[Cite as *State ex rel. Combs v. Indus. Comm.*, 2010-Ohio-6120.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Floyd Combs,	:	
Relator,	:	
v.	:	No. 10AP-64
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 14, 2010

Philip J. Fulton Law Office, and *Ross R. Fulton*, for relator.

Richard Cordray, Attorney General, and *Rachel L. Lawless*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Floyd Combs, filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order, which denied his application for permanent total disability ("PTD") compensation, and ordering the commission to grant him that compensation pursuant to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296.

{¶2} This court 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, including findings of fact and conclusions of law, recommending that this court deny the requested writ. No party has filed objections to the magistrate's findings of fact, and we adopt them as our own.

{¶3} In brief, relator suffered a work-related injury in 1971, when he was 34 years old. He has not worked since then. Relator filed the PTD application at issue here, his fifth, in 2007. A staff hearing officer ("SHO") denied the application. The SHO found that relator was capable of sedentary work and that his psychological condition did not prevent him from working. The SHO also found that relator's non-medical factors—his age (71), his education (fifth grade), his transferable skills (none)—were all negative. Nevertheless, the SHO found that relator had failed to pursue any educational opportunities or to attempt to find employment in the 37 years since his injury. Concluding that relator's disability and his lack of work are of "his own choosing," the SHO denied the application. On mandamus before this court, the magistrate concluded that the commission had not abused its discretion by denying the application.

{¶4} Relator raises the following objections:

> OBJECTION 1
>
> THE MAGISTRATE ERRED WHEN SHE DID NOT CONSIDER THE IMPACT OF [RELATOR'S] ILLITERACY AND LOW ACADEMIC POTENTIAL ON HIS REHABILITATION EFFORTS.
>
> OBJECTION 2
>
> THE MAGISTRATE FURTHER ERRED BY NOT FOLLOWING SUPREME COURT PRECEDENT AND BY DISTINGUISHING [*STATE EX REL. DAVIS V. INDUS.*

> *COMM.*, 76 OHIO ST.3D 72, 1996-OHIO-154], AND [*STATE EX REL. HALL V. INDUS. COMM.*, 80 OHIO ST.3D 289, 1997-OHIO-113], FROM THE PRESENT CASE BASED UPON AN INCORRECT LEGAL AND FACTUAL BASIS.

{¶5} Before addressing relator's objections, we consider his motion to supplement the record. Relator moves to add the following three documents: (1) the July 12, 1989 report of Richard M. Ashbrook, Ph.D.; (2) the April 26, 1984 report of Donald L. Brown, M.D.; and (3) the July 28, 1975 report of Albert Kostoff, M.D. Relator states that each of these documents was part of the record before the commission and notes that the magistrate referred to Dr. Ashbrook's report in her decision. The commission does not disagree with these points, but contends that it would suffer prejudice if the record were supplemented. We disagree. In light of the documents' inclusion in the record before the commission, we grant relator's motion to include them here, and we deny the commission's motion to strike them.

{¶6} We turn now to relator's objections. We address them together.

{¶7} We agree with the magistrate that the Supreme Court of Ohio holds claimants responsible for pursuing opportunities for rehabilitation. Relator cites *State ex rel. Davis v. Indus. Comm.*, 76 Ohio St.3d 72, 1996-Ohio-154, however, in support of his contention that PTD compensation must be granted where, as here, all of the non-medical factors are negative. Relator also cites *State ex rel. Hall v. Indus. Comm.*, 80 Ohio St.3d 289, 1997-Ohio-113, in which the Supreme Court concluded that the claimant's illiteracy made other non-medical factors immaterial.

{¶8} The magistrate also considered *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250. In *Wilson*, the court recognized that extenuating circumstances may excuse a claimant's failure to participate in retraining efforts. We

agree with relator that the record, particularly as supplemented, contains evidence that relator may be illiterate, which may have precluded him from participating in rehabilitative efforts, particularly educational efforts.

