

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Betty J. Culbert, :
Relator, :
v. : No. 11AP-172
Industrial Commission of Ohio, : (REGULAR CALENDAR)
Ridgecrest Healthcare Group, Inc., and :
Enrichment Center, Inc., :
Respondents. :

D E C I S I O N

Rendered on March 22, 2012

Urban, Co., L.P.A., and Anthony P. Christine, for relator.

Michael DeWine, Attorney General, and Robert Eskridge, III, for respondent Industrial Commission of Ohio.

Walter & Haverfield LLP, and Patricia F. Weisberg, for respondent Ridgecrest Healthcare Group, Inc.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Betty J. Culbert, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its January 31, 2011 order that denied her application for permanent total disability ("PTD") compensation and to enter a new order granting said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. Relator has filed an objection to the magistrate's decision.

{¶ 3} Relator argues in her sole objection that the commission "waived [its] right to being the sole evaluator of the * * * non-medical vocational factors" when it stated it was relying upon the vocational report of Howard Caston, Ph.D., which indicates relator can engage in the "light range" of work but then concluded that relator was capable of only sedentary work. We disagree. Relator acknowledges that the commission also relied upon the medical report of John Dunne, D.O., who found relator could engage in only sedentary work. Thus, the commission's finding regarding relator's work-level ability was based upon some evidence in the record. In addition, relator's argument ignores the fact that the commission is the exclusive evaluator of disability. *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117 (1994). The commission may accept the findings in a vocational report, or some of the findings, or none of the findings. *State ex rel. Gen. Motors, L.L.C. v. Indus. Comm.*, 10th Dist. No. 10AP-855, 2011-Ohio-4922, ¶ 38. Thus, here, the commission could ignore Dr. Caston's comments regarding the "light range" of work but still rely upon the other portions of his vocational analysis. For these reasons, we cannot find the magistrate or the commission erred in this regard. Relator's objection is overruled.

{¶ 4} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's objection, we overrule relator's objection and adopt the magistrate's findings of fact and conclusions of law. Relator's request for a writ of mandamus is denied.

*Objection overruled;
writ of mandamus denied.*

BRYANT and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Betty J. Culbert,	:	
Relator,	:	
v.	:	No. 11AP-172
Industrial Commission of Ohio, Ridgecrest Healthcare Group, Inc., and Enrichment Center, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 21, 2011

Urban, Co., L.P.A., and Anthony P. Christine, for relator.

*Michael DeWine, Attorney General, and Robert Eskridge, III,
for respondent Industrial Commission of Ohio.*

*Walter & Haverfield LLP, and Patricia F. Weisberg, for
respondent Ridgecrest Healthcare Group, Inc.*

IN MANDAMUS

{¶ 5} Relator, Betty J. Culbert, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its January 31, 2011 order which denied her permanent total disability ("PTD") compensation and to enter a new order granting her PTD benefits.

Findings of Fact:

{¶ 6} 1. On November 13, 1997, relator sustained a work-related injury in the course of her employment as a registered nurse for Enrichment Center, Inc. She filed a workers' compensation claim (No. 97-624630) that was allowed for "sprain of neck; sprain lumbar region; sprain left knee; tear medial meniscus, left knee; right knee, sprain/strain; torn medial meniscus, right knee; herniated disc C4-C5; [and] herniated disc C5-C6."

{¶ 7} 2. Relator returned to the workforce, but sustained another work-related injury on December 24, 2007, while employed as a registered nurse for respondent, Ridgecrest Healthcare Group, Inc. ("Ridgecrest"). She filed a workers' compensation claim (No. 07-406184) that was allowed for "left knee sprain; right hip sprain; substantial aggravation of left knee osteoarthritis."

{¶ 8} 3. Relator last worked for Ridgecrest on January 11, 2008. She last received temporary total compensation on February 2, 2010.

{¶ 9} 4. Relator filed an application for PTD compensation on August 3, 2010.

{¶ 10} 5. Relator was examined by Ira J. Ungar, M.D., on September 1, 2010. Dr. Ungar concluded that relator was not permanently and totally disabled. He reported as follows:

Ms. Culbert is clearly burdened by age, significant degenerative disease, and super morbid obesity (BMI greater than 50). Ms. Culbert has some difficulty moving about the examining room and participating in physical activities simply because of her large physical size and large abdominal wall panniculus.

Notably though, Ms. Culbert does perform all of her own activities of daily living, is able to drive a motor vehicle, and uses a computer at home. Therefore, despite her multiple medical problems, the allowed conditions in this claim and other occupational claims, for which there is limited physical exam findings, Ms. Culbert would be capable of performing job duties in the sedentary through light work duty categories.

{¶ 11} 6. On September 15, 2010, Howard L. Caston, Ph.D., a Certified Rehabilitation Counselor, reviewed the medical information, reviewed the vocational data contained in the records, analyzed the transferable skills based on relator's work history and education, analyzed the vocational significance of the medical impairments, and reviewed the labor market. Based upon that analysis, Dr. Caston developed an opinion as to relator's ability to engage in further employment. He concluded she was capable of working, as follows:

The significance of her work history is that Ms. Culbert has extensive knowledge of the nursing field as a registered nurse. She obviously has the skills to perform the basic work of a registered nurse. She also has ability to perform office-related work activities in the nursing field including supervision, scheduling, team leader, clinical manager, and trainer. These positions are generally within the light range of functional capacities and restrictions consistent with those outlined by her treating physician, or they can easily be modified to accommodate her.

