

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. David S. Hall,	:	
Relator,	:	
v.	:	No. 12AP-857
The Industrial Commission of Ohio and TWC Concrete Services, LLC,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 23, 2013

Clements, Mahin & Cohen, L.P.A., Co., Edward Cohen and Mackenzie M. Farmer, for relator.

Michael DeWine, Attorney General, and Lydia M. Arko, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} David S. Hall filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to re-evaluate his entitlement to permanent total disability ("PTD") compensation.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth District Court of Appeals, the case was referred to a magistrate to conduct appropriate proceedings. The parties then 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.

{¶ 3} Counsel for Hall has filed 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} Hall's claim has been allowed for right inguinal hernia, injury nerve right pelvis/leg, and depressive disorder. The inguinal hernia was surgically treated in 2002 and 2007. Apparently, the hernia itself was repaired, but a severe, shooting pain from the right inguinal area down into the right thigh developed. The pain treatment he received has had only partial success, leaving Hall on regular doses of methadone and percocet.

{¶ 5} Hall attempted to participate in vocational rehabilitation but began missing his classes. He indicated that his doctors' appointments and his pain interfered with his participation.

{¶ 6} The Ohio Bureau of Workers' Compensation ("BWC") determined that, as of that time, Hall was medically unstable. The BWC indicated that Hall could hopefully return to rehabilitation once he could prove he was medically stable.

{¶ 7} At about this time, Hall was awarded Supplemental Security Income Disability payments, which apparently affected his motivation to return to rehabilitation. His treating physician reported that Hall had lumbar degenerative disc disease, which was considered for purposes of Social Security disability, but could not be considered for workers' compensation purposes.

{¶ 8} In May 2011, Hall's treating physician for pain purposes reported Hall's pain as being down to 6 on a scale of 0 to 10. Hall reported his pain medication as helping him function on a daily basis. Hall reported to his physician that he does a lot of physical activity, including mowing his grass and painting his garage.

{¶ 9} Another physician reported Hall as having no restrictions as to sedentary work and possibly being capable of light work.

{¶ 10} Clearly, Hall was medically capable of sustained remunerative employment, making an analysis of his non-medical disability factors necessary for the commission to determine if he qualified for PTD compensation.

{¶ 11} The staff hearing officer ("SHO") who addressed the nonmedical disability factors found Hall's age of 53 a neutral factor and his education and work history as positive factors. These findings are extremely reasonable and are not seriously contested in this mandamus proceeding.

{¶ 12} The point of contention seems to be whether Hall's participation in but failure to complete rehabilitation classes in computer skills should be viewed as a positive, negative or mutual factor. The SHO indicated that Hall's failure to resume rehabilitation "reflects negatively on his application" for PTD.

{¶ 13} We find that Hall's pain level had significantly reduced from the levels present when his rehabilitation efforts stopped. Before it stopped, Hall had acquired knowledge in a number of computer programs. The record before us does not demonstrate any reason why Hall could not find employment unless his lumbar problems made him incapable of sedentary work. As noted earlier, his lumbar problems are not part of the consideration in evaluating Hall's entitlement for benefits under the workers' compensation system.

{¶ 14} In short, Hall had the skills to enable him to find new employment and did not have cognizable medical conditions to prevent it regardless of his pursuing or not pursuing rehabilitation.

{¶ 15} The objections to the magistrate's decision are overruled. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

KLATT, P.J., and O'GRADY, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. David S. Hall,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-857
	:	
The Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and TWC Concrete Services, LLC,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on April 9, 2013

Clements, Mahin & Cohen, L.P.A., Co., Edward Cohen and Mackenzie M. Farmer, for relator.

Michael DeWine, Attorney General, and Lydia M. Arko, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 16} Relator, David S. Hall, 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 relator's application for permanent total disability ("PTD") compensation and ordering the commission to grant his application for PTD compensation or to reconsider his application with a proper consideration of the effect of the allowed conditions on his ability to work and/or engage in vocational rehabilitation.

