[Cite as *State ex rel. Gonzales v. Indus. Comm.*, 2010-Ohio-1959.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Trevor Gonzales,	:	
Relator,	:	
v.	:	No. 09AP-752
James E. Morgan, James E. Morgan Racing Stables and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 4, 2010

Weisser and Wolf, and *Lisa M. Clark*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relator, Trevor Gonzales, 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 application for permanent total disability ("PTD") compensation, and to enter an order finding that he is entitled to that compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, and recommended that this court deny relator's request for a writ of mandamus.

{¶3} Relator does not delineate a specific objection, but essentially reargues the same points addressed in the magistrate's decision. Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

{¶4} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled, and we 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 decision, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

KLATT and FRENCH, JJ., concur.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Trevor Gonzales,	:	
Relator,	:	
v.	:	No. 09AP-752
James E. Morgan, James E. Morgan Racing Stables 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 January 29, 2010

Weisser and Wolf, and *Lisa M. Clark*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} Relator, Trevor Gonzales, 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 application for permanent total disability ("PTD") compensation, and ordering the commission to find that he is entitled to that compensation pursuant to *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on June 29, 2003, and his claim has been allowed for:

> Sprain left shoulder; sprain of neck; closed fracture phalanx second toe right foot; contusion of right second toe; enthesopathy right second toe; disc herniation at C5-6 without cord compression; depressive disorder; gastro esophageal reflux disease; esophagitis; spastic colon.

{¶7} 2. On January 26, 2009, relator filed his application for PTD compensation. In support of his application, relator submitted the medical records of his treating physician, Luis F. Pagani, M.D., from August 2008. Dr. Pagani opined that relator was permanently and totally disabled due to the persistence of symptoms of head and neck pain, short attention span, and due to difficulties with the side effects of his medications.

{¶8} 3. At the time relator submitted his PTD application, a psychological report from Michael A. Murphy, Ph.D., was already in the record. In his May 13, 2008 report, Dr. Murphy identified the psychological evidence he reviewed, provided a relevant history and concluded that relator had mild limitations in his daily activities, social interaction and concentration, persistence and pace, as well as moderate limitations to his adaptation to the workplace. Further, Dr. Murphy did not recommend rehabilitation based on relator's psychological condition.

{¶9} 4. An independent medical examination was performed by James T. Lutz, M.D. In his April 14, 2009 report, Dr. Lutz indicated that relator stated he could stand and walk for 20 to 30 minutes at a time; however, Dr. Lutz noted that these limitations were not secondary to the allowed conditions. Similarly, relator indicated that he could sit for 20 to 30 minutes at a time, secondary to low back pain, for which there is no allowance in

the claim. Dr. Lutz provided his physical findings upon examination and indicated that, in his opinion, relator gave less than maximal effort during range of motion testing. Dr. Lutz concluded that relator's allowed conditions had reached maximum medical improvement ("MMI"), assessed a 37 percent whole person impairment, and opined that relator was capable of performing sedentary work with no overhead work with his left upper extremity.

{¶10} 5. An independent psychological evaluation was performed by Norman L. Berg, Ph.D. In his April 15, 2009 report, Dr. Berg opined that relator had mild impairment in his activities of daily living, social functioning, concentration, persistence and pace for task completion, and decompensation in work-like settings. Dr. Berg opined that relator's allowed psychological condition had reached MMI and that continued counseling would be helpful for maintenance purposes. Dr. Berg assessed a 20 percent impairment and opined that relator was capable of working with the following limitations: mild limitations in his ability to cope with routine stress in a work setting; ability to relate adequately with others in a work setting; ability to maintain attention and concentration; and no limitations in his ability to understand and follow simple verbal directions in a work setting.

{¶11} 6. Relator submitted a vocational report from Janet Chapman, CRC, dated May 30, 2009. Chapman concluded that, considering the barriers faced by relator, it did not appear that a return to work was possible. Specifically, she noted that because of his heavy Jamaican accent, communication was, at times, difficult. This was especially significant given that he could not perform heavy manual labor and many light-duty and sedentary duty jobs require a certain amount of communication with the public. Further, she noted that his limited education was also a barrier to reemployment.

{¶12} 7. There is evidence in the record that relator was contacted in 2004 for an evaluation of eligibility for vocational rehabilitation services. In the letter, dated January 5, 2004, relator was informed that he was not a feasible candidate for vocational rehabilitation based on his "decision not to participate in Vocational Rehabilitation Services at this time after [he] discussed [the] issue with [his] attorney."

{¶13} 8. Relator's application was heard before a staff hearing officer ("SHO") on June 29, 2009, and was denied. The SHO relied upon the medical reports of Drs. Lutz and Berg and concluded that relator was capable of performing at a sedentary work level and, from a psychological standpoint, relator could work with mild limitations in his ability to maintain attention and concentration, to relate adequately with others and in his ability to cope with routine stress is found in a work setting. Thereafter, the SHO analyzed the nonmedical disability factors and concluded:

> It is the finding of the Staff Hearing Officer that the Injured Worker is 52 years old. He last worked in any type of employment on 06/23/2003, which is the date the Injured Worker was injured in this claim. Further, it is the finding of the Staff Hearing Officer and as noted by Dr. Tosi during the course of his exam on 11/27/2007 that the Injured Worker is functionally illiterate. The Injured Worker self-reported on the IC-2 application that he last completed the ninth grade in Kingston, Jamaica and has not received a GED or any type of high school diploma. The Injured Worker also self-reported that he could not read, write, or do basic math very well. It is also the finding of the Staff Hearing Officer that the Injured Worker worked for 30 years from 1971 through 2001 as a street food vendor in Jamaica. In 2001 the Injured Worker migrated to the United States. He then worked as a general laborer, a stocker, a packer, a kitchen helper and food preparer, a delivery representative for a phone company and as a hot walker for a race track. The hot walker position required the Injured Worker to care for race horses.
>
> It is the finding of the Staff Hearing Officer that the Injured Worker's age is not a detriment nor a negative factor in his

