[Cite as *State ex rel. Barfield v. Indus. Comm.*, 2010-Ohio-5552.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Linda D. Barfield,	:	
Relator,	:	
v.	:	No. 10AP-61
The Industrial Commission of Ohio, and Judson Care Center, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 16, 2010

Clements, Mahin & Cohen, L.P.A. Co., Edward Cohen and *Whitney Sheff,* for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter,* for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Linda D. Barfield, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying her application for permanent total disability compensation and to enter an order granting said compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision the magistrate concluded (1) the commission could not rely on its determination that relator failed to participate in rehabilitation as a factor to deny her application for permanent total disability, and (2) even if that be so, the commission's order nonetheless can stand pursuant to this court's decision in *State ex rel. Searles v. Indus. Comm.,* 10th Dist. No. 01AP-970, 2002-Ohio-3097, affirmed 98 Ohio St.3d 390, 2003-Ohio-1493, and *State ex rel. Retar v. Indus. Comm.,* 10th Dist. No. 08AP-856, 2009-Ohio-5669. Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Relator filed an objection to the magistrate's conclusions of law:

> The Magistrate erred because the Industrial Commission's Order denying permanent total disability benefits was inseparably intertwined with its impermissible conclusions and inferences regarding Relator's lack of participation in vocational rehabilitation.

{¶4} Relator's single objection asserts the staff hearing officer's determination inferring that relator unjustifiably failed to participate in vocational rehabilitation is so intertwined with the remainder of the order that the matter must be returned to the commission to consider relator's application for permanent total disability compensation after it separates the improper evidence from that properly considered.

{¶5} As the magistrate correctly concluded, "the commission's determination inferring that relator unjustifiably failed to participate in vocational rehabilitation efforts

during the 13 years she last worked is not supported by any evidence upon which the commission relied, nor is such inference supported by the record before this court." (Mag. Dec., ¶44.) More problematic is whether the improper reference to vocational rehabilitation requires that we return the matter to the commission for an analysis that excludes consideration of the vocational rehabilitation issue.

{¶6} The magistrate's decision properly cites the pertinent cases, the results of which turn on factors such as whether the discussion of vocational rehabilitation was confined to a paragraph separate from those discussing the medical and nonmedical factors. See *Searles,* supra. Alternatively, the issue has been resolved based on explicit language of the staff hearing officer that delineates the basis for the decision, a basis that is "largely irrelevant" to the failure to pursue rehabilitation. See *Retar* at ¶39.

{¶7} Unlike either of those cases, the staff hearing officer in this case "bookends" her decision with a reference to vocational rehabilitation. Moreover, in the summary paragraph that explains the decision, the staff hearing officer first concludes relator "retains the physical functional capacity to perform sedentary employment activities which require limited use of the right hand and which are low stress activities." Acknowledging relator "has restrictions," the staff hearing officer in the same paragraph follows with the statement that relator "made no effort in the 13 years since she last worked to participate in a program of rehabilitation designed to enhance or improve her ability to return to the work force." (Mag. Dec., ¶26.) In light of such a paragraph, we are compelled to conclude the staff hearing officer's erroneous analysis of the vocational rehabilitation issue is so intertwined with the analysis of the medical and nonmedical factors that we must grant a limited writ and return this matter to the commission to consider relator's application for

permanent total disability compensation without at the same time considering that she did not engage in vocational rehabilitation.

III. Disposition

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts, and we adopt them as our own. Moreover, we conclude the magistrate properly ascertained that "the commission's determination inferring that relator unjustifiably failed to participate in vocational rehabilitation efforts during the 13 years she last worked is not supported by any evidence upon which the commission relied, nor is such inference supported by the record before this court." (Mag. Dec. ¶44.) Accordingly, we adopt not only the conclusion but the analysis leading to it. We, however, reject that portion of the magistrate's decision that determines the vocational rehabilitation issue is not so intertwined with the medical and nonmedical factors analysis that the commission's decision may stand. Rather, we sustain relator's objection to the limited extent of granting a limited writ that returns this matter to the commission to determine relator's permanent total disability compensation application without considering the vocational rehabilitation factor.

