

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. G&J Pepsi-Cola Bottlers, Inc., :
Relator, :
v. : No. 08AP-1115
Industrial Commission of Ohio : (REGULAR CALENDAR)
and Michael R. Saylor, :
Respondents. :
:

D E C I S I O N

Rendered on September 24, 2009

Taft Stettinius & Hollister LLP, and *Charles M. Stephan*, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Becker & Cade, and *Dennis A. Becker*, for respondent Michael R. Saylor.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} In this original action, relator, G&J Pepsi-Cola Bottlers, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Michael R. Saylor ("claimant"), and to enter an order finding that claimant is not entitled to that compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission failed to explain why claimant is unable to perform any sustained remunerative employment, and that simply listing the nonmedical factors without an explanation does not satisfy the requirements of *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, and its progeny. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and ordering the commission to issue a new order, either granting or denying the requested compensation, after providing the requisite analysis.

{¶3} Relator has filed objections to the magistrate's decision. Relator first states in its objections that it "does not object to the Magistrate's findings of fact except to point out two errors." (Relator's brief at 2.) According to relator, paragraph three of the magistrate's decision should state that claimant, rather than relator, submitted the report of Dr. Zancan, and finding of fact No. 4 of the magistrate's decision should reflect that Dr. Ray himself, rather than claimant, submitted Dr. Ray's report. A review of the evidence indicates that relator is correct. Therefore, following an independent review of the magistrate's findings of fact, with the addition of these corrections, we adopt the magistrate's findings of fact as our own.¹

¹ These corrections do not change the substance or meaning of the submitted record and in large part are not relevant to our determination of whether to grant or deny a writ of mandamus as they are corrections of clerical errors only.

{¶4} Relator further contends in its objections that because the evidence does not support an award of PTD compensation, the magistrate should not have issued a limited writ but, instead, issued a full writ ordering the commission to enter an order finding that claimant is not entitled to PTD compensation.

{¶5} Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken. Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we adopt the magistrate's decision as our own, including the findings of fact with our noted corrections and conclusions of law contained therein. In accordance with the magistrate's decision, we issue a limited writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and ordering the commission to issue a new order, either granting or denying the requested compensation, after providing the requisite analysis.

Objections overruled; limited writ granted.

BRYANT and BROWN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. G&J Pepsi-Cola Bottlers, Inc., :
 Relator, :
 v. : No. 08AP-1115
 Industrial Commission of Ohio : (REGULAR CALENDAR)
 and Michael R. Saylor, :
 Respondents. :

MAGISTRATE'S DECISION

Rendered on June 9, 2009

Taft Stettinius & Hollister LLP, and Charles M. Stephan, for relator.

Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

Becker & Cade, and Dennis A. Becker, for respondent Michael R. Saylor.

IN MANDAMUS

{¶6} Relator, G&J Pepsi-Cola Bottlers, 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 granted permanent total

disability ("PTD") compensation to respondent Michael R. Saylor ("claimant") and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶7} 1. Claimant sustained a work-related injury on March 11, 1986 and his workers' compensation claim has been allowed for the following conditions: "fractured left knee; torn medial meniscus lateral meniscus left knee; degenerative arthritis of left knee; mechanical complications of internal orthopedic implant, left."

{¶8} 2. In January 2008, claimant filed an application for PTD compensation. At the time, claimant was 56 years old. According to his application, claimant graduated from college in 1992 and was able to read, write, and perform basic math. Claimant's past work history consists of work as a computer equipment installer, telecommunications manager, and route salesman. Those jobs were classified as medium to heavy level. Claimant last worked in March 2003.

{¶9} 3. Relator submitted the January 11, 2008 report of Walter L. Zancan, M.D., who opined as follows:

* * * I have seen Mr. Saylor since his original injury of March 11, 1986. Throughout the past years Mr. Saylor has had numerous injections and surgeries, however, there continues to be no change in his left knee condition.

Mr. Saylor was most recently seen on December 17, 2007 at which time he continues to have stiffness, pain and tenderness of the left knee. He was given a prescription for Lidoderm Patches to help control pain and an order for a custom made Don Joy brace to stabilize and support the knee. Mr. Saylor also wears a TENS unit which is very beneficial as it also controls his pain and allows him to remain active.