{¶9} In his 1989 report, Dr. Ashbrook estimated relator's "cognitive functioning" to be "in the borderline range." While Dr. Ashbrook noted that relator's motivation for rehabilitation was "extremely low," he also noted that relator "is nearly functionally illiterate and would have difficulty learning new tasks." In his 1984 report, Dr. Brown noted that he had "no reason to disagree with [relator's] tested full scale I.Q. of 65."

{¶10} The SHO's discussion of relator's medical history included review of the report of James H. Rutherford, M.D., who noted that vocational rehabilitation was closed in 1989 due, in part, to relator's illiteracy, and the report of Earl F. Greer, Jr., Ed.D., who found relator's general intellectual level of functioning to be in the "borderline to low average range." The SHO's order does not, however, include an analysis of the impact of relator's low intelligence on his lack of retraining and re-education, an analysis we conclude is necessary in light of *Wilson*, *Davis*, and *Hall*.

{¶11} We decline, however, to grant relief under *Gay*,[1] as relator requests. While we acknowledge that the Supreme Court granted *Gay* relief in both *Davis* and *Hall*, we conclude that the facts of those cases are distinguishable from this case, where the record contains evidence that relator's failure to pursue rehabilitation may have been due to his lack of motivation. Rather than grant PTD compensation, we conclude that a full adjudication of relator's application is necessary.

[1] In *Gay*, the Supreme Court held that, in a PTD case, "where the facts of the case indicate that there is a substantial likelihood that a claimant is permanently and totally disabled," a court may issue a writ ordering the commission to award PTD benefits. *Gay* at 323.

{¶12} In conclusion, based on our independent review of this matter, we grant relator's motion to supplement the record, deny the commission's motion to strike, sustain relator's first objection, and deny relator's second objection as moot. We adopt the magistrate's findings of fact, but decline to adopt the magistrate's conclusions of law, to the extent indicated here. We grant a limited writ and order the commission to adjudicate relator's application for PTD compensation and to include within that adjudication an analysis of the impact of relator's intellectual functioning upon his failure to pursue rehabilitative educational or training opportunities.

Motion to supplement granted,
motion to strike denied.
Relator's first objection sustained,
second objection denied as moot,
limited writ of mandamus granted.

BROWN and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Floyd Combs,	:	
Relator,	:	
v.	:	No. 10AP-64
Industrial Commission of Ohio and Jeffrey Galion, 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 September 24, 2010

Philip J. Fulton Law Office, and *Ross R. Fulton*, for relator.

Richard Cordray, Attorney General, and *Joseph C. Mastrangelo*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶13} Relator, Floyd Combs, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for permanent total disability ("PTD") compensation, and asking this court to order the commission to grant

him that compensation pursuant to *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 1994-Ohio-296.

Findings of Fact:

{¶14} 1. Relator sustained a work-related injury on June 25, 1971, and his workers' compensation claim was originally allowed for "[l]umbosacral sprain." In March 1974, relator's claim was additionally allowed for "[p]ost traumatic anxiety reaction." At the time of his injury, relator was 34 years of age. Relator's claim was also additionally allowed for "aggravation of pre-existing degenerative disc disease at L4-5 and L5-S1 resulting in lumbar spinal canal stenosis," in an order dated January 6, 2005.

{¶15} 2. The PTD application at issue here was filed on October 2, 2007. This is the fifth application for PTD compensation filed by relator. This first application was filed in 1975 when relator was 38 years of age. A subsequent application indicated that relator did participate in vocational rehabilitation; however, his file was closed for the following reasons: "The rehabilitation file was closed on 6-19-89 due to the lack of transferable skills, low motivation, psychological distress, illiteracy and unemployment for 18 years." Relator's previous applications for PTD compensation have been denied based upon findings that he was physically and psychologically able to perform some sustained remunerative employment.

