

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections were filed concerning the magistrate's findings of fact, and we adopt them as our own.

{¶3} In brief, relator sustained work-related injuries, the last of which occurred in 1995. Her claims were allowed for both physical and psychological conditions resulting from the injuries.

{¶4} In 2009, relator filed an application for PTD compensation. Relator supported her application with the report of Michael Glenn Drown, Ph.D. As detailed in the magistrate's decision, Dr. Drown concluded that relator's psychiatric disability is "permanent total." He recommended that she be permitted to participate in at least 26 weeks of intensive therapy, followed by a second evaluation.

{¶5} Kurt A. Kuhlman, D.O., issued a report, which concluded that relator was capable of sedentary work, with certain conditions. Cheryl A. Blankenship, Ph.D., issued a report, which also concluded that relator was capable of sedentary work, subject to certain conditions. Molly S. Williams submitted a vocational report, which concluded that relator could not perform the position of nurse's aide and that she was permanently and totally disabled.

{¶6} A hearing occurred before a staff hearing officer ("SHO"). At the outset, relator asked the SHO to recuse herself because she had heard and denied an

application for PTD compensation that relator submitted in 2004. The SHO refused and held the hearing. Ultimately, the SHO denied the application.

{¶7} On mandamus before the magistrate, relator contended that she was entitled to a writ because (1) the SHO should have recused herself, and (2) the commission abused its discretion by denying relator's application. In a comprehensive and well-reasoned decision, the magistrate addressed and rejected each of these contentions. The magistrate recommended that we deny relator's request for a writ.

{¶8} In her objections, relator raises the same contentions she raised before the magistrate, i.e., that the SHO should have recused herself, and the commission erred by denying the application. For the reasons expressed by the magistrate, we overrule relator's objections.

{¶9} Based on our independent review of the record in this matter, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny the requested writ.

*Objections overruled;
writ of mandamus denied.*

BRYANT, P.J., and TYACK, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Kathy K. Summit,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-768
	:	
Wyandot County and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

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

Rendered on April 26, 2011

Michael J. Muldoon, for relator.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶10} Relator, Kathy K. Summit, 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 her application for permanent total disability ("PTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶11} 1. Relator has sustained three work-related injuries, the most recent of which occurred on March 27, 1995. Relator's workers' compensation claims have been allowed for the following conditions: Claim No. OD185911 has been allowed for "bilateral carpal tunnel syndrome." Claim No. OD203748 has been allowed for "bursitis left shoulder." Claim No. PEL232405 has been allowed for "lumbar strain; adjustment disorder with features of anxiety and depressed mood."

{¶12} 2. Relator filed an application for PTD compensation on October 19, 2009. According to her application, relator was 59 years of age, had last worked in March 1995, had applied for and was receiving Social Security Disability Benefits, graduated from high school, attended cosmetology school in 1968, and received training as a graphic artist in 1993. Further, relator indicated that she could read, write, and perform basic math. Relator indicated that she had not participated in rehabilitation services and listed her prior work experience as a waitress, laborer, performing various tasks at a florist shop, and as a nurse's aide.

{¶13} 3. Relator's application was supported by the March 31, 2009 report of Michael Glenn Drown, Ph.D. In his report, Dr. Drown concluded that relator's allowed psychological condition had worsened over time, that her current psychiatric impairment falls within the moderate-marked range and that her psychiatric disability was permanent and total. Dr. Drown recommended at least 26 weeks of intensive cognitive and behavioral therapy focusing on management of mood, anxiety and physical pain.

At the end of that treatment, Dr. Drown recommended a second evaluation to address the efficacy of the treatment.

{¶14} 4. Relator did not submit any medical reports pertaining to her allowed physical conditions with her application.

{¶15} 5. An independent medical examination was performed by Kurt A. Kuhlman, D.O. In his December 8, 2009 report, Dr. Kuhlman listed the allowed conditions, identified the medical records he reviewed, and concluded that relator's allowed physical conditions had reached maximum medical improvement ("MMI"). He assessed an 11 percent whole person impairment, and concluded that relator was capable of performing at a sedentary work level provided that she limit repetitive activity with her hands and overhead activity with the left shoulder as well as that she limit lifting, standing and walking.

