

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Janet West,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-563
	:	
Department of Insurance and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on June 21, 2011

Stanley R. Jurus Law Offices, and Michael J. Muldoon, for relator.

Lee M. Smith & Associates Co., L.P.A., and Bradley R. Glover, for respondent Ohio Department of Insurance.

Michael DeWine, Attorney General, and Allan K. Showalter, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Janet West, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order

denying her application for permanent total disability compensation and to find she is entitled to that compensation.

I. Facts and 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, appended to this decision. In her decision the magistrate discussed relator's two main arguments: (1) the commission should have afforded her attending physician's report enhanced weight, and (2) the commission should have given heightened deference to the reports of the physicians who examined relator at the commission's behest. Rejecting both arguments, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Although relator does not set forth specifically enumerated objections, the gist of the memorandum supporting her objections to the magistrate's conclusions of law reargues those matters raised and appropriately resolved in the magistrate's decision.

{¶4} As the magistrate properly pointed out, the Supreme Court of Ohio addressed both arguments in *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 1995-Ohio-121. In *Bell*, the claimant argued his treating physician's reports were entitled to enhanced weight. The court disagreed and concluded "[t]he commission has exclusive authority to evaluate evidentiary weight and credibility." *Id.* at 577. In the same case, the court addressed relator's second contention, as the claimant in *Bell* alternatively asserted "that the reports of Industrial Commission physicians were in heightened deference." *Id.* Again the court refused to embrace the argument. See also *State ex rel. Baker v. Indus.*

Comm., 10th Dist. No. 09AP-373, 2010-Ohio-2727 (concluding the commission "is free to reject reports from its own physicians"). *Id.* at ¶35. Because the magistrate properly resolved the issues raised in relator's objections, we overrule the objections.

III. Disposition

{¶5} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. 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 deny the requested writ of mandamus.

*Objections overruled;
writ denied.*

KLATT and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Janet West,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-563
	:	
Department of Insurance and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 11, 2011

Stanley R. Jurus Law Offices, and Michael J. Muldoon, for relator.

Lee M. Smith & Associates Co., L.P.A., and Bradley R. Glover, for respondent Ohio Department of Insurance.

Michael DeWine, Attorney General, and Allan K. Showalter, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶6} Relator, Janet West, 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:

{¶7} 1. Relator sustained a work-related injury on September 14, 1990 and her workers' compensation claim has been allowed for the following conditions:

CONTUSION TO RIGHT BUTTOCK AND LEFT KNEE;
LOW BACK STRAIN; RIGHT SHOULDER STRAIN;
AGGRAVATION OF DEGENERATIVE ARTHRITIS OF THE
RIGHT SHOULDER, LEFT KNEE AND LOW BACK; RIGHT
KNEE SPRAIN; TEAR LATERAL MENISCUS, RIGHT
KNEE; AGGRAVATION OF DEGENERATIVE JOINT
DISEASE, RIGHT KNEE; TEAR MEDIAL MENISCUS, LEFT
KNEE; CHONDROMALACIA, LEFT PATELLA;
AGGRAVATION OF PRE-EXISTING DYSTHYMIA.

{¶8} 2. Relator filed her application for PTD compensation on March 31, 2009. In support of her application, relator attached the February 2, 2009 report of her treating physician, Charles B. May, D.O., who opined that she was permanently and totally disabled from any form of sustained gainful employment based on the allowed physical conditions.

{¶9} 3. Scott E. Singer, M.D., conducted an independent medical evaluation of relator relative to her allowed physical conditions. In his September 14, 2009 report, Dr. Singer provided a brief history of relator's injuries, identified the medical records which he reviewed, provided his physical findings upon examination, and made the following conclusions: (1) relator's allowed physical conditions had reached maximum medical improvement ("MMI"); (2) relator had a 41 percent whole person impairment; and (3) relator was capable of performing sedentary work.

{¶10} 4. Denise Rabold, Ph.D., provided an independent medical evaluation for relator's allowed psychological condition. Ultimately, Dr. Rabold opined that relator's allowed psychological condition had reached MMI; that she had mild impairments with regards to activities of daily living, social functioning and adaptation; and a moderate impairment regarding concentration. Dr. Rabold assessed a 25 percent whole person impairment, and opined that relator was incapable of work.

{¶11} 5. Relator's employer, respondent Ohio Department of Insurance ("employer"), also had relator evaluated. A psychiatric evaluation was performed by Lee Howard, Ph.D. In his August 6, 2009 report, Dr. Howard performed certain tests including the Structured Inventory of Malingered Symptomatology ("SIMS") test. Dr. Howard found that the results of the SIMS test were highly suspicious, reflecting a tendency to accentuate or exaggerate symptoms. Dr. Howard also administered the Minnesota Multiphasic Personality Inventory—II test which he concluded was invalid because the results also reflected a tendency towards physical or psychological over-magnification and/or exaggeration. In reaching his ultimate conclusion, Dr. Howard noted that he had previously examined relator on March 15, 2005. Dr. Howard concluded that there was little change in relator's presentation, perhaps some improvement in depression, and some mild increase in crying spells. Ultimately, Dr. Howard concluded that relator's allowed psychological condition had reached MMI, that she had a 15 percent permanent partial impairment and that she could return to her former position of employment with no significant restrictions.

