examined by psychologist Ralph E. Skillings, Ph.D. In his six-page narrative report, Dr. Skillings opines:

REFERRAL QUESTIONS:

[One] Has the injured worker [reached] maximum medical improvement?

IW has undergone psychotropic medication administration about 3 years and psychotherapy each 2 weeks for a year and 5 months yet with similar symptoms that remain variable but persistent. Available records of his provider identify the unrelenting chronic pain. Identity of strategies professionally as well as the relative modification of care plan is not evident. Characterological issues identified within his

objective testing include social anxiety and emotional withdrawal in public. Such coping procedures put them at risk for depressive condition when some stressor is sufficiently severe to stimulate ongoing helplessness. It is reasonable to conclude from the evidence in the file that IW impairments will continue for an indefinite period of time without any present indication of recovery there from. Therefore it is reasonable to conclude these impairments are permanent. IW is permanently unable to return to the performance of his former occupation but could perform some other substantial gainful activity. Based solely upon the allowed psychological conditions listed in this claim such conditions have reached Maximum Medical Improvement where no fundamental change can be expected within a reasonable probability in spite of continuing rehabilitative procedure. This condition has reached MMI.

[Two] What is the percentage of impairment arising from each of the highlighted allowed conditions in each claim? If there is none, please indicate.

The 5th Ed of the AMA Guides to the Evaluation of Permanent Impairment was utilized to determine the class of impairment. Physical system impairment directly limits body function, while psychological impairment indirectly limits function by reducing work capacity. This determination takes into account the severity of symptoms, duration of impairment, and the impact that his psychological disorder has had and is continuing to have on his daily life. Based upon medical evidence and exam findings associated with the allowed psychological condition this worker demonstrates[:]

17% Class 1 Mild level whole person impairment.

[Three] Complete the Occupational Activity Assessment form to provide your estimate of the injured worker's functional capacity.

* * *

This opinion is based solely on objective and subjective findings associated with the allowed psychological conditions. Disability factors of age, sex, and education are

not addressed. This review addresses only impairment factors from his psychological condition.

{¶ 25} 9. On May 6, 2009, Dr. Skillings completed a form captioned "Occupational Activity Assessment, Mental & Behavioral Examination." On the occupational activity assessment form ("OAA"), Dr. Skillings indicated by his mark that he agrees with the preprinted statement:

This Injured Worker is capable of work with the limitation(s)/modification(s) noted below:

In the space provided, Dr. Skillings wrote:

Activities of daily living based solely upon the allowed psychological condition IW is able to leave home and transport himself, provide for his own sustenance care. He uses a riding mower for 60 minutes and could fish in his own pond for 30 minutes. Cognitively a fund of information was routine; orientation, attention, concentration and memory were objectively measured without impairment: Mild impairment. **Persistence and pace** are negatively influenced by the chronic and unrelenting pain. The frustration of feeling tense, uptight and unable to continue pace longer than 30 minutes without taking a break influences his daily habits. He reports the necessity of spacing between shaving and showering or driving long distances as part of his effort to pace himself and this results with significant number of interruptions. It is reasonable to conclude that the physical pain is stimulating the majority of the pacing limitations rather than psychological causation: Mild impairment. **With Social functioning** IW tends to stay way from other people and not socialize. Objective testing identifies these are factors that are characterological and preceded his work injury and likely would occur regardless of having a depression condition. He was polite and responsive throughout this exam. Startle response, autonomic symptoms of anxiety and difficulty making decisions are not indicated: No impairment. **Adaptation** IW struggles with the impact of his mood issues with reduced energy, self criticism of feeling worthless and feeling disgusted due to the limitations of his discouragement: Moderate impairment. Physical pain experience appears to be setting the primary limitations from employment. Severity of his depression condition does not preclude employment.

{¶ 26} 10. Following a July 23, 2009 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

After full consideration of the issue it is the order of the Staff Hearing Officer that the application filed 03/30/2009, for permanent total disability compensation, be denied. The Staff Hearing Officer finds the residual functional capacity stemming from the allowed conditions in the claim, when considered together with Mr. Roberts' disability factors, does not render Mr. Roberts permanently and totally disabled.

Mr. Roberts sustained the back injury recognized in this claim six years ago. Mr. Roberts underwent a lumbar microlaminectomy, medial facetectomy, foraminotomy and excision in March 2004. Lumbar fusion surgery was considered but Mr. Roberts instead pursued pain relief through the implantation of a spinal cord stimulator. Other treatment modalities have included lumbar epidural steroid injections and chiropractic services. Presently, Mr. Robert[s] uses a lumbar brace and TENs unit and he takes prescription medications.

The claim includes an allowance for depression and Mr. Roberts takes a prescription antidepressant. Mr. Roberts also attends counseling twice per month. Mr. Roberts testified that he has significant difficulty with exhaustion; however, he recently initiated a prescription sleep aid, which has resulted in some benefit.