Findings of Fact:

{¶ 17} 1. Relator sustained a work-related injury on December 26, 2001, and his workers' compensation claim has been allowed for the following conditions: "right unilateral inguinal hernia; injury nerve right pelvis/leg; depressive disorder."

{¶ 18} 2. On February 5, 2002, relator underwent surgery to repair the right inguinal hernia. The surgery was successful.

{¶ 19} 3. On October 26, 2007, relator underwent a second procedure to repair the right inguinal hernia.

{¶ 20} 4. As noted in the December 28, 2010 progress note of John B. Kelly, M.D., "[a]s he was recuperating from the original pain of the surgery he developed a severe shooting pain in the right inguinal region shooting down the medial aspect of the thigh." As a result, relator was referred to a pain management specialist who prescribed Neurontin. Apparently, the medication did not improve his pain. Relator "underwent several Ilioinguinal nerve blocks and RF ablation"; however, while this did help the "shooting pain down the anterior portion of the thigh, * * * none of these procedures ever helped the severe pain that he experiences on the upper medial thigh."

{¶ 21} 5. Relator underwent a spinal cord stimulator trial; however, that only aggravated his pain. Relator also underwent a peripheral nerve stimulator trial which also aggravated his pain. Relator is "presently on methadone 10 mg q.i.d. and Percocet 10/325 q.i.d." Apparently, these medications provide him some pain relief, but not a lot.

{¶ 22} 6. Relator entered vocational rehabilitation through Goodwill on July 12, 2010. It was recommended that relator participate in "20 weeks to gain skills in keyboarding and obtain knowledge and competitive skills in Windows XP, basic Microsoft Office Word and intermediate Excel and Access 2007." Relator indicated that he wanted to return to full-time work, preferably supervisory or estimating/-inspection work. According to the discharge summary dated December 27, 2010, relator demonstrated good work habits, was task oriented and strived to complete his weekly assignments on time. However, beginning in October, relator began having problems and the following was noted in the discharge summary:

David's attendance, in October and November, was considered problematic in that he left early or missed several

days in training due to reported increased pain levels or medical appointments.

* * *

Although David reported he is in constant pain, he denied the need for additional ergonomic equipment. He was encouraged to get up and move about as necessary to reduce any discomfort. Throughout his time in training, Clerical Training staff had observed David in obvious pain through his body language and facial expressions, which appeared to worsen as the weeks progressed. His pain was discussed with him by Clerical Case Manager Baran and was addressed in a staffing in November. David reported, "The more he moves, the more he hurts."

* * *

David reported that his pain was "getting worse as time goes on" and that the [sic] up until the last week of November he was "ok at the begining [sic] of the week and then the pain progressively worsened". He reported for the last week of November he had averaged a pain level of 8 to 10 all week. His medical issues and concerns along with a change in treatment were discussed. David changed his Physician of Record to John Kelly. Dr. Kelly had recommended David consult with a surgeon regarding a procedure that may be able to turn his pain into a numbness.

{¶ 23} 7. Relator's training ended on December 3, 2010 after the Ohio Bureau of Workers' Compensation ("BWC") determined that he was medically unstable. It was recommended that "[w]hen able to provide medical documentation that he is medically stable, David should return to the training program to review the skills he learned and complete his studies in intermediate Microsoft Office Access 2007."

{¶ 24} 8. In the BWC's vocational rehabilitation closure report dated December 13, 2010, his case manager concluded:

Successfully completed Windows, Word and Excel training and he achieved a keyboarding speed of 28 wpm. Mr. Hall continued treating with Dr. Hansen but the planned monthly numbing injections to the groin area were ineffective. The physician returned to delivering monthly epidural steroid injections which were both ineffective and increased Mr.

