DC Taylor - Aff'm in part, reverse in part, remand
Bunn
DC Helms

NO. COA99-780

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2000

ROBERT H. ALPHIN, JR.,
Employee/Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 021806

TART L.P. GAS COMPANY,
Employer/Defendant,

and

AETNA LIFE & CASUALTY,
Carrier/Defendant.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 17 March 1999. Heard in the Court of Appeals 30 March 2000.

Brenton D. Adams, for plaintiff-appellant.

Yates, McLamb and Weyher, L.L.P., by Virginia G. Adams, Michael J. Byrne, and Nancy W. Gregory, for defendant-appellees.

SMITH, Judge.

Plaintiff appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission) terminating his disability compensation. We affirm in part, reverse in part and remand.

Pertinent facts and procedural information include the

following: On 8 March 1990, plaintiff suffered a compensable back injury by accident arising out of and in the course of his employment with defendant-employer. At the time of the accident plaintiff was earning an average weekly wage of $258.80. On 5 June 1990, plaintiff was treated by Dr. Kenneth Rich (Dr. Rich), for his injury and underwent a microdiskectomy at L4-5 and a foraminotomy at L5-S1 on 31 August 1991. On 26 November 1991, Dr. Rich rated plaintiff as suffering a 15% permanent partial impairment to the back. Plaintiff underwent a second surgery for a herniated disk at L4-5 on 28 May 1993. Thereafter, Dr. Rich released plaintiff on 11 November 1993 with a disability rating of 25% permanent impairment to the back as a result of his 8 March 1990 compensable injury, and opined that plaintiff could perform sedentary work not involving bending and twisting, and which would allow plaintiff to sit or stand.

Pursuant to a Form 21 Agreement for Compensation for Disability approved by the Commission 3 April 1990, and several Supplemental Memorandums of Agreement as to payment of compensation approved by the Commission, defendants agreed to pay plaintiff temporary total disability compensation at the rate of $172.54 per week to continue for "necessary weeks," and 45 weeks of permanent

partial impairment compensation for plaintiff's 15% permanent partial disability rating of 26 November 1991.

On 12 January 1994, plaintiff was referred to Total Rehabilitation, a vocational rehabilitation group, where he expressed interest in becoming a tattoo artist. Vocational testing revealed plaintiff would have probable success in this vocation and he was asked to gather information and formulate a business plan to pursue this career. After numerous requests and demands, plaintiff presented a business plan but failed to act upon suggestions as to how the plan might be implemented and made no further efforts regarding the plan. Plaintiff was thereafter scheduled to attend a job club (the club) in Fayetteville, North Carolina on 2 March 1994, but did not attend based on an alleged lack of transportation. On 9 March 1994, plaintiff attended the club but was uncooperative, and subsequently missed appointments on 16 March and 23 March 1994 without cancellation.

On 12 July 1994, plaintiff met with Linda DeBaer (DeBaer), a job-placement counselor/vocational coordinator with Total Rehabilitation, to assess plaintiff's level of employability and discuss participation in Work Alternatives, a rehabilitation program. The Work Alternatives program would allow plaintiff to work at a comfortable pace commensurate with his ability, while

receiving support, productive activity and assistance in gradually improving his status. Plaintiff canceled three consecutive appointments to tour Work Alternatives, and attended seven of thirty-four work appointments between 13 January and 2 March 1995. One excuse plaintiff gave for missed appointments was an alleged lack of transportation, notwithstanding defendants' continuous offers to provide transportation. Plaintiff also claimed that pain prevented him from attending the program regularly, even though the Work Alternatives program designed for plaintiff was approved by Dr. Rich, involved duties within plaintiff's physical demands, and plaintiff never sought medical treatment for his allegedly debilitating pain. In a 6 September 1994 report, DeBaer remarked on plaintiff's lack of attendance, and noted plaintiff had "repeatedly stated that he did not wish to pursue vocational rehabilitation services."

In 1994, defendants twice filed a Form 24 "Application to Terminate or Suspend Payment of Compensation" alleging plaintiff "does not wish to comply with vocational rehabilitation." In a 10 May 1994 order, the Commission's Chief Claims Examiner disapproved the first application, but expressly ordered that plaintiff comply with defendants' vocational rehabilitation efforts. Thereafter, in a 30 November 1994 Administrative Decision and Order, the

Commission similarly disapproved defendants' second application to terminate compensation, but held that:

> Plaintiff should comply with vocational rehabilitation efforts in good faith. The issue of transportation should no longer be put forth as a reason to cancel an appointment, whether plaintiff chooses to accept [DeBaer's] offer [of transportation] or chooses to decline the offer. . . . *Non-compliance with this decision, the 10 May 1994 Order and future vocational rehabilitation efforts will result in termination of benefits*. (emphasis added).

