[Cite as *State ex rel. Seymore v. Indus. Comm.*, 2011-Ohio-2367.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Roy Seymore,	:	
Relator,	:	
v.	:	No. 10AP-411
Industrial Commission of Ohio and Martin Painting & Coating Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 17, 2011

Philip J. Fulton Law Office, and *Ross R. Fulton*, for relator.

Michael DeWine, Attorney General, *Jeanna R. Volp* and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Roy Seymore filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant him permanent total disability ("PTD") compensation.

{¶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 deny the request for a writ.

{¶3} Counsel for Roy Seymore 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} Seymore was injured in 1985. His worker's compensation claim has been recognized for "sprain left elbow; sprain low back; cervical sprain/strain complex with left brachial radiculitis; left carpal tunnel syndrome; pain disorder associated with depression."

{¶5} He has not worked since 1987. He has made minimal effort to improve his skills since then. One medical report lists him as physically capable of medium work. A psychological report asserts that he is capable of low-stress work which allows for frequent breaks.

{¶6} Seymore has filed for PTD compensation twice before and had been denied. The staff hearing officer who heard the three applications noted that Seymore has aged a little, but nothing else has changed.

{¶7} Counsel for Seymore has filed three specific objections to the magistrate's decision. They are:

> I. THE EVIDENCE FAILS TO DEMONSTRATE THAT MR. SEYMORE CAN DEVELOP SKILLS.

II. MR. SEYMORE'S FUNCTIONAL RESTRICTIONS ARE SO LIMITED THAT SEDENTARY WORK IS NOT FEASIBLE.

III. THE COMMISSION WRONGLY RELIED UPON SPEELMAN.

{¶8} Addressing the first objection, nothing in the record indicates that Seymore cannot develop more skills if he tries. His academic skills are somewhat limited, partly because he quit high school in the tenth grade. However, none of the psychological reports indicate that he is under a developmental disability. The lack of impairment implies an ongoing ability to learn.

{¶9} The first objection is overruled.

{¶10} As to the second objection, Seymore has been assessed as capable of medium work, more than sedentary employment and more than light work. His physical restrictions are relatively minimal for a 57-year-old man.

{¶11} His psychological restrictions are also relatively minimal.

{¶12} In short, the record indicates that Seymore is capable of more than sedentary work.

{¶13} The second objection is overruled.

{¶14} *Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757 is still good guidance for the commission. The fact that Seymore was not specifically found to be psychologically capable of returning to his work as a painter does not mean he could not return to work as a painter. In fact, painting could be viewed as low stress employment which allows for frequent breaks.

{¶15} The third objection is overruled.

{¶16} All three objections having been overruled, the findings of fact and conclusions of law in the magistrate's decision are adopted. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

BROWN and FRENCH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Roy Seymore,	:	
Relator,	:	
v.	:	No. 10AP-411
Industrial Commission of Ohio and Martin Painting & Coating Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 28, 2011

Philip J. Fulton Law Office, and *Ross R. Fulton*, for relator.

Michael DeWine, Attorney General, *Jeanna R. Volp* and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶17} In this original action, relator, Roy Seymore, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the November 14, 2008 order of its staff hearing officer ("SHO") that denies relator's July 1, 2008 application for permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶18} 1. On September 24, 1985, relator sustained an industrial injury while employed as a painter. The industrial claim (No. 85-53550) is allowed for:

> Sprain left elbow; sprain low back; cervical sprain/strain complex with left brachial radiculitis; left carpal tunnel syndrome; pain disorder associated with depression.

{¶19} 2. Relator has filed three applications for PTD compensation. All three applications have been denied by the commission.

{¶20} 3. Relator's second PTD application was filed June 25, 2004. Following a January 26, 2005 hearing, an SHO denied the second application.

{¶21} 4. On July 1, 2008, relator filed his third PTD application which is the one at issue in this action.

{¶22} 5. On August 5, 2008, at the commission's request, relator was examined by psychologist Bruce Goldsmith, Ph.D. In his five-page narrative report, Dr. Goldsmith opined:

> * * * The degree of emotional impairment due to his industrial accident of 9/24/1985 would currently not be expected to solely prevent him from working. He appears capable of performing a wide range of routine low-stress tasks with frequent breaks.

{¶23} 6. Dr. Goldsmith also completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Goldsmith wrote in his own hand "[h]e is capable of low-stress tasks with frequent breaks."

{¶24} 7. On August 14, 2008, at the commission's request, relator was examined by John W. Cunningham, M.D. In his five-page narrative report, Dr. Cunningham opines:

> * * * [T]his individual has a 19% whole person permanent partial impairment in regards to this claim on a nonpsychiatric/nonemotional basis. A Physical Strength Rating form has been completed by this physician and attached to this report for your review. In my medical opinion, this individual is capable of some medium physical work activity provided he is not asked to lift, carry, push, pull or otherwise move objects greater than 30 lbs. in the course of his physical work activity. * * *

{¶25} 8. On August 14, 2008, Dr. Cunningham also completed a Physical Strength Rating form. On the form, Dr. Cunningham indicated by his mark that relator is capable of performing "medium work."

