[Cite as *State ex rel. Jones v. Indus. Comm.*, 2011-Ohio-5658.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. James Jones,	:	
Relator,	:	
v.	:	No. 10AP-829
Industrial Commission of Ohio and Set Silica Sand Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 3, 2011

Stocker Pitts Co. LPA, and *Thomas R. Pitts*, for relator.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, James Jones, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his application for permanent total disability ("PTD") compensation and to enter an order granting said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission: (1) adequately considered relator's education; (2) properly addressed his work history; (3) was not required to discuss relator's attempts at vocational rehabilitation in this case; and (4) considered the impact of relator's psychological condition. Therefore, the commission did not abuse its discretion in denying relator PTD compensation. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed four objections to the magistrate's decision. In his first objection, relator contends that the magistrate erred in determining that the commission properly addressed relator's work history and, specifically, any transferable skills. We disagree.

{¶4} Although it did not expressly use the phrase "transferable work skills," the commission's order identifies a number of transferable skills that relator acquired through past employment and training. Specifically, the commission noted that relator has skills in welding, tow motor operation and the completion of work orders associated with shipping and receiving. Therefore, we disagree with relator's assertion that the commission made no determination regarding his transferable skills.

{¶5} We also disagree with relator's assertion that the magistrate crafted a new basis to support the commission's order. The magistrate's reference to "record keeping" work is simply another way to express relator's experience using his reading and writing

skills to complete work orders and to read and write merchandise and shipping orders. The magistrate did not craft a new basis to support the commission's order.

{¶6} Lastly, we disagree with relator's assertion that the magistrate held that the commission did not have to consider relator's transferable work skills in that analysis. The magistrate simply pointed out that unskilled work does not require transferable skills. Regardless of the magistrate's comment, the commission clearly identified and considered a number of transferable skills acquired by relator through past training and employment. For these reasons, we overrule relator's first objection.

{¶7} Relator argues in his second objection that the magistrate erred in determining that the commission adequately considered relator's educational abilities. Relator contends that the commission failed to make a determination regarding his educational level or to explain how relator's educational abilities support the denial of PTD compensation. We disagree.

{¶8} As noted by respondent, the commission is not required to make a specific determination regarding a claimant's level of education. The commission is only required to consider a claimant's education, along with other nonmedical factors such as the claimant's age and work history, in assessing the claimant's ability to perform work within the provided physical restrictions. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167.

{¶9} Here, the commission considered and adequately discussed relator's education in its assessment of the nonmedical factors. The commission noted that relator completed 11 years of formal education and left school for reasons unrelated to his academic performance. Relator could read, write and perform basic math equations. His

educational abilities were sufficient to enable relator to complete specialized training programs as well as to fill out paperwork associated with shipping and receiving duties required by past employment. This discussion of relator's education and how it affects his ability to perform light duty and sedentary work, is sufficient under *Stephenson*. We agree with the magistrate that the commission did not abuse its discretion in its assessment of relator's education.

{¶10} Moreover, contrary to relator's contention, the magistrate's decision does not create a rule that requires relator to prove that he brought certain evidence regarding his educational abilities to the attention of the commission. The magistrate only pointed out that it is unclear whether relator did so in this case. Nevertheless, the evidence of relator's educational abilities is contained in three vocational reports that are part of the stipulated record. While the commission is required to consider all evidence in the record, it is not required to rely on vocational reports because the commission is the exclusive evaluator of disability. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152; *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117, 1994-Ohio-188. In assessing relator's education, the commission relied on relator's PTD application. Because the PTD application is some evidence supporting the commission's decision, the commission did not abuse its discretion. Nor was the commission required to state why it did not rely upon the vocational reports.

{¶11} We also disagree with relator's assertion that the magistrate's discussion of *State ex rel. McKenzie v. Indus. Comm.*, 10th Dist. No. 05AP-1309, 2006-Ohio-5944, *State ex rel. Stamm v. Harm & Ring Mechanical, Inc.*, 10th Dist. No. 05AP-742, 2006-Ohio-3108, and *State ex rel. Adair v. Reading Restaurants, Inc.*, 10th Dist. No. 03AP-

1130, 2004-Ohio-5254 implies that these cases were considered as evidence supporting the commission's decision. The magistrate cited these cases as illustrative of the legal principles at issue and how those principles have been applied in similar factual scenarios. The magistrate did not treat these cases as evidence.