Objection sustained to extent indicated; limited writ granted.

TYACK, P.J., and FRENCH, J., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Linda D. Barfield,	:	
Relator,	:	
v.	:	No. 10AP-61
The Industrial Commission of Ohio and Judson Care Center, 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 July 30, 2010

Clements, Mahin & Cohen, L.P.A. Co., Edward Cohen and *Whitney Sheff*, for relator.

Richard Cordray, Attorney General, and *Allan K. Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

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

Findings of Fact:

{¶10} 1. On July 3, 1996, relator sustained an industrial injury while employed as a certified nursing assistant ("CNA") for respondent Judson Care Center, Inc.

{¶11} 2. The industrial claim (No. 96-425691) is allowed for "contusion of right elbow; right ulnar nerve lesion; aggravation of pre-existing dysthymic disorder and aggravation of pre-existing major depression."

{¶12} 3. Relator last worked in 1996.

{¶13} 4. On April 19, 2000, at the request of the Ohio Bureau of Workers' Compensation ("bureau"), relator was examined by David C. Randolph, M.D. In his six page report, dated May 19, 2000, Dr. Randolph, who is not a psychiatrist, indicates he performed a "physical examination." Dr. Randolph wrote:

> Upon review of the existing medical records, it is quite clear that the claimant's treatment is being directed toward significant psychiatric problems, however there was no indication from the existing record that intervention by an appropriate mental health professional was currently part of the record.
>
> It was not entirely clear from the record exactly what condition was being treated with respect to the cause of the physical pain.
>
> Under the circumstances, I would recommend continued evaluation with respect to the neurologic abnormalities contained herein. I would also recommend that an appropriate mental health professional be consulted with ongoing treatment directed toward Ms. Barfield on a regular basis. This opinion is based on the fact that she clearly has substantial conditions allowed in this claim which are producing a significant impact on her current clinical presentation. Additional evaluation with respect to her current neurologic status is also warranted, based upon the subjective complaints and objective findings noted in her physical examination presently.

> Under the circumstances, it is my opinion she has not reached maximum medical improvement. I would agree with the above referenced treatment recommendations and would indicate that Dr. Simons has been provided an explanation of these recommendations. * * *
>
> Under [sic] Ms. Barfield's psychiatric status is completely evaluated, it is my opinion vocational rehabilitation may not be appropriate. Her physical presentation reveals evidence of significant emotional distress at the present time consistent with the diagnoses allowed in this claim (neurotic depression and recurrent depressive psychosis). Until a formal and complete psychiatric/psychological assessment becomes available, it is my opinion that vocational rehabilitation is not appropriate.
>
> In my opinion her current status precludes return to sustained remunerative employment. * * *

{¶14} 5. On May 1, 2000, at the bureau's request, relator was examined by psychiatrist James R. Hawkins, M.D. In his eight page report, dated May 24, 2000, Dr. Hawkins indicates he performed a "mental status examination." Dr. Hawkins responded to several queries:

> [Three] If the injured worker has not reached MMI [maximum medical improvement], is vocational rehabilitation appropriate? Please specify services recommended.
>
> N/A
>
> [Four] Can the injured worker return to his/her former position of employment? If functional limitations exist, please identify these limitations and recommend modified work or worksite modifications.
>
> The claimant does suffer from a mild chronic depressive illness that would prevent returning to her prior position of employment. Because of her depression, she would have some difficulty interacting with others and some degree of difficulty following complex instructions. However, the Dysthymic Disorder related to the industrial injury is not so

> severe to prevent remunerative employment at a low stress, sedentary type job.

{¶15} 6. On a C-84 dated July 14, 2000, treating physician Mitchell Simons, M.D., certified a period of temporary total disability ("TTD"). The C-84 form asks: "Is the injured worker a candidate for vocational rehabilitation services focusing on return to work?" In response, Dr. Simons marked the "No" box. Similarly, on a C-84 dated September 28, 2000, Dr. Simons marked the "No" box to the same query.

