

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Lake Hospital System, Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-217
	:	
Linda Giffin and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on October 29, 2009

David R. Cook, for relator.

Robert C. Ochs, for respondent Linda Giffin.

Richard Cordray, Attorney General, and *John R. Smart*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Lake Hospital System, Inc. ("Lake Hospital"), filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to overturn its award of permanent total disability ("PTD") compensation to Linda Giffin.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we refuse to grant the requested writ.

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

{¶4} The objections filed on behalf of Lake Hospital are little more than a repetition of the arguments raised before the magistrate and validly rejected by the magistrate for reasons fully explained in the magistrate's 15-page decision.

{¶5} The objections to the magistrate's decision are overruled. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

BROWN and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Lake Hospital System, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-217
Linda Giffin and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on July 29, 2009

David R. Cook, for relator.

Robert C. Ochs, for respondent Linda Giffin.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶6} Relator, Lake Hospital System, 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 Linda Giffin ("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 June 16, 1989, and relator originally recognized her claim for "[s]train, sprain neck and shoulder." In November 1996, relator additionally recognized claimant's claim for "[r]ight rotator cuff tear status post repair w/surgical fibrosis, diffused myofascial pain syndrome." In December 2006, the commission additionally allowed claimant's claim for "impingement of right shoulder and chronic subacromial bursitis."

{¶8} 2. Claimant filed an application for PTD compensation in 1997 and a hearing was held before a staff hearing officer ("SHO") on December 11, 1997. The SHO relied upon medical evidence to find that claimant was unable to return to her former position of employment, but that she was capable of performing in the sedentary and light-duty work classifications. Based upon the vocational evidence, the SHO concluded that, although claimant had minimal transferable skills and would benefit best from direct job placement, she could perform some types of sedentary and light work within her medical restrictions.

{¶9} 3. Claimant filed her second application for PTD compensation in August 2007. According to her application, claimant was 59 years old, last worked in 1989, completed the ninth grade, could read, write, and perform basic math, had taken but failed to pass the GED, and had not received any specialized training. Her work history consisted of factory work and housekeeping duties.

{¶10} 4. In support of her application, claimant submitted the May 29, 2007 report of Harry C. Walker, D.C. In his report, Dr. Walker concluded that claimant was permanently and totally disabled due to conditions involving her right shoulder, neck, both hands, lumbar spine, and right knee. Dr. Walker concluded that claimant had a 72 percent whole person impairment, noted that she also suffers from diabetes, has high blood pressure, and suffered a heart attack in 2004. He ultimately concluded that claimant was unable to perform substantial gainful employment either now or in the foreseeable future and that she was permanently and totally disabled.

{¶11} 5. On October 10, 2007, Paul C. Martin, M.D., examined claimant on behalf of relator. Dr. Martin had examined claimant previously. At the time he examined her in 1998, claimant's claim had been allowed for "strain/sprain neck and shoulder, right rotator cuff tear status post repair with surgical fibrosis, diffuse myofascial pain syndrome." After providing his physical findings upon examination, Dr. Martin concluded that claimant had a nine percent whole person impairment. Dr. Martin examined claimant again in 2006 at which time he opined that her claim should be additionally allowed for "impingement syndrome and chronic subacromial bursitis." Dr. Martin examined claimant again in 2007 for the specific purpose of determining whether she was permanently and totally impaired. Dr. Martin listed claimant's allowed conditions as "sprain/strain neck and shoulders, right rotator cuff tear, status post repair with surgical fibrosis and diffuse myofascial pain syndrome." Dr. Martin did not indicate that he was aware that claimant's claim had been allowed for the additional conditions

of impingement of right shoulder and chronic subacromial bursitis. Dr. Martin concluded:

When considering only the allowed conditions in this claim, Ms. Giffin does not present with medical evidence which would support her as being permanently and totally impaired. As it relates solely to the allowed conditions in this claim, it is my opinion Ms. Giffin is physically capable of working in a modified work environment where she would not lift greater than 20 pounds, avoid frequent or repetitive pushing or pulling with the right arm, and avoid working with the right arm in an overhead position. It is worth noting Ms. Giffin has various other difficulties related to her hands, knee, and lower back, which contribute to her overall physical capabilities resulting in additional impairment over and above that which can be specifically related to the allowed conditions in this claim.

