[Cite as *State ex rel. Consolidation Coal Co. v. Tippins*, 2013-Ohio-179.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Consolidation Coal Company (Quarto Mining Company),	:	
Relator,	:	
v.	:	No. 12AP-337
Rodney Tippins and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on January 24, 2013

Fregiato, Myser & Davies, and *Gerald P. Duff*, for relator.

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley*, for respondent Rodney Tippins.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Consolidation Coal Company (Quarto Mining Company) ("Consolidation Coal Co.") has filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order granting permanent total disability ("PTD") compensation for Rodney Tippins.

{¶ 2} In accord with Loc.R. 13(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed

briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 3} Consolidation Coal Co. has filed objections and amended objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} The objections filed on behalf of Consolidation Coal Co. are 13 in number as no number 7 was presented. They read:

> 1. The Magistrate's Conclusions of Law are erroneous and not supported.
>
> 2. The Magistrate's listing of Relator's argument points is incomplete. This is not a technical point, but one that addresses a fatal flaw in the Magistrate's Decision. She only lists rehabilitation failure as being argued and fails to list the Relator's points as to Claimant's unexplained and complete failure to improve his educational level, and to get retraining for other employment skills.
>
> 3. The Magistrate's consideration of the *Taylor* and *Lopez* cases on the "inconsistency point" as to Dr. Vargo's report is legally incorrect.
>
> 4. The Magistrate erred in finding that Claimant worked exclusively in coal mines. She states this several times in her Decision and such Finding is clearly inconsistent with Finding No. 12, App. 6, which quotes the SHO Order finding that Claimant testified he had worked in other types of businesses.
>
> 5. The Magistrate erred by making an improper *Gonzales* case analysis. She failed to consider his lack of retraining and/or getting his education increased since 1991. This is not a proper *Gonzales* case analysis. At App. 6 and 7 of the her [sic] Decision, the Magistrate notes that the SHO mentions Claimant's low educational capacities, but the Magistrate committed error as did the SHO, in failing to find they are due to Claimant's owned [sic] failings and inactions and thus she doesn't do a proper analysis under the *Gonzales* and *Bowling* and related cases.

> 6. The Magistrate erred in not finding that Ms. Valentine's analysis is erroneously limited to lack of rehabilitation attempts, and that Ms. Valentine mentions, low educational capacities, but doesn't acknowledge its due to his own failings and inactions. There is no consideration of the Claimant's lack of education updates or retraining.
>
> [7.] The Magistrate incorrectly didn't even address the applicable *Wilson* and *Paraskevopoulos* cases.
>
> [8.] The Magistrate erred in failing to find or recognize that the SHO didn't even consider Claimant's failure to participate in rehabilitation.
>
> [9.] The Magistrate at pages 16-17 erred in failing to find that Claimant had skills he could have developed. He had prior work, and then training in mines. He was and is trainable.
>
> [10.] The Magistrate made a wrong analysis of cases such as *Lubrizol* etc. The Claimant there worked as car salesman before. Similar prior work exists by the Claimant here. The Magistrate erroneously didn't consider the same.
>
> [11.] The Magistrate erred in not finding Ms. Valentine's stated opinions of Claimant's inability to engage in sustained competitive employment to be the wrong PTD standard. And, she also erred in incorrectly holding that such opinion is only in Ms. Valentine's November 21, 2011 report, when it is in both of Ms. Valentine's November 7, 2011 and November 21, 2011 reports, and is inconsistent with her Decision at App. 14. At a minimum Ms. Valentine's reports are inconsistent in this regard as quoting different PTD standards.
>
> [12.] The Magistrate erred in finding that Ms. Valentine's report constituted some evidence to grant PTD in light of Ms. Valentine improperly making medical opinions in her report.
>
> [13.] The Magistrate committed overall errors and a legally and factually improper analysis and thereby erred in upholding the SHO.

{¶ 5} Rodney Tippins only went to school through the 8th grade. He never completed the 9th grade or his GED. His educational level clearly is a significant factor weighing against his obtaining sustained remunerative employment.

{¶ 6} Tippins was born in late 1950. He is now 62 years of age. His age is also a negative non-medical factor.

{¶ 7} Tippins has not worked in over 15 years due to his back injury. This gap in his work history is also a negative factor.

{¶ 8} Tippins tried to return to work for Consolidation Coal Co. on two occasions during that gap in employment, but failed the physical on both occasions (2001 and 2003).

{¶ 9} Tippins worked in coal mines from 1973 to 1998, when he was laid off. His other employment included cleaning cars for an auto dealer and working as a tree trimmer. None of his past employment provides readily transferable skills. All involved manual labor which his low back problems no longer permit.