{¶12} For the foregoing reasons, we overrule relator's second objection.

{¶13} In his third objection, relator contends that the magistrate erred in determining that the commission adequately considered relator's psychological condition in assessing the nonmedical factors. Again, we disagree.

{¶14} Relator correctly points out that *Stephenson* and its progeny required the commission to consider how his medical and psychological restrictions, viewed in the context of the relevant *Stephenson* factors, impacted relator's ability to engage in sustained remunerative employment. Relator is incorrect in asserting that the commission failed to conduct this analysis.

{¶15} The commission identified and discussed both the medical and psychological reports upon which it relied. The commission also referenced both reports in assessing the *Stephenson* factors. We agree with the magistrate that the commission conducted the required analysis. Therefore, we overrule relator's third objection.

{¶16} In his fourth and final objection, relator contends that the magistrate erred in determining that the commission was not required to consider relator's alleged lack of vocational rehabilitation potential or to explain how it supports the denial of PTD. We disagree.

{¶17} Although the commission did not expressly discuss relator's rehabilitation potential, it was not required to do so. Rehabilitation potential is not determinative of a

claimant's PTD eligibility, and the commission did not abuse its discretion by not discussing it. *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 585, 1997-Ohio-181. Moreover, as respondent points out, relator's alleged lack of rehabilitation potential was based solely upon Dr. Sassano's report. Relator submitted Dr. Sassano's report in support of his PTD application. In denying PTD, the commission relied on Dr. Gade-Pulido's report rather than on Dr. Sassano's report. Therefore, the commission found the only evidence of relator's purported lack of rehabilitative potential to be unpersuasive.

{¶18} We also disagree with relator's assertion that the magistrate usurped the power of the commission by noting that relator's one attempt at vocational rehabilitation in the 29 years following his injury might have been a negative factor. Although this speculation by the magistrate was unnecessary and irrelevant, it is not error. Therefore, we overrule relator's fourth objection.

{¶19} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, 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 relator's request for a writ of mandamus.

Objections overruled;
writ of mandamus denied.

CONNOR and DORRIAN, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. James Jones,	:	
Relator,	:	
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Industrial Commission of Ohio and Set Silica Sand Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on April 29, 2011

Stocker Pitts Co. LPA, and *Thomas R. Pitts*, for relator.

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

IN MANDAMUS

{¶20} Relator, James Jones, 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 his application for permanent total disability ("PTD") compensation and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶21} 1. Relator sustained a work-related injury on November 14, 1981 and his workers' compensation claim has been allowed for the following conditions:

> Cervical strain, dorsal sprain, cervical nerve root compression, myofascitis and radiculitis of intercostal nerves; concussion, contusion of the back and left arm; aggravation of pre-existing severe posttraumatic neurosis primarily of a conversion reaction type associated with complete invalidism.

{¶22} 2. Relator's first application for PTD compensation, filed in February 2002, was heard before a staff hearing officer ("SHO") on January 14, 2004 and was denied. The SHO noted that relator had last worked as a tow motor operator in 1999 and that his treatment for both his physical and psychological conditions had been conservative. The commission relied upon the report of Paul T. Scheatzle, D.O., and concluded that relator was capable of performing light work. The commission also relied on the report of Robert L. Byrnes, Ph.D., who concluded that, from a psychological standpoint, relator could not return to his former position of employment; however, he would be able to return to non-demanding positions for which he was otherwise qualified. The commission considered the non-medical disability factors and denied the application for PTD compensation as follows:

> Based on the claimant's testimony and his permanent total disability application, the Staff Hearing Officer finds that the claimant is forty-two years old. He states that he quit high school in the twelfth grade to get a job and support his daughter. The Staff Hearing Officer also finds that the claimant is able to read, write, and do basic math. In addition to his high school education, the claimant completed the training necessary to become a certified tow motor operator.
>
> After quitting school the claimant began working for a temporary agency. The claimant worked until he was injured

