

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State ex rel. Richard Phillips, | : | |
| Relator, | : | |
| v. | : | No. 09AP-29 |
| Complete Carpentry, Inc. and Industrial Commission of Ohio, | : | (REGULAR CALENDAR) |
| Respondents. | : | |

D E C I S I O N

Rendered on October 20, 2009

Kennedy & Colasurd, and Michael D. Colasurd, for relator.

*Richard Cordray, Attorney General, and John R. Smart, for
respondent Industrial Commission of Ohio.*

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Richard Phillips filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to modify the starting date of his permanent total disability ("PTD") compensation from June 14 to March 22, 2007.

{¶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 refuse to grant the requested writ.

{¶3} Counsel for Richard Phillips 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} Phillips was injured in 1996, but continued working for years thereafter. Eventually, he was unable to continue his old job and began receiving temporary total disability ("TTD") compensation. The TTD compensation was terminated effective March 21, 2007 due to the fact his condition was found to have reached maximum medical improvement ("MMI"). Phillips did not submit an application for PTD compensation until July 7, 2008. The application was granted with an effective date of June 14, 2007. Counsel for Phillips argued then, as now, that the PTD compensation should begin as of the date TTD compensation terminated.

{¶5} The staff hearing officer ("SHO") who heard the application considered counsel's argument, but found that the medical reports from the treating physician for Phillips were equivocal until the physician issued a report on June 14, 2007 which was clear that Phillips was PTD. Our magistrate found that the SHO's resolution of the issues was not an abuse of discretion.

{¶6} Counsel for Phillips argues two points in his objections to the magistrate's decision. First, counsel asserts that the earlier start date was supported on a medical basis alone. Second, counsel argues that the SHO should have done an analysis of the *Stephenson* factors for the period March 22 to June 14, 2007 to determine if Phillips was

eligible for PTD compensation for that three month period. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167.

{¶7} The medical evidence clearly was equivocal at best until the June 14, 2007 report from the treating physician. The doctor's report, up until then, assumed Phillips could do sedentary work. Rehabilitation efforts were pursued. Only after attempts at rehabilitation were abandoned did the doctor report that Phillips was PTD. From a medical perspective, the SHO's finding was appropriate.

{¶8} Because Phillips was found to be entitled to PTD compensation based upon his medical condition, the SHO who made the initial order did not address the *Stephenson* factors. The argument that the factors should have been considered was not clearly presented at that time. Nor was the argument clearly presented to the SHO who considered the start date following a request for reconsideration. Arguably, the issue was waived and cannot be presented for the first time in a mandamus action before us.

{¶9} Even if the argument should now be considered, the evidence before us does not demonstrate that Phillips was incapable of finding sustained remunerative employment of a sedentary nature during the period March 22 to June 14, 2007. A doctor's report that his prospects were "quite guarded" does not demonstrate a total inability to find sedentary work or even light work, given no limitations on his upper extremities. The fact that Phillips' reading skills were limited, did not change the situation. Many jobs require little or no reading.

{¶10} Again, the start date of June 14, 2007 for PTD compensation was reasonable, given the evidence actually before the commission.

{¶11} The objections to the magistrate's decision are overruled. The findings of fact and conclusions of law contained in the magistrate's decision are hereby adopted. As a result, we decline to issue the requested writ of mandamus.

Objections overruled; writ denied.

FRENCH, P.J., and CONNOR, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Complete Carpentry, Inc. and | : | (REGULAR CALENDAR) |
| Industrial Commission of Ohio, | : | |
| | : | |
| Respondents. | : | |
| | : | |

MAGISTRATE'S DECISION

Rendered on June 22, 2009

Kennedy & Colasurd, and Michael D. Colasurd, for relator.

Richard Cordray, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶12} Relator, Richard Phillips, 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 set June 14, 2007 as the date to begin permanent total disability ("PTD") compensation and ordering the commission to find the medical evidence supports beginning that compensation on March 22, 2007.

Findings of Fact:

{¶13} 1. Relator sustained a work-related injury on May 8, 1996 and his workers' compensation claim has been allowed for the following conditions: "Lumbar region sprain; herniated nucleus pulposus L4-L5; lumbosacral instability; spinal stenosis-lumbar; lumbar degenerative disc disease L2-3, L3-4; lumbago; postlaminectomy syndrome-lumbar; lumbosacral radiculitis."

{¶14} 2. Relator has had two surgeries for his allowed back conditions.

{¶15} 3. Relator was able to work until April 2004.

{¶16} 4. Relator was receiving temporary total disability ("TTD") compensation until March 21, 2007. At that time, a hearing was held before a district hearing officer ("DHO") who determined that relator's allowed conditions had reached maximum medical improvement ("MMI"). In so finding, the DHO relied on the February 12, 2007 report of James J. Powers, M.D., who opined that relator's condition had stabilized and relator would be able to perform sedentary to light-duty work.

