

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Frank Pergrem, :
Relator, :
v. : No. 09AP-203
Fujitec and Industrial Commission of Ohio, : (REGULAR CALENDAR)
Respondents. :

D E C I S I O N

Rendered on March 31, 2010

Casper & Casper, and Sanford I. Casper, for relator.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relator, Frank Pergrem, 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 him permanent total disability ("PTD") compensation and to enter an order granting said compensation.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate examined the evidence and issued a decision, including findings of fact and conclusions of law, which is

appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in denying relator's request for PTD compensation. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} In his objection, relator contends the magistrate erred in the same manner as the commission by analyzing the impact of relator's physical restrictions, psychological restrictions, and *Stephenson*¹ factors in isolation instead of considering their combined impact upon relator's ability to return to any employment. We do not find relator's position well-taken as our review of the record indicates the evidence was considered together and not individually.

{¶4} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, relator's objection to the magistrate's decision is overruled, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objection overruled; writ of mandamus denied.

TYACK, P.J., and SADLER, J., concur.

¹ *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167 (requiring that the commission consider the nonmedical factors of age, education, and work history, in addition to other factors, such as physical, psychological, and sociological factors, in its PTD analysis.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State ex rel. Frank Pergrem, | : | |
| | : | |
| Relator, | : | |
| | : | |
| v. | : | No. 09AP-203 |
| | : | |
| Fujitec and Industrial Commission of Ohio, | : | (REGULAR CALENDAR) |
| | : | |
| Respondents. | : | |

MAGISTRATE'S DECISION

Rendered on December 4, 2009

Casper & Casper, and Sanford I. Casper, for relator.

Richard Cordray, Attorney General, and Joseph C. Mastrangelo, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} In this original action, relator, Frank Pergrem, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation, and to enter an order granting said compensation.

Findings of Fact:

{¶6} 1. Relator has three industrial claims arising from his employment as a "production technician" for respondent Fujitec America Inc., a state-fund employer. His August 10, 1993 injury (claim No. 93-312099) is allowed for "[s]prain lumbar region" and "aggravation of pre-existing depressive disorder." This claim is also disallowed for "[d]isc disease L5-S1 and/or aggravation of pre-existing disc disease L5-S1; facet arthrosis L4-5 and L5-S1 and/or aggravation of pre-existing facet arthrosis at L4-5 and L5-S1."

{¶7} His August 19, 1998 injury (claim No. 98-486814) is allowed for "[b]ilateral lateral epicondylitis," "right medial epicondylitis," "right synovitis," and "right chondromalacia."

{¶8} His November 1, 1999 injury (claim No. 99-570209) is allowed for "[s]prain lumbosacral; neuralgia/neuritis."

{¶9} 2. On March 6, 2008, relator filed an application for PTD compensation. In support of the application, relator submitted a report, dated January 18, 2008, from Richard J. Watson, M.D.:

I would consider Mr. Pergrem totally and permanently disabled. He's unable to do any gainful occupation. He has quite high permanent impairments noted on the elbows and in the back. He has decreased range of motion in the elbow as well as tenderness in the elbow. He has decreased range of motion in the wrist, weakness in the triceps and wrist extensor. He has decreased range of motion in the lumbar spine with spasm, absent ankle reflex and weaknesses in the foot and toe dorsiflexors.

I believe this combination would make him totally and permanently disabled for any and all occupations on a permanent basis. * * *

{¶10} 3. In further support of his application, relator submitted a report dated February 18, 2008 from psychologist Stephen W. Halmi, Psy.D.:

Based on my interaction with Mr. Pergrem, his self report, and performance on the MMPI-2 and WAIS-III, I opine that his depression prevents him from working in any capacity. Specifically, I opine that Mr. Pergrem's ability to understand and remember detailed instructions is markedly impaired. I also opine that his ability to carry out detailed instructions, maintain attention and concentration for extended periods, ability to complete a normal workday and work week without interruption from psychologically based symptoms, and perform at a consistent pace without an unreasonable number and length of rest periods is markedly impaired. I also opine that Mr. Pergrem's mental ability to interact appropriately with supervisors, coworkers, and the general public is markedly impaired by his emotional lability, hypersensitivity, and lack of interest in socializing, which are all symptoms of depression. Finally, I opine that his ability to adjust to the daily stress associated with routine work is markedly impaired. I opine that his low frustration tolerance and emotional lability would significantly interfere with his ability to manage even minor stress.

In addition to his physical restrictions, emotional problems, and cognitive disabilities, Mr. Pergrem has sociological factors that render him a poor candidate for vocational rehabilitation. For example, he does not have a high school diploma nor a GED. In addition, he has only worked in physical labor jobs and is 64 years old.

In summary, I opine that Mr. Pergrem is permanently and totally disabled from employment as a result of his Depressive Disorder NOS alone. * * *

{¶11} 4. On June 24, 2008, at the commission's request, relator was examined by psychologist Donald J. Tosi, Ph.D., who issued a seven-page narrative report. In his report, Dr. Tosi opines:

What is the Injured Worker's occupational activity capacity?
The Injured Worker is able to return to work. He would function best in a low/moderate work stress situation. Work tasks should be simple to moderate in complexity.

