

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Daimler Chrysler Corp.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-1017
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Michael A. Liles,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on November 3, 2009

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and Joshua R. Lounsbury, for relator.

Richard Cordray, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

Larrimer and Larrimer, and Thomas L. Reitz, for respondent Michael A. Liles.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Daimler Chrysler Corp., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its

order which grants permanent total disability compensation to respondent Michael A. Liles ("claimant"), and to conclude claimant is not entitled to that award.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 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 to this decision. In her decision the magistrate concluded the commission abused its discretion because the medical evidence the commission relied on does not support the finding that claimant is permanently and totally disabled based solely upon the allowed medical conditions. Accordingly the magistrate determined this court should issue a writ of mandamus and return the matter to the commission for further consideration.

II. Objections

{¶3} Claimant filed objections to the magistrate's conclusions of law:

OBJECTION NO. 1.

The magistrate violated established law by reweighing the evidence in contravention of the law set forth by the Ohio Supreme Court in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203 and *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373.

OBJECTION NO. 2.

The magistrate improperly applies the legal standard of "probability," set forth in civil cases, when evaluating the medical evidence.

OBJECTION NO. 3.

The magistrate improperly concluded that the prior medical reports noting a DRE Category are not evidence supporting a finding of permanent total disability.

OBJECTION NO. 4.

The magistrate cannot base her decision upon the omission of the allowed conditions in a medical opinion letter generated at the request of the Defendant-employer.

A. Reweighing the evidence

{¶4} Claimant first contends the magistrate improperly reweighed the evidence. Contrary to claimant's assertion, the magistrate examined the evidence to determine whether, if it were believed, it supports the conclusion that claimant is permanently and totally disabled solely as the result of the medical conditions in his claim. After considering the evidence, the magistrate appropriately determined the evidence is insufficient, and she set forth the reasons for her conclusion. (See Magistrate's Decision, ¶29-32.) While claimant may disagree with the result the magistrate reached, the disagreement does not lie in the magistrate's reweighing the evidence, but in her conclusion that the evidence is legally insufficient to support the commission's conclusion.

{¶5} The first objection is overruled.

B. Legal standard of "probability"

{¶6} Claimant's second objection contends the magistrate improperly applied the legal standard of probability in evaluating the medical evidence. In it, claimant takes issue with the magistrate's examination of Dr. Nguyen's report, because the report uses the phrase "it is unlikely." Contending that the phrase comports with a preponderance of the evidence standard, claimant contends the magistrate erred in determining Dr. Nguyen's report is not some evidence supporting the commission's award of compensation.

{¶7} The problem with Dr. Nguyen's report does not lie simply with the phrase "it is unlikely." Rather, it is the entirety of the phrase in Dr. Nguyen's report: "it is unlikely that he will be able to resume any type of vocation requiring physical exertions [sic]." (Findings of Fact No. 3.) Claimant's inability to perform physical exertion does not support a conclusion that claimant is medically incapable of sustained remunerative employment. While it may limit the range of occupations available to him so much, in combination with the nonmedical factors, that he is rendered permanently and totally disabled, the staff hearing officer here did not conduct a nonmedical factor analysis; the staff hearing officer determined claimant was medically incapable of sustained remunerative employment. Dr. Nguyen's statement does not support that conclusion.

{¶8} The second objection is overruled.

C. DRE Category

{¶9} Claimant's third objection contends the DRE Category V reports, on which the staff hearing officer relied, are evidence supporting the staff hearing officer's conclusion that claimant is permanently and totally disabled on a medical basis alone.

{¶10} Drs. Chavez, Wunder, and Roman reported that claimant's back conditions resulted in a DRE Category V impairment. Drs. Wunder and Roman determined relator could perform work at a sedentary work level. Accordingly, their reports do not support the staff hearing officer's conclusions that claimant is permanently and totally disabled for medical reasons alone. Because, in their opinion, he is capable of sedentary employment, a permanent total disability compensation award would require analysis of the nonmedical factors as well.

{¶11} While Dr. Chavez examined claimant, he did so in 1997 and concluded claimant was DRE Category V impairment despite the fact claimant still was working. Dr. Chavez's report then, though it opines that claimant is a DRE Category V impairment, cannot support the additional conclusion that he is incapable of work solely due to his medical conditions.

{¶12} The third objection is overruled.

D. Medical opinion of doctor relator selected

{¶13} Finally, claimant contends the magistrate cannot properly base her decision upon the omission of a statement of allowed conditions in the medical opinion submitted from the doctor who examined claimant at relator's request. While Dr. Swan's failure to state the allowed conditions may present a problem in his opinion, his opinion suffered from another deficiency. Specifically, he states "[t]he patient is disabled *to my interpretation*. From his chronic radiculitis of the lower extremity, he has a 15% whole person functional impairment." (Findings of Fact No. 4.)