{¶17} 5. During the same timeframe, relator continued to be seen by his treating physician, Paige S. Gutheil, D.O. In her February 15, 2007 office note, Dr. Gutheil noted that relator's condition remained the same, his pain was a six on a scale of one to ten, that relator may look into disability, and that Dr. Gutheil may consider repeat nerve studies and pain management. In her March 22, 2007 office note, Dr. Gutheil noted further that she wanted relator to undergo a functional capacity evaluation ("FCE") and vocational rehabilitation to determine the extent of his disability.

{¶18} 6. The FCE was conducted on April 19, 2007. The evaluator concluded:

Based on the allowed conditions of this claim, subject is currently able to perform tasks within the SEDENTARY physical demand level. Due to his previous surgeries, he is very limited in his lumbar and sacral range of motion. Ability to participate in vocational rehab is limited by his age, difficulty with reading, and limited vocational skills.

(Emphasis sic.)

{¶19} 7. Following the FCE, Dr. Gutheil saw relator on June 14, 2007. In that note, Dr. Gutheil noted that she had extensive discussions with relator about his options, indicated that relator had reached MMI, but would need continuing medical care, and opined that he was permanently disabled.

{¶20} 8. The stipulated evidence also contains a MEDCO-14 Physician's Report of Work Ability form completed by Dr. Gutheil on June 14, 2007. With regard to relator's work ability, Dr. Gutheil noted that relator was permanently totally disabled. On that form, Dr. Gutheil was asked to indicate whether or not relator had reached MMI. Dr. Gutheil checked the box indicating "yes." Thereafter, the form requests that the doctor give the date the patient reached MMI. In response, Dr. Gutheil noted "6/14/07."

{¶21} 9. Relator pursued vocational rehabilitation. In an e-mail from CareWorks dated June 27, 2007, relator's pursuit of rehabilitation was summarized:

The [injured worker] was first referred and found eligible on 1/11/07 following MCO/DMC staffing. No rehab plans were rendered. After being referred, IW indicated that he did not feel that he would be able to devote his time to voc rehab at that time due to an upcoming trial and taking care of his daughter's child. The file was closed on 1/19/07. IW was referred again, however he was determined to be ineligible on 4/10/07 due to the fact that he was MMI, however there were no restrictions on file. This determination was appealed and IW was made eligible for voc rehab as of 5/2/07, per BWC orders[.] On 6/14/07, the [physician of record] submitted a Medco-14 which stated that IW was MMI as of

that date and vocational rehab was indicated. The Medco 14 did provide restrictions, however, per this document, IW is permanently disabled from working. It was decided that because IW is MMI and he is permanently disabled from working, he was not a candidate for voc rehab services[.]
* * *

This decision is now appealed and re-reviewed. There do not appear to be any changed circumstances which would make IW capable of participating in vocational rehab[.] IW remains permanently disabled from working and would therefore no[t] be able to participate in plan appropriate services such as job search[.] * * *

{¶22} 10. Relator filed an application for PTD compensation on July 7, 2008. In support of his application, relator submitted the June 28, 2008 report of Dr. Gutheil wherein she stated as follows:

In my opinion Mr. Phillips is permanently unable to return to any kind of work because of his physical limitations from his injury. This has been the case since March 21, 2007.

{¶23} 11. Relator also submitted a psychological evaluation performed by John M. Malinky, Ph.D., who opined that relator was permanently and totally impaired from all sustained remunerative employment as a result of his psychological condition.

{¶24} 12. Relator's application was heard before a staff hearing officer ("SHO") on November 5, 2008 and resulted in an order granting the requested compensation. The SHO stated, in pertinent part:

Permanent and total disability compensation is awarded from 06/14/2007 for the reason that it is supported by the office notes and MEDCO-14 of that date of Dr. Gutheil.

* * *

The Staff Hearing Officer accepts and relies upon the 06/14/2007 office note and MEDCO-14 and the 06/23/2008 report of Paige S. Gutheil, D.O., who indicates that the injured worker is permanently and totally disabled from all

sustained remunerative employment due to the allowed conditions of this claim. The Staff Hearing Officer relies upon this evidence in finding that the injured worker is indeed medically permanently and totally disabled.

{¶25} During the hearing before the SHO, counsel for relator requested that, if PTD compensation was granted, that it be granted beginning March 21, 2007 when TTD compensation ended. The following exchange took place:

MR. COLASURD: And the last thing. We're asking for PTD to go back to when temporary total was terminated, which was March 21, '07. I'm sorry.

THE HEARING OFFICER: Yeah.

MR. COLASURD: Yeah, that's right.

THE HEARING OFFICER: That's right. I'm not sure I can do that, but - - I'm not sure I have evidence that goes back that far, but I'll see what I can do.

