IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-520

Filed: 5 April 2016

North Carolina Industrial Commission, I.C. No. Y00921

TEDDY D. BENNETT, Employee, Plaintiff,

v.

STOKES COUNTY, Employer, SEDGWICK CMS, INC., Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 28 January 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 October 2015.

The Law Offices of Timothy D. Welborn, P.A., by Timothy D. Welborn, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Ben S. Greenberg, for defendants-appellees.

GEER, Judge.

Plaintiff Teddy D. Bennett appeals from an Opinion and Award of the Industrial Commission concluding that plaintiff failed to meet his burden of proving ongoing disability and is, therefore, no longer entitled to disability benefits under N.C. Gen. Stat. § 97-29 (2015). We hold that competent evidence exists supporting the Commission's findings of fact, which in turn support its determination that plaintiff failed to meet his burden of demonstrating his ongoing incapacity to earn

wages under the tests set out in *Russell v. Lowes Product Distribution,* 108 N.C. App. 762, 425 S.E.2d 454 (1993). Consequently, we affirm the Opinion and Award of the Full Commission.

Facts

At the time of the hearing before the deputy commissioner, plaintiff was 57 years old. He was a high school graduate and had trained as a paramedic. He worked as a paramedic for defendant for more than 30 years before retiring, although after retiring, he continued to work part-time for defendant as a paramedic.

On 17 April 2012, plaintiff suffered a back injury lifting a stretcher onto an ambulance. On 14 May 2012, defendants filed a Form 60, accepting the injury as compensable and agreeing to pay plaintiff weekly temporary compensation in the amount of $265.94.

After seeing plaintiff on 13 September 2012, Dr. Mark Hnilica of Forsyth Brain and Spine Surgery gave plaintiff the following work restrictions: "[plaintiff] can return to light duty work with primarily sedentary work or rare lifting up to 15 pounds with no repetitive bending, stooping, or squatting . . . this would not allow for him to return as a paramedic . . . ." Plaintiff again saw Dr. Hnilica on 3 April 2013. At that visit, Dr. Hnilica concluded that plaintiff had reached maximum medical improvement ("MMI") and was capable of full-time, light-duty work, which limited

him to lifting no more than 15 pounds and only occasional bending, stooping, or twisting, and restricted him from prolonged standing or walking.

On 28 May 2013, plaintiff was examined by Dr. Richard Ramos of Greensboro Orthopaedics. Dr. Ramos assigned plaintiff a one percent permanent partial disability rating to the lumbar spine because of plaintiff's persistent lower back pain.

At the time of the compensable injury, plaintiff occasionally supplemented his income by working at his brother's pig farm and by collecting scrap metal. While plaintiff was collecting scrap metal after the date of his injury, defendants obtained surveillance video allegedly showing plaintiff performing work "above and beyond his permanent work restrictions." Based on the surveillance video, defendants filed a Form 24 "Application to Terminate or Suspend Payment of Compensation" on 29 October 2013. This Form 24 request was initially denied by Special Deputy Commissioner Michelle Denning on 3 December 2013. However, on appeal before Deputy Commissioner James C. Gillen, the deputy commissioner entered an opinion and award concluding that plaintiff had failed to prove that "subsequent to 3 April 2013 he was incapable of work in any employment, that he was unable to obtain employment after a reasonable effort, or that it was futile for him to seek employment because of other factors."

The Full Commission affirmed the deputy commissioner's opinion and award on 28 January 2015, concluding that plaintiff had failed to satisfy his ongoing burden

of proving disability because he had not demonstrated his incapacity to earn wages pursuant to the test set out in *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission, therefore, determined that as a result of the 17 April 2012 compensable injury, plaintiff was totally disabled for the closed period 17 April 2012 through 3 April 2013 when he was released to return to work by Dr. Hnilica. The Commission concluded that plaintiff was entitled to permanent partial disability compensation based on his rating for a period of three weeks at a rate of $265.94 per week. Finally, the Commission awarded defendants a credit in the amount of $18,349.86 "for the temporary total disability compensation paid subsequent to Plaintiff's date of [MMI], 3 April 2013." Plaintiff timely appealed to this Court.