{¶12} 6. An independent medical examination was conducted by John G. Nemunaitis, M.D. In his January 23, 2008 report, Dr. Nemunaitis provided his physical findings upon examination, concluded that her allowed conditions had reached maximum medical improvement, assessed a 14 percent whole person impairment, and concluded that she was capable of working at a sedentary work level.

{¶13} 7. Claimant submitted a vocational report prepared by Mark A. Anderson. In his report, Anderson noted that he administered the SRA clerical, math and reading tests to claimant as part of his evaluation. His assessment revealed the following:

* * * Ms. Giffin's SRA clerical aptitudes placed below the 1st percentile, indicating a lack of clerical aptitude. She reported that she has no computer skills. Her reading placed at the mid-4th Grade Level while her math placed at the 5th Grade Level. This counselor attempted to administer the Purdue Pegboard manual dexterity test. However, Ms. Giffin was unable to reach forward with her right extremity to pick up the pins.

{¶14} Anderson noted that all of claimant's previous work history had been unskilled and would not provide her with any transferable skills to sedentary work. Ultimately, Anderson concluded that claimant was not employable and that she was not a candidate for vocational rehabilitation.

{¶15} 8. Relator submitted the March 17, 2008 vocational report of Denise O'Conner. According to O'Conner, the majority of medical reports indicated that claimant was capable of returning to work in the sedentary to light range of physical abilities. Based upon her conclusion that claimant had performed some semi-skilled positions in the past, O'Conner opined that she could increase her skill level and develop basic computer skills and keyboarding. She also concluded that claimant would benefit from retaking the GED. Thereafter, O'Conner provided an extensive list of potential job opportunities for claimant; however, more than 95 percent of those jobs listed were in the light-duty work category.

{¶16} 9. Claimant's application was heard before an SHO on December 4, 2008 and was granted. The SHO relied upon the medical report of Dr. Nemunaitis and concluded that claimant was capable of performing sedentary work. The SHO analyzed the nonmedical disability factors:

The Staff Hearing Officer finds that the claimant is unable to find sustained and gainful employment based upon a finding of sedentary work and basis [sic] this opinion on the following vocational evidence. Claimant testified credibly that she only attended school until the 9th grade and was unable to pass a GED test. Claimant testified that it was her understanding that she was held back in school at an early age, and her grades were D's and C's. Claimant testified that she does not read well, does not do basic math well, does not have a checking account for the reason that she is

unable to do the simple math needed to balance a checking account, is not able to use a computer and is unable to drive a car and currently does not own a car. She testifies she attempted to learn how to use a computer but failed.

The Staff Hearing Officer finds that the claimant is now 59 years old and that her prior work experience was that of unskilled labor. Claimant worked as a housekeeper, in manufacturing and janitorial occupations. * * * Thus the Staff Hearing Officer relies upon prior experience in finding that the claimant's vocational factors of being 59 years old, attending school to the 9th grade, unable to pass a GED test, receiving D's and C's in school, failing a grade in school, unable to perform simple math required for a checking account, her inability to pay her own bills, and her prior work experience which is in an unskilled medium to light work capacity and absolutely no prior experience in a sedentary work environment and unable to work a computer would indicate that the claimant would not be able to find employment in the sedentary work setting. Finally it is important to note that the claimant's injuries are to her dominate right shoulder and this would increase claimant's disability even further.