{¶16} 7. On August 11, 2000, at the bureau's request, relator was examined by Andrew G. Freeman, M.D. In his nine page report, Dr. Freeman indicates he performed a "physical examination." He responded to several queries:

> [Three] If the injured worker has not reached MMI, is vocational rehabilitation appropriate? Please specify services recommended.
>
> Since Ms. Barfield is at MMI for both her right elbow contusion and right ulnar neuropathy, it would be prudent for her to undergo vocational rehabilitation at this point.
>
> [Four] Can the injured worker return to his or her former position of employment? If functional limitations exist, please identify these limitations and recommend modified work or work site modifications.
>
> It is unlikely that Ms. Barfield will ever return to her former position of employment as a certified nurse assistant. This work is highly physical in nature requiring a great deal of pushing, pulling, caring [sic] and lifting and given her degree of right arm pain as well as her significant ongoing depression, she would not be able to return to work as a certified nursing assistant at this time. * * *

{¶17} 8. The record contains a one page bureau document on form RH-4. Captioned "LTD/RTW Assessment," the form instructs:

> Determine the reasonable probability that the injured worker will benefit from vocational rehab and return-to-work based on the information at hand or that which can be accessed by telephone.
>
> In response to the above instruction, the following box was marked:
> Rehab is not feasible for injured worker (proceed to section 3)
>
> Section three of the form contains the following typewritten entry:
>
> **Outcome of staffing:** [Injured worker] stated on 10/31/2000 that she is not able to participated [sic] in rehab due to her allowed conditions. Staffed with CSS via e-mail recommending referral for LSS as [injured worker] states that she currently receives $250.00 monthe [sic] social security which is not sufficient for her support. Also suggested to [injured worker] that should she feel able to participate in rehab in the future to contact her [managed care organization].

{¶18} 9. On January 8, 2009, relator filed an application for PTD compensation. Under the "rehabilitation history" section of the application, the following query is posed:

{¶19} "Have you ever participated in rehabilitation services?" In response, relator marked the "yes" box. She then explained: "I participated twice and they discontinued my program; I was unable to complete it."

{¶20} Under the "work history" section of the application, relator indicates she was employed as a CNA at a "[n]ursing [h]ome" from 1971 to 1996. She was employed at the nursing home six to seven days per week. From 1990 to 1996, she owned her own beauty shop. From 1980 to 1990, she was employed as a cosmetologist. Relator describes her duties as a CNA: "Care for nursing home patients; moving and lifting patients; giving baths; and home health care."

{¶21} Under the "education" section of the application, relator indicates that she is a high school graduate. In response to a query as to any special training she has, relator wrote: "Mortuary school for 2 years (early 1980's); CNA (through Harrison Nursing Home); Cosmetology School (1979) – graduated; and computer clases [sic]."

{¶22} 10. On February 24, 2009, at the commission's request, relator was examined by James T. Lutz, M.D., who indicates he performed a "physical examination." Dr. Lutz issued a three page report and completed a "physical strength rating" form. On the form, Dr. Lutz indicates that relator was limited to sedentary work. Under "[f]urther limitations," he wrote: "Essentially [left] handed work only. Minimal use of the [right] upper extremity."

