IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1377

Filed: 6 September 2016

North Carolina Industrial Commission, No. X74819

JOHN MCLEAN, Plaintiff,

v.

BAKER SAND AND GRAVEL, Employer, and NC FARM BUREAU MUTUAL INSURANCE, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 23 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 May 2016.

Hardison & Cochran P.L.L.C., by Benjamin T. Cochran, for plaintiff-appellant.

Young Moore and Henderson P.A., by Zachary C. Bolen, for defendant-appellees.

BRYANT, Judge.

Where competent evidence supports the Full Commission's findings and conclusions determining plaintiff failed to meet his burden of proving ongoing disability, and where the Industrial Commission properly denied plaintiff's request for vocational rehabilitation services as those services are only appropriate where ongoing disability has been established, we affirm.

Plaintiff John McLean, a fifty-seven-year-old male, began employment with Baker Sand & Gravel, defendant-employer, as a truck driver around 1980 and was so

employed for approximately thirty years. On 22 September 2011, plaintiff injured his upper left extremity while attempting to adjust the tarp on the top of his dump truck. Defendants accepted liability for plaintiff's claim on 9 January 2012 via a Form 60 *Employer's Admission of Employee's Right to Compensation*.

Plaintiff first saw orthopaedic surgeon Dr. Daniel McBrayer on 12 January 2012. Dr. McBrayer reviewed plaintiff's MRI taken in December, recommended conservative treatments and physical therapy, and placed plaintiff on light duty work restrictions of no lifting more than ten pounds with his left arm. After approximately three months of conservative treatments with no improvement, Dr. McBrayer recommended surgery.

Dr. McBrayer surgically repaired plaintiff's left rotator cuff. Plaintiff participated in physical therapy and, during one of his sessions, plaintiff suffered a full-thickness tear of his right rotator cuff while attempting to lift a thirty-five-pound box. This injury necessitated further surgery, which Dr. McBrayer performed in October 2012.

Plaintiff continued with physical therapy per Dr. McBrayer's recommendation. In June 2013, Dr. McBrayer saw plaintiff to address a meniscus tear plaintiff suffered while participating in physical therapy, and thereafter performed surgery to repair the meniscus tear. During his deposition, Dr. McBrayer testified to a reasonable degree of medical certainty that all the ensuing medical treatment to date stemmed

from the original compensable injury that occurred on 22 September 2011. He also testified that it was his opinion that plaintiff's permanent lifting restriction of no overhead lifting greater than fifty pounds is necessary for plaintiff's safety. Plaintiff also suffered from and received treatment for depression. He was diagnosed with situational depression and was recommended for counseling in April 2013.

In December 2013, Dr. McBrayer performed a Functional Capacity Evaluation ("FCE") and, despite findings of submaximal effort from plaintiff, the FCE showed he could safely perform all aspects of his preinjury job. The only permanent restriction assigned by Dr. McBrayer was for plaintiff to avoid overhead lifting of greater than fifty pounds.

Meanwhile, Barbara Readling, a senior vocational case manager with Carolina Case Management, conducted a "Digital Job Analysis" to assess whether plaintiff's former truck driver position's duties were within his restrictions. Readling gathered information about plaintiff, his physical restrictions, and his work and educational backgrounds in an attempt to identify transferable skills. Plaintiff was present when Readling conducted the Job Analysis and was able to provide feedback if he desired to do so.

Later, plaintiff indicated that the Digital Job Analysis was accurate but incomplete. Plaintiff noted that his job duties included performing safety checks on the front end loader every day before using the truck, changing the oil once every six

months, and occasionally using a shovel to remove any dirt that might be remaining in the bed of the truck after use. Plaintiff also stated he would have to change the tires on his truck if they became worn or needed replacing.

In July 2014, Readling performed a labor market survey to "determine [plaintiff's] ability to obtain suitable employment in the current labor market given his marketable transferable skills, current physical abilities and education level." Readling identified three full-time positions—traffic controller, poultry worker, and bus driver—that plaintiff could perform given his transferable skills and permanent lifting restriction. The position of traffic controller did not require lifting any more than forty pounds, provided on-the-job training, and did not require a GED, but was "High School diploma/GED preferred." The poultry worker position involved limited lifting and had no minimum education requirement, and Readling indicated that plaintiff would be considered for the position of bus driver given his work experience, despite his lack of a GED.

