

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Mary Ann Smith,	:	
Relator,	:	
v.	:	No. 09AP-214
Ohio State University Hospital and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 17, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Matthew J. Lampke*,
for respondent Ohio State University Hospital.

Richard Cordray, Attorney General, and *Derrick Knapp*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} In this original action, relator, Mary Ann Smith, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission"), to vacate its order which denied her application for permanent total disability ("PTD") compensation and order the commission to find that she is entitled to that compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(D) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, which is appended to this decision, including findings of fact and conclusions of law. Therein, the magistrate concluded: (1) the commission did not abuse its discretion when the hearing officer concluded that relator's testimony, the sum of which was that she was physically unable to return to her former position of employment, was not supported by any documentary evidence; (2) the commission did not abuse its discretion by considering alternative reasons for denying relator's application for PTD compensation; (3) the reports of Drs. Vogelstein and Clary, both of whom essentially opined that relator could return to her former position of employment, constitute some evidence upon which the commission could rely in denying relator's application; (4) because of the conclusion that relator could return to her former position of employment, the commission was not required to examine the nonmedical disability factors to determine whether or not relator could perform some other sustained remunerative employment; and (5) the commission is only required to cite that evidence upon which it relied and is not required to provide any explanation as to why it did not rely on other evidence. Therefore, the magistrate recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. Although not delineating specific objections, relator first argues that her testimony clearly establishes that she was physically unable to return to her former position, and, thus, the commission abused its discretion by denying her application. Relator next argues that the commission abused its discretion when it disregarded the report of Molly Williams, the vocational

specialist who examined relator, as well as the reports of Drs. Altic and Chapman, all of whom, relator contends, opined that relator was physically unable to return to her former position. Lastly, relator assigns error to the commission's consideration of alternative reasons for denying her application for PTD compensation. These arguments are, in essence, the same issues raised to and addressed by the magistrate. For the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

{¶4} 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 and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled, writ of mandamus denied.

BRYANT and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Mary Ann Smith,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-214
	:	
Ohio State University Hospital and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on August 25, 2009

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Matthew J. Lampke*,
for respondent Ohio State University Hospital.

Richard Cordray, Attorney General, and *Derrick Knapp*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} Relator, Mary Ann Smith, 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 denied her application for permanent total

disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on December 19, 1989 and her claim has been allowed for the following conditions: "strain right wrist; right arm; left knee; head; cervical dorsal strain/sprain; thoracic strain/sprain; depressive disorder."

{¶7} 2. Relator filed her application for PTD compensation on June 5, 2008. On that application, relator indicates that she is 58 years old; has a high school education; can read, write, and perform basic math; uses a brace on her hand; and has not participated in any rehabilitation services. Relator did not file any medical evidence indicating that she had received any treatment for either the allowed physical or psychological conditions from at least 2001 through the date she retired, December 31, 2005.

{¶8} 3. Relator did submit the May 8, 2008 report of James E. Lundeen, Sr., M.D., who concluded that she was permanently and totally disabled with no expectation of recovery. He indicated that she could occasionally lift 5 to 7 pounds; frequently lift up to 3 pounds; stand and/or walk for 2 to 3 hours a day, and for 15 minutes without interruption; sit for 4 hours a day and for 45 minutes without interruption; and occasionally climb, balance, stoop, crouch and kneel, but never crawl.

{¶9} 4. The record also contains the August 19, 2008 report of Seth H. Vogelstein, D.O. Dr. Vogelstein noted that relator had not seen an orthopedic surgeon; had never been sent for formal physical therapy; and had been treated with intermittent medications, heat, and other passive modalities. Relator indicated that she has not

received any counseling; however, she has occasionally seen a psychiatrist. After providing his physical findings upon examination, Dr. Vogelstein concluded that relator's allowed physical conditions had been at maximum medical improvement ("MMI") for many years, and that she has little, if any, disability as a result of the allowed physical conditions. Dr. Vogelstein noted further that relator was capable of remunerative employment without any specific restrictions or limitations; that her main complaints consist of stiffness in her hands, knees, and low back; and that these complaints are not secondary to the allowed conditions. He stated further that relator may require restrictions because of her age and other physical conditions; however, he indicated that she does not require any restrictions as a result of the allowed conditions in the claim which, in his opinion, had resolved years previously.

{¶10} 5. Relator was also examined by Richard N. Clary, M.D., who authored a report dated August 19, 2008. Dr. Clary noted that relator indicated that she saw a counselor for her allowed psychological condition for approximately four visits in 2007, but that she was not currently treating with a psychiatrist, psychologist or counselor, nor was she currently taking any medications for her psychiatric condition. Dr. Clary also noted that relator indicated she was receiving regular retirement since December 2005. Dr. Clary concluded that relator's allowed psychiatric condition had reached MMI; assessed a ten percent whole person impairment; and indicated that relator had no limitations or restrictions with regard to her allowed psychiatric condition.

{¶11} 6. The record also contains the September 10, 2008 report of Pamela Chapman, Ph.D., who ultimately opined that relator's allowed psychiatric condition had

reached MMI; assessed a 20 percent whole person impairment; and concluded that relator was capable of work as long as she avoid stressful settings.

{¶12} 7. The record also contains the October 8, 2008 report of Stephen Altic, D.O., who concluded that, in his opinion, relator was not yet at MMI because she never had any MRI studies of her cervical and thoracic spine. Dr. Altic opined that relator had a 28 percent impairment and could perform at a sedentary work level.

{¶13} 8. A vocational report was prepared by Molly S. Williams. In her November 9, 2008 report, Ms. Williams concluded that, based upon the reports of Drs. Altic and Chapman, relator was permanently and totally disabled.

{¶14} 9. Relator's application was heard before a staff hearing officer ("SHO") on February 20, 2009.