{¶23} 11. On February 27, 2009, at the commission's request, relator was examined by psychiatrist Jennifer J. Stoeckel, Ph.D. In her six page report, Dr. Stoeckel opines:

> In response to the specific referral questions, it is my professional opinion without reservation that Ms. Barfield's allowed psychological conditions of aggravation of pre-existing dysthmic [sic] disorder and aggravation of pre-existing major depression are certainly maximally medically improved and permanent in nature. Ms. Barfield's injury is remote, having occurred nearly 13 years ago. In the interim[,] she has had extensive and reportedly consistent mental health involvement, as well as the benefit of psychotropic management. Despite this, she continues to report rather significant levels of depression. Unfortunately[,] test results taken on examination were invalid, however, her presentation and self-report are consistent with moderately severe levels of depressive affect. While there is certainly a residual depression associated with the 1996 work injury, Ms. Barfield more recently has had significant health concerns including treatment for congestive heart failure, kidney failure, treatment with dialysis, respiratory problems, etc. She has had multiple hospitalizations for these

> conditions and admits that her added health concerns contribute and add to her existing depression. While her overall level of permanent impairment may be greater, the degree of permanent partial impairment to the body as a whole related specifically to the allowed conditions of aggravation of pre-existing dysthmic [sic] disorder and aggravation of pre-existing major depressive disorder combined would be 25% (referencing the AMA Guides to the Evaluation of Permanent Impairment-Fifth Edition). Based solely on the depression as it relates to this claim, Ms. Barfield is expected to have mild impairment in ADL's; mild impairment in social functioning; moderate impairment in concentration, endurance, pace, and task completion; and moderate impairment in overall adaptation. Per the claimant[,] she is more withdrawn and given her level of depression is likely to decompensate easily under stressful situations and does demonstrate moderate impairment in long and short-term memory. Her allowed psychological conditions in and of themselves do not preclude competitive employment, however, Ms. Barfield would require a low stress, simple routine job position where she could be successful.

{¶24} 12. Dr. Stoeckel also completed a form captioned "Occupation Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Stoeckel placed a checkmark beside the following pre-printed statement: "This injured worker is capable of work with the limitation(s) / modification(s) noted below."

{¶25} Below the above statement, in her own hand, Dr. Stoeckel wrote: "Claimant restricted to low stress repetitive occupations."

{¶26} 13. Following a May 12, 2009 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

> All of the relevant medical and vocational reports on file were reviewed and considered in arriving at this decision. This order is based upon the reports of Dr. Lutz and Dr. Stoeckel.
>
> The industrial injury that is recognized in this claim occurred on 07/03/1996 when the Injured Worker was employed as a

certified nursing assistant. The injury occurred when the Injured Worker hit her elbow on a wall while attempting to keep a patient from falling. The claim is allowed for psychological conditions and for right elbow conditions. Treatment for the physical conditions in this claim has been conservative. The Injured Worker's permanent and total disability application indicates that the Injured Worker has undergone the implantation and removal of a spinal cord stimulator in this claim. Review of the claim file demonstrates that the spinal cord stimulator trial was not requested, authorized or paid for in this workers' compensation claim. The Injured Worker has not worked since 1996. The Injured Worker has not participated in a rehabilitation program. Although the Injured Worker was contacted by the rehabilitation division, the Injured Worker advised that she did not feel that she was able to participate in rehabilitation because of the allowed conditions in this claim.

Dr. Jennifer Stoeckel, Ph.D., evaluated the Injured Worker on 02/27/2009 at the request of the Industrial Commission. The Injured Worker told Dr. Stoeckel that she graduated from high school in 1970; attended Moeller Beauty College and earned a cosmetology manager license in 1980; attended the Cincinnati College of Mortuary Science for two years but did not earn a degree or licensure; and earned her CNA in 1990. The Injured Worker further advised that she was employed as a CNA for approximately three years prior to the date of the injury. The Injured Worker further advised that she worked as a beauty shop owner, a hair designer, a cosmetologist and a weatherizer.

The Injured Worker advised Dr. Stoeckel that she has numerous medical conditions that are not related to the industrial injury that is recognized in this claim. The Injured Worker advised that she undergoes treatment for these conditions and takes medication for these conditions. The results of Dr. Stoeckel's clinical evaluation are contained in her report. Dr. Stoeckel administered the MMPI-2 to the Injured Worker.