{¶ 10} The staff hearing officer ("SHO") who granted PTD compensation for Tippins relied in part on vocational reports from Shannon C. Valentine, MCC, CRC, which indicated that Tippins did not have the transferable skills nor the innate ability to acquire the new skills to enable him to obtain a new job involving sedentary work. The SHO found those reports more credible than a vocational report by Craig Johnston, Ph.D., finding otherwise.

{¶ 11} Turning to the numerous specific objections, the allegations that the magistrate's conclusions of law "are erroneous and not supported" really is nothing more than counsel asserting that his arguments should have been accepted instead of the opposing assertions on behalf of the commission. We do not accept this blanket objection as being valid.

{¶ 12} The first objection is overruled.

{¶ 13} The magistrate is not required to list and rebut every argument presented by a relator in a mandamus action. Instead, the relator must show a clear legal right to relief. Relator's main argument seems to be that Tippins, with an educational history of schooling only through the 8th grade and a history of manual labor, including 25 years in the coal mines, should have gone back to school to improve his intellectual functioning. This argument ignores the fact that Tippins worked until he was laid off and then attempted to return to work with Consolidated Coal Co. on two occasions only to fail his physical. Tippins clearly hoped to return to work in the coal mines and was rejected for

such work. His focus was not on additional schooling to help him get sedentary employment.

{¶ 14} Further, the record before us does not prove that Tippins could have improved his intellectual functioning, with or without additional schooling or training.

{¶ 15} The second objection is overruled.

{¶ 16} We also do not find fault with the magistrate's analysis of the "*Taylor* and *Lopez* cases." In fact, the magistrate's detailed analysis of the cases is correct.

{¶ 17} The third objection is overruled.

{¶ 18} Relator is correct to assert that Tippins had other jobs as a handyman in a car lot and as a tree trimmer. Those jobs were physical jobs apparently held over 40 years ago. Both relied on manual labor. Tippins is not physically capable of either job now, especially the job as a tree trimmer. The jobs Tippins held for many, many years were in the coal mines and he could no longer work in the mines. The magistrate's findings are a reference to the only significant employment Tippins has had during the last 40 years.

{¶ 19} The fourth objection is overruled.

{¶ 20} We do not disagree with the magistrate's analysis of *State ex rel. Gonzalez v. Morgan*, 131 Ohio St.3d 62, 2011-Ohio-6047. The SHO who heard the application for PTD compensation was within his discretion to find that Tippins was not required to improve on his 8th grade education in order to be awarded PTD compensation.

{¶ 21} The fifth objection is overruled.

{¶ 22} There is no basis in the record before us for counsel's assertion Tippins' low educational capacities are due to Tippins "own failing and inactions."

{¶ 23} The sixth objection is overruled.

{¶ 24} The magistrate did not have to address or rebut every case counsel put forth.

{¶ 25} The [7th] objection is overruled.

{¶ 26} The SHO clearly considered both vocational reports before him and therefore considered the issues related to Tippins' failure to pursue additional schooling or training.

{¶ 27} The [8th] objection is overruled.

{¶ 28} The issue of training was clearly considered by both the SHO and the magistrate in addressing the SHO's order. The SHO's resolution of this is clearly supported by some evidence.

{¶ 29} The [9th] objection is overruled.

{¶ 30} The magistrate did not err in her review of *State ex rel. The Lubrizol Corp. v. Indus. Comm.*, 10th Dist. No. 07AP-204, 2008-Ohio-463. The facts are sufficiently different such that a different result is reasonable.

{¶ 31} The [10th] objection is overruled.

{¶ 32} The SHO who addressed the application for PTD compensation for Tippins clearly was aware of the correct standards for awarding PTD compensation. Both the SHO and our magistrate correctly reviewed and addressed the reports of Ms. Valentine.

{¶ 33} The [11th and 12th] objections are overruled.

{¶ 34} The [13th] objection appears to be nothing but a recap of the other objections. It also is overruled for the reasons set forth above.

{¶ 35} All the objections having been overruled, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. We, therefore, deny the request for a writ of mandamus.

Objections overruled; writ denied.

SADLER and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Consolidation Coal Company (Quarto Mining Company),	:	
Relator,	:	
v.	:	No. 12AP-337
Rodney Tippins and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 17, 2012

Fregiato, Myser & Davies, and *Gerald P. Duff*, for relator.

Heller, Maas, Moro & Magill Co., L.P.A., and *Robert J. Foley*, for respondent Rodney Tippins.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 36} Relator, Consolidation Coal Company (Quarto Mining Company), 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 awarded permanent total disability ("PTD") compensation to respondent Rodney Tippins ("claimant") and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶ 37} 1. Claimant sustained a work-related injury on July 2, 1991 while unloading cement blocks or bricks for use in a coal mine.