{¶26} 9. Following a November 14, 2008 hearing, an SHO issued an order denying relator's third PTD application. The SHO's order explains:

> This decision is based upon the following findings.
>
> The claimant is now 57 years old and testified at hearing that he dropped out of school in the 10th grade. In his 1996 application, the injured worker indicated that he was able to read, write, and perform basic math skills; however, he now indicates that he is able to read and write, but "not well". He also now indicates that he failed the 2nd, 4th, and 10th grades, however, there is no documentation via grade school records on file. His prior employment experience includes that of a landscaper, painter and produce loader. He last worked on 01/01/1987, at which time he was laid off due to lack of work.
>
> On 08/14/2008, Dr. Cunningham, M.D., examined claimant to determine the extent of physical impairment and to render an opinion as to his ability to perform some sustained remunerative employment. Dr. Cunningham opined that the injured worker is capable of some medium physical work activity provided he is not asked to lift, carry, push, pull or otherwise move objects greater than 30 pounds in the course of his physical work activity.

Dr. Bruce Goldsmith, Ph.D., evaluated the injured worker's allowed psychological conditions on 08/05/2008. Dr. Goldsmith opines that the injured worker appears capable of performing a wide range of routine low-stress tasks with frequent breaks.

The claimant last worked in 1987 when he was 35 years old. Since he abandoned a rehabilitation program in 1991 due to a "family crisis", he has made no effort to enhance his employability. The claimant also testified that he attempted to obtain a GED, but quit after four weeks. The Staff Hearing Officer finds that such a brief one-time effort reflects the claimant's lack of motivation to improve his employment potential, rather than his inability to develop new vocational skills for a medium to sedentary position. Two prior applications for permanent and total disability have been denied, pursuant to Staff Hearing Officer orders dated 11/15/2000 and 01/26/2005. This Staff Hearing Officer finds nothing has changed other than the injured worker has gotten older since the last denial of permanent and total disability, and, in fact, the physical restrictions opined by Dr. Cunningham are less restrictive than the restrictions were four years ago. Likewise, Dr. Goldsmith opines that the injured worker appears capable of performing a wide range of routine low-stress tasks with frequent breaks relative to the allowed psychological condition in this claim. Pursuant to Speelman v. Indus. Comm., (1992), 73 O. App. 3d 757, a mere increase in age, rather than the allowed disability, may not be the sole causal factor to support an award of permanent and total disability.

The claimant's age of 57 is found to be a negative vocational factor. However, the claimant has had ample time to pursue remediation, rehabilitation and retraining. Despite the claimant's 10th grade education and poor performance during his years in public school, there is no evidence of any mental impairment that would preclude him from developing skills that are required for entry level work. The claimant's work history does not provide him with any transferable skills for a medium to sedentary work level job. However, again, he has had sufficient time and ability to obtain new skills and/or find employment that provides on-the-job training for a medium to sedentary position. Such work may include store greeter, security screen monitor, light assembly work,

> toll booth operator, ticket taker, telephone solicitor[,] small products inspector, toy assembler, nut sorter, ATC.
>
> Based upon the foregoing findings, the Staff Hearing Officer finds that the claimant retains the ability to perform some sustained remunerative employment within the restrictions described by Drs. Cunningham and Goldsmith. In addition, the Staff Hearing Officer finds nothing has changed since the prior finding denying permanent and total disability, and in fact the injured worker's physical restrictions are less restrictive than those opined restrictions in the prior application. Therefore, the application for permanent and total disability filed 07/01/2008 is denied.

{¶27} On April 29, 2010, relator, Roy Seymore, filed this mandamus action.

Conclusions of Law:

{¶28} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶29} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(D)(1)(g) provides:

> If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the injured worker's age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the injured worker's nonmedical profile.

{¶30} Ohio Adm.Code 4121-3-34(D)(2)(b) provides:

> If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed

> conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.
>
> The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. * * *

{¶31} Ohio Adm.Code 4121-3-34(D)(1)(g) is clarified by this court's decision in *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 763, wherein this court states:

> The non-medical factors include those that may, in certain instances, be held to constitute causation for the person being unable to engage in substantially remunerative employment despite the medical disability from the allowed condition(s). For example, claimant may be disabled at age fifty-five from returning to the former position of employment but, at that time, be capable of obtaining sustained remunerative employment within the medically limiting capabilities that the claimant has, after considering all non-medical factors, including age. Ten or fifteen years may elapse with the physical condition remaining approximately the same. At that time, the age factor may be combined with the disability to disqualify claimant from any sustained remunerative employment. In that event, the Industrial Commission should have the discretion to find that the sole causal factor is the increase in age rather than the allowed disability.

{¶32} Also, in *Speelman*, this court states:

> * * * It is not improper [for the commission] to state alternative grounds for supporting the order, but those grounds should not be merged together and should be explained separately so that a reviewing court can understand what has been done.

Id. at 761.

