[Cite as *State ex rel. Dawson v. Indus. Comm.*, 2012-Ohio-4418.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Raymond K. Dawson, Jr.,	:	
Relator,	:	
v.	:	No. 11AP-1017
Gentzler Tool & Die Corp. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 27, 2012

Richard L. Williger Co., LPA, and *Richard L. Williger*, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Raymond K. Dawson, Jr., has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's application for permanent total disability ("PTD") compensation, and ordering the commission to find he is entitled to such compensation.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. On June 20, 2012, the

magistrate issued the appended decision, including findings of facts and conclusions of law, recommending that this court deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision, arguing that the magistrate erred in failing to find that the commission did not abuse its discretion in analyzing the non-medical disability factors, including relator's single attempt at vocational rehabilitation. In his objections, relator reargues the same issues that were presented to, and addressed by, the magistrate. For the reasons set forth in the magistrate's decision, we do not find the objections well-taken.

{¶ 4} Following an independent review of the record, we find that the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's objections and 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 recommendation, we deny the requested writ of mandamus.

Objections overruled; writ denied.

SADLER and CONNOR, JJ., concur.

_____

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Raymond K. Dawson, Jr.,	:	
Relator,	:	
v.	:	No. 11AP-1017
Gentzler Tool & Die Corp. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 20, 2012

Richard L. Williger Co., LPA, and *Richard L. Williger*, for relator.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 5} Relator, Raymond K. Dawson, Jr., 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 relator's application for permanent total disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 6} 1. Relator sustained a work-related injury on May 24, 1978 (p.36) when a large piece of metal fell and struck him in the head. Relator's workers' compensation claim has been allowed for the following conditions:

> Contusion of scalp, superficial laceration; post-traumatic headaches and dizziness; depressive disorder, dysthymic disorder.

{¶ 7} 2. In the years following his injury, relator has worked off and on, but has not worked consistently. According to the stipulation of evidence, relator last worked in 1995 or 1996. Relator previously filed a PTD application on August 6, 2002, and his application was first denied by a staff hearing officer ("SHO") in an order dated August 6, 2003, and any further appeal was refused in a commission order dated September 23, 2003.

{¶ 8} 3. His second application for PTD compensation was filed October 8, 2007 and was denied following a hearing before an SHO in an order dated October 9, 2008.

{¶ 9} 4. Following the denial of his second application for PTD compensation, relator applied for vocational rehabilitation services in 2010.

{¶ 10} 5. In a letter dated February 5, 2010, relator's request was denied based on a medical report indicating that he was totally disabled due to his allowed psychological condition. Specifically, that letter provides:

> You have been referred for consideration of vocational rehabilitation services and our records indicate that you have been determined eligible for these services by BWC. As your managed care organization, we have reviewed your file and determined that you are currently not ready for vocational rehabilitation services at this time for the following reason:
>
> "YOU ARE NON FEASIBLE DUE MEDICAL REPORT DATED 11/13/09 WHICH STATES THAT YOU ARE TOTALLY DISABLED DUE TO ALLOWED MENTAL CONDITION. WE DO NOT HAVE PSYCH PROVIDER SUPPORT ON FILE."[1]

[1] This November 13, 2009 report is not contained in the stipulation of evidence.

> Once we have received a medical update indicating that this has been resolved, your file will again be reviewed to be sure that you are still eligible for vocational rehabilitation services and that you are capable of participating in such services. You may be contacted at that time to determine your interest.
>
> If you or your employer disagrees with this decision, you have 20 days from the date you receive this letter to appeal. All appeals are to be submitted in writing * * *.

(Emphasis sic.)

{¶ 11} 6. Relator appealed and his file was forwarded to Al Walker, MS, CVE, D-ABVE, who opined that the closure of relator's vocational rehabilitation case was appropriate.

{¶ 12} 7. Specifically, in his March 3, 2010 report, Mr. Walker stated:

> OPINION: In my professional opinion, the closure of this vocational rehabilitation case was appropriate.
>
> RATIONALE:
>
> [One] The above referenced injured worker's rehabilitation case was closed on 2/5/10 due to: ["]You are non feasible due medical report dated 11/13/09 which states that you are totally disabled due to allowed mental condition. We do not have psych provider support on file." Review of the file shows there are no records documenting any other referrals to vocational rehabilitation.
>
> [Two] After reviewing the file it appears the injured worker is eligible for vocational rehabilitation services. Industrial Commission reports capability of Light strength work with no psychological limitations as of 2008. Current physician of Record states that Mr. Dawson is permanently and totally disabled for psychological reasons. Without any support from the treating physician the vocational case manager cannot provide any rehabilitation services. If the POR changes their opinion and decides Mr. Dawson would benefit from participation a referral should be made for services.

