

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Brad A. Johnson,	:	
Relator,	:	
v.	:	No. 12AP-304
The Perfection Group, Inc. and	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on February 21, 2013

Clements, Mahin and Cohen, L.P.A., Co., and Edward Cohen, for relator.

Benjamin, Yocum & Heather, LLC, and Bradford C. Weber, for respondent The Perfection Group, Inc.

Michael DeWine, Attorney General, and *Lydia M. Arko*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Brad A. Johnson, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied his application for permanent total disability ("PTD")

compensation and ordering the commission to grant him that compensation or conduct a new hearing.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(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 hereto. The magistrate concluded the commission did not abuse its discretion by relying on the vocational report of Brett J. Heath and in denying relator's application for PTD compensation. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

I. RELATOR'S OBJECTION

{¶ 3} Relator has filed an objection to the magistrate's decision as follows:

The Magistrate erred in denying Relator's requested writ of mandamus since the disputed Commission order was not based on "some evidence."

{¶ 4} In his objection, relator asserts three arguments: (1) the magistrate erred in denying the requested writ of mandamus because Mr. Heath's vocational evaluation did not consider the allowed conditions from relator's 2000 workers' compensation claim, (2) the magistrate erred in denying the requested writ of mandamus because Mr. Heath's vocational assessment improperly integrated a medical report which had been expressly rejected by the commission, and (3) the magistrate erred in denying the requested writ of mandamus because Mr. Heath's vocational assessment did not conclude that relator could engage in full-time sustained gainful employment.

{¶ 5} The arguments raised in relator's objection are essentially the same as those raised to and addressed by the magistrate. While relator continues to challenge Mr. Heath's vocational report, for the reasons stated in the magistrate's decision, we reject relator's claim that Mr. Heath's vocational assessment does not constitute some evidence upon which the commission could rely. For the reasons stated in the magistrate's decision, we do not find merit to relator's objection.

{¶ 6} Accordingly, relator's objection to the magistrate's decision is overruled.

II. CONCLUSION

{¶ 7} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly

determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objection to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objection overruled;
writ of mandamus denied.*

TYACK and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Brad A. Johnson,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-304
	:	
The Perfection Group, Inc. and	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on October 30, 2012

Clements, Mahin and Cohen, L.P.A., Co., and Edward Cohen, for relator.

Benjamin, Yocum & Heather, LLC, and Bradford C. Weber, for respondent The Perfection Group, Inc.

Michael DeWine, Attorney General, and Lydia M. Arko, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶8} Relator, Brad A. Johnson, 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 relator's application for permanent total disability ("PTD") compensation and ordering the commission to grant him that compensation or conduct a new hearing.

Findings of Fact:

{¶9} 1. Relator has two separate workers' compensation claims. The first claim, filed in 2000, is allowed for: "Bilateral carpal tunnel syndrome."

{¶10} 2. Relator underwent carpal tunnel decompression surgery for both hands in 2003.

{¶11} 3. The second claim, filed in 2008, is allowed for the following conditions:

Sprain of neck; sprain thoracic region; substantial aggravation of pre-existing cervical spondylitic degenerative disc disease at C5-6 and C6-7; sprain lumbar region; herniated disc at L3-4.

{¶12} 4. In 2008, relator underwent the following surgical procedure for his neck:

Microscopic anterior cervical discectomy and fusion C5-C6 and C6-C7 with back bone and anterior cervical Zephyr plate, cloward technique.

{¶13} 5. Relator was examined by Judith Wachendorf, M.D. In her July 15, 2010 report, Dr. Wachendorf noted the allowed conditions in relator's 2008 claim, identified the medical records which she reviewed, and provided her physical findings upon examination. Thereafter, Dr. Wachendorf opined that the current treatment relator was receiving appeared to be necessary and appropriate, there were no additional diagnostic or treatment services to be considered, and the allowed conditions had reached maximum medical improvement ("MMI"). Dr. Wachendorf completed a C-143 form, DEP Physician's Report of Work Ability. Dr. Wachendorf opined that relator could lift/carry up to ten pounds occasionally, that he could push/pull occasionally provided that he not lift more than five pounds with his right hand, and relator could stand/walk/sit occasionally with certain restrictions. Dr. Wachendorf noted restrictions for relator's left hand indicating that he could not lift more than two pounds, he engage in no repetitive activities, he not work with hot or cold substances, and he not work with vibrating tools. She also indicated that relator could not perform any overhead work and could not lift above shoulder level.

