

[Cite as *State ex rel. Ferguson v. Indus. Comm.*, 2010-Ohio-1141.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard Ferguson, :
Relator, :
v. : No. 09AP-389
Industrial Commission of Ohio et al., : (REGULAR CALENDAR)
Respondents. :

D E C I S I O N

Rendered on March 23, 2010

Salisbury & Salisbury, and Richard L. Salisbury, for relator.

Richard Cordray, Attorney General, and Derrick L. Knapp, for respondent Industrial Commission of Ohio.

Jose M. Gonzalez, for respondent City of Cleveland.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Richard Ferguson, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied his request for a

closed period of temporary total disability ("TTD") compensation from February 4 through December 31, 2008, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. The magistrate concluded the following: (1) the commission did not abuse its discretion by finding that relator had presented sufficient objective medical evidence to support his claim; and (2) the commission did abuse its discretion by relying on the report of Sheldon Kaffen, M.D., as some evidence to support denial of the claim.

{¶3} As to the second issue, regarding Dr. Kaffen's report, neither relator nor the commission objected to the magistrate's conclusion. We adopt that portion of the magistrate's decision as our own and conclude that Dr. Kaffen's report was not some evidence on which the commission could rely to deny relator's claim. Therefore, we limit our analysis to the remaining evidence in the record.

{¶4} As to the first issue, regarding the sufficiency of the evidence, relator objects and contends that both the magistrate and the staff hearing officer ("SHO") ignored evidence supporting his claim. We note, however, that the SHO's order states: "All evidence was reviewed and considered."

{¶5} We acknowledge the February 2009 letter of Dr. Zenos Vangelos, in which he explained why his office notes had not addressed relator's ability to return to work prior to completing the November 2008 C-84 form. Nevertheless, the key question remains whether medical evidence supports TTD compensation for the requested

period. As to this question, despite protestations to the contrary, relator asks us to reweigh and interpret the medical evidence, none of which indicates that relator suffered a disability that would have prevented his return to employment during the closed period. In the absence of such evidence, we conclude that the commission did not abuse its discretion in denying relator's claim for compensation. Therefore, we overrule relator's objection.

{¶6} Having conducted an independent review of the evidence, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own, except that we correct the word "insubstantial" in the fourth line of the final paragraph to "insufficient." Accordingly, we deny the requested writ.

Objection overruled, writ of mandamus denied.

TYACK, P.J., and SADLER, J., concur.

A P P E N D I X

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State of Ohio ex rel. Richard Ferguson,	:	
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Relator,	:	
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v.	:	No. 09AP-389
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and City of Cleveland,	:	
	:	
Respondents.	:	
	:	

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

Rendered on October 15, 2009

Salisbury & Salisbury, and Richard L. Salisbury, for relator.

Richard Cordray, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.

Robert J. Triozzi, Director of Law, and Jose M. Gonzalez, for respondent City of Cleveland.

IN MANDAMUS

{¶7} Relator, Richard Ferguson, 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 his request for a closed period of

temporary total disability ("TTD") compensation from February 4 through December 31, 2008, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶8} 1. Relator sustained a work-related injury on May 7, 2004, and his workers' compensation claim was ultimately allowed for "sprain of neck, sprain thoracic region, sprain lumbosacral, degenerative disc disease C5-C6, C6-C7 and degenerative disc disease L4-L5, L5-S1; isolated phobias NEC; L3-4 disc herniation."

{¶9} 2. Relator missed significant periods of work as evidenced by the Medco-14 forms completed by his treating physician Zenos Vangelos, D.O. According to those forms, relator was unable to work from May 8 through October 1, 2004, February 27 through September 1, 2006, and from February 16 through December 1, 2007. Relator's employer, City of Cleveland ("employer"), elected to pay relator wage continuation in the form of hazardous duty income ("HDI") in lieu of TTD compensation for these periods of time when he was unable to work.

{¶10} 3. Relator retired on disability as a firefighter on February 3, 2008. None of the information regarding relator's disability retirement is provided in the record.

{¶11} 4. According to the evidence in the record, including the first report of injury, relator complained of pain in both his neck and back following the injury.

{¶12} 5. A review of the office records of Dr. Vangelos indicates that, although relator had both neck and back pain, treatment originally focused on relator's back pain. On November 15, 2007, relator was seen by Dr. Vangelos complaining that, over the last few months, he had been having neck pain with radiation down both arms, mostly on the left, as well as tingling and numbness. On examination, Dr. Vangelos noted:

cervical spine neurovascular status within normal limits; deep tendon reflexes 1-4+ in the upper extremity; negative Tinel's sign (tingling produced by pressing on damaged nerve trunk); negative Phalen's sign (carpal tunnel); negative Adson's sign (thoracic outlet syndrome); Equivocal Spurling's sign bilaterally (used to assess possible nerve root compression); palpable tenderness at cervicothoracic junction; forward posturing of cervical spine; full flexion; extension limited somewhat to 10 degrees; side bending limited to 10 degrees bilaterally; and rotation 70 degrees bilaterally. Beginning in December 2007, relator began receiving treatment for his cervical condition, including paraspinal blocks and various medications.

