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NO. COA10-358

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

DAVID MATTHEW HARRELL,
Employee,
Plaintiff,

v.

GENERAL ELECTRIC,
Employer,
SELF-INSURED (ELECTRIC INSURANCE/SEDGWICK CMS,
Servicing Agent),
Defendant.

North Carolina
Industrial Commission
I.C. No. 529102

Appeal by defendant from opinion and award entered 22 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 September 2010.

Stedman Law, by Charles N. Stedman, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by Bruce A. Hamilton, Julia S. Hooten, and John L. Kubis, Jr., for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant General Electric appeals from the Industrial Commission's decision awarding plaintiff David Matthew Harrell temporary total disability benefits. General Electric primarily argues that there is insufficient evidence to support the Commission's finding of disability under *Russell v. Lowe's Prod. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). We conclude,

however, that the record contains sufficient evidence of disability under *Russell's* third method of proof. Consequently, we affirm the Commission's opinion and award.

Facts

On 9 February 2005, plaintiff, who was then 36 years old, worked on the paint line for General Electric, where he had been employed "on and off" for roughly 10 years. Plaintiff's position on the paint line required him to set the controls for the automatic paint dispensers, ensure that the paint guns sprayed properly, and transfer various parts to the assembly area, which required him to lift some items or attach heavier items to a motorized crane. Plaintiff's duties also involved hanging items using a hand jack and rolling barrels of dry paint on a hand truck to refill the paint dispensers.

Plaintiff has a high school equivalency and a work history involving restaurant work, landscaping, carpet cleaning, assembly line work, and pipe fitting. In August 2000, plaintiff was diagnosed with congestive heart failure, which steadily progressed to the point that in 2003 plaintiff was forced to give up his only hobby, playing softball, and in August 2005 he had a defibrillator implanted. Plaintiff has also suffered from anxiety and depression since childhood. He periodically missed work due to his anxiety/depression and has a history of psychiatric hospitalizations dating back to 1999.

While working on the paint line on 9 February 2005, plaintiff felt a "pop" in his back when he was pushing a cart of sheet metal

that had become stuck in a rut in the floor. He reported the incident to the occupational health nurse who told him that he could leave work early. Rather than leaving early, plaintiff continued his shift, which ended at 3:00 p.m.

Plaintiff was seen the next day (10 February 2005) by a physician's assistant at Burlington Family Practice who assessed plaintiff as having a back strain and restricted him from working for one week. On 21 February 2005, plaintiff was evaluated by Dr. Charles Goodno, an occupational medicine physician who provides medical care for General Electric employees. Dr. Goodno continued to write plaintiff out of work. He also recommended physical therapy and prescribed plaintiff medication.

Plaintiff returned to Dr. Goodno on 28 February 2005. His radicular symptoms had improved and he was released to a gradual return to work. On 2 March 2005, plaintiff returned to part time, light duty work in General Electric's BUS department, working on a drill and tap machine. The BUS position was a sit down job, but plaintiff was allowed to stand up and stretch as needed.

On 16 March 2005, plaintiff had an MRI performed on his lumbar spine ("16 March 2005 MRI"), which the reporting radiologist interpreted as showing no evidence of disc herniations, protrusions, or bulges within the lumbar spine. After the MRI, plaintiff returned to Dr. Goodno on 21 March 2005, reporting pain at a level of four to five on a scale of one to 10. Dr. Goodno assessed a resolved lumbar strain and released plaintiff to return to regular work on 22 March 2005.

General Electric filed a Form 60 on 9 March 2005, admitting as compensable plaintiff's lumbar back strain and paying temporary total disability benefits in the amount of $549.28 per week beginning 28 February 2005. General Electric subsequently filed a Form 62, paying temporary partial disability benefits in the amount of $370.80 for the period plaintiff was employed in the part time, light work position, 2 March to 22 March 2005.

