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NO. COA04-1297

NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2005

CORVAIR L. FAISON,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 628691

AMERICAN NATIONAL CAN COMPANY,
Employer,

GALLAGHER BASSETT SERVICES,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 25 May 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 June 2005.

Ben E. Roney, Jr. for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P. by George H. Pender, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Corvair Faison (now Batts) (“plaintiff”) appeals from an opinion and award of the North Carolina Industrial Commission (“Full Commission”). For reasons stated herein, we affirm the opinion and award of the Full Commission in part and remand in part.

Plaintiff sustained a compensable injury while employed by American National Can Company (“American Can”). American Can is a duly qualified self-insured and Gallagher Bassett Services is the claims administrator (“claims administrator”) (collectively, “defendants”).

Plaintiff's injury resulted in disability beginning 24 November 1995. On 13 March 2003, a deputy commissioner awarded plaintiff temporary total disability compensation and ordered defendants to pay for all psychological and physical treatment. Plaintiff was also ordered to cooperate in any reasonable requests by defendants to participate in vocational rehabilitation. The parties appealed the opinion and award to the Full Commission.

The Full Commission found the following pertinent facts:

1. Plaintiff's back was injured while turning the crank on a carton machine on August 2, 1995. The injury resulted in disability beginning November 24, 1995.

2. Liability was admitted by Form 21 agreement and plaintiff began receiving compensation for incapacity to earn wages beginning November 24, 1995.

3. Plaintiff returned to light duty on August 2, 1996. She was transferred to her regular job and her back pain was aggravated to the point that she could not work beginning September 4, 1996.

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7. Medical case management was assigned to the claim by the workers' compensation administrator during February 1999. The case manager arranged for prescriptive medications by mail beginning July 1, 1999, an independent psychological examination by Dr. Schmickley, a functional capacity evaluation, and an independent medical evaluation by Dr. Sanitate.

8. On October 21, 1999, Dr. Boyette diagnosed nothing surgical in plaintiff. There was a lack of objective findings to coordinate with reported symptoms. Dr. Boyette recommended evaluation by a psychiatrist.

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12. Plaintiff was evaluated by Gary Bachara, Ph.D. on August 15, 2001 on referral from the North Carolina Department of Health and Human Resources. Plaintiff presented with a history of back pain due to injury at work. Plaintiff was suffering from pain associated with both physical and psychological factors. The

prognosis for her working was poor. Treatment at a pain clinic was recommended.

13. On September 18, 2001, plaintiff became a patient of Raymundo D. Millan, M.D. who is a physician specialized in pain management. He began treating her for chronic low back pain and myofascial pain syndrome.

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15. William J. Albrecht, Ph.D. became plaintiff's treating psychologist on September 18, 2001.

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17. Dr. Albrecht has provided cognitive behavioral treatment for plaintiff since October 2, 2001.

18. Plaintiff has multiple musculoskeletal complaints involving chronic low back pain and myofacial [sic] syndrome of the low back: her physical complaints are in excess of what would be expected from the history, physical examination and laboratory findings; her symptoms have caused clinically significant distress and impairment of occupational functioning continuously since November 24, 1995; and, her symptoms are not intentionally produced or feigned.

19. The psychological diagnoses of plaintiff include undifferentiated somatoform disorder, general anxiety disorder and dysthymic disorder (depression that is persistent for more than two years), and dependent personality characteristics.

20. The greater weight of the evidence does not show that plaintiff's psychological problems were aggravated or caused by the August 2, 1995 injury at work.

21. Plaintiff perceives herself as being a disabled person secondary to low back pain that originated on August 2, 1995. However, plaintiff is capable of sedentary work with lifting restrictions of 15 pounds, despite plaintiff's contentions to the contrary.

22. Plaintiff has reached the point of maximum medical improvement as to her back condition. Vocational rehabilitation could prove fruitful.

Based upon the foregoing findings, the Full Commission concluded as a matter of law:

1. Due to the compensable injury and plaintiff's ongoing disability, plaintiff is entitled to weekly compensation at a rate of \$330.65 from August 2, 1995 and continuing. N.C.G.S. §97-29.

