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NO. COA02-794

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2003

GWENDOLYN ANDERSON,
Plaintiff/Employee,

v.

North Carolina Industrial Commission
I.C. File No. 584214

BLACK & DECKER,
Defendant/Employer

and

ESIS INSURANCE CO.,
Defendant/Carrier.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission entered 18 April 2002. Heard in the Court of Appeals 25 March 2003.

Daniel F. Read for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and Tracey L. Jones, for defendant-appellees.

MARTIN, Judge.

Plaintiff Gwendolyn Anderson appeals from an opinion and award entered by the North Carolina Industrial Commission concluding that she unjustifiably refused employment within her restrictions, that her carpal tunnel syndrome has not caused her to be disabled since her unjustified refusal to work, and that she is therefore not entitled to further compensation.

The Commission found the following facts: plaintiff was employed by defendant Black & Decker as a production technician. During her employment, plaintiff developed wrist problems, and in October 1995, she was diagnosed with bilateral carpal tunnel syndrome by Dr. James Whetter, who prescribed physical therapy. Plaintiff reported no improvement, and in December 1995, she sought treatment from orthopedic surgeon Dr. Louis Clark. Dr. Clark performed surgery on plaintiff's wrist in February 1996 to release the median nerve at the carpal tunnel. Plaintiff reported no improvement after the surgery and physical therapy. Dr. Clark noted that plaintiff's physical therapist had recorded that plaintiff's subjective complaints were not supported by the objective findings.

In August 1996, plaintiff sought an independent medical evaluation from Dr. Glenn Subin. Dr. Subin found no physiological explanation for plaintiff's grip strength, and he could not explain plaintiff's apparent failure to improve following adequate surgery. Dr. Subin opined that plaintiff had a 10% permanent partial impairment of her right hand, and that she had reached maximum medical improvement.

In October 1996, plaintiff sought medical treatment for her right knee from a Dr. Johnson. Dr. Johnson performed arthroscopic surgery on plaintiff's knee that month. Following surgery, plaintiff presented to Dr. Whetter again, complaining of knee and hip pain; plaintiff did not report wrist pain. Dr. Whetter referred plaintiff to Dr. Gwenesta Melton, and in February 1997, plaintiff presented to Dr. Melton, complaining of pain in her right knee and left hip. Dr. Melton observed that plaintiff's joints appeared normal, despite her complaints of widespread pain. Dr. Melton diagnosed plaintiff with fibromyalgia, and opined that she was disabled as result of the condition, and that the condition had not changed between February 1997 and July 2000. Dr. Melton did not treat plaintiff for wrist pain.

In March 1997, plaintiff sought treatment from Dr. Damon Anagnos. Plaintiff did not report her widespread complaints which she had reported to Dr. Melton one month prior; plaintiff complained only of wrist pain. Dr. Anagnos found plaintiff's complaints were out of proportion to his physical findings, and that there was no objective basis on which to keep plaintiff from working. Dr. Anagnos approved plaintiff for work with restrictions that she not lift objects over 25 pounds, that she wear splints, and that she not be exposed to hot or sharp objects. Dr. Anagnos' work authorization containing the restrictions was later altered to reflect a 5 to 10 pound restriction as opposed to 25 pounds. Dr. Anagnos did not know who made that change. Plaintiff continued to complain of wrist pain, and in May 1997, Dr. Anagnos performed a left carpal tunnel release, after which plaintiff underwent further physical therapy.

As a result of her carpal tunnel syndrome, plaintiff ceased working, and she began receiving temporary partial disability beginning 12 September 1997. On 23 September 1997, plaintiff sought an additional independent medical evaluation from orthopedic surgeon Dr. Jon Kolkin, who specialized in hand treatment. Dr. Kolkin could find no physical basis for plaintiff's complaints, and he recommended no further treatment.

