NO. COA10-1366
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

P.K. Price
Plaintiff

v. North Carolina Industrial Commission
I.C. File No. 582312

Mental Health Association

and

Cincinnati Insurance Company
Defendants

Appeal by Plaintiff from opinion and award entered 8 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 April 2011.

Ganly & Ramer, PLLC, by Thomas F. Ramer for Plaintiff-appellant.

Jones, Hewson & Woolard, by R.G. Spratt III for Defendant-appellees.

HUNTER, JR., Robert N., Judge.

P.K. Price ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission") contending the Commission erred in determining (1) Plaintiff

failed to carry her burden of proof by showing she is and has been disabled as a result of a compensable injury and (2) Plaintiff did not make a reasonable vocational effort to find employment. For the following reasons, we affirm.

I. Factual and Procedural History

Plaintiff, 50 years old at the time of her injury, worked for Defendant Mental Health Association ("MHA") as a program specialist. The position required her to transport mentally handicapped residents to and from social recreation activities, transport patients for outside activities and relationship building, and provide administrative assistance to the program director. On 23 October 2005, Plaintiff was rolling the wheelchair of a patient through a gravel parking lot when the wheelchair became stuck. As Plaintiff attempted to dislodge the wheelchair, she suffered a lumbosacral[1] strain. Defendants conceded the injury was compensable and filed an Employer's Admission of Employee's Right to Compensation Form 60 on 9 March 2006.

Beginning on 28 October 2005, Plaintiff was treated at Pardee Urgent Care. She was diagnosed with a lumbar strain and

[1] "Lumbosacral" means relating to the lumbar portion of the vertebral column and the sacrum. Ida G. Dox et al., *Attorney's Illustrated Medical Dictionary* L49 (1997).

placed on light duty. On 12 December 2005, Plaintiff underwent an MRI of the lumbar spine, and the radiologist concluded that, except for the L4-5 disc, her spinal discs were mildly degenerated. There was no evidence of spinal stenosis,[2] disc herniation,[3] or neoplasm.[4] On 3 January 2006, Plaintiff began receiving treatment from Dr. Margaret Burke, who concluded the findings from the MRI were consistent with what would be expected of a 50 year-old and released Plaintiff to continue work with restrictions of no pushing, twisting, bending, stooping, or lifting over ten pounds until she completed her treatment.

Plaintiff continued to work for MHA on light duty status into the summer of 2006. On 7 August 2006, Plaintiff provided MHA with a letter tendering her resignation, which stated she planned to enter into full-time work within the human services community in a position that was more aligned with her education, work-related experiences, and present financial considera-

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[2] "Spinal stenosis" is the narrowing of the sagittal diameter of the spinal canal, its sub articular lateral recesses and/or the neural foramina. Roscoe N. Gray & Louise J. Gordy, *Attorneys' Textbook of Medicine* 11.50 (3d ed. 2010).

[3] "Herniation" is the formation of an abnormal protrusion. Dox et al., *supra* note 1, at H21.

[4] "Neoplasm" is an abnormal mass of tissue characterized by excessive growth that is uncoordinated with that of the surrounding normal tissues and persists in the same excessive manner after cessation of the stimuli that initiated the change. It is also called a tumor. *Id.* at N7.

tions. Plaintiff did not mention her injury or difficulty performing her duties as reasons for leaving her employment. Plaintiff then worked a sedentary administrative position with New Vistas, a new employer, from 14 August 2006 until 8 September 2006.

Shortly after Plaintiff ceased working for New Vistas, she spoke with Autumn Squirrel, the regional coordinator for MHA. Ms. Squirrel advised Plaintiff that her former position as a program specialist was still available and asked her to return to MHA. Plaintiff declined to do so, stating she could not perform the duties of her former position.

From 26 January 2007 to 13 July 2007, Plaintiff underwent a series of medical procedures, including epidural steroid injections, provocation discography[5] and a radio frequency ablation.[6] On 15 October 2007, Plaintiff submitted a petition to re-open in which she contended she had been taken out of work by Dr. Burke and was thus entitled to disability benefits.[7] Defendants then

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[5] "Diskography" is "[t]he making of x-ray pictures of an intervertebral disk after injection of a radiopaque substance into the disk." Dox et al., *supra* note 1, at D38.

[6] "Ablation" is the "[r]emoval or eradication of diseased tissue, usually by surgery, laser, or freezing radiotherapy." *Id*. at A2.

[7] A petition to re-open is a request to re-open a case previously closed due to a change in the condition of any party in interest. *See* N.C. Gen. Stat. § 97-47 (2009).

filed a Denial of Workers' Compensation Claim Form 61 on 30 November 2007 denying disability benefits were owed to Plaintiff, as she had voluntarily resigned her employment with MHA in order to take a new job with New Vistas.