On 20 April 1995, DeBaer transferred plaintiff to a work program closer to his home, Harnett Production Enterprises (HPE), in an effort to obviate alleged transportation problems and for an evaluation to assess plaintiff's attendance, physical tolerance, production, work skills and job interests. Plaintiff attended only eleven of forty-nine appointments at HPE. Of those attended plaintiff left early with complaints of pain, either in his head, neck, stomach, and/or back. On or about 15 May 1995, DeBaer recommended, with Dr. Rich's approval, that plaintiff attend a spine center program that focuses on functional restoration and self-management techniques for pain. DeBaer explained the program would help maximize plaintiff's ability to function, but plaintiff refused to attend a three-week or weekend program, and declined to visit for an evaluation. Plaintiff related that he did not want to

be away from his son that amount of time, and that the program "would be a waste of time" and would not benefit him.

On 12 May 1995, defendants filed a third Form 24, requesting that plaintiff's compensation be terminated based on his failure to comply with rehabilitative efforts. Following a 27 June 1995 telephonic hearing, the Special Deputy Commissioner, pursuant to N.C.G.S. § 97-18.1 (1999), entered an Administrative Decision and Order approving termination of plaintiff's compensation effective 5 May 1995.

On 13 April 1996, plaintiff filed a Form 33 "Request that Claim Be Assigned For Hearing," seeking "total and permanent disability" beginning 5 May 1995 and continuing for an "undetermined" period of time. Subsequently, on 26 June 1996 plaintiff filed a Motion for Reinstatement of Benefits, contending he has "fully complied" with defendants' rehabilitative efforts, and that he is "ready, willing, and able to fully and completely cooperate with any and all rehabilitation efforts by the defendant." Following a 19 December 1996 hearing, the Deputy Commissioner filed an Opinion and Award 3 February 1997, holding that plaintiff had not willfully failed to comply with defendant's vocational rehabilitation efforts, and granting plaintiff temporary total disability benefits from 5 May 1995 through 7 November 1996,

and permanent partial disability for 75 weeks at a rate of $172.54. Both parties appealed. The Full Commission conducted a hearing 28 July 1997, and thereafter filed an Opinion and Award 17 March 1999, reversing the Deputy Commissioner's ruling.

The Commission made the following pertinent findings of fact:

> 12. As of November 11, 1993, plaintiff was capable of earning wages in sedentary work with no bending and twisting and with sitting and standing. . . .
>
> 13. After the May 10, 1994 Order of the [Commission] ordering compliance and continuing until May 5, 1995 when defendants were allowed to terminate compensation, plaintiff was consistently non-compliant with vocational efforts.
>
> 14. . . . [P]laintiff did not reached [sic] the end of his vocational rehabilitation period until May 5, 1995, when it became clear that plaintiff refused to comply with vocational rehabilitation efforts.

Based upon the foregoing factual findings, the Commission made the following conclusions of law:

> 1. Plaintiff failed to cooperate with vocational rehabilitation efforts even following Orders by the [Commission] to do so on May 10, 1994 and November 30, 1994.
>
> 2. As a result of plaintiff's continued failure to comply with vocational rehabilitation efforts, defendants are entitled to terminate plaintiff's [temporary total] workers' compensation effective May 5, 1995.

> 3. Defendants continued to pay compensation to plaintiff . . . from May 5, 1995 until July 7, 1995. Defendants are entitled to an offset for these payments.
>
> 4. Plaintiff retains a 25% permanent partial impairment . . . and is entitled to payment of compensation in the amount of $172.52 for a period of 75 weeks therefore. . . . Defendants are . . . entitled to an offset for the 45 weeks of compensation for permanent partial impairment which plaintiff has previously received and an offset for [temporary total disability] payments made between May 5, 1995 and July 7, 1995.

Plaintiff appeals.

Plaintiff first contends the Commission's findings of fact regarding his alleged failure to comply with vocational rehabilitation efforts are not supported by the evidence, and thereby its conclusions of law, allegedly not supported by proper factual findings, are erroneous. We disagree.

Initially, we note that plaintiff's appellate brief includes no argument or authority to support assignments of error one and five through fourteen. Accordingly, those assignments of error are deemed abandoned, *see* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned"), and we do not address them.

Appellate review of an award by the Industrial Commission is limited to a determination of

> whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law.

Hedrick v. PPG Industries, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence," *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 463, 470 S.E.2d 357, 358 (1996), notwithstanding the existence of evidence to support contrary findings, *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992). Further, "the Commission is the sole judge of the credibility of the witnesses" as well as of the weight to be given their testimony. *Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856.