There is nothing in her educational background that would preclude the ability of Ms. Culbert to learn other skills such as basic office computer skills. Since she has a high school education and an Associates degree, she has the basic qualifications for accessing entry-level jobs.

The record indicates that Ms. Culbert is capable of the routine activities of daily living.

The vocational limitations of Ms. Culbert concludes [sic] functional restrictions to light work, no work since she quit working in 2007, multiple medical problems related to her allowed claim, non-industrial-related problems that include morbid obesity, hypertension, a downturn in the economy, and having developed a passive/disability lifestyle.

Her vocational strengths include a long and successful work history prior to her injury, minimal limitations of activities of daily living, credentials and work experience as a registered nurse, employment opportunities that do exist in her area of residence, and the ability to learn new skills for entry-level work.

Therefore, taking into consideration all of the vocational, psychological, and medical information, it is my opinion that Ms. Culbert is not removed from employment based on the effects of the allowed claim. The injuries that are related to her claim do not remove her from employment.

Specific jobs that Ms. Culbert can perform include non-strenuous management positions as a registered nurse, supervision, scheduling, team leader, clinical manager, and trainer. These positions are within the light range of functional capacities and restrictions outlined by her treating physician or can be easily be [sic] modified to accommodate her.

{¶ 12} 7. On October 21, 2010, John L. Dunne, D.O., examined relator and found the allowed conditions had reached maximum medical improvement ("MMI") and that she had a 24 percent whole person impairment for the allowed conditions. He determined:

* * * Ms. Culbert is not permanently and totally disabled for any type of physical work activity, as she is currently functioning at a light demand level defined as or "(2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls" with further limitations of no steps indicated. She would also be able to work any type of sedentary work with combinations [sic] of the left knee.

{¶ 13} 8. Relator was evaluated by Robert Mangiarelli, M.Ed., a vocational specialist, but the evaluation date is unclear from the report. Mangiarelli concluded that:

* * * [Relator was] displaying insufficient worker traits to qualify for gainful employment. At best, she is limited to sedentary activities. When standing and ambulating, she needs to use a cane for stability. She presents with neither marketable nor transferable skills given her current physical and past relative work history. She does not present with current work skills or the ability to benefit from clerical training at this time. When considering all information presented, it is the opinion of this vocational specialist that Ms. Culbert would not be capable of engaging in any and all forms of sustained, competitive employment.

{¶ 14} 9. On November 16, 2010, John Ruth, M.S., a vocational consultant, evaluated relator. Ruth determined that relator is unable to successfully seek or sustain

remunerative employment now or in the future. He found serious barriers prohibiting her return to work. Those barriers include:

* * * [A] chronological age of 64 placing her in the closely approaching advanced age category not allowing her to adapt to new work situations or to do work in competition with others, range of motion restrictions functionally preventing her from working in an overhead plane and prohibiting her from entering or performing work in a bent or crouched position interfering with her ability to perform all aspects of even sedentary work, limited sitting/standing-/walking tolerance as well as stair climbing not allowing this woman to perform all aspects of sedentary work, poor manual dexterity capabilities (understanding and speed) due to left hand/finger numbness as well as range of motion limitations interfering with this woman's ability to perform assembly work or jobs involving any significant degree of manual manipulation activities, medications causing unusual side effects interfering with this woman's ability to work safely in any work environment and potentially interfering with the safety of others working around her in an industrial environment, medical limiting factors reducing employability potentials, limited lifting capacity not allowing this woman to perform light or medium work as she had done in the past thus significantly reducing vocational options, and a clear lack of transferability of past relevant work experience to a more sedentary occupation this woman could physically perform preventing her from bringing salable vocational skills to an employment interview or work site.

{¶ 15} 10. On January 31, 2011, a hearing was held by a staff hearing officer ("SHO") on relator's application for PTD compensation. The SHO denied the application for PTD compensation based upon the report of Dr. Dunne and the vocational report from Dr. Caston. The SHO concluded, as follows:

* * * [T]he Injured Worker's non-medical disability factors on a whole, favor reemployment i.e. that the positive work history and education factors outweigh the negative age factor and that the Injured Worker can at least be retrained to perform some other occupation possibly in the medical field based upon her prior skilled work history or at least have the ability to excess [sic] other unskilled work in a sedentary work environment.

Therefore, based upon the limited physical restrictions as indicated by Dr. Dunne, who on a whole indicates that the Injured Worker can perform sedentary work, coupled with the Injured Worker's skilled work history and high school plus education, the Staff Hearing Officer finds that the Injured Worker is not permanently and totally disabled and not precluded from all sustained remunerative employment.

{¶ 16} 11. Relator filed the instant mandamus action in this court on February 23, 2011, asking this court to order the commission to vacate its order denying her PTD compensation and to enter a new order granting PTD compensation.