{¶ 38} 2. Claimant's workers' compensation claim has been allowed for the following conditions: "Strain low back; bulging disc L4-5, lumbar."

{¶ 39} 3. Following low back surgery, claimant returned to work with relator until May 1998, when he was laid off.

{¶ 40} 4. According to his testimony, claimant was called back to work in the coal mines on two occasions, once in 2001 and once in 2003; however, he was unable to pass the physical examination due to his low back condition and was not able to return to work.

{¶ 41} 5. Claimant filed his application for PTD compensation on April 14, 2011. According to his application, claimant was 61 years of age, indicated that he had filed for Social Security Disability Benefits and indicated that he was receiving disability benefits other than Social Security. Claimant completed the ninth grade, did not obtain his GED, and his work history consisted of exclusively working in the coal mines. Claimant did not indicate whether he could read, write, or perform basic math.

{¶ 42} 6. Claimant's application for PTD compensation was supported by the December 15, 2010 report of John J. Vargo, D.O. After noting his physical findings upon examination, Dr. Vargo opined that claimant had a 29 percent whole person impairment due to the allowed conditions in the claim. Dr. Vargo noted the following restrictions:

> [T]he injured worker, as a result of his injuries is unable to push, pull, lift or carry more than 5 pounds. He cannot climb, be around unprotected heights, unlevel surfaces or heavy equipment. He must avoid bending at the waist or kneeling.

{¶ 43} Dr. Vargo concluded that claimant was permanently and totally unable to return to any form of remunerative employment.

{¶ 44} 7. Relator had claimant examined by Paul T. Hogya, M.D. In his June 6, 2011 report, after properly identifying the allowed conditions and recounting the history of claimant's injury and treatment, Dr. Hogya provided his physical findings upon examination and concluded that his objective medical findings did not support the

conclusion that claimant was permanently and totally unable to perform sustained remunerative employment. Dr. Hogya opined that claimant could perform work activity with the following restrictions:

> Based solely on those conditions, he is readily capable of functioning in a light industrial demand capacity. That means exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently and/or a negligible amount of force constantly in the course of lifting, carrying, pushing or pulling various objects. Sitting, standing and walking should generally be up to one hour at a time with an opportunity to change positions. He is capable of occasional squatting and kneeling as needed. He can climb stairs and ramps as needed such as to enter and exit a building. He may drive automobiles and small pickup trucks with automatic transmission up to an hour at a time with an opportunity to exit the vehicle. He should avoid crawling. He may use step stools and ladders up to four feet. He has no restrictions with regard to use of the hands for fine manipulation, pinching, grasping, squeezing and light assembly. He is capable of using hand tools, although he should generally avoid vibrating tools. He has no restrictions with regard to hearing, seeing or speaking. He is capable of operating a telephone, headset, keyboard and mouse.

{¶ 45} 8. Kalapala Seshagiri Rao, M.D., examined relator on behalf of the commission. In his August 8, 2011 report, Dr. Rao opined that claimant's allowed conditions had reached maximum medical improvement ("MMI"), assessed a 13 percent whole person impairment and opined that claimant was capable of performing sedentary work.

{¶ 46} 9. Craig Johnston, Ph.D., performed an employability assessment dated November 1, 2011. Considering his age, education, and work history, Dr. Johnston opined that claimant could engage only in entry-level work. Considering that claimant was capable of performing sedentary work, Mr. Johnston opined that claimant could perform unskilled occupations including assembler, sorter, parts inspector, surveillance system monitor, and cashier. Mr. Johnston noted that claimant was 47 years old when he last worked and had 13 years to pursue his GED or engage in a short-term training program to acquire skills necessary for sedentary and light-work activity, yet he failed to do so. Mr. Johnston concluded that claimant's then age of 60 years was a potential barrier to

employment but was not work prohibitive. Although claimant's education was considered limited, Mr. Johnston opined that it was consistent with the ability to engage in unskilled and semi-skilled work activity. Mr. Johnston also opined that claimant's work history provided few transferrable skills but it did reflect his capacity to perform entry-level work.

