[Cite as *State ex rel. Mackey v. Ohio Dept. of Edn.*, 2010-Ohio-3522.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Cerena N. Mackey,	:	
Relator,	:	
v.	:	No. 09AP-966
Department of Education and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 29, 2010

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Cerena N. Mackey, filed an original action in mandamus requesting this court to issue a writ of mandamus requiring respondent, Industrial Commission of Ohio ("commission"), to vacate its order granting the request for reconsideration filed by her employer, Ohio Department of Education ("DOE"), and

ultimately denying her permanent total disability ("PTD") compensation, and to order the commission to find that she is entitled to 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.

{¶3} In brief, relator's claim for a work-related injury was allowed in 1985. Additional claims were allowed in 1998 and 2007. Relator retired from DOE in 2005 at the age of 65, after working for DOE for 36 years.

{¶4} In 2008, relator applied for PTD compensation. Following a hearing in March 2009, a staff hearing officer ("SHO") granted her application based on the allowed physical conditions.

{¶5} DOE filed a request for reconsideration by the full commission, arguing that the SHO had not considered whether relator's removal from the work force was voluntary. Following a hearing in August 2009, the commission determined that the SHO had made a mistake of law by failing to address the issue of voluntary retirement. On the merits of relator's application for PTD compensation, the commission denied compensation on the grounds that relator had abandoned the work force voluntarily. Alternatively, the commission also concluded that relator was capable of performing sedentary employment.

{¶6} On mandamus, relator argued to the magistrate that the commission erred by determining that the SHO made a mistake of law and abused its discretion by finding that relator abandoned the work force voluntarily. The magistrate addressed these

issues, concluded that the commission did not err, and denied relator's request for a writ.

{¶7} In her objection, relator again argues that the SHO did not make a mistake of law, as the parties made arguments and presented evidence regarding voluntary retirement at the hearing before the SHO. Although the SHO's order did not discuss the issue, relator contends that the SHO "obviously" rejected DOE's argument that relator retired voluntarily. Relator also contends that the commission abused its discretion in determining that relator retired voluntarily, as she presented evidence to the contrary. On both counts, we disagree.

{¶8} First, we agree with the magistrate's analysis of the SHO's order. If a claimant becomes permanently disabled after retiring, a voluntary retirement will preclude the payment of PTD compensation if the retirement was voluntary and constituted an abandonment of the entire work force. *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 215, 1994-Ohio-437. Here, although the parties discussed and presented evidence regarding whether relator retired voluntarily, the SHO did not discuss or decide the issue in the order. By failing to decide this issue, the SHO made a mistake of law. *State ex rel. Hayes v. Indus. Comm.*, 10th Dist. No. 01AP-1087, 2002-Ohio-3675 (concluding it was an abuse of discretion for an SHO to fail to address the issue of voluntary retirement where the employer had presented the issue; the full commission did not abuse its discretion by invoking its continuing jurisdiction to address the issue). See also *State ex rel. Chrysler Corp. v. Indus. Comm.* (1991), 62 Ohio St.3d 193, 196 (affirming this court's order

returning matter to commission where commission failed to address issue of voluntary retirement).

{¶9} Second, we also agree with the magistrate that the commission did not abuse its discretion by denying PTD compensation. Relator offered no medical evidence contemporaneous with her retirement to show that her retirement was involuntary. While relator offered the 2008 report of James E. Lundeen, Sr., M.D., in support of her application, other medical evidence showed that relator was not disabled permanently. The commission has discretion to determine questions of credibility and the weight to be given evidence. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 168-69. Here, the commission rejected relator's explanation for her retirement, considered the medical evidence and the lack of work restrictions prior to her retirement, and determined that relator retired voluntarily at age 65. Because there is some evidence to support the commission's decision to deny PTD compensation, we conclude that the commission did not abuse its discretion.

{¶10} Based on our independent review of this matter, we overrule relator's objection to the magistrate's decision. We adopt that decision, including the findings of fact and conclusions of law contained in it, as our own, except that we correct typographical errors in Findings of Fact Nos. 5 and 7. Accordingly, we deny the requested writ.

Objection overruled,
writ of mandamus denied.