{¶16} 3. In the October 12, 2005 staff hearing officer's ("SHO") order denying relator's fourth application for PTD compensation, the SHO relied upon medical reports to conclude that relator was capable of performing sedentary, light, and some modified medium level work and that his allowed psychological condition was not work prohibitive. Thereafter, the SHO discussed the nonmedical disability factors and stated:

While this Staff Hearing Officer realizes that the injured worker is now 68-years old, the Staff Hearing Officer finds that age in and of itself cannot be relied on as the determinative factor in granting permanent total disability. The Staff Hearing Officer notes that the injured worker was only 34-years old at the time of his industrial injury on 06/25/1971. Since that time, approximately 34-years have past. During that 34-year period, the injured worker has made no attempts to obtain further education or training that would enhance his potential for returning to work. The injured worker testified that there have been no attempts on his part to obtain his GED certificate. As set forth in State ex rel. Speelman vs Industrial Commission (1992), 73 Ohio App.3d 757, the Commission, in considering a claim for permanent total disability, may consider not only past employment skills, but those skills which may reasonably be developed. Accordingly, the Industrial Commission may take into account the failure of the injured worker to undergo training or further education that would permit his return to sustained remunerative employment. At the time the injured worker's IC-2 application indicates he last worked, in 1971, the injured worker was only 34-years old. At age 34, the injured worker could have normally expected many more years of productivity ahead of him, with ample time to pursue additional training or education, if necessary, that would have enhanced his potential for returning to gainful employment. When Dr. Tosi examined the injured worker, he indicated that the injured worker had only mild impairments in the categories of adapting to the work place, and in concentration, persistence and pace. The Staff Hearing Officer notes that permanent total disability compensation is a compensation of last resort. The Staff Hearing Officer finds that in the instant case, the injured worker did not exhaust all his efforts to become reemployed.

Therefore, because the injured worker retains the physical, functional, capacity to perform sedentary, light, and some modified medium level work, based on the allowed physical conditions in the claim, and because the allowed psychological condition is not work prohibitive, and because the injured worker was qualified by his young age at the time of injury to have pursued additional training or education, had he chosen to do so since 1971, the date he testified he last sustained employment, the Staff Hearing Officer finds that the

> injured worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 application filed 04/29/2005 is denied.

(Emphasis sic.)

{¶17} 4. In support of his most recent application for PTD compensation, relator attached the September 9, 2000 report of James E. Lundeen, Sr., M.D. After providing his physical findings upon examination, Dr. Lundeen noted the following restrictions for lifting/carrying: five to seven pounds occasionally and three pounds frequently. With regard to his restrictions for standing/walking, Dr. Lundeen limited him to three hours total and without interruption for 15 minutes. Regarding restrictions for sitting, Dr. Lundeen noted that relator could sit for three hours during an eight hour workday and for 30 minutes without interruption. Dr. Lundeen further noted that relator could climb, balance, stoop, crouch, could kneel occasionally to never and could never crawl. Further restrictions included avoiding heights, moving machinery, temperature extremes, humidity and vibration. Dr. Lundeen concluded that relator is permanently and totally disabled.

{¶18} 5. Dr. Earl F. Greer, Jr., Ed.D., examined relator for his allowed psychological condition. In his March 27, 2008 report, Dr. Greer noted that various testing demonstrated that relator had psychological symptoms including depression with anxiety/tension and the tendency to develop or aggravate physical or somatic concerns when under perceived distress. He noted further that relator had experienced several significantly more severe physical and psychological stressors since the 1971 injury which occurred approximately 36 and one-half years ago. Ultimately, Dr. Greer concluded that relator's allowed psychological condition had reached maximum medical improvement ("MMI"), assessed an 18 percent whole person impairment, and opined that the

psychological condition would not be expected to solely prevent him from working and, in fact, would be therapeutic. However, Dr. Greer noted that motivation was a significant factor.

{¶19} 6. The record also contains the April 9, 2008 report of James H. Rutherford, M.D., who examined relator for his allowed physical conditions. Dr. Rutherford identified the medical records he reviewed, provided his physical findings upon examination, and ultimately concluded that relator's allowed physical conditions had reached MMI, assessed a 13 percent whole person impairment, and concluded that relator was capable of sedentary work activity with no stooping or bending below knee level as well as no climbing or crawling. He noted further that relator could drive to work, but could not drive heavy equipment.

{¶20} 7. An employability assessment was prepared by Beal D. Lowe, Ph.D., and is dated May 8, 2008. Dr. Lowe concluded that relator was permanently and totally disabled based upon his physical functional restriction of sedentary work in combination with his limitations arising from his limited education, lack of transferable skills, and advanced age.