Defendants commenced this action on 9 May 2014 by filing a Form 24 application to terminate or suspend payment of compensation on the grounds that plaintiff is no longer disabled and, therefore, capable of performing his pre-injury work. Plaintiff responded, denying that he had been released to "full duty" and stating he remained disabled.

This matter was initially heard before former Deputy Commissioner Victoria M. Homick, then jurisdiction was transferred to Deputy Commissioner Myra L. Griffin. On 6 March 2015, Deputy Commissioner Griffin filed an opinion and award concluding that plaintiff failed to meet his burden of proving ongoing disability. Plaintiff appealed to the Full Commission and, on 23 September 2015, the Full Commission filed an opinion and award affirming the decision of the Deputy Commissioner. Plaintiff filed notice of appeal to this Court.

On appeal, plaintiff argues the Full Commission erred by concluding that (I) plaintiff failed to meet his burden of proving disability beyond 9 May 2014; (II) plaintiff is not entitled to any temporary total disability benefits beyond 9 May 2014; and (III) plaintiff failed to meet his burden of proof and establish that he is entitled to vocational rehabilitation services.

I

Plaintiff first argues that the Full Commission erred in concluding that he failed to meet the "shifting burden" to prove disability beyond 9 May 2014. We disagree.

The Full Commission's Conclusions of Law Nos. 3, 4, and 5 state as follows:

> 3. Dr. McBrayer released [p]laintiff to return to his pre-injury position with a 50-pound maximum overhead lifting restriction as of December 5, 2013. Given the evidence presented in this case, [p]laintiff has not established that,

subsequent to May 9, 2014, he was incapable of any work, that he exerted "reasonable effort" in conducting a job search, or that it would be futile for him to seek employment due to other factors, as a result of his compensable injuries. [*Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993]. Therefore, plaintiff failed to carry his burden of proving disability under any prong of *Russell* as of May 9, 2014. *Id.*; *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683–84 (1982).

4. Because plaintiff has failed to meet his burden of proof of disability, he is not entitled to vocational rehabilitation services. *Johnson v. So. Tire Sales & Serv.*, ___ N.C. App. ___, 758, S.E.2d 19, 24–26 (2014), *cited in Porter v. Bearcat, Inc.*, No. COA15-128 (N.C. Ct. App. July 7, 2015) and *Kelly v. Ray of Light Homes, LLC*, NO. COA14-1029 (N.C. Ct. App. July 7, 2015).

5. The Form 60 filed in this case entitles plaintiff to a rebuttable presumption that the requested medical treatment for pain management is causally related to his injuries arising from the September 22, 2011 work event. *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135–36, 620 S.E.2d 288, 292–93 (2005), *disc. rev. improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). Based upon a preponderance of the evidence in view of the entire record, the Commission concludes that defendants successfully rebutted the Parsons presumption through the expert medical opinion of Dr. Harris, who opined to a reasonable degree of medical probability that plaintiff had reached MMI with no further treatments, including pain management and counseling, were indicated. If defendant rebuts the *Parsons* presumption, the burden of proof shifts back to plaintiff. *See McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 664 (1996). Plaintiff has failed to meet this shifting burden, therefore, defendants are not liable for pain management or counseling. *Id.*; *Perez*, 174

N.C. App. at 135–36, 630 S.E.2d at 292–93.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). "This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.* (quoting *Anderson v. Lincoln Constr. Co.,* 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000) (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997)).

However, the Commission's legal conclusions will not be disturbed on appeal if the Commission has correctly apprehended the relevant law, *see Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005), and "there are sufficient findings of fact based on competent evidence to support the [tribunal's] conclusions of law, [even if there are also] erroneous findings which do not affect the conclusions." *Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (first alteration in original) (citation and quotation marks omitted). "Moreover, findings of fact which are left unchallenged by the parties on appeal are

'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.' " *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (citing *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)).