{¶33} Analysis here begins with the observation that the SHO's order of November 14, 2008 sets forth alternative grounds for supporting the denial of PTD compensation. That is, the commission denied PTD compensation under both Ohio Adm.Code 4121-3-34(D)(1)(g) where age is the sole cause, and Ohio Adm.Code 4121-3-34(D)(2)(b) where the industrial injury permits some sustained remunerative employment based upon the medical impairments and the nonmedical factors.

{¶34} The magistrate finds that the commission did not abuse its discretion in denying the PTD application under Ohio Adm.Code 4121-3-34(D)(2)(b) and therefore this court need not determine whether the commission may have abused its discretion in determining that age is the sole causal factor. However, relator does challenge as an abuse of discretion, the commission's determination that the industrial injury permits some sustained remunerative employment, and thus, that challenge shall be addressed here.

{¶35} Citing *State ex rel. Howard v. Millennium Inorganic Chem.,* 10th Dist. No. 03AP-637, 2004-Ohio-6603, relator contends that Dr. Goldsmith's reports cannot constitute some evidence that the allowed psychiatric condition permits some sustained remunerative employment. According to relator, Dr. Goldsmith's statement that claimant "appears capable of performing a wide range of routine low-stress tasks with frequent breaks" must be viewed as prohibiting all sustained remunerative employment because allegedly "[e]mployers do not hire employees who need 'frequent breaks.' " (Relator's brief, at 5.) Also, relator translates Dr. Goldsmith's statement as meaning that "only brief

periods of work activity can be achieved." (Relator's brief, at 13.) The magistrate disagrees with relator's argument.

{¶36} In *Howard*, the commission denied PTD compensation based in part upon the report of John Dobrowski, M.D., who had indicated on a checklist form that the claimant, Robert L. Howard was capable of activity at the sedentary level. In *Howard*, this court determined that the "restriction-related findings" contained in Dr. Dobrowski's narrative report "seem inconsistent with the possibility of [Howard] maintaining substantial remunerative employment." Id. at ¶11. Accordingly, this court, in *Howard*, issued a limited writ of mandamus "so that the commission may resolve the issue whether or not Dr. Dobrowski's report is consistent with the possibility of [Howard] maintaining sustained remunerative employment." Id. at ¶13. Relator's reliance upon *Howard* is misplaced.

{¶37} To begin, the so-called need for "frequent breaks" during work activity does not necessarily translate into relator's conclusion that "only brief periods of work activity can be achieved." "Frequent breaks" is not numerically defined by Dr. Goldsmith in terms of the duration of the break or the number of breaks required during a given work period. It cannot be ignored that Dr. Goldsmith obviously did not believe that the frequent breaks he had in mind would prevent the performance of "a wide range of routine low-stress tasks."

{¶38} It is the commission that weighs the evidence. Here, it was within the commission's fact-finding discretion to interpret Dr. Goldsmith's statement regarding "frequent breaks" in a manner that is consistent with his opinion that relator can work.

Certainly, the commission was not required to read into the statement the inconsistency that relator argues here.

{¶39} In addressing the nonmedical factors, the SHO explains:

> The claimant's age of 57 is found to be a negative vocational factor. However, the claimant has had ample time to pursue remediation, rehabilitation and retraining. Despite the claimant's 10th grade education and poor performance during his years in public school, there is no evidence of any mental impairment that would preclude him from developing skills that are required for entry level work. The claimant's work history does not provide him with any transferable skills for a medium to sedentary work level job. However, again, he has had sufficient time and ability to obtain new skills and/or find employment that provides on-the-job training for a medium to sedentary position. Such work may include store greeter, security screen monitor, light assembly work, toll booth operator, ticket taker, telephone solicitor[,] small products inspector, toy assembler, nut sorter, ATC.

{¶40} Significantly, the SHO focused on relator's ability to develop skills that can return him to sustained remunerative employment. It was indeed appropriate that the SHO did so. *State ex rel B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525. In determining that relator has the ability to develop those skills, the SHO found no evidence of mental impairment that would preclude the development of skills required for entry-level work. Earlier in the order, the SHO notes that, on an earlier PTD application, relator indicated that he was able to read, write, and perform basic math, but now he indicates that he is only able to read and write "not well." See *State ex rel. West v. Indus. Comm.* (1995), 74 Ohio St.3d 354. (Claimant selected the "not well" response to all three queries; the claimant's self-assessment was some evidence supporting the commission's determination that the claimant possessed basic abilities in those areas.)

{¶41} Here, relator incorrectly characterizes the SHO's order as finding that there are no positive vocational factors. (Relator's brief, at 8, 17.) In support of this characterization, relator points to his age of 57 years which was found to be a "negative factor," his education, which is at the 10th grade level, his lack of transferable skills, and his lack of training for clerical or other types of sedentary work. (Relator's brief, at 17.)

{¶42} Relator's analysis of the nonmedical factors is focused on his current abilities. That analysis does not undermine the SHO's determination that relator has the ability to develop skills required for entry-level work. *B.F. Goodrich*.

{¶43} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/Kenneth W. Macke
KENNETH W. MACKE
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).