NO. COA06-1182

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

ODETTA BATTS,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 283730

FRESENIUS KABI CLAYTON,
Employer,

and

N.C. INSURANCE GUARANTY ASSOCIATION,
Carrier,
Defendants-Appellees,

Appeal by plaintiff from opinion and award of the North Carolina Industrial Full Commission entered 11 April 2006 by Commissioner Thomas J. Bolch. Heard in the Court of Appeals 11 April 2007.

Schiller & Schiller, PLLC, by David G. Schiller, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for defendants-appellees.

JACKSON, Judge.

Odetta Batts ("plaintiff") sustained a compensable workplace injury on 18 September 2001, while employed with Fresenius Kabi Clayton ("defendant"). Plaintiff's injury to her left knee resulted in her having surgery to repair torn cartilage in the knee. She returned to work briefly following her surgery, however she experienced an increased level of pain, and was

diagnosed as having Reflex Sympathetic Dystrophy. Dr. Richard Alioto ("Dr. Alioto"), who performed plaintiff's first surgery in November 2001, and performed a second surgery on plaintiff's knee in April 2002.

Dr. Alioto diagnosed plaintiff as having reached maximum medical improvement on 10 January 2003, and he determined that she had a twelve percent permanent partial impairment rating for her left knee. He imposed work restrictions for plaintiff, stating that she was not to stand for more than one to two hours, she was not to walk excessively, no climbing or squatting, and she must be allowed to sit. At Dr. Alioto's 13 December 2004 deposition, he indicated that he did not believe plaintiff's work restrictions needed to be altered.

On 3 July 2002, Dr. Alioto referred plaintiff to a pain clinic, where she began treatment with Dr. Thomas Buchheit ("Dr. Buchheit"). From July 2002 though December 2004, plaintiff was treated with several medications and a series of fourteen lumbar sympathetic blocks, which worked to alleviate the continuing pain plaintiff felt in her knee. Plaintiff last saw Dr. Buchheit in December 2004, at which time he found plaintiff's condition was improving, although she continued to experience pain.

In October 2003, plaintiff began working with Paul Goodney ("Goodney"), a vocational rehabilitation specialist. She met with Goodney on a weekly basis as she actively sought employment which would fit within Dr. Alioto's work restrictions. Plaintiff was very active in the process, however, as of the date of the Full Commission's Order she had been unable to secure employment.

On 23 December 2003, plaintiff filed a Form 33 Request that Claim Be Assigned for Hearing with the North Carolina Industrial Commission. In the Form 33, plaintiff sought payment for permanent partial disability and permanent and total disability, citing that defendant

failed to acknowledge that she was totally disabled. In an Opinion and Award filed 9 August 2005 by Deputy Commissioner James C. Gillen, plaintiff's request was denied, and she was granted temporary total disability compensation that was ordered to continue until further order of the Commission. Defendant also was ordered to pay all medical expenses incurred by plaintiff as a result of her compensable injury. Plaintiff appealed the award to the Full Commission.

In an Opinion and Award filed 11 April 2006, the Full Commission affirmed the award of the Deputy Commissioner, with minor modifications. The Full Commission concluded that the medical evidence failed to establish plaintiff was unable to perform gainful employment of any kind, including light duty positions. The Full Commission held plaintiff was not permanently and totally disabled, and continued her temporary total disability compensation and payment of her medical expenses. Plaintiff appeals from the Opinion and Award of the Full Commission.

On appeal, our review of a decision of the Full Commission is limited to a consideration of whether there is any competent evidence to support 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). The Commission's findings of fact are deemed conclusive on appeal when they are supported by competent evidence, even when there is evidence that would support contrary findings. *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Findings of fact not assigned as error, or for which no argument on appeal is presented, are presumed to be supported by competent evidence and are binding on appeal. *Dreyer v. Smith*, 163 N.C. App. 155, 156-57, 592 S.E.2d 594, 595 (2004). "[T]he [F]ull Commission is the sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553 (citing *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). This Court "does not have the

right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Our review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Id*.