KLATT and SADLER, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Cerena N. Mackey,	:	
Relator,	:	
v.	:	No. 09AP-966
Department of Education 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 March 26, 2010

Michael J. Muldoon, for relator.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} Relator, Cerena N. Mackey, 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 granting the request for reconsideration filed by her employer, Ohio Department of Education, and ultimately denying her permanent total

disability ("PTD") compensation, and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on May 1, 1985. Relator's claim was originally allowed for "[h]erniated disc, spinal stenosis L4-5." In 1998, relator's claim was allowed for the additional condition of "anxiety state." In 2007, relator's claim was additionally allowed for "L4 over L5 degenerative anterolisthesis; L5 radiculopathy, left."

{¶13} 2. Relator returned to work for the department of education in 1986 after undergoing back surgery, and relator continued to work without restrictions or limitations until she retired in 2005 at the age of 65. Relator testified that she took a regular retirement after being employed with the department of education for 36 years. Relator also testified that she was becoming increasingly irritable around people and was having some problems walking.

{¶14} 3. Relator filed her application for PTD compensation in 2008. Relator included the September 4, 2008 report of James E. Lundeen, Sr., M.D., in support. In his report, Dr. Lundeen provided his physical findings upon examination and concluded that, based on her allowed physical conditions, relator was permanently removed from the workforce and had no potential for retraining.

{¶15} 4. At the time of the hearing on her application for PTD compensation there was other medical evidence in the record as well. Specifically: (a) The March 24, 2006 report of Donald J. Tosi, Ph.D., who noted that relator had no formal psychological/psychiatric treatment following her injury until March 2006 when she

began treating with Dr. Friday. Dr. Tosi opined that relator's allowed psychological condition would not prevent her from returning to work in any capacity without restrictions. (b) The May 3, 2006 report of William W. Friday, Ph.D., who opined that relator suffered from major depression and general anxiety disorder. (c) The August 13, 2007 report of Gregory Z. Mavian, D.O., who recommended a course of physical therapy and stabilization of the lumbar spine, pain management and additional medications such as nerve membrane stabilizing agents. If she did not improve, Dr. Mavian indicated that he would assist in any way he could with a surgical option. (d) The October 17, 2007 report of relator's treating physician, Charles B. May, D.O. Dr. May indicated that a 2007 MRI showed worsening of relator's back condition and agreed that she would benefit from epidural injections and physical therapy. (e) The October 29, 2008 report of Gordon Zellers, M.D. Dr. Zellers provided his physical findings upon examination and opined that relator was capable of returning to the workforce with the following restrictions: sedentary to limited light duty labor activities only; ten pound maximum lifting limit on an occasional basis as tolerated; no prolonged sitting, standing or ambulating; the ability to change body positions on an intermittent basis; and that bending activities be performed only occasionally, as tolerated; no squatting; repetitive activities involving the left lower extremity on an occasional basis, as tolerated; no climbing; the ability to use her TENS unit as needed; and that relator refrain from performing safety-sensitive work activities while under the influence of sedative-type medications. (f) The December 6, 2008 report of Marianne N. Collins, Ph.D., who opined that relator's allowed psychological condition had reached maximum medical improvement ("MMI"), assessed a 12 percent whole person impairment, and

concluded that relator could return to work with no limitations. (g) The December 23, 2008 report of James H. Rutherford, M.D. After identifying the medical reports he reviewed and providing his physical findings upon examination, Dr. Rutherford opined that relator's allowed physical conditions had reached MMI, assessed a 22 percent whole person impairment, and concluded that relator could return to sedentary work activities with the additional restrictions of no stooping or bending below knee level for regular work activity, and no climbing of ladders or crawling for work activity.

{¶16} 5. Relator's application was heard before a staff hearing officer ("SHO") on March 18, 2009. A review of the transcript from that hearing demonstrates that relator's retirement from her employment with the department of education was discussed and her employer argued that the retirement was voluntary. The SHO relied on the medical report of Dr. Lundeen and awarded relator PTD compensation beginning July 25, 2008, the date of Dr. Lundeen's report. Because the SHO determined that relator was permanently totally disabled based solely on the allowed [physical] condition, the SHO did not discuss her allowed psychological condition nor the nonmedical disability factors. Further, the SHO did not discuss relator's retirement and its possible impact on her PTD application.

{¶17} 6. The employer filed a request for reconsideration arguing that the SHO failed to consider whether relator had voluntarily removed herself from the workforce.

{¶18} 7. In an interlocutory order mailed April 25, 2009, the commission [set] the employer's request for hearing.