{¶21} 8. Relator's application was heard before an SHO on October 2, 2008, and was denied. The SHO relied on the medical reports of Drs. Rutherford and Greer and concluded that relator was capable of performing at a sedentary work level with the additional restrictions noted by Dr. Rutherford and found that his psychological condition would not prevent him from returning to work. Thereafter, the SHO addressed the nonmedical disability factors as follows:

> * * * At the time of this hearing[,] the claimant's age is 71 which places him in the advanced age category. The Hearing

> Officer finds that the claimant's age is detrimental in him seeking entry level positions due to the fact that 71 is possibly six years past the retirement age. It must be noted[,] as was noted in other PTD orders prior to this, that the claimant had since 1971 attempted no educational enhancement courses, that the claimant did not attempt to go back to get a GED, nor has the claimant attempted to find any other type of employment in the 37 years since this injury upon which this claim is predicated occurred.
>
> The claimant's education consists of going through the 5th grade and stopping due to the illness of his father. The Hearing Officer finds that the claimant has past employment which consists of working in foundries and a coal mine as indicated in Dr. Rutherford's report.
>
> The Hearing Officer finds that the claimant's education is a detrimental factor in the fact that the claimant only completed 5th grade. In addition, the Hearing Officer finds that the claimant's work history shows no transferable skills and that the claimant has had no training whatsoever in clerical or any other type of sedentary work.

{¶22} In spite of finding that relator's disability factors were all negative, the SHO denied relator's application for PTD compensation because of his failure to attempt to further his education to enhance his reemployment opportunities and his failure to attempt to find any other employment for the 37 years since his injury. Specifically, the SHO stated:

> The Staff Hearing Officer finds that all factors must be considered in making a determination whether the claimant is eligible for permanent and total disability compensation. The Hearing Officer finds that the claimant as indicated has an injury in 1971 that was the last day worked and that the claimant has not attempted to pursue any educational avenues at the time that he was injured up until this hearing, that he did not attempt to find employment for those 37 years and that his failure to do either does not justify him receiving permanent and total disability. The Hearing Officer finds that his current disability and the fact that he is not working is of his own choosing. The Hearing Officer finds as indicated that the claimant's application for permanent and total disability

> status is denied and that the claimant is not to be considered permanently and totally disabled.

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

Conclusions of Law:

{¶24} Citing *State ex rel. Hall v. Indus. Comm.*, 80 Ohio St.3d 289, 1997-Ohio-113, and *State ex rel. Davis v. Indus. Comm.*, 76 Ohio St.3d 72, 1996-Ohio-154, relator argues that where, as here, the commission finds that all the nonmedical disability factors are negative the commission is required to award the injured worker PTD compensation because the injured worker is not capable of retraining or reemployment. Relator asserts that, since injured workers are required only to make all reasonable efforts to return to employment, it was unreasonable to expect him to attempt rehabilitation where such an attempt would have been fruitless.

{¶25} Finding that the commission permissibly considered relator's failure to attempt to enhance his education or to find employment for 37 years, the magistrate would deny relator's request for a writ of mandamus.

{¶26} The Supreme Court of Ohio has repeatedly addressed the obligation of a claimant seeking an award of PTD compensation to undergo opportunities for rehabilitation. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525, 1995-Ohio-291; *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 1996-Ohio-200; *State ex rel. Wood v. Indus. Comm.*, 78 Ohio St.3d 414, 1997-Ohio-201; *State ex rel. Wilson v. Indus. Comm.* (1997), 80 Ohio St.3d 250; and *State ex rel. Cunningham v. Indus. Comm.*, 91 Ohio St.3d 261, 2001-Ohio-35.

{¶27} In *B.F. Goodrich*, the court stated:

> 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 reversed for the most severely disabled workers and should be allowed only when there is no possibility for re-employment.

Id. at 529.

{¶28} In *Wilson*, the court 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 no longer assume that a participatory role, or lack thereof, will go unscrutinized.

Id. at 253-254.