{¶ 47} 10. Shannon C. Valentine, MRC, CRC, also submitted an employability assessment dated November 7, 2011. Claimant participated in a one-day vocational evaluation. According to the assessment, claimant had considerable difficulty with both sitting and standing for any appreciable amount of time due to ongoing pain and discomfort, specifically related to his low back. General work pace on psychometric testing was slow because claimant needed to take several breaks to alleviate his pain. It was noted that this affected his work productivity. Ms. Valentine administered certain testing which revealed that claimant was unable to complete his reading assignment due to increased pain levels, and his reading comprehension was 48 percent. It was determined that claimant's educational aptitudes were decreased and were not compatible with retraining at a sedentary level. The Minnesota Clerical Test was administered and claimant's scores fell in the very low range indicating that he had considerable difficulty when attempting to perceive tabular material, observe differences in copies or proofread words and numbers. As such, it was determined that claimant would not be a viable candidate for any sedentary/clerical pursuits of a semi-skilled or skilled nature. A skills transfer analysis revealed that claimant presented with neither marketable nor transferrable skills to sedentary activities. Ms. Valentine ultimately concluded that claimant would not be capable of engaging in any sustained remunerative employment, stating:

> In the opinion of this vocational specialist, Mr. Tippins is displaying insufficient worker traits to qualify for gainful employment. The combined effects of these limitations would impact negatively on his capacity to engage in sustained competitive employment. He also presents with neither marketable nor transferable skills given his past relevant work history and current physical limitations.
>
> In addition, Mr. Tippins presents with chronic pain behaviors which are not consistent with competitive employment standards. His ability to sustain himself for any

> appreciable amount of time is certainly compromised. Overall, he presents with decreased stamina and endurance.
> Mr. Tippins does not appear capable of engaging in activities of a light duty nature, as indicated by Paul Hogya, MD on 5/24/11. Light duty work would require an individual to be up on his/her feet for up to 66% of the workday. He specifically stated, "Sitting, standing and walking should generally be up to one hour at a time with an opportunity to change positions." This statement is not indicative of light work. Compounding Mr. Tippins' difficulties are his severely decreased educational capacities. Reading skills are significantly decreased and would not be compatible with on-the-job or formal retraining in sedentary occupations. Vocational Rehabilitation is contraindicated at this time.

{¶ 48} 11. Ms. Valentine prepared a second report in response to Dr. Johnston's report. The date of that report is November 21, 2011. In that report, Ms. Valentine explains that the testing she administered demonstrates that claimant does not have the aptitude nor transferable skills to perform the jobs identified by Dr. Johnston.

{¶ 49} 12. Claimant's application was heard before a staff hearing officer ("SHO") on January 12, 2012. The SHO awarded claimant PTD compensation based on the medical reports of Drs. Vargo and Rao and used the date of Dr. Vargo's report (December 15, 2010) as the start date for that award. The SHO relied upon the medical report of Dr. Rao to find that claimant was capable of performing at a sedentary work level, stating:

> Proof on file reflects that the Injured Worker sustained a low back injury in this claim on 07/02/1991 while unloading cement blocks or bricks for use in a coal mine. He did go on to have a low back surgery in this claim in December of 1993. He did return to work for this employer from approximately 1996 until 05/05/1998, when he was laid off. The Injured Worker testified at hearing that there were two occasions when he was called back to work in the coal mines, once in 2001 and once in 2003, but that he could not pass the physical examination due to his low back condition, so that he did not return to work. The Injured Worker's application is supported by a report dated 12/15/2010 from Dr. Vargo. Dr. Vargo have [sic] an opinion that the Injured Worker is permanently and totally disabled due to the conditions allowed in this claim.
> The Injured Worker was examined on behalf of the Industrial Commission on 08/08/2011 by Dr. Rao, a

> specialist in physical medicine and rehabilitation. Dr. Rao took a thorough history from the Injured Worker, and conducted a physical evaluation, and concluded that the Injured Worker would be capable of sedentary work.
> A review of proof on file shows there to have been little medical activity in this claim over the years. However, there is a packet of office notes from Dr. Earley, a treating physician, covering the time period from 01/28/1998 through 10/25/2010, which do document the Injured Worker's ongoing low back complaints.

{¶ 50} Thereafter, the SHO discussed the vocational evidence and concluded that claimant was permanently and totally disabled, stating:

> Vocationally, it is found that the Injured Worker is currently age 61. He testified at hearing that he had completed the eighth grade, but left school in the ninth grade. There has been no further education attempts or attempts at obtaining his G.E.D. As a work history, the Injured Worked testified to a period of cleaning cars for an auto dealer, and also a period of doing work as a tree trimmer. Further, it appears that he worked in the coal mines from approximately 1975 to 1998. The jobs in the coal mine appear to have been primarily either work as a Brattice man, or as a roof bolter. As mentioned above, he last worked in 1998. The Injured Worker lives in West Virginia, and it appears that there has been no contact with the rehabilitation division.
>
> Vocational evaluation reports are on file from Mr. Johnston and from Ms. Valentine. The Johnston report is dated 11/01/2011, and the Valentine report is dated 11/21/2011. Overall, the evaluation by Ms. Valentine is found more persuasive. Ms. Valentine concluded that the Injured Worker is not capable of sustained remunerative employment. She concluded that the Injured Worker did not display sufficient worker traits to qualify for gainful employment and that he presents with neither marketable nor transferrable skills, in light of his past relevant work history and his current physical limitations.