{¶19} 8. The request for reconsideration was heard before the commission on August 6, 2009. At that time, the commission found that the employer had met its

burden of proving that the March 18, 2009 SHO's order contained a clear mistake of law because of the failure to address the employer's argument that relator had voluntarily abandoned the workforce by retiring. Thereafter, the commission denied relator's request for PTD compensation. First, the commission found that relator had voluntarily abandoned the workforce:

> The Commission finds that the Injured Worker retired on 01/20/2005, at the age of 65 after working over 36 years for the instant Employer. This was not a disability retirement, but a regular retirement based upon her age and years of service. Therefore, the Commission finds that the Injured Worker voluntarily abandoned the entire job market and is not entitled to receive permanent and total disability compensation.
>
> The Injured Worker testified she retired due to the allowed conditions in her claim. Specifically, the Injured Worker stated that pain related to her allowed physical condition caused her to be irritated and agitated and affected her job performance. Consequently, she retired.
>
> The Commission finds no medical evidence to support the Injured Worker's testimony and does not find the Injured Worker credible regarding the reason for her retirement. There is no contemporaneous medical evidence that documents the Injured Worker had severe pain related to the allowed physical condition or that she had any symptoms related to the allowed psychological condition. The file contains no medical evidence from 03/26/2001 until 05/17/2005. Both the 2001 and 2005 reports are related to an award of permanent partial disability, neither report from the physician of record relates to treatment. Further, the Injured Worker informed Seth Vogelstein, D.O., during her examination on 04/05/2006, that she retired in 2005 because of her age of 65. Injured Worker continued to perform her routine work duties without any restrictions or limitations until she retired in January, 2005, at the age of 65. Further, the Injured Worker stated that the first time she began to receive psychiatric treatment was in March, 2006, at the recommendation of her attorney. No mention is made of retirement due to claim related disability.

{¶20} In the alternative, the commission also determined that relator was capable of performing some sustained remunerative employment. Specifically, the commission relied on the reports of Drs. Rutherford, Tosi, and Collins, and found that relator was capable of performing sedentary employment with the additional restrictions noted by Dr. Rutherford and no restrictions related to the allowed psychological condition. The commission did find that relator's age of 69 years was a negative factor; however, the commission noted her high school diploma and associate's degree in accounting and concluded that her education was a positive factor. Further, the commission noted her 40-year employment history that included data entry, computer operation, including computer technical assistance and rebuilding hardware, and her ability to supervise up to ten people. The commission determined that these skills would be a positive asset for relator regarding entry level work, skilled or unskilled.

{¶21} 9. Relator disagreed with the commission's determination and filed this mandamus action.

Conclusions of Law:

{¶22} 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.

{¶23} 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.

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

{¶25} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

> R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, *e.g., State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶26} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(d) provides:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶27} Paragraph two of the syllabus of *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 1994-Ohio-437, provides:

> An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is

> voluntary and constitutes an abandonment of the entire job market. * * *

{¶28} In *State ex rel. Kinnear Div., Harsco Corp. v. Indus. Comm.*, 77 Ohio St.3d 258, 266, 1997-Ohio-40, the court stated: "In order for retirement to preclude PTD compensation, the retirement must be taken before the claimant became permanently and totally disabled, it must have been voluntary, and it must have constituted an abandonment of the entire job market."

{¶29} In the present case, a review of the transcript from the SHO's hearing, reveals that the employer did raise the issue of relator's retirement and whether she had voluntarily abandoned the workforce. In spite of the fact that the issue was raised and there was evidence in the record from which the SHO could have made a determination, the SHO failed to address the issue. At oral argument, counsel acknowledged that the transcript contains 15 references to relator's retirement. Because the SHO did not discuss this issue in the order, relator asserts that the SHO obviously determined that her retirement was not voluntary. This constituted a clear mistake of law.

{¶30} Because the SHO failed to address the issue of relator's retirement and whether it constituted a voluntary abandonment of the workforce, the order granting PTD compensation contained a clear mistake of law. The commission properly exercised its continuing jurisdiction in order to correct that error. Because there is evidence in the record from which the commission could conclude that relator's retirement was not related to her allowed conditions and because relator failed to present contemporaneous medical evidence showing that her retirement was related to her allowed conditions, the commission did not abuse its discretion in finding that

relator's retirement constituted a voluntary abandonment of the workforce and denying her PTD compensation on that ground.

{¶31} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by exercising its continuing jurisdiction and granting the employer's motion for reconsideration. Further, relator has failed to demonstrate that the commission abused its discretion in finding that her retirement constituted a voluntary abandonment from the workforce which precluded her receipt of PTD compensation. As such, 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).