{¶16} 6. Cheryl A. Blankenship, Ph.D., conducted a psychological examination and issued a report dated February 10, 2009. In her report, Dr. Blankenship listed the allowed conditions and identified the various medical records which she reviewed. Dr. Blankenship administered the Beck Depression Inventory 2 test and indicated that relator had a Global Assessment of Functioning score of 61, and noted that relator had a Class 2, or a mild level of impairment due to her allowed psychological condition with regards to activities of daily living, social functioning, concentration, persistence and pace, and adaptation. Dr. Blankenship assessed a 12 percent whole person impairment and concluded that relator was capable of performing sedentary work as follows:

* * * [T]he injured worker is capable of work with the limitations/modifications noted: Ms. Summit would require a sedentary, reduced stressor vocational environment which would allow for enhanced focus and concentration. Also, she would benefit from a work situation that would not have a great deal of social interaction with others. Tasks would benefit from being simple and somewhat repetitive in nature to avoid additional stress.

{¶17} 7. Relator also submitted the January 17, 2010 vocational report prepared by Molly S. Williams. Ms. Williams accepted the reports of Drs. Kuhlman and Blankenship. Thereafter, when considering her past work and skills, Ms. Williams noted that the position of nurse's aide was beyond both relator's physical and mental residual functional capacity. Ms. Williams indicated that, at age 59, relator was an individual of advanced age and her high school education was completed in the remote past. Ms. Williams was unable to identify any jobs to which relator's skills as a nurse's aide would transfer and that she had no other transferable skills. Ultimately, Ms. Williams concluded that relator was permanently and totally disabled.

{¶18} 8. A hearing was held before Hearing Officer Melissa Karl at the Mansfield, Ohio office on June 7, 2010. At the outset of the hearing, counsel for relator asked the hearing officer to recuse herself because she had heard and denied a previous application for PTD compensation filed by relator:

Yeah, as a preliminary matter, I was reviewing the file, Ms. Karl, I noticed that you previously had heard this application of permanent total disability and had denied it. I think in fairness to my client I would ask to recuse yourself and it be reset in front of a different staff hearing officer so my client can have fresh eyes to evaluate the application.

* * *

Well, I think it's fair that my client, she would feel more comfortable if someone else evaluated it. The statute says the staff hearing officer is supposed to rotate. So it certainly, we certainly feel that she should have an opportunity for someone else to evaluate her case.

4123.90(5) [sic] says the statute is supposed to be liberally interpreted in favor of the injured worker. And so we certainly feel that liberal interpretation will give her the opportunity for someone else to evaluate her case. It's difficult I think for an individual to overrule themselves when they've already made a decision on something. Just puts the hearing person in a difficult situation.

(Tr. 3-4.)

{¶19} 9. Hearing Officer Karl responded that she was willing to put the question to her superiors; however, she also informed counsel that if the matter was reheard in Mansfield, she would likely be the hearing officer assigned:

I mean chances are I'll let you know right now. When you come to Mansfield, chances are 90 percent you're going to get me. So if it does get reset, you need to make certain before it gets reset that it gets set before someone in Akron.

(Tr. 6.)

{¶20} After inquiring with the hearing administrator, Hearing Officer Karl informed counsel that this was not a valid reason to continue the case and reset it before a different hearing officer and the hearing proceeded.

{¶21} 10. At the hearing, relator indicated that she had not received treatment for her psychological condition for over one year and that she had not tried any vocational rehabilitation.

{¶22} 11. In denying relator's application for PTD compensation, the commission relied on the reports of Drs. Kuhlman and Blankenship and concluded that relator had the physical capacity to perform sedentary work within the limitations indicated by Dr. Kuhlman and that her psychological condition would not prevent her from being employed. Specifically, the staff hearing officer ("SHO") stated:

Based on the reports from Dr. Kuhlman and Dr. Blankenship which are found persuasive, the Staff Hearing Officer finds the Injured Worker retains the physical functional capacity to perform sedentary work provided the sedentary work does not involve repetitious use of the hands and overhead activities with her left shoulder. Dr. Blankenship further noted the sedentary work should be in a reduced stress environment where the Injured Worker did not have a "great deal" of social interaction with others and that she should perform simple tasks. The Staff Hearing Officer finds that when these restrictions are coupled with the Injured Worker's disability factors, the Injured Worker retains the capacity to perform sedentary work and is not permanently and totally disabled.