2. Plaintiff's psychological condition is not related to the August 2, 1995 [injury] and the plaintiff is not entitled to further treatment for the psychological aspect of her condition. N.C.G.S. §97-25.

3. Plaintiff is currently capable of sedentary work with a lifting restriction of 15 pounds. However, it has not been proven that any such job is currently available in plaintiff's geographical area that is otherwise suitable. *Dixon v. City of Durham*, 128 N.C. App. 501, 495 SE 2d 380 (1998); *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997); *Peoples v. Cone Mills*, 316 N.C. 426, 342 S.E.2d 798 (1986).

The Full Commission awarded plaintiff temporary total disability compensation, and ordered plaintiff to cooperate with any reasonable requests by defendants to participate in vocational rehabilitation. The Full Commission ordered defendants to provide plaintiff vocational rehabilitation. Plaintiff appeals that order.

The issues presented by this appeal are: (I) whether the Full Commission's findings of fact are supported by the evidence and whether those findings of fact support the conclusions of law; and (II) whether the Full Commission erred in failing to address plaintiff's request for attorney's fees pursuant to N.C. Gen. Stat. §97-88.1.

Plaintiff argues that the Full Commission erred by failing to acknowledge plaintiff's entitlement to the Form 21 presumption of continuing incapacity based on her psychological conditions. Specifically, plaintiff contends that the Form 21 agreement provided a range of

presumptions of continuing incapacity to earn wages which entitled her to medical compensation including, but not limited to, psychological treatment. We disagree.

Our case law has consistently held that a presumption of disability attaches in favor of the employee once a Form 21 agreement is entered into by the parties and approved by the Full Commission. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997); *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 470, 577 S.E.2d 345, 350 (2003). This presumption has its origins in the fact that payment is being made pursuant to an award of the Commission. *See* N.C. Gen. Stat. §97-18(b) (2003); N.C. Gen. Stat. §97-82(b) (2003); Workers' Compensation Rule 404(1); *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588 (1971); *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E.2d 109 (1951); *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 374 S.E.2d 483 (1988). Following the approval by the Commission of a Form 21 admission of liability, there is a presumption that the treatment will be causally related to the compensable injury. *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 523 S.E.2d 720 (1999).

In this case, plaintiff and defendants entered into an agreement for compensation, pursuant to North Carolina Industrial Commission Form 21, for an injury sustained by plaintiff on 2 August 1995. The agreement stated, in pertinent part, that plaintiff sustained an injury resulting in "back strain". The agreement was approved by the Full Commission, pursuant to N.C. Gen. Stat. §97-82, on 2 June 1997. The Form 21 agreement speaks only to "back strain" and does not mention any psychological condition. Thus, the Form 21 agreement has no bearing on the psychological claim and no Form 21 presumption attaches to plaintiff's claims for medical compensation for psychological conditions.

Next, plaintiff argues defendants' evidence in chief does not rebut the presumption that plaintiff's psychological problems are causally related to the August 2, 1995 injury at work.

When reviewing a decision of the Full Commission, this Court 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 Court examines whether there was competent evidence to support the Full Commission's findings of fact, but it does not re-examine or weigh the evidence. *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002). We are bound by the Full Commission's findings if those findings are supported by competent evidence. Contrarily, conclusions of law are fully reviewable. *Gilberto*, 152 N.C. App. at 116, 566 S.E.2d at 792; *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. rev. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). This Court's duty is "to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Full 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.

[T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Deese, 352 N.C. at 116-17, 530 S.E.2d at 553.

In the instant case, the Full Commission found as a fact: "The greater weight of the evidence does not show that plaintiff's psychological problems were aggravated or caused by the

August 2, 1995 injury at work.” Plaintiff was diagnosed by Verne Schmickley, Ph.D., Stephanie Griffin, M.D., Raymundo Millan, M.D. and William Albrecht, Ph.D. as having a depression/dysthymic disorder, conversion disorder, and/or somatoform disorder. The physicians and psychologists testified that they could not state with any certainty that plaintiff’s psychological condition was caused, aggravated, or accelerated by the August 2, 1995 accident. Thus, competent evidence supports the Full Commission’s finding that the greater weight of the evidence does not show that plaintiff’s psychological problems were aggravated or caused by the 2 August 1995 injury at work.

