**[Cite as *State ex rel. Henderson v. CHS-Ohio Valley Inc.*, 2009-Ohio-3438.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|---|---|---|
| State ex rel. Helen Henderson, | : | |
| Relator, | : | |
| v. | : | No. 08AP-566 |
| CHS-Ohio Valley Inc. et al., | : | (REGULAR CALENDAR) |
| Respondents. | : | |

D E C I S I O N

Rendered on July 14, 2009

*O'Connor, Acciani & Levy*, and *Mark L. Newman*, for relator.

*Richard Cordray*, Attorney General, and *Kevin Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

FRENCH, P.J.

**{¶1}** Relator, Helen Henderson, filed this original action, which asks this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its order denying her permanent total disability compensation and to enter an order granting that compensation.

**{¶2}** We referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision,

which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections to that decision have been filed.

**{¶3}** Finding no error of law or other defect on the face of the magistrate's decision, this court adopts 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, the requested writ is denied.

*Writ of mandamus denied.*

KLATT and CONNOR, JJ., concur.

# A P P E N D I X

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| | | |
|---|---|---|
| State ex rel. Helen Henderson, | : | |
| Relator, | : | |
| v. | : | No. 08AP-566 |
| CHS-Ohio Valley Inc. and Industrial Commission of Ohio, | : | (REGULAR CALENDAR) |
| Respondents. | : | |

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

Rendered on March 30, 2009

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*O'Connor, Acciani & Levy, LPA*, and *Mark L. Newman*, for relator.

*Richard Cordray*, Attorney General, and *Kevin Reis*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS

**{¶4}** In this original action, relator, Helen Henderson, 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:

**{¶5}** 1. Relator has three industrial claims. Her most recent industrial injury (claim number 04-363569) occurred on June 11, 2004 while she was employed as a certified nurse's aide ("CNA") for respondent CHS-Ohio Valley Inc. ("employer"), a state-fund employer. That claim is allowed for "[s]prain lumbosacral," "aggravation of pre-existing lumbar spondylosis L5-S1; lumbar radiculopathy L5-S1."

**{¶6}** 2. Earlier, on February 15, 2003, relator sustained an industrial injury while employed as a CNA. This claim (number 03-320682) is allowed for "[c]ontusion shoulder, left; contusion of hip, left."

**{¶7}** 3. Earlier, on October 12, 2001, relator sustained an industrial injury while employed as a CNA. This claim (number 01-462644) is allowed for "[h]ead contusion and lumbar strain."

**{¶8}** 4. On November 2, 2007, relator filed an application for PTD compensation. Under the "Education" section of the application form, relator indicated that the highest grade of school she had completed was the 11th grade and this occurred in the year 1956. She has not earned a certificate for passing the General Educational Development (GED) test.

**{¶9}** The applicant is asked whether he/she has gone to a trade or vocational school or had any type of special training. If the answer is affirmative, the applicant is asked to describe the type of trade school or special training received. In response to the query, relator wrote: "On the job training and employer training meetings to work as a certified nursing assistant in a retirement facility."

**{¶10}** 5. Among other information sought, the application form posed three questions to the applicant: (1) "Can you read?" (2) "Can you write?" and (3) "Can you do basic math?" Given a choice of "yes," "no," and "not well," relator selected the "yes" response to all three queries.

**{¶11}** 6. The application form asks the applicant to provide information regarding the work history. In response, relator indicated that she worked as a "Nursing Asst." from 1980 to June 2004.

**{¶12}** 7. The application form asks the applicant to provide information in response to six questions about the previous job:

> 1. Your basic duties: Patient care, assisted with feedings, bathing patient personal oral care, dressing patients, cleaning/changing bed linens. Moving patients to dining area, recreation area.
>
> 2. Machines, tools, equipment you used: Wheelchairs and transferring patients from bed to chair. Use of hoyer lifts to move patients to whirlpool baths, and to wheelchairs. Trained in personal protection equipment and sanitation.
>
> 3. Exact operations you performed: See other descriptions[.]
>
> 4. Technical knowledge and skills you used: Assisted nurses in wound care bed sores adn [sic] bowel or bladder control issues.
>
> 5. Reading / Writing you did: I had to read special care instructions on each patient. Report on patient. Report on patient care during my shift and pass information to next shift.
>
> 6. Number of people you supervised: I was a senior aid for a period of time and supervised co-workers, help training new employees.

