

[Cite as *State ex rel. Lawson v. Indus. Comm.*, 2010-Ohio-4604.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Kenneth Lawson,	:	
	:	
Relator,	:	No. 09AP-1190
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio et al.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on September 28, 2010

Spears & Associates Co., L.P.A., and David R. Spears, for relator.

Richard Cordray, Attorney General, and Latawnda N. Moore, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Kenneth Lawson, 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 denying relator permanent total disability ("PTD") compensation, and to enter a new order granting said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission did not abuse its discretion in denying relator PTD compensation. Relator filed objections to the magistrate's decision and the commission filed a memorandum contra to relator's objections. This cause is now before the court for a full, independent review.

{¶3} Before the magistrate, relator argued that the commission abused its discretion by denying PTD in the following three ways: (1) by finding that he had not engaged in meaningful vocational rehabilitation, (2) by finding that his condition worsened due solely to the aging process, and (3) by finding that he is currently capable of performing sustained remunerative employment. The magistrate rejected all three arguments and recommended that this court deny the requested writ of mandamus.

{¶4} In his objections, relator first contends the magistrate ignored case law from this court, *State ex rel. Sears Roebuck & Co. v. Davy*, 10th Dist. No. 09AP-272, 2010-Ohio-87, holding that PTD compensation can be awarded where there is no participation in vocational rehabilitation if such participation would be a vain act. *Id.*, ¶12. We note that relator bears the burden of proving that any attempt at vocational rehabilitation would be in vain. *Id.*, ¶17. Relator relies on his attempted return to work between 2004 and 2006, when he worked in his son's bakery performing various light-duty activities such as sweeping floors, emptying trash, and driving a delivery truck, as proof that participation in

vocational rehabilitation would have been a vain act. Specifically, relator contends that since the goal of vocational rehabilitation is to return to work, and he accomplished that goal without the need for vocational rehabilitation, participation in vocational rehabilitation would have been in vain. However, as noted by the commission, relator's argument ignores the fact that an essential part of vocational rehabilitation is acquiring job training and remedial education in order to improve reemployment potential that simply could not be gained from working as a janitor/deliveryman at his son's bakery. Moreover, relator's argument does not account for the fact that he did not pursue vocational rehabilitation during the 18-year period between his 1986 injury and his attempted return to work in 2004. Thus, even if we were to conclude that his attempt at reemployment in 2004 excuses his failure to pursue vocational rehabilitation after that point, it does not justify his failure to do so for the previous 18 years, when he was younger and had greater rehabilitative potential.

{¶5} Relator's second objection essentially reargues his contention that the commission improperly determined his condition worsened over time due solely to the natural aging process. We agree with the magistrate that the commission's reference to case law indicating that PTD compensation cannot be awarded solely on the basis that the injured worker has grown old cannot be construed to indicate that the commission believes that relator's allowed conditions had worsened due solely to the natural aging process or that the commission failed to recognize that his physical and recently allowed psychological condition had worsened due to the allowed conditions. As the magistrate noted, the commission's statement specifically referred to relator's failure to pursue vocational rehabilitation from 1986 to 2006 despite the medical and intellectual ability to

do so, and that nothing in the commission's order indicates that the commission misapplied the law or misinterpreted the medical evidence.

{¶6} Relator's final objection contends the magistrate failed to consider the impairments imposed by relator's allowed psychological condition in concluding that the commission did not abuse its discretion in finding relator to be capable of sustained remunerative employment. Although the magistrate's findings of fact note Dr. Wilson's examination of relator's allowed psychological condition and her conclusion that relator is capable of sustained remunerative employment with certain restrictions, the magistrate's conclusions of law do not address the additional impairments imposed by relator's psychological condition. However, the commission discussed relator's psychological impairment in its order, expressly relying upon the report of Dr. Wilson in concluding that relator is capable of performing sustained remunerative employment. Relator argues that the commission abused its discretion in relying on Dr. Wilson's psychological report because the restrictions contained therein – reduced work hours, limited interaction with the public, and increased supervision depending upon the complexity of the work task – foreclose him from performing any type of sustained remunerative employment.