{¶13} 6. On November 7, 2008, Dr. Vangelos completed a C-84 form certifying that relator was temporarily and totally disabled from February 4 through December 31, 2008. In the objective portion of the C-84, Dr. Vangelos noted mild palpable tenderness cervicothoracic region and, in the subjective portion of the C-84, Dr. Vangelos noted back and neck pain, and numbness and tingling in the left arm and hand.

{¶14} 7. Relator was examined by Sheldon Kaffen, M.D., on December 22, 2008. On examination, there was no tenderness to palpation in the midline or over both paraspinal muscular masses and no muscle guarding. Cervical range of motion: flexion to 60 degrees; extension to 30 degrees; rotation right 30 degrees; rotation left 50 degrees. There was no complaint of pain on motion.

{¶15} In his December 24, 2008 report, Dr. Kaffen listed the various medical records which he reviewed. Some of those records related to relator's lumbar problems and others related to his cervical condition. With regards to the cervical condition only, Dr. Kaffen listed and described the following evidence, much of which is not contained

anywhere else in the record: (a) May 14, 2004 – X-rays of relator's cervical spine showed "moderate degenerative changes at C5-C7"; (b) an independent medical evaluation was performed on March 3, 2006. At that time, relator complained of pain in his neck, upper and lower back. On examination, there was no tenderness or muscle guarding, the neurological examination was within normal limits and relator had limited motion of his cervical spine; (c) relator was seen by Young H. Kim, M.D., on February 12, 2007, at which time he complained of low back and neck pain. Again, the neurological examination was within normal limits and relator did have limited motion of his cervical spine; (d) on November 15, 2007, relator was seen by Dr. Vangelos complaining of neck pain with radiation into both upper extremities with numbness and tingling. Dr. Vangelos noted that the neurological examination was within normal limits, relator had tenderness and limited motion of his cervical spine. X-rays of the cervical spine were obtained and showed "anterolisthesis of C4 on 5 and severe narrowing of the discs at C5-6 and C6-C7"; (e) an MRI of the cervical spine was performed on November 27, 2007. The MRI revealed mild disc desiccation at C2-C3, osteophyte disc complex to the right with a small central disc protrusion and mild central canal stenosis at C3-C4; moderate broad-based bulging of the disc with moderate central canal stenosis and moderate left sided facet arthropathy at C4-C5; annular bulging of the disc and moderate central canal stenosis with moderate unilateral neural foraminal narrowing at C5-C6; disc desiccation and a broad-based annular bulge with moderate central canal stenosis and moderate bilateral neural foraminal narrowing at C6-C7; minimal retrolisthesis of C6 on C7; and (f) disc desiccation and mild central canal stenosis at C7-T1. Dr. Kaffen also noted that relator underwent a series of cervical

paraspinal blocks on December 17, 2007, January 24, September 24 and October 22, 2008.

{¶16} Thereafter, Dr. Kaffen opined that, within a reasonable degree of medical certainty, the medical evidence did not support the requested period of TTD beginning February 4, 2008 as being related to the industrial injury. Dr. Kaffen concluded:

* * * [R]eview of the medical documentation and my examination of 12/22/08 indicates that the claimant had reached maximum medical improvement for the allowed orthopedic conditions in this claim as early as February, 2007 based on Dr. Kim's examination of 2/12/07. Although the claimant continued to have complaints referable to his neck and low back, there was no change in his complaints or physical findings noted in the documentation. My examination of 12/22/08 actually showed the claimant to have improved.

{¶17} 8. Relator's request for TTD compensation was heard before a district hearing officer ("DHO") on February 5, 2009 and was denied.

{¶18} 9. Relator's appeal was heard before a staff hearing officer ("SHO") on March 10, 2009. The SHO modified the prior DHO's order, yet still denied relator's request for TTD compensation for the following reasons:

The Staff Hearing Officer notes that the only evidence on file supporting the alleged disability period is the C-84 application which was signed by Zenos Vangelos, D.O. on 11/07/2008. The only objective clinical finding noted by Dr. Vangelos is "mild palpable tenderness cervicothoracic region." The Staff Hearing Officer finds that insufficient objective medical evidence has been presented to support the alleged lengthy disability period.

The Staff Hearing Officer notes that the Injured Worker is receiving a permanent disability award from the Ohio Police and Fire Pension Fund. The Injured Worker has received numerous cervical and lumbar injections with little evidence of documented improvement. The Staff Hearing Officer has

relied upon the 12/24/2008 report of Sheldon Kaffen, M.D. in finding that the alleged disability period is not medically substantiated.