{¶ 51} The SHO concluded:

> In summary, it is found that the Injured Worker maintains the physical capacity for sedentary work, per the report of Dr. Rao. Vocationally, it is found that the Injured Worker's age is a limiting factor, and his education and work history

> are also further limiting factors. There is found to be no reason to believe that the Injured Worker maintains the potential to benefit from rehabilitation services, or to be able to return to any type of sustained remunerative employment, even of an unskilled nature, based on his limited physical capacities.

{¶ 52} 13. Relator's request for reconsideration was denied by order of the commission mailed March 3, 2012.

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

Conclusions of Law:

{¶ 54} Relator argues that the commission abused its discretion in awarding claimant PTD compensation because: (1) the medical report of Dr. Vargo is internally inconsistent and cannot constitute some evidence; (2) the vocational report of Ms. Valentine failed to address claimant's lack of participation in any vocational rehabilitation and considered claimant's pain as a limiting factor and applied the wrong standard; (3) the commission's order itself has errors; and (4) the commission did not consider or address the medical report of Dr. Hogya.

{¶ 55} The magistrate finds that the commission did not abuse its discretion by awarding claimant PTD compensation. The magistrate finds that: (1) the medical report of Dr. Vargo is not internally inconsistent; (2) the vocational report of Ms. Valentine does constitute some evidence upon which the commission could rely; (3) the commission's order does not contain the errors alleged by relator; and (4) the commission is not required to address medical evidence upon which the commission does not rely.

{¶ 56} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry*

Co., 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 57} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693 (1994). Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 58} Equivocal medical opinions are not evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657 (1994). Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement. *Id.* A medical report can be so internally inconsistent that it cannot be some evidence upon which the commission can rely. *State ex rel. Lopez v. Indus. Comm.*, 69 Ohio St.3d 445 (1994); *State ex rel. Taylor v. Indus. Comm.*, 71 Ohio St.3d 582 (1995).

{¶ 59} Relator contends that the medical report of Dr. Vargo is internally inconsistent. Specifically, relator points out that Dr. Vargo opined that claimant had a 29 percent whole person impairment, and despite this low impairment, Dr. Vargo concluded that claimant was permanently and totally disabled. Relator contends that Dr. Vargo's opinion is legally unreliable.

{¶ 60} For the reasons that follow, this magistrate disagrees.

{¶ 61} Relator relies on *Taylor* in support of its argument. In that case, the claimant, Robert J. Taylor, sustained a work-related injury and applied for PTD compensation. Taylor was examined by Dr. Gary I. Katz who found no objective findings, yet concluded that Taylor had a 50 percent permanent partial impairment and that he was capable of sustained remunerative employment including his former job. The

commission relied on medical reports, including the report of Dr. Katz, to deny Taylor's application for PTD compensation.

{¶ 62} Ultimately, the matter was heard before the Supreme Court of Ohio. After determining that the commission's decision to deny Taylor PTD compensation was premised exclusively on Dr. Katz's assessment, the court then found that Dr. Katz's report did not constitute some evidence upon which the commission could properly rely. Specifically, the court stated:

> Recently, in *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 633 N.E. 2d 528, this court considered the evidentiary sufficiency of a medical report on which the commission relied in denying a claimant permanent total disability compensation. The report at issue in *Lopez* also involved the same doctor at issue here, Dr. Katz. In fact, the report in *Lopez* was substantively identical to the report in the present situation in that Dr. Katz found no objective findings, concluded that the claimant could return to heavy labor, and then, however, assessed a fifty percent permanent partial impairment. We rejected Dr. Katz's report in *Lopez*, reasoning:
>
> We recognize that the court of appeals did not have the benefit of our decision in *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445, 633 N.E. 2d 528.
>
> "Katz's report, however, while unequivocal, is so internally inconsistent that it cannot be 'some evidence' supporting the commission's decision. Despite 'normal' physical findings, Katz assessed a high (fifty percent) degree of impairment. He then, however, concluded that claimant could perform heavy foundry labor. Being unable to reconcile these seeming contradictions, we find that the report is not 'some evidence' on which to predicate a denial of permanent total disability compensation." *Id.* at 449, 633 N.E.2d at 531-532.
>
> Clearly, Dr. Katz's report in the present situation contains the same infirmities as those contained in his report in *Lopez.* Thus, consistent with our findings in *Lopez*, we find that Dr. Katz's report in the case at bar cannot, as a matter of law, be "some evidence" supporting the commission's decision.