Hall's pain levels. Medication changes were also tried. Mr. Hall requested a consult visit with another physician to explore other options as his pain level continued to escalate. At this same time, Mr. Hall was notified by Social Security that he had been awarded SSDI. Mr. Hall saw Dr. John Kelly, a neurologist, in consult on 11/23/2010. A discussion of the increase in pain and frequency of training program absences resulted in the recommendation that Mr. Hall suspend his vocational rehabilitation participation until some resolution of the pain is achieved. Dr. Kelly suggested that Mr. Hall might want to see a surgeon to discuss a procedure that would likely relieve the groin pain. Mr. Hall elected to transfer his care to Dr. Kelly and completed a C-23. Mr. Hall and the case manager met with Goodwill staff to report the outcome of the consult and it was suggested that he should return to training services after the medical issues are addressed for completion of Access software training prior to job searching. The vocational file is being closed at this time for Medical Instability.

{¶ 25} 9. Apparently, Dr. Kelly asked relator about returning to vocational rehabilitation and, as noted in his December 28, 2010 progress note, relator informed Dr. Kelly that he had already been awarded Social Security Disability:

I asked him about going back to voc rehab. He confided that he has already been awarded social security disability (he has other conditions including lumbar degenerative disc disease). Therefore I do not foresee him actually completing the program and returning to work.

From my perspective he is therefore at MMI.

At this time, relator indicated his pain was at a nine on a zero-to-ten scale.

{¶ 26} 10. Relator treated with Michael Fletcher, M.D., a pain specialist. In his May 24, 2011 report, Dr. Fletcher noted the following:

The patient rates his pain today at a level of 6 on a 0-10 visual analog scale. The patient reported: pain in the right groin. The patient denies any changes in conditions since the last visit. The patient denies any nausea or vomiting. The patient denies constipation. The patient denies any adverse effects from medication including sedation. The patient denies any self adjustment of medications. The patient states he does not work.

* * *

The patient is tolerating their [sic] medication well and has exhibited no major side effects or signs or unreasonable tolerance or dependence. The patient states the medication provides good analgesia and helps [him] remain functional in the activities of daily living and thus improve quality of life and help[s] control the patient's moderate to severe pain.

The patient comes in for evaluation s/p DRG to right L1 and L2. He reports that he feels he had a few hours relief but at this point his pain has returned to the baseline level. He feels that the majority of his treatments have offered temporary relief but no more than one week at a time. He feels that he does do a lot of physical activity that may aggravate this but he states, "I have always been a worker and it is hard for me to give that up." His activities he has recently been referencing includes mowing the grass and painting his garage. He states that he can tolerate about 30 to 45 minutes of activity and then he must take breaks. He states that he feels that he is at his maximal amount of improvement and doesn't feel that it will get much better from this point on.

At this point I agree that the patient is at his maximal medical improvement. He has a probable need for ongoing care including global pain management which may include medications and injections which we will be willing to provide these. Overall, the injections at this point have provided intermittent relief and he most likely will require this on a[n] interval basis. We will continue to monitor him and evaluate for treatments as needed.

We did feel it was appropriate to start him back on a medication regimen. He reports that pain medication has offered him some relief and allowed him to perform activities longer. We will start him on Norco 10/325mg QID Prn pain and also added Ultram 50mg four times per day. We instructed him on the appropriate administration of these medications and not to accelerate the dosage. We reviewed the narcotic agreement in detail, he agreed to abide by the rules of this document. This was signed, dated, witnessed and incorporated into the chart.

{¶ 27} 11. Dr. V.P. Mannava examined relator on December 19, 2011. After listing the allowed conditions, identifying the medical records which he reviewed, and providing

his physical findings upon examination, Dr. Mannava opined that relator had reached maximum medical improvement ("MMI"), could not return to his former position of employment, and that he could work as follows:

He should not have any limitations in sit-down or sedentary type level. He also in my opinion should be able to participate in at least light-duty activities.