{¶29} The *Wilson* court thus recognized that extenuating circumstances can excuse a claimant's nonparticipation in rehabilitation or retraining. For example, in *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, this court determined that the commission abused it 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. Because the commission held Slater accountable for his failure to pursue vocational rehabilitation absent any reasoning supported by some evidence, this court

issued a writ of mandamus ordering the commission to issue a new order adjudicating the PTD application.

{¶30} In the present case, relator has not asserted that there were any extenuating circumstances which precluded him from pursuing vocational rehabilitation or taking other steps to enhance his education. Further, relator does not cite any evidence which would indicate that, in the 37 years between the date of injury and this application for PTD compensation that he was without opportunities or the ability to make such an attempt. The commission is permitted to hold relator accountable for 37 years of failing to attempt to improve his education or to seek any employment at all against him in considering this application for PTD compensation. The prior orders denying relator's earlier applications for PTD compensation all relied on medical evidence indicating that relator was capable of performing some sustained remunerative employment. While the earliest orders were issued prior to the Supreme Court of Ohio's decision in *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, relator has not offered any explanation for his failure to attempt to improve his chances of reemployment during the past 37 years.

{¶31} In the SHO's order from October 12, 2005 which denied relator's fourth application for PTD compensation, the SHO did comply with the requirements of *Noll* and, just as the hearing officer here did, held relator accountable for his failure to make any effort to improve his chances of reemployment. As the SHO stated in 2005, relator was 34 years old when he last worked in 1971 and because relator was qualified by his young age at the time of his injury to have pursued additional training or education, the SHO determined that the application for PTD compensation should be denied.

{¶32} The same situation exists today. The record shows that relator's only attempt at rehabilitation was in 1989, 15 years after the date of his injury, and his rehabilitation file was closed because of his lack of transferable skills, his low motivation, his psychological distress, his illiteracy, and the fact that he had been unemployed for 18 years.

{¶33} Further, the magistrate finds that relator's reliance on *Hall* is misplaced. In *Hall*, the claimant was functionally illiterate. Here, relator dropped out of school in the fifth grade to tend to his ill father and not because he lacked the intellectual capacity to learn. Also on his PTD application, claimant noted that he was able to read, write, and perform basic math. In *Hall*, the commission had found that the claimant's age of 53 years was young enough to make retraining and rehabilitation a probability. However, as the Supreme Court noted, age is immaterial if a claimant lacks the intellectual capacity to learn.

{¶34} Here, relator was only 34 years old when he was injured. Relator did attempt vocational rehabilitation 18 years later but, as stated previously, his file was closed for several reasons: his lack of transferable skills, psychological distress, illiteracy, and the fact that he had been unemployed for 18 years. The file was also closed due to relator's low motivation. While the statement of facts prepared in February 1990 mentioned "illiteracy," nothing in the record indicates the source of that information and nothing in the evidence relator presented contradicts his statement on the application that he is able to read, write, and perform basic math. As such, the evidence presented by relator indicates that he is not illiterate, and the *Hall* case is distinguishable. Further, because relator is being held accountable for a 37 year failure

to pursue any educational or vocational rehabilitation when he was in his 30s and 40s, these facts also distinguish relator's case from *Hall*.

{¶35} Relator also cites *Davis* and asserts that it firmly establishes that PTD compensation must be granted to a claimant where all of their nonmedical factors are unfavorable. In *Davis*, the claimant, Earl Davis, was 44 years old when he last worked and his prior work history consisted of work as a railroad laborer, construction laborer, and hod carrier. At the time he filed his application for PTD compensation, Davis was 56 years old, had completed the ninth grade, and it appears that he was limited to sedentary work. The record contained a vocational evaluation prepared by Michael T. Farrell, Ph.D., who opined that Davis was permanently and totally disabled based on his inability to resume his previous work activities, his long term history of unskilled labor, his limited education, his opinion that the claimant was motivated and wanted to reenter the job market, and the difficulty he would have adjusting to sedentary employment given his age and the lack of variety in job duties. The commission's rehabilitation division found Davis was a poor candidate for retraining as well.