{¶ 13} 8. Following a hearing before a district hearing officer ("DHO") on April 7, 2010, relator's appeal was refused based on Mr. Walker's review of the record.

{¶ 14} 9. Relator's further appeal was heard before an SHO on May 5, 2010. The SHO upheld the prior DHO's order, stating:

> The Hearing Officer finds the Injured Worker has failed to establish participation in the vocational rehabilitation plan is appropriate.
>
> This order is based on Mr. Walker's report dated 03/03/2010. Mr. Walker opines the closure is appropriate.
>
> Notably, this claim is recognized for psychological conditions and the Injured Worker's treating physician for the psychological conditions has not issued restrictions or approved the Injured Worker's participation in the vocational rehabilitation plan.
>
> This order is based on Dr. Parikh's report dated 04/27/2010.

{¶ 15} 10. Relator's further appeal was refused by order of the commission mailed May 26, 2010.

{¶ 16} 11. Thereafter, on January 5, 2011, relator filed his third application for PTD compensation.

{¶ 17} 12. In addition to the medical evidence already filed supporting his application, relator filed a vocational evaluation prepared by Daniel Simone, M.Ed., CRC, CDMS. Mr. Simone found that relator's age of 69 years was a negative vocational factor and that he would not be considered a realistic candidate for additional education or vocational training. Further, Mr. Simone indicated that relator could not return to his previous work activities and that he had not developed any skills which would transfer into other occupations. Ultimately, Mr. Simone concluded that, from a vocational standpoint, relator was not capable of returning to work. Specifically, Mr. Simone stated:

> The preponderance of information reviewed indicates that Mr. Dawson is experiencing marked physical and psychological limitations as a direct result of his compensable injury. From a physical perspective Mr. Dawson would be restricted to sedentary occupations. He is unable to tolerate prolonged standing or walking. He also has limitations in repetitively lifting and carrying in excess of 10 pounds. Although the physical limitations would significantly impact upon the claimant's ability to work Mr. Dawson's psychological limitations are even more

> vocationally debilitating. Dr. Parikh and Dr. Steinberg both concluded that as a result of his psychological conditions Mr. Dawson would be unable to perform any sustained work activity. Dr. Byrnes restricted Mr. Dawson to simple, non-demanding, low stress work which necessitated only limited interpersonal demands. Mr. Dawson's rehabilitation file was closed due to a determination that services were not feasible due to the extent of his psychological condition. Mr. Dawson is unable to return to his past work activities. He has not developed skills which would transfer into other occupations. His combined physical and psychological limitations would preclude even sedentary work on a sustained basis. In addition, Mr. Dawson is currently 69 years of age and he has not worked in approximately 16 years. Therefore as a result of these factors and the current labor market Mr. Dawson has experienced a total inability to perform remunerative employment on a sustained basis.

{¶ 18} 13. Jon A. Elias, M.D., examined relator concerning his allowed physical conditions. In his February 22, 2011 report, Dr. Elias identified relator's allowed physical conditions, listed the medical records which he reviewed, concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"), assessed a 0 percent whole person impairment for the contusion of scalp and superficial laceration, a 7 percent impairment related to his dizziness and unsteadiness and a 2 percent whole person impairment for headaches. In total, Dr. Elias opined that relator had a 9 percent whole person impairment. Dr. Elias opined that relator was not permanently and totally disabled and that he could perform sedentary work. Dr. Elias explained his opinion as follows:

> In regards to his purely physical symptoms, as he has had the dizziness to some degree, I would suggest that he have a sedentary type of work. He has no deficits related to his allowed conditions in regards to the upper or lower extremities, and therefore, under the guidelines of sedentary work, I would give no further limitations other than those listed.

{¶ 19} 14. Robert L. Byrnes, Ph.D, examined relator for his allowed psychological conditions. In his February 22, 2011 report, Dr. Byrnes correctly identified the allowed conditions in relator's claim, took an accurate history and identified the medical records

which he reviewed. Dr. Byrnes concluded that relator's allowed psychological conditions had reached MMI, assessed a 20 percent whole person impairment, and found that he could return to work with the following limitations:

> This IW's impairment arising from his allowed mental conditions (depression) in and of itself would not preclude all work. His cognitive problems which likely arise significantly from problems other than depression are much more limiting. Considering only his depression, he could still work in simple, non-demanding, low stress jobs with limited interpersonal demands.