MR. COLASURD: If I can just push it one more second - -

THE HEARING OFFICER: Okay.

MR. COLASURD: -- about that. Dr. Gutheil goes back to that date on her report, June 23rd, '08, and at that time basically the combined Bureau exams would be preclusive of work efforts.

THE HEARING OFFICER: The problem becomes I need contemporary evidence at the time. It's nice that Dr. Gutheil is willing to retroactively make him PTD for a year and a half, but I need something from the doctor at that time.

MR. COLASURD: The only thing I can add to that is they were the doctors over that period of time and they were examining him and so forth, so it's not like they were strangers to that period of time, plus, again, the combined Bureau exams that were used to terminate him from temporary total.

THE HEARING OFFICER: I can look at some of those and see what those have to say. If they dovetail into the same kind of concept, that's one thing, but I --

MR. COLASURD: All right. Thank you.

THE HEARING OFFICER: All right. Let me take it under advisement. Thanks very much.

{¶26} 13. Relator filed a request for reconsideration regarding the start date of his PTD compensation. The matter was heard before an SHO on December 15, 2008 and was denied:

It is the order of the Staff Hearing Officer that the request to adjust the start date of Permanent Total Disability Compensation from 06/14/2007 to 03/22/2007 (the day after the last date of Temporary Total Disability Compensation paid) is denied. The Staff Hearing Officer finds that the 03/22/2007 office note of Dr. Gutheil states "look into FCE and vocational rehabilitation to determine extent of disability." The Staff Hearing Officer finds that this statement does not constitute a medical opinion that the Injured Worker was unable to perform sustained gainful employment at that time, but rather that further inquiry is indeed necessary. This finding is also supported by the 02/15/2007 office note that stated "patient may look into disability." This statement is not found to rise to the level of a legally competent and definitive medical opinion sufficient to support this request. The 04/26/2007 office note is silent as to the matter of disability, even though the FCE was completed on 04/19/2007. Only in the next office visit of 06/14/2007 does the physician provide a definitive medical opinion that the Injured Worker has reached maximum medical improvement and is permanently (and totally) disabled. Thus, the Staff Hearing Officer finds that 06/14/2007 was the first date of any medical evidence on file that supports the IC-2 application.

{¶27} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶28} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶29} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. Generally, in making this determination, the commission must consider not only medical impairments, but also the claimant's age, education, work record and other relevant nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203.

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

{¶31} In this mandamus action, relator asserts that the medical evidence supports only one conclusion: he was permanently and totally disabled as of March 21, 2007. Relator contends that, by relying on Dr. Gutheil's June 23, 2008 report wherein she stated that relator had been permanently and totally disabled since March 21, 2007, the SHO was required to utilize that date as the start date.

{¶32} In denying relator's request for an earlier start date, the commission specifically indicated that there was no contemporaneous medical evidence submitted from March 2007 indicating that relator was permanently and totally disabled. Instead, Dr. Gutheil referred relator for an FCE which was conducted on April 19, 2007. The evaluator concluded that relator was capable of performing within the sedentary physical demand level. Thereafter, on June 14, 2007, Dr. Gutheil opined, for the first time, that relator was permanently and totally disabled. Furthermore, on the Medco-14, Dr. Gutheil indicated that relator had reached MMI as of June 14, 2007. Dr. Gutheil could have indicated a March 2007 date for MMI, however, she did not.

{¶33} Relator also points out that his efforts to pursue vocational rehabilitation and to appeal the closure of his file is further evidence that he was not able to work much earlier than June. However, the record indicates that relator was first referred for vocational rehabilitation in January 2007 and it was determined that he was eligible. However, at relator's request, and for reasons unrelated to his allowed conditions, the file was closed on January 19, 2007. Relator was again referred for vocational rehabilitation, but because there were no restrictions on file, relator was determined to

be ineligible on April 10, 2007. Pursuant to relator's appeal, he was again made eligible for vocational rehabilitation on May 2, 2007. On June 14, 2007, Dr. Gutheil submitted the Medco-14 indicating that relator was at MMI as of that date and that vocational rehabilitation was indicated; however, she also indicated that relator was permanently disabled from working. As such, relator's file was closed again.

{¶34} Contrary to relator's assertions, nothing in the history of his pursuit of vocational rehabilitation requires a conclusion that he was permanently and totally disabled in March 2007.

{¶35} In the present case, the commission considered, evaluated, and weighed the medical evidence and concluded that, based upon the evidence submitted by relator, the start date for his PTD award was June 14, 2007. Following a review of the record, the magistrate cannot say that the commission abused its discretion in selecting the date of June 14, 2007 as the start date for relator's PTD award. Relator has not demonstrated a clear legal right to a writ of mandamus ordering the commission to change the start date of his PTD compensation to March 21, 2007.

{¶36} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in setting June 14, 2007 as the start date for his PTD award and this court should deny relator's 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).