Under North Carolina Workers' Compensation law, "[t]he term 'disability' means 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) (2015). "Initially, claimants must prove the extent and degree of their disability, but once the disability is proven, there is a presumption that the disability continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 283, 458 S.E.2d 251, 257 (1995) (quoting *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 475–76, 374 S.E.2d 483, 485 (1988)). "The employer's filing of a Form 60 is an admission of compensability." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 293 (2005) (citation omitted). Thus,

> because payments made pursuant to a Form 60 are an admission of compensability under the Workers' Compensation Act, these payments are the equivalent of an employee's proof that the injury is compensable. As compensability has been determined by the employer's Form 60 payments, the *Parsons* presumption applies to shift the burden to the employer.

Id. at 136, 620 S.E.2d at 293.

In *Parsons*, "this Court held that where the Commission has made a determination that a worker has suffered a compensable injury, there is a presumption that additional medical treatment is causally related to the original injury." *Gross v. Gene Bennett, Co.,* 209 N.C. App. 349, 351, 703 S.E.2d 915, 917 (2011) (citing *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869). The presumption generally arises because of a prior determination of compensability. *See id.* Indeed, this Court has stated that

> [t]he presumption of compensability applies to future symptoms allegedly related to the original compensable injury. We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability . . . although slight, would still be upon the employer.

Perez, 174 N.C. App. at 136–37 n.1, 620 S.E.2d at 293 n.1. However, "[an] employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Id.* at 135, 620 S.E.2d at 292 (citing *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999)).

Here, "[d]efendants accepted compensation via Form 60 filed January 9, 2012." *See id.* at 136, 630 S.E.2d at 293. Accordingly, the *Parsons* presumption applied, and defendants bore the burden of proving that plaintiff was no longer disabled. *See id.* at 135–36, 630 S.E.2d at 292–93. The Industrial Commission made the following

pertinent findings of fact, which plaintiff does not challenge on appeal, regarding defendant's evidence offered to rebut this presumption:

> 16. On February 4, 2014, plaintiff presented to Dr. Toni Harris at Eastern Carolina Pain Management Center, Inc., for an Independent Medical Evaluation (hereinafter "IME"). The parties did not depose Dr. Harris but agreed that the medical opinions rendered by [Dr.] Harris in her IME report of February 4, 2014 were offered to a reasonable degree of medical probability. In reviewing plaintiff's medical history, Dr. Harris noted that plaintiff's primary care physician, Dr. Ferguson, prescribed Xanax in 2010, "which suggest[s] prior psychological distress." Dr. Ferguson prescribed a higher dose of Hydrocodone continuously from June 2009 until December 30, 2011. On February 12, 2012, Dr. McBrayer reduced the amount of prescribed narcotics. For the remainder of 2012 and 2013, Dr. McBrayer prescribed much less narcotics than Dr. Ferguson had prescribed. The last narcotic prescription plaintiff received was on August 15, 2013. Thereafter, plaintiff did not return to either Dr. McBrayer or Dr. Ferguson for pain medication. Dr. Harris further noted that plaintiff appeared to move "fairly comfortably" during the evaluation. Dr. Harris noted, "It appears [plaintiff] was requiring four pain pills per day before his workers' compensation injury and now has been off of narcotics since August, 2013, this suggests that he is better now than he was before the injury."
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> 17. Based upon her review of plaintiff's medical records and her examination of plaintiff, Dr. Harris assessed plaintiff at MMI with no indications for further treatment. Dr. Harris noted that plaintiff was receiving counseling, which encouraged him to increase his social contact, and that it was reasonable to terminate therapy as of the IME date [4 February 2014]. She further opined that "[plaintiff] is back to his baseline pain level or better than prior to his injury." With respect to return to work, Dr. Harris noted that plaintiff needs a permanent partial impairment rating and

> work restrictions prescribed by Dr. McBrayer. Additionally, she noted that "[plaintiff] has many areas of long standing pain and may be a liability if he returns to physically demanding work."

As plaintiff does not challenge these findings of fact, they are "presumed to be supported by competent evidence" and "are conclusively established on appeal." *See Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118 (citations omitted). Rather, plaintiff argues "the preponderance of the competent evidence shows [p]laintiff met his burden of proving disability."