Throughout Plaintiff's workers' compensation proceedings, she operated a ministry called Tablelands. In her role for Tablelands, Plaintiff provides counseling services at her home and speaks to churches. Tablelands' website solicits contributions and directs them to Plaintiff's residence. From approximately 8 August 2007 to 17 September 2007, Plaintiff took a trip to Africa and traveled to three countries (Kenya, Uganda, and Burundi). There, she spoke at churches and a women's conference. She also counseled and met with leaders and pastors. Both Plaintiff and Dr. Burke testified the trip to Africa did not cause her medical condition to deteriorate.

In her deposition, Dr. Burke clarified that the reason she wrote doctor's notes removing Plaintiff from work on some occasions was that Plaintiff could not do the type of work she had been performing as of 23 October 2005 because she could not perform certain activities, such as transporting patients. Dr. Burke further stated Plaintiff was able to do the type of light duty work she was performing during the first six months of 2006

before she resigned from her job with MHA in order to take the full-time position with New Vistas. Dr. Burke treated Plaintiff until 2 October 2008.

From January to March of 2008, Plaintiff submitted only three applications for new employment and did not interview for any jobs. Plaintiff testified she made a telephone call to the North Carolina Division of Vocational Rehabilitation Services ("NCVR"), took a trip to the Employment Security Commission, and visited JobLink[8] on the Internet.

From March to December 2008, Plaintiff was seen by Dr. Leland Berkwits, Dr. Dennis White, and Dr. Burke on at least six different occasions. After being declared at maximum medical improvement by Dr. White, Plaintiff sought vocational assistance from NCVR.

The records from NCVR contain no indication that Plaintiff applied for any jobs from August to December of 2009. However, from 15 September 2009 to 20 September 2009, Plaintiff participated in a vocational evaluation provided by Transylvania Vocational Services ("TVS") and expressed her goal to become a chaplain. On 11 December 2009, the Deputy Commissioner concluded,

[8] JobLink is a management information system found at http://secure.ncjoblinkmis.com. The system allows customers to register for free employment and training services online.

among other things, that Plaintiff continued to be disabled from her admittedly compensable lumbosacral strain and awarded temporary total disability benefits in the amount of $144.43 per week from 9 September 2006 until she returned to work or until other order by the Commission. Defendants appealed to the Full Commission on 18 December 2009.

The Commission issued an opinion and award reversing the Deputy Commissioner's finding of continuing disability on 8 July 2010. The Commission found as fact, among other things, that Plaintiff failed to meet her burden of proving disability and failed to undertake reasonable vocational efforts to find employment. Consequently, she was not entitled to indemnity benefits. Plaintiff timely appealed.

II. Jurisdiction

Appeal lies of right to this Court from decisions of the Commission. N.C. Gen. Stat. § 97-86 (2009). Therefore, we have jurisdiction over Plaintiff's appeal.

III. Analysis

Plaintiff contends the Commission erred in finding as fact that she failed to carry her burden of proof by showing she is and has been disabled as a result of a compensable injury. We disagree.

On appeal, we review an award of the Industrial Commission to determine "'whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.'" *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)) (alterations in original). The Commission's findings of fact are conclusive on appeal if they are supported by competent evidence, even if the record contains evidence that would support contrary findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Commission's conclusions of law are reviewed *de novo*. *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007).

The Commission found as a fact that "[p]laintiff has failed to carry her burden of proof that she is or has been disabled from working." Plaintiff contends this finding of fact is a conclusory statement amounting to a conclusion of law and is thus subject to *de novo* review. Despite Plaintiff's contention, the record is replete with factual findings supported by competent evidence that support the Commission's ultimate conclusion

of law that "Plaintiff has failed to prove disability as a result of her compensable injury by accident."

For example, the Commission found as a fact that it is "Dr. Burke's opinion that, at all times, plaintiff has been capable of performing modified work for 20 hours per week . . . and that she is physically able to perform several of the jobs for which she is well qualified." The competent medical evidence provided by Dr. Burke at her deposition, as discussed below, supports this finding of fact. Additionally, the Commission found as a fact that Plaintiff went to Africa, traveled to three countries, spoke at churches and a women's conference, and counseled and met with leaders and pastors while there. This finding of fact is supported by competent evidence, as Plaintiff admitted to it at her hearing before the Commission. The above findings support the Commission's conclusion of law that "Plaintiff has failed to prove disability as a result of her compensable injury by accident."

To be entitled to disability benefits, the burden of proof is on the employee to show she is unable to earn the same wages she had earned before the injury, either in the same employment or in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C.

593, 595, 290 S.E.2d 682, 683 (1982). The employee can meet this burden in one of four ways:

> (1) [T]he production of medical evidence that [s]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 [s]he is capable of some work, but that [s]he has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) the production of evidence that [s]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 [s]he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Plaintiff argues the first prong of the test has been met by her production of evidence indicating she is physically incapable of work in any employment as a consequence of her work related injury. To the contrary, Dr. Burke made clear that in her opinion, Plaintiff was capable of performing light duty work:

> Q: Okay. So even when you were writing her out of work, she could have done the job like she was doing in those first six months of 2006, where she was working about 20 hours a week and doing light-duty work without any heavy lifting?
>
> [Dr. Burke]: That's my opinion, yes.