Dr. Stoeckel opined that the Injured Worker has reached maximum medical improvement for the recognized psychological conditions. Dr. Stoeckel opined that although the injury is remote and the Injured Worker has had extensive mental health involvement, the Injured Worker

continues to report significant levels of depression. Dr. Stoeckel advised that the test results were invalid but the Injured Worker's presentation and self report were consistent with moderately severe levels of depressive affect. Dr. Stoeckel further advised that although the Injured Worker has residual depression associated with the industrial injury, the Injured Worker has significant health concerns and admits that her health concerns contribute to her depression. Dr. Stoeckel opined that based solely upon the allowed conditions in this claim the Injured Worker has mild impairment in the activities of daily living; mild impairment in social functioning; moderate impairment in concentration, endurance, pace and task completion; and moderate impairment in overall adaptation. Dr. Stoeckel opined that the allowed psychological conditions in and of themselves do not preclude competitive employment but would require a low stress, simple routine job position for the Injured Worker to be successful.

Dr. James Lutz, Occupational Medicine, examined the Injured Worker on 02/24/2009 at the request of the Industrial Commission.

To Dr. Lutz[,] the Injured Worker complained of constant right elbow pain and numbness with constant radiation of pain and numbness down the ulnar side of the forearm all the way to the ring and small fingers. The Injured Worker also complained of occasional drawing up of multiple fingers of the right hand with a frequent feeling of coldness in the right hand. The Injured Worker advised that her symptoms are exacerbated with use of the right hand and weather changes. Regarding the activities of daily living[,] the Injured Worker advised that she does light cooking but essentially no other household chores due in part to non-related medical conditions. The Injured Worker further advised that she no longer drives due to multiple reasons. The Injured Worker further advised that she does very little with the right upper extremity using it only when she has to. The Injured Worker told Dr. Lutz that she has multiple non-industrial medical problems. Dr. Lutz's examination findings are contained in his report.

Dr. Lutz opined that the Injured Worker has reached maximum medical improvement for the allowed conditions in this claim. On the physical strength rating form that is

attached to this [sic] report, Dr. Lutz indicated that the Injured Worker could perform sedentary work with minimal use of the right upper extremity.

The Staff Hearing Officer finds that the Injured Worker has reached maximum medical improvement for each of the conditions that are recognized in her industrial claim. The Staff Hearing Officer further finds, based upon the reports of Dr. Lutz and Dr. Stoeckel, that the Injured Worker is capable of performing sustained remunerative employment that is low in stress and requires minimal use of the right upper extremity.

The Staff Hearing Officer finds that the Injured Worker is 57 years of age with a high school education, a cosmetology manager's degree, a CNA and training in mortuary science. The Staff Hearing Officer further finds that the Injured Worker is able to read, write and perform basic math well. The Staff Hearing Officer further finds that the Injured Worker has specific vocational training as a CNA and as a cosmetologist.

The Staff Hearing Officer finds that the Injured Worker's age of 57 years is a mild barrier to the Injured Worker with regard to her ability to return to and compete in the work force. The Staff Hearing Officer further finds, however, that age alone is not a factor which prevents any person from returning to work. The Staff Hearing Officer further finds that the Injured Worker's academic levels are sufficient for the performance of many entry level jobs and are assets to the Injured Worker with regard to her ability to return to work. The Staff Hearing Officer further finds that the Injured Worker's vocational training does not provide the Injured Worker with skills that are transferable to sedentary work or to the Injured Worker's present vocational restrictions. The Staff Hearing Officer further finds, however, that the Injured Worker's academic skills would be assets to the Injured Worker with regard to her ability to learn the new work rules, work skills and work procedures necessary to perform some other type of employment. The Staff Hearing Officer further finds that the Injured Worker's varied vocational history is evidence that the Injured Worker should be able to learn to perform other employment activities on the job. The Staff Hearing Officer further finds that there is no basis for determining that the Injured Worker would not be capable of learning employment