{¶7} Contrary to relator's contention, the restrictions imposed by Dr. Wilson do not render relator incapable of performing sustained remunerative employment. As noted by the commission, the restrictions are imposed so that relator may successfully return to work, and, in that way, are no different than the sedentary restrictions imposed by Dr. Fisher. Moreover, relator's argument ignores the balance of Dr. Wilson's report wherein she found relator's general knowledge, abstract reasoning skills and social comprehension/judgment to be adequate given his age, educational background, and

occupational history. The commission relied on this aspect of Dr. Wilson's report to conclude that relator is, consistent with his age and normal limitations associated with his age, capable of performing sustained remunerative employment from a psychological standpoint. We find that the commission did not abuse its discretion when it relied on Dr. Wilson's psychological report and determined that relator's psychological condition does not prevent him from performing sustained remunerative employment. The magistrate's decision is modified accordingly.

{¶8} Following an independent review of the evidence, we find that the magistrate has properly determined the pertinent facts and applied the relevant law to those facts. We adopt the magistrate's decision, including the findings of fact and the conclusions of law, as modified, contained therein.

{¶9} Accordingly, relator's objections to the magistrate's decision are overruled. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

KLATT and McGRATH, JJ., concur.

A P P E N D I X
 IN THE COURT OF APPEALS OF OHIO
 TENTH APPELLATE DISTRICT

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Kenneth Lawson,	:	
Relator,	:	
v.	:	No. 09AP-1190
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

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

Rendered on May 26, 2010

Spears & Associates Co., LPA, and David R. Spears, for relator.

Richard Cordray, Attorney General, and Latawnda N. Moore, for respondent Industrial Commission of Ohio.

I N M A N D A M U S

{¶10} Relator, Kenneth Lawson, has filed this original action requesting 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

on grounds that relator had not attempted rehabilitation or retraining prior to 2006, and ordering the commission to find that relator is entitled to that compensation.

Findings of Fact:

{¶11} 1. Relator sustained a work-related injury on December 4, 1986. Relator's workers' compensation claim was originally allowed for "Backache Nos[;] Lumb/Lumbosac Disc Degen." In an order dated January 5, 2007, relator's claim was additionally allowed for the following two conditions: "Acute Intervertebral Disk Syndrome[;] L4-5 L5-S1 Arthritis Agg Pre-Ex." Following a hearing on January 27, 2009, a staff hearing officer ("SHO") additionally allowed relator's claim for the following psychological condition: "Depressive Disorder."

{¶12} 2. Relator was 47 years old at the time of his injury and he did not return to work following his injury. In October 1987, relator began receiving Social Security disability payments.

{¶13} 3. Relator received a period of temporary total disability compensation and received a 40 percent permanent partial disability award payment.

{¶14} 4. Relator's first application for PTD compensation was filed on February 13, 2006. Relator's application was denied in an order dated June 28, 2006 after the SHO found that relator was able to return to sustained remunerative employment at a sedentary work level.

{¶15} 5. Following the denial of his first application for PTD compensation, relator sought to participate in vocational rehabilitation for the first time. Because relator had been out of the work market for 20 years, his pre-injury employer was no longer in business, and relator indicated that he had no transferrable skills, ambulates with a cane

and can only drive for periods of less than one-half hour, it was determined that relator was not a candidate for vocational rehabilitation services.

{¶16} 6. Relator's second application for PTD compensation was filed on May 24, 2007.

