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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-363

Filed 19 December 2023

N.C. Industrial Commission, I.C. No. 16-053823

KERRY PORTER, Employee, Plaintiff,

v.

ALLIANCE CREDIT COUNSELING, Employer, THE HARTFORD, Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 27 January 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2023.

The Sumwalt Group, by Vernon Sumwalt and Christa Sumwalt, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Lindsay N. Wikle, for defendants-appellees.

GORE, Judge.

Kerry Porter (“