> skills on the job. The Staff Hearing Officer further finds that the Injured Worker's academic levels would be assets to the Injured Worker with regard to learning the new work skills, work procedures and tool[s] use[d] necessary to perform some other type of work.
>
> The Staff Hearing Officer further finds that the fact that the Injured Worker has performed skilled employment in the past is evidence that the Injured Worker possesses intelligence to learn to perform at least unskilled and semi-skilled employment in the future.
>
> Based upon the reports of Dr. Lutz and Dr. Stoeckel, the Staff Hearing Officer finds that the Injured Worker retains the physical functional capacity to perform sedentary employment activities which require limited use of the right hand and which are low stress activities. The Staff Hearing Officer accepts the fact that the Injured Worker has restrictions. The Staff Hearing Officer further finds, however, that the Injured Worker has made no effort in the 13 years since she last worked to participate in a program of rehabilitation designed to enhance or improve her ability to return to the work force.
>
> Based upon the reports of Dr. Lutz and Dr. Stoeckel, the Staff Hearing Officer finds that the Injured Worker is capable of performing sustained remunerative employment. The Staff Hearing Officer therefore finds that the Injured Worker is not permanently and totally disabled. The Application for Permanent and Total Disability, filed by the Injured Worker on 01/08/2009[,] is therefore denied.

{¶27} 14. On January 21, 2010, relator, Linda D. Barfield, filed this mandamus action.

Conclusions of Law:

{¶28} Two issues are presented: (1) whether the commission's determination that relator failed to participate in rehabilitation can be relied upon as a factor to deny the PTD application, and (2) even if the failure to participate in rehabilitation cannot be a relied-upon factor, can the commission's order stand nevertheless?

{¶29} The magistrate finds: (1) the commission's determination that relator failed to participate in rehabilitation cannot be relied upon as a factor to deny the PTD application, and (2) even if the failure to participate in rehabilitation cannot be a relied-upon factor, the commission's order can stand nevertheless.

{¶30} Turning to the first issue, the Supreme Court of Ohio has repeatedly addressed the obligation of a PTD claimant to undergo opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.* (1995), 73 Ohio St.3d 525; *State ex rel. Bowling v. Natl. Can Corp.* (1996), 77 Ohio St.3d 148; *State ex rel. Wood v. Indus. Comm.* (1997), 78 Ohio St.3d 414; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; *State ex rel. Cunningham v. Indus. Comm.* (2001), 91 Ohio St.3d 261.

{¶31} In *B.F. Goodrich*, the court states:

> The commission does not, nor should it, have the authority to force a claimant to participate in rehabilitation services. However, we are disturbed by the prospect that claimant may have simply decided to forgo retraining opportunities that could enhance re-employment opportunities. An award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

Id. at 529.

{¶32} In *Wilson*, the court states:

> 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

> no longer assume that a participatory role, or lack thereof, will go unscrutinized.

Id. at 253-254.

{¶33} The *Wilson* court thus recognized that extenuating circumstances can excuse a claimant's nonparticipation in rehabilitation or retraining.

{¶34} Here, the commission, through its SHO, made the following two determinations regarding a failure to participate in rehabilitation:

> * * * The Injured Worker has not participated in a rehabilitation program. Although the Injured Worker was contacted by the rehabilitation division, the Injured Worker advised that she did not feel that she was able to participate in rehabilitation because of the allowed conditions in this claim.
>
> * * *
>
> * * * The Staff Hearing Officer accepts the fact that the Injured Worker has restrictions. The Staff Hearing Officer further finds, however, that the Injured Worker has made no effort in the 13 years since she last worked to participate in a program of rehabilitation designed to enhance or improve her ability to return to the work force.

{¶35} As relator points out, the first commission determination is supported by the RH-4 form captioned "LTD/RTW Assessment" that was apparently prepared by a bureau rehabilitation staff person in October 2000. As the commission correctly notes in its order, at that time, relator informed the bureau that she was not able to participate in rehabilitation due to her industrial injury.

{¶36} However, more problematical is the commission's second determination—that relator has made no effort to participate in rehabilitation during the 13 years since she last worked. Strongly suggested is the inference that the failure to participate was not

justified and, thus, the failure to participate was viewed as a factor upon which denial of the application can be based.

