NO. COA06-900

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

CHARLES M. BEE,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 140822

PURSER CONSTRUCTION SERVICE,
Employer,

and

CINCINNATI INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendant from an opinion and award filed 9 May 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 March 2007.

Brinkley Walser, PLLC, by G. Thompson Miller, for plaintiff appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant appellants.

McCULLOUGH, Judge.

Purser Construction Services and Cincinnati Insurance Company ("defendants") appeal an opinion and award entered by the North Carolina Industrial Commission ("the Commission") finding and concluding that Charles Bee ("plaintiff") is permanently and totally disabled and that plaintiff should not be required to participate in vocational rehabilitation.

Plaintiff was injured by an accident arising out of and in the course of his employment on 17 April 2001 when he injured his back lifting a heavy door. Plaintiff's primary treating physician, Dr. Charles Taft, diagnosed plaintiff's condition as low back pain with degenerative disc disease. Dr. Taft found that plaintiff reached maximum medical improvement on 5 September 2001 and concluded that plaintiff was unable to return to gainful employment due to pain, back problems and a pre-existing right leg injury.

Dr. John Hayes conducted an independent medical evaluation of plaintiff and concluded that if plaintiff was to return to work he must be limited to no more than 50 pounds no more than 4 times a day or 25 pounds frequently. He further stated that, if any of the work activities increased pain in plaintiff's back or right leg, then the restrictions would have to be increased.

Plaintiff testified that, as a result of the injury sustained during employment, he suffers debilitating back pain which interferes with his sleep and substantially limits his daily activities and his ability to focus on tasks. He further testified that physical therapy, home exercise and pain medication have failed to provide any relief from the day-to-day pain.

Plaintiff participated in a functional capacity evaluation in which the physical therapist concluded that plaintiff "'is able to tolerate work in the light category with maximal safe lifting limits of 34 pounds from floor to knuckle, 34 pounds from knuckle to shoulder and 24 pounds from shoulder to overhead on an occasional basis for a full time 8 hour work period.'" During the functional capacity evaluation, plaintiff reported experiencing pain levels of 8 out of 10 and subsequent to the evaluation experienced steady pain in his back and numbness from his leg down into his foot.

Defendants introduced videotaped evidence depicting plaintiff unhooking a camper from his truck at the beach and lowering the trailer, riding a bike, using a metal detector on the beach for approximately 50 minutes, and walking with his wife to get onto a boat.

After reviewing the report of the functional capacity evaluation and the videotaped evidence, Dr. Taft testified that he did not think plaintiff's back would be able to tolerate lifting 34 pounds on an occasional or repetitive basis. He further testified that plaintiff could benefit from vocational rehabilitation but that he was not optimistic that there would be a job that plaintiff would be able to do.

The Commission concluded that plaintiff was totally and permanently disabled and that vocational rehabilitation was not an appropriate option for plaintiff. From the opinion and award entered thereafter, defendants appeal.

Defendants contend on appeal the Commission erred in concluding that plaintiff was totally and permanently disabled.

Appellate review of an Industrial Commission decision "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). We review the Commission's conclusions of law *de novo*. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

In a claim for permanent and total disability, an employee must prove the existence of the disability and its extent. *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 530 S.E.2d 62 (2000).

An employee may meet this burden of proof in one of four ways: "'(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he or she is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.'" *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (citation omitted), *disc. review denied*, 355 N.C. 749, 565 S.E.2d 667 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003).

The Commission made the following findings of fact:

> 3. Dr. Taft found that plaintiff had reached MMI on or about September 5, 2001. Dr. Taft gave plaintiff a 7% permanent partial disability rating to his back and was of the opinion, and the Full Commission finds as fact, that plaintiff would not be able to return to gainful employment due to the pain and other problems with his back and the pre-existing right leg injury.
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> 5. Dr. Hayes indicated that if plaintiff was to return to work he would limit plaintiff to lifting no more than 50 pounds perhaps no more than four times per day, limit plaintiff to lifting no more than 25 pounds frequently, and if any of the work activities caused increased pain either in his back or right leg, then the restrictions would be increased.
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> 6. Dr. Taft was of the opinion, and the Full Commission finds as fact, that plaintiff could expect to suffer severe debilitating pain in his back, that plaintiff's back pain was chronic and plaintiff is permanently and totally disabled and will not be able to work on a regular sustained basis. Dr. Taft further opined, and the Full Commission finds as fact, that plaintiff would not benefit from rehabilitation.

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> 15. Dr. Taft indicated that plaintiff might be able to perform something where he would be sedentary, but it would have to be a special type of job and he thinks that is probably more of a chance that plaintiff would ***not*** be able to tolerate the sitting. Although he indicated that a sit/stand option might help, be remained "guarded" with plaintiff's going back to any sort of regular work.

Defendants' main contention on appeal is that the Commission erred in concluding that plaintiff was totally and permanently disabled, where Dr. Hayes gave the opinion that plaintiff was not totally and permanently disabled. Dr. Hayes testified that plaintiff could work with certain restrictions, and a functional capacity evaluation confirmed that plaintiff could work in light-duty employment. However, we have repeatedly stated that this Court may not weigh the evidence or evaluate the credibility of witnesses as "'[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Further, a finding of fact is conclusive and binding on appeal "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, . . . even though there is evidence that would have supported a finding to the contrary.'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (citation omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

Dr. Taft testified in his first deposition to a reasonable degree of medical certainty that plaintiff would not be able to work again on a regularly sustained basis. After reviewing the functional capacity evaluation report and video surveillance offered by defendants, Dr. Taft gave a second deposition in which he stated that he was guarded as to whether plaintiff could go back to any sort of regular work. Dr. Taft's opinion in his two depositions, taken as a whole, was that

plaintiff was incapable of regularly sustaining work in any employment. Further there was testimony from both plaintiff and Dr. Taft regarding the severe pain that plaintiff endures, his inability to handle the tasks of everyday life, and the failure of home exercise, physical rehabilitation or pain medication to alleviate the pain.

While there was evidence which was contrary to the determination that plaintiff is unable to work in any gainful employment and that vocational rehabilitation could be useful, the existence of such evidence does not warrant reversal. Therefore, this assignment of error is overruled.

Defendants further contend the Commission erred in concluding that plaintiff should not be required to participate in vocational rehabilitation.

As stated *supra*, we review the decision of the Commission for whether the findings of fact are supported by any competent evidence and whether those findings support the conclusions. *Cross*, 104 N.C. App. at 285-86, 409 S.E.2d at 104.

Dr. Taft testified through deposition that while further efforts to rehabilitate would be a reasonable thing to do, he did not think that those efforts would be successful. Dr. Taft further stated in his second deposition that plaintiff may be able to perform some type of sedentary work, but he stated that he was not optimistic that there would be a job that plaintiff could do. As such, the finding that plaintiff would not benefit from rehabilitation is supported by competent evidence and in turn supports the Commission's conclusion that plaintiff should not be required to participate in vocational rehabilitation.

Accordingly, the opinion and award of the Commission is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).