{¶ 28} Dr. Mannava completed a C-143 DEP Physician's Report of Work Ability form and noted that relator could lift/carry up to 10 pounds frequently and up to 20 pounds occasionally; relator could bend, twist/turn, push/pull, and stand/walk frequently and he could reach below knee and squat/kneel occasionally. Dr. Mannava opined that relator could continuously sit and lift above shoulder level.

{¶ 29} 12. Relator filed his application for PTD compensation on February 13, 2012. According to his application, relator was 53 years old, indicated that he had last worked on September 21, 2009, and that he had applied for and was receiving Social Security Disability Benefits in the amount of \$2,054. Further, relator indicated that he had graduated from high school and participated in vocational school or specialized training in heating, air conditioning, and refrigeration training at Northern Kentucky Vocational School. Relator also indicated that he could read, write and perform basic math.

{¶ 30} 13. Relator's application was supported by the December 20, 2011 report of Kendall Hansen, M.D., who stated as follows:

This letter is in reference to David Hall BWC claim #02-319962. He has been treated for chronic pain due to an injured pelvic nerve since November 2007. He has not been employed since this injury. Mr. Hall reports his pain has been non-responsive to any interventional procedures or medical interventions. A job description is not available to me but, according to Mr. Hall, his type of work is physical and his pain inhibits him from working at anytime. Diagnostic tests part of his medical record due to contribute to the disabling diagnosis of his injured pelvic nerve[.]

In the realm of medical probability, Mr. Hall is permanently and totally disabled with consideration of his age, education, and work history.

{¶ 31} 14. Relator also filed the January 2, 2012 mental functional capacity assessment prepared by Barbara King, Ph.D., who opined that relator was markedly limited in his ability to carry out very short and simple instructions as well as detailed instructions, maintain attention and concentration for extended periods, perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, sustain an ordinary routine without special supervision, work in coordination with or proximity to others without being distracted by them, make simple work-related decisions, and complete a normal workday and work week without interruptions. He was also markedly limited in his ability to accept instructions and respond appropriately to criticism from supervisors and to get along with co-workers or peers without distracting them or exhibit behavioral extremes, and in traveling in unfamiliar places or using public transportation. Dr. King opined that relator's social functioning, concentration, persistence and pace, as well as his adaptation to stressful conditions was a class "4" marked impairment and that, with regard to the activities of daily living, he had a class "3" impairment and was able to perform them, but inconsistently.

{¶ 32} 15. The record also contains a second report from Dr. Fletcher, dated March 13, 2012. At that time, Dr. Fletcher noted that relator's pain was at a level of eight on a zero-to-ten visual analog scale.

{¶ 33} 16. Relator was examined by Donald J. Tosi, Ph.D., at the request of the commission. In his April 5, 2012 report, Dr. Tosi concluded that relator was mildly impaired in all areas (activities of daily living, social interaction, adaptation, concentration, persistence and pace). Specifically, Dr. Tosi noted:

The Injured Worker's daily activities include light housework, doing some laundry, taking care of a dog, using the telephone, preparing simple meals, spending time with his daughter, taking brief walks, reading (magazines and books), watching television, listening to the radio, grocery shopping on occasion, doing yard work (with a riding lawn mower), dining out on occasion, using a home computer ("I research auctions"), and attending medical appointments and therapies. He is able to drive independently. He is able to handle his personal finances. He travels locally. He states, "I haven't had a vacation in four years." He takes

medications as prescribed. He has hobbies. He states, "Auctions."

* * *

The Injured Worker is able to sustain focus or attention long enough to permit completion of tasks in a work environment. He is able to complete a normal workday and work week and maintain regular attendance from a psychological standpoint.

Dr. Tosi concluded that relator had a 15 percent impairment and that he was able to work with no clinically significant mental limitations resulting from the allowed psychological condition.