In October 1997, with the assistance of a rehabilitation specialist, Black & Decker evaluated three available positions. The positions were described to Drs. Anagnos and Kolkin, and two of the available positions were approved by both doctors as being suitable positions for plaintiff given her restrictions. As a result, on 31 October 1997, Black & Decker offered the two positions to plaintiff and instructed her to return to work on 10 November 1997. Plaintiff received the offer on 4 November 1997, but failed to report for work on 10 November. Accordingly, her employment was terminated 15 December 1997. Despite receiving notice of

termination, plaintiff did not respond or otherwise indicate a willingness to accept employment with Black & Decker.

On 24 March 1998, the Commission approved defendants' application to cease plaintiff's compensation. Plaintiff's attorney thereafter wrote Black & Decker, stating plaintiff would attempt to return to work in one of the jobs offered. The Commission found that other than this correspondence, plaintiff had not made any attempt to return to work and, in fact, had continued to report to her doctors that she was unable to work. Plaintiff never reported to work at Black & Decker, nor did she take any other action towards employment.

On 12 November 1999, plaintiff sought treatment from Dr. Eddie Powell, who ordered nerve conduction studies and an MRI of plaintiff's cervical spine. All results were normal. Repeat nerve conduction studies and a brain MRI were performed in December 1999, and the results of those tests were also normal. Dr. Powell referred plaintiff to plastic surgeon James Lowe. Dr. Lowe performed bilateral carpal tunnel surgery in January 2000. Plaintiff reported no improvement following the surgery. The Commission found as fact that Dr. Lowe's opinion of plaintiff's condition was of little weight because it was not supported by plaintiff's other doctors and plaintiff had not responded favorably to his treatment.

In July 2000, plaintiff presented to Dr. Kolkin for a follow-up evaluation. Dr. Kolkin's evaluation yielded the same result as before: there was no anatomic explanation for plaintiff's complaints of wrist pain. Plaintiff did not mention fibromyalgia or diffuse pain to Dr. Kolkin.

In January 2000, a rehabilitation specialist was assigned to plaintiff's case to perform a labor market survey. The Commission found that at that time, and since October 1997, there were jobs available within plaintiff's restrictions.

Based on the preceding findings, the Commission found that plaintiff unjustifiably refused to accept employment within her restrictions in November 1997 when Black & Decker instructed her to return to work in a position approved by her doctors. It further found that since that refusal, there has been employment available within plaintiff's restrictions, and that had plaintiff made a reasonable effort under the circumstances, she would have obtained employment. The Commission did not accept plaintiff's assertion that she was willing to return to work in April 1998 following the cessation of her benefits because she continued to complain of pain to her doctors and she did not believe that she was capable of working at that time or any other relevant time. The Commission summarized: "The greater weight of the evidence is that plaintiff has not desired to return to work, that suitable work was timely and appropriately offered by [Black & Decker], that this employment was not seasonably accepted by plaintiff, and that plaintiff has not taken other reasonable efforts to find suitable work within her restrictions." The Commission further found that nerve conduction studies performed in November and December 1999 were normal, thereby failing to establish any lingering impairment from plaintiff's compensable bilateral carpal tunnel syndrome.

The Commission concluded that by her failure to report to work on 10 November 1997, plaintiff unjustifiably refused employment within her restrictions and is not entitled to further compensation; and that since that date, plaintiff's carpal tunnel syndrome has not caused her to be disabled, and she is not entitled to further compensation on that basis. One Commissioner dissented, stating any unjustified refusal to work on plaintiff's part ceased in April 1998 when she expressed that she was willing to work. Plaintiff appeals.

Our standard of review of an opinion and award of the Industrial Commission is limited to whether there exists any competent evidence in the record to support the Commission's findings of fact, and whether those findings support the Commission's conclusions of law. *Smith v. Pinkerton's Sec. & Investigations*, 146 N.C. App. 278, 280, 552 S.E.2d 682, 684 (2001). "If there is any competent evidence to support the Commission's findings of fact, those findings are deemed conclusive on appeal even if there is evidence supporting contrary findings." *Id.* An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted).

Plaintiff assigns error to the Commission's finding that she unjustifiably refused to return to work on 10 November 1997, and its failure to find that any unjustified refusal ceased in April 1998 when she reported that she would return to work. G.S. §97-32 provides: "[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. §97-32 (2003).