{¶17} 7. Following a hearing before an SHO on February 12, 2008, relator's second application for PTD compensation was denied. The SHO relied on the December 11, 2007 report of Dr. Koppenhoefer who concluded that relator had an eight percent whole person impairment and was capable of performing sedentary and light-duty work activities providing he avoid repetitive bending and stooping activities. The SHO listed specific unskilled, entry-level jobs which fell within relator's physical restrictions and for which he would not need to have any transferrable skills or rehabilitation programming. The SHO also noted that relator's age of 68 years was overall viewed as a positive vocational asset, that his high school education was also a positive vocational asset, and that, overall, his work history was a positive vocational asset. Further, the SHO noted that relator was capable of driving for his own transportation. As such, the SHO denied relator's application for PTD compensation.

{¶18} 8. Following a hearing before an SHO on January 27, 2009, relator's claim was additionally allowed for depressive disorder.

{¶19} 9. Relator inquired about vocational rehabilitation with the Bureau of Workers' Compensation ("BWC"). However, in a letter dated March 19, 2009, the BWC determined that relator was not a feasible candidate for vocational rehabilitation services because his treating physician had indicated that he had permanent restrictions indicating that the total number of hours per day and per week was " '0' hours '0' days."

{¶20} 10. Relator filed his third application for PTD compensation on May 20, 2009. In support of his application, relator submitted the March 12, 2009 report of his treating physician, Neil R. DuFore, D.C., who opined that relator was permanently and totally disabled because he was unable to sit for any length of time, could not stand, stoop, bend, lift, or stretch without pain, could flex his lumbar spine against gravity, had a permanent loss of lumbar range of motion, and progressive motor weakness.

{¶21} 11. Relator also submitted the February 20, 2009 report of Wendy M. Blevins who opined that relator is permanently and totally disabled as a direct result of his allowed psychological conditions.

{¶22} 12. An independent medical examination was conducted by E. Gregory Fisher, M.D. In his June 30, 2009 report, Dr. Fisher identified the medical records which he reviewed, provided his physical findings upon examination, concluded relator's allowed physical conditions had reached maximum medical improvement, assessed an eight percent whole person impairment and concluded that relator was capable of performing sedentary work activity noting that he was able to drive a car, go grocery shopping, mow the lawn, and perform his daily activities.

{¶23} 13. Relator was also examined by Kimilee Y. Wilson, Psy.D. for his allowed psychological condition. In her July 7, 2009 report, Dr. Wilson identified the medical records reviewed, provided her findings following the mental status examination, concluded that relator's allowed psychological condition had reached maximum medical improvement and assessed an eight percent impairment for his allowed psychological condition. She concluded that relator was capable of performing work activity with the following restrictions:

Mr. Lawson's occupational activity capacity is mildly influenced by his depressive state. His primary limitations are likely due to his physical limitations and chronic pain condition. Nevertheless, his depressive symptoms, most notably his social withdrawal, irritability, diminished concentration, and lack of energy, would limit his ability to succeed in sustained, remunerative employment without modifications, such as reduced work hours, limited interaction with the public, and increased supervision depending on the complexity of his work tasks.

{¶24} 14. Relator's third application for PTD compensation was heard before an SHO on August 26, 2009 and was denied. The SHO specifically noted that relator was 67 years old when he first applied for PTD compensation in 2006 and, at that time, there was no evidence that he had ever attempted to participate in a rehabilitation program or otherwise attempted to return to work. The SHO also noted that relator had not worked since 1986 and began receiving Social Security disability income in 1987. The SHO did note that, after 2006, relator applied for rehabilitation services; however, the SHO noted "it is certainly within the realm of general knowledge that a 67 year old man who has not been employed for over 20 years is not a likely candidate for successful rehabilitation services." Because of his failure to seek rehabilitation services from 1986 through 2006, the SHO found that relator's "subsequent applications for rehabilitation services are not persuasive or indicative of a good faith attempt to return to work," but that, "in 1986 when he was only 45 years of age and within five years or so after the injury, there was a realistic chance that the Injured Worker could have been returned to work, but there is no evidence that the Injured Worker during these years made any such attempt at rehabilitation or retraining to return to work." Concerning relator's current physical and psychological capacity for work the SHO relied on medical reports of Drs. Fisher and

