

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Section (M), Loc.R. 12 of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.)

{¶3} No objections have been filed to the magistrate's decision.

{¶4} As there have been no objections filed to the magistrate's decision, and as it contains no error of law or other defect on its face, we adopt the decision of the magistrate as our own, including the findings of fact and conclusions of law contained in it. In accordance with the decision of the magistrate, the requested writ of mandamus is denied.

Writ of mandamus denied.

BOWMAN and KLATT, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jacquelyn Hooks,	:	
Relator,	:	
v.	:	No. 03AP-996
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Harrison House, Inc.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on May 26, 2004

David E. Pflanz, for relator.

Jim Petro, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

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

Findings of Fact:

{¶6} 1. On November 6, 1995, relator sustained an industrial injury while employed as a dietary supervisor at a nursing home. Her industrial claim is allowed for: "lumbosacral sprain; aggravation of pre-existing spondylolistheses L3-4," and is assigned claim number 95-567377.

{¶7} 2. On March 18, 2003, relator filed an application for PTD compensation.

{¶8} 3. On June 10, 2003, relator was examined, at the commission's request, by James T. Lutz, M.D., who is board certified in occupational medicine. In his narrative report, Dr. Lutz opined that, due to the industrial injury, relator has a 25 percent whole person impairment.

{¶9} 4. Dr. Lutz also completed a Physical Strength Rating form on which he indicated that relator was medically capable of performing sedentary work.

{¶10} 5. The commission requested an employability assessment report from Caroline Wolfe. The Wolfe report, dated July 10, 2003, responds to the following query:

* * * Based on your separate consideration of reviewed medical and psychological opinions regarding functional limitations which arise from the allowed condition(s), identify (A) occupations which the claimant may reasonably be expected to perform, immediately and or (B) following appropriate academic remediation.

{¶11} Indicating acceptance of Dr. Lutz's reports and responding to the above query, Ms. Wolfe wrote:

[A] Skills do not transfer to significant number of jobs with this restriction.

[B] Claimant not eligible for retraining because of lack of education[.]

{¶12} Under "Effects of Other Employment Factors," the Wolfe report further states:

[One] **Question:** How, if at all, do the claimant's age, education, work history or other factors (physical, psychological and sociological) effect his/her ability to meet basic demands of entry level occupations?

* * *

Age: As a younger person, age will not prevent re-employment[.]

Education: Lack of high school diploma may be a barrier in seeking new employment[.]

Work History: Work history consists of unskilled to semi-skilled positions with some responsibility to supervise others. She has limited transferable skills.

Other: History of hypertension, chronic sinusitis, chronic constipation and anxiety attacks; overweight. These conditions should not impede her ability to work.

[Two] **Question:** Does your review of background data indicate whether the claimant may reasonably develop academic or other skills required to perform entry level Sedentary or Light jobs?

Answer: Claimant is within the BWC age guidelines for formal rehab or training; however, she lacks the academics.

(Emphasis sic.) The Wolfe report further states:

WORK HISTORY

JOB TITLE	* * *	SKILL LEVEL	STRENGTH LEVEL	DATES
Kitchen Supervisor	* * *	Skilled	Medium	[1993-96]
Housecleaner	* * *	Semi-skilled	Medium	[1989-93]

Mailroom Clerk	* * *	Unskilled	Light	[1987-87]
Food Service worker, Hospital	* * *	Unskilled	Medium	[1985-86]
* * *				

EDUCATIONAL HISTORY:

Highest Grade Completed:	11 th grade
Date of Last Attendance:	1977
H.S. Graduate:	No
GED:	No
Vocational Training:	None
ICO Educational Classification:	Limited education (claimant says she cannot read, write, or do basic math very well)[.]

(Emphasis sic.)

{¶13} 6. Following an August 27, 2003 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order states:

The injured worker was examined at the request of the Industrial Commission by Dr. Lutz on 06/10/2003 with regard to the allowed orthopedic conditions in the claim. Dr. Lutz indicated that those conditions have reached maximum medical improvement and result in a 25 percent whole person impairment rating. Dr. Lutz indicated that the injured worker would be able to engage in sedentary work activity based upon his examination of the injured worker.

The hearing officer finds that the injured worker's condition is permanent and has reached maximum medical improvement and precludes the injured worker from returning to her former position of employment. The Hearing Officer finds that the injured worker would be able to engage in sedentary

work activity within the abilities noted by Dr. Lutz in his 06/10/2003 report.

The hearing officer finds that the injured worker is 43 years of age, has an 11th grade education and has previous work experience as a dietary supervisor in a nursing home, house keeper, mail clerk and kitchen aide in a nursing home.

The Hearing Officer finds that the injured worker's age of 43 classifies the injured worker as a person of young age and would not prevent the injured worker from engaging in entry level sedentary employment activity or engaging in the retraining which may be necessary for such reemployment activity.

The hearing officer finds that the injured worker has an 11th grade education and finds that this level of education is efficient [sic] in order for the injured worker to engage in entry level sedentary employment activity or retraining which may be necessary for such employment activity.