The patient has permanent work restrictions such as no bending, twisting, turning, pushing, pulling, squatting,

kneeling, standing, walking and no reaching below knee level.

It is my opinion Michael Saylor will never return to gainful employment. I feel the patient is permanently and totally disabled.

{¶10} 4. Claimant also submitted the April 3, 2008 report of Gary L. Ray, M.D.

Claimant self reported his abilities to Dr. Ray as follows:

He is not sure how much he can lift and carry. He reports when he tries to carry his grandson who weighs about 25 lbs. he has difficulty with this. He reports that he can bench press about 300 pounds. He reports being able to sit for up to 10-15 minutes at a time. He reports being able to stand for up to 10-15 minutes at a time. He reports being able to walk for up to 100 yards at a time. He uses a cane when walking outdoors. He reports having trouble with squatting and ascending and descending steps.

{¶11} After listing his physical findings upon examination, Dr. Ray opined that claimant has a 20 percent whole person impairment and was capable of performing at a sedentary level of functioning provided he avoid squatting, kneeling, and climbing activities.

{¶12} 5. In the statement of facts, it is indicated that claimant's rehabilitation file was closed on July 5, 2005 due to medical instability. One and one-half months later, claimant underwent a diagnostic arthroscopy for excision of fibrotic fat pad and synovitis. Claimant had two additional knee surgeries; one in 2006 and one in 2007.

{¶13} 6. Claimant's application was heard before a staff hearing officer ("SHO") on August 13, 2008 and was granted. After reviewing the reports of Drs. Zancan and Ray, the commission specifically found that "the limitations given by Dr. Ray are the limitations that the injured worker has as the result of the allowed conditions in the claim." (Dr. Ray had opined that claimant was capable of work at a sedentary level of functioning

provided he avoid squatting, kneeling, and climbing activities.) Thereafter, the SHO provided the following analysis of the nonmedical disability factors:

* * * The Staff Hearing Officer finds that the injured worker is an older individual of 57 years of age. The Staff Hearing Officer finds that the injured worker has work experience as an installer of computer equipment, telecommunications manager and route salesman. The Staff Hearing Officer finds that these positions are medium to heavy level jobs. The Staff Hearing Officer finds that due to his medical limitations, the injured worker is unable to engage in any of his prior occupations. The Staff Hearing Officer finds that the injured worker has a college education having graduated from the college of Mount Saint Joseph with a Bachelor's Degree in Business. The Staff Hearing Officer finds that the injured worker's education is a positive factor in trying to secure future employment.

The Staff Hearing Officer finds that the injured worker had an involvement with rehabilitation but the rehabilitation was closed due to medical instability. The Staff Hearing Officer finds that despite the injured worker's positive education level, the injured worker is unable to engage in sustained remunerative employment because of the medical limitations due to the allowed conditions in the claim. The Staff Hearing Officer finds that the limitations that Dr. Ray placed on the injured worker including avoiding squatting and kneeling made reemployment difficult. The Staff Hearing Officer notes that Dr. Ray noted in his report that the injured worker uses a cane when he walks outdoors. The injured worker reported that Dr. Ray that having trouble with squatting and ascending and descending steps. [Sic.]

The Staff Hearing Officer finds that given the injured worker's age of 57, his multiple left knee surgeries, and the medical restrictions due to the allowed conditions in the claim the injured worker is unable to engage in sustained remunerative employment and is permanently and totally disabled.

{¶14} The SHO used the date of Dr. Zancan's report as the starting date for claimant's award of PTD compensation.

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

Conclusions of Law:

{¶16} 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.* (1967), 11 Ohio St.2d 141. 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.* (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. 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.* (1981), 68 Ohio St.2d 165.

{¶17} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. 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 nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. 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.* (1991), 57 Ohio St.3d 203.