Plaintiff alleges that findings of fact numbers seven, eight and nine are not supported by the evidence.

In its seventh factual determination, the Commission found:

> 7. Plaintiff was scheduled to tour Work Alternatives . . . [and] canceled three consecutive appointments due to an alleged lack of transportation. . . . As plaintiff alleged problems with transportation, defendants again offered transportation . . . [but] [p]laintiff refused these services stating that he could borrow a car; however, plaintiff continued to use lack of transportation as an excuse for missing

> appointments. During plaintiff's program with Work Alternatives, he attended only 7 out of 34 appointments from January 13, 1995 through March 2, 1995. This program was within the physical demand level approved by . . . Dr. Rich, and plaintiff was never given a doctor's excuse for his failure to attend . . . nor did he seek medical treatment during this period. When plaintiff did attend . . . he complained of intense pain but showed no objective signs of pain. . . .

This finding is supported by plaintiff's own testimony that he attended only seven of thirty-four visits, and that his lack of attendance was due to transportation problems and pain. Plaintiff testified that he had "to borrow . . . family members' cars to get" to the program, and that after the insurance company provided him with a vehicle he was still unable to attend every appointment due to pain, which he admittedly had not sought medical treatment to relieve. Clifford Overby (Overby), the Director of the Work Alternatives program, also testified that plaintiff attended only seven of thirty-four possible work days based in part on alleged transportation problems, notwithstanding defendants' continuous offer to provide transportation. Both Overby and DeBaer testified that defendants initially provided plaintiff with a rental car and later transportation on a disability van to allow him to sit or lie down as needed for resolution of his alleged transportation problems, but plaintiff continually refused such transportation and

continued to frequently blame his poor attendance on transportation problems.

Overby testified that his notes reflect plaintiff missed work on numerous days due to pain allegedly affecting either his neck, stomach, back and/or head. Overby testified that on days plaintiff attended the program, he complained of intense pain, but "show[ed] no signs of official distress . . . no tears, no sweating," and he "completed the testing and his activities . . . [with] no visual signs of distress," "would walk, stand at another bench twenty-five feet away without assistance of the cane," worked at a "slow to medium pace," and on one occasion was observed "laughing and joking with a friend during his tasks." Further, although plaintiff complained of severe headaches when his back hurt, Overby noted that "he had no specific complaints of low back pain or its location," and made no attempt to seek medical treatment from one of the programs physical or occupational therapists, and did not request to see a doctor. Both Overby and DeBaer testified that plaintiff's program was designed according to plaintiff's work restrictions and was approved by Dr. Rich. We hold this evidence is competent support for finding of fact number seven.

Finding of fact number eight provides in part:

> 8. When plaintiff's vocational rehabilitation was moved . . . on April 20, 1995 . . . closer to his home, . . . [he] attended only 11 out of 49 appointments . . . even though defendants provided transportation. Again, at [HPE], plaintiff never sought medical treatment for his complaints of back pain. When plaintiff did attend, he would take frequent breaks and would leave early.

DeBaer testified that plaintiff's rehabilitation program was transferred to HPE, which was closer to plaintiff's home, to decrease a lengthy and allegedly painful ride and possibly increase plaintiff's rehabilitation participation and attendance. However, notwithstanding defendants' continued offers of transportation, DeBaer testified that the poor attendance continued at HPE, with plaintiff attending only eleven of forty-nine visits. Barbara Smith (Smith), a vocational evaluator who worked with plaintiff at HPE between 19 April 1995 and 22 June 1995, testified that out of "[f]orty-nine" possible days defendant had worked only "eleven." Plaintiff testified he had missed appointments due to pain, but stated he had not sought treatment for such pain, admitted that no "doctor has []ever said [he] was unable to do work because of pain," and acknowledged that Dr. Rich had released him to perform sedentary work 11 November 1993 and had approved the HPE program as being within his work restrictions.

Finally, the Commission's finding number nine provided:

> 9. After plaintiff's continued lack of attendance and participation and complaints of alleged back pain, it was recommended by vocational rehabilitation and approved by Dr. Rich that plaintiff attend the Spine Center. On June 20, 1995, plaintiff refused to attend the three-week program . . . [and] to attend on weekends. . . .

DeBaer testified that because of plaintiff's continued complaints of intense pain, she discussed with him the benefits of participation in a rehabilitation program at the Spine Center in High Point. Both DeBaer and plaintiff testified that plaintiff informed her he did not want to leave his home for a week or more, would not attend the program on weekends, and would not visit the center for an evaluation.