{¶17} In reaching his decision, the SHO specifically rejected the medical reports of both Drs. Walker and Martin. With regard to the report of Dr. Walker, the SHO stated:

The claimant filed a 05/29/2008 report from Dr. Walker to support the permanent total disability application. The employer argued persuasively that this report cannot be considered for the reason that Dr. Walker considers conditions which are not allowed in the claim, i.e. hands, lumbar back and right knee. The Staff Hearing Officer finds this argument persuasive and does not consider Dr. Walker in arriving at the above finding.

{¶18} With regard to the report of Dr. Martin, the SHO provided the following reason for rejecting it:

The employer had the claimant examined by Dr. Martin and his report dated 10/10/2007 is also found not to be considered for the reason that the claimant argued persuasively that Dr. Martin does not include the claimant's allowed conditions of impingement syndrome and chronic subacromial bursitis. Dr. Martin's report is inconsistent as to whether in fact he is aware of the allowed conditions as the report states in one area that he reviewed his reports from 10/18/1998, 07/31/1998 and 10/10/2006 which would have encompassed these allowed conditions, but in another area on page 3 of his report he states, "according to the enclosed reports, Ms. Giffin's claim has been allowed for sprain/strain neck and shoulders, right rotator cuff tear, status-post repair with surgical fibrosis and diffuse myofascial pain syndrome." Thus the Staff Hearing Officer finds Dr. Martin's report inconsistent and does not rely upon his opinion in making the above finding.

{¶19} The SHO also rejected both vocational reports stating:

* * * The parties submitted vocational reports from a Denise O'Connor [sic] dated 03/17/2008 and a Mr. Anderson dated 02/23/2008. The Staff Hearing Officer finds both of these reports not persuasive as the employer noted that Mr. Anderson's report is flawed as he is basing his opinion on the report of Dr. Walker who as stated previously considered non-allowed conditions. The report of Denise O'Connor [sic] was found to be not persuasive as the claimant argued persuasively that some of the jobs that Ms. O'Connor [sic] found claimant capable of doing was, for example on page 7, that of a switchboard operator at Lake Hospital Systems. Lake Hospital Systems is the current employer and the Staff Hearing Officer notes that the position of switchboard operator probably does not exist in the economy at the present time. * * *

{¶20} 10. Relator filed a motion for reconsideration and argued that the SHO erred in excluding the report of Dr. Martin on grounds that Dr. Martin had examined claimant two times previously and, regardless of the fact that he did not list all the allowed conditions in his 2007 report, relator argued that Dr. Martin was well aware of

claimant's allowed conditions. Relator also argued that the SHO erred by excluding the vocational report of O'Conner. Relator argues that O'Conner's conclusion was based on both the less restrictive limitations as determined by Dr. Martin as well as the more restrictive limitations as noted by Dr. Nemunaitis. Relator also argued that the SHO should have held claimant accountable for her failure to participate in any form of rehabilitation in the ten years since she filed her first application and that there was no evidence of any newer changed circumstances.

{¶21} 11. Relator's request for reconsideration was denied by order of the commission mailed January 23, 2009.

{¶22} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶23} 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.

{¶24} 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.* (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.

{¶25} In this mandamus action, relator argues that the commission abused its discretion in the following four ways: (1) failing to dismiss claimant's PTD application since it was not supported by medical evidence as required by Ohio Adm.Code 4121-3-34; (2) excluding the report of Dr. Martin when he obviously knew claimant's allowed conditions; (3) failing to hold claimant accountable for her failure to undertake any rehabilitation or retraining in the ten years since her last PTD application; and (4) excluding from consideration the vocational report of O'Conner. For the reasons that follow, the magistrate rejects relator's arguments.

{¶26} Relator's first argument is that the commission abused its discretion by failing to dismiss claimant's PTD application without any consideration since her

application was not supported by medical evidence as required by Ohio Adm.Code 4121-3-34. Relator's argument focuses on the fact that the report of Dr. Walker which claimant submitted in support of her application was ultimately rejected by the commission since Dr. Walker considered nonallowed conditions in rendering his opinion that claimant was permanently totally disabled. While relator argues that the commission properly excluded that report, relator argues that the commission abused its discretion by failing to dismiss the application outright.

