

including findings of fact and conclusions of law. In her decision, the magistrate noted the commission relied on the report of Dr. Keith, who opined relator could perform sedentary work using her left hand but not her right hand, as well as the report of Dr. Martin, who concluded relator's allowed psychological condition did not prevent her from working.

{¶ 3} In terms of the nonmedical factors, the magistrate considered relator's contention that, although the commission concluded relator would have additional vocational opportunities on obtaining a G.E.D, the commission did not explain how relator could obtain a G.E.D. or how it would advance her employability. Accordingly, relator asserted the commission abused its discretion in (1) determining, in effect, that persons without a G.E.D. or high school diploma who can perform work at a sedentary level are "de facto" not entitled to permanent total disability benefits and (2) violating *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 4} In resolving the issues, the magistrate determined the commission did not abuse its discretion when it decided relator was capable of obtaining a G.E.D., which would open vocational rehabilitation opportunities, and the ability to transition to employment, she had not yet pursued. Further concluding the commission's order complies with the requirements of *Noll*, the magistrate determined this court should deny the requested writ.

II. Objections

{¶ 5} Relator filed two objections to the magistrate's conclusions of law:

1. The Magistrate erred by speculating as to what effect having her GED would have on Ms. Whitt's *Stephenson* factors when vocational testimony was that she was unemployable and not a candidate for vocational rehabilitation.

2. The Magistrate erred by finding *State ex rel. Gemind v. Indus. Comm.*, is not analogous to Ms. Whitt's situation and therefore wholly denied.

A. First Objection

{¶ 6} Relator's first objection identifies the primary issue to be whether the commission properly denied relator's application for permanent total disability compensation based entirely on her not having a G.E.D. Contrary to relator's contentions,

the commission did not deny her application solely because she lacks a G.E.D. Rather, the commission determined an award of permanent total disability compensation would be premature in view of two factors: (1) the testimony of Paul T. Kijewski that he knew of no reason relator could not obtain a G.E.D., and (2) the additional vocational rehabilitation options that not only would be open to her after she obtained a G.E.D., but would enhance her ability to transition to one-handed, sedentary work.

{¶ 7} The evidence in the record supports the commission's decision. Although the staff hearing officer found relator's injuries preclude her from returning to her former position of employment, the issue was whether she could transition to one-handed, sedentary work. Relator neither completed high school nor obtained a G.E.D., but the staff hearing officer noted she completed a six-week training course to become a state-tested nurse's assistant. The staff hearing officer coupled such training with Kijewski's testimony and the report of Dr. Keith, who did not document any left hand or left arm problem relator was experiencing, to permissibly conclude a G.E.D., and the additional vocational and employment opportunities it would allow, were within relator's capabilities. With that predicate, the staff hearing officer could conclude an award of permanent total disability compensation was premature.

{¶ 8} To the extent relator contends the commission violated *Noll*, the record discloses otherwise. The commission considered not only the medical evidence, but also relator's age of 53 years, her education, Kijewski's testimony concerning relator's ability to obtain a G.E.D., her training to become a state-tested nurse's assistant, her varied vocational history, and her demonstrated ability to work in different work environments. Although the commission acknowledged relator will require vocational rehabilitation to transition to one-handed, sedentary work, the commission noted Kijewski's testimony that, on obtaining a G.E.D., relator would have additional rehabilitation options open to her. The commission thus explained its rationale for determining an award of permanent total disability compensation to be premature at the time and, in doing so, satisfied the requirements of *Noll*. Relator's first objection is overruled.

B. *Second Objection*

{¶ 9} Relator's second objection contends that, contrary to the magistrate's conclusion, *State ex rel. Gemind v. Indus. Comm.*, 82 Ohio St.3d 457 (1998), applies here

and demonstrates the commission abused its discretion in denying relator's application for permanent total disability compensation. The facts of *Gemind* are substantially different from those pertinent to relator, in that Gemind completed only the 9th grade, no evidence suggested he was capable of obtaining a G.E.D., he had limited reading, writing, and math abilities and he never worked in any occupation except as a cement finisher. By contrast, relator completed the 11th grade, is capable of obtaining a G.E.D. and completed training as a nurse's assistant. *Gemind* does not enhance relator's contentions. Relator's second objection is overruled.