**{¶13}** 8. On January 30, 2008, at the employer's request, relator was examined by Steven S. Wunder, M.D. In his six-page narrative report, Dr. Wunder opined:

> Based on the current objective findings and allowed conditions, Ms. Henderson would be capable of performing sustained remunerative employment. She would, however[,] require restrictions. She reports she is able to lift up to 10 pounds and sit for up to an hour or an hour and a half at a time. She would have limited ability for prolonged standing or walking. Therefore, she would qualify for the full range of sedentary type of activities.

**{¶14}** 9. On March 10, 2008, at the commission's request, relator was examined by Andrew Freeman, M.D. In his six-page narrative report, Dr. Freeman opined that relator has a 32 percent whole person impairment resulting from the allowed conditions of the three industrial claims.

**{¶15}** 10. On March 10, 2008, Dr. Freeman completed a physical strength rating form. On the form, Dr. Freeman indicated by his mark that relator is capable of sedentary work with the limitation "[m]ust be able to ambulate with a quad cane."

**{¶16}** 11. On April 23, 2008, relator was seen for a vocational assessment by psychologist Jennifer J. Stoeckel, Ph.D. In her six-page narrative report, Dr. Stoeckel opined:

> Based upon the results of my examination and the information provided/reviewed, without reservation, Ms. Henderson presents as permanently and totally disabled given her allowed conditions, residual impairment, and vocational characteristics. Briefly, Ms. Henderson sustained a significant work related injury 6-11-04 over the long term course of her employment with Clermont Nursing and Convalescent Center as a CNA. Claim No. 04-363569 is recognized for sprain lumbosacral; lumbosacral spondylosis; and lumbar radiculopathy. Ms. Henderson is status post failed lumbar fusion/laminectomy/decompression in 2005. She has not been competitively employed since the 2004 injury. Her treating physician, Dr. McLaughlin, has opined Ms. Henderson would be considered permanently and totally disabled from all work activity given her allowed conditions. She has very limited capacities. Sitting, standing, and walking are significantly restricted. She uses a motorized

> cart for ambulation and/or cane. She was evaluated by Dr. Freeman for the Industrial Commission. Dr. Freeman assessed a 32% permanent partial disability and restricted her to sedentary work with the ability to ambulate with a quad-cane. She was evaluated by Dr. Fisher who restricted her to sedentary work on a part time basis only with sitting, standing, and walking limited to three to four hours in an eight hour work day with frequent breaks. Dr. Wunder who evaluated her for the employer indicated she could perform the full range of sedentary employment.
>
> Unfortunately, even if she were physically capable of sedentary work, Ms. Henderson has no training or skills for such. In fact, she has many unfavorable vocational characteristics. Foremost, Ms. Henderson is 68 years of age. Her age is considered advanced and alone would interfere with her ability to acquire new work skills as well as compete with younger workers for entry level positions. Similarly, Ms. Henderson has only a limited 10th grade education, has never obtained a GED, and has had only one employment throughout her adult life as a CNA. While this is considered semi-skilled, it would not afford her any transferable skills within the more liberal restrictions reported by Drs. Freeman and Wunder. Furthermore, results of testing identify an individual with low average to borderline intellectual functioning (Full Scale IQ score = 73), significantly below average academic abilities (reading 5th grade; comprehension 6th grade; spelling 4th grade; math computation 3rd grade), and significantly below average work aptitudes. Based upon test scores she could not compete in entry level clerical sedentary positions.
>
> Summarily, within reasonable vocational certainty, Ms. Henderson presents as permanently and totally disabled given her allowed conditions, residual impairment, significantly advanced age, limited education, lack of transferable work skills, limited work history, and below average intellectual, academic, and vocational functioning.

**{¶17}** 12. Following a May 29, 2008 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

> The injured worker is a 68 year old female with three separate workers' compensation claims. Claim number 03-320682 is predicated upon an industrial accident which

occurred on 02/15/2003 when the injured worker slipped on ice and fell injuring her left shoulder and left hip. Claim number 01-462644 is predicated upon an industrial accident which occurred on 10/12/2001 when the injured worker slipped and fell injuring her head and low back. Finally, claim number 04-363569 is predicated upon an industrial accident which occurred on 06/11/2004 when the injured worker injured her low back while helping a patient into bed.

