[Cite as *State ex rel. Bacon v. Indus. Comm.*, 2011-Ohio-3026.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Eleanor E. Bacon,	:	
Relator,	:	
v.	:	No. 10AP-230
Ohio Industrial Commission and Lawrence County Auditor,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 21, 2011

Spears & Associates Co., L.P.A., and *David R. Spears,* for relator.

Michael DeWine, Attorney General, *Jeanna R. Volp* and *Stephen D. Plymale,* for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, P.J.

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

I. Facts and 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, appended to this decision. In his decision, the magistrate identified two issues relator's complaint presents: "(1) whether the commission abused its discretion by rejecting Dr. Levy's report on grounds that it must be eliminated from evidentiary consideration under the rule set forth in *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17," and "(2) whether the commission determined that relator has transferable skills and then abused its discretion by allegedly finding that the transferrable skills permit sedentary employment." (Mag. Dec., ¶35.)

{¶3} In resolving the issues, the magistrate concluded: (1) the commission did not abuse its discretion in rejecting Dr. Levy's report, and (2) the staff hearing officer did not find relator had transferrable skills but rather had the ability to be retrained. Accordingly, the magistrate determined the requested writ should be denied.

II. Objection

{¶4} Relator filed one objection to the magistrate's conclusions of law:

> Relator objects to the conclusion of the Magistrate that the Commission did not abuse its discretion in its determination that Relator had the ability to retrain for various types of work if she so desired.

{¶5} Relator's memorandum supporting her objection argues "the Staff Hearing Officer order did not consider the significance of the above mentioned psychological impairments, or indicate how such serious erosion of mental capacity would allow Relator to develop new work skills through retraining." (Objection, 3.) In so arguing, relator's

objection appears to equate her depression, the allowed condition, with a loss of mental capacity. Although we are less than certain what relator means in using the term "mental capacity," the psychological evidence does not suggest relator's depression deprives her of the mental capacity to be retrained. Rather, Dr. Farrell opined she suffers from "a moderate level of impairment in stress tolerance, a moderate level of impairment in social functioning, a mild impairment in endurance/pace, and a minimal impairment in cognitive functioning." (Magistrate's Decision, ¶24.)

{¶6} Seemingly most pertinent to her being retrained, her cognitive functioning is the least impaired of all the factors mentioned. In the absence of such evidence, we cannot accept relator's proposition that her depression caused a loss of mental capacity that would deprive her of the ability to be retrained.

{¶7} Relator next points out that Dr. Goldsmith stated relator could work only in simple, routine, low stress, and nonpublic work that involved minimal interpersonal contact. Again, however, such restrictions do not dictate that retraining is not possible. As the commission notes, although Dr. Goldsmith provided limitations, the limitations allowed for employment. The staff hearing officer, who is charged with assessing the vocational factors, considered the limitations and, applying the commission's prerogative with respect to vocational factors, concluded relator has the ability to be trained for positions within those limitations. See *State ex rel. McKenzie v. Indus. Comm.,* 10th Dist. No. 05AP-1309, 2006-Ohio-5944, ¶24.

{¶8} Lastly, relator points to the evidence indicating her vocational rehabilitation file was closed due to nonfeasibility. The date the vocational rehabilitation file was closed preceded the medical and psychological evidence on which the commission relied.

Moreover, the decision of vocational rehabilitation to close its file does not control the commission's decision as to whether relator's vocational factors allow her to be employed within the limitations the medical and psychological evidence indicate.

{¶9} Accordingly, relator's objection is overruled.

III. Disposition

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

Objection overruled;
writ denied.

TYACK and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Eleanor E. Bacon,	:	
Relator,	:	
		No. 10AP-230
v.	:	
		(REGULAR CALENDAR)
Ohio Industrial Commission and Lawrence County Auditor,	:	
Respondents.	:	

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

Rendered on February 25, 2011

Spears & Associates Co., L.P.A., and *David R. Spears*, for relator.

Michael DeWine, Attorney General, *Jeanna R. Volp* and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, Eleanor E. Bacon, 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:

{¶12} 1. Relator has two industrial claims arising out of and in the course of her employment as a workshop supervisor for the Lawrence County Mental Retardation and Developmental Disabilities (MRDD) Board.

{¶13} 2. Her January 28, 1998 injury ("Claim No. 98-321701") is allowed for:

> * * * Sprain left medial collateral ligament; sprain left cruciate ligament; sprain left knee and leg; enlarged plica left knee.

