

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Department of	:	
Administrative Services, Ohio Department	:	
of Developmental Disabilities, Gallipolis	:	
Developmental Center,	:	
	:	No. 10AP-389
Relator,	:	
	:	(REGULAR CALENDAR)
v.	:	
	:	
Industrial Commission of Ohio and	:	
Shirley BurrIDGE,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on May 19, 2011

Michael DeWine, Attorney General; *Lee M. Smith & Associates*, *Lisa R. Miller*, and *Lee M. Smith*, Special Counsel for relator.

Michael DeWine, Attorney General, and *Jeanna R. Volp*, for respondent Industrial Commission of Ohio.

Spears & Associates Co., L.P.A., and *David R. Spears*, for respondent Shirley BurrIDGE.

IN MANDAMUS

BROWN, J.

{¶1} Relator, Department of Administrative Services, Ohio Department of Developmental Disabilities, Gallipolis Developmental Center, 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 that awarded permanent total disability ("PTD") compensation to respondent Shirley Burrige, and to enter an order denying said compensation.

{¶2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision which is appended to this decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. No objections have been filed to that decision.

{¶3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Relator's request for a writ of mandamus is denied.

Writ denied.

FRENCH and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Department of Administrative Services, Ohio Department of Developmental Disabilities, Gallipolis Developmental Center,	:	
	:	No. 10AP-389
Relator,	:	(REGULAR CALENDAR)
v.	:	
Industrial Commission of Ohio and Shirley Burridge,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 24, 2011

Michael DeWine, Attorney General; *Lee M. Smith & Associates*, *Lisa R. Miller* and *Lee M. Smith*, for relator.

Michael DeWine, Attorney General, and *Jeanna R. Volp*, for respondent Industrial Commission of Ohio.

Spears & Associates Co., L.P.A., and *David R. Spears*, for respondent Shirley Burridge.

IN MANDAMUS

{¶4} In this original action, relator, Department of Administrative Services, Ohio Department of Developmental Disabilities, Gallipolis Developmental Center, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to

vacate its order awarding permanent total disability ("PTD") compensation to respondent Shirley Burrige ("claimant") and to enter an order denying said compensation.

Findings of Fact:

{¶5} 1. On December 13, 2002, claimant was injured in the course of and arising out of her employment with relator. Claimant had been employed by relator as a "therapeutic program worker." The industrial claim (No. 02-878185) is allowed for:

Sprain of left knee & leg; sprain of neck; sprain lumbar region; tear medial meniscus left knee; aggravation of pre-existing degenerative disc disease of the lumbar spine.

{¶6} 2. Claimant has four other industrial claims that arose out of and in the course of her employment with relator.

{¶7} 3. Claimant received temporary total disability ("TTD") compensation in the industrial claim.

{¶8} 4. Pursuant to Ohio Adm.Code 4123-3-32, the Ohio Bureau of Workers' Compensation ("bureau") scheduled claimant for a so-called "ninety-day examination" which was performed by Christopher Holzaepfel, M.D., on April 25, 2008.

{¶9} 5. Following the April 25, 2008 examination, Dr. Holzaepfel issued a three-page narrative report stating:

DISCUSSION: The injured worker was seen on April 25, 2008. Based on this evaluation, review of the medical records, considering the allowed conditions of this claim and the physical findings, the following questions are answered within a reasonable degree of medical certainty.

[One.] In your medical opinion, has the injured worker reached a treatment plateau that is static or well stabilized, at which no fundamental, functional or physiological change can be expected within reasonable medical probability in spite of

continuing medical or rehabilitation procedures (maximum medical improvement)? Please explain.

It is my medical opinion that the injured workers is now MMI for all allowed conditions in this claim. She has gone through appropriate treatment for all allowed conditions in this claim including surgery on the left knee and repeated epidural steroid injections of the lumbar spine with only temporary improvement. No further treatment is indicated.

[Two.] Can the injured worker return to his/her former position of employment? If yes, are there any restrictions or modifications?

The injured worker cannot return to her former position of employment as an aide for the Department of Mental Retardation as it would require prolonged standing, bending, stooping, and lifting.

[Three.] Please provide a summary of any functional limitations solely due to the allowed physical condition(s) in this claim(s). In other words, please indicate the type of work the injured worker can perform and the supportive rationale for this opinion.

The injured worker cannot return to any type of functional occupation. She is unable to sit for any period of time or stand for any period of time.

[Four.] Has the injury/disease reached MMI? If not, are there any recommendations for vocational rehabilitation and when should a re-examination be considered?

The injured worker is now MMI. There is no recommendation for vocational rehabilitation. I do not feel that she would be able to be gainfully employed given the impairments found on exam today.