{¶12} 6. David C. Randolph, M.D., examined relator for her allowed physical conditions. In his August 14, 2009 report, Dr. Randolph provided his physical findings

upon examination, identified the extensive list of medical records which he reviewed, and concluded that relator's allowed physical conditions had reached MMI; she was capable of work at a sedentary to light physical level provided she avoid overhead and forceful use of her right arm; and that she be afforded the opportunity to change positions periodically, and that bending, twisting and stooping be performed occasionally. Dr. Randolph assessed a 28 percent whole person impairment and concluded that relator could return to her former position of employment.

{¶13} 7. A vocational assessment was prepared by Craig Johnston, Ph.D. In his March 8, 2010 report, Dr. Johnston noted that relator was currently 71 years old, with a college education, the ability to read, write, and perform basic math, as well as a history of skilled employment. Dr. Johnston noted further that relator's first application for PTD compensation was filed when she was 66 years of age and that it was denied in 2005. Dr. Johnston noted that relator's age of 71 years was a potential barrier to employment; however, he noted that she was injured at age 51 and continued to work until 2002 when she was 63 years of age. In his opinion, the only change in vocational profile in the past eight years was that she had grown older. Dr. Johnston opined that relator's education was a positive factor in terms of her ability to be reemployed, that her multiple positions of skilled employment include: investigator, program manager, and secretary, demonstrate the ability to engage in college levels of reasoning, mathematics, and language development, as well as above-average proficiency in the key cognitive aptitudes of general learning ability, verbal skill, numerical skill, and clerical perception. He noted further that she has a temperament to perform a variety of duties, deal with people, direct and supervise others, and make judgments and decisions. He noted further skills include

using a computer, typing, utilizing a variety of office equipment, understanding state and federal insurance laws, researching information, completing paperwork and reports, budgeting, writing grants, planning activities, and supervising staff. Dr. Johnston concluded that relator had significant transferable skills to alternative employment.

{¶14} 8. Relator's application was heard before a staff hearing officer ("SHO") on April 14, 2010 and was denied. The SHO relied upon the report of Dr. Randolph and concluded that relator's allowed physical conditions would allow her to return to her former position of employment as well as any other sedentary and some light sustained remunerative employment. The SHO also relied upon the report of Dr. Howard and concluded that relator's allowed psychological condition did not prevent her from returning to her former position of employment. Because she could return to her former position of employment, her application was denied. However, the SHO also determined that, in the event relator could not return to her former position of employment, she still was not entitled to PTD compensation for the following reasons:

Alternatively, even if the Injured Worker was not found to be capable of performing her former position of employment, the Staff Hearing Officer finds as did the Staff Hearing Officer on 08/31/2005 and based on the 03/08/2010 vocational report of Craig Johnston, Ph.D., that the Injured Worker's vocational factors are generally assets in her ability to become reemployed. While her age is found to be a neutral factor which does not enhance nor prohibit her ability to perform sustained remunerative employment, her education and prior work history are clearly positive assets that would assist her in successfully returning to the labor force on the basis of the multiple transferable skills that she possesses as enumerated in the 03/08/2010 vocational report of Dr. Johnston. Therefore, her application is also denied on this additional basis.

{¶15} 9. Relator's request for reconsideration was denied by order of the commission mailed June 4, 2010.

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

Conclusions of Law:

{¶17} In this mandamus action, relator argues that the commission abused its discretion by rejecting the medical opinions of the commission's "own 'independent specialists,' " Drs. Singer and Rabold. Relator contends that it was an abuse of discretion for the commission to rely upon the medical reports submitted by Drs. Howard and Randolph which reports were submitted by the employer. According to relator, the commission's order clearly evidences prejudice and bias.

{¶18} It is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by relying on the reports of Drs. Howard and Randolph and this court should deny relator's request for a writ of mandamus.

{¶19} 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.

{¶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. *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} In this mandamus action, relator does not challenge the reports of Drs. Howard and Randolph and does not argue that those reports cannot constitute "some evidence" upon which the commission could rely. Instead, relator argues that the commission's rejection of the independent medical evaluations provided by Drs. Singer Rabold, coupled with the reliance on the reports of Drs. Howard and Randolph, clearly demonstrates prejudice and bias and constitutes an abuse of discretion.

{¶22} Pursuant to *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, and *Noll*, the commission is required to cite the evidence relied upon in reaching a decision and is required to provide a brief explanation for that decision. The commission is not required to enumerate all the evidence considered nor is the commission required to explain why certain evidence is found to be more persuasive than other evidence. See *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19; *State ex rel. Lovell v. Indus. Comm.* (1996), 74 Ohio St.3d 250; and *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575.