Plaintiff first contends the Commission erred in making certain findings of fact that she argues are contrary to the evidence, and thus not supported by competent evidence in the record. Plaintiff specifically contends the following findings are not supported by the evidence before the Commission:

> 12. On July 3, 2003, Dr. Buchheit examined plaintiff and found her to be improving and near maximum medical improvement. Plaintiff last saw Dr. Buchheit on December 29, 2004. Dr. Buchheit was satisfied that plaintiff was stable on her medications and that her pain would improve over time. Dr. Buchheit's December 29, 2004, note further states that plaintiff is able to conduct job search activities while taking her medications, which are Trileptal, Klonopin, Aleve, and Flexeril.
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> 13. Dr. Buchheit testified that he does not restrict patients from driving or working who are taking the same medications as plaintiff.
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> . . . .
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> 15. Goodney testified at the hearing that plaintiff was a good prospect for employment and that plaintiff lives within 35-50 miles of a job market containing jobs that plaintiff was capable of doing.

We begin by noting that plaintiff has failed to cite to any caselaw in support of her first argument. Pursuant to Rule 28(b)(6) of our appellate rules, an appellant's argument "shall contain citations of the authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6) (2006). Our Rules of Appellate Procedure "'are mandatory and not directory.'" *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (quoting *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982)). Failure to comply with the rules "will subject an appeal to dismissal."

Steingress v. Steingress, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). However, as our Supreme Court recently held, an appeal that is "subject to" dismissal for rules violations need not be dismissed for simply any violation of the rules. *State v. Hart*, __ N.C. __,__, __ S.E.2d __, __ (2007) (No. 446A06). Thus, we address plaintiff's argument.

Plaintiff's contention that the specific findings of fact are unsupported by the evidence is wholly without merit. Dr. Buchheit's own deposition testimony supports findings of fact twelve and thirteen. His deposition testimony is nearly identical to the Commission's findings, in that on 3 July 2003, he found plaintiff to be "very near maximum medical improvement" and that while she was not free of pain, her condition was improving. Further, when he saw plaintiff on 29 December 2004, he informed her that her pain would improve over time. He did testify that the medications plaintiff took could impair an individual's ability to drive, operate heavy machinery, or function in a high cognitive environment, however, these side effects would vary from person to person. In addition, the evidence in the record clearly shows that plaintiff had been taking the various medications since she began seeing Dr. Buchheit in 2002, and that she continued to take the medications during the time in which she participated in vocational rehabilitation efforts from October 2003 through the date of the hearing in the instant case.

Based upon the evidence in the record, particularly Dr. Buchheit's deposition testimony, we hold findings of fact twelve and thirteen to be supported by competent evidence. Although plaintiff may have presented testimony that she was unable to function at her full capacity while on the medications, this Court may not re-weigh the evidence and our role is only to determine whether the findings are supported by competent evidence. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

We further hold that finding of fact fifteen also is supported by the evidence in the record. Goodney testified before the Deputy Commissioner that he believes plaintiff is a good prospect for employment, and that there is a good job market in the geographic area around plaintiff's home. Goodney's testimony, along with his reports detailing plaintiff's vocational rehabilitation efforts, indicate that plaintiff was very active in her pursuit of employment, and that she regularly applied for several positions each week which were within her work restrictions. Thus, the Commission's finding of fact fifteen is clearly supported by competent evidence in the record, and plaintiff's assignment of error is therefore overruled.

Next, plaintiff contends the Commission erred in failing to conclude that she is permanently and totally disabled. Plaintiff argues the evidence in the record supports a conclusion that she is physically incapable of work in any employment, and that after a reasonable effort on her part, she has been unable to obtain employment.

Our state's Workers' Compensation Act defines "disability" as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2005). In order to show that an individual is disabled under the Act, the plaintiff employee has the burden of proving:

> (1) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment, (2) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury."

Demery v. Perdue Farms, Inc., 143 N.C. App. 259, 264, 545 S.E.2d 485, 489 (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)), *aff'd*, 354 N.C. 355, 554 S.E.2d 337 (2001). An employee may meet this burden by producing:

> (1) . . . medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) . . . evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) . . . evidence that [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) . . . evidence that [she] has obtained other employment at a wage less than that earned prior to the injury.