{¶27} The magistrate rejects relator's argument for two reasons. First, there is no evidence in the record that relator raised this argument administratively. Based upon a review of the commission's order, it is apparent that relator argued that Dr. Walker's report could not be considered because he based his opinion, in part, on nonallowed conditions, and that the vocational report of Anderson should not be considered because he relied on the report of Dr. Walker. In its motion for reconsideration, relator argued further that the SHO erred by rejecting the medical report of Dr. Martin and the vocational report of O'Conner, and that the SHO erred by failing to hold claimant accountable for her failure to pursue rehabilitation or retraining since her first application for PTD compensation was denied. Pursuant to *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, this court does not have to consider an error which relator could have called, but did not call, to the commission's attention when it could have been avoided or corrected. In response, relator argues that it was not required to raise this issue because the commission was required to dismiss claimant's application. This magistrate disagrees.

{¶28} First, although relator correctly argues that claimants are required to submit medical evidence in support of their applications for PTD compensation, their physicians might actually render a finding that the claimant is capable of some sedentary work activity at a specific strength level or that the claimant is unable to perform any sustained remunerative employment due to the allowed conditions. Regardless, the commission is not required to accept and rely on a claimant's medical evidence. In the present case, the commission ultimately determined that the report of Dr. Ward could not constitute some evidence to support an award of PTD compensation because Dr. Ward's opinion was based in part on nonallowed conditions. As such, in the final analysis, Dr. Ward's report did not support claimant's application for PTD compensation. However, relator's argument would require a careful analysis of every medical report filed in support of PTD applications before the matter is submitted for hearing. While it would be easy for a commission employee to determine whether or not the medical examination upon which the report is based was performed within 24 months prior to the date of the filing of the application for PTD compensation, it would not be nearly so easy to determine whether or not a medical report supported an application without undertaking a review of the claimant's claim file. This type of prehearing review is simply not contemplated by the Ohio Administrative Code. Further, relator could have moved the commission to dismiss claimant's application after relator reviewed Dr. Ward's report. Relator did not so move the commission and, instead, had claimant examined by Dr. Martin. See *State ex rel. Lear Operations Corp. v. Crispen*, 10th Dist. No. 07AP-428, 2008-Ohio-5256.

{¶29} Relator next argues that the commission abused its discretion by excluding the report of Dr. Martin. Relator argues that, inasmuch as this was Dr. Martin's third report, he was obviously aware of claimant's allowed conditions. This magistrate disagrees.

{¶30} As noted in the findings of fact, Dr. Martin examined claimant in 1998, 2006, and 2007. In 1998, claimant's claim was only allowed for "strain/sprain neck and shoulder, right rotator cuff tear status post repair with surgical fibrosis, diffuse myofascial pain syndrome." In 2006, eight years after his first examination, claimant's claim had not been allowed for any additional conditions. In 2006, Dr. Martin was asked to render an opinion as to claimant's extent of injury and whether certain additional conditions should be allowed. At that time, Dr. Martin opined that claimant's claim should be additionally allowed for "impingement syndrome and chronic subacromial bursitis." Dr. Martin also opined that the following additional conditions should not be allowed in claimant's claim: "post-traumatic arthritis, degeneration right shoulder, contraction headaches or chronic sprain/strain neck and right shoulder." When Dr. Martin again examined her in 2007, he listed the following conditions as being allowed in her claim: "sprain/strain neck and shoulders, right rotator cuff tear, status post repair with surgical fibrosis and diffuse myofascial pain syndrome." Nothing in his report indicates that he was aware that claimant's claim was additionally allowed for any of the conditions about which he had earlier rendered an opinion in 2006. Claimant's claim was additionally allowed for impingement syndrome and chronic subacromial bursitis; however, her claim could have also been allowed for post-traumatic arthritis,

degeneration right shoulder, contraction headaches and chronic sprain/strain neck and right shoulder. Claimant was seeking to have all those conditions allowed in 2006. Nothing in Dr. Martin's 2007 report would indicate that he was aware that any new conditions had been allowed. As such, the magistrate finds that the commission did not abuse its discretion in excluding his report from evidentiary consideration.