{¶14} Dr. Swan's report is lacking for more than one reason. Initially, it does not list the allowed conditions or explain the purpose of his examining claimant. More significantly, however, his statement that claimant is disabled "to my interpretation" fails to opine that claimant is permanently and totally disabled, much less according to the standards the commission utilizes.

{¶15} Finally, the magistrate notes that the 15 percent whole person functional impairment Dr. Swan ascribed to claimant is relatively low for permanent total disability. While that factor alone may not be enough to conclude Dr. Swan's report does not provide some evidence to support the staff hearing officer's order, it does nothing to

ameliorate the deficiency already noted in the report. As a result, even if every aspect of Dr. Swan's report be believed, it fails to opine that the claimant is permanently and totally disabled.

{¶16} Claimant's fourth objection is overruled.

{¶17} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we issue a writ of mandamus ordering the commission to vacate its order finding claimant to be permanently and totally disabled solely on the basis of a medical condition. We return this matter to the commission for further consideration. In doing so, we do not suggest the commission cannot seek clarification of the reports submitted; nor do we suggest claimant is not totally and permanently disabled based on an analysis that includes the nonmedical factors. We conclude only that the evidence the staff hearing officer relied on is not some evidence on which the commission could base an order finding claimant to be permanently and totally disabled solely on the basis of his medical condition.

*Objections overruled;
limited writ granted.*

FRENCH, P.J., and TYACK, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Daimler Chrysler Corp.,	:	
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Relator,	:	
	:	
v.	:	No. 08AP-1017
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Michael A. Liles,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on July 30, 2009

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and Joshua R. Lounsbury, for relator.

Richard Cordray, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

Larrimer and Larrimer, and Thomas L. Reitz, for respondent Michael A. Liles.

IN MANDAMUS

{¶18} Relator, Daimler Chrysler Corp., 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 A. Liles ("claimant"), and ordering the commission to find that claimant is not entitled to that award.

Findings of Fact:

{¶19} 1. Claimant has sustained two work-related injuries and his claims have been allowed for "sprain lumbar region" and "abrasion, left forearm, lumbosacral sprain/strain; intervertebral disc syndrome; herniated lumbar disc L4-5, bilateral; herniated disc L5-S1; lumbar post-laminectomy syndrome; arachnoiditis."

{¶20} 2. Claimant filed his application for PTD compensation on October 2, 2007. According to his application, claimant was 59 years old, completed the ninth grade in 1965, had not received his GED, could read, write, and perform basic math, uses a cane and had not participated in rehabilitation. Claimant had worked as a maintenance electrician. Claimant last worked in 2002.

{¶21} 3. In support of his application for PTD compensation, claimant attached the September 16, 2007 report of his treating physician, Thomas Nguyen, M.D., who stated:

After reviewing the history profile of Mr. Michael Liles' medical injury for the past 18 months, I agree * * * that Mr. Liles has a permanent injury with regard to his lumbar spine. He has shown no significant clinical change or improvement in the past 18 months. Due to his chronic back pain and difficulty with range of motion, it is unlikely that he will be able to resume any type of vocation requiring physical assertions.

{¶22} 4. Relator had claimant examined by William E. Swan, Jr., M.D., on November 6, 2007. In his report dated December 3, 2007, Dr. Swan reviewed claimant's medical history, provided physical findings upon examination, and stated:

* * * He came to the office with a cane which he used. When attempting to walk, he limps and in addition, he walks with an impaired gait and he cannot walk on either of his toes or heels. The mobility of his back is extremely limited. The lower extremities: he has marked atrophy, but he has palpable pulses.

By measurement, the atrophy of his legs are symmetrical. Sensation is decreased to both lower extremities, especially below the knee. His motor function is about four over five. His reflexes to both lower extremities are absent.

By physical examination, he has marked limitation of motion of his back. His straight leg raising was positive on the left at 20 degrees and on the right at 25 degrees.

My impression is that Mr. Liles has chronic low back pain, especially at L4-5 and L5-S1 and 2) He has chronic arachnoiditis in the lumbar spine, 3) he has low back syndrome, 4) he is post spinal stenosis.

The patient also has serious other medical problems which affect his overall condition and these include: diabetes, diabetes with peripheral neuropathy, pancreatitis and arteriosclerotic vascular disease.

The patient is disabled to my interpretation. From his chronic radiculitis of the lower extremity, he has a 15% whole person functional impairment.