{¶ 34} 17. Relator was examined by James T. Lutz, M.D., for his allowed physical conditions. In his March 26, 2012 report, Dr. Lutz noted that relator rated his pain as a four on a scale of one-to-ten on the visual analog scale, without radiation of pain or associated numbness or tingling. Dr. Lutz concluded that relator's allowed physical conditions had reached MMI, assessed a 19 percent whole person impairment, and opined that relator would be capable of performing at a sedentary work level, stating:

In my opinion, based on the history as provided by the claimant, the medical evidence submitted and findings on physical examination, this injured worker is capable of sedentary work. In my opinion, this injured worker is capable of exerting up to 10-pounds of force occasionally, and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects; while sitting most of the time and occasionally walking or standing for brief periods of time.

{¶ 35} 18. Relator's application for PTD compensation was heard before a staff hearing officer ("SHO") on May 30, 2012. The SHO relied on the medical reports of Drs. Lutz and Tosi and concluded that relator was capable of performing work at the sedentary level without any significant limitations as a result of the allowed psychological condition. Thereafter, the SHO determined that relator's age of 53 years was a neutral factor and that his education and work history were positive vocational factors. Specifically, the SHO stated:

The Injured Worker is currently 53 years of age. He is a high school graduate having earned his high school degree in

1976. He also attended a Northern Kentucky vocational school for heating, air[]conditioning, and refrigeration training. He indicated on his application that he is able to read, write, and perform basic math. The Injured Worker was in the Army for three years and during that period of time functioned as a helicopter mechanic. The Injured Worker's prior work history included work in the concrete construction industry, oil industry and as a long distance operator in the telephone industry.

The Hearing Officer finds that the Injured Worker's age of 53 years is a neutral vocational factor. The Hearing Officer finds that the Injured Worker's education level is a positive vocational factor. The Injured Worker is a high school graduate and has received specialized training in the area of HVAC. He has demonstrated the intellectual ability to obtain his degree and to participate in specialized training in a technical field. He is able to read, write and perform basic math. In addition, he indicated on his application that he was required to use basic math skills in his jobs in the construction field. The Hearing Officer finds that the Injured Worker would have the intellectual capacity to undergo retraining in a new vocational field and would be able to learn the new work rules, policies and procedures which may be necessary for a return to the work force in a new area of work.

The Hearing Officer finds that the Injured Worker's previous work history is also a positive vocational factor. Although a significant period of his employment history was in the heavy labor field which he can no longer perform, he also performed work and obtained skills that would transfer to sedentary work. First, he indicated that he used basic math skills and was required to read blueprints and work orders in the construction field. At an earlier job as a telephone operator, he learned to use telephone equipment and a switch board and to receive training to operate those pieces of equipment. He indicated that he was a working supervisor in the construction industry and supervised 4-5 people regularly, and more people on occasion. The Hearing Officer finds that the Injured Worker has obtained supervisory skills, as well as the more technical skills of reading blueprints and operating equipment. In addition, he was trained as a helicopter mechanic in the U.S. Army. Although this experience was remote in time, the Hearing Officer finds

that it demonstrates the Injured Worker's significant intellectual capabilities.

Thereafter, the SHO discussed relator's vocational rehabilitation, stating:

The Injured Worker participated in a vocational rehabilitation program in 2010. He was enrolled in training through Ohio Valley Goodwill Industries and received training and education until the rehabilitation file was closed in December of 2010. The file was closed because the Injured Worker's physical condition was not stable. He had had several absences due to pain complaints. At that time, he was referred to a new physician to consider the possibility of further surgery. This option was not ultimately recommended by the consulting surgeon. The Injured Worker has not made any attempts to pursue any rehabilitation or reeducation subsequent to the closure of his vocational rehabilitation file.