{¶ 20} 15. Relator's application was heard before an SHO on June 2, 2011. The SHO relied on the medical reports of Drs. Elias and Byrnes and concluded that relator could perform sedentary work within the restrictions identified by Dr. Byrnes. Thereafter, the SHO considered the non-medical disability factors. The SHO found that relator's age of 69 years was a negative vocational factor. However, the SHO noted that age is not to be evaluated in isolation and must be considered with the other vocational factors. Citing *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414 (1996), the SHO found that relator's education was a positive vocational factor. Specifically, relator graduated from high school in 1960, and high school graduates have the ability in reasoning, arithmetic, and language skills to perform semi-skilled through skilled work. The SHO also considered that relator's prior work history was a positive vocational factor noting that the variety of work he had performed demonstrated the ability to learn and perform a variety of tasks consistent with his educational level. The SHO specifically listed the following prior jobs:

> The Injured Worker has [a] long work history. He worked as a welder (medium, semi-skilled) in an automobile stamping plant from 1964 to 1970; as a bagger and tow motor operator (very heavy, semi-skilled) in a chemical plant from 1970 to 1971; as a salesman of cookware and china (heavy, semi-skilled) from 1971 to 1973; as a stamping and press operator (medium, semi-skilled), the former position of employment, from 1973 to 1983; and as a telemarketer (light, semi-skilled) from 1985 to 1995. The evidence in file reflects the Injured Worker also worked as an organist (light, skilled) and a band leader (light, skilled) for many years.

{¶ 21} Thereafter, the SHO discussed relator's vocational rehabilitation efforts. The SHO noted that relator did not seek to improve his education or skills, nor did he attempt any rehabilitation until after his second PTD application was denied. Specifically, in addressing relator's rehabilitation efforts, the SHO stated:

> The only evidence of interest in vocational rehabilitation is dated 02/01/2010, after the Injured Worker's second denial for permanent total disability benefits. At that time the Injured Worker was 68 years of age and had been out of the work force for approximately 15 years. Participation at that time was denied as the Injured Worker, who was found to be eligible for participation, was not found to be feasible as his treating psychiatrist indicated the Injured Worker was permanently and totally disabled.
>
> It is significant to note that in the 32 years since the date of injury in this claim, and more importantly in the 16 years since the Injured Worker last worked, the Injured Worker made no timely effort to be vocationally retrained or rehabilitated for work. When the Injured Worker last worked in 1995, he was 53 years of age. The Injured Worker's only effort toward vocational rehabilitation occurred at age 68 while the Injured Worker was pursuing permanent total disability benefits.
>
> The evidence in file reflects the Injured Worker applied for and received social security disability benefits retroactive to 1996. This award was predicated, in part, upon conditions which are not recognized in this claim: bilateral hip problems (a right hip replacement was performed in 1999 and a left hip replacement was performed in 2004) and back problems.
>
> The receipt of social security disability benefits, compensation for the inability to work, is a disincentive to vocational rehabilitation and the return to work. When these benefits converted to retirement benefits on the Injured Worker's sixty-second birthday, the Injured [Worker] still made no effort for vocational retraining and/or an attempt to return to work.
>
> Permanent total disability is a compensation "of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed." *State, ex rel. Wilson v. Industrial*

> *Commission* (1997), 80 Ohio St. 3d 250, 253. The Injured Worker's residual functional capacity for simple, low stress, non-demanding sedentary work which has limited interpersonal demands, educational level, ability to learn, and varied work experience make him a candidate for rehabilitation and re-entry into the workforce. The failure to timely explore or participate in vocational rehabilitation is a significant factor in denying this benefit of last resort.

{¶ 22} 16. Relator's request for reconsideration was denied by the commission in an order mailed August 2, 2011.

{¶ 23} 17. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 24} In this mandamus action, relator argues that the SHO improperly analyzed the non-medical disability factors. Specifically, relator argues that the commission abused its discretion by denying his PTD application based on a finding that he had failed to avail himself of vocational rehabilitation. Relator argues that: (1) he never refused to participate in vocational rehabilitation; (2) when he did pursue vocational rehabilitation services, he was found not to be a feasible candidate; and (3) there is no medical evidence in the record from which the commission could have found that he had been medically able to participate in vocational rehabilitation in the 15-to-16 years since he last worked.

{¶ 25} It is this magistrate's decision that the commission identified the medical evidence upon which it relied and found that relator could perform sedentary work within the psychological restrictions provided. Further, it is this magistrate's decision that the commission did not abuse its discretion when it analyzed the non-medical disability factors, including relator's single attempt at vocational rehabilitation, and this court should deny his request for writ of mandamus.

{¶ 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.*, 11 Ohio St.2d 141 (1967). 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., 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 27} Relator does not challenge the commission's reliance on the medical reports of Drs. Elias and Byrnes. Instead, relator's mandamus action focuses solely on the commission's analysis of the non-medical disability factors, specifically arguing that the SHO's decision was improperly based on his failure to timely pursue vocational rehabilitation. Relator contends that the SHO presumed that he would have been eligible and feasible to participate in vocational rehabilitation previously.