{¶14} 6. Because his allowed conditions had been found to have reached MMI, relator was evaluated for vocational rehabilitation.

{¶15} 7. Relator was referred to NovaCare for a functional capacity evaluation ("FCE"). The evaluator administered the KASCH Step Test¹ to predict relator's functional aerobic capacity. Although relator was unable to complete the testing, NovaCare concluded as follows:

The results of this evaluation indicate that Brad Johnson is capable of functioning within the SEDENTARY Physical Demand Category according to the US Department of Labor. However, due to his very limited sitting, standing, and walking tolerance, it is unlikely that he would tolerate an 8 hour work day.

Brad Johnson demonstrated the ability to occasionally lift up to 10 lbs. floor to waste, 7 lbs. waist to shoulder, carry up to 10 lbs., push 25 lbs. of force, and pull 25 lbs. of force. For positional tolerance see the chart on page 2. Brad Johnson failed to complete the Kasch Step Test at a level that can accurately predict his functional aerobic capacity.

Deficits identified during testing include limited [range of motion] and strength of BUE, BLE, cervical and lumbar spine; antalgic gait pattern; very limited sitting, standing, and walking tolerance.

Brad Johnson demonstrated consistent performance throughout testing. This, in combination with physiological responses (heart rate and respiratory rate), movement and muscle recruitment patterns both aware and unaware of observation, indicates that the results of this evaluation can be considered to be an accurate representation of Brad Johnson's functional abilities.

(Emphasis sic.)

{¶16} 8. After receiving the results of the FCE, relator's treating physician Doug R. Miles, M.D., authored a report dated September 23, 2010. Based on the results

¹ The procedure involves stepping on and off a 12 inch high bench for 3 minutes. The participant steps up with one foot and then the other, steps down with one foot followed by the other foot. At the end of the test, the participant's heart rate is checked and is used to measure their cardiovascular endurance. Cardiorespiratory Fitness Recovery Rate <http://www.livestrong.com/article/358594-cardiorespiratory-fitness-recovery-rate/> (assessed Sept. 7, 2012.)

of the FCE, Dr. Miles recommended that relator apply for both Social Security Disability benefits and temporary total disability ("TTD") based on his chronic neck and back disorders. Dr. Miles also indicated that relator would follow-up with a pain specialist, Dr. John Kelly, in hopes that his future pain could be managed to the point where he would be able to obtain work. Dr. Miles concluded that relator was totally disabled at that point and time based on chronic neck and back disorders.

{¶17} 9. In a closure report dated September 28, 2010, relator's vocational case manager summarized the findings as follows:

[P]hysical therapist indicated that Mr. Johnson did not demonstrate the ability to tolerant [sic] an 8-hour work day, maximum stand, walk and sit was 15 minutes at a time. Lifting was at 10 lbs, Push/Pull was 20 lbs. Mary, physical therapist indicated that Mr. Johnson was less then the sedentary physical demand level.

* * *

Dr. Miles, POR reviewed the results of the FCE, per conversation it was determined that with the limited physical restrictions and pain levels that Mr. Johnson may not be feasible for employment at this time. * * * It was agreed that if pain management could relieve some of Mr. Johnson's symptoms that he might be feasible for employment options in the future. Dr. Miles indicated that if pain decreases in the future that a referral vocational rehabilitation can be made, to assist Mr. Johnson in seeking employment options within his physical restrictions. Mr. Johnson received permanent restrictions placed by Dr. Miles, POR. Permanent restrictions include: No more then 4 hours per day, occasional lifting 10 lbs, occasional push/pull 25 lbs, sitting, standing and walking 15 minutes at a time, no bending, twist/turn. Per staffing with MCO and DMC the case manager was instructed to complete a Transferable Skills Analysis and Labor Market survey to determine any feasible employment options, considering physical restrictions.

The Transferable Skill[s] Analysis and Labor Market information was completed, identifying three possible employment options within Mr. Johnson['s] restrictions. Surveillance-System Monitor was the only job out of three that had potential in the current labor market.

{¶18} 10. In a letter dated September 29, 2010, relator was informed that his rehabilitation file was being closed for the following reasons: "Not Feasible for Vocational Rehabilitation Services."