> ability to attain sedentary employment or to train for and learn the skills necessary to obtain a sedentary level position. Also, the Injured Worker's varied work history is a positive factor that highlights his ability to learn new jobs skills and to work in different work environments. It is the finding of the Staff Hearing Officer that the Injured Worker's functional illiteracy is a negative factor in his ability to obtain sedentary employment. However, this factor is greatly outweighed by the fact that the Injured Worker has not participated in any type of rehabilitation program to negate his ability to not read, write, or do basic math very well. The evidence in the claim file notes that two letters were sent to the Injured Worker on 01/05/2004 and 03/12/2004 which found that the Injured Worker was not feasible to participate in a vocational rehabilitation program based upon his decision to not participate in such a program or his failure to contact and return phone calls in regards to participating in a rehabilitation program. Therefore, based upon the Injured Worker's failure to undergo appropriate and reasonable vocational rehabilitation to increase his residual functional capacity and/or obtain new marketable employment skills and to improve upon his ability to write, read, or do math is the basis for the denial of his application for permanent total disability application. The Injured Worker has presented no evidence that he is unable to participate in any type of vocational rehabilitation program.

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

Conclusions of Law:

{¶15} 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.

{¶16} 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. *Gay*. 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.

{¶17} In this mandamus action, relator contends that the commission abused its discretion in finding that he was not entitled to an award of PTD compensation. Specifically, relator challenges the commission's analysis of the nonmedical disability factors. Relator points out that both Dr. Murphy and Chapman opined that rehabilitation was not recommended. Dr. Murphy's report was prepared in January 2008 before relator filed his PTD application and Chapman's vocational report was prepared in May 2009. Relator asks this court to provide him relief pursuant to *Gay.* For the reasons that follow, this magistrate disagrees.

{¶18} In the present case, relator's work-related injury occurred in 2003. Relator has had no surgeries for his allowed conditions and has not worked since the date of injury.

{¶19} Relator was contacted regarding participation in vocational rehabilitation in early 2004; approximately six months after he was injured. At that time, relator indicated that he was not interested in participating in vocational rehabilitation and his file was closed. In *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, the Supreme Court of Ohio stated that it is reasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve their reemployment potential. The court noted that, although extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimant should no longer assume that a participatory rule, or lack thereof, will not be scrutinized.

{¶20} In the present case, there is evidence in the record from May 2008 and May 2009 from Dr. Murphy and Chapman indicating that, in their opinion, relator was not a candidate for vocational rehabilitation. However, vocational rehabilitation services were offered to relator in 2004 and relator has not submitted any evidence that would indicate that those services might not have benefited him had he elected to participate at that time. Further, relator has not presented medical evidence that he was unable to participate in rehabilitation services at that time. The magistrate is cognizant that relator had only been in the United States since 2001 and was functionally illiterate; however, relator had managed to obtain employment here since he arrived. One of his jobs involved delivering telephone books which necessitated an ability to read street addresses and follow a map. While it is impossible to say whether or not relator could

have been retrained to perform sedentary employment, the fact remains that he had the opportunity to attempt rehabilitation and refused. Relator asserts that his facts are analogous to the facts in *State ex rel. Hall v. Poff Plastics, Inc.*, 10th Dist. No. 08AP-34, 2008-Ohio-4421. Relator asserts that his age, in conjunction with his illiteracy, renders him permanently and totally disabled and entitled to *Gay* relief. This magistrate disagrees.

{¶21} In *Hall*, the claimant was 53 years of age, had a sixth grade education, and a work history that consisted of heavy labor. In an order which was found insufficient under *Noll*, the commission denied PTD compensation finding that claimant's age rendered him capable of retraining.

{¶22} In granting *Gay* relief, the Supreme Court of Ohio stated that age is immaterial if the claimant lacks the intellectual capacity to be retrained. For the reasons that follow, this magistrate finds *Hall* distinguishable from the facts of this case.

{¶23} Here, relator's work history is not confined to heavy labor. Relator has worked as a street vendor in Jamaica, a general laborer, a stacker, a packer, a kitchen helper/food preparer, a delivery representative for a phone company, and a hot walker for a race track. This work history required social interaction, the ability to take direction and learn on the job, as well as the ability to read a map and drive. Relator's illiteracy did not prevent him from obtaining and performing these jobs. The commission cited this varied work history as evidence of relator's ability to learn new job skills and work in different settings. The commission is the sole evaluator of the vocational evidence and is not required to rely on other vocational evidence in the record. Further, relator refused rehabilitation services in 2004 when there was no evidence that he would not benefit from

such services. It is not an abuse of discretion for the commission to hold relator accountable for this failure.

{¶24} As above noted, the SHO concluded that relator's age was not a detriment in his ability to attain sedentary employment or to train for and learn necessary skills. The SHO also found that relator's varied work history was a positive factor highlighting his ability to learn new job skills and work in different work environments. The SHO did find that relator's functional illiteracy was a negative factor in his ability to obtain sedentary employment. However, the SHO concluded that this negative factor was greatly outweighed by relator's failure to participate in any type of rehabilitation program in spite of the fact that he had been contacted to do so.

{¶25} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in denying him 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).