

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a claimant's performance in a vocational rehabilitation program be considered in a decision to deny permanent total disability benefits?

Permanent total disability ("PTD") in Ohio can be based solely on the allowed medical conditions, or on a combination of medical conditions and other factors. These factors can include a claimant's age, education, work skills, and education. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 107 (1987). Recently, the Supreme Court of Ohio considered an appeal from a claimant who maintained that her PTD application was denied based, at least in part, on poor reviews given for her participation in a vocational rehabilitation program.

State ex rel. Guthrie v. Indus. Comm., 133 Ohio St.3d 244, 2012-Ohio-4637, involved a claimant who suffered a knee injury which resulted in 20 percent permanent partial award. The claimant was in her mid-40s at the time she was injured, completed a four-year graphic arts program, and was a high school graduate. The claimant could not return to her former position, and twice participated in a vocational rehabilitation program with mixed results. (In a report closing her file, there was a reference to "self-defeating attitudes" and a failure to undertake a realistic job search.) In 2009, the claimant sought PTD, but a Staff Hearing Officer ("SHO") denied the motion, concluding that she was "medically and vocationally capable" of sedentary employment. The claimant sought a writ of *mandamus*, contending that the SHO abused her discretion when she did not consider her participation in vocational rehabilitation, a depressed job market, and pre-existing severe hearing loss, and that she was being "punished" for failing to find a job. The 10th District denied the writ, and the claimant appealed.

The Supreme Court affirmed, finding that the SHO did not abuse her discretion in concluding that the claimant was capable of "sustained remunerative employment." Most of the Court's opinion addressed the claimant's contention that her failure to obtain a job was the basis for the denial, stating that the failure of the end result (*e.g.*, finding a job) was not relevant to a PTD analysis. The Court distinguished *State ex rel. Ramsey v. Indus. Comm.*, holding that a full participation in vocational rehabilitation should be a factor, because the SHO in *Guthrie* did consider participation in rehabilitation and there was no evidence of an intent to "punish" her. The Court also noted that unrelated medical conditions such as the claimant's hearing loss can never be the basis for a disability finding. The Court concluded by finding that the SHO's reference to a poor job market was nothing more than a "surplus observation."

Guthrie stands for the proposition that vocational rehabilitation can, at best, be considered as evidence, but should not be the sole basis for a PTD determination. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me.

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