{¶23} Specifically, in *Bell*, the claimant made two arguments: (1) the report of his attending physician was entitled to enhanced weight, and (2) the reports of the commission's physicians warranted heightened deference. Further, the claimant had argued that all commission orders should be made to set forth the reasons for finding one

report more persuasive than another. The Supreme Court of Ohio rejected those arguments as follows:

Claimant also proposes that Dr. Edelstein's reports are entitled to enhanced weight because he was claimant's attending physician. We disagree. The commission has exclusive authority to evaluate evidentiary weight and credibility. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936. Claimant's proposal infringes on that authority.

Claimant alternatively asserts that the reports of Industrial Commission physicians warrant heightened deference. Apparently, however, the proposed precept applies only to those doctors with opinions favorable to claimant, for claimant, in the next breath, criticizes the commission for relying on its other specialists—Drs. Koppenhoefer, Louis and Howard. The flaws in this argument are obvious.

Claimant also suggests that, henceforth, *all* commission orders be made to set forth the reasons for finding one report more persuasive than another. Claimant's argument, as a broad proposition, is weakened by *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1984), 6 Ohio St.3d 481, 6 OBR 531, 453 N.E.2d 721, and *Noll, supra*. *Noll* requires only a brief explanation of the commission's reasoning. *Mitchell* instructs the commission to list in its orders the evidence on which it relied. Moreover, later decisions have stressed that a reviewing court is not aided by a recitation of evidence that was considered but not found persuasive. See, e.g., *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 550 N.E.2d 174. * * *

Id. at 577-78. (Emphasis sic.)

{¶24} Further, in *State ex re. Baker v. Indus. Comm.*, 10th Dist. No. 09AP-373, 2010-Ohio-2727, this court adopted the decision of its magistrate and concluded that the commission had not abused its discretion by rejecting the reports of Dr. Ackerman even though it was the commission that had requested those reports. Specifically, this court stated as follows at ¶35-36:

* * * [T]he commission has exclusive authority to evaluate evidentiary weight and credibility. *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575, 577, 651 N.E.2d 989, citing *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 508 N.E.2d 936. It follows from that premise that the commission is free to reject reports from its own physicians. *Id.* The commission need not give heightened deference to a report from its own physician. *Id.* See *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 666 N.E.2d 1125 (requiring the commission to accept the conclusions in a report from its own rehabilitation center would improperly make the rehabilitation division, not the commission, the ultimate evaluator of disability).

Given the above authorities, the second issue is easily answered. Clearly, it was within the commission's discretion to reject Dr. Ackerman's reports as evidence upon which it would rely.

{¶25} As above indicated, the commission was not required to accept the medical opinions of the physicians to whom the commission referred relator for evaluations.

{¶26} In arguing further that the commission's rejection of the reports of Drs. Howard and Randolph demonstrates bias, relator argues that such bias is demonstrated by the fact that the commission provided an alternative reason for denying her PTD application. However, 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. Further, this court has previously rejected that argument. See *State ex rel. Smith v. Indus. Comm.*, 10th Dist. No. 09AP-214, 2009-Ohio-6661; *State ex rel. Bennett v. Indus. Comm.*, 10th Dist. No. 07AP-139, 2007-Ohio-139; and *State ex rel. Tressler v. Indus. Comm.*, 10th Dist. No. 05AP-654, 2006-Ohio-2449.

{¶27} Relator also cites various cases for certain propositions apparently arguing that the commission did not follow the law properly. However, as indicated below, this magistrate disagrees.

{¶28} First, relator cites *State ex rel. Brunner* (1997), 77 Ohio St.3d 243, where the Supreme Court of Ohio criticized the commission for denying PTD compensation based upon transferable skills that the commission refused to identify. In the present case, the commission cited and relied upon the vocational report of Dr. Johnston, who specifically identified numerous transferable skills which relator possessed as a result of her college education and her history of skilled employment. This court has stated previously that where vocational reports extensively discuss and analyze all relevant and nonmedical factors, the commission is not required to repeat that analysis in its order. See *State ex rel. Yakimoff v. Indus. Comm.*, 10th Dist. No. 06AP-766, 2007-Ohio-2387, citing *State ex rel. Hunt v. Indus. Comm.* (Sept. 28, 1995), 10th Dist. No. 94APD11-1659 (memorandum decision), *State ex rel. Freeman v. Indus. Comm.* (Mar. 17, 1998), 10th Dist. No. 97APD02-251 (memorandum decision), and *State ex rel. DeMooy v. Indus. Comm.*, 10th Dist. No. 05AP-814, 2006-Ohio-3708.

{¶29} Relator also cites *State ex rel. Pierce v. Indus. Comm.* (1997), 77 Ohio St.3d 275; *State ex rel. Haddix v. Indus. Comm.* (1994), 70 Ohio St.3d 59; and *State ex rel. Mann v. Indus. Comm.* (1998), 80 Ohio St.3d 656, arguing that the commission did not properly consider her work history and that the commission simply provided a boilerplate recitation. For the same reasons explained by this court in *Yakimoff*, *Hunt*, *Freeman* and *DeMooy*, relator's arguments are rejected. The vocational report of Dr. Johnston

thoroughly evaluated the nonmedical disability factors and the commission was not required to repeat Dr. Johnston's analysis in its order.

{¶30} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying her application for PTD compensation and this court should deny her request for a writ of mandamus.

/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).