The opinions offered by Dr. Harris in her 4 February 2014 IME report directly support the Commission's findings of fact regarding plaintiff's physical improvements, which tended to show that plaintiff was no longer medically disabled or had reached MMI (maximum medical improvement). Contrary to plaintiff's contention, the Commission found that based on a preponderance of the evidence, defendants rebutted plaintiff's presumption of disability, but plaintiff did not meet his shifting burden to prove ongoing disability. As the Commission's findings of fact support the conclusions of law determining that plaintiff failed to prove his ongoing entitlement to disability compensation, plaintiff's argument is without merit.

II

Next, plaintiff contends that the competent evidence shows plaintiff's permanent restrictions and preexisting personal characteristics render a job search futile, and accordingly, he is disabled and entitled to ongoing indemnity benefits.

Further, plaintiff contends that testimony and evidence offered by defendants' vocational expert does not rebut plaintiff's showing that a job search would be futile. We disagree.

"An employee in a workers' compensation claim is required to prove 'that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment.' " *McCoy v. Oxford Janitorial Serv. Co.*, 122 N.C. App. 730, 732, 471 S.E.2d 662, 664 (1996) (quoting *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). Once an employee proves his disability, "there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time the injury occurred." *Id.* at 732, 471 S.E.2d at 664 (citations and quotation marks omitted). "Once the employee establishes his disability (reduction in earning capacity), the employer has the burden of showing that 'suitable jobs are available' and that he is capable of getting one of those jobs." *Id.* at 733, 471 S.E.2d 662, 664 (1996) (citing *Tyndall v. Walter Kiddie Co.*, 102 N.C. App. 726, 732, 403 S.E.2d 548, 551 (1991)). If the defendant-employer presents evidence that "suitable jobs are available" that the employee is "capable of getting one of those jobs," such evidence will successfully rebut the presumption, and the burden of proof shifts back to the plaintiff, who then "must present either evidence disputing the evidence presented by the employer or

'show that [he] had unsuccessfully sought such other employment.' " *Id.* (alteration in original) (citing *Tyndall*, 102 N.C. App. at 732, 403 S.E.2d at 551).

In *McCoy*, this Court affirmed the Full Commission's opinion and award terminating temporary total disability where it "concluded that . . . jobs [available to the plaintiff] were suitable and there [were] findings that . . . show[ed] that [the] plaintiff was capable of performing the jobs 'considering his age, education, physical limitations, vocational skills, and experience.' " *Id.* at 733–34, 471 S.E.2d at 664–65 (quoting *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)).

Similarly, in the instant case the Industrial Commission made the following pertinent findings of fact:

> 18. At issue in this claim is whether plaintiff remains disabled as a result of his compensable bilateral shoulder and left knee conditions. Defendants contend plaintiff has been released to return to his pre-injury position with a restriction of lifting no more than 50 pounds overhead. At defendants' request, Barbara Readling, MS, CRC, LPC, a senior vocational case manager with Carolina Case Management, prepared a "Digital Job Analysis" of plaintiff's truck driving position with defendant-employer. During a post-hearing deposition, defendants tendered Ms. Readling as an expert in the field of vocational rehabilitation and vocational case management without objection by plaintiff.
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> 19. In preparing the Digital Job Analysis, Ms. Readling observed the job being performed, took pictures, and used a scale and tape measure to weigh items and measure forces. Plaintiff was present during Ms. Readling's

analysis, and she requested that plaintiff provide any additional information about the job and any feedback about the Analysis.

. . .

22. According to the Digital Job Analysis prepared by Ms. Readling, to open the hood of the truck plaintiff drove with defendant-employer, the driver stands with one foot on the bumper and the other foot on the ground and uses his body weight to open the hood. The weight of the hood was not measured as part of the Analysis.