{¶14} 3. Her January 11, 2006 injury ("Claim No. 06-303198") is allowed for:

> * * * Sprain of right ankle; left knee sprain; neck sprain; lumbar sprain; thoracic sprain; current tear medial meniscus left knee; aggravation of pre-existing degenerative changes at L3-4, L5-S1; aggravation of pre-existing mild narrowing at C4-5, C5-6; aggravation of pre-existing left anterior cruciate ligament deficiency; major depression.

{¶15} 4. Relator has not worked since January 11, 2006, the date of her second industrial injury. The Ohio Bureau of Workers' Compensation ("bureau") began payments of temporary total disability ("TTD") compensation.

{¶16} 5. Beginning February 13, 2008, relator was hospitalized for major depression. The hospital admission evaluation estimates a five to seven day length of stay.

{¶17} 6. On December 18, 2008, at the bureau's request, relator was examined by psychiatrist, Allen B. Levy, M.D. In a three-page narrative report, Dr. Levy opines:

> * * * I believe Eleanor's allowed condition of depression is at [maximum medical improvement]. Despite aggressive psychotherapy and medication treatment, there has not been

> significant improvement, and it is unlikely that this will change particularly since her persisting pain has not changed or has gotten worse. By Eleanor's description over the past year, depression and anxiety are both worse than they were previously. I believe she is disabled from working, and I believe this disability to be permanent. She is not a vocational rehabilitation candidate. * * *

{¶18} 7. On January 6, 2009, the bureau moved for termination of TTD compensation on grounds that the major depression had reached maximum medical improvement ("MMI").

{¶19} 8. Following a February 10, 2009 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation as of February 10, 2009 on grounds that the psychiatric condition is at MMI. The DHO relied exclusively upon Dr. Levy's report.

{¶20} 9. Relator administratively appealed the DHO's order of February 10, 2009.

{¶21} 10. Following an April 8, 2009 hearing, a staff hearing officer ("SHO") issued an order vacating the DHO's order of February 10, 2009. The SHO's order of April 8, 2009 explains:

> It is the order the Staff Hearing Officer that the Bureau of Workers' Compensation Motion filed 01/06/2009 is denied.
>
> The Staff Hearing Officer finds that the Injured Worker has not reached maximum medical improvement relative to the allowed psychological condition in this claim. This finding is based on the C-84 dated 10/13/2008 from Dr. McHenry. This finding is also supported by the 12/30/2008 report from Ms. Joyce Estep, counselor, wherein she also concurs that the Injured Worker has not reached maximum medical improvement relative to the allowed condition in this claim, and needs out-patient therapy and continued treatment with her current psychiatrist.
>
> Temporary total compensation is therefore payable from the date of last payment to 04/13/2009, and to continue upon submission of medical evidence.

{¶22} 11. Apparently, the April 8, 2009 order of the SHO was not administratively appealed.

{¶23} 12. On July 22, 2009, at the bureau's request, relator was examined by psychologist Michael T. Farrell, Ph.D.

{¶24} 13. In his nine-page narrative report, dated August 6, 2009, Dr. Farrell opined:

> Based upon the results of this evaluation and the information provided/reviewed, it is my opinion that a Major Depressive Disorder allowed in the BWC claim of record is of a permanent nature and has reached maximum medical improvement. * * * Within psychological certainty, however, it is my opinion that she is psychologically not able to resume her previous employment activity as a workshop supervisor. There is a moderate level of impairment in stress tolerance, a moderate level of impairment in social functioning, a mild impairment in endurance/pace, and a minimal impairment in cognitive functioning. She is psychologically able to work in other jobs given these restrictions. Given the influence of the underlying Histrionic Personality Disorder, her 50 years of age, her strong identification with her past long-term employment as a workshop supervisor, and her apparent identification with a disabled lifestyle, participation in a vocational rehabilitation program would not likely be successful. Continuing medical health treatment is recommended to maintain her current level of emotional functioning and to guard against any significant emotional decompensation. * * *

{¶25} 14. On August 24, 2009, the bureau moved to terminate TTD compensation based upon Dr. Farrell's opinion that the psychiatric condition is at MMI.

{¶26} 15. Following a September 16, 2009 hearing, a DHO issued an order terminating TTD compensation as of the September 16, 2009 hearing date based upon

Dr. Farrell's opinion that the psychiatric condition has reached MMI. Apparently, the DHO's order of September 16, 2009 was not administratively appealed.

{¶27} 16. Earlier, on March 3, 2009, relator filed an application for PTD compensation.