> on November 14, 1981. For most of the next ten years, the claimant drew workers' compensation benefits in this claim. For a small portion of the time the claimant worked at general labor positions. His final employment was from 1997 to 1999, when he was a tow motor operator.
>
> In order to determine the impact of the claimant's non-medical disability factors on his ability to work, the Commission had an Employability Assessment done by Lynn Mark. After reviewing the aforementioned disability factors in conjunction with the medical reports of Dr. Scheatzle and Dr. Byrnes, Ms. Mark indicated that the claimant remained employable. Ms. Mark noted that claimant's current age places him in the younger person category and as such his age is an asset to employment. She noted that the claimant's work history included some skilled work. However, Ms. Mark indicated the claimant may not be able to meet the basic demands of entry-level work because of his long absence from work. With regard to the claimant's education, she stated that academic skill testing would be needed to determine whether the claimant has the ability to meet the demands of entry-level work. At the present time Ms. Mark indicated that the claimant could be employed as a laborer, helper, gluer, sorter, cleaner, and polisher and would not need academic remediation to qualify for these positions.
>
> A claimant is considered to be permanently and totally disabled when there is no sustained remunerative employment that the claimant can presently perform or be retrained to perform. In this case the claimant is a young man who has only worked on a limited basis. Yet he still retains the physical and mental capacity to do some light work. Since the evidence shows that the claimant retains both the physical and vocational capacity to engage in sustained remunerative employment, he is not permanently and totally disabled. Accordingly, the claimant's Application for Permanent Total Disability is DENIED.

(Emphasis sic.)

{¶23} 3. Relator's second application for PTD compensation was filed in February 2010. According to his application, relator was 49 years of age, had applied for Social Security Disability Benefits, completed the 11th grade at Akron South High

School and, in 1980, he left school in order to support his family. Relator indicated that he had received special training in welding and that he could read, write, and perform basic math. Relator indicated that he had prior experience as a shipping clerk which required him to have basic reading skills so he could ship orders and write maintenance orders. He also indicated that in his job in shipping and receiving, he prepared work orders for loading and unloading trucks. (These are the last two jobs relator held.) Relator's other employment was in general labor and, the job he was performing at the time he was injured, which involved operating a rock crushing machine and general maintenance.

{¶24} 4. In support of his second application for PTD compensation, relator submitted the February 4, 2009 Physician's Report of Work Ability form completed by John M. Sassano, D.O., who opined that relator was totally disabled and would never be able to return to work.

{¶25} 5. Relator also submitted the May 12, 2009 report of David Aronson, Ph.D., who indicated that relator had been treating with him since April 1999, and he continued to experience problems with his attention, focus, concentration and stress tolerance. Dr. Aronson opined that, from a psychological standpoint, relator was permanently and totally disabled as a result of the allowed psychological condition.

{¶26} 6. The commission sent relator to Steven B. Van Auken, Ph.D., for a psychological evaluation. In his report, dated March 17, 2010, Dr. Van Auken identified various medical records, took a history from relator, and provided his findings. Dr. Van Auken also administered certain tests and concluded that relator's allowed psychological condition had reached maximum medical improvement ("MMI") and

assessed an 11 percent whole person impairment. Dr. Van Auken concluded that relator had no impairment with regard to social functioning and a mild impairment with regard to activities of daily living, adaptation to changing life circumstances, as well as concentration, persistence, and pace. Ultimately, Dr. Van Auken concluded that relator was capable of work with the following limitations:

> In and of themselves, Mr. Jones' remaining psychological symptoms - - including some diminishments in concentration and energy level - - would not preclude all forms of employment. He would not likely be able to return to the position at which he was injured; to attempt to do so would likely exacerbate his psychological symptoms. He would tend to do best in work that is well-structured, with mild to moderate performance demands.

{¶27} 7. Karen Gade-Pulido, M.D., examined relator for his allowed physical conditions. In her March 19, 2010 report, Dr. Gade-Pulido identified the records which she reviewed, provided her physical findings upon examination, concluded that relator's allowed physical conditions had reached MMI, assessed a five percent whole person impairment, and concluded that relator could perform light work.