23. Ms. Readling also performed a labor market survey based upon information provided by defendants. Ms. Readling obtained information to allow her to determine plaintiff's transferable skills, such as work background, physical restrictions, length of time with defendant-employer, and educational background. Plaintiff did not receive a high school diploma and did not obtain a GED. His vocational experience is limited to farm work as an adolescent and more than 30 years as a truck driver. Ms. Readling searched for suitable jobs in a reasonable geographic area to identify positions closely related to plaintiff's 30-year truck driver history. Ms. Readling identified some full-time positions that plaintiff could perform given his transferable skills and permanent lifting restriction. Such jobs included traffic controller/flagger, which did not require lifting any more than 40 pounds, provided on-the-job training, and did not require a GED. She also identified a position as a poultry worker, which involved very limited lifting and had no minimum education requirement. Ms. Readling also located a bus driver position that would have required plaintiff to drive routes and maintain logs. Ms. Readling specifically contacted the human resources manager about plaintiff's candidacy for the bus driver position and learned that plaintiff would be considered for the position despite his lack of GED, given his work experience.

> 24. *Plaintiff testified that he wouldn't know where to begin to try to find another job, and he did not present evidence of a reasonable job search via job search logs or copies of submitted applications*. Defendant-employer did not offer plaintiff a position with its company.
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> 25. Upon being released at MMI, plaintiff was capable of working with a restriction of lifting no more than 50 pounds overhead. Based on the preponderance of the evidence in view of the entire record, the Commission finds that plaintiff has not shown that he made a reasonable, but unsuccessful effort to search for work. Plaintiff has not shown that it was futile for him to search for work due to pre-existing conditions, and plaintiff has not established disability under any of the remaining *Russell* prongs. Therefore, the Commission finds plaintiff has failed to establish disability as of May 9, 2014, the date upon which defendants filed a Form 24 *Application to Terminate or Suspend Payment of Compensation*.

(Emphasis added).

Here, defendants presented evidence of "some full-time positions that plaintiff could perform given his transferable skills and permanent lifting restriction." Such jobs included traffic controller/flagger, poultry worker, and bus driver. None of these jobs required lifting more than forty pounds, and with regard to the bus driver position, "plaintiff would be considered for the position despite his lack of GED, given his work experience." Thus, just as the Commission in *McCoy* considered the plaintiff's "age, education, physical limitations, vocational skills, and experience," so too did the Commission in the instant case. The Commission's findings noted that plaintiff's "vocational experience is limited to farm work as an adolescent and more

than 30 years as a truck driver. Readling searched for suitable jobs in a reasonable geographic area to identify positions closely related to plaintiff's 30-year truck driver history."

Competent evidence supported the Commission's findings of fact. The findings pertaining to Readling's activities and opinions were taken directly from her deposition testimony and written report. Thus, defendants' evidence served to successfully rebut plaintiff's evidence that a job search would be futile. Accordingly, plaintiff's argument is overruled.

III

Plaintiff lastly contends that the Full Commission erroneously concluded that plaintiff failed to meet his burden of proving disability and that plaintiff is entitled to vocational rehabilitation services. Specifically, plaintiff asserts that "the preponderance of the competent evidence shows plaintiff met his burden of proving some degree of disability and that he is entitled to vocational rehabilitation to lessen this period of disability." As we have already determined that the Commission's determination that plaintiff was no longer disabled is supported by competent evidence, we disagree.

Under the Workers' Compensation Act, vocational rehabilitation services fall within the definition of "medical compensation," which requires a showing that the requested services are reasonably required to effect a cure, give relief, or "in the

judgment of the Commission, *will tend to lessen the period of disability*[.]" N.C.G.S. § 97-2(19) (emphasis added). Here, the Commission found and concluded as follows:

> 26. Plaintiff requested Industrial Commission authorization for pain management and counseling for his injuries resulting from the September 22, 2011 event giving rise to this claim. However, the medical treatment plaintiff is requesting is not causally related to his compensable injuries of September 22, 2011, nor is such treatment reasonable and necessary, to effect a cure, give relief, or lessen any disability associated with plaintiff's compensable injuries.
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> 4. Because plaintiff has failed to meet his burden of proof of disability, he is not entitled to vocational rehabilitation services.

Again, plaintiff is operating under a misapprehension of the applicable standard of review when he asserts that the preponderance of the evidence shows he met his burden to prove entitlement to vocational rehabilitation. The Commission's findings and conclusions are well supported and establish that there is no disability and we will not reweigh the evidence on appeal. Accordingly, because plaintiff has failed to meet his burden of proving ongoing disability, the Commission's opinion and award denying plaintiff's claims for medical treatment and medical compensation in the form of vocational rehabilitation is

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).