Dr. Andrew Freeman examined the injured worker on 03/10/2008 at the request of the Industrial Commission. Dr. Freeman examined the injured worker on the allowed conditions and concludes that the allowed conditions have reached maximum medical improvement.

Dr. Freeman further opines that the injured worker retains the functional capacity to perform sedentary employment, with the limitation that the injured worker be allowed to ambulate with a quad cane. Sedentary employment includes the ability to exert 10 pounds of force one-third of the time, negligible amounts of force two-thirds of the time and sedentary work is performed while sitting most of the time.

Dr. Steven Wunder examined the injured worker on 01/30/2008 at the employer's request. Dr. Wunder examined the injured worker on the allowed conditions and concludes that the injured worker retains the functional capacity to perform a full range of sedentary work.

Based upon the report of Dr. Freeman, the Staff Hearing Officer finds that the allowed conditions in this claim have reached maximum medical improvement.

The Staff Hearing Officer further finds, based on the reports of Drs. Freeman and Wunder, that the injured worker retains the functional capacity to perform sustained remunerative employment when the impairments arising out of the allowed conditions are considered.

Additionally, when the injured worker's impairments arising out of the allowed conditions are considered in conjunction with the injured worker's non-medical disability factors, the Staff Hearing Officer finds that the injured worker retains the functional capacity to perform sustained remunerative employment and is therefore not permanently and totally disabled.

> The Staff Hearing Officer finds that the injured worker's age, 68 years old, constitutes a moderate barrier to re-employment. However, pursuant to State ex rel. Moss v. The Industrial Commission (1996) 75 Ohio St. 3d 414, age alone does not constitute an absolute barrier to re-employment. Rather, the injured worker's age must be considered in conjunction with all other relevant factors.
>
> The Staff Hearing Officer finds that the injured worker has a 10th grade education. The Staff Hearing Officer finds that the injured worker's educational history indicates that the injured worker can read, write and perform basic math skills, as would be expected of an individual with the injured worker's level of formal education. Further, a 10th grade education ordinarily constitutes a limited education as that term is defined in O.A.C. 4121-3-34(B)(3)(b)(iii). Although a limited education could constitute a barrier to re-employment, the Staff Hearing Officer finds that this is not the situation in the case at hand. Specifically, the Staff Hearing Officer finds that the injured worker's IC-2 Application for Permanent Total Disability indicates that the injured worker has been able to obtain and perform skilled employment as a certified nurse's aide for 24 years.
>
> Accordingly, the Staff Hearing Officer finds that the injured worker's educational history constitutes neither a positive nor negative vocational asset.
>
> As previously stated, [t]he Staff Hearing Officer finds that the injured worker's IC-2 Application for Permanent Total Disability indicates that the injured worker has previously been employed for 24 years as a certified nurse's assistant. As part of her job duties, the injured worker participated in on-the-job training and obtained CNA certification. Additionally, the injured worker was trained in personal protection equipment and sanitation. The injured worker's position as a CNA also required the injured worker to be able to read and follow patients' special care instructions and report on patient care. Ultimately, the injured worker attained the status of senior aide and was responsible for supervising co-workers and training new employees.
>
> Importantly, the injured worker's work history demonstrates that the injured worker has the transferable skills, such as the ability to learn from on-the-job training, supervise and

> train co-workers, and read and follow special instructions, necessary to perform sedentary employment.
>
> Accordingly, the Staff Hearing Officer finds that the injured worker's work history constitutes a positive vocational asset which enhances the injured worker's ability to gain re-employment.
>
> The Staff Hearing Officer further finds that the injured worker's work history demonstrates that the injured worker has been able to overcome her limited education and has been able to find skilled employment in spite of her limited education.
>
> Based on these non-medical disability factors, the Staff Hearing Officer finds that the injured worker has the vocational ability, intellect and literacy ability to perform sedentary employment.
>
> Further, when the injured worker's non-medical disability factors are considered in conjunction with the injured worker's impairments arising out of the allowed conditions, the Staff Hearing Officer finds that the injured worker retains the functional capacity to perform sustained remunerative employment and is therefore not permanently and totally disabled.
>
> Accordingly, the injured worker's IC-2 Application for Permanent and Total Disability, filed 11/02/2007, is denied.
>
> This order is based on the reports of Dr. Freeman dated 03/10/2008, Dr. Wunder dated 01/30/2008 and the non-medical disability factors.