{¶28} 8. The stipulation of evidence contains various vocational reports to which relator cites in this mandamus action. Those reports include the following: (a) Relator submitted the February 22, 1984 report of Thomas O. Hoover, Ph.D., a clinical psychologist, who noted that relator's reading comprehension was less than the sixth grade level and that it was estimated that his academic skills were poor. (b) The April 25, 2000 vocational report prepared by Tracie Miller of Goodwill Industries of Akron, Inc. Specifically, relator points to Ms. Miller's interpretation of the Peabody Pictures Vocabulary Test indicating that relator scored the age equivalent of a 13 year old demonstrating that he has basic vocabulary knowledge. Ms. Miller also

administered the Wide Range Achievement Test which indicated that relator demonstrated the ability to solve basic math problems and that he scored within a seventh grade reading level and a fourth grade spelling level. Ms. Miller was not able to administer the Gates-MacGinitie Reading Test because it would have required relator to sit for a period of 35 minutes and retain concentration. Having determined that relator's concentration was poor, Ms. Miller did not administer this test. Thereafter, Ms. Miller determined that relator had average reasoning skills, average to below average mathematical skills (fifth grade) and average to below-average language skills (seventh grade). Ultimately, Ms. Miller recommended the following:

> Mr. Jones was placed in contracts in a seated position packaging towels. He had requested working only two hours at a time because of his health and mental status. He was present for two days but had a very hard time staying focused and would get up very often to walk around. He had stated that emotional he was not doing well and had made and [sic] appointment to see his psychiatrist. Mr. Jones['] supervisor stated that he was unable to get complete any work during the time he was present because he seemed to be preoccupied and had so much difficulty sitting to try to stay on task.
>
> Mr. Jones contacted the evaluator stating he was unable to continue with the program at this time. He stated he had seen his psychiatrist and his medication had been increased. He hoped this would help him improve. At the time he spoke to the evaluator, he spoke very slowly and deliberate, more so than usual. He stated he would contact his vocational counselor about postponing or discontinuing the program until his status improved.

(c) The August 29, 2003 employability assessment was prepared by Lynn S. Mark. Specifically, relator points to the following:

> The claimant completed the 11th grade and does not have a GED. He did not state his [sic] able to read, write and do basic math on his PTD application. His previous jobs

> required academic skills of reasoning at the 7-8th grade level, math at the 4-6th grade level and language skills at the 7-8th grade level. Academic skills evaluation is needed in order to determine if he may have or develop the academic ability to meet basic demands of entry-level occupations.

(d) Relator also submitted the September 7, 2003 vocational assessment prepared by Mark A. Anderson. According to testing administered by Mr. Anderson, relator's reading placed him in the seventh grade level while his math placed him below a third grade level.

{¶29} 9. Relator's application for PTD compensation was heard before an SHO on June 29, 2010 and was denied. The SHO relied upon the reports of Drs. Gade-Pulido and Van Auken to conclude that relator was capable of performing light-duty work within the psychological limitations noted by Dr. Van Auken. Thereafter, the commission analyzed the non-medical disability factors as follows:

> **[AGE]**
>
> The Injured Worker is 49 years of age and is classified as a younger individual. The Injured Worker's age is a positive factor as many employer's prefer younger workers.
>
> **[EDUCATION]**
>
> The Injured Worker completed 11 years of formal education. The Injured Worker completed his eleventh year at Akron South High School and testified he left school in order to support his daughter. There is no evidence the Injured Worker left school due to academic difficulties. In fact, the Injured Worker reported on the IC-2 application that he can read, write, and perform basic math equations. These skills are helpful in the performance of entry level sedentary and light jobs.
>
> Moreover, the Injured Worker received specialized training in welding. He reported on the IC-2 application that this specialized training helped him procure his "first good job."

> This achievement evidence[d] the Injured Worker's ability to complete a short-term training course.
>
> The Injured Worker has also completed the necessary training to become a certified tow motor operator. The Injured [W]orker has worked a variety of jobs. It is noted that he received workers' compensation benefits for approximately ten years in the instant claim.
>
> **[WORK EXPERIENCE]**
>
> The Injured Worker has a history of performing unskilled and semi-skilled jobs. The Injured Worker worked in maintenance, as a laborer, and shipping and receiving. The Injured Worker testified he used his reading and writing skills to locate the merchandise in his shipping and receiving job. The Injured Worker has experience operating a welding a [sic] machine and driving a tow motor. He has also worked on an assembly line and loaded boxes.
>
> The Injured Worker reported he used his writing skills as he completed work orders for the product he loaded and unloaded. He read merchandise and shipping orders and also completed merchandise orders. The Injured Worker has experienced performing repetitive tasks, doing precise work, and also performing varied duties.

