ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO ex rel. MARLON R. FERGUSON,	:	CASE NO. 2009-2359
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Case No. 08AP-902
vs.	:	
INDUSTRIAL COMMISSION OF OHIO, et al.,	:	
Appellees.	:	

BRIEF OF APPELLEE, INDUSTRIAL COMMISSION OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE FACTS AND CASE 1

LAW AND ARGUMENT 4

Standard of review 4

Industrial Commission's Proposition of Law # 1 5

An Industrial Commission order that relies on specifically identified portions of several reports and explains its reasoning to deny permanent total disability is not an abuse of discretion. 5

Industrial Commission's Proposition of Law # 2: 7

The Industrial Commission does not abuse its discretion when it relies on a vocational report that order that indicates that the claimant retains transferrable skills, albeit in a diminished capacity. 7

Industrial Commission's Proposition of Law # 3: 8

An expert who allegedly ignores something that is not reflected in the information available to that expert, does not make the expert's report ambiguous, nor does it call into question the reliability of the report 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

State ex rel. Commercial Lovelace Motor Freight v. Lancaster
(1986), 22 Ohio St.3d 191 5

State ex rel. Elliot v. Indus. Comm.
(1986), 26 Ohio St.3d 76 5

State ex rel. Ellis v. McGraw Edison Co.
66 Ohio St.3d 92, 1993-Ohio-209 6

State ex rel. Frigidaire v. Indus. Comm.
(1988), 35 Ohio St.3d 105 7

State ex rel. Haylett v. Ohio Bureau of Workers' Comp.
87 Ohio St.3d 325, 1999-Ohio-134 4

State ex rel. LTV Steel Co. v. Indus. Comm.
88 Ohio St.3d 284, 2000-Ohio-328 5

State ex rel. Lopez v. Indus. Comm.
(1994), 69 Ohio St.3d 445 7

State ex rel. Marshall v. Keller
(1968), 15 Ohio St.2d 203 4

State ex rel. Moore v. Malone
96 Ohio St.3d 417, 2002-Ohio-4821 4

State ex rel. Pass v. C.S.T. Extraction Co.
74 Ohio St.3d 373, 1996-Ohio-126 5

State ex rel. Stephenson v. Indus. Comm.
(1987), 31 Ohio St.3d 167 5

State ex rel. Teece v. Indus. Comm.
(1981), 68 Ohio St.2d 165 4

State ex rel. Zollner v. Indus. Comm.
1989 Ohio App. LEXIS 3985 (10th App. Dist. 1989) 7

INTRODUCTION

This case is an appeal of right from a workers' compensation mandamus action originating in the Tenth District Court of Appeals. The appellate court found that Appellee, Industrial Commission of Ohio ("commission"), acted within its discretion when it denied permanent total disability ("PTD") benefits to Appellant, Marlon R. Ferguson ("Ferguson").

In denying Ferguson's PTD application, the commission relied on three separate medical opinions to determine that Ferguson was physically capable of sedentary work and three separate psychological opinions to determine that Ferguson was capable of work within physical limitations. As a presumed expert of vocational evidence, the commission then properly analyzed the non-medical factors and determined that Ferguson is capable of engaging in sustained remunerative employment. In making that finding, the commission relied, in part, on a vocational evaluation. There being evidence supporting its decision, the commission asks this Court to affirm the appellate court's decision to deny the requested writ.

STATEMENT OF THE FACTS AND CASE

Ferguson's first industrial accident was on July 7, 1991, when he fell while lifting a tote box off a cart and setting it down on the floor. (Appendix to Merit Brief of Marlon R. Ferguson, at pg. 37 "App. #"). That claim has been allowed for lumbar strain, aggravation of pre-existing spondylolysis and spondylolisthesis of L5-S1. Id. His second industrial injury was on October 5, 1999. While he was lifting a box, he felt a twinge in his back. (App. 38). This claim has been allowed for sprain lumbosacral; aggravation of L3-4, L4-5, L5-S1 spondylolisthesis; aggravation of L3-4, L4-5, L5-S1 disc degeneration; dysthymic disorder and L1-2 displacement. (App. 37).