Conclusions of Law:

{¶ 17} The issue is whether the commission abused its discretion in denying relator's PTD compensation application. Finding that the commission did not abuse its discretion, it is the magistrate's decision that this court deny the requested writ of mandamus, as more fully explained below.

{¶ 18} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28. 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 to the 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.

{¶ 19} The purpose of PTD compensation is to compensate injured persons for impairment of earning capacity. *State ex rel. General Motors Corp. v. Indus. Comm.* (1975), 42 Ohio St.2d 278, 282. The commission evaluates the evidence concerning the

degree to which the injured worker's ability to work has been impaired. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. "The ultimate consideration is whether the claimant is 'unfit for sustained remunerative employment.'" ' ' Id. at 170, quoting *State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72. (Emphasis omitted.) "Payment of PTD is inappropriate where there is evidence of (1) actual sustained remunerative employment, * * * (2) the physical ability to do sustained remunerative employment, * * * or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award." *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, ¶16.

{¶ 20} 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. *Stephenson*. 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} The commission relied upon Dr. Dunne's narrative report. Dr. Dunne found that the allowed conditions had reached MMI and, utilizing the "Combined Values Tables" determined that relator had a 24 percent whole person impairment based on the allowed conditions. Dr. Dunne opined that relator was not permanently and totally disabled for any type of physical work activity because she was currently functioning at a light demand level. Dr. Dunne stated that relator "would also be able to work any type of sedentary work with combinations [sic] of the left knee." The commission thus concluded that relator was medically capable of performing some sustained remunerative employment that is sedentary work with accommodations to her left knee.

{¶ 22} The commission also relied on the vocational report from Dr. Caston. Dr. Caston concluded that relator can perform positions within the light range of

functional capacities and restrictions. Ohio Adm.Code 4121-3-34(B)(2)(b) defines "light work" as follows:

"Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

{¶ 23} Sedentary work is more restrictive than light work. It is defined in Ohio Adm.Code 4121-3-34(B)(2)(a), as follows:

"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.

{¶ 24} The commission relied on the medical reports of Dr. Caston and Dr. Dunne. Although Dr. Caston concluded that relator could perform light-duty work, the commission determined she could only perform sedentary work.

{¶ 25} The commission found that relator was 64 years of age. While the commission found her age to be a barrier to re-employment and an unfavorable factor in her re-employment potential, the commission ultimately concluded that her age was outweighed by her education and work history. The fact that she graduated from high school and had some college evidenced an ability to be retrained for different employment opportunities. The commission found her work history was a positive factor because her ability to perform skilled work indicated she had the skills and qualifications to perform some other occupation or be retrained to perform some other occupation.

{¶ 26} The commission is the sole evaluator of the non-medical factors. "Because the commission is the expert on the nonmedical or vocational evidence, it is not critical or even necessary for the commission to accept any vocational reports." *State ex rel. Bonnell v. McGill Septic Tank Co.*, 10th Dist. No. 04AP-1291, 2005-Ohio-5485, ¶21. The commission considered and discussed relator's age, education, and work history as required under *Stephenson*. Further, the order explains the impact of these non-medical factors on her ability to engage in sustained remunerative employment and the reasoning for denying her PTD compensation application as required by *Noll*.

{¶ 27} Relator argues that the commission erred in not relying on the vocational opinions of John Ruth and Robert Mangiarelli. As previously stated, questions of credibility and weight are clearly within the discretion of the commission as fact finder. *Teece*. Furthermore, the commission is the sole evaluator of the non-medical factors and may reject any and all vocational reports. See *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 1996-Ohio-316. The commission is not required to explain why it found certain evidence unpersuasive. *State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio 3915, ¶16, citing *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 20.

{¶ 28} Finally, relator argues that the commission's order is equivocal on its face. Relator contends that the equivocation occurred when the commission relied on Dr. Caston's report, which concluded that relator could engage in the light range of functional capacity and restrictions and then concluded that relator can return to sedentary work.

{¶ 29} Equivocal medical opinions are not evidence. *State ex rel. Certified Oil Corp. v. Mabe*, 10th Dist. No. 06AP-835, 2007-Ohio-3877, citing *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 657. "[E]quivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. Ambiguous statements, however, are considered equivocal only while they are unclarified. * * * Repudiated, contradictory or uncertain statements reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable." *Id.*

{¶ 30} But here, relator contends the commission's order itself, not a medical report, is equivocal. As previously discussed, the commission relied on Dr. Caston's

report and Dr. Dunne's report, but found that relator was only capable of performing some sustained remunerative employment at the sedentary level. Had the commission determined that she could in fact perform light-duty work, relator would have been found capable of performing even more jobs. The commission's determination did not prejudice relator in any form and to remand this case for a finding that relator could actually perform light-duty work would be a vain act.

{¶ 31} Thus, the commission had evidence that relator was not permanently and totally disabled and not precluded from all sustained remunerative employment. Finding that there was some evidence to support the commission's finding, the magistrate finds that the commission did not abuse its discretion in denying relator's application for PTD compensation and this court should deny relator's request for a writ of mandamus.

s/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).