Plaintiff asserts her refusal to report to work at Black & Decker on 10 November 1997 was justified due to her physical condition at the time. However, the evidence established that in October 1997, with the assistance of rehabilitation specialist Pete Hocamp, Black & Decker identified three available positions as being within plaintiff's physical restrictions. Hocamp testified that he sent an analysis of the three positions to Drs. Kolkin and Anagnos. Dr. Kolkin approved all three positions as being suitable for plaintiff to perform, and Dr. Anagnos approved two of the positions as jobs plaintiff would be capable of performing notwithstanding her

physical condition. This evidence supports the Commission's finding and its conclusion that plaintiff was not justified in refusing to report to work on 10 November 1997 in a position medically approved for her restrictions. *See Shah v. Howard Johnson*, 140 N.C. App. 58, 70, 535 S.E.2d 577, 584-85 (2000) (upholding Commission's conclusion that plaintiff unjustifiably refused employment based on evidence that plaintiff's doctor believed plaintiff capable of performing job offered by defendant-employer), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

Plaintiff also contends, by a separate assignment of error, that the Commission ignored evidence of Dr. Lowe's opinion that plaintiff suffered from her initial compensable carpal tunnel syndrome at all relevant times. However, the Commission did consider Dr. Lowe's testimony; it simply determined that it would accord Dr. Lowe's opinion little weight because it was not supported by other medical evidence, and because plaintiff did not respond favorably to Dr. Lowe's treatment. The weight and credibility to be accorded the testimony of any witness is within the exclusive province of the Commission. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). This assignment of error is overruled.

Plaintiff further argues the Commission erred in not determining that, even if her initial refusal to work was unjustified, the unjustified refusal ceased in April 1998 when she reported to Black & Decker that she would return to work, and that under G.S. §97-32, she was entitled to a continuation of her benefits as of that date.

However, the Commission determined that plaintiff's unjustified refusal never ceased. It found as fact that although plaintiff communicated in April 1998 that she would return to work, her assertion was not credible in the face of evidence that at all relevant times, plaintiff continued

to complain of pain to her doctors and did not believe she was capable of working. This finding is supported by competent evidence, and is therefore binding on appeal. The record establishes that throughout all relevant times, and after April 1998, plaintiff continued to seek medical treatment for her wrist pain, complaining that she had not been able to find relief despite various treatments, and that her condition had actually worsened. Despite instructing her attorney to contact Black & Decker in April 1998 after her compensation was terminated, plaintiff testified that she did not feel ready to work at that time; rather, plaintiff stated that she “didn’t think [she] could do it,” and that although she would try to work, her pain was such that she was skeptical about being able to remain at work.

Moreover, the Commission’s determination with respect to plaintiff’s credibility and its finding that plaintiff simply did not desire to work at all relevant times are further supported by the overwhelming medical evidence that several of plaintiff’s health care providers found plaintiff’s subjective complaints of pain were not supported by the objective evidence; that there was no physical evidence to support plaintiff’s complaints of pain; by evidence that plaintiff was inconsistent in her descriptions of pain to her various doctors; and by evidence that, although released to return to work in March 1997 by Dr. Anagnos, plaintiff testified she never contacted Black & Decker nor instructed her attorney to contact Black & Decker about being able to work. The Commission’s findings that plaintiff unjustifiably refused to report to work on 10 November 1997 and that she was not, in fact, willing to return to work in April 1998 and took no other steps toward employment at any relevant time support its conclusion that plaintiff was not entitled to compensation under G.S. §97-32.

We note that the Commission also concluded that plaintiff was not entitled to further compensation for the independent, alternative reason that she was no longer disabled by her

carpal tunnel syndrome as of the date she initially refused employment on 10 November 1997. Although plaintiff assigned error to the conclusion and has listed the assignment of error, with others, under the second question presented in her brief, she has not specifically advanced any argument in support of the assignment of error and it may be deemed to have been abandoned. N.C.R. App. P. 28(b)(6) (2003).

For the foregoing reasons, the opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges HUDSON and ELMORE concur.

Report per Rule 30(e).