**{¶18}** 13. On July 2, 2008, relator, Helen Henderson, filed this mandamus action.

Conclusions of Law:

**{¶19}** It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

**{¶20}** For its threshold medical determination, the commission, through its SHO, determined that the allowed conditions of the three industrial claims medically permit

relator to perform sustained remunerative employment of a sedentary nature. The commission relied upon the reports of Drs. Freeman and Wunder to support this determination of relator's "residual functional capacity." (See Ohio Adm.Code 4121-3-34(B)(4).)

**{¶21}** Relator does not challenge here the commission's determination of residual functional capacity nor does she challenge the reports of Drs. Freeman and Wunder upon which the commission relied. However, relator does challenge the commission's analysis of the nonmedical disability factors.

**{¶22}** In her argument to this court, relator sets forth three propositions or issues that are captioned as follows:

> (A) The finding of the Staff Hearing Officer that Relator's "work history constitutes a positive vocational asset which enhances Relator's ability to gain re-employment" is not supported by some evidence, and therefore constitutes an abuse of discretion.
>
> * * *
>
> (B) The failure of the Staff Hearing Officer to explain how Relator can overcome the "moderate barrier to re-employment" created by Relator's age (68) constitutes an abuse of discretion.
>
> * * *
>
> (C) The failure of the Staff Hearing Officer to consider the uncontroverted vocational expert evidence from Dr. Jennifer J. Stoeckel, or to explain why the Staff Hearing Officer rejected such evidence, constitutes an abuse of discretion.

(Relator's brief, at 8, 10, 11.)

**{¶23}** Turning to the first issue, Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to the adjudication of PTD applications.

**{¶24}** Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the commission's rules.

**{¶25}** Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors."

**{¶26}** Ohio Adm.Code 4121-3-34(B)(3)(c) is captioned "Work experience." Thereunder, the following definitions are found:

> (i) "Unskilled work" is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.
>
> (ii) "Semi-skilled work" is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.
>
> (iii) "Skilled work" is work which requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.

> (iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.
>
> (v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

**{¶27}** In *State ex rel. Haddix v. Indus. Comm.*, 70 Ohio St.3d 59, 60, 1994-Ohio-443, a case cited by relator, the commission denied an application for PTD compensation filed by William Haddix. The commission's order stated:

> "The weight of the evidence indicates claimant is not permanently and totally disabled due to the allowed conditions. The objective findings contained within the report of Dr. Louis reflect claimant can engage in some types of job activities. Claimant's age (60), his varied vocational background (gas station service attendant and press operator) indicate[s] he retains the transferable skills to engage in sedentary types of job duties. Claimant's 8th grade education, while an impediment to returning to work, does not, alone, result in a total inability to engage in job duties."

**{¶28}** The *Haddix* court found the commission's order to be inadequate, explaining:

> The commission determined that claimant's prior work as a gas station attendant and press operator provided him with skills transferable to sedentary employment. The commission's order, however, does not identify what those skills are. Such elaboration is critical in this case, since

> common sense suggests that neither prior work is, in and of itself, sedentary.
>
> The commission responds that it "inferred" from claimant's gas station job that claimant "perform[ed] a variety of duties, which would include such things as pumping gas, washing windows, dealing with customers at retail, making change, filling out credit card slips, operating a cash register, and light custodial work." Again, however, none of this explanation was stated in the order. Moreover, pumping gas, washing windows and light custodial duties do not suggest sedentary employment.

Id. at 61.