{¶31} Relator also contends the commission abused its discretion by excluding consideration of the vocational report of O'Conner. Relator argues that the commission's reason for excluding it was invalid and, more importantly, by excluding O'Conner's opinion that claimant could secure potential future employment, the commission rewarded claimant for her failure to pursue any rehabilitation.

{¶32} The SHO excluded the vocational report of O'Conner after finding that some of the jobs, specifically that of a switchboard operator, probably do not exist in the economy at the present time. While the SHO only identifies one job in the order, the SHO's statement indicates that counsel argued persuasively that some of the jobs probably did not exist in the economy at the present time. The fact that the SHO did not identify all the jobs identified by claimant's counsel at the hearing does not render the commission's exclusion of her vocational report an abuse of discretion. Further, as noted in the findings of fact, more than 95 percent of the jobs listed by O'Conner were light-duty jobs. Inasmuch as the SHO concluded that claimant was capable of performing at a sedentary work level, claimant would not have been able to perform the vast majority of jobs identified by O'Conner. Lastly, the commission is not bound to accept or rely on any vocational reports that are presented since the commission is the

ultimate evaluator of disability under *Stephenson*. See *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117, and *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. The magistrate finds that it was not an abuse of discretion for the commission to exclude this report from consideration.

{¶33} Lastly, relator argues that the commission should have denied claimant's application for PTD compensation because she failed to pursue any rehabilitation in the ten years since her first application was filed. As part of this argument, relator contends that claimant's condition had not worsened in the ten years since her first application was denied.

{¶34} It is undisputed that the commission is permitted to hold a claimant accountable where, in spite of time and an ability to seek rehabilitation or retraining, the claimant fails to do so. In *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148, the court held that the failure of a claimant to make reasonable efforts to enhance their reemployment can be a factor in a PTD determination. However, contrary to relator's arguments, nothing requires the commission to make such a finding. Further, in the present case, the SHO provided an analysis of his opinion of claimant's current abilities as well as her potential to increase her skills. Specifically, the SHO stated:

The Staff Hearing Officer finds that the claimant is unable to find sustained and gainful employment based upon a finding of sedentary work and basis [sic] this opinion on the following vocational evidence. Claimant testified credibly that she only attended school until the 9th grade and was unable to pass a GED test. Claimant testified that it was her understanding that she was held back in school at an early age, and her grades were D's and C's. Claimant testified that she does not read well, does not do basic math well, does not have a checking account for the reason that she is

unable to do the simple math needed to balance a checking account, is not able to use a computer and is unable to drive a car and currently does not own a car. She testifies she attempted to learn how to use a computer but failed.

The Staff Hearing Officer finds that the claimant is now 59 years old and that her prior work experience was that of unskilled labor. Claimant worked as a housekeeper, in manufacturing and janitorial occupations. * * * Thus the Staff Hearing Officer relies upon prior experience in finding that the claimant's vocational factors of being 59 years old, attending school to the 9th grade, unable to pass a GED test, receiving D's and C's in school, failing a grade in school, unable to perform simple math required for a checking account, her inability to pay her own bills, and her prior work experience which is in an unskilled medium to light work capacity and absolutely no prior experience in a sedentary work environment and unable to work a computer would indicate that the claimant would not be able to find employment in the sedentary work setting. Finally it is important to note that the claimant's injuries are to her dominate right shoulder and this would increase claimant's disability even further.

{¶35} In the present case, the commission found that claimant's education, inability to pass the GED test, inability to perform the simple math required to maintain a checking account, prior work experience, and her failed attempt to learn how to use a computer provides an explanation as to the SHO's opinion of her ability to be retrained.

{¶36} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in granting claimant's PTSD compensation and relator's request for a writ of mandamus should be denied.

/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).