{¶19} 11. Relator filed his application for PTD compensation on October 12, 2010. According to his application, relator was 42 years old, had filed for Social Security Disability benefits, graduated from high school, pursued masonry training after high school, could read, write, and perform basic math.

{¶20} 12. The commission had relator examined by Richard T. Sheridan, M.D. In his November 16, 2010 report, Dr. Sheridan correctly identified the conditions allowed in the 2008 claim, provided his physical findings upon examination, concluded that relator had a 16 percent whole person impairment and that he was capable of performing light work.

{¶21} 13. Relator filed a motion asking to depose Dr. Sheridan on grounds that a substantial disparity existed between his report and the report of Dr. Miles and that there was significant discrepancies in Dr. Sheridan's summary evaluation and that reported by relator.

{¶22} 14. In a compliance letter mailed January 11, 2011, the commission stated:

The Injured Worker's representative argues that the report of Dr. Richard Sheridan is so inconsistent with other medical in file that his report is fatally flawed and as such unreliable.

The Hearing Officer agrees that the differences in the evidence in file cannot be adequately and fairly addressed by the hearing process. The Injured Worker's request for a new exam is a reasonable one.

This claim is referred back to the medical section to schedule a new Permanent Total Disability exam with a different physician.

It is further the finding of the Hearing Administrator that the parties must adhere to the provisions of this compliance letter.

{¶23} 15. As a result, a new medical examination was ordered and relator was examined by E. Gregory Fisher, M.D. In his January 27, 2011 report, Dr. Fisher

correctly identified the allowed conditions in both of relator's claims and identified the medical records which he reviewed. Dr. Fisher noted that relator states that "both hands are 'doing fine' and he is able to use each hand on a daily basis with no restrictions or limitation."

{¶24} Thereafter, Dr. Fisher provided his physical findings upon examination, concluded that relator had reached MMI, found that relator had a 0 percent whole person impairment arising from the bilateral carpal tunnel syndrome and a 34 percent whole person impairment arising from the remaining allowed conditions. Dr. Fisher opined that relator was capable of performing at a sedentary work level.

{¶25} 16. An employability assessment was conducted by Brett J. Heath, a vocational specialist. Mr. Heath identified and discussed the records which he reviewed. Mr. Heath did review the medical report of Dr. Sheridan which relator had previously challenged.

{¶26} 17. Mr. Heath noted that, at age 42, relator was considered a younger person. Mr. Heath noted that relator had graduated from high school, had received training in masonry, and was certified in HVAC. Mr. Heath noted that relator had worked in the HVAC field for 20 years, could read blueprint/duct work structures and manuals and had worked in a supervisory position. In terms of skills/traits, Mr. Heath noted relator's history had provided him with the following:

The personal traits or "temperaments" required of a worker for this occupation include the ability to perform a variety of duties (work situations that involve frequent changes of tasks using different techniques, procedures, or degrees of attentiveness without loss of efficiency or composure); the ability to make judgments of decisions (work situations that involve solving problems, making evaluations, or reaching conclusions based on subjective or objective criteria, such as the five senses, knowledge, past experiences, or quantifiable or factual data); and the ability to attain precise set limits, tolerances and standards (work situations that involve adhering to and achieving exact levels of performance, using precision measuring instruments, tools, and machines to attain precise dimensions; preparing exact verbal and numerical records; and complying with precise instruments and specifications for materials, methods, procedures, and techniques to attain specified standards).

{¶27} 18. After considering the non-medical disability factors, Mr. Heath concluded that: "based on a consensus of the physicians' recommendations regarding the physical allowances in the claim, the claimant would still have access to unskilled work and select lower level semi-skilled work within in the Sedentary physical demand level." Thereafter, Mr. Heath identified the following potential jobs: "Dispatcher, Surveillance Camera Monitor, Department Store Greeter/Information Clerk, Telemarketer, Appointment Clerk, Routing Clerk, Telephone Answering Machine Operator, Order Clerk, Charge Account Clerk and Food Checker (Cashier)."

{¶28} 19. Mr. Heath also indicated that relator would benefit from vocational rehabilitation services to assist him in regaining access to the labor market. In his opinion, these services should include assistance with skill enhancement and short-term training which would provide him with the skills compatible with sedentary work. Ultimately, Mr. Heath concluded that relator could return to the labor market, stating:

Based on the medical and vocational documentation in the file, the claimant's capacities, skills, age, work history and education, it is this specialist's opinion that the claimant is capable of sustained remunerative employment for select jobs within the Sedentary physical demand level. The medical documentation suggests he may be best suited for part-time work, at least initially. In the opinion of this vocational specialist, this claimant is not permanently and totally disabled from all remunerative employment.