Discussion

As a general matter, " '[a]ppellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.' " *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Id.* However, "[t]he Commission's conclusions of law are reviewable *de novo*." *Id.*

I

We first address plaintiff's argument that the Full Commission committed reversible error by placing the burden of proving ongoing disability on him when defendants had filed a Form 24 application to terminate his benefits. Because defendants appealed from an initial administrative decision denying their Form 24 request, all parties agree that North Carolina Industrial Commission Rule 404 applies. It provides in pertinent part:

> Either party may appeal the Administrative Decision and Order of the Commission . . . . A Deputy Commissioner shall conduct a hearing which shall be a hearing de novo. . . . The employer has the burden of producing evidence on the issue of the employer's application for termination or suspension of compensation.

Workers' Comp. R. of N.C. Indus. Comm'n 404(g), 201 Ann. R. N.C. 1370.

As the Commission noted, Rule 404 by its own terms imposes only a burden of production. When, as here, the defendant has accepted a claim pursuant to a Form 60, "[t]he burden of proving disability . . . remains with plaintiff." *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 160, 542 S.E.2d 277, 282 (2001). "[A]dmitting compensability and liability . . . by the use of a Form 60 . . . does not create a presumption of continuing disability . . . ." *Id.* at 159-60, 542 S.E.2d at 281-82.

Here, the record indicates that Deputy Commissioner Gillen properly observed at the beginning of the 28 March 2014 hearing that it was "defendants' burden to

move forward." Shortly thereafter, counsel for defendants began examining plaintiff regarding his search for employment following Dr. Hnilica's determination that he had reached MMI as of 3 April 2013. Based on the specific evidence from this testimony, Deputy Commissioner Gillen granted defendants' Form 24 request. Plaintiff then appealed to the Full Commission, which upheld Deputy Commissioner Gillen's ruling and concluded that Rule 404, "does not affect Plaintiff's ongoing burden of demonstrating disability[,]" citing *Sims* in support of this conclusion. The Commission did not err in placing the burden of proof on plaintiff to establish his ongoing disability.

II

Plaintiff next argues that the Commission's conclusion that plaintiff was no longer disabled as of his MMI date of 3 April 2013 is not supported by adequate findings of fact. Specifically, plaintiff claims that "[t]he Opinion and Award herein does not contain a specific finding of fact that Plaintiff-Appellant has been capable of working after April 3, 2013 or that his disability ended as of that date."

To the contrary, the Commission, after summarizing the evidence from Dr. Hnilica regarding his assessment of plaintiff's condition, then specifically found, based on that evidence: "[A]s of 3 April 2013, Plaintiff had reached maximum medical improvement and was released by Dr. Hnilica to return to full-time, light-duty work." This finding of fact establishes that plaintiff was no longer totally disabled and was

capable of working. This is not a case in which the Commission has simply recited the evidence without making its own findings of fact. *See Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977) (holding that when findings are "mere recitals of the evidence," they "are not sufficiently positive and specific to enable this court to judge the propriety of the order"). Instead, after summarizing the evidence, the Commission made its own finding of fact based on that evidence.

With respect to plaintiff's disability, after Dr. Hnilica released plaintiff to return to work, the question remained whether plaintiff could obtain work within his restrictions. The Commission also made specific findings of fact -- some of which are incorporated within the Commission's conclusions of law -- establishing that plaintiff failed to meet his burden of proving he is incapable after his injury of earning the same wages he had earned before his injury in the same or different employment. The Commission's Opinion and Award is, therefore, supported by adequate findings of fact.