Ferguson applied for PTD compensation on December 12, 2007. (Supplement To The Brief by Marlon R. Ferguson, at pg. 100 "Supp. #"). At the time of the application, Ferguson

was 52 years old (Supp. 100). He had been a laborer and security guard, but for the majority of his work history, he had been self-employed. (Supp. 102). Ferguson left school at the eleventh grade because he was not interested in school and got married. (Supp. 100). Although he scored high on the GED pre-test, he did not ultimately take the test, stating he did not see a need for a GED (Supp. 156) and he was never very interested in academics. (Supp. 34). His PTD application indicates that he can read, write, and do basic math well, and that he has experience reading specs/blueprints to build machine pieces (Supp. 101, 105).

Joseph Marino, M.D., and Paul J. Eby, M.D., examined Ferguson on behalf of the employer and the commission for his allowed physical conditions. (Supp. 109-118, 130-136). Dr. Marino determined that Ferguson was capable of sedentary work limited to lifting no more than ten pounds, no work below the hip level or above the shoulder level, no pushing or pulling with greater than ten pounds of force, no reaching beyond arm length, no climbing steps or ladders and no repetitive twisting to his right or left. With the freedom to sit or stand and change positions as needed, Ferguson can work up to four hours a day for up to twenty hours a week. (Supp. 117). Dr. Marino also opined that Ferguson would benefit from a conditioning program to improve his endurance and ability to perform positional transfers. (Supp. 116). The commission found Dr. Marino's report persuasive and consistent with findings contained in reports from Paul J. Eby, M.D., and Jeffrey F. Wirebaugh, M.D., and found that when only the impairment from the allowed physical conditions are considered, Ferguson was capable of returning to work in a sedentary capacity. (App. 39).

Mark Querry, Ph.D., and Raymond D. Richetta, Ph.D., examined Ferguson on behalf of the employer and the commission for his allowed psychological condition. (Supp. 118-129, 137-144). Dr. Querry found that Ferguson had 3% impairment, and could tolerate groups of people

and crowds without emotional distress. (Supp. 126). He placed no restrictions based on Ferguson's allowed psychological condition. (Supp. 128). He also determined that his energy level, motivation, social skills, memory functions, cognitive processing and decision making were adequate for remunerative employment. Id. Dr. Richetta found similar limitations, but added that Ferguson's ability to return to work was limited by a need to work only in a setting with few social demands and where he would not have to engage in rapid decision making. (Supp. 141-144). The commission found these reports, as well as a similar report from Anthony M. Alfono, Ph.D., persuasive, and held that, when considering only the allowed psychological condition, Ferguson was capable of returning to work consistent with these restrictions. (App. 39). The commission next determined that, when the physical and psychological limitations are combined, Ferguson is capable of sustained remunerative employment and is not permanently and totally disabled. Id.

In considering Ferguson's non-medical disability factors, the commission first found that, at 52 years old, his age was a vocational asset. Id. His eleventh grade education and ability to read, write and do basic math did not prevent him from obtaining and successfully performing the jobs that made up his work history, jobs it identified as semi-skilled. (App. 40). Relying on a VocWorks vocational evaluation, the commission found Ferguson had transferrable skills, a stable work history and the ability to learn new skills based on past work history and that he would be capable of unskilled and semi-skilled work. Id.

The commission, also relying on the VocWorks assessment, determined that Ferguson was vocationally qualified to obtain and perform employment activity within the injury-related physical and psychological limitations set forth by the commission. Id. This, combined with his age and education, demonstrated Ferguson has the capacity to acquire new skills, at least

informally, that could widen the scope of employment options available to him. (App. 40). When only his allowed conditions are considered, Ferguson is capable of performing sustained remunerative employment, and is not permanently and totally disabled. Id. The commission denied Ferguson's PTD application. Id.