The Hearing Officer finds that permanent total disability is compensation that is to be awarded only when there is no possibility of re-employment. The Hearing Officer finds that the Industrial Commission is entitled to consider, not only an Injured Worker's past work history, but also any employment skills that may be reasonably developed. The Hearing Officer finds that the Injured Worker was in the process of developing further skills when the vocational file was closed due to a medical interruption. The Hearing Officer finds that the Injured Worker's failure to pursue further vocational training once his condition had stabilized reflects negatively on his application.

Based upon the Injured Worker's education level and intellectual ability, his previous work history, and his ability to return to sedentary work activity, the Hearing Officer finds that the Injured Worker is able to participate in sustained remunerative employment activities. Therefore, the Hearing Officer finds that the Injured Worker is not permanently and totally disabled. The application for permanent and total disability, filed on 2/13/2012, is denied.

{¶ 36} The SHO concluded that relator's education level, his intellectual ability, his previous work history, and his ability to return to sedentary work activity rendered him capable of participating in sustained remunerative employment.

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

Conclusions of Law:

{¶ 38} 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).

{¶ 39} 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).

{¶ 40} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶ 41} Relator contends that the commission abused its discretion by "improperly integrating an unsupported assumption into the analysis of Relator's rehabilitation efforts and potential." (Relator's brief, at ii.) Relator argues that the commission abused its discretion by finding that relator's failure to pursue further vocational training once his condition had stabilized reflected negatively on his application. Relator contends that the stipulated record, specifically the vocational

rehabilitation closure report, indicates that vocational rehabilitation was terminated because relator was experiencing increased pain. Relator argues that resuming vocational rehabilitation in the future was premised on the hope his pain would decrease. Relator contends that the commission's finding that he could currently participate in vocational rehabilitation was based on the unsupported assumption that his pain levels had decreased to the point where he was able to resume rehabilitation activities.

{¶ 42} Relator specifically points out that he had been very diligent in his participation in vocational rehabilitation despite periodic episodes of pain and/or sleeping difficulties that caused absences. Relator's increase in pain was followed by an increase in the number of training sessions he missed and that it was recommended that "Mr. Hall suspend his vocational rehabilitation participation until some resolution of the pain is achieved." Relator contends that his pain remained at the same levels and further argues that, to the extent the commission now points to medical evidence from which it can be inferred that his pain had decreased, the commission's order is still flawed because the SHO did not specifically cite that evidence.

{¶ 43} In response, the attorney general points out that the commission first found that relator was able to participate in sedentary activities and without significant limitations as a result of the allowed psychological condition. The commission then determined that relator's age of 53 years was a neutral vocational factor, that his education as well as his demonstrated intellectual ability indicated that he has the capacity to undergo retraining in a new vocational field, and that his previous work history was also a positive vocational factor because he obtained supervisory skills as well as the more technical skills of reading blueprints and operating equipment. Thereafter, the commission concluded that "[b]ased upon the Injured Worker's education level and intellectual ability, his previous work history, and his ability to return to sedentary work activity, the Hearing Officer finds that the Injured Worker is able to participate in sustained remunerative employment activities." As such, the attorney general argues that the commission first found that relator was able to return to work activities without considering the fact that he did not return to vocational rehabilitation. This was an independent basis supporting the commission's denial of PTD compensation.

{¶ 44} The magistrate finds that, without even considering whether the commission made improper assumptions concerning his vocational efforts, there is an independent basis supporting the commission's order and, as such, this court should not issue a writ of mandamus. *See State ex rel. Wombold v. Indus. Comm.*, 10th Dist. No. 08AP-806, 2009-Ohio-5578, ¶ 5; *State ex rel. Sherry v. Indus. Comm.*, 10th Dist. No. 04AP-78, 2004-Ohio-7050, ¶ 42.

{¶ 45} The commission determined that relator was not entitled to an award of PTD compensation on two independent grounds: (1) relator was capable of performing some sustained remunerative employment, and (2) relator failed to pursue additional vocational rehabilitation after his pain levels decreased.