{¶28} 17. On June 23, 2009, at the commission's request, relator was examined by orthopedist William Reynolds, M.D. Dr. Reynolds examined for all the allowed physical conditions of the two industrial claims. In his three-page narrative report, Dr. Reynolds opined that relator "has reached a level of maximum medical improvement" and that her "combined effect permanent partial impairment of function of person a whole is 23%."

{¶29} 18. On a physical strength rating form dated June 23, 2009, Dr. Reynolds indicated by his checkmark that relator is capable of "sedentary work."

{¶30} 19. Also on June 23, 2009, at the commission's request, relator was examined by psychologist Bruce J. Goldsmith, Ph.D. In his six-page narrative report, Dr. Goldsmith opines:

> The injured worker has reached a condition of maximum medical improvement in regard to her Major Depressive Disorder. * * *
>
> * * *
>
> * * * [T]he degree of permanent impairment from her allowed condition of Major Depressive Disorder, resulting from her industrial accident of 1/11/2006 and referenced by the AMA Guide to Permanent Impairment (2nd and 5th editions), is presently estimated at Class III/ 45%.
>
> * * *

> * * * The degree of emotional impairment due to her industrial accident of 1/11/2006 would currently not be expected to solely prevent her from working in any capacity.

{¶31} 20. On June 26, 2009, Dr. Goldsmith completed a form captioned "Occupational Activity Assessment[,] Mental & Behavioral Examination." On the form, Dr. Goldsmith placed his checkmark aside the preprinted statement: "This Injured Worker is capable of work with the limitation(s)/modification(s) noted below."

> Below the preprinted statement, Dr. Goldsmith wrote in his own hand:
>
> She is limited to simple, routine, low-stress, nonpublic work with minimal interpersonal contact.

{¶32} 21. Following a September 22, 2009 hearing, an SHO issued an order denying relator's PTD application. The SHO's order explains:

> There are two claims involved here. Both claims came about as the Injured Worker was employed as a workshop supervisor for disabled clients. The first of these arose on 01/28/1998 when the Injured Worker, Ms. Bacon, was charged by a resident who pushed her to the floor causing her to twist her left knee. The injury caused multiple conditions in the left knee and resulted in a surgery. The second claim arose on 01/11/2006. Ms. Bacon was, again, working as a workshop supervisor. A client attacked her and pulled her and another worker down to the floor. She was able to get up briefly, but the client attacked her again and her leg popped. This claim has multiple allowed conditions including a psychological condition. This claim has, also, caused surgery on the left knee.
>
> Ms. Bacon is now fifty years old. Her last day worked was 01/11/2006. She is a high school graduate and has worked as a telemarketer, a cashier at a large department store and as a workshop supervisor at a county MRDD agency. She held the workshop supervisor position for approximately sixteen years. The Injured Worker has not been involved in vocational rehabilitation. She was referred to rehabilitation in 2008. A closure report dated 03/13/2008 indicated that she was not psychologically feasible to participate at the time.

The Injured Worker was examined for the Industrial Commission, on the allowed physical conditions, by William Reynolds, M.D., who issued a 06/23/2009 report. Dr. Reynolds concluded the Injured Worker was capable of sedentary range work. Sedentary work is defined as work exerting up to ten pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met. The Injured Worker was examined for the Industrial Commission, on the psychological/psychiatric condition, by Bruce J. Goldsmith, Ph.D., who also issued a 06/23/2009 report. Dr. Goldsmith gave the Injured Worker a rather high impairment rating of 45 percent, but, nonetheless, felt she was capable of work within limitations he listed. These limitations were that the work should be simple, routine, low stress, non-public work with minimal interpersonal contact.

From a vocational perspective, the Staff Hearing Officer finds the Injured Worker's current age of fifty to be a neutral factor. She is not in the prime age period for finding work, but she is certainly not beyond the age of finding work. The workforce is replete with many individuals in their fifties and much older. Ms. Bacon's work history is found to be a positive factor. She has done three types of work, as mentioned above. Two types of these work would involve interpersonal contact. Her work history has been steady and she has had positions of responsibility. This would be particularly true of the workshop supervisor position. The Injured Worker's formal education is found to be a slightly positive factor. She is a high school graduate and having a high school diploma is still a plus in today's workforce. Although her psychological difficulties would prevent her from returning to the type of work in which she was injured, her employment indicates an ability to learn new tasks. Working as a cashier and as a telemarketer involves organization and learning rules and regulations. She has the ability to be trained for various types of work if she so desires.