**{¶29}** In the instant case, the following portion of the commission's order is under challenge:

> * * * The Staff Hearing Officer finds that the injured worker's IC-2 Application for Permanent Total Disability indicates that the injured worker has previously been employed for 24 years as a certified nurse's assistant. As part of her job duties, the injured worker participated in on-the-job training and obtained CNA certification. Additionally, the injured worker was trained in personal protection equipment and sanitation. The injured worker's position as a CNA also required the injured worker to be able to read and follow patients' special care instructions and report on patient care. Ultimately, the injured worker attained the status of senior aide and was responsible for supervising co-workers and training new employees.
>
> Importantly, the injured worker's work history demonstrates that the injured worker has the transferable skills, such as the ability to learn from on-the-job training, supervise and train co-workers, and read and follow special instructions, necessary to perform sedentary employment.
>
> Accordingly, the Staff Hearing Officer finds that the injured worker's work history constitutes a positive vocational asset which enhances the injured worker's ability to gain re-employment.

**{¶30}** In the order, so-called "transferable skills" are identified as "the ability to learn from on-the-job training, supervise and train co-workers, and read and follow special instructions."

**{¶31}** Citing *Haddix*, relator argues that the commission failed to actually identify "work skills" because allegedly "these are traits that involve an innate aptitude or ability of a worker." (Relator's brief, at 9.) Relator thus concludes that the commission has "failed to identify any specific skills Relator possesses that are transferable to sedentary work." Id.

**{¶32}** In the magistrate's view, it matters little whether one characterizes what the commission has identified as work skills or traits or innate aptitudes and abilities.

**{¶33}** The commission has specifically identified what relator has exhibited during her work history that will be of assistance to her in performing sedentary employment. That the abilities identified may not neatly fit into the definition of transferable skills does not detract at all from the significance of their identification by the commission. Indeed, unlike *Haddix*, the commission analyzed the information relator provided on her application and specifically set forth in its order the abilities that she exhibited in her prior employment that would be of assistance in performing sustained remunerative employment. See *State ex rel. Ewart v. Indus. Comm.* (1996), 76 Ohio St.3d 139 (lack of transferable skills does not mandate a PTD award).

**{¶34}** Given the above analysis, there was no abuse of discretion in the commission's finding that the work history "constitutes a positive vocational asset."

**{¶35}** Relator also contends that the commission abused its discretion when it referred to her 24 years of employment as a CNA as "skilled" employment. Relator

points out that Dr. Stoeckel found that relator's employment as a "certified nurse's assistant" was "semi-skilled."

**{¶36}** Regardless of whether it can be said that employment as a CNA is semi-skilled, it is clear that the SHO understood the job duties of relator's employment because the SHO referenced the PTD application in setting forth those job duties in the order. The SHO determined from the job duties that relator had exhibited certain "skills" identified in the order. It does not appear that the SHO's identification of "skills" that can prove useful to sedentary employment depended upon whether the employment history can be described as skilled or semi-skilled. So even if it is more appropriate to characterize relator's employment as semi-skilled, that does not in any way detract from the commission's finding that skills were exhibited that can be of assistance in the performance of sedentary employment.

**{¶37}** As previously noted, the second proposition advanced by relator is that the commission impermissibly failed to explain how relator can overcome the "moderate barrier to re-employment" caused by her age of 68 years. Some review of the case law will be helpful.

**{¶38}** In *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 417, the court states:

> * * * It is not enough for the commission to just acknowledge claimant's age. It must discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects.

**{¶39}** In *Moss*, the commission denied the PTD application of a 78-year-old applicant with an eighth grade education and an ability to read, write, and do basic math. The claimant had worked as a housekeeper. The *Moss* court stated:

> Our analysis of the commission's order reveals [*State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203] compliance. In so holding, we recognize the significant impediment that claimant's age presents to her reemployment. Workers' compensation benefits, however, were never intended to compensate claimants for simply growing old.
>
> Age must instead be considered on a case-by-case basis. To effectively do so, the commission must deem any presumptions about age rebuttable. Equally important, age must never be viewed in isolation. A college degree, for example, can do much to ameliorate the effects of advanced age.

Id. at 416-417.

