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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-981

Filed: 21 May 2019

North Carolina Industrial Commission, Nos. 14–052758 & 14–782354

MARGARITA WALSTON, Employee, Plaintiff,

v.

DUKE UNIVERSITY, Self-Insured Employer, Defendant.

Appeal by plaintiff from opinion and award entered 22 June 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 April 2019.

Law Offices of James Scott Farrin, by Matthew D. Harbin and Michael F. Roessler, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Jennifer Morris Jones, for defendant-appellee.

BRYANT, Judge.

Where the findings of fact are supported by competent evidence, which support the conclusions of law, we affirm the opinion and award of the Industrial Commission (“the Commission”) granting defendant’s request to terminate plaintiff’s benefits.

Plaintiff Margarita Walston is a registered nurse and sustained a compensable injury to her right shoulder on 8 August 2014, while working at the hospital for defendant-employer Duke University (hereinafter “Duke”). Duke filed a Form 60

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accepting liability, and plaintiff eventually underwent surgery after an MRI scan revealed a torn rotator cuff in her right shoulder. Plaintiff was reassigned to a light-duty desk job with permanent work restrictions involving her right arm.

On 13 October 2014, while opening a heavy door with her left arm, plaintiff sustained another injury: a sprain to her left knee. Plaintiff was referred to Dr. Louis Almekinders, and an MRI of her left knee revealed that plaintiff had a “meniscal degeneration without a tear.” Duke filed a Form 63 regarding plaintiff’s left knee injury that granted payment for medical benefits only without prejudice to later deny compensability.

On 8 July 2015, Duke filed a Form 62 to reinstate indemnity benefits because suitable employment for plaintiff was unavailable at the time. Plaintiff was assigned to Kathy Walters, a vocational rehabilitation case manager, to begin counseling in her job search consistent with her disability restrictions. Plaintiff was asked to apply for two to three jobs a week and follow-up on any positions provided to her from Ms. Walters. As such, plaintiff’s disability benefits were contingent upon her compliance with vocational rehabilitation services. When plaintiff began receiving vocational rehabilitation services, Ms. Walters had considered job vacancies within the statutorily defined 50-mile radius of plaintiff’s home. Plaintiff was given a few job vacancies and also a form to document her independent job searches.

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On 2 April 2016, Duke filed to terminate plaintiff's benefits because plaintiff failed to comply with reasonable vocational rehabilitation. This matter was heard before the deputy commissioner who issued an opinion and award on 20 March 2017 granting Duke's request to terminate benefits. Plaintiff appealed to the Full Commission.

On review, the Full Commission upheld the opinion and award of the deputy commissioner affirming the termination of plaintiff's benefits. The Full Commission's findings of fact in support of its opinion and award—that plaintiff failed to substantially comply with reasonable vocational rehabilitation services—were virtually unchallenged.¹

On 19 May 2015, during a post-surgery follow-up appointment regarding plaintiff's right shoulder, Dr. Almekinders determined plaintiff was at maximum medical improvement and assigned work lifting restrictions no greater than ten (10) pounds from ground to waist, no lifting greater than five (5) pounds from waist to shoulder level, occasional reaching above shoulder, and no overhead lifting or pulling. Around the same time, Duke hired a private investigator to conduct surveillance of plaintiff after her shoulder was suggested to be more functional than initially alleged. The footage showed plaintiff performing yard work and walking without a cane. Plaintiff used a cane when she attended doctor's appointments.

¹ Plaintiff specifically challenges the Full Commission's findings of fact 50 and 51 as to whether her compliance efforts were substantial.

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By December 2015, plaintiff performed a functional capacity evaluation (“FCE”), in which she demonstrated that she could work in a “light physical demand category.” However, the evaluator noted that plaintiff displayed “inconsistent performance with self-limiting behaviors” during testing. Duke provided the surveillance footage to the evaluator for the purposes of comparing plaintiff’s performance outside of a doctor’s office. The evaluator noted, notwithstanding plaintiff’s FCE results, the surveillance footage showed that plaintiff demonstrated an ability to “ambulate and reach constantly, squat and get into an automobile, and step onto curbs with the left lower extremity with little to no difficulty.”

Plaintiff returned to Dr. Almekinders’s office on 7 January 2016 to discuss the results of the FCE. Dr. Almekinders was also asked to review the footage and noted in his medical record that the “surveillance video showed relatively unrestricted use of the upper extremities.” Dr. Almekinders elevated plaintiff’s work restrictions to a medium physical demand category, noting that the results of the FCE, as well as plaintiff’s initial weight restrictions, were not reflective of her true physical abilities regarding her right shoulder. Dr. Almekinders also increased plaintiff’s lifting restrictions to no greater than twenty-five (25) pounds from ground to waist and twenty (20) pounds from waist to shoulder level.

One month later, plaintiff was given several available positions from Ms. Walters, but she did not apply for any of the available positions. Plaintiff’s

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noncompliance as to the available positions was documented. Plaintiff's continued noncompliance resulted in an order from the special deputy commissioner on 1 March 2016 to "fully comply with all reasonable vocational rehabilitation provided by [Duke]" and respond "to e-mails from [Ms. Walters] within twenty-four (24) hours of receipt."