{¶12} 5. On August 4, 2008, at the commission's request, relator was examined by Andrew Freeman, M.D., who issued a six-page narrative report. In his report, Dr. Freeman opined that relator has a total of 20 percent whole person impairment.

{¶13} 6. On August 4, 2008, Dr. Freeman completed a physical strength rating form. On the form, Dr. Freeman indicated by his mark that relator is capable of sedentary work.

{¶14} 7. In further support of his PTD application, relator submitted a report, dated September 29, 2008, from vocational expert William T. Cody. In his report, Cody concludes:

Mr. Pergrem would be unable to adapt to a new kind of work activity when the following factors are taken into account[:] he is sixty-five years of age, has a limited, eleventh grade, education, has a restricted largely physically demanding work history, and has significant physical impairments, including a substantial level of pain, as cited by Dr. Freeman and Dr. Watson. He also has psychological impairments that affect his ability to adapt to a new kind of work, concentrate, work at an appropriate pace, and persist. Under these circumstances[,] Mr. Pergrem could not be expected to adequately adapt to the new tools, tasks, procedures, and rules involved in performing a new type of work activity, a type of work that he has not performed in the past. This holds true even for unskilled work.

The Industrial Commission defines the age of sixty-five years as closely approaching advanced age. Being of this age presents substantial obstacles in terms of adjusting to a new kind of work activity. When combined with significant physical impairments, a restricted physically demanding work history, a limited education, psychological limitations, and a substantial level of pain being of this age clearly serves as a contributing factor to an inability to make vocational adjustments.

Therefore, in the opinion of this vocational expert, Frank Pergrem is permanently and totally occupationally disabled.

* * *

{¶15} 8. Following an October 3, 2008 hearing, a staff hearing officer ("SHO") issued an order denying the PTD application. The SHO's order explains:

The injured worker is a 64 year old male who has three separate worker's compensation claims. Claim number 99-570209 is predicated upon an industrial accident which occurred on 11/01/1999 when the injured worker tripped in a hole injuring his low back. Claim number 98-486814 is predicated upon an industrial accident which occurred on 08/19/98 when the injured worker injured his elbows while repetitively flipping doors over. Claim number 93-312099 is predicated upon an industrial accident which occurred on 08/19/1993 when the injured worker injured his low back while lifting 50 to 60 pound jamps. This claim also has a psychological component.

The Staff Hearing Officer notes that claims number 93-312099 and 99-570209 are both allowed for low back injuries. Claim number 99-570209 is allowed for the conditions sprain lumbosacral and neuralgia/neuritis and claim number 93-312099 is allowed for a lumbar sprain. The Staff Hearing Officer finds it significant that claim number 93-312099 is specifically disallowed for the conditions disc disease at L5-S1 and/or aggravation of pre-existing disc disease at L5-S1 and facet arthrosis at L4-5 and L5-S1 and/or aggravation of pre-existing facet arthrosis at L4-5 and L5-S1.

Dr. Andrew Freeman examined the injured worker on 08/04/2008 at the request of the Industrial Commission. Dr. Freeman examined the injured worker on the allowed physical conditions and concludes that the allowed physical conditions have reached maximum medical improvement.

Dr. Freeman further opines that the injured worker retains the functional capacity to perform sedentary employment with the restriction that the injured worker should not repetitively use his right hand. Sedentary employment includes the ability to exert 10 pounds of force one-third of the time, negligible force two-thirds of the time and sedentary work is performed while sitting most of the time.

Dr. Donald Tosi examined the injured worker on 06/24/2008 at the request of the Industrial Commission. Dr. Tosi examined the injured worker on the allowed psychological

condition and concludes that the allowed psychological condition has reached maximum medical improvement. Dr. Tosi further opines that the allowed psychological condition does not prevent the injured worker from returning to work. Dr. Tosi does find that the injured worker would function best in a low to moderate stress situation and all work tasks should be simple to moderate in complexity.

The Staff Hearing Officer finds that all allowed conditions have reached maximum medical improvement based upon the reports of Dr. Freeman and Dr. Tosi.

Further, the Staff Hearing Officer finds that the injured worker retains the functional capacity to perform sustained remunerative employment when the impairments arising out of the allowed conditions are considered based on the reports of Dr. Freeman and Dr. Tosi.

Additionally, when the injured worker's impairments arising out of the allowed conditions are considered in conjunction with the injured worker's non medical disability factors, the Staff Hearing Officer finds that the injured worker retains the functional capacity to perform sustained remunerative employment and is therefore not permanently and totally disabled.

The Staff Hearing Officer finds that the injured worker's age, 64 years old, constitute[s] a moderate barrier to reemployment. However, pursuant to State ex rel. Moss v. Indus. Comm. (1996) 75 OS3d 414, age alone does not constitute an absolute barrier to re-employment. Rather, the injured worker's age must be considered in conjunction with all other relevant factors.