Ultimately, the SHO concluded as follows:

> The Injured Worker is a younger individual who completed 11 years of formal education. He can read, write, and perform basic math equations. He has also completed specialized training in welding and obtained certification to drive a tow motor. The Injured Worker has read and completed shipping and merchandise orders in his past jobs.
>
> Thus, the Hearing Officer finds the Injured Worker retains the ability to perform sedentary and light work within the restrictions of Drs. Gade-Pulido and Van Auken.
>
> As such, the Injured Worker's disability is not total as the Injured Worker is able to engage in sustained remunerative employment.

{¶30} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶31} In this mandamus action, relator specifically criticizes the commission's analysis of the non-medical disability factors. The commission abused its discretion by: (1) failing to consider relator's actual educational abilities; (2) failing to consider his work history and documented lack of transferable skills; (3) failing to consider his documented lack of vocational rehabilitation potential; and (4) failing to consider the impact of his documented psychological impairment. Relator seeks relief pursuant to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296.

{¶32} It is the magistrate's decision that the commission: (1) adequately considered relator's education; (2) properly addressed his work history; (3) was not required to discuss relator's attempts at vocational rehabilitation in this case; and (4) considered the impact of relator's psychological condition.

{¶33} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be

given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶34} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. 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 nonmedical factors. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *Gay*. 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*. (1991), 57 Ohio St.3d 203.

{¶35} Relator does not challenge the commission's reliance on the medical reports of Drs. Gade-Pulido and Van Auken. Dr. Gade-Pulido opined that relator could perform light work which is defined in Ohio Adm.Code 4121-3-34(B)(2)(b) as follows:

> (b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

{¶36} Dr. Van Auken examined relator for his allowed psychological condition, concluded that condition had reached MMI, and assessed an 11 percent whole person

impairment. According to Dr. Van Auken, relator's impairment was mild and would not preclude him from working, particularly in a well-structured work environment with mild to moderate performance demands.

{¶37} Relator's challenge to the commission's order relates to the commission's analysis of the non-medical disability factors, specifically, as it concerns relator's educational abilities, past work experience, and his efforts at vocational rehabilitation. Relator also contends that the commission failed to consider his psychological impairment.

{¶38} Relator's first challenge concerns the commission's treatment of his educational abilities. Specifically, relator argues that he submitted sufficient evidence to prove to the commission that his educational abilities were far below his 11th grade education and that the commission failed to consider this.

{¶39} An 11th grade education is ordinarily considered to be a "limited education" and is defined in Ohio Adm.Code 4121-3-34(B)(3)(a)(iii):

> (iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

However, the Ohio Administrative Code also provides that one's educational level may not be an accurate reflection of one's actual educational abilities. Specifically, Ohio Adm.Code 4121-3-34(B)(3)(b) provides:

> (b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one’s actual educational abilities. If there is no

> other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

{¶40} Relator contends that he submitted sufficient evidence which would tend to establish that, at best, his education should be considered marginal which is defined in Ohio Adm.Code 4121-3-34(B)(3)(b)(ii) as follows:

> (ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.

{¶41} Relator did present several pieces of information apparently to demonstrate that his actual educational abilities were significantly below his academic level. This evidence is contained in three vocational reports and a 1984 report from a clinical psychologist who opined that relator had a 40 percent impairment, was temporarily disabled and needed intense psychiatric intervention. However, while this information is contained in the stipulation of evidence, at no time does relator assert that he specifically brought any of this evidence to the attention of the hearing officer. Relator's first application for PTD compensation was denied in 2004. All of this evidence concerning relator's educational deficiencies had been prepared before the hearing and would have been available for consideration of relator's first application. Because the hearing officer, at that time, described relator's educational abilities in substantially the same manner in which this SHO described his educational abilities here, relator should have brought this information to the attention of the hearing officer. It is impossible, in this mandamus action, to know whether or not relator made the SHO specifically aware of this information.