{¶23} 5. An independent medical examination was performed by Angel M. Roman, Jr., M.D., on February 27, 2008. In his report, Dr. Roman identified the medical records which he reviewed, provided his physical findings upon examination, concluded that claimant's allowed conditions had reached maximum medical improvement, assessed a 25 percent whole person impairment, concluded that claimant had a DRE lumbar Category V impairment for his back and concluded that claimant was capable of performing sedentary work provided he not work overtime and take his medications as prescribed.

{¶24} 6. Claimant's application was heard before a staff hearing officer ("SHO") on June 20, 2008. The SHO relied upon the medical reports of Drs. Nguyen and Swan as follows:

The Staff Hearing Officer accepts and relies upon the 09/16/2007 report of Thomas Nguyen, M.D., as well as the 12/03/2007 report of William Swan, M.D. Dr. Nguyen indicates that the claimant cannot perform any vocational activities with physical assertions while Dr. Swan indicates that the injured worker is disabled to my interpretation. It is also noted that many medical reports on file indicate that the claimant's allowed conditions in his low back result in a DRE category 5 impairment. Therefore, based upon these reports, the Staff Hearing Officer finds that the claimant is indeed permanently and totally disabled based upon the medical allowances of claim #98-1403-22.

* * *

Based upon the report(s) of Dr(s). Nguyen and Swan, it is found that the injured worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed condition(s). Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992), 73 Ohio App. 3d 757, it is not necessary to discuss or analyze the injured worker's non-medical disability factors.

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

Conclusions of Law:

{¶26} 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.

{¶27} 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.

{¶28} For the reasons that follow, it is this magistrate's conclusion that this court should issue a writ of mandamus.

{¶29} In the present case, the commission awarded claimant PTD compensation based solely upon the medical evidence without any reference to the nonmedical disability factors. However, the medical evidence upon which the commission relied does not support the finding that claimant is permanently and totally disabled based solely upon the allowed conditions. Neither Dr. Nguyen nor Dr. Swan opined that claimant was

incapable of performing any sustained remunerative employment or otherwise permanently and totally disabled and, neither Dr. Nguyen nor Dr. Swan provided any limitations or restrictions on claimant's abilities from which the commission could have concluded that he was entitled to an award of PTD compensation.

{¶30} As claimant's treating physician, the magistrate finds that Dr. Nguyen would not necessarily have needed to include objective findings in his report since those objective findings would have been contained in claimant's medical records. However, Dr. Nguyen was required to give an opinion as to claimant's medical ability or inability to perform work activities. The only statement Dr. Nguyen made was that, due to claimant's chronic back pain and difficulty with range of motion, it was "unlikely that he will be able to resume any type of vocation requiring physical exertions." That statement alone does not support the commission's determination that claimant is permanently and totally disabled and the stipulation of evidence before this court does not contain any office records from Dr. Nguyen relating to claimant's visits. As such, there is no evidence from Dr. Nguyen setting out any restrictions on claimant's physical abilities.

{¶31} Similarly, Dr. Swan did not note any physical restrictions and did not offer an opinion as to claimant's ability to perform at any specific exertion level. Dr. Swan's statement that claimant is "disabled to my interpretation" does not support the finding either. Considering Dr. Swan's report as a whole, nowhere does he list the allowed conditions or explain that he was examining claimant with regard to determining whether or not claimant is permanently and totally disabled. Lastly, the two short paragraphs preceding Dr. Swan's statement that claimant is "disabled to my interpretation" contain references to nonallowed conditions. As such, his statement is not the equivalent of

stating that claimant is permanently and totally disabled. Further, Dr. Swan found a 15 percent whole person impairment which is relatively low considering that Dr. Swan's report was used to support a finding of permanent total disability.

{¶32} The commission also indicated that the decision to grant PTD compensation was based on the many medical reports in the file indicating that claimant's allowed back condition results in a DRE Category V impairment. Based upon the stipulated evidence, this conclusion is not supported. Drs. Chavez, Wunder, Swan, and Raymond all opined that claimant's back condition resulted in a DRE Category V impairment. However, Dr. Chavez examined claimant in 1997 when he was still working, and Drs. Wunder, Swan, and Raymond all concluded that relator could perform at the sedentary work level. Further, Dr. Mannava found a DRE Category IV impairment in 1998 and Dr. Raymond found a DRE Category III impairment in 2007. As such, the commission's reliance on medical reports finding a DRE Category V impairment to support its order granting PTD compensation based solely on the medical evidence constitutes an abuse of discretion. All the doctors opined that, physically, claimant was capable of working.

{¶33} Based on the foregoing, it is this magistrate's conclusion that relator has demonstrated that the commission abused its discretion as the medical evidence relied upon by the commission does not support the finding that claimant is permanently and totally disabled based solely upon the allowed medical conditions. As such, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order finding that claimant is permanently and totally disabled