> Prior to the filing of the IC-2 Application, the Injured Worker was examined on the issue of extent of disability for the Administrator (Bureau of Workers' Compensation) by Alan Levy, M.D., on the psychological/psychiatric allowed condition. Dr. Levy issued a 12/18/2008 report. Said doctor felt the Injured Worker's psychological condition was at maximum medical improvement. Dr. Levy went on to opine that Ms. Bacon was disabled from working and that he believed this disability to be permanent. So, the examination basically supports the assertion that the Injured Worker is permanently and totally disabled. Ms. Bacon was receiving temporary total compensation for the psychological condition. Per a District Hearing Officer order of 02/10/2009 temporary total compensation was terminated on a finding of maximum medical improvement. The basis of the order was the 12/18/2008 report of Dr. Levy. However, on appeal, a 04/08/2009 Staff Hearing Officer order vacated the 02/10/2009 order and found the psychiatric condition was still temporary. Temporary total compensation was continued for a short period of time. So, the report by Dr. Levy was rejected by the 04/08/2009 Staff Hearing Officer order, and that order was a final order on that issue. Consequently, the report from Dr. Levy cannot be used as some evidence for this matter of permanent total disability. Citing State ex rel. Zamora v. Indus. Comm. (1989), 45 Ohio [St.3d] 17, the Ohio Supreme Court in State ex rel. Verbanek v. Indus. Comm. (1995), 73 Ohio [St.3d] 562 indicated that it would be inconsistent to let the Commission reject a report at one level, for whatever reason, and rely on the report at another.
>
> Based on the above discussed reports from Doctors Reynolds and Goldsmith, which are found to be persuasive, the Staff Hearing Officer finds that when only the impairment arising from the allowed conditions is considered, the Injured Worker has the residual functional capacity to perform a variety of work activities. Further, it is found that when her degree of medical impairment is considered in conjunction with her non-medical disability factors, and the relevant case law, the Injured Worker is capable of sustained remunerative employment and is not permanently and totally disabled. Accordingly, the IC-2 Application, filed 03/03/2009, is denied.

{¶33} 22. Relator moved the commission for a reconsideration of the SHO's order of September 22, 2009. The commission denied reconsideration.

{¶34} 23. On March 15, 2010, relator, Eleanor E. Bacon, filed this mandamus action.

Conclusions of Law:

{¶35} Two issues are presented: (1) whether the commission abused its discretion by rejecting Dr. Levy's report on grounds that it must be eliminated from evidentiary consideration under the rule set forth in *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17 (*Zamora* rule), (2) whether the commission determined that relator has transferable skills and then abused its discretion by allegedly finding that the transferable skills permit sedentary employment.

{¶36} Finding no abuse of discretion, it is the magistrate's decision that this court deny relator's request for writ of mandamus, as more fully explained below.

{¶37} Turning to the first issue, the commission, through its SHO, rejected Dr. Levy's report on grounds that it must be eliminated from evidentiary consideration under the *Zamora* rule.

{¶38} Recently, in *State ex rel. Deal v. Cunningham*, 10th Dist. No. 10AP-142, 2010-Ohio-6175, ¶9-10, this court succinctly summarized the law concerning the commission's rejection of medical reports:

> The commission has the exclusive authority to evaluate the weight and credibility of the evidence. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20-21, 508 N.E.2d 936. The commission is not required to note the evidence it finds unpersuasive or the reason for rejecting it, because "[l]ogic dictates that if the identity of rejected evidence is irrelevant, so is the reason for the rejection." *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575, 578, 651 N.E.2d 989. Accordingly, the commission does not need to state why it found one doctor's report more

> persuasive than that of another doctor. *Id.* at 577, 651 N.E.2d 989.
>
> When, however, the commission states a reason for rejecting a report, it may not do so arbitrarily. *State ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 13-14, 278 N.E.2d 34. To avoid rejecting medical proof arbitrarily, the commission must have, "some reasonable basis for the * * * rejection of a physician's finding." *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 655, 640 N.E.2d 815; see also *State ex rel. Pavis v. Gen. Motors Corp.,* 65 Ohio St.3d 30, 33, 599 N.E.2d 272, 1992-Ohio-114.

{¶39} Here, because the commission stated a reason for rejecting Dr. Levy's report, it abuses its discretion if it has done so arbitrarily or for an improper reason.

{¶40} *Zamora* prohibits the commission from relying on a medical report that the commission had earlier found unpersuasive. *State ex rel. Jeep Corp. v. Indus. Comm.,* 64 Ohio St.3d 378, 381, 1992-Ohio-106.