Wilson and concluded that relator was capable of performing sedentary work activities with the psychological restrictions noted by Dr. Wilson. Thereafter, the SHO discussed the nonmedical disability factors:

The Injured Worker is now 70 years of age, so he is unlikely to return to work, but he was only 45 years of age when injured. He only has experience as a general laborer, but he has a high school education and no evidence of a cognitive deficiency. It is concluded that if he was so motivated that [he] could have returned to work. Even now, at age 70, there are jobs consistent with his age, that the Injured Worker would still be able to perform. An ideal job for the Injured Worker would be working at a retirement home, monitoring the front desk, arranging transportation pick up for residents or, since he is still able to drive, driving the residents to their appointments.

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

Conclusions of Law:

{¶26} 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.*, 69 Ohio St.3d 693, 1994-Ohio-95. 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*, 68 Ohio St.3d 315, 1994-Ohio-296.

{¶27} Relator raises three issues: (1) whether the commission abused its discretion when it held him accountable for his failure to attempt any rehabilitation from 1986 to 2006 since relator was unaware of his requirement to pursue rehabilitation; (2)

whether the commission abused its discretion by finding that relator's condition had simply worsened due to the aging process; and (3) whether the commission abused its discretion by finding that relator was currently capable of performing some sustained remunerative employment.

{¶28} The magistrate finds: (1) the commission did not abuse its discretion when it held him accountable for his 20-year failure to pursue any vocational rehabilitation; (2) the commission did not deny his application based upon a finding that his condition had simply worsened due to the aging process; and (3) the commission did not abuse its discretion by finding, in the alternative, that relator was capable of performing some sustained remunerative employment.

{¶29} Turning to the first issue, the Supreme Court of Ohio has repeatedly addressed the obligation of a PTD claimant to pursue opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525, 1995-Ohio-291; *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 1996-Ohio-200; *State ex rel. Wood v. Indus. Comm.*, 78 Ohio St.3d 414, 1997-Ohio-201; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; *State ex rel. Cunningham v. Indus. Comm.*, 91 Ohio St.3d 261, 2001-Ohio-35.

{¶30} In *B.F. Goodrich*, the court states at 529:

The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forgo retraining opportunities that could enhance re-employment opportunities. An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

{¶31} In *Wilson*, the court states at 253-54:

We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable 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 reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should no longer assume that a participatory role, or lack thereof, will go unscrutinized.

The *Wilson* court did recognize that extenuating circumstances can excuse a claimant's nonparticipation in rehabilitation or retraining.

{¶32} In *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, this court determined that the commission abused its discretion in its denial of PTD compensation by holding the claimant, Glenn O. Slater, accountable for his failure to explore vocational rehabilitation and training indicating that Slater had undergone chemotherapy and a tracheotomy for his nonindustrial carcinoma.

{¶33} As this court noted in *Slater*, nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. Thus, if the nonindustrial carcinoma prevented Slater from pursuing vocational rehabilitation, the failure to pursue rehabilitation cannot be used to defeat his PTD application.

{¶34} In the present case, relator's only excuse for his failure to attempt any vocational rehabilitation or retraining is that he did not know that he should do so or that his failure to do so could be held against him later. However, relator has not cited a single case to support his argument that his ignorance of the law constitutes an

extenuating circumstance which the commission should have found excused him from seeking rehabilitation or retraining. This magistrate likewise can find no authority in the law requiring the commission to find excusable neglect under these circumstances.

{¶35} In *Bowling*, the commission denied PTD compensation to Earl Bowling based, in large part, on Bowling's failure to pursue vocational rehabilitation. Bowling was 47 years old in 1974 when he last worked; was 66 years old when he applied for PTD compensation, had a fifth grade education, and work experience as a machine operator. The commission relied on medical evidence to find Bowling currently capable of light to sedentary work. In denying his application, the commission stressed that Bowling had 19 years in which to improve his educational skills and retrain for light or sedentary work.