{¶10} 6. On October 3, 2008, claimant's attending physician, Robert M. Holley, M.D., wrote a letter to claimant's counsel. The letter identifies claimant by name and the industrial claim (No. 02-878185). Below that identification, the body of the letter states in its entirety:

In regards to your letter that was faxed to our office on 10/01/08, this patient is incapable of returning to any form of regular ruminative [sic] employment.

This is a permanent condition which we do not foresee to change during her lifetime.

{¶11} 7. On October 8, 2008, claimant filed an application for PTD compensation.

In support, claimant submitted Dr. Holley's October 3, 2008 letter.

{¶12} 8. The PTD application prompted relator to have claimant examined by E. Gregory Fisher, M.D. The examination was conducted on November 25, 2008. Dr. Fisher only examined for the allowed conditions in claim No. 02-878185. Thereafter, Dr. Fisher issued a five-page narrative report stating:

[One.] Has Ms. Burridge reached maximum medical improvement in regard to all of her allowed conditions?

Based on my physical exam and on reviewing the medical records as well as the medical history taken, it is my medical opinion Ms. Burridge has reached Maximum Medical Improvement for the allowed conditions of her sprain neck, sprain lumbar area, sprain knee, tear of the medial meniscus and the degenerative disc disease from L3 to S1.

* * *

[Two.] Based solely upon the physical condition, do these conditions preclude Ms. Burridge's from return [sic] to her former position of employment at Gallipolis as a therapeutic program worker with MRDD clients?

The answer is yes. The type of work she performed requires her to bend, stoop, lift heavy items several times a day, being on her feet for long periods of time and she is unable to do these requirements because of the medical condition of her back.

[Three.] Is Ms. Burridge is [sic] capable of sustained ruminative [sic] employment in any capacity considering the

allowed conditions in the claim involving her knee, neck and back area?

The answer is yes. She is able to perform activities of a sedentary nature in that she could perform sit down jobs for 4-6 hours per day with frequent breaks, be on her feet for two to three hours with frequent breaks. Avoid excessive bending and twisting at the waist level and have a weight limitation of carrying, lifting up to 10 pounds frequently and very occasionally 15 pounds for short periods of time.

[Four.] Is Ms. Burrige is [sic] permanently and totally disabled as a direct and proximate result of the medical condition recognized in this claim?

The answer is no because it is my medical opinion after performing an examination, obtaining a history, and reviewing the medical records including all the IME reports and the other reports from Dr. Holley and Dr. Ozlurk she is able to perform jobs or activities of a sedentary nature and therefore, and is not primarily and totally disabled from this injury claimed of December 13, 2002.

{¶13} 9. The PTD application prompted the commission to have claimant examined by Richard T. Sheridan, M.D. The examination was conducted on January 8, 2009. Dr. Sheridan examined for all the allowed physical conditions of the five industrial claims. Thereafter, Dr. Sheridan issued a seven-page narrative report, concluding:

I think that in view of the multiple areas of her body that have been injured with multiple claims, I think her reasonable residual functional capacity is for sedentary work.

{¶14} 10. On January 8, 2009, Dr. Sheridan also completed a physical strength rating form. On the form, Dr. Sheridan indicates by his checkmark that claimant is capable of "sedentary work."

{¶15} 11. The PTD application also prompted the commission to have claimant examined by psychologist Andrea D. Evans, Psy.D. Dr. Evans examined for "anxiety and

depression" which is allowed in one of the industrial claims. Thereafter, Dr. Evans issued a six-page narrative report in which she opined:

Has the injured worker reached maximum medical improvement with regard to the specific allowed condition?

No, it is believed that Shirley Burrige has not reached Maximum Medical Improvement (MMI) for the allowed psychological conditions of anxiety and depression. She continues to experience moderate affective symptoms that in my opinion warrant ongoing treatment. Based upon her report and presentation, it is believed she could experience further relief of affective symptoms with a few more months of psychotherapy in conjunction with psychotropic management.

{¶16} 12. Following a May 27, 2009 hearing, the staff hearing officer ("SHO") issued an order awarding PTD compensation. The SHO's order explains:

Permanent total disability compensation is awarded from 08/07/2008 * * * and to continue without suspension unless future facts or circumstances should warrant the stopping of the award. Such payments are to be made in accordance with R.C. 4123.58(A).

Permanent and total disability is awarded from 08/07/2008 for the reason that it is the day after the last payment of temporary total compensation and avoids an overpayment of compensation.

The cost of this award is apportioned as follows:

100% in claim #02-878185.

The apportionment is based upon the fact the medical reports relied upon base disability solely on the 2002 claim.

Based upon the reports of Dr. Christopher Holzaepfel (04/25/2008) and Dr. Robert Holley (10/03/2008), it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the allowed conditions. Therefore, pursuant to State ex rel. Speelman v. Indus. Comm. (1992),

73 Ohio App.3d 757, it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors.

This decision is based on the allowed physical conditions only.