Ferguson then filed an action in mandamus with the Tenth District Court of Appeals. (App. 103). In his decision, the Court of Appeals magistrate agreed with the SHO's finding and recommended the denial of issuance of a writ of mandamus. (App. 30, ¶¶ 35-36). The Tenth District Court of Appeals found the magistrate had properly determined the facts and the applicable law, and adopted the magistrate's decision as its own, denying a writ. (App. 9, ¶ 11). Ferguson appealed.

LAW AND ARGUMENT

Standard of review

"A writ of mandamus is an extraordinary remedy." *State ex rel. Haylett v. Ohio Bureau of Workers' Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134. Entitlement to a writ of mandamus requires: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the respondent; and (3) the lack of an adequate remedy for the relator in the ordinary course of the law. *State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 420, 2002-Ohio-4821. A writ is not a means to conduct an appellate review of a decision with which a party disagrees, nor is a writ of mandamus a de novo review. "Mandamus is not a substitute for an appeal, nor can it be used to create an appeal in cases where an appeal is not provided by law." *State ex rel. Marshall v. Keller* (1968), 15 Ohio St.2d 203.

The commission is the exclusive evaluator of evidentiary weight and credibility. See *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. For Ferguson to establish a basis

for mandamus relief concerning a factual matter, he must show the commission abused its discretion by issuing an order that is not supported by any evidence in the administrative record. *State ex rel. Elliot v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. The commission's actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; as long as some evidence supports its findings, its orders will not be overturned. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170.

A writ will not be granted if a commission order is supported by "some evidence," even if contrary evidence of greater quality and/or quantity was presented at the administrative hearing. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 376, 1996-Ohio-126. An abuse of discretion is "not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the Commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

Industrial Commission's Proposition of Law # 1:

> *An Industrial Commission order that relies on specifically identified portions of several reports and explains its reasoning to deny permanent total disability is not an abuse of discretion.*

The commission order justifiably denied Ferguson PTD compensation based on portions of several records, explained its reasoning and stated the evidence that it relied on in reaching its decision. "The commission is the exclusive evaluator of weight and credibility, and as long as some evidence supports the commission's decision, reviewing courts must defer to its judgment." *State ex rel. LTV Steel Co. v. Indus. Comm.*, 88 Ohio St.3d 284, 287 2000-Ohio-328. The commission's decision here is fully supported by the record.

The commission relied on three separate medical reports to determine that, based only on his allowed physical conditions, Ferguson is capable of sedentary work. (App. 40). Next, the commission relied on three separate psychological reports to determine that, based only on his allowed psychological condition of dysthymic disorder, Ferguson is capable of returning to work consistent with appropriate restrictions. (App. 39).

The commission issued a four page order that detailed all of the findings in each professional report. (App. 37-41). It relied upon Dr. Querry's report for Ferguson's functional capacity percentage and upon Dr. Richetta's report for his psychosocial employment restrictions. The commission concluded that "the injured worker has the residual functional capacity to perform sedentary work activity, as described by Drs. Richetta, Querry, Marino, Eby, and Wirebaugh, when only the impairment arising from the allowed conditions is considered." (App. 40). It is clear that the commission relied on those experts' reports to determine that Ferguson possessed residual functional capacity for sedentary work and, on this point, both Dr. Querry and Dr. Richetta had agreed.

Ferguson argues the commission abused its discretion in relying on Dr. Querry's and Dr. Richetta's reports because the two reports are contradictory with respect to Ferguson's whole-person impairment percentage and restrictions. Ferguson's focus on whole person impairment percentages misses the point. The commission was not using Dr. Querry's and Dr. Richetta's reports for their impairment ratings. It used those reports, along with other identified reports, to determine his residual functional capacity.

The commission may accept all, none, or any portion of any expert's report and is not required to give special weight to any particular vocational or medical report. *State ex rel. Ellis v. McGraw Edison Co.*, 66 Ohio St.3d 92, 1993-Ohio-209. Here, the commission found that

together the reports demonstrate that Ferguson possessed residual functional capacity for sedentary work, a conclusion entirely consistent with each report, and with which Dr. Quarry and Dr. Richetta agree.