{¶36} The commission denied Davis' application for PTD compensation after finding that Davis was physically capable of performing some sustained remunerative employment. Thereafter, the commission addressed the nonmedical disability factors as follows:

> "* * * The claimant's age (56), education (completed 9th grade) and prior work history (Railroad laborer, construction laborer and hod carrier) might possibly hinder a rehabilitation and retraining program to return the claimant to work. However, his medical impairment from the allowed conditions as found by Dr. Louis in this claim would not prohibit a rehabilitation and retraining effort. Another significant factor is [that] the claimant was 44 years old when he last worked

> and there is no indication of attempts at retraining or finding work during this period."

Id. at 74.

{¶37} In granting *Davis* relief pursuant to *Gay*, the Supreme Court stated:

> * * * As stated in *State ex rel. Lawrence v. Am. Lubricants Co.* (1988), 40 Ohio St.3d 321, 322, 533 N.E.2d 344, 346:
>
> "[A] person's medically based capacity for certain employment is immaterial if age, work experience or education forecloses him or her from such employment."
>
> Here, the commission classified all of claimant's nonmedical factors as unfavorable. This dictates one conclusion in this case—that claimant's nonmedical profile is not conducive to retraining/re-employment into a position other than his former one, to which he cannot return because of his medical condition. It is, therefore, immaterial, under *Lawrence*, that claimant is medically capable of other work.

Id. at 75.

{¶38} While there are similarities between relator's situation and Davis' situation, the magistrate finds that the *Davis* decision does not mandate *Gay* relief in this case because there are some significant differences. First, these two individuals' timelines differ significantly. In *Davis*, the claimant was 44 years old when he last worked and was 56 years old when he filed his application for PTD compensation. This is a gap of 12 years. In the present case, relator was 34 years of age when he sustained his work-related injury. Here, relator filed his first application for PTD compensation on June 26, 1975, four years after the date he was injured. Thereafter, relator filed several additional applications for PTD compensation and the one currently before this court was filed 37 years after the date relator was injured. Second, relator's claim was originally allowed for lumbosacral sprain and, according to the stipulated evidence, his treatment for this

condition was conservative. It was not until 1974 that his claim was additionally allowed for post-traumatic anxiety reaction and it was not until January 6, 2005 that relator's claim was additionally allowed for aggravation of preexisting degenerative disc disease at L4-5 and L5-S1 resulting in lumbar spinal canal stenosis. By comparison, Davis' claim had been allowed for acute lumbar sprain and L4-5 disc herniation. These conditions are significantly more severe than relator's originally allowed conditions. Third, the commission relied on the medical report of Dr. Rutherford who found a 13 percent whole person impairment based on the allowed physical conditions. By comparison, in *Davis*, the commission relied on medical evidence that Davis had a 40 percent whole person impairment for his allowed physical conditions. These are significant differences.

{¶39} Further, the evidence here indicates that, although he could read, write, and perform basic math, relator did not attempt to further his education in an effort to become reemployed nor did he attempt to become reemployed. Unfortunately, there is no medical evidence in the stipulated record which would indicate what relator's early physical limitations may have been. The earliest evidence of any physical limitations is contained in the February 26, 1990 statement of facts which was prepared for relator's October 3, 1988 application for PTD compensation. At that time, medical evidence is referenced indicating that relator could perform at a sedentary level. Given that this medical evidence was obtained 18 years after his date of injury and the fact that his claim was not allowed for aggravation of preexisting degenerative disc disease at L4-5 and L5-S1 resulting in lumbar spinal canal stenosis until 2005, it is conceivable that relator could have performed at a higher than sedentary level during those 18 years following his injury. Relator's situation simply is not identical to Davis' situation and the court's decision

in *Davis* does not mandate *Gay* relief in this case. Yes, at this time, all of relator's nonmedical disability factors are negative. However, PTD compensation was never intended to compensate claimants for simply growing old. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414. The commission did not abuse its discretion when it held relator accountable for the 37 years when he made no attempts to improve his education or to pursue other vocational rehabilitation. Relator's situation is distinguishable from the situation in *Davis*.

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

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).