III. Disposition

{¶ 10} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;
writ denied.*

KLATT and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Cheryl L. Whitt,	:	
Relator,	:	
v.	:	No. 11AP-448
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on January 31, 2012

Shapiro, Marnecheck, Riemer & Palnik, and Matthew Palnik,
for relator.

Michael DeWine, Attorney General, Andrew J. Alatis and
Elise Porter, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 11} Relator, Cheryl L. Whitt, 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 her application for permanent total disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶ 12} 1. Relator sustained a work-related injury on September 14, 2001, and her workers' compensation claim has been allowed for the following conditions: "Sprain of right wrist; contusion of right wrist; sprain right forearm; fracture right metacarpal, closed; articular cartilage dislocation right forearm; tenosynovitis of right hand; right carpal tunnel syndrome; injury ulnar nerve; other lesion ulnar nerve; joint derangement right forearm; neuropathy left ulnar nerve; depressive disorder; right wrist deQuervains."

{¶ 13} 2. As a result of these injuries, relator has undergone numerous surgeries, all but one involving her right hand.

{¶ 14} 3. Following her surgeries, relator underwent much physical therapy.

{¶ 15} 4. Relator filed her application for PTD compensation in November 2009. According to her application, relator had applied for and was receiving past social security benefits, had completed the 11th grade, did not receive her G.E.D., and underwent training to be certified as a nursing assistant. Relator indicated that she could read, write, and perform basic math, but not well, and that she had not participated in any rehabilitative services.

{¶ 16} In support of her application, relator included the September 15, 2009 report of Ralph J. Kovach, M.D. Following his examination, Dr. Kovach concluded that relator's allowed conditions had reached maximum medical improvement ("MMI") and that she could not return to her former position of employment. With regard to functional limitations, Dr. Kovach indicated:

Functional limitations at this time are that the claimant cannot lift or carry anything heavier than three pounds. She has excellent range of motion but she still has unresolved diminished sensation of the fingers of the right hand in the median nerve distribution. She claims she has diminished sensation over the anterior aspect of her forearm after her most recent surgical procedure. She cannot do any pushing or pulling that requires strength rated over three pounds. She cannot do fine manipulation due to diminished sensation in the fingers.

Dr. Kovach opined that relator could not return to any form of remunerative employment, and he did not consider her a candidate for vocational rehabilitation.

{¶ 17} 5. The commission had relator examined by Michael W. Keith, M.D. In his February 22, 2010 report, Dr. Keith identified the medical records which he reviewed, provided his physical findings upon examination, opined that relator had reached an 8 percent whole person impairment, and noted the following restrictions:

* * * I do not have strength measurements because it was quite clear that the patient's voluntary effort is very low and she doesn't trust the use of her right hand. She does trust the use of her left hand. As we went through her job description and the definitions of various types of work, it was clear that she could only perform sedentary work using her left hand and not use the right hand at all. She is capable to driving an automobile herself and therefore could report to work at a distance and has no other central nerve system impairments that would prevent sedentary work.

{¶ 18} 6. Patricia Martin, M.D., completed an independent psychiatric evaluation on February 8, 2010. Dr. Martin concluded that relator's allowed psychological condition had reached MMI and that she was not prevented from working, as follows:

Overall, Ms. Whitt's Occupational Activity capacity is minimally influenced by her allowed Depressive condition, if at all. Her primary limitations are due to her physical problems of difficulty using her right arm. A full review of her mild impairment rating (approximately 10%) is outlined previously is [sic] Assessment of Severity. She should be able to perform any occupational activity she is physically capable of performing.