{¶ 28} It is undisputed that the commission and courts can demand accountability from a claimant who, despite time and medical ability to do so, never tried to further their education or learn new skills. *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148 (1996); *State ex rel. Wood v. Indus. Comm.*, 78 Ohio St.3d 414 (1997); and *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250 (1997). Further, the commission does not just look to a claimant's past abilities; instead, the commission can look at current and future (i.e., potentially developable) skills. *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139 (1996); *State ex rel. Ehlinger v. Indus. Comm.*, 76 Ohio St.3d 400 (1996).

{¶ 29} Part of relator's argument is that he was not medically capable of pursuing vocational rehabilitation after he left the workforce in 1995 or 1996. However, the record indicates that relator's first application for PTD compensation, filed in August 2002, was denied in August 2003. The commission obviously relied on medical evidence that relator was capable of performing some sustained remunerative employment. Further, relator has not supplied copies of any medical records from that time period which would indicate that he could not have participated in vocational rehabilitation when he left the workforce. Instead, the commission found that he was capable of performing sustained remunerative employment in 2003. If he could have worked, arguably he could have participated in vocational rehabilitation. Without any supporting documentation, relator's argument fails.

{¶ 30} Further, there is no evidence in the record that relator attempted any vocational rehabilitation between 2003, when his first application for PTD was denied, and 2007, when his second application for PTD compensation was filed. Again, there is no medical evidence in the stipulation of evidence indicating that relator was unable, either physically or psychologically, to have pursued vocational rehabilitation or to have found employment during those years. Therefore, the SHO's statement that in the 16 years since relator last worked he made no effort to pursue vocational rehabilitation is accurate and relator has failed to present any medical evidence to support his argument that he was not physically or psychologically incapable of doing so. Without any medical evidence from that time period, the magistrate cannot say that the commission abused its discretion by denying his third application for PTD compensation after finding that he was physically and psychologically able to work, his non-medical disability factors supported an ability to return to work or be retrained, and he had failed to pursue any vocational rehabilitation until after his second application for PTD compensation was denied.

{¶ 31} Relator argues that the timing of his attempt to pursue vocational rehabilitation is immaterial. Relator asserts that the important fact is that he did apply for vocational rehabilitation but, despite his appeals, he was rejected and never refused to participate as had the claimant in *State ex rel. Gonzales v. Morgan*, 131 Ohio St.3d 62, 2011-Ohio-6047.

{¶ 32} The magistrate finds that the timing of relator's sole attempt to avail himself of vocational rehabilitation services is material and that the commission did not abuse its discretion.

{¶ 33} Relator's citation to *Gonzales* as supporting his position that, since he never refused to participate in vocational rehabilitation, the timing of his attempt is immaterial, is inaccurate.

{¶ 34} Trevor Gonzales never returned to any type of employment after he sustained his work-related injury in 2003 and the time he filed his application for PTD compensation six years later.

{¶ 35} Gonzales was 52 years of age when he applied for PTD compensation. Gonzales was functionally illiterate but he had worked as a street vendor in Jamaica, a

general laborer, a stacker, a packer, a kitchen/food preparer, a delivery representative for a phone company, and a hot walker for a race track. Gonzales was contacted two times in 2004 for an evaluation of eligibility for vocational rehabilitation services; however, he was found not to be a feasible candidate because, after he spoke with his attorney, he decided not to participate.

{¶ 36} In denying Gonzales' application for PTD compensation, the commission found that his failure to undergo appropriate and reasonable vocational rehabilitation to increase his residual functional capacity and/or obtain new marketable skills and to improve his ability to read, write and perform basic math was a reason to deny his application.

{¶ 37} Gonzales filed a mandamus action arguing that the commission did not properly consider the impact of his illiteracy on his ability to participate in vocational rehabilitation and ignored the report of his treating psychologist that he was not a candidate for rehabilitation, as well as the vocational report he submitted indicating that he was unlikely to be re-employed.

{¶ 38} Both this court and the Supreme Court of Ohio denied Gonzales' request for a writ of mandamus finding that the commission did not abuse its discretion by holding Gonzales accountable for his failure to pursue vocational rehabilitation.

{¶ 39} In *Gonzales*, the focus was not on Gonzales' refusal to participate in vocational rehabilitation; instead, the focus was on Gonzales' failure to improve his skills and enhance his employment options.

{¶ 40} In the present case, relator has a high school education, had worked as a welder in an automobile stamping plant, as a bagger and tow motor operator in a chemical plant, as a salesman of cookware and china, as a stamping and press operator, and a telemarketer, and was 53 years of age when he last worked. By comparison, Gonzales was illiterate, had a varied, but less impressive work history, and was 53 years of age when he last worked. Six years had passed since Gonzales last worked, while, in the present case, 16 years had passed since relator last worked.

{¶ 41} Relator simply has not demonstrated that there were any extenuating circumstances excusing him from participating in vocational rehabilitation.

{¶ 42} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying his third application for PTD compensation, and this court should deny his 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).