{¶23} Thereafter, the commission considered the nonmedical disability factors and concluded both that relator was capable of performing some sustained remunerative employment and that she had not exhausted all rehabilitation measures since her previous PTD application was denied in 2004:

The Staff Hearing Officer finds that the Injured Worker's current age of 59 is not a bar to re-employment. The Injured Worker's high school education is found to be an asset to re-employment. The Injured Worker further indicates that she can read, write, and perform basic math which all would be assets in any attempt to become re-employed. The Staff Hearing Officer has reviewed the Injured Worker's past work history as contained on her IC-2 Application. In the Injured Worker's past work history, she has performed such functions as completing daily charting, has ordered

merchandise, took orders from customers in person and via the telephone, has supervised employees, and while self-employed as a florist has also performed billing of customers. The Staff Hearing Officer finds these past job functions of ordering supplies, billing customers, and taking telephone orders are all consistent with sedentary clerical type of work. These past work experiences would be assets in the Injured Workers' attempt to become re-employed, and are consistent with her physical limitations to sedentary work. As the Injured Worker needs to be in a reduced stress vocational environment based on the report of Dr. Blankenship, with not a great deal of social interaction, the Staff Hearing Officer envisions a position where the Injured Worker could work by herself from home doing telephone sales or some type of telemarketing which would seem to comply with both her physical and psychological restrictions. The Injured Worker testified, upon questioning from the Bureau of Workers' Compensation representative, that she has not had made any attempt to return to work in the past five years and has made no attempt at any type of vocational rehabilitation in the last five years that could enhance her potential for returning to some type of work within her restrictions. The Staff Hearing Officer notes that an award of permanent total disability compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility for re-employment. B.F. GOODRICH v. INDUSTRIAL COMMISSION (1995), 73 Ohio St.3d 525. It does not appear that the Injured Worker has exhausted all rehabilitation measures since the time that permanent total disability was last denied in 2004.

{¶24} 12. Relator filed a request for reconsideration arguing that she was deprived a fair and impartial evaluation because the same SHO had heard and denied her previous application.

{¶25} 13. In an order mailed July 30, 2010, the commission denied relator's request for reconsideration.

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

Conclusions of Law:

{¶27} Relator makes the following two arguments: (1) it was an abuse of discretion for the SHO to have refused to recuse herself, and (2) PTD compensation should have been awarded to relator based on the report of Dr. Drown.

{¶28} It is this magistrate's decision that: (1) the SHO's decision not to recuse herself was not an abuse of discretion as relator has not demonstrated that she was denied a fair and impartial hearing, and (2) there was some evidence in the record upon which the commission relied to deny relator's second application for PTD compensation.

{¶29} Relator first asserts that she was denied a fair and impartial hearing because the SHO who heard, determined and denied her 2009 application for PTD compensation is the same SHO who heard, determined and denied her first application for PTD compensation in 2004. Relator points to R.C. 4121.36 which provides that the commission shall adopt rules to ensure a fair, equitable, and uniform hearing process as well as R.C. 4123.95 which provides that sections R.C. 4123.01 through 4123.94 shall be liberally construed in favor of employees in support of her argument that the commission abused its discretion.

{¶30} R.C. 4121.36 states:

(A) The industrial commission shall adopt rules as to the conduct of all hearings before the commission and its staff and district hearing officers and the rendering of a decision and shall focus such rules on managing, directing, and otherwise ensuring a fair, equitable, and uniform hearing process. These rules shall provide for at least the following steps and procedures:

* * *

(4) Impartial assignment of staff and district hearing officers and assignment of appeals from a decision of the administrator of workers' compensation to a district hearing officer located at the commission service office that is the closest in geographic proximity to the claimant's residence[.]

{¶31} Supplementing R.C. 4121.36 are Ohio Adm.Code Section 4121-3-09 and 4121-15-10. Ohio Adm.Code 4121-3-09 is entitled "Conduct of hearings before the commission and its staff and district hearing officers" and provides, in pertinent part:

(C) Hearings before the industrial commission, its staff hearing officers, and the district hearing officers, and the rendering of their decision.

* * *

(8) Hearings with notice before the district hearing officers on contested claims matters, disputed issues or claims, and appeals from a decision of the administrator shall be conducted in the industrial commission service office that is closest to the injured worker's residence, which shall be presumed to be the office that houses the claim file unless otherwise determined by agreement of the parties. * * *

{¶32} Ohio Adm.Code 4121-15-10 is entitled "Standards of conduct for adjudicators" and provides, in relevant part:

(A) Definitions. The following definitions shall apply to the adjudication of all disputes before the industrial commission:

* * *

(8) "Conflict" means a situation where the adjudicator is disqualified under the terms of paragraph (B) of this rule.