{¶29} 20. Relator's application was heard before a staff hearing officer ("SHO") on April 21, 2011. The SHO relied on the medical report of Dr. Fisher to conclude that relator was capable of engaging in sedentary work. The SHO stated:

The Staff Hearing Officer finds that the Injured Worker's young age of 42 is a great asset which would permit him to return to entry level sedentary work activity. The Staff Hearing Officer finds that the Injured Worker's young age and his high school education and skilled work history are sufficient in order for the Injured Worker to return to employment and engage in entry level sedentary work positions.

The Staff Hearing Officer further finds that the Injured Worker's young age, education and work history are assets to

the Injured Worker which would allow the Injured Worker to learn new work rules and procedures.

{¶30} Thereafter, the SHO discussed the non-medical disability factors as identified in the vocational assessment of Mr. Heath. Specifically, the SHO stated as follows:

The Staff Hearing Officer finds that the Injured Worker is a young individual of 42 years of age who has a high school education. The Staff Hearing Officer finds that the Injured Worker is able to read, write and do basic math. The Staff Hearing Officer finds that the Injured Worker has worked as a heating and air conditioning [technician] and supervisor which is a skilled position in which he had to read and analyze blue prints for doing his heating and air conditioning work with commercial buildings.

* * *

The Staff Hearing Officer finds that the Injured Worker is only 42 years old at this time and at this younger age skill enhancement efforts would be more likely to succeed. The Industrial Commission must consider not only past employment skills, but those skills which may be reasonably developed. State ex rel. Speelman v. Industrial Commission (1992) 73 Ohio Apps. 3d 757.

Mr. Brett Heath, vocational specialist for the Employer, completed an employee assessment report dated 03/21/2011. Mr. Heath opined that the Injured Worker is a high [school] graduate with a solid work history and his work as an HVAC installer/repairer required above average degrees of reasoning, language and math abilities. Mr. Heath opined that the Injured Worker's work history consisted of essentially one type of work, HVAC installer/repairer and this job is classified as skilled and falls within the medium physical demand category. Mr. Heath opines that there is no objective evidence in the file indicating that the Injured Worker has any cognitive impairment that would interfere with his ability to learn new information.

Mr. Heath opined that based on the Injured Worker's capacities, skills, age, work history and education that the Injured Worker is capable of sustained remunerative

employment for select jobs within the sedentary physical demand level.

Based on a careful consideration of the above, as well as all the evidence in file and at the hearing, the Staff Hearing Officer concludes that the Injured Worker is capable of performing sustained remunerative employment consistent with sedentary work. Therefore, the Injured Worker is not permanently and totally disabled.

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

Conclusions of Law:

{¶32} In this mandamus action, relator argues that the commission abused its discretion by relying on the vocational assessment of Mr. Heath which failed to consider all the allowed conditions and was based in part on a medical report "which had "previously been determined by the Commission to be fatally flawed and which does not conclude that the Claimant can perform full time sustained remunerative employment." (Relator's brief, at 4.)

{¶33} The magistrate finds that the commission did not abuse its discretion by relying on the vocational report of Mr. Heath.

{¶34} First, the record does not reflect that Mr. Heath failed to consider all the allowed conditions and second, to the extent Mr. Heath considered the report of Dr. Sheridan, he based his findings on the medical consensus that relator could perform at a sedentary level and not at a light-duty level at which Dr. Sheridan had opined that he could. The commission also concluded relator was capable of sedentary work.

{¶35} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶36} 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). 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 non-medical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). 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.*, 57 Ohio St.3d 203 (1991).

{¶37} Relator's first argument is that, in rendering his vocational assessment, Mr. Heath did not consider the allowed condition of bilateral carpal tunnel syndrome. This argument is based on the fact that Mr. Heath only identified the 2008 claim at the outset of his report. However, a review of the record indicates that there is no evidence that relator was having any problems with his hands or that his activities were restricted in any way. Specifically, in his September 23, 2010 report, relator's physician of record, Dr. Miles, indicated that relator was permanently and totally disabled "based on his chronic neck and back disorders." Relator only listed the 2008 claim on his PTD application as the claim he wanted considered. Likewise, in the January 27, 2011 report of Dr. Fisher, relator informed Dr. Fisher that he had no difficulties with either hand or wrist. Specifically, Dr. Fisher noted:

Post operatively, after each surgical procedure, there were no complications, and he returned to work approximately six to eight weeks after the last surgery was performed to his same job without restrictions. He has not seen Dr. Due since 2003 for either hand.