{¶42} The most recent information which relator submitted is contained in the 2003 vocational reports of Lynn Mark and Mark Anderson. Pursuant to *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266 and *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117, the commission is the exclusive evaluator of disability, is not bound to accept vocational evidence, even if uncontroverted, and, if bound to accept a rehabilitation report's conclusions, the rehabilitation division, and not the commission, would become the ultimate evaluator of disability, contrary to *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167. According to both of those vocational reports, relator's reading and language levels were estimated to be seventh to eighth grade and his math level was estimated to be somewhere between the third and sixth grades. These numbers would put relator in the category of having a marginal education. This means that relator would have the ability in reasoning, arithmetic, and language skills necessary to perform unskilled type of work.

{¶43} In denying his application for PTD compensation, the commission found that relator had the ability to perform sedentary and light-duty work without making any reference to whether or not that work would be semi-skilled or unskilled. However, in discussing relator's work history, the SHO did note that relator had performed semi-skilled and unskilled jobs in the past in maintenance, as a laborer and in shipping and receiving.

{¶44} Relator does not contend that there are no unskilled jobs out there in the sedentary or light-duty range. In *State ex rel. McKenzie v. Indus. Comm.*, 10th Dist. No. 05AP-1309, 2006-Ohio-5944, this court upheld the commission's decision to deny PTD compensation to a claimant who was 55 years of age, had completed the 11th grade,

but had not obtained a GED, and was considered to have a marginal education. The commission found that she could perform unskilled entry-level employment in sedentary and light-duty jobs. In *State ex rel. Stamm v. Harm & Ring Mechanical, Inc*., 10th Dist. No. 05AP-742, 2006-Ohio-3108, this court upheld the commission's decision to deny PTD compensation to a 61 year old claimant with a 9th grade formal education, but for whom testing revealed that he read at a 7th grade level, spelled at a 5th grade level, and performed mathematics at a 6th grade level, and was capable of performing unskilled sedentary occupations. Similar to here, the commission noted that the claimant had demonstrated the ability to learn skills through training and could learn new skills through on-the-job training. Further, in *State ex rel. Adair v. Reading Restaurants, Inc*., 10th Dist. No. 03AP-1130, 2004-Ohio-5254, this court upheld the commission's decision to deny PTD compensation to a claimant who was 58 years old, had a 4th grade formal education, and work experience as a cook and factory worker. In that case, claimant participated in a rehabilitation program which revealed that he read at a 5th grade level. The commission determined that with that education, he could perform entry-level unskilled sedentary employment.

{¶45} In the present case, the commission's analysis of relator's education is sparse; however, it is consistent with other decisions which have been upheld by this court, and from the standpoint that relator here can perform light-duty work as well as sedentary work, and is younger, his educational level should be less of a barrier than it was for these other claimants who were limited to sedentary employment. As such, in spite of acknowledging that a more thorough analysis would be preferred, the magistrate cannot say that the commission abused its discretion in coming to the

conclusion to which it came and does not see the necessity for the granting of a writ of mandamus.

{¶46} Relator also challenges the commission's analysis of his work experience, specifically arguing that he has no transferable skills. However, while it is true that relator's previous work experience has been in medium to heavy work and arguably provided him with few transferable skills, the commission's determination that he could perform sedentary to light-duty work which is unskilled is not inconsistent with the evidence.

{¶47} On his PTD application, relator indicated that he had performed some record-keeping work. In spite of the fact that those jobs required him to perform a significant amount of walking and would not be considered light-duty jobs, good record-keeping skills can be considered a transferable asset. However, even if it is assumed that relator has no transferable skills, unskilled work does not require any skills. There simply is no deficiency with regard to the commission's treatment of relator's prior work history even considering the commission's less than perfect treatment of his educational abilities.

{¶48} Relator next contends that the commission failed to consider his documented lack of vocational rehabilitation potential. This magistrate disagrees.

{¶49} The record indicates that relator's injury occurred in 1981 when he was 20 years old. Relator's first application for PTD compensation was filed in 2002, when he was 41 years old and his second application for PTD compensation was filed in 2010, when he was 49 years old.