**{¶40}** In *State ex rel. Rothkegel v. Westlake* (2000), 88 Ohio St.3d 409, 411-412, the court states:

> Claimant also proposes that the commission's treatment of his age warrants a return of the cause for further consideration. The commission concedes that it mentioned claimant's age only in passing, but argues that the defect does not compel a return of the cause.
>
> Claimant relies on *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 662 N.E.2d 364, in which we held:
>
> "[The commission has a] responsibility to affirmatively address the age factor. It is not enough for the commission just to acknowledge claimant's age. It must discuss age in conjunction with the other aspects of the claimant's individual profile that may lessen or magnify age's effects." *Id.* at 417, 662 N.E.2d at 366.
>
> Since that time, we have declared that the absence of an age discussion is not necessarily a fatal flaw, nor does it, in some cases, even compel a return of the cause. In *State ex rel. Blue v. Indus. Comm.* (1997), 79 Ohio St.3d 466, 683 N.E.2d 1131—relied on by both the commission and the court of appeals—we wrote:
>
> "As another *Noll* flaw, claimant assails the commission's cursory mention of his age. While the commission did not 'discuss' this factor, that flaw, in this instance, should not be

> deemed fatal. Claimant was fifty-seven when permanent total disability compensation was denied. While not a vocational asset, claimant's age is also not an insurmountable barrier to re-employment. If claimant's other vocational factors were all negative, further consideration of his age would be appropriate, since age could be outcome-determinative—the last straw that could compel a different result. All of claimant's other vocational factors are, however, positive. A claimant may not be granted permanent total disability compensation due solely to his age. Therefore, even in the absence of detailed discussion on the effects of claimant's age, the commission's explanation satisfies *Noll*." *Id.* at 469-470, 683 N.E.2d at 1134.
>
> Claimant responds that *Blue* did not overrule *Moss* and did not, therefore, eliminate the commission's responsibility to affirmatively discuss age. This is true, but claimant misses the point. The question is not whether the commission has such a duty, but rather what happens when the commission falls short of this duty. *Blue* indicates that where the claimant's other vocational factors are favorable, a return of the cause is not a given.
>
> In this case, claimant's other vocational factors are favorable. Like the claimant in *Blue*, our claimant is a high school graduate. Both claimants, moreover, received extensive additional schooling in highly demanding areas—Blue as a certified electrician and our claimant as a paramedic.
>
> Therefore, consistent with *Blue*, we decline to return the cause for further consideration * * *.

**{¶41}** Here, citing *Moss*, and acknowledging relator's age to be 68 years, the commission's order finds that her age "constitutes a moderate barrier to re-employment." No further discussion of age is found in the commission's order.

**{¶42}** According to relator, the commission "must explain how this injured worker can overcome that barrier. No explanation, or evidence, was provided." (Relator's brief, at 10-11.)

**{¶43}** The commission responds that the "positive vocational assets explain how [relator] can 'overcome' the limitations of her age." (Commission's brief, at 10.)

**{¶44}** *Rothkegel* and *Blue* are highly instructive here.

**{¶45}** In *Rothkegel*, the claimant was a 62 year old former firefighter-paramedic with a high school degree. In *Blue*, the claimant was 57 years old, had a 12th grade education and a work history as a certified electrician. In both cases, the court found that educational status and work history were favorable and thus explained how age could be overcome.

**{¶46}** Here, relator is 68 years old with an 11th grade education and a 24 year work history as a CNA. Relator is much older than the claimants in *Rothkegel* and *Blue* and she has an 11th grade education rather than a high school education. Relator's 24 year work history as a CNA can be compared favorably to the 14 years of employment as a paramedic in *Rothkegel* or to the work history as a certified electrician in *Blue*.

**{¶47}** Certainly, relator's age of 68 years presents a greater barrier than the ages of the claimants in *Rothkegel* and *Blue*. Nevertheless, it was well within the commission's fact-finding discretion to find that relator's 11th grade education and her 24 year work history as a CNA were favorable enough to overcome any barrier that age presents. Accordingly, any flaw in the commission's order as to the adequacy of discussion of age is not fatal to the order.

**{¶48}** For her third proposition, relator asserts that the commission failed to consider Dr. Stoeckel's vocational report or to explain why Dr. Stoeckel's report was rejected. This proposition or issue is easily answered.

**{¶49}** The commission must cite in its orders the evidence on which it relied to reach its decision. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 252, 1996-Ohio-321. The commission is not required to enumerate the evidence considered nor explain why evidence was rejected. Id.

**{¶50}** Clearly, the absence of any mention of Dr. Stoeckel's report in the commission's order is not an abuse of discretion. Given the presumption of regularity that attaches to commission proceedings, the presumption is that the commission considered Dr. Stoeckel's report but found it unpersuasive. Id.

**{¶51}** 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).