{¶ 46} The attorney general asserts that there is some evidence in the record that would support the conclusion that relator began receiving Social Security Disability Benefits in March 2010, before he even began vocational rehabilitation. The attorney general also notes that in the December 28, 2010 progress note from Dr. Kelly, relator was asked by Dr. Kelly whether he intended to go back into vocational rehabilitation. Dr. Kelly noted that relator "confided that he has already been awarded social security disability (he has other conditions including lumbar degenerative disc disease). Therefore I do not foresee him actually completing the program and returning to work." Further, it was at this time that Dr. Kelly opined that relator's allowed physical conditions had reached MMI (relator's temporary total disability compensation was ultimately terminated based on finding that his allowed conditions had reached MMI on February 15, 2012). Further, the attorney general points to the May 24, 2011 report of Dr. Fletcher specifically noting that Dr. Fletcher stated that "[t]he patient states the medication provides good analgesia and helps [him] remain functional in the activities of daily living and thus improve quality of life and help[s] control the patient's moderate to severe pain." Also, in the April 11, 2012 report of Dr. Fletcher, relator again indicated that he was "[o]btaining good analgesia with current medication/regimen." Considering that relator's allowed conditions had reached MMI, the commission contends that his condition had stabilized and that there is evidence that the medication was helping with his pain.

{¶ 47} The magistrate agrees that there is some evidence in the record that relator's physical conditions had stabilized and that he even had some reduction in his

pain. However, the fact that the evidence is present in the record is not sufficient to support the commission's findings in the absence of a citation to the evidence upon which the commission relied. As such, while the magistrate finds that the commission made a proper assumption based on the evidence, the commission's failure to cite that evidence is problematic pursuant to *Noll*.

{¶ 48} Relator also cites this court's decision in *State ex rel. Slater v. Indus. Comm.*, 10th Dist. No. 06AP-1137, 2007-Ohio-4413, and argues that the commission abuses its discretion when it denies PTD compensation by holding a claimant accountable for his failure to explore vocational rehabilitation absent any reasoning supported by some evidence showing that this failure was within the claimant's control. In *Slater*, the claimant, Glenn O. Slater, had filed an application for PTD compensation two and one-half years after his second industrial injury. After attempting a return to light-duty work, Slater was diagnosed with throat cancer and, at the hearing, he stated that he was not able to attempt vocational rehabilitation because of his non-industrial carcinoma. Nevertheless, the SHO indicated that Slater's failure to pursue vocational rehabilitation significantly impeded Slater's ability to gauge his re-employment potential.

In granting a writ of mandamus, this court stated:

In the absence of any evidence indicating the factual inaccuracy of Dr. Kennedy's reporting of relator's problems with his nonindustrial carcinoma, it is difficult to see how relator can be held accountable for a failure to pursue vocational rehabilitation under these circumstances.

Id. at ¶ 40.

{¶ 49} Relator asserts that it was his pain that prevented him from attempting additional rehabilitation and that, just as Slater's problems dealing with his cancer were out of Slater's control and constituted extenuating circumstances, relator's pain was outside his control. The magistrate finds that this court's reasoning from *Slater* is not applicable here. Relator has not offered any evidence that he endured extenuating circumstances that rise to the level of those experienced by Slater. Relator simply has not shown the existence of any extenuating circumstances sufficient to excuse him from participating in vocational rehabilitation.

{¶ 50} The magistrate finds that the commission did not make an improper assumption concerning relator's pain and that there is some evidence in the record to support the SHO's finding that relator's condition had stabilized. However, because the commission failed to cite the evidence upon which it relied to make its findings, the commission's order violates *Noll*. However, the magistrate finds that there is some evidence in the record to support the commission's finding that relator was capable of performing some sustained remunerative employment based solely upon his restrictions and consideration of the non-medical *Stephenson* disability factors and this provides an independent basis upon which the commission's order is based.

{¶ 51} Based on the foregoing, it is this magistrate's decision that this court 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).