Mr. Johnson states he had a satisfactory result for his hand surgeries with no symptoms of numbness, tingling, of discomfort over either hand or wrist.

{¶38} Dr. Fisher examined both hands and wrists and assessed a 0 percent whole person impairment arising from the bilateral carpal tunnel syndrome. Further, a review of the FCE demonstrates that, to the extent relator had any restrictions concerning his hands and wrists, they were minimal. Specifically, under the heading "Manipulative Ability," it was noted that relator could perform the following actions frequently with his right hand and occasionally with his left hand: object handling, fingering, simple hand grasp, firm hand grasp, and fine/gross manipulation. Further, in the subjective history

portion of the report, there was no mention that relator had any difficulties with his hands. The only negative comment regarding either of relator's hands is found in the "Musculoskeleton Screening" post-test summary. Under that heading, the following notation was made:

Neurological:

Increased complaints of numbness and tingling into left digits.

{¶39} In his brief, relator indicates that Dr. Wackendorf cited "severe restrictions with the use of his hands." (Relator's brief, at 6.)

{¶40} The magistrate disagrees with relator's assertion that Dr. Wachendorf noted severe restrictions concerning his hands. As noted in the findings of fact, Dr. Wackendorf opined that relator: could lift/carry up to ten pounds occasionally, that he could push/pull occasionally provided that he not lift more than five pounds with his right hand and relator could stand/walk/sit occasionally with certain restrictions. Dr. Wachendorf noted restrictions for relator's left hand indicating that he could not lift more than two pounds, that he engage in no repetitive activities, that he not work with hot or cold substances, and that he not work with vibrating tools. These restrictions would permit relator to perform sedentary work.

{¶41} To the extent that relator challenges the vocational report of Mr. Heath due to a failure on his part, to consider that relator had restrictions concerning his left and right hand and wrist, the magistrate finds that his failure to identify the 2000 claim does not mean he did not consider all the allowed conditions. By discussing the medical report, Mr. Heath did consider all the allowed conditions.

{¶42} Relator also contends that Mr. Heath's employability assessment cannot constitute some evidence upon which the commission could rely because, on several occasions, Mr. Heath cited the report of Dr. Sheridan which, in relator's opinion, had been rejected as being fatally flawed. The magistrate disagrees.

{¶43} First, the commission never determined that Dr. Sheridan's medical report was fatally flawed. Although relator argued that the report of Dr. Sheridan was so inconsistent with other medical evidence in file that his report was fatally flawed and, as

such, unreliable, the only determination made by the hearing officer was that the "differences in the evidence in file cannot be adequately and fairly addressed by the hearing process." Thereafter, the commission ordered a new examination.

{¶44} Second, while relator is correct to state that Mr. Heath discussed the report of Dr. Sheridan on several occasions, Mr. Heath also discussed the medical reports of Drs. Miles and Fisher on several occasions as well as the report of Dr. Wachendorf. Ultimately, Mr. Heath based his conclusion on the consensus of all the physicians' recommendations regarding relator's ability noting that he was limited to perform work within the sedentary physical demand level. Relator's argument that the employability assessment of Mr. Heath cannot constitute some evidence in the record upon which the commission could rely simply because he discussed the report of Dr. Sheridan does not constitute a reason to remove that report from the record. Both Mr. Heath and the SHO considered whether or not relator was permanently and totally disabled based upon a finding that he was able to perform at a sedentary work level.

{¶45} Relator also asserts that Mr. Heath determined he could only work part-time. This is incorrect. Mr. Heath suggested that relator "may be best suited for part-time work, at least initially." This statement is immaterial. Mr. Heath is not a physician. The commission relied on the medical report of Dr. Fisher who did not limit relator to part-time work.

{¶46} Based upon a review of the stipulation of evidence, the magistrate finds that relator has failed to demonstrate that the commission, by relying on the employability assessment of Mr. Heath, also relied on the medical report of Dr. Sheridan. As such, the magistrate finds that relator has not demonstrated that the commission abused its discretion.

{¶47} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in denying relator's application for PTD compensation and this court should deny his request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).