Id. at 264-65, 545 S.E.2d at 489-90 (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)).

In the instant case, the Commission found as fact that "[n]either Dr. Alioto nor Dr. Buchheit currently evaluate plaintiff as being unable to work in any capacity. To the contrary, they establish that job searching and sedentary work are possible for plaintiff." Although plaintiff initially assigned error to this finding of fact, she did not present any argument regarding it on appeal, thus the finding of fact is deemed binding on us. *Dreyer*,163 N.C. App. at 156-57, 592 S.E.2d at 595. The Commission did not make any findings of fact that plaintiff is unable to earn wages in any employment. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. However, plaintiff contends the evidence, particularly her testimony, proves that her physical limitations and pain prevent her from being able to work.

Although evidence a plaintiff suffers from pain as a result of her compensable injury may be competent evidence to support a conclusion the plaintiff is disabled, *see Niple v. Seawell Realty & Insurance Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987) (plaintiff's degree of pain may be considered when determining whether he or she is capable of work), *disc. review denied*, 321 N.C. 744, 366 S.E.2d 861 (1988), the evidence must show that pain renders the plaintiff incapable of work in any employment, *see, e.g., Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 118, 415 S.E.2d 583, 585-86 (1992) (plaintiff's testimony he suffered from excessive pain, in conjunction with his physician's testimony

plaintiff could not "'do any kind of gainful employment at this time, under any light duty of any kind'" is competent evidence plaintiff is permanently and totally disabled).

Demery, 143 N.C. App. at 265-66, 545 S.E.2d at 490.

The record before us does not contain any such evidence that plaintiff's "pain renders [her] incapable of work in any employment." *Id*. at 265, 545 S.E.2d at 490. Plaintiff also did not present any evidence from a medical doctor or vocational specialist that she is unable to work in any employment. While she did testify that she cannot think of any position that she could perform due to her pain and her medications, these issues did not prevent her from actively seeking employment for more than three years. Moreover, evidence plaintiff had only a twelve percent permanent partial impairment rating on her left knee and that she had job restrictions does not constitute medical evidence that plaintiff has a permanent and total disability. *See Demery v. Converse, Inc.*, 138 N.C. App. 243, 250-52, 530 S.E.2d 871, 876-77 (2000) (evidence plaintiff had a twenty percent partial impairment to his back and evidence plaintiff had permanent work restrictions insufficient to support conclusion plaintiff suffered a permanent total disability); *Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322, 331-32, 533 S.E.2d 284, 290 (2000) (Commission's findings of fact that "'plaintiff is not capable of working in a job that requires standing from eight to ten hours a day,'" that plaintiff could "'perform a seated job if she can keep her left leg elevated most of the time,'" and that plaintiff "'made no effort to find alternative employment within her restrictions after she reached maximum medical improvement'" support the Commission's conclusion plaintiff did not meet her burden of showing it would be futile for her to seek other employment).

Thus, we hold there was not "medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[,]" and as such,

plaintiff's contention that she is physically incapable of work in any employment is without merit, and the Commission's Conclusion of Law two is properly supported by the evidence and findings of fact.

Plaintiff also contends the evidence presented establishes that she has a disability, in that it shows "[she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment." *Demery*, 143 N.C. App. at 265, 545 S.E.2d at 489. Again, plaintiff's contention is unsupported by the evidence and without merit. There is no evidence in the record indicating that any of plaintiff's physicians or vocational rehabilitation specialists have reached the determination that having plaintiff continue to seek employment should be ceased. The evidence simply indicates that plaintiff has been actively seeking employment for three years, but has been unsuccessful for one reason or another. There is no indication that she has been unsuccessful due to her age, inexperience, lack of education or other preexisting factors; in fact, the converse is true. The evidence contained in the record indicates that many of the employers are very impressed by plaintiff's work ethic and her past employment experience. The Commission did find that plaintiff is disabled, as evidenced by the award of temporary total disability compensation. However, as there was not evidence in the record to support a determination that she is permanently and totally disabled, we hold the Commission did not err in failing to conclude as much. Thus, plaintiff's final assignment of error is also overruled.

Affirmed.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).