{¶ 19} 7. Paul T. Kijewski, a certified vocational evaluator, examined relator and provided a comprehensive vocational evaluation report dated June 1, 2010. Mr. Kijewski noted that relator last worked in January 2003, that she completed the 11th grade, that she did not have a G.E.D., but completed a six-week training program to become a certified nursing assistant. Ultimately, Mr. Kijewski determined that relator was not a candidate for vocational services and did not appear to be capable of sustained remunerative employment based on the following factors:

[One] All of the jobs which Ms. Whitt has performed in the past are now beyond her present physical capabilities. Even simple cashiering work involving minimal lifting would involve repetitive use of the hands which is contraindicated in light of the affects of injuries allowed in this claim. She notes

a loss of grip strength in her dominant left hand and has also undergone an ulnar nerve transposition on that arm which also makes repetitive use of her left arm and hand contraindicated.

[Two] Ms. Whitt lacks a GED which poses a barrier to entrance into formal academic training programs to acquire new skills with which she could re-enter the work force.

[Three] Dr. Keith finds that Ms. Whitt can perform sedentary work with little use of the right hand. Testing indicates that she has limited fine finger dexterity in both hands which would eliminate sedentary assembly type work. Her limited fine finger dexterity would also indicate that she does not have the capability of acquiring competitive keyboarding skills needed for entry-level clerical work as indicated elsewhere on this report. Even if she had the necessary dexterity, medical information indicates that she would not be able to perform keyboarding tasks for any prolonged period of time.

{¶ 20} 8. The record contains a vocational rehabilitation closure report from the Ohio Bureau of Workers' Compensation ("BWC") dated June 7, 2010, indicating that vocational rehabilitation services were being terminated for the following reasons:

* * * The results of the evaluation indicated that she would not be a candidate for vocational rehabilitation. She is limited to jobs in the sedentary range of physical demands with little use of the right hand according to Dr. Keith. Testing indicated that she has limited finger dexterity in both hands ruling out assembly and clerical (keyboarding) jobs and she lacks a GED that would pose as a barrier to entrance into training programs to acquire new skills. The results of the vocational evaluation were reviewed by the MCO and closure was recommended. Simultaneously, notification was received from BWC that termination of vocational rehabilitation services was required as her claim is pending claim settlement. A closure letter has been sent to Ms. Whitt, her attorney, the DMC assigned to the case and the MCO.

{¶ 21} 9. Relator's application was heard before a staff hearing officer ("SHO") on March 10, 2011. Mr. Kijewski testified and provided the following relevant information: (1) relator had been an average student in school and left high school because she became involved with a young man; (2) there were no factors that would prevent relator from

being able to obtain her G.E.D.; (3) if she obtained her G.E.D., relator would qualify for additional vocational training; and (4) relator was left-hand dominant.

{¶ 22} 10. The SHO entered an interlocutory order taking the matter under advisement due to the need to spend additional time reviewing the file.

{¶ 23} 11. The SHO's order from the March 10, 2011 hearing was typed on March 21, 2011. The SHO relied on the medical reports of Drs. Keith and Martin, as well as the report and testimony of Mr. Kijewski. Relying on the report of Dr. Keith, the SHO determined that relator was capable of performing sedentary work with her left hand only and that, from a psychosocial standpoint, relator had no work limitations. Thereafter, the SHO determined that it was premature to grant relator PTD compensation at this time because, in the SHO's opinion, relator had vocational opportunities which she had not yet pursued. Specifically, the SHO stated:

* * * The next issue to be considered is whether the Injured Worker is capable of making a vocational transition to the one handed sedentary work of which Dr. Keith finds her to be capable. At fifty-three year[s] of age is [sic] she is a worker of middle age. This is found to be a vocationally neutral factor. The Injured Worker has only an eleventh grade education. She testified that she does not have a GED and has never tried to obtain one. Mr. Kijewski, who administered a battery of educational and other tests to the Injured Worker, testified that he knows of no reason that the Injured Worker could not obtain a GED. The Injured Worker also demonstrated the ability to complete the program to become a state tested nurses' assistant. The Injured Worker does not have a history of performing sedentary work. She does have a varied vocational history and has demonstrated the ability to work in different work environments. She also was able to learn the skills necessary to become a nurse's assistant. It is clear that the Injured Worker will require vocational rehabilitation if she is to make the transition to one handed sedentary work. Mr. Kijewski recommended to the Managed Care Organization in this claim that the vocational rehabilitation file be closed. He did this because the Injured Worker did not have a GED and he believed the Injured Worker had significant problems with repetitive use and manual dexterity of the left hand and arm. The left hand and arm limitations are not documented in the report of Dr. Keith, the hand surgeon who examined the Injured Worker on behalf of the Industrial Commission. The rehabilitation file was closed by the Managed Care

Organization based on Mr. Kijewski's report and also at the direction of the Bureau of Workers' Compensation as settlement negotiations were under way. Mr. Kijewski indicated at the hearing, however, that if the Injured Worker could obtain a GED additional rehabilitation options would be open to her. The Hearing Officer believes that a finding of permanent total disability would be premature when the Injured Worker has made no effort to obtain the GED that could be her opening into vocational rehabilitation. The application is denied.

{¶ 24} 12. The SHO specifically focused on the fact that Mr. Kijewski assumed that relator had significant problems with repetitive use and manual dexterity of her left hand and arm, which was not documented in the report of Dr. Keith. Mr. Kijewski had recommended to the managed care organization that relator's vocational rehabilitation file be closed because relator did not have her G.E.D., and he believed that her use of her left hand and arm was significantly restricted. It should be noted that the rehabilitation file was closed based on Mr. Kijewski's report and at the direction of the BWC because settlement negotiations were underway. Because Mr. Kijewski testified at the hearing that additional rehabilitation options would be open to relator if she obtained her G.E.D., the SHO determined that it was premature to award her PTD at that time and denied her motion.

{¶ 25} 13. Relator's request for reconsideration was denied by order of the commission mailed April 23, 2011.

{¶ 26} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 27} Relator contends that the commission abused its discretion by "Holding that Persons Without a GED or High School Diploma Who Can Perform Work at a Sedentary level are De Facto Not Entitled to Permanent Total Disability Benefits," and that the commission's order violates *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, because the commission failed to explain how relator would obtain a G.E.D. and the effect that would have and failed to explain why the commission ignored Dr. Kovach's report and relied on Dr. Keith's report. (Relator's brief, at 9.)

{¶ 28} It is this magistrate's decision that the commission did not abuse its discretion by finding it was premature to award relator PTD compensation because there were vocational rehabilitation opportunities available to her which she had not yet pursued and that the commission's order complies with the requirements of *Noll*. As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141; *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693, 1994-Ohio-95.

{¶ 29} Permanent total disability is the inability to perform any sustained remunerative employment. *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316. In *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250, 253-54, the Supreme Court of Ohio stated:

We view permanent total disability compensation as compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. Thus, it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential. While extenuating circumstances can excuse a claimant's nonparticipation in reeducation or retraining efforts, claimants should not longer assume that a participatory role, or lack thereof, will go unscrutinized.

{¶ 30} The commission does not just look at past abilities; instead, the commission looks at current and future (i.e. potentially developable skills). *State ex rel. Ehlinger v. Indus. Comm.*, 76 Ohio St.3d 400, 1996-Ohio-191; *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 1996-Ohio-316; and *State ex rel. B.F. Goodrich v. Indus. Comm.*, 73 Ohio St.3d 525, 1995-Ohio-291. The commission is the exclusive evaluator of disability. *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152, and *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117, 1994-Ohio-188.