(B) Disqualification of the adjudicator.

(1) An adjudicator shall disqualify himself or herself in a proceeding in which there arises the appearance of

impropriety or the adjudicator's impartiality might reasonably be questioned, including but not limited to instances where:

(a) The adjudicator reviews a written, electronic or other ex parte communication, or participates or otherwise takes part in an oral or other ex parte communication;

(b) The adjudicator has a personal bias or prejudice concerning a party or representative, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) The adjudicator served as a representative in the claim, or a representative with whom the adjudicator previously was associated, acted during such association, as a representative concerning the claim, or the adjudicator or such representative been a material witness concerning the claim. An employee in a governmental agency does not necessarily have an association with other employees of that agency within the meaning of this subsection; an adjudicator formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if there arises the appearance of impropriety or his or her impartiality might reasonably be questioned because of such association;

(d) The adjudicator knows that, the adjudicator individually or as a fiduciary, or the adjudicator's spouse or minor child residing in the adjudicator's household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding;

(e) The adjudicator or the adjudicator's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a representative in the proceeding;

(iii) Is known by the adjudicator to have an substantial financial interest that could be affected by the outcome of the proceeding; or

(iv) Is to the adjudicator's knowledge likely to be a material witness in the proceeding.

{¶33} Relator does not dispute that the hearing before SHO Karl was assigned to the Mansfield, Ohio office because that is the office closest in geographic proximity to her residence. As indicated in the transcript, SHO Karl indicated to relator's counsel that, in the event the hearing was continued, there was a 90 percent chance the hearing would again be assigned to her and that the only way to ensure that would not happen would be for the case to be heard in Akron, Ohio. Further, SHO Karl did check with her superiors and was informed that relator's complaint was not valid.

{¶34} Relator does not cite to any code provision nor any case law indicating that this situation was improper or that it constituted an abuse of discretion for SHO Karl to hear a second application for PTD compensation. Further, Ohio Adm.Code 4121-15-10(B) clearly enumerates specific instances in which a hearing officer should disqualify himself or herself from hearing a case and there has been no argument that any of these reasons exist here.

{¶35} In support of the decision to permit SHO Karl to hear relator's second application for PTD compensation, the attorney general points to cases involving judges who are likewise presumed to be fair, impartial and able to rule on matters where his or her own decisions are at issue. In *In re Disqualification of Mascio* (1990), 74 Ohio St.3d 1218, 1219, the court listed several examples from which a trial judge is not automatically disqualified. The court stated:

* * * It has been held that a trial judge is not automatically disqualified from:

- a. presiding at a retrial if his decision was reversed on appeal, *In re Disqualification of Kimmel* (1987), 36 Ohio St.3d 602, 522 N.E.2d 456;
- b. hearing a motion to vacate sentence, *In re Disqualification of Kilbane* (1989), 42 Ohio St.3d 602, 536 N.E.2d 1153;
- c. hearing a motion to vacate an adoption order when the judge presided over the adoption proceedings, *In re Disqualification of Buck* (1989), 42 Ohio St.3d 602, 536 N.E.2d 1153; or
- d. hearing a motion for relief from judgment when the same judge granted a motion for summary judgment, *In re Disqualification of Badger* (1989), 43 Ohio St.3d 601, 538 N.E.2d 1023.

{¶36} Relator has not presented any evidence which would demonstrate any actual bias on the part of SHO Karl. Further, review of the stipulation of evidence, including the transcript and the order itself, does not give the appearance that SHO Karl was biased against relator. In the absence of any evidence that actual bias occurred, the magistrate finds that it was not an abuse of discretion for SHO Karl to hear relator's second application for PTD compensation.

{¶37} Relator's second argument is that her application for PTD compensation should have been granted on the basis of Dr. Drown's report.

{¶38} The relevant inquiry in a determination of permanent total disability is the claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.* (1994), 69 Ohio St.3d 693. 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 nonmedical factors. *State*

ex rel. Stephenson v. Indus. Comm. (1987), 31 Ohio St.3d 167. Thus, a claimant's medical capacity to work is not dispositive if the claimant's nonmedical factors foreclose employability. *State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. 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.* (1991), 57 Ohio St.3d 203.