{¶18} In this mandamus action, relator contends that the commission's order does not comply with the requirements of *Noll* and *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757. Specifically, relator argues that the commission's analysis of the nonmedical disability factors is insufficient and that the commission failed to explain how claimant's work-related medical limitations, together with both positive and negative nonmedical disability factors, render claimant unable to engage in any sustained remunerative employment. For the reasons that follow, this magistrate agrees.

{¶19} In the present case, the commission specifically indicated that it relied upon the medical report of Dr. Ray for assessing claimant's functional capacity. Dr. Ray concluded that claimant was restricted to sedentary work provided he avoid squatting, kneeling, and climbing activities. However, nothing in Dr. Ray's report indicates how much claimant can lift, carry, push, or pull. The only reference in Dr. Ray's report to claimant's abilities in this area comes from claimant's own self reporting of his abilities:

He is not sure how much he can lift and carry. He reports when he tries to carry his grandson who weighs about 25 lbs. he has difficulty with this. He reports that he can bench press about 300 pounds. He reports being able to sit for up to 10-15 minutes at a time. He reports being able to stand for up to 10-15 minutes at a time. He reports being able to walk for up to 100 yards at a time. He uses a cane when walking outdoors. He reports having trouble with squatting and ascending and descending steps.

{¶20} If claimant can indeed handle this kind of weight, it appears he could perform more than sedentary work.

{¶21} Ohio Adm.Code 4121-3-34(B)(2)(a) states:

"Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-

third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶22} An ability to carry up to 25 pounds and bench press 300 pounds does not constitute sedentary work.

{¶23} The commission did indicate that it also relied upon the report of Dr. Zancan. However, since the commission specifically stated that claimant had the restrictions as set forth in Dr. Ray's report, it appears that the reliance upon the report of Dr. Zancan was solely to use the date of that report, January 11, 2008, as the starting date for claimant's award of PTD compensation.

{¶24} Because the commission concluded that claimant could perform at least sedentary work, it was incumbent upon the commission to discuss and analyze the nonmedical disability factors. Those factors include the following: (1) claimant was 57 years of age; (2) claimant graduated from college with a Bachelor's degree in business; (3) claimant's prior work history was in medium to heavy duty work including computer equipment installation, telecommunications manager, and route salesman; and (4) claimant's rehabilitation file was closed in July 2005 due to medical instability.

{¶25} In considering the nonmedical disability factors, the commission indicated that a person of 57 years of age is an older individual. However, the commission defines the age of 57 years as middle age. While a person of this age would likely have obstacles to adjusting to a new kind of work activity, that age does not, in and of itself, preclude the ability to adjust to performing a new kind of work activity. The commission also noted that claimant had a college education in business administration; however, the

commission found that claimant's age and his medical restrictions made reemployment not only difficult, but impossible. The commission did find that claimant's prior work history consisted of medium to heavy duty jobs. Lastly, the commission noted that claimant's rehabilitation file was closed in July 2005 due to medical instability. However, as noted in the findings of fact, this was one month before claimant underwent a diagnostic arthroscopy which resulted in the excision of fibrotic fat pad and synovitis and before his 2006 and 2007 surgeries. Claimant's ability to pursue rehabilitation after these surgeries was not considered or addressed. Further, there was no discussion as to whether claimant was otherwise capable of being retrained. Given his college education in 1992 when claimant was 41 years old, this issue should be addressed.

{¶26} Although mindful that the commission is the expert in these matters, the magistrate finds that the commission has failed to explain why claimant, a 57 year old college educated gentleman, who is limited to at least sedentary work, is unable to perform any sustained remunerative employment. The commission concluded that, "despite the injured worker's positive education level, the injured worker is unable to engage in sustained remunerative employment because of the medical limitations due to the allowed conditions in the claim." Simply listing the nonmedical factors without an explanation does not satisfy the requirements of *Noll* and its progeny.

{¶27} Accordingly, it is the magistrate's conclusion that relator has demonstrated that the commission abused its discretion in granting PTD compensation to claimant and this court should issue a writ of mandamus ordering the commission to vacate its order granting claimant PTD compensation and ordering the commission to issue a new order,

either granting or denying the requested compensation, after providing the requisite analysis.

/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).