{¶37} The only evidence in the record from the bureau's rehabilitation division that, in any way, relates to relator's efforts at rehabilitation, is the RH-4 form completed in October 2000. Clearly, that document contains no evidence upon which it can be inferred that relator's failure to participate was not justified. The document itself simply reports the reason given by relator for her nonparticipation—that her industrial injury prevented her from participation. There is no indication in the document itself that the bureau's rehabilitation staff disagreed with relator's own assessment of her rehabilitation capability.

{¶38} Relator points to Dr. Randolph's May 19, 2000 report to the bureau in which he opines that "vocational rehabilitation may not be appropriate" and that "her current status precludes return to sustained remunerative employment." Relator also points to the two C-84s from Dr. Simons prepared during the year 2000 in which it is opined that relator is not a candidate for vocational rehabilitation services.

{¶39} To counter, the commission points to the reports of Drs. Freeman and Hawkins. As earlier noted, Dr. Freeman opined "it would be prudent for her to undergo vocational rehabilitation at this point."

{¶40} As also earlier noted, Dr. Hawkins wrote: "N/A [not applicable]" in response to the query of whether vocational rehabilitation is appropriate.

{¶41} Here, the commission incorrectly asserts: "Dr. Hawkins's report also makes clear that Barfield was capable of completing vocational rehabilitation over eight years before she applied for PTD compensation." (Commission's brief, at 10.) Dr. Hawkins

renders no such opinion. Contrary to the commission's assertion, Dr. Hawkins does not address relator's ability to successfully participate in vocational rehabilitation.

{¶42} The commission also incorrectly suggests that Dr. Freeman's opinion regarding vocational rehabilitation must be viewed by this court as some evidence supporting the commission's determination regarding relator's failure to participate because, allegedly, Dr. Freeman's report was relied upon by the commission to terminate TTD compensation on grounds that the industrial injury had reached maximum medical improvement ("MMI").[1] Allegedly, the commission relied upon Dr. Freeman's opinion that the industrial injury was at MMI. But that reliance cannot translate into a subsequent commission reliance upon that report for support of its rehabilitation determination. With respect to the commission's order at issue, the order does not state reliance upon Dr. Freeman's report.

{¶43} In effect, the commission is inviting this court to render a determination that relator was medically able to undergo vocational rehabilitation in October 2000 when she told the bureau that she was medically unable to do so. This court must reject the invitation. Clearly, the commission made no such determination in its order and, thus, it would not be appropriate for this court to make the medical finding for the commission.

{¶44} In short, the commission's determination inferring that relator unjustifiably failed to participate in vocational rehabilitation efforts during the 13 years she last worked is not supported by any evidence upon which the commission relied, nor is such inference supported by the record before this court.

---

[1] The commission's order terminating TTD compensation on MMI grounds is not contained in the record before this court.

{¶45} As earlier noted, the second issue is whether the commission's order can stand despite the commission's flawed determination regarding vocational rehabilitation.

{¶46} On at least three occasions, this court has had to determine a similar issue.

{¶47} In *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, this court determined that the commission abused its discretion in its denial of PTD compensation by holding the claimant, Glenn O. Slater, accountable for his failure to explore vocational rehabilitation and training when medical evidence indicated that Slater had undergone chemotherapy and a tracheostomy for treatment of his nonindustrial carcinoma. Specifically, in violation of *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the commission held Slater accountable for his failure to pursue vocational rehabilitation absent any reasoning supported by some evidence.

{¶48} In *Slater*, this court issued a writ of mandamus ordering the commission to issue a new order that adjudicates the PTD application.

{¶49} In *Slater*, this court, through its magistrate, distinguished this court's decision in *State ex rel. Searles v. Indus. Comm.*, 10th Dist. No. 01AP-970, 2002-Ohio-3097, affirmed 98 Ohio St.3d 390, 2003-Ohio-1493.