{¶50} Between the date of injury in 1981 and the denial of his first application for PTD compensation in 2004, there is no evidence that relator undertook any efforts at vocational rehabilitation. However, after his first application was denied, instead of immediately pursing any vocational rehabilitation, relator waited an additional five years before attempting vocational rehabilitation. In a letter dated August 4, 2009, relator was informed that, after reviewing his doctor's MEDCO-14, his treating physician indicated that he was totally disabled. As such, it was determined that no services could be provided. In a letter dated August 13, 2009, relator appealed this finding on grounds that he had been denied PTD compensation in 2004 because it was determined that he could perform light-duty work even though his doctor said he was permanently and totally disabled. Relator asked that he be afforded the opportunity to make an attempt at vocational services.

{¶51} Relator's file was sent to Gloria E. Mosur, R.N., for a peer review. In her letter dated August 25, 2009, Ms. Mosur first identified the evidence she considered which included medical reports from Drs. Aronson and Sassan, who opined that relator was unable to perform any sustained remunerative employment from both a physical as well as a psychological standpoint. Thereafter, Ms. Mosur identified the factors upon which the denial had been based and which were still a consideration: (1) relator's treating physician stated that he was totally disabled from work, and (2) relator was approved for Social Security Disability in 2001 and that such determination further indicates that relator would not benefit from referral to vocational rehabilitation services. On those bases, relator's appeal was denied.

{¶52} Relator appealed again and the matter was sent to the Ohio Bureau of Workers' Compensation's ("BWC") Alternative Dispute Resolution Unit for determination. However, the closure was upheld in an order mailed September 24, 2009 specifically because relator's treating physician indicated that he could not perform any work.

{¶53} Relator again appealed and the matter was heard before a district hearing officer on November 5, 2009. The BWC's order was affirmed for the following reason:

> In affirming the Administrator's decision to close vocational rehabilitation as not feasible, the District Hearing Officer has relied upon the 08/25/2009 report of Ms. Mosure [sic] RN, CDMS, CCM. Ms. Mosure [sic] has indicated that a vocational rehabilitation plan is not feasible as the physician of record has indicated that the Injured Worker is not capable of any return to work.

{¶54} While relator did pursue vocational rehabilitation, the magistrate finds that the commission did not abuse its discretion by not addressing it as a positive factor or as evidence that he was incapable of working. First, between the 1981 date of injury and the submission of his first PTD application in 2002, 21 years had passed without relator seeking any type of rehabilitation or retraining in an effort to improve his potential to become re-employed. Further, after his first PTD application was denied in 2004, relator waited another five years before he pursued any vocational rehabilitation. His file was closed for one reason—his treating physician opined that he was not capable of performing any work at any level. There was no determination that relator could not benefit from vocational rehabilitation and there was no finding that he lacked the potential to be rehabilitated.

{¶55} Contrary to relator's assertions, his late efforts at vocational rehabilitation did not need to be considered by the commission and, in all actuality, could have been held against him and used as an alternative reason to deny his application for PTD compensation. As the Supreme Court of Ohio stated in *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 1996-Ohio-200, the commission and courts can demand accountability of claimants who, despite time and medical ability to do so, never try to further their education or learn new skills. The commission can hold a PTD claimant accountable for their failure to take advantage of the opportunity for rehabilitation or retraining. Here, the commission did not consider relator's efforts to be positive or negative. For those reasons, the magistrate finds that the commission did not abuse its discretion in this regard.

{¶56} Relator's last argument is that the commission did not consider his psychological impairment. However, this magistrate disagrees. The commission specifically relied on the report of Dr. Van Auken who concluded that relator's psychological impairment was mild and that he could perform work, preferably in an environment that is well-structured and that had mild to moderate performance demands. To the extent that relator points to the reports of other doctors who evaluated him for psychological conditions, the commission was not required to rely on those reports. Credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *Teece*. Furthermore, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373. Dr. Van Auken's report constitutes some evidence upon which the commission could

rely and he found that relator's psychological impairment was mild. The commission was not required to accept the findings of any of the other doctors and relator has not asserted that Dr. Van Auken's report does not constitute some evidence, only that it fails to accurately reflect his abilities.

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

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).