{¶39} 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.* (1981), 68 Ohio St.2d 165. Furthermore, it is immaterial whether other evidence, even if greater in quality and/or quantity, supports a conclusion contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373.

{¶40} In the present case, the commission relied on the reports of Drs. Kuhlman and Blankenship. Relator does not challenge Dr. Kuhlman's report, inasmuch as it is the only report which was in the record relating to her allowed physical conditions. Dr. Kuhlman opined that relator could perform sedentary work provided she limit repetitive activity with her hands and/or activity with her left shoulder and that she limit lifting, standing, and walking. Relator does not challenge the commission's finding that she could perform at a sedentary work level.

{¶41} The commission relied on the report of Dr. Blankenship to conclude that relator's allowed psychological condition did not prohibit her from working. In her February 10, 2009 report, Dr. Blankenship opined that relator's allowed psychological condition had reached MMI, and assessed a 12 percent impairment. Dr. Blankenship opined that relator was mildly impaired in the following areas: activities of daily living,

social functioning, concentration, persistence and pace, and adaptation. Ultimately, Dr.

Blankenship concluded:

* * * [T]he injured worker is capable of work with the limitations/modifications noted: Ms. Summit would require a sedentary, reduced stressor vocational environment which would allow for enhanced focus and concentration. Also, she would benefit from a work situation that would not have a great deal of social interaction with others. Tasks would benefit from being simple and somewhat repetitive in nature to avoid additional stress.

{¶42} Relator does not challenge Dr. Blankenship's report. Instead, relator contends that Dr. Blankenship provided significant limitations which would make working impossible. It is the responsibility of the commission to consider the medical evidence before it and, in the absence of any specific criticisms of Dr. Blankenship's report, the magistrate finds that the commission did not abuse its discretion by relying on that report and in finding that relator's allowed condition would not prohibit her from working within those limitations.

{¶43} Relator also does not specifically challenge the commission's analysis of the nonmedical disability factors except to indicate that Ms. Williams opined that she did not have any transferable skills. However, a review of Ms. Williams' vocational report indicates that the only prior job which Ms. Williams considered was relator's most recent job as a nurse's aide. In her report, there is no mention of relator's other jobs and it was from those other jobs that the commission determined that she had some transferable skills.

{¶44} Specifically, the commission noted that relator worked as a floral designer and as a florist for several years before she worked as a nurse's aide. With regard to her prior work history, the SHO specifically noted:

* * * The Staff Hearing Officer has reviewed the Injured Worker's past work history as contained on her IC-2 Application. In the Injured Worker's past work history, she has performed such functions as completing daily charting, has ordered merchandise, took orders from customers in person and via the telephone, has supervised employees, and while self-employed as a florist has also performed billing of customers. The Staff Hearing Officer finds these past job functions of ordering supplies, billing customers, and taking telephone orders are all consistent with sedentary clerical type of work. These past work experiences would be assets in the Injured Workers' attempt to become re-employed, and are consistent with her physical limitations to sedentary work. As the Injured Worker needs to be in a reduced stress vocational environment based on the report of Dr. Blankenship, with not a great deal of social interaction, the Staff Hearing Officer envisions a position where the Injured Worker could work by herself from home doing telephone sales or some type of telemarketing which would seem to comply with both her physical and psychological restrictions. * * *

{¶45} The magistrate finds that the commission did not abuse its discretion in finding that relator was capable of performing some sustained remunerative employment.

{¶46} The commission also noted that relator acknowledged that she had not made any attempt to return to work in the past five years, she had made no attempts to enhance her potential for returning to some type of work within her restrictions. Pursuant to the Supreme Court of Ohio's decision in *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio St.3d 525, 1995-Ohio-291, the commission may look not only to

current abilities to be retrained, but also capacities which might be developed through retraining. Further, an injured worker's lack of participation in retraining does not equate to an inability to be retrained. Pursuant to *State ex rel. Bowling v. Natl. Can Corp.*, 77 Ohio St.3d 148, 1996-Ohio-200, the commission and courts can demand accountability of an injured worker who, despite time and medical ability to do so, never tries to further their education or learn new skills. It was not an abuse of discretion for the commission to find, in the alternative, that relator's failure to participate in any rehabilitation was a reason to deny her application for PTD compensation.

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

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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