Following the 1 March 2016 order, Ms. Walters met with plaintiff occasionally and provided her with more job vacancies. Plaintiff responded to some but not all of the available positions, citing the following as reasons for noncompliance: lack of qualifications or experience; the requirement for weekend hours; and distance from her residence. Plaintiff told Ms. Walters that some of the positions, albeit within the 50-mile radius, were too far away from her residence and the driving distance would have an impact on her injuries. However, plaintiff's work record did not contain any driving restrictions. As such, absent proof of any driving restrictions, Ms. Walters continued to provide plaintiff with job vacancies up to 50 miles away.

The Full Commission found that between the summer of 2016 and October 2016, plaintiff failed to promptly notify Ms. Walters regarding the job vacancies provided to her. Plaintiff did not provide proof of applications and Ms. Walters could not confirm whether plaintiff submitted an application. On numerous occasions, plaintiff was asked to renew her basic life support (BLS) certification for other health care positions, however, she failed to do so. Plaintiff's failure to renew her

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certification prevented her from applying to a vacant position provided by Ms. Walters.

Two days after undergoing surgery to her left knee, plaintiff was offered a new position as a nurse on 14 July 2016. Plaintiff did not accept the position due to the immediate start date; however, she did not communicate with Ms. Walters about the job offer despite having interactions with Ms. Walters after the position was offered. Plaintiff's job offer—including her failure to accept it and her failure to notify Ms. Walters—was later revealed during her testimony at the hearing before the deputy commissioner.

Based on these findings, the Full Commission concluded that plaintiff failed to substantially comply with reasonable vocational rehabilitation services and terminated her benefits. Plaintiff appeals to this Court.

This Court's review of decisions by the Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). All findings of fact shall be conclusive and binding upon review of the Commission if there is any evidence to support the finding. *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001). "Before making findings of fact, the Industrial

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Commission must consider all of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it.” *Weaver v. Am. Nat. Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). “Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.” *Johnson v. Lowe’s Cos., Inc.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 618 (2001) (citation and quotation marks omitted).

On appeal, plaintiff argues the Commission erred by terminating her disability benefits based on its findings that she exaggerated her physical limitations in proving her disability and refused to comply with reasonable vocational rehabilitation services.

“In order to qualify for compensation under the Workers’ Compensation Act, a[n] [employee] must prove both the existence and the extent of disability.” *Id.*

[A]n employee can meet the burden of proving disability by producing either: (1) medical evidence that the employee is physically or mentally incapable of work in any employment; (2) evidence that the employee is capable of some work, but has been unsuccessful in her effort to obtain employment after a reasonable effort; (3) evidence that the employee is capable of some work, but it would be futile to pursue other employment because of pre-existing conditions like age, inexperience, or lack of education; or (4) evidence that the employee has obtained other employment at a wage less than that earned before the injury.

Powe v. Centerpoint Human Servs., 226 N.C. App. 256, 262, 742 S.E.2d 218, 222 (2013).

Here, the Commission determined that plaintiff did not meet her burden of proving a continuing disability after concluding:

5. . . . Plaintiff has failed to produce competent medical evidence that she is physically or mentally incapable of work in any employment. [] Plaintiff also failed to conduct a reasonable job search by resisting the vocational process, including by limiting her applications based on her reservations about the potential jobs identified by Ms. Walters, and by exaggerating her physical limitations to her treating physicians. [] No evidence has been presented that it would be futile for [p]laintiff to seek employment due to preexisting conditions, or that she has obtained other employment at a wage less than that earned prior to the injury. []

After reviewing the record, we agree with the Commission's conclusion as there was competent evidence that plaintiff misrepresented her injuries while undertaking her job search. As with any award granted by the Commission for a compensable injury, plaintiff is presumed to have a disability if she is unable to return to work. *See Johnson*, 143 N.C. App. at 350, 546 S.E.2d at 618 ("If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work[.]" (citation and quotation marks omitted)). However, defendant presented evidence that plaintiff exaggerated the severity of her injuries and that she was capable of performing tasks beyond her recommended capacity. *See id.* ("[A]ny presumptions existing in favor of plaintiff-employee [can be] rebutted by defendant[] through witness testimony, videotaped surveillance of plaintiff, as well as medical evidence and strong evidence of fraud.").

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Defendant produced video surveillance that plaintiff had performed extensive personal tasks with unrestricted use of her leg and arm. Plaintiff's doctors noted plaintiff's inconsistency with her injuries as she demonstrated self-limiting behaviors during medical visits. Dr. Almekinders, in particular, observed the surveillance video and noted that plaintiff's true abilities were not accurately reflected in the FCE results. Plaintiff was also seen running errands without cane assistance despite going to medical visits with a cane. Therefore, defendant successfully put forth evidence that plaintiff exaggerated her physical limitations.

Additionally, plaintiff cannot prove that she was unsuccessful in obtaining employment after reasonable efforts. The record reflects that plaintiff had been given several potential jobs within the applicable mile radius and she failed to apply for these positions due to various excuses, including undocumented driving or work restrictions. Despite receiving a job offer, plaintiff did not assert that she rejected the position because it was offered at a reduced salary from her pre-injury employment. Instead, she stated that she could not accept the position for other reasons. Additionally, there is evidence that plaintiff was unable to apply for certain positions because her BLS certification expired and, after repeated requests, did not renew her certification in a reasonable time to qualify for the positions.

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Accordingly, plaintiff's argument that the Commission erred by terminating her disability benefits is overruled. For the reasons stated herein, the Commission's opinion and award is

AFFIRMED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).