{¶ 31} In the present case, relator was limited to performing work solely with her left dominant hand. Relator was 53 years of age and had completed the 11th grade, but had not attempted to earn her G.E.D. Mr. Kijewski administered tests and testified that, in his opinion, relator could earn her G.E.D. and that, if she did, her employment opportunities would increase. Thereafter, the commission noted that Mr. Kijewski had

recommended that relator's vocational rehabilitation file be closed because she did not have a G.E.D. and because he believed that she had significant problems with repetitive use and manual dexterity of her left hand and arm. The commission noted that those restrictions had not been documented by Dr. Keith. The commission ultimately concluded that it was premature to award relator PTD compensation, finding that she had not exhausted all vocational opportunities; namely, relator had not attempted to obtain a G.E.D. which would enhance her reemployment potential.

{¶ 32} Relator cites *State ex rel. Gemind v. Indus. Comm.*, 82 Ohio St.3d 457, 1998-Ohio-214, in support of her argument that the commission provided no explanation of how she was qualified to obtain her G.E.D. However, the magistrate finds that the *Gemind* case is not applicable here.

{¶ 33} In *Gemind*, the claimant, Michael T. Gemind, had been a cement finisher since the age of 13. The medical evidence limited him to sedentary work. The commission noted that Gemind was 48 years old, had completed the ninth grade, did not have his G.E.D., and could not read, write, or perform basic math well. In discussing the non-medical disability factors, the commission stated:

"The hearing officers find that the claimant's past employment has consisted of heavy work as a cement finisher only. This work did not yield any skills which could be transferable to sedentary work activities. In light of the claimant's relatively young age of 48, some consideration, the claimant's ability to be retrained is appropriate. There is no vocational report in file or any other evidence addressing the claimant's ability to be retrained. There being no evidence to the contrary, the Staff Hearing Officers conclude that the claimant is capable of obtaining his G.E.D. and undertaking retraining so as to qualify for a more sedentary-type of work. There are machine operator positions in existence which allow the operator to stand for short periods but sit most of the time."

Id. at 459.

{¶ 34} In granting a writ of mandamus, the Supreme Court noted that there was no evidence that Gemind had the proficiency to obtain a G.E.D. in that the commission had provided no explanation how, given his present limited abilities, he was qualified to obtain a G.E.D. As such, the Supreme Court issued a writ of mandamus returning the

matter to the commission indicating that, in reconsidering Gemind's application, the commission "would be required to explain how it is that a forty-eight-year-old claimant, who has worked his entire working life as a cement finisher, who has not worked since 1989, who is incapable of returning to his former job duties, who has no transferable job skills, and who has limited reading, writing, and math abilities, can realistically return to the job market to perform some type of sedentary work." *Id.* at 462.

{¶ 35} Relator's situation is not analogous to Gemind's. Here, relator completed the 11th grade and, according to Mr. Kijewski, the vocational evaluator, there was no reason why relator could not obtain a G.E.D. Further, Mr. Kijewski noted that, with her G.E.D., relator would qualify for additional vocational rehabilitation with the BWC, enhancing her opportunities to become reemployed. Based upon this determination, the commission concluded that it was premature to award relator PTD compensation.

{¶ 36} As above indicated, the commission did explain how it was that relator was capable of obtaining her G.E.D. and undertaking retraining so that she could qualify for vocational rehabilitation, thereby increasing her reemployment opportunities. *Gemind* does not require this court to grant a writ of mandamus in this case.

{¶ 37} Relator also contends that the commission's order violates *Noll*; however, as above indicated, the commission did explain its rationale for finding that relator should not be awarded PTD compensation at this time. Further, to the extent that relator contends that the commission ignored Dr. Kovach's support, the commission is required only to list that evidence upon which it relies and is not required to cite and discuss all the evidence in the record. See *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, and *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19.

{¶ 38} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by finding that an award of PTD compensation to her at this time would be premature, and this court should deny relator's 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).