{¶15} At the hearing before the SHO, relator testified that she stopped work in December 2005 after working with her employer for 37 years because she started having complications and was not able to perform her job as a supervisor. She indicated further that she would still be working, but for the fact that she began having more leg and neck pain as well as headaches. Relator indicated that she had been receiving treatment at a clinic without submitting the bills to workers' compensation; however, relator did not supply any medical evidence regarding this treatment. Specifically, when asked, relator indicated that she did not have any current medical evidence from a current attending physician.

{¶16} The SHO's first reason for denying relator's application was based on the conclusion that relator had voluntarily retired from the workforce. Specifically, the SHO stated:

The allowed claim occurred in 1989. All of the allowed conditions were allowed by 1997, with no additional conditions added since. The injured worker was able to work as a food preparation service worker and supervisor (of up to 22 people according to her testimony) for 8 years until her retirement despite all of the allowed conditions. There is no medical evidence on file of any treatment for either the allowed physical or mental conditions from at least 2001 through the injured worker's retirement in December of 2005. The injured worker's counsel indicated at the hearing that the injured worker took a regular retirement and not a disability retirement. (This is supported by the 08/19/2008 report from Dr. Clary). There is no medical evidence on file showing any physical or psychiatric restrictions due to the allowed injuries at or anywhere near the time of retirement. The injured worker had 37 years in with the hospital at the time she retired. The number of years the injured worker had worked with the named employer when she retired, the lack of any medical documentation of physical or psychiatric restrictions due to the allowed conditions at the time of the retirement, and the fact the injured worker took a regular and not a disability retirement, are all found to show that the injured worker's retirement was voluntary and not due to the allowed claim and conditions. The injured worker's testimony and argument to the contrary is not supported by any documentary evidence or the factors noted above and is not found persuasive. Further, there is no evidence of any attempts to return to the work force since the injured worker retired.

{¶17} The SHO also denied relator's application based upon a finding that relator was able to return to her former position of employment based upon the reports of Drs. Vogelstein and Clary. Specifically, the SHO stated:

Dr. Seth Vogelstein (08/19/2008) performed a physical examination and provided a detailed narrative report. He considered all of the allowed physical conditions and his report and conclusions are found persuasive. He states the claimant has no physical restrictions due to the allowed claim. In light of the fact the allowed conditions include only soft tissue sprains and strains and a headache, and the fact the injured worker was able to work with all of these conditions for numerous years without any physical

restrictions, Dr. Vogelstein's report and opinion is found persuasive.

Dr. Richard Clary (08/19/2008) performed a psychiatric evaluation and provided a detailed narrative report. He considered all of the allowed psychiatric conditions and his report and conclusions are found persuasive. He states that the allowed psychiatric conditions cause no limitations or restrictions in the injured worker's ability to work. In light of the fact the injured worker was able to continue working for 8 years following the allowance of the psychiatric condition, including supervising other workers, Dr. Clary's report and opinion is found persuasive.

Based on the fact that both doctors find no restrictions due to the allowed conditions, it is found that both doctors support a finding that the injured worker can return to her former job.

{¶18} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶19} 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.

{¶20} 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.

{¶21} For the reasons that follow, it is this magistrate's conclusion that this court should deny relator's request for a writ of mandamus.

{¶22} In this mandamus action, relator argues that the commission abused its discretion when it concluded that she had voluntarily retired from her employment. Relator asserts that she unequivocally testified at the hearing that she stopped working because she began having complications related to her allowed conditions and that she would still be working but for her injury.

{¶23} It is well settled that a voluntary retirement precludes the receipt of PTD compensation. See *State ex rel. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 Ohio St.3d 202, paragraph two of the syllabus. In its order, the commission stated the following reasons supporting the conclusion that relator's retirement was voluntary and was not related to her injury. Specifically, the SHO stated: (1) no additional conditions were added in relator's claim since 1997; (2) relator was able to continue work as a food

preparation service worker and supervisor for eight years despite all the allowed conditions; (3) relator failed to provide any medical evidence of any treatment for either her allowed physical or psychological conditions from at least 2001 through her retirement in December 2005; and (4) relator had 37 years of service with the hospital at the time she retired.

{¶24} Bearing in mind that the commission is the exclusive evaluator of the weight and credibility to be given the evidence pursuant to *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, the magistrate finds that the commission did not abuse its discretion when the hearing officer concluded that relator's testimony was not supported by any documentary evidence did not constitute an abuse of discretion. Obviously, the SHO did not find relator's testimony to be credible in light of the fact that there was no medical evidence to support her statements.

{¶25} Further, relator contends that the commission abused its discretion considering an alternative basis for denying her application and by relying on the medical evidence submitted by respondent Ohio State University Hospital while rejecting relator's evidence. Also, relator contends that the commission failed to examine the nonmedical disability factors. For the reasons that follow, this magistrate finds that relator's arguments lack merit.

{¶26} Relator provides no authority for the argument that it is an abuse of discretion for the commission to consider alternative reasons for denying an application for PTD compensation and this magistrate cannot find any either. This argument is rejected.

{¶27} In the present case, the commission relied upon the medical reports of Drs. Vogelstein and Clary. Dr. Vogelstein concluded that relator's allowed physical conditions did not restrict her in any way and that she could return to her former position of employment. Likewise, Dr. Clary found that relator had no limitations as a result of her psychological condition and that she was not precluded from returning to her former position of employment. Based upon the conclusion that relator could return to her former position of employment, there was no requirement that the commission examine the nonmedical disability factors to determine whether or not relator could perform some other sustained remunerative employment. Further, the commission is only required to cite that evidence upon which it relied and is not required to provide any explanation of why the commission did not rely on other evidence.

{¶28} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in finding that she had voluntarily retired from the workforce 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).