{¶50} In *Searles*, this court states:

> The commission may state separate, alternative grounds for denial of PTD. *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 598 N.E.2d 192. If the commission does choose to use alternative grounds, "those grounds should not be merged together and should be explained separately so that a reviewing court can understand what has been done." *Id*. at 761, 598 N.E.2d 192. The commission's decision, in separate paragraphs, details the grounds utilized to deny relator's PTD application. One basis for the denial of PTD was relator's failure to participate in rehabilitation. But the commission also focused

> on factors that would be assets for relator in obtaining employment. Although the commission did not expressly state that these were all separate reasons for denial, the decision did explain the grounds separately, thereby allowing this court to properly review that decision.
>
> Even if the commission improperly weighed relator's failure to participate in rehabilitation, we find that there was other evidence in the record to support the commission's decision to deny relator's PTD application. * * *

Id. at ¶5-6.

{¶51} In *Slater*, this court, through its magistrate, distinguished *Searles*:

> Unlike the situation in *Searles*, the SHO's order here does not address the failure to pursue vocational rehabilitation in a separate paragraph. Actually, the SHO points to the failure to pursue vocational rehabilitation in the two key paragraphs in which the other nonmedical factors such as age, education and work history are addressed. That is, the SHO's finding of a failure to pursue vocational rehabilitation is intertwined with the analysis of the other nonmedical factors.

Id. at ¶44.

{¶52} In *State ex rel. Retar v. Indus. Comm.*, 10th Dist. No. 08AP-856, 2009-Ohio-5669, despite the commission's flawed determination regarding vocational rehabilitation, this court, through its magistrate, determined that the commission's flawed determination can be separated from the remainder of the nonmedical analysis. The magistrate's order, as adopted by the court, states:

> Relator's alleged failure to participate in vocational rehabilitation is largely irrelevant to the commission's finding that relator "retains the functional capacity to be trained to perform work within the sedentary classification."

Id. at ¶39.

{¶53} The magistrate finds that the instant case presents a situation similar to that presented in *Retar*.

{¶54} Here, as in *Retar*, relator's failure to participate in vocational rehabilitation is largely irrelevant to the commission's findings that relator has the ability to learn new employment. In that regard, the SHO's order, again, states:

> * * * The Staff Hearing Officer further finds, however, that the Injured Worker's academic skills would be assets to the Injured Worker with regard to her ability to learn the new work rules, work skills and work procedures necessary to perform some other type of employment. The Staff Hearing Officer further finds that the Injured Worker's varied vocational history is evidence that the Injured Worker should be able to learn to perform other employment activities on the job. The Staff Hearing Officer further finds that there is no basis for determining that the Injured Worker would not be capable of learning employment skills on the job. The Staff Hearing Officer further finds that the Injured Worker's academic levels would be assets to the Injured Worker with regard to learning the new work skills, work procedures and tool[s] use[d] necessary to perform some other type of work.
>
> The Staff Hearing Officer further finds that the fact that the Injured Worker has performed skilled employment in the past is evidence that the Injured Worker possesses intelligence to learn to perform at least unskilled and semi-skilled employment in the future.

{¶55} Thus, despite any current inability to perform sustained remunerative employment that might arguably be the result of a failure to participate in vocational rehabilitation, the commission focused on relator's potential for future ability to perform sustained remunerative employment. The commission relied upon relator's academic skills, and that she has demonstrated through her past varied work history an intelligence to learn new employment. See *Goodrich*, at 530. ("A claimant's lack of participation in retraining does not necessarily translate into an *inability* to be retrained.") (Emphasis sic.)

{¶56} The commission successfully articulated a finding, supported by some evidence, that relator has the ability to learn new employment. That finding is completely severable from the commission's flawed finding regarding vocational rehabilitation. Thus, the magistrate concludes that the commission's order can stand despite the flawed finding regarding vocational rehabilitation.

{¶57} Accordingly, for all the above reasons, 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

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).