The Staff Hearing Officer finds that the injured worker has an 11th grade education. The Staff Hearing Officer finds that the injured worker's educational history indicates that the injured worker can read, write, and perform basic math skills, as would be expected of an individual with the injured worker's level of formal education. Further, an 11th grade education ordinarily constitutes a limited education as that term is defined in OAC 4121-3-34 (B)(3)(b)(iii). Although a limited education could constitute a barrier to re-employment, the Staff Hearing Officer finds that this is not the situation in the case at hand. Specifically, the Staff Hearing Officer finds that the injured worker's IC-2

Application for Permanent and Total Disability Compensation indicates that the injured worker was able [to] obtain and perform semi-skilled to skilled employment as a welder for 25 plus years.

Accordingly, the Staff Hearing Officer finds that the injured worker's educational history constitutes neither a positive nor negative vocational asset.

As previously stated, the Staff Hearing Officer finds that the injured worker's IC-2 application for Permanent and Total Disability Compensation indicates that the injured worker has previously been employed as a welder for 25 plus years. As part of his job duties, the injured worker was required to use welders, spot welders, grinders, buffers, sanders and polishing compound.

Importantly, the injured worker's work history demonstrates that the injured worker is capable of learning, from on the job or short term training, how to perform each of these tasks[.]

According[ly], the Staff He[a]ring Officer finds that the injured worker's work history demonstrates that the injured worker has the transferable skills, such as the ability to learn from on the job or short term training, necessary to perform sustained remunerative employment.

Therefore, the Staff Hearing Officer finds that the injured worker's work history constitutes a positive vocational asset which enhances the injured worker's ability to gain re-employment.

Based on these non medical disability factors, the Staff Hearing Officer finds that the injured worker has the vocational ability, intellect and literacy ability to perform sedentary employment.

Further, when the injured worker's non medical disability factors are considered in conjunction with the injured worker's impairments arising out of the allowed conditions, the Staff Hearing Officer finds that the injured worker retains the functional capacity to perform sustained remunerative employment and is therefore not permanently and totally disabled.

Accordingly, the injured worker's IC-2 Application for Permanent and Total Disability Compensation, filed 03/06/2008, is denied.

This order is based on the reports of Dr. Freeman dated 08/04/2008, Dr. Tosi dated 06/24/2008 and the non medical disability factors.

{¶16} 9. On February 26, 2009, relator, Frank Pergrem, filed this original action.

Conclusions of Law:

{¶17} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶18} For its determination of residual functional capacity, Ohio Adm.Code 4121-3-34(B)(4), the commission, through its SHO, relied upon the reports of Drs. Freeman and Tosi. Dr. Freeman opined that relator is physically capable of performing sedentary work. Dr. Tosi found that relator is able to return to work, but the tasks should be simple to moderate in complexity. Also, relator would function best in a low/moderate work stress situation, according to Dr. Tosi.

{¶19} Here, relator does not challenge the commission's reliance upon the reports of Drs. Freeman and Tosi. However, relator does challenge the commission's analysis of the nonmedical factors.

{¶20} Ohio Adm.Code 4121-3-34 sets forth the commission's rules for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B) sets forth definitions. Ohio Adm.Code 4121-3-34(B)(3) is captioned: "Vocational factors." Ohio Adm.Code 4121-3-34(B)(3)(c) is captioned: "Work experience." Thereunder, the rules provide:

(iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual

has obtained through working at past relevant work may qualify individuals for some other type of employment.

(v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

{¶21} In his order, the SHO analyzed relator's 25 years of experience as a welder, noting that he was required to use welders, spot welders, grinders, buffers, sanders and polishing compound. From this information, the SHO inferred that relator "has the transferable skills, such as the ability to learn from on the job or short term training, necessary to perform sustained remunerative employment." The SHO found that the work history presents a "positive vocational asset."

{¶22} Here, relator asserts that there is no evidence to support the SHO's determination regarding his work history. The magistrate disagrees.

{¶23} Analysis begins with the observation that the commission and its hearing officers are the experts on the vocational factors. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266. Thus, it is not necessary that the commission rely upon the findings and opinions of vocational experts. The commission may choose to conduct its own analysis of the nonmedical factors. *Id.*

{¶24} Also, it is important to note that nonmedical factors are often subject to different interpretations and thus the commission must have the freedom to independently

evaluate the nonmedical factors. *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 141-42. Also, a lack of transferable skills does not mandate a PTD award.

{¶25} In effect, the SHO determined that relator's work history as a welder shows that he has the intellectual ability to train for a new job. That conclusion is a valid one to draw from relator's work history and was well within the commission's vocational expertise.

{¶26} That the SHO may have incorrectly equated the ability to learn (intellectual ability) with the transferability of skills under Ohio Adm.Code 4121-3-34(B)(3)(c)(iv), does not automatically detract from the analysis. Clearly, the commission could validly conclude that the work history as a welder demonstrates "the ability to learn from on the job or short term training."

{¶27} Relator also asserts that, given his psychological restrictions, he cannot be found to retain the ability to learn a new job. Relator's assertion is clearly under-mined by Dr. Tosi's report upon whom the commission relied. Dr. Tosi never said that relator now lacks the ability to retrain for a new job. Dr. Tosi only limited the types of jobs that relator can retrain for.

{¶28} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).