Ferguson cites *State ex rel. Frigidaire v. Indus. Comm.* (1988) 35 Ohio St.3d 105, in which the commission improperly relied on a medical opinion that contained a non-allowed condition for the proposition the commission abused its discretion in relying on the "conflicting" reports of Dr. Querry and Dr. Richetta, but presents no evidence that either doctor relied upon non-allowed conditions in his report. Ferguson's reference to *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994) is similarly misplaced. That case addressed an internal inconsistency within one report, not the commission's reference to portions of two reports. *Lopez* is so significantly different that it provides no assistance here.

State ex rel. Zollner v. Indus. Comm., 1989 Ohio App. LEXIS 3985 (10th App. Dist. 1989) considered a commission denial of permanent total disability including one of four medical reports which "was completely contrary to the finding of no permanent partial disability." Id. at 2. Here, the commission relied on Dr. Quarry and Dr. Richetta to determine that Ferguson possessed residual functional capacity for sedentary work and, on this point, both doctors had agreed. There is no "completely contrary" report.

Industrial Commission's Proposition of Law # 2:

> *The Industrial Commission does not abuse its discretion when it relies on a vocational report that indicates that the claimant retains transferrable skills, albeit in a diminished capacity.*

The commission found that "the injured worker is currently vocationally qualified to obtain and perform employment activity within the injury-related physical and psychological limitations set forth by the above-mentioned doctors. *The vocational assessment report of Denise*

O'Conner from VocWorks is relied upon in making this finding." (Emphasis added.) (App. 40). Ms. O'Conner took into account the most severe psychological restrictions found in the professional reports, those of Dr. Richetta, who restricted Ferguson to working under few social demands and without having to engage in rapid decision-making. (Supp. 155-158).

Ferguson argues that Dr. Richetta's report and Ms. O'Conner's vocational report are incompatible because, while O'Conner stated that Ferguson has transferable skills, Dr. Richetta found his moderate psychological impairment impairs his social functioning, concentration, and ability to perform under stress. Ferguson argues that the vocational report impermissibly relies upon transferable skills that Ferguson no longer retains. However, neither Dr. Richetta nor any other professional stated that he no longer retains any transferable skills; Dr. Richetta merely opined that certain skills – social functioning, concentration, and performance under stress – have been diminished. Ms. O'Conner took this fully into account in performing her analysis. The vocational report is "some evidence" on which the commission could rely.

Industrial Commission's Proposition of Law # 3:

> *An expert who allegedly ignores something that is not reflected in the information available to that expert, does not make the expert's report ambiguous, nor does it call into question the reliability of the report.*

Ferguson never identifies the pre-existing baseline that he alleges Dr. Querry ignored. Nowhere in his "Statement of Facts" does Dr. Querry raise a negative psychological history prior to his first industrial injury in 1991, and the only pre-1991 historical information Ferguson's psychologist, David S. Doane, Ph.D., identifies is that Ferguson had been married twice before his current wife, gets along with his former wives and he had been a heavy drinker before marrying his current wife in 1988. (Supp. 34). When Dr. Querry examined Ferguson on

February 16, 2008, he took an extensive history and reported, "[Ferguson] stated that his childhood was 'fine, normal' devoid of abuse or neglect." (Supp. 123).

Dr. Querry identified no adverse psychological history. There is no negative "pre-injury baseline" to ignore. Ferguson doesn't explain how an expert ignoring a fact that turns out not to be present in any way constitutes an ambiguity or defect in the report. Thus, the commission did not abuse its discretion in using Dr. Querry's report.

CONCLUSION

For the foregoing reasons, the Industrial Commission did not abuse its discretion when it denied Ferguson PTD compensation. The commission's findings are supported by the evidence before the commissioners. Accordingly, the decision of the court of appeals should be upheld and the requested writ of mandamus should be denied.

Respectfully submitted,

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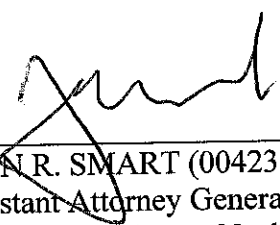

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