{¶19} 10. Further appeal was refused by order of the commission mailed March 25, 2009.

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

Conclusions of Law:

{¶21} 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.

{¶22} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the

former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement ("MMI"). See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

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

{¶24} As noted in the findings of fact, the SHO cited two reasons for denying the requested period of compensation. First, the SHO determined that there was insufficient objective medical evidence in the record to support the period of disability. Second, the SHO relied on Dr. Kaffen's report to find that the alleged period of disability was not medically substantiated.

{¶25} With respect to the first finding, that there was insufficient objective medical evidence in the record, the magistrate finds that this did not constitute an abuse of discretion. Although the employer elected to pay relator HDI for various periods of disability, the issue of whether or not relator was temporarily and totally disabled was not presented to the commission until relator filed his November 2008 request for TTD compensation. As such, contrary to relator's arguments, no determination had yet been made as to whether or not relator was eligible for TTD compensation.

{¶26} In finding that relator's evidence was insufficient, the SHO noted that the only evidence on file supporting the alleged disability period was the C-84 and the only objective clinical findings noted by Dr. Vangelos were mild palpable tenderness cervicothoracic region. The SHO concluded that there was insufficient objective medical evidence to support the requested period of disability. Relator contends that

the SHO failed to consider the medical evidence concerning relator's cervical issues beginning November 15, 2007. Relator saw Dr. Vangelos on that day complaining of neck pain. Dr. Vangelos' report is summarized at findings of fact number five. In that office note, Dr. Vangelos made no mention of any limitations relative to relator's neck. Thereafter, relator began receiving paraspinal injections and was feeling better in January 2008. Four months later, in May 2008, Dr. Vangelos' office notes indicate relator was again feeling some numbness in his fingers. Nothing in these office notes references any restrictions on relator or his ability to work. Relator asserts that Dr. Vangelos did not mention any restrictions or limitations on his ability to work because the employer was paying him HDI. However, HDI was no longer being paid after relator retired on February 3, 2008. Dr. Vangelos did not mention any disability until the November 7, 2008 C-84. As such, the magistrate finds that the commission did not abuse its discretion when it found insufficient objective medical evidence.

{¶27} With regard to the second finding, the report of Dr. Kaffen, the magistrate finds that Dr. Kaffen's report is problematic. At the end of his report, Dr. Kaffen specifically states that there was no change in relator's complaints or physical findings noted in the documentation. However, a reading of Dr. Kaffen's own report and his review of medical records says otherwise. Dr. Kaffen specifically identified a May 14, 2004 cervical x-ray which showed moderate degenerative changes at C5-C7. Dr. Kaffen then referenced a November 15, 2007 x-ray of relator's cervical region which showed anterolisthesis of C4 on 5 and severe narrowing of the discs at C5-C6 and C6-C7. In his report, Dr. Kaffen noted that there were changes in physical findings with regard to relator's cervical region. Further, Dr. Kaffen relied on the February 2007

report of Dr. Kim for his conclusion that relator's allowed conditions had reached MMI.

However, Dr. Kim's report provides, in total, as follows:

You came to my office on the 8th of February 2007, for complaints of chronic low back pain. You injured your back in 2004 at work. Ever since you have been suffering from this lower back pain. You do not have any pain running down to your legs. Your pain is primarily localized over the 5th lumbar disc levels. I reviewed your lumbar MRI scan. There is evidence of disc degeneration at the 3rd and 5th levels, but your pain locations are more on the bottom lumbar discs. You tried all kind[s] of conservative treatment without lasting benefit. I would like you to have lumbar paraspinal blocks as ordered to relieve your back pain.

{¶28} To the extent that Dr. Kaffen relied upon the above report of Dr. Kim to find that relator's lumbar conditions had reached MMI, Dr. Kim's report supports that conclusion. However, because Dr. Kim made no mention of relator's cervical condition, his report would not support a conclusion that relator's allowed cervical conditions had reached MMI.

{¶29} Because Dr. Kaffen contradicts himself at the end of his report when he states that there is no evidence of a change in physical findings, when those changes are specifically noted earlier in his report, the magistrate finds that his report is internally inconsistent and does not constitute some evidence to support the commission's finding.

{¶30} Based on the foregoing, it is this magistrate's conclusion that the report of Dr. Kaffen does not constitute some evidence upon which the commission could rely. However, because the magistrate finds that the commission did not abuse its discretion in finding that relator's evidence was [insufficient] to support the requested period of disability, it is this magistrate's decision that relator has not demonstrated that the

commission abused its discretion and relator's request for a writ of mandamus should be denied.

/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).