Plaintiff next argues that the Full Commission committed reversible error in concluding that plaintiff is capable of sedentary work. There is medical documentation and testimony from five different physicians who all assert that plaintiff is capable of working with restrictions. In addition, the Full Commission had video evidence showing plaintiff lifting and carrying a baby around her apartment complex, as well as testimonial evidence of plaintiff’s admission that she was employed as a babysitter while claiming disability and an inability to work. We conclude that there is competent evidence in the record to support the Full Commission’s conclusion that plaintiff is capable of sedentary work with lifting restrictions of fifteen pounds.

Plaintiff also argues the Full Commission erred in finding vocational rehabilitation could be fruitful and ordering the parties to participate in vocational rehabilitation. Dr. Griffin, plaintiff’s family physician, testified that plaintiff is capable of working in a competitive market if she is allowed to move around at her own pace and sit at her own pace, but that plaintiff would not be able to work in the type of labor she had been previously engaged. Dr. Schmickley, who performed an independent psychological evaluation on plaintiff, recommended vocational rehabilitation services. Dr. Sanitate stated that he did not think plaintiff was physically limited.

Dr. Millan, one of plaintiff's treating physicians, stated that vocational rehabilitation is the usual recommendation in cases similar to plaintiff's. There is competent evidence to support the Full Commission's finding that plaintiff is capable of working and that vocational efforts would be beneficial.

Plaintiff next contends that the Full Commission erred by failing to review for sufficiency the expert witness fee assessed as costs for Dr. Albrecht by the deputy commissioner. An appeal to the Full Commission must be filed within fifteen days and must clearly specify the order or opinion and award appealed from. N.C. Gen. Stat. §97-85 (2003). In the instant case, the deputy commissioner entered an order on 20 February 2003 directing defendants to pay Dr. Albrecht \$200.00 as an expert witness fee. Plaintiff did not appeal the order. Plaintiff's notice of appeal, filed 27 March 2003, speaks only to the opinion and award entered 13 March 2003. Therefore, the issue of sufficiency of the deposition fee of Dr. Albrecht was not properly before the Full Commission on appeal. Plaintiff's assignment of error is overruled.

Plaintiff argues that the Full Commission erred by failing to rule upon plaintiff's petition for assessment of attorney fees as costs pursuant to N.C. Gen. Stat. §97-88.1. We agree.

The standard of review for an award of attorneys' fees by the Full Commission is abuse of discretion. *Childress v. Trion, Inc.*, 125 N.C. App. 588, 590, 481 S.E.2d 697, 698, *disc. rev. denied*, 346 N.C. 276, 487 S.E.2d 541 (1997).

Section 97-88.1 of the North Carolina General Statutes provides:

If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it *may assess* the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

N.C. Gen. Stat. §97-88.1 (2003)(emphasis added). It is clear from the language of the statute that the Full Commission is not required to award attorneys' fees. "Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission." *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 397, 298 S.E.2d 681, 684 (1983).

The Full Commission reviewed this matter and issued an opinion and award on 25 May 2004 with regard to attorney's fees as follows:

Twenty-five percent of the compensation due to plaintiff in paragraph one of this Opinion and Award is approved for her attorney fees. The defendants shall send every fourth compensation check to plaintiff's attorney beginning with the first check due to plaintiff subsequent to the filing of this Opinion and Award.

The Full Commission's Opinion and Award does not reference N.C. Gen. Stat. §97-88.1 or plaintiff's Form 44 assignment of error on the issue. Thus, we conclude that the attorney's fee award above is simply the ordinary contingent fee, awarded pursuant to N.C. Gen. Stat. §97-90, and that the Full Commission has not addressed whether grounds exist for an award of additional attorney's fees pursuant to plaintiff's motion. The Full Commission is required to address such a motion. *Cialino*, 156 N.C. App. at 474, 577 S.E.2d at 353. Thus, we remand this case for the Full Commission to address plaintiff's request for attorney's fees pursuant to N.C. Gen. Stat. §97-88.1.

AFFIRMED in part, REMANDED in part.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).