Referred by a company nurse, plaintiff went to Dr. Edward Hines, an orthopaedic surgeon, on 4 April 2005, complaining of severe pain over the left iliac crest and the left paralumbar area. Dr. Hines reviewed the 16 March 2005 MRI and determined that it showed mild posterior bulging at L3-4 and L4-5, centrally, with no apparent nerve root impingement. Dr. Hines believed that plaintiff's back pain was more likely than not caused by the 9 February accident at work.

Plaintiff continued to work in his regular duty paint line job through 14 July 2005, when he was laid off in a general reduction of force. During this period, although he was working his regular job, he was unable to do some of the job's duties and had other employees assist him. After being laid off, plaintiff collected unemployment benefits for 26 weeks.

On 1 June 2006, plaintiff was seen by Dr. Mark Roy, a neurosurgeon with Guilford Neurological Associates. Dr. Roy also reviewed the 16 March 2005 MRI and concluded that it showed a herniated nucleus pulposus at L4-5. Dr. Roy suggested that plaintiff be re-examined to determine whether the pathology had

resolved and recommended epidural steroid injections. Two weeks later, plaintiff underwent a lumbar spine CT scan without contrast, which showed a left foraminal protrusion at L4-5 and left foraminal shallow protrusion at L5-S1. Plaintiff's back pain dissipated after receiving epidural steroid injections in June, July, and August 2006.

In June 2006, plaintiff was offered a job by GKN, a local automotive parts manufacturer. Plaintiff was unable to accept the job, however, because of magnetic fields at the plant that would have interfered with his defibrillator.

Plaintiff returned to Dr. Roy on 15 November 2006, who noted full strength and preserved reflexes. Dr. Roy believed plaintiff to be a poor surgical candidate due to his cardiac disease.

On 30 September 2008, plaintiff was seen by Dr. Frank Rowan, an orthopaedic surgeon at Guilford Orthopaedic and Sports Medicine Center, for an independent medical examination. Afterward, Dr. Rowan reviewed the 16 March 2005 MRI and noted the presence of a herniation at L4-5. Dr. Rowan prescribed physical therapy, anti-inflammatory medicines, cortisone injections, and surgery. Dr. Rowan concluded, however, that plaintiff was not a surgical candidate because of his heart condition. He also determined that plaintiff had reached maximum medical improvement, assigning a 10% permanent partial impairment rating to plaintiff's back.

The deputy commissioner conducted an evidentiary hearing on 21 October 2008 and entered an opinion and award on 12 May 2009, in which the deputy commissioner determined that plaintiff's herniated

disc was a compensable injury, but that plaintiff was not entitled to total disability compensation as he had "failed [to] meet his burden of showing that he is unable to earn the same wages he had earned before the injury, either in the same employment or other employment . . . ." Plaintiff appealed the deputy commissioner's opinion and award to the Full Commission, which, in an opinion and award entered 22 December 2009, reversed the deputy commissioner's decision and awarded plaintiff temporary total disability benefits. General Electric timely appealed to this Court.

Discussion

General Electric contends on appeal that the Commission erred in concluding that plaintiff is entitled to ongoing temporary total disability benefits. Appellate review of a decision 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). The Commission's findings are binding on appeal when supported by competent evidence, despite evidence in the record that would support contrary findings. *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). The Commission's conclusions of law, however, are reviewed de novo. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

On appeal, General Electric "do[es] not dispute that [plaintiff] sustained a compensable injury to his low back," but,

rather, "contend[s] that [plaintiff] failed to meet his burden of proving disability . . . ." It is well established that "[t]he employee has the burden of proving the existence and extent of his disability[.]" *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 388, 656 S.E.2d 608, 613 (2008), *disc. review denied in part*, 362 N.C. 359, 664 S.E.2d 308, *aff'd per curiam in part*, 362 N.C. 676, 669 S.E.2d 319 (2008). To support a conclusion of disability, the Commission must find: "(1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986). A plaintiff may establish the first two elements through any one of four methods of proof:

> (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 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.