Relying upon the 02/27/2009 examination report by Robert Whitten, Jr., M.D. and the 05/28/2009 examination report by Steven Wunder, M.D., the Staff Hearing Officer finds the allowed physical conditions restrict Mr. Roberts to employment of a sedentary nature that includes the opportunity to alternate sitting and standing as needed. Relying upon the 05/06/2009 examination report by Ralph Skillings, Ph.D., the Staff Hearing Officer finds the allowed psychological condition does not preclude, nor restrict, employment.

Mr. Roberts is 53 years old. Mr. Roberts last worked in August 2003, at the age of 46. Mr. Roberts is a high school graduate. Both his age and education level are vocational assets.

Mr. Roberts was questioned regarding his employment history and he provided a more exhaustive history than that enumerated on the Application for Permanent Total Disability Compensation. Following his graduation from high school, Mr. Roberts did factory work, followed by construction and janitorial positions. Thereafter, he was a maintenance man and a gas station clerk/auto repairman. Mr. Roberts' employment history also includes work as a truck driver, tree trimmer, and lawn mower repairman. The Staff Hearing Officer acknowledges Mr. Roberts has no employment experience in sedentary occupations. However, he has worked in a semiskilled trade (auto and lawn mower repair), which demonstrates some vocational aptitude. The Dictionary of Occupational Titles lists a number of sedentary clerk positions. As Mr. Roberts has some experience as a gas station clerk, and given his education, age, and semiskilled work history, the Staff Hearing Officer finds Mr. Roberts is vocationally qualified for such sedentary positions.

Finally, the Staff Hearing Officer relies upon the Supreme Court decisions that set out the rule of law regarding rehabilitation and an injured worker's lack of participation in such. See State ex rel. Speelman v. Industrial Commission (1992), 73 Ohio App. 3d 757; State ex rel. Bowling v. National Can Corp. (1996), 77 Ohio St. 3d 148; and State ex rel. Cunningham v. Industrial Commission (2001), 91 Ohio St. 3d 261. Mr. Roberts was 46 years old when he last worked and he has made no attempt at vocational rehabilitation. The Staff Hearing Officer acknowledges Mr. Roberts was actively pursuing treatment and pain relief over the last six years. And the Staff Hearing Officer reviewed the abbreviated rehabilitation assessments from March and July 2009. However, Mr. Roberts has not initiated rehabilitation services to secure sedentary work consistent with the opinions from Drs. Wunder and Whitten. Given his moderate age, Mr. Roberts is expected to improve his reemployment potential through vocational services prior to finding that he is precluded from all work.

Accordingly, the Application for Permanent Total Disability compensation filed 03/30/2008 is denied.

{¶ 27} 11. On April 2, 2012, relator, Gary W. Roberts, filed this mandamus action.

Conclusions of Law:

{¶ 28} The main issue is whether the SHO's order of July 23, 2009 indicates a misreading of the reports of Dr. Skillings.

{¶ 29} Finding that the SHO's order indicates a misreading of Dr. Skillings' reports, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 30} In the order, the SHO states:

Relying upon the 05/06/2009 examination report by Ralph Skillings, Ph.D., the Staff Hearing Officer finds the allowed psychological condition does not preclude, nor restrict, employment.

{¶ 31} Relator takes issue with the SHO's statement that, based on Dr. Skillings' reports, the psychological condition does not "restrict" employment. Relator contends that it is inaccurate and an abuse of discretion for the SHO to conclude that there are no employment restrictions based upon Dr. Skillings' reports. The magistrate agrees.

{¶ 32} Given that the SHO misread the reports of Dr. Skillings, it cannot be said that the commission appropriately considered the reports when it analyzed the non-medical factors.

{¶ 33} In his May 6, 2009 narrative report, Dr. Skillings opines that relator "is permanently unable to return to the performance of his former occupation but could perform some other substantial gainful activity." Clearly, the inability to perform one's former occupation is a significant employment restriction.

{¶ 34} In his May 6, 2009 narrative report, Dr. Skillings states that "[p]hysical system impairment directly limits body function, while psychological impairment indirectly limits function by reducing work capacity." Clearly, reduction of work capacity suggests a restricted ability to perform work.

{¶ 35} On the OAA form, under "Adaptation," Dr. Skillings concludes that relator experiences "[m]oderate impairment." Dr. Skillings then states:

Physical pain experience appears to be setting the primary limitations from employment. Severity of his depression condition does not preclude employment.

{¶ 36} Significantly, the concluding sentence opines that the depressive condition does not preclude employment, but it does not say that there are no employment restrictions. The SHO read something into the reports that is not there.

{¶ 37} While the commission, through its SHO, has the authority to interpret and weigh the medical evidence, the commission has no authority to misread a report or to give a report a meaning that is not there.

{¶ 38} Given that the commission has failed to appropriately determine relator's residual functional capacity based upon the physical and psychological conditions of the claim, it would be premature for this court to address whether the SHO erred in his analysis of the non-medical factors. *See State ex rel. Corona v. Indus. Comm.*, 81 Ohio St.3d 587 (1998).

{¶ 39} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of July 23, 2009 and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the PTD application.

/S/ MAGISTRATE
KENNETH W. MACKE

NOTICE TO THE PARTIES

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