{¶17} 13. On April 23, 2010, relator filed this mandamus action.

Conclusions of Law:

{¶18} In awarding PTD compensation, the commission determined that the industrial injury (No. 02-878185) alone prohibits sustained remunerative employment, and thus there is no need to consider the vocational factors. In reaching this determination, the commission relied upon two medical reports—the April 25, 2008 report of Dr. Holzaepfel and the October 3, 2008 report of Dr. Holley.

{¶19} Because Dr. Holzaepfel's report constitutes the some evidence needed to support the commission's PTD award, it is the magistrate's decision that this court deny relator's request for a writ of mandamus as more fully explained below.

{¶20} Relator advances two arguments challenging the evidentiary value of Dr. Holzaepfel's report. First, relator claims that the report cannot constitute some evidence upon which the commission can rely in a PTD proceeding because the report was generated by a so-called "ninety-day examination" conducted to determine claimant's continued entitlement to TTD compensation.

{¶21} Secondly, relator contends that use of the word "today" in the key sentence of the report must be read to indicate that Dr. Holzaepfel was of the opinion that the industrial injury is not permanent.

{¶22} These two arguments will be examined more fully below.

{¶23} Turning to the first argument, R.C. 4123.53 provides:

(B) When an employee initially receives temporary total disability compensation pursuant to section 4123.56 of the Revised Code for a consecutive ninety-day period, the administrator shall refer the employee to the bureau medical section for a medical examination to determine the employee's continued entitlement to such compensation, the employee's rehabilitation potential, and the appropriateness of the medical treatment the employee is receiving. The bureau medical section shall conduct the examination not later than thirty days following the end of the initial ninety-day period. If the medical examiner, upon an initial or any subsequent examination recommended by the medical examiner under this division, determines that the employee is temporarily and totally impaired, the medical examiner shall recommend a date when the employee should be reexamined. Upon the issuance of the medical examination report containing a recommendation for reexamination, the administrator shall schedule an examination and, if at the date of reexamination the employee is receiving temporary total disability compensation, the employee shall be examined. * * *

{¶24} Supplementing the statute, Ohio Adm.Code 4123-3-32 provides:

(A) Pursuant to the provisions of section 4123.53 of the Revised Code, the bureau of workers' compensation shall schedule an examination to determine the employee's continued entitlement to temporary total disability compensation, the employee's rehabilitation potential, and the appropriateness of the employee's medical treatment. The examination shall be conducted not later than thirty days following the end of the initial ninety-day period of temporary total disability compensation.

{¶25} This court has repeatedly held that a medical report can be relied upon by the commission in a PTD proceeding even though it was generated as evidence to be considered on the question of a claimant's continued entitlement to TTD compensation. *State ex rel. Bray v. Hamilton Fixture Co.*, 10th Dist. No. 05AP-821, 2006-Ohio-4459; *State ex rel. Baker v. Indus. Comm.*, 10th Dist. No. 09AP-373, 2010-Ohio-2727; *State ex rel. Deal v. Indus. Comm.*, 10th Dist. No. 10AP-142, 2010-Ohio-6175.

{¶26} The purpose of the so-called "ninety-day examination" under the statute and rule is "to determine the employee's continued entitlement to temporary total disability compensation, the employee's rehabilitation potential, and the appropriateness of the employee's medical treatment." Ohio Adm.Code 4123-3-32(A).

{¶27} The question and answer that provided the key evidence upon which the commission relied to support its PTD award is, again, as follows:

[Four.] Has the injury/disease reached MMI? If not, are there any recommendations for vocational rehabilitation and when should a re-examination be considered?

The injured worker is now MMI. There is no recommendation for vocational rehabilitation. I do not feel that she would be able to be gainfully employed given the impairments found on exam today.

{¶28} Dr. Holzaepfel directly responded to the bureau's question relating to the stated purpose of the R.C. 4123.53(B) examination. That is to say, Dr. Holzaepfel's opinion regarding claimant's capability for gainful employment was offered in direct response to an appropriate bureau question under the statute and rule.

{¶29} Moreover, neither the statute nor the rule prohibit use of the generated medical evidence in a PTD proceeding.

{¶30} Given the above analysis, it is clear that relator's argument must fail.

{¶31} Relator's second argument is as follows:

[Dr. Holzaepfel's] opinion merely states that as of *today*, Burrige is not able to be gainfully employed. By providing an opinion regarding only Burrige's impairments as of the date of exam, it appears that Burrige's condition is only temporary. This opinion indicating that Burrige's impairments as of the day of the exam render her incapable of working, does not establish that Burrige will never be able to perform sustained remunerative employment. Dr. Holzaepfel never