The *Jeep* court summarized *Zamora*, stating:

> * * * In *Zamora*, the claimant simultaneously applied to have an additional psychiatric allowance and to have himself declared permanently totally disabled. The claimant was examined by various specialists, including Dr. Dennis W. Kogut, who stated that the claimant's depression preceded his industrial injury and that the contribution of the industrial injury to the depression was minimal.
>
> The commission allowed the psychiatric condition and, in so doing, implicitly rejected Kogut's report. However, ten months later, the commission denied the application for permanent total disability based partially on Dr. Kogut's same narrative. The claimant challenged the commission's subsequent reliance on that report, arguing that once rejected, the report was removed from evidentiary consideration. We agreed.

{¶41} Despite the rule in *Zamora*, *State ex rel. Verbanek v. Indus. Comm.*, 73 Ohio St.3d 562, 1995-Ohio-330, has been viewed as permitting severability in the analysis of whether *Zamora* prohibits reliance on a report. *State ex rel. Rutherford v. Indus. Comm.*, 10th Dis. No. 05AP-986, 2007-Ohio-12, ¶21.

{¶42} In his December 18, 2008 report, Dr. Levy opines that the allowed psychiatric condition is at MMI. He also opines "I believe she is disabled from working, and I believe this disability to be permanent."

{¶43} Clearly, Dr. Levy's opinion that the allowed condition is at MMI was implicitly rejected by the commission, through its SHO's order of February 10, 2009, where the bureau's January 6, 2009 motion to terminate TTD compensation on MMI grounds was denied.

{¶44} Under the *Verbanek* severability rule, the question here is whether the commission's rejection of Dr. Levy's MMI opinion is also a rejection of his opinion that relator is permanently disabled from working. In the view of the magistrate, commission rejection of Dr. Levy's opinion that the allowed condition is at MMI is necessarily a rejection of his opinion that relator is permanently disabled from working.

{¶45} Ohio Adm.Code 4121-3-34 sets forth the commission's rules applicable to PTD applications. Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Thereunder, Ohio Adm.Code 4121-3-34(D)(1)(f) provides:

> If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. * * *

{¶46} Clearly, MMI is a prerequisite to establishing an allowed condition as a proximate cause of PTD. Because the commission had rejected Dr. Levy's opinion that the allowed condition had reached MMI in determining to continue payments of TTD compensation, it necessarily rejected the opinion that relator is permanently disabled from working even though PTD was not directly at issue at the April 8, 2009 hearing before the SHO.

{¶47} Based upon the above analysis, the magistrate concludes that the commission did not abuse its discretion when it specifically rejected Dr. Levy's report in adjudicating relator's PTD application.

{¶48} Turning to the second issue, Ohio Adm.Code 4121-3-34(B) sets forth definitions applicable to the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(B)(3) is captioned "Vocational factors." Ohio Adm.Code 4121-3-34(B)(3)(c) is captioned " 'Work experience.' "

> Thereunder, Ohio Adm. Code 4121-3-34(B)(3)(c) states:
>
> (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.
>
> According to relator:
>
> It is respectfully submitted that the finding of the Staff Hearing Officer that working as a cashier and telemarketer provided Relator with transferrable skills to other work cannot be supported by the record because [of] the Staff Hearing Officer's finding that the job skills acquired in the Relator's past employment were precluded by her psychological restrictions. If the job skills required are medically precluded, they cannot be transferred to less exertional levels of employment.

(Relator's brief, at 7.)

{¶49} The magistrate disagrees with relator's argument.

{¶50} To begin, the SHO did not find that prior employment as a cashier and telemarketer provides relator with transferable skills. What the SHO said bears repeating:

> * * * Although her psychological difficulties would prevent her from returning to the type of work in which she was injured, her employment indicates an ability to learn new tasks. Working as a cashier and as a telemarketer involves organization and learning rules and regulations. She has the ability to be trained for various types of work if she so desires.

{¶51} There is no mention of the concept of transferability of skills in the SHO's order. However, the SHO did find that relator's performance of the cashier and telemarketing jobs demonstrates "the ability to be trained for various types of work."

{¶52} Presumably, the SHO was referring to a mental ability that has been demonstrated in relator's prior employment. The SHO found that ability would serve relator in any retraining efforts.

{¶53} Thus, the SHO did not focus exclusively upon relator's current abilities, but addressed relator's capacity to develop new work skills through retraining. It was appropriate for the SHO to do so. *State ex rel. B.F. Goodrich Co. v. Indus. Comm*., 73 Ohio St.3d 525, 1995-Ohio-291.

{¶54} In short, relator's argument must fail.

{¶55} 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).