Id. at 584.

{¶ 63} Relator argues that the reverse situation is present here; Dr. Vargo assessed a low percentage of impairment and yet concluded that claimant was permanently and totally disabled. However, the magistrate disagrees with relator's argument.

{¶ 64} Dr. Vargo's report does not suffer from the same problems which were associated with Dr. Katz's report. In both *Lopez* and *Taylor*, Dr. Katz found no objective findings, assessed a 50 percent degree of impairment, and then opined that both claimants could return to heavy labor. By comparison, Dr. Vargo's report includes objective findings from which he determined claimant's degree of impairment. Further, Dr. Vargo opined that, as a result of his allowed conditions, claimant was unable to push, pull, lift or carry more than five pounds, could not climb, be around unprotected heights, unlevel surfaces or heavy equipment, and must avoid bending at the waist or kneeling. Based upon his objective findings, claimant's degree of impairment and restrictions, Dr. Vargo concluded that claimant was unable to return to any remunerative employment. Finding that Dr. Vargo's report does not suffer from the same deficiencies as did the reports of Dr. Katz, the magistrate finds that the commission did not abuse its discretion in relying on his report to determine the start date for claimant's PTD compensation.

{¶ 65} As noted in the findings of fact, the commission relied on two medical reports to find that claimant was entitled to an award of PTD compensation: the reports of Drs. Vargo and Rao. In relying on those reports, the commission concluded that claimant could perform work at a sedentary work level. A review of both reports supports this conclusion. Dr. Vargo limited claimant to lifting no more than five pounds which is within the definition of sedentary work. Sedentary work is defined in Ohio Adm.Code 4121-3-34(B)(2)(a) as follows:

> "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) 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.

{¶ 66} It was not an abuse of discretion for the commission to rely on the restrictions Dr. Vargo placed on claimant without also relying on Dr. Vargo's ultimate conclusion that those restrictions would preclude claimant from performing any sustained remunerative employment. *See State ex rel. York Internatl. Corp. v. Indus. Comm.*, 10th Dist. No. 04AP-979, 2005-Ohio-3792. Relying on the reports from Drs. Vargo and Rao, the commission found claimant capable of performing at a sedentary work level and, because Dr. Vargo's report supported the commission's conclusion, the commission did not abuse its discretion by using the date of his report as the start date for the award.

{¶ 67} Relator also contends that the vocational report of Ms. Valentine does not constitute some evidence upon which the commission could rely. Specifically, relator argues that Ms. Valentine did not consider the fact that claimant had not participated in any vocational rehabilitation. By comparison, relator points out that Dr. Johnston did consider the fact that claimant had not participated in vocational rehabilitation and determined that he would have benefited from rehabilitation if he would have participated.

{¶ 68} It must be remembered that the commission is the vocational expert and that the commission can, but is not required to, rely on vocational reports. *See State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117 (1994). Further, the commission has discretion to accept one vocational report while rejecting another vocational report. Here, the commission found the Valentine report was more persuasive than the Johnston report.

{¶ 69} Relator is correct to assert that the commission and courts can demand accountability of claimants who, despite time and medical ability to do so, never try to further their education or learn new skills. *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148 (1996). Relator cites the Supreme Court of Ohio's decision in *State ex rel. Gonzales v. Morgan*, 131 Ohio St.3d 62, 2011-Ohio-6047. In that case, the commission had denied Trevor Gonzales' application for PTD compensation in an order that emphasized his refusal to participate in vocational rehabilitation. Gonzales had last worked in 2003, the year he sustained his work-related injury. Six years later, Gonzales filed an application for PTD compensation. The commission relied on medical reports to

conclude that Gonzales was capable of performing at a sedentary work level and, from a psychological standpoint, he could work with mild limitations. The commission noted that Gonzales was 52 years old, had last worked in 2003, had completed the ninth grade in Kingston, Jamaica, and had not received his GED. It was noted that Gonzales self-reported that he could not read, write, or perform basic math very well. The commission noted that Gonzales had worked for 30 years as a street food vendor in Jamaica before migrating to the United States where he worked as a general laborer, a stocker, a packer, a kitchen helper and food preparer, a delivery representative for a phone company, and as a hot walker for a race track. The commission concluded that Gonzales's age was not a detriment to his ability to obtain sedentary work and that his work history was a positive factor highlighting his ability to learn new job skills and to work in different work environments. The commission did find Gonzales's functional illiteracy to be a negative factor in his ability to obtain sedentary employment; however, the commission determined that factor was greatly outweighed by Gonzales's lack of participation in any type of rehabilitation program to negate his ability to not read, write, or perform basic math well.