Russell v. Lowes Product Distrib., 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

General Electric argues that neither the evidence in the record nor the Commission's findings of fact support its conclusion of law that plaintiff established disability under *Russell's* third method of proof. With respect to this issue, the Commission found that at the time plaintiff sustained his injury, he was 36 years old, had a high school equivalency education, and had a work history that included restaurant work, landscaping, carpet cleaning, assembly line work, and pipe fitting; that plaintiff has suffered from anxiety and depression since childhood, has missed work due to his depression, and has a history of psychiatric hospitalization; that plaintiff was diagnosed with congestive heart failure in 2000, which progressed to the point that plaintiff had to give up playing sports in 2003 and had to have a defibrillator implanted in 2005; that plaintiff's herniated L4-5 disc was caused by the work accident on 9 February 2005; that after being laid off in July 2005, plaintiff received unemployment benefits for at least 26 weeks and "made the job search efforts necessary to maintain receipt of benefits" during that period; that plaintiff received a job offer from GKN, an auto parts manufacturer, in June 2006 but was unable to accept the offer due to the use of magnets in the manufacturing process that would interfere with plaintiff's defibrillator; that plaintiff had not looked for employment since June 2006; and, that plaintiff reached maximum medical improvement in September 2008 and was assigned a 10% permanent partial impairment rating to his back.

The Commission ultimately found:

> Plaintiff is unable to return to his job at General Electric, but he is capable of sedentary work. However, plaintiff made reasonable job searches during the time that he received unemployment benefits from 2005 into 2006. . . . [W]hile plaintiff is capable of some work, it would be futile for him to seek employment within his work restrictions due to his pre-existing medical conditions, work experience, lack of education, training and transferable skills, and physical impairment.

Based on these findings, the Commission concluded that plaintiff established continuing disability under *Russell's* third prong:

> Plaintiff has carried his burden to show that he remains disabled as a consequence of his compensable back injury. Given his compensable back condition, sedentary work restrictions, pre-existing medical conditions, vocational experience, lack of education, training and transferrable skills, physical impairment, and depression, it would be futile for plaintiff to seek work within the physical limitations created by his back injury.

The Commission's findings are supported by plaintiff's testimony about his level of education, his work history, his history of depression and anxiety, and his congestive heart failure. Plaintiff also explained that although he was taking medication for his back pain, it was "keeping [him] in bed most of the time." He also stated that due to his back injury, he cannot lift more than 25 pounds and cannot perform tasks involving "push[ing], pull[ing], lift[ing], stoop[ing], [or] bend[ing] . . . ."

The Commission found, based on these underlying findings, that plaintiff's lack of education, training, and transferrable skills

combined with his physical restrictions led to the conclusion that it would be futile for plaintiff to seek employment. This Court has previously held similar findings and evidence sufficient to support a determination of disability. *See, e.g., Johnson*, 188 N.C. App. at 391, 656 S.E.2d at 615 (noting findings that plaintiff only had high school education, had worked as custodian most of his life, had numerous physical problems, and was not offered and had not received vocational rehabilitation services); *Weatherford v. American Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (finding sufficient to support determination of Commission's findings that plaintiff had GED, had worked only in maintenance positions, had no office skills or training, had severe pain in his knees, and had doctor's restrictions on bending, stooping, squatting, or walking more than few minutes at a time); *Matthews v. City of Raleigh*, 160 N.C. App. 597, 612-13, 586 S.E.2d 829, 841 (2003) (evidence that plaintiff was "limited by lack of education, neurological and cognitive damage, and inability to sustain the degree of attention necessary to hold a job" was sufficient to support determination of disability); *Rivera v. Trapp*, 135 N.C. App. 296, 303, 519 S.E.2d 777, 781 (1999) (upholding determination of disability based on plaintiff's testimony that "his arm was 'no good'" and on his "limited ability to understand English, coupled with his exclusive background in construction work," which made him unemployable); *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 684-85, 474 S.E.2d 793, 796 (1996) (upholding conclusion of disability under third *Russell*

prong where evidence and findings showed that "although plaintiff is capable of some work, most employment would be futile due to plaintiff's pre-existing conditions, *i.e.*, his lack of education, manic depressive disorder, limitations on lifting due to his back and lack of rehabilitative success"). The Commission, therefore, did not err in determining that plaintiff was disabled and entitled to temporary total disability benefits.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).