Based upon the foregoing, we hold there is plenary competent evidence to support the Commission's findings regarding plaintiff's non-compliance with vocation rehabilitation. Accordingly, such findings are conclusive on appeal, *see Hoyle*, 122 N.C. App. at 463, 470 S.E.2d at 358, notwithstanding the existence of evidence to support contrary findings, *see Matthews*, 108 N.C. App. at 264, 423 S.E.2d at 535. This Court "does not have the right to weigh the evidence and decide [an] issue on the basis of its weight," but is limited to determining "whether the record contains any evidence tending to support . . . finding[s]," *Anderson v. Construction Co.*,

265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965), made by the "ultimate fact-find[er]," the Commission, *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413, (1998). *See Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 606-07, 471 S.E.2d 92, 94-95 (1996), *disc. review denied*, 345 N.C. 347, 483 S.E.2d 177 (1997)(finding that claimant unjustifiably refused to cooperate with employer's reasonable vocational rehabilitation efforts supported by competent evidence of record). Additionally, we hold the Commission's findings of fact provide adequate support for the conclusions of law. *See Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856 (appellate review limited to a determination of "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law").

Plaintiff next contends the Commission erred in terminating rather than suspending his benefits under N.C.G.S. § 97-25 (1999), upon determining he did not comply with rehabilitative efforts.

In pertinent part, section 97-25 provides:

> Medical Compensation shall be provided by the employer. . . . In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatments, the Industrial Commission may order such further

> treatment as may in the discretion of the Commission be necessary.
>
> . . . .
>
> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

G.S. § 97-25. Although section 97-25 permits the suspension of disability benefits upon the "refusal of the employee to accept any . . . rehabilitative procedure," *id.*, "an employee's refusal to cooperate only bars h[im] from receiving compensation until h[is] refusal ceases," *Scurlock v. Durham County General Hosp.*, __ N.C. App. __, __, 523 S.E.2d 439, 441 (1999). An employee is entitled to a resumption of benefits "upon a proper showing . . . that he is willing to cooperate with . . . rehabilitative efforts." *Sanhueza*, 122 N.C. App. at 608, 471 S.E.2d at 95.

Initially, plaintiff argues "there was not sufficient evidence to support a finding that [he] refused to comply with vocational rehabilitation efforts." On this point we disagree.

Plaintiff alleged in his 26 June 1996 Motion for Reinstatement of Benefits he was currently in compliance with all rehabilitative efforts and to the extent the Commission previously found he did not cooperate, he "stands ready, willing, and able to fully and completely cooperate with any and all rehabilitative efforts." However, for resumption of benefits, plaintiff must have "affirmatively establish[ed]" *Scurlock*, ___ N.C. App. at ___, 523 S.E.2d at 443, a willingness to cooperate with rehabilitative efforts to the satisfaction of the Commission, which he failed to do.

The Commission, as fact-finder, chose to believe defendants' evidence, including the testimony of DeBaer, plaintiff's vocational coordinator, Overby, his Work Alternatives supervisor, and Smith, a vocational evaluator at HPE, describing a continuous pattern of uncooperative conduct, including a lack of effort or participation by plaintiff. Although portions of plaintiff's testimony is contrary to defendants' evidence, the Commission's determination that plaintiff's testimony is less credible and less believable than that offered by defendants is an assessment of witness credibility that is conclusive on appeal. *See Sanhueza*, 122 N.C. App. at 606, 471 S.E.2d at 94-95 ("Commission's assessment of witness credibility is conclusive").

Plaintiff further argues that assuming there was evidence to support finding an unjustified refusal, the Commission was authorized only to suspend benefits under G.S. § 97-25 "until such refusal ceases," G.S. § 97-25, and had no authority to terminate benefits. On this issue we agree.

The terminology of the Commission's opinion and award effectively "terminates" plaintiff's right to receive future temporary or permanent disability benefits, rather than merely suspending that right for the period of plaintiff's unjustified refusal to cooperate with defendants' vocational rehabilitative efforts. Section 97-25 is "clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation 'until such refusal ceases.'" *Sanhueza*, 122 N.C. App. at 608, 471 S.E.2d at 95 (quoting G.S. § 97-25). The Commission concluded that "[a]s a result of plaintiff's continued failure to comply with vocational rehabilitation efforts, defendants are entitled to 'terminate' plaintiff's workers' compensation effective May 5, 1995," the date which the Commission found "it became clear that plaintiff refused to comply with vocational rehabilitation efforts." Accordingly, we must reverse the Commission's opinion and award as to this conclusion. The Commission's opinion and award "must reflect the

fact that plaintiff may again be entitled to weekly compensation benefits upon a proper showing by plaintiff that he is willing to cooperate with defendants' rehabilitative efforts." *Id.*

Affirmed in part, reversed in part, and remanded.

Judges WYNN and HORTON concur.

Report per Rule 30(e).