III

Next, Plaintiff argues that the Full Commission improperly concluded that he was no longer disabled as of 3 April 2013. In order to conclude that a plaintiff is disabled, the Commission must find "that plaintiff was incapable after his injury of earning the same wages he had earned before his injury" in the same or different

employment, and "that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

However, "[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The employee may meet this burden by proving:

> (1) . . . that he is physically or mentally, as a consequence of the work related injury, incapable of work in *any* employment; (2) . . . 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) . . . 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) . . . that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (emphasis added) (internal citations omitted). The Full Commission, in its Opinion and Award terminating plaintiff's benefits as of 3 April 2013, systematically addressed the first three tests set out in *Russell*. The fourth is inapplicable.

With respect to the first test, the Full Commission concluded that although "Plaintiff was incapable of work in any employment . . . from 27 April 2012 through 3 April 2013[,]" the fact that he could return to full-time, light-duty work as of 3 April 2013 meant that "Plaintiff has failed to establish ongoing disability under the first test set forth in *Russell*." While plaintiff focuses on his inability to return to work as a paramedic, the first *Russell* test requires a showing that he is incapable of work in

any employment. The Commission properly concluded that the medical evidence established that plaintiff failed to meet the first test in *Russell*.

As for the second prong of *Russell*, the Full Commission found that "Plaintiff has not established ongoing disability under the second *Russell* test" because he "made only two or three inquiries with local businesses within a five mile radius of [his] home[,] . . . had not expanded his job search to areas with more employment opportunities such as Winston-Salem, which is approximately thirty miles from Plaintiff's home[,] . . . [and] [s]uch effort is not indicative of a reasonable job search." Plaintiff simply disagrees with the Commission's view of his job search and urges that the Commission should have found his explanations for his job search credible. On appeal, however, we may not revisit the Commission's credibility determinations.

We note that the Workers' Compensation Act defines "[s]uitable employment" as "employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located *within a 50-mile radius* of the employee's residence at the time of injury . . . ." N.C. Gen. Stat. § 97-2(22) (2015) (emphasis added). Based on plaintiff's testimony that he did not seek any employment within an area "with more employment opportunities" only 30 miles away from his home, the Commission could reasonably conclude that plaintiff did not conduct an adequate job search.

Lastly, the Full Commission concluded plaintiff failed to satisfy the third test of ongoing disability because given his education, qualifications, and experience, he was unable to demonstrate "that it would be futile to search for work due to preexisting conditions." In support of that conclusion, the Commission pointed to plaintiff's own testimony that "he feels that he is qualified for other types of work, such as . . . a driving position for a wrecker service . . . [and] an overseer position that involved managing a livestock feed company[.]"

Plaintiff, however, relies on *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 359, 734 S.E.2d 125, 129 (2012), in which this Court upheld the Commission's conclusion that it would be futile for the plaintiff to seek employment based on the Commission's findings that plaintiff was "45 years old, had only completed high school, and his work experience was limited to heavy labor jobs"; plaintiff was "restricted to lifting no more than 15 pounds"; and plaintiff "was required to avoid repetitious bending, lifting, and twisting." Although the findings noted in *Thompson* are similar to the Commission's findings in this case, the *Thompson* Court emphasized that "the Commission was not required to reach this conclusion given the evidence," but that the Court was required to affirm the decision because the Commission's "decision is sufficiently supported under our standard of review." *Id.*

In this case, the standard of review likewise requires that we uphold the Commission's conclusion that "Plaintiff has not established ongoing disability under

the third *Russell* test" because the conclusion is supported by findings of fact supported by the evidence, including plaintiff's own testimony that he has certifications in his field, that he has experience in other jobs, and that he feels capable of other work, including managerial and supervisory positions.

IV

Lastly, plaintiff contends that the Commission erred by awarding defendants a credit for benefits paid after the date of 3 April 2013. However, plaintiff's only argument regarding the credit is that defendants failed to meet their burden of showing that plaintiff's benefits should be terminated and that, to the contrary, he met his own burden of establishing compensability for his ongoing disability. Since we have already held that the Commission did not err in concluding otherwise, we need not address this argument further. Plaintiff has failed to show that the Commission erred in awarding defendants a credit "for the temporary total disability compensation paid subsequent to Plaintiff's date of . . . 3 April 2013" in the amount of $18,349.86.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).