{¶36} In this case, relator was 47 years old when he last worked, 70 years old at the time he filed this PTD application, had a high school education, and work experience as a general laborer. The commission relied on medical evidence to find relator currently capable of sedentary work. In denying his application, the commission held him accountable for his 20-year failure to seek to improve his opportunities of reemployment. These facts are very similar to the facts in *Bowling*.

{¶37} Relator also argues that, even if he would have engaged in vocational services between 1986 and 2006 and successfully obtained employment, at this time it is obvious that his failure to continue working is due to the allowed conditions in the claim. However, the commission determined that relator was currently capable of performing some sustained remunerative employment. As such, the commission's

determination that he could have sought to improve his reemployment potential is relevant.

{¶38} Relator argues further that PTD compensation should be awarded because he is receiving Social Security disability payments. As noted in the findings of fact, relator applied for and began receiving Social Security disability benefits within a year of his date of injury; however, the standard for awarding Social Security disability compensation and PTD compensation are different. This court has recognized that the commission's guidelines for assessing disability are different from those of the Social Security Administration, and the commission is not required to follow the federal agency's guidelines. See *State ex rel. Bryson v. GAC Merchandising*, 10th Dist. No. 03AP-650, 2004-Ohio-3723, affirmed at 106 Ohio St.3d 40, 2005-Ohio-3556; *State ex rel. Alley-Yazell v. Trim Systems, Inc.*, 10th Dist. No. 05AP-1107, 2006-Ohio-5775.

{¶39} Relator also contends that the commission abused its discretion when, in listing an alternative reason for denying his application, the commission actually found that he was capable of performing some sustained remunerative employment such as "working at a retirement home, monitoring the front desk, arranging transportation pick up for residents or, since he is still able to drive, driving the residents to their appointments." Relator also objects to the SHO's statement that PTD compensation is not awarded solely on the basis of growing old. For the reasons that follow, the magistrate finds that these arguments lack merit as well.

{¶40} The commission relied on the June 30, 2009 report of Dr. Fisher to find that relator was capable of performing some employment at the sedentary level. However, relator argues that Dr. Fisher's report does not constitute some evidence

upon which the commission could rely because he had informed Dr. Fisher that he "uses a riding lawnmower to mow his lawn * * * goes grocery shopping with his wife * * * [and] can sit for approximately 30 minutes, stand and walk for approximately 30 minutes before resting." Relator contends that the information he provided Dr. Fisher establishes that he is actually not capable of performing at a sedentary work level.

{¶41} Sedentary work is defined in Ohio Adm.Code 4121-3-34(B)(2)(a) as follows:

"Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

{¶42} Based upon his physical examination of relator, Dr. Fisher concluded he could perform work activities within the above-noted limitations. As such, Dr. Fisher found relator capable of performing a full range of sedentary work. The fact that relator informed Dr. Fisher that he could only sit for approximately 30 minutes apparently before changing positions and that he could only stand and walk for approximately 30 minutes before resting is both subjective rather than objective and is not outside the scope of the definition of sedentary work. Because relator has not identified any defect in Dr. Fisher's report, the magistrate concludes that the commission did not abuse its discretion in finding that that report was some evidence that relator could perform at a sedentary work level.

{¶43} Lastly, while the commission did note in its order that PTD compensation is not awarded solely on the basis that an injured worker has grown older, the magistrate disagrees with relator's argument that this statement indicates that the commission believed that his allowed conditions had simply worsened over time and failed to recognize that his physical and recently allowed psychological condition had worsened due to the allowed conditions. Nothing in the commission's order supports relator's contention that the commission ever made this finding. While the commission did note the applicable case law indicating that PTD compensation is not awarded solely on the basis that the injured worker has grown old, the statement was specifically made in reference to relator's failure to pursue any vocational rehabilitation from 1986 to 2006 despite the medical and intellectual ability to do so. Nothing in the commission's order indicates that the law was misapplied or that the commission misinterpreted his medical evidence.

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