The injured worker's past work history has included work as a dietary supervisor which involved supervising up to five people. This required the injured worker to supervise the work of others and to make sure that work was done in a proper manner. The injured worker was required to periodically report to her supervisor the work activity of the individuals that she supervised and was to indicate whether these people were completing their work activity satisfactorily. The injured worker was also required to make sure that various individuals obtain the proper food which fit within their dietary restrictions.

The injured worker's past employment activities also included work as a house cleaner, mail clerk, and kitchen aide.

The hearing officer finds that the injured worker['s] past work history has involved supervisory work and has also demonstrated the injured worker's ability to master and adapt to a number of different employment activities.

The Hearing Officer finds that the injured worker's past work history would not be a barrier to the injured worker in

engaging in new types of work activity which involves adhering to new work processes, rules, and procedures.

A review of the file indicates that the injured worker had previously engaged in a rehabilitation effort in November of 2001 but that the injured worker's rehabilitation file was closed based upon her failure to make 10 to 15 job contacts a week as required. A report in file from the vocational rehabilitation department indicates that the injured worker gave below average effort with regard to her job contacts and that she did not seem eager to work nor engage in continuation of rehabilitation services. The department found that the injured worker was not truly motivated to return to work and her rehabilitation file was closed on November 11, 2001.

The Hearing Officer finds that the injured worker has not made a good faith effort to engage in rehabilitation services and finds that this is not a positive factor with regard to the injured worker's application for permanent and total disability compensation.

Based upon the injured worker's age, education, past work experience and prior attempts at rehabilitation, the hearing officer finds that the injured worker would be able to engage in sustained remunerative work activity and is not permanently and totally disabled.

7. On October 6, 2003, relator, Jacquelyn Hooks, filed this mandamus action.

Conclusions of Law:

{¶14} The main issue presented by relator is whether the commission abused its discretion by issuing an order that does not indicate that the employability assessment report of Caroline Wolfe was reviewed. Finding that the commission did not abuse its discretion, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶15} Before reaching the main issue, the magistrate notes that, for its threshold medical determination, the commission relied exclusively upon the reports of Dr. Lutz who found that relator is medically able to perform sedentary work. Relator asserts in her brief that "the Staff Hearing Officer does not state that he relied upon any medical evidence." (Relator's brief at 5.) In her reply brief, relator again asserts "the Commission's order does not specifically state that the SHO relied upon any medical report." (Relator's reply brief at 3.) Relator is simply mistaken in these assertions. The SHO's order is clear that Dr. Lutz's reports are relied upon for the determination of relator's residual medical capacity.

{¶16} Because relator does not even acknowledge the commission's reliance upon Dr. Lutz's reports, obviously, relator does not challenge Dr. Lutz's reports nor the commission's conclusion that she is medically capable of performing sedentary work. However, relator does challenge the commission's nonmedical analysis.

{¶17} At the outset, the magistrate observes that the commission conducted its own analysis of the nonmedical factors. The commission did not state reliance upon the Wolfe employability assessment report, nor did the commission mention that the report was considered.

{¶18} Because the commission is the expert on the nonmedical or vocational evidence, it is not critical or even necessary for the commission to accept or rely upon a vocational report. *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 271. Accordingly, the commission does not abuse its discretion by conducting its own nonmedical analysis without reference even to its own employability assessment report. The commission is free to accept or reject the vocational conclusions of its own vocational

expert. *State ex rel. Ellis v. McGraw Edison Co.* (1993), 66 Ohio St.3d 92, 94; *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139, 141.

{¶19} Moreover, the commission is not required to list the evidence it considered, nor is it required to explain why it did not rely upon certain evidence. *State ex rel. Lovell v. Indus. Comm.* (1996), 74 Ohio St.3d 250. There is a presumption of regularity that attaches to commission proceedings. *Id.* Here, the presumption is that the commission considered the Wolfe report but found it unpersuasive. *Id.*

{¶20} Relator also asserts that the commission abused its discretion in rendering the following finding:

The hearing officer finds that the injured worker has an 11th grade education and finds that this level of education is efficient [sic] in order for the injured worker to engage in entry level sedentary employment activity or retraining which may be necessary for such employment activity.

{¶21} Apparently, relator's assertion that the above-quoted finding constitutes an abuse of discretion is premised upon the Wolfe report which concludes that "lack of high school diploma may be a barrier in seeking new employment." As previously noted, the presumption is that the commission exercised its discretion by rejecting many of the conclusions that Ms. Wolfe draws in her report. *Lovell*, supra.

Moreover, Ohio Adm.Code 4121-3-34(B)(3)(b)(iii) states:

"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 a claimant 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.

{¶22} Given the above-quoted provisions of the Ohio Administrative Code, relator's 11th grade education does not automatically negate the commission's finding that relator is qualified to engage in "entry level sedentary employment activity."

{¶23} To summarize, relator has failed to show that the commission abused its discretion in denying her PTD application.

{¶24} Accordingly, 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