> . . . .
>
> Q: [W]ould that be your opinion from the beginning of your treatment of her to the current time?
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> [Dr. Burke]: Yes.

This competent medical evidence provided by Dr. Burke supports the Commission's finding of fact that "Plaintiff has been capable of performing modified work for 20 hours per week at all times since she stopped working for New Vistas on September 8, 2006," and this finding supports the Commission's conclusion of law that Plaintiff failed to prove her disability as a result of her compensable injury. Accordingly, Plaintiff has failed to meet her burden of proving herself disabled in accordance with the first *Russell* prong.

Plaintiff next contends the Commission erred in finding as fact and concluding as law that Plaintiff did not make a reasonable vocational effort to find employment. In support, Plaintiff argues she has met either the second or third *Russell* prongs by presenting evidence that (1) she is capable of some work, but has been unsuccessful after a reasonable vocational effort to locate suitable employment, or (2) she is capable of some work, but it would be futile to seek employment. We disagree.

Defendants rely on our decision in *Gilberto v. Wake Forest University*, 152 N.C. App. 112, 566 S.E.2d 788 (2002) (holding the submission of twenty-six job applications in five years was not a reasonable vocational effort). They assert Plaintiff's submission of only three applications to employers between 8 September 2006 (when she left employment with New Vistas) and the hearing on 9 December 2008, approximately twenty-seven months, is not a reasonable vocational effort. Plaintiff counters that Defendants' reliance on *Gilberto* is misplaced because *Gilberto* was premised upon the testimony of an expert witness.

Plaintiff's argument is unpersuasive. Submitting only three job applications in twenty-seven months is not a reasonable vocational effort. Furthermore, the Commission's finding of fact that Plaintiff submitted only three applications to employers from 8 September 2006 to the hearing on 9 December 2008 is supported by competent evidence as Plaintiff admitted to it during the hearing, and this finding of fact supports its conclusion of law that "she failed to show that she made a reasonable but unsuccessful effort to find employment."

Plaintiff next argues the vocational evaluation provided by TVS[9] and a letter sent to Plaintiff's attorney by Jane Claypool, a counselor with NCVR, provide undisputed evidence Plaintiff undertook extensive vocational efforts to find employment, and seeking employment prior to her completion of a chaplaincy program would be futile.

As discussed above, the Commission found as a fact that from approximately 8 August 2007 to 17 September 2007, Plaintiff took a trip to Africa, traveled to three countries there, spoke at churches and a women's conference, and counseled and met with leaders and pastors. This finding of fact is supported by competent evidence, as Plaintiff admitted to it at the hearing. The Commission also found as a fact that

> [e]xcept for the work she has performed for Tablelands, plaintiff has made little effort to find employment since she stopped working at New Vistas on September 8, 2006. She has submitted only three applications for employment, and she has not had any interviews for jobs. . . . She focused on becoming a

[9] The TVS vocational evaluation states, in pertinent part, "[Plaintiff] ***demonstrated the ability to do sedentary work*** . . . [and] [***s***]***he demonstrated the ability to maintain a part-time schedule*** . . . it is felt that currently she would not be able to meet the demands of even a sedentary job ***with full-time hours***." (Emphasis added). The evaluation goes on to list Plaintiff's barriers to employment, but expressly states she "[***m***]***ay be limited to part-time hours.***" (Emphasis added). Thus, the evaluation makes clear Plaintiff demonstrated the ability to do sedentary work, and that her work may be limited to part-time employment.

> hospital chaplain, although that requires training. Plaintiff was unwilling to pursue positions for which she is already qualified because she claimed that it would not use her credentials, or because they did not meet her interests and goals.

This finding of fact is supported by competent evidence, as Plaintiff admitted she submitted only three applications for employment and had no interviews for jobs at the hearing. Furthermore, two separate letters to Plaintiff from Jane Claypool provide competent evidence that Plaintiff was unwilling to pursue any employment other than as a chaplain. The first letter, dated 13 October 2009, states, "Park Ridge has a full time opening for a patient representative, which consisted of sitting in their front lobby and directing visitors. *You were not interested in this job as it wouldn't use* [*your*] *credentials*." (Emphasis added; internal quotation marks omitted). The second letter, dated 19 October 2009, states Plaintiff "consistently indicated a goal to work as a chaplain. Although you possess the necessary degree you lack the required credentialing that most places require . . . . *We looked at several types of sedentary jobs in the human services field and these did not meet your interests and goals*." (Emphasis added). These letters support that a lack of interest, not futility, kept Plaintiff

from seeking employment prior to her completion of a chaplaincy program.

Therefore, competent evidence exists to support the Commission's above findings of fact, and these findings support its conclusion of law, that Plaintiff "failed to show that she made a reasonable but unsuccessful effort to find employment or that it was futile for her to seek employment due to other factors." Accordingly, Plaintiff has failed to meet her burden under either the second or third *Russell* prongs.

Finally, Plaintiff makes no argument about whether she may have met her burden of proving disability under the fourth *Russell* prong, so we do not address the possibility here.

For the reasons stated herein, the decision of the Industrial Commission is

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per rule 30(e).