{¶ 70} In the present case, claimant's entire work history had been spent in the coal mines. Claimant sustained his injury in 1991 and last worked in 1998 when he was laid off. In 2001 and 2003, claimant was called back to work in the coal mine; however, he was unable to pass the physical examination due to his low back condition. Claimant was 48 years of age in 1998, 53 years of age in 2003 when he last attempted to return to work, and 61 years of age when he applied for PTD compensation. Claimant completed the ninth grade, did not have his GED, and vocational testing conducted by Ms. Valentine demonstrated that his reading comprehension was 48 percent and that he was not a viable candidate for any sedentary/clerical pursuits of a semi-skilled or skilled nature.

{¶ 71} Relator's argument is understandable and perhaps a different hearing officer would have reached a different conclusion in this case. However, the question is whether the commission abused its discretion and not whether a different hearing officer or this court would reach a different result. While the commission can take a claimant's failure to pursue vocational rehabilitation into account and hold any failure to do so against the claimant, the commission is not required to find, in every instance, that where

a claimant does not participate in vocational rehabilitation the claimant will be denied PTD compensation. In *Gonzales*, the commission specifically found that Gonzales' varied work history was a positive factor demonstrating his ability to learn new job skills and work in different work environments. By comparison, claimant's only work experience here is in the coal mine and he has no transferrable skills. Ms. Valentine concluded that "Vocational Rehabilitation is contraindicated at this time."

{¶ 72} In relying on Ms. Valentine's report, the commission also concluded that vocational rehabilitation was not indicated. The commission was not required to explain why it did not determine that claimant's failure to pursue vocational rehabilitation against him and this magistrate cannot say that the commission abused its discretion in both relying on the report of Ms. Valentine and in not holding his failure to participate in vocational rehabilitation against him.

{¶ 73} Relator also argues that Ms. Valentine improperly discussed relator's pain and how it affects his ability to sit and stand and that Ms. Valentine applied the wrong standard when she stated that, in her opinion, claimant would not be capable of any and all forms of sustained competitive employment. Relator contends that vocational experts may not consider an injured worker's physical abilities in determining their ability to be retrained and that Ms. Valentine failed to state that claimant was incapable of performing any sustained remunerative (as opposed to competitive) employment.

{¶ 74} Ms. Valentine opined that claimant displayed insufficient worker traits to qualify for gainful employment, and that he presented with neither marketable nor transferrable skills given his past relevant work history and current physical limitations. She noted that his chronic pain behaviors were inconsistent with competitive employment standards, his ability to sustain himself for any approachable amount of time was compromised, and he presents with decreased stamina and endurance.

{¶ 75} Although relator argues that a vocational expert may not consider a claimant's physical abilities and may not rely on their observations when rendering an opinion as to a claimant's ability to work, the magistrate disagrees. Ms. Valentine addressed the reports of Drs. Vargo, Rao, and Hogya. Thereafter, she noted her own observations as to claimant's ability to sit and stand. The magistrate is unaware of any cases which would preclude a vocational expert from making observations of a claimant

and utilizing those observations in rendering their decision. Contrary to relator's argument, Ms. Valentine was not acting as a doctor; instead, she noted and considered claimant's ability to participate in vocational rehabilitation and perform some sustained remunerative employment based on the medical evidence, the non-medical disability factors, and her observations of claimant's abilities.

{¶ 76} Further, the magistrate rejects relator's argument that Ms. Valentine applied an improper standard. At the conclusion of her November 7, 2011 report, Ms. Valentine stated:

> It is the opinion of this vocational specialist that Mr. Tippins would not be capable of engaging in any sustained, remunerative employment.

{¶ 77} In making its argument, relator points to Ms. Valentine's second report, dated November 21, 2011, written in response to the employability assessment completed by Dr. Johnston. In that report, Ms. Valentine stated that: "Overall, when considering all information presented, is it [sic] the opinion once again by this Vocational Specialist, that Mr. Tippins would not be capable of any and all forms of sustained competitive employment." This is the only place where Ms. Valentine phrases her opinion that claimant is not capable of engaging in sustained remunerative employment in this manner. The magistrate does not find her statement that claimant would not be capable of any and all forms of sustained *competitive* employment as evidence that she applied an incorrect standard in the first instance and finds that relator's argument does not have merit.

{¶ 78} Relator also contends that the commission's order has several errors. For the reasons that follow, the magistrate finds that relator's argument lacks merit.

{¶ 79} First, relator contends that the reports of Drs. Vargo and Rao contain inconsistent and opposite conclusions. However, as discussed earlier, the magistrate has found that the reports of Drs. Vargo and Rao do constitute some evidence upon which the commission could rely to support the commission's finding that claimant could perform at a sedentary work level.

{¶ 80} Relator next argues that the reports of Dr. Rao and Ms. Valentine are totally inconsistent. Relator points out that Dr. Rao concluded that claimant was capable of

performing sedentary work while Ms. Valentine noted that, in her opinion, due to his chronic pain, claimant did not have the physical capacity to work in sedentary occupations. As said previously, it was not improper for Ms. Valentine to consider her observations. Contrary to relator's argument, she did not render a medical opinion and it was not an error for the commission to find her vocational report to be more persuasive.

{¶ 81} Relator next contends that the commission abused its discretion by not discussing claimant's rehabilitation potential. Relator contends it was an abuse of discretion for the SHO to conclude that he had no reason to believe that claimant would benefit from rehabilitation services.

{¶ 82} As noted previously, the commission was not required to find that claimant's failure to participate in vocational rehabilitation constituted grounds to deny his application for PTD compensation. Relator contends that, pursuant to *State ex rel. The Lubrizol Corp. v. Indus. Comm.*, 10th Dist. No. 07AP-204, 2008-Ohio-463, this court should issue a writ of mandamus and remand the matter to the commission for appropriate evidentiary evaluation of the non-medical disability factors. For the reasons that follow, the magistrate disagrees with relator's argument.

{¶ 83} In *Lubrizol Corp.*, the claimant, Terry W. Sigler sustained a work-related injury and ultimately applied for PTD compensation. The commission determined that Sigler was capable of performing, at best, sedentary to light-work. Thereafter, the commission considered Sigler's vocational factors. In doing so, the SHO discussed the skills that Sigler currently possessed, but did not clearly discuss whether Sigler had any potential skills that could be developed. Through its magistrate, this court stated:

> The magistrate finds that the commission's order in the instant case is flawed in a manner similar to that found in B.F. Goodrich.
>
> Here, the commission determined that claimant's transferable skills into sedentary employment "are minimal at best." The conclusion regarding minimal transferable skills was based upon the fact that claimant had been involved in a manual labor job for over 20 years and his employment prior to that as a car salesman is too remote. The commission also relied upon the fact that relator was unable to place claimant in a job at the sedentary/light level

> of employment. Clearly, this line of reasoning is focused upon claimant's current skills, or lack thereof.
>
> Yet the commission found that claimant's age of 58 years is a "vocational asset," and that he is a high school graduate who attended a community college in 1972.
>
> Like the situation in B.F. Goodrich, the commission's analysis of the nonmedical factors does not go far enough. The commission, through its SHO, failed to determine whether there are skills which may be reasonably developed that can lead to sustained remunerative employment.

Id. at ¶ 31-34.

{¶ 84} This court's decision in *Lubrizol Corp.* does not persuade the magistrate that a writ of mandamus should be granted here. Sigler was 58 years old, was a high school graduate who had attended a community college in 1972. In the present case, claimant was 61 years of age, had only completed the ninth grade, and had no college experience. Sigler's completion of high school and his attendance at the community college meant that Sigler had abilities in reading, arithmetic, and language skills and that he could perform semi-skilled through skilled work. *See* Ohio Adm.Code 4121-3-34(B)(3)(b)(iv). By comparison, by completing the ninth grade, claimant has a limited education which means ability in reasoning, arithmetic and language skills but not enough to allow the injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. *See* Ohio Adm.Code 4121-3-34(B)(3)(b)(iii). Sigler's education, in and of itself, provided him with skills that would be transferrable to sedentary work. Claimant's education did not equip him with any such transferrable skills. Further, although Sigler had worked for the proceeding 20 years in a manual labor job, he had been employed as a car salesman before that.

{¶ 85} By comparison, in the present case, claimant has spent his entire working life in the coal mines. Neither his education nor his work experience provide him with any transferrable skills. Further, without a high school education or a college education or any other job besides working in the coal mines, it was not an abuse of discretion for the commission to find that there was no reason to believe that he would benefit from rehabilitation services. By comparison, there was every reason to believe that Sigler could

benefit from rehabilitation services and, as such, this court returned the matter to the commission for further consideration. Here, the commission did not ignore the issue. Instead, relying in part on Ms. Valentine's report, the commission concluded that claimant lacked rehabilitation potential. Relator has not shown that this conclusion constitutes an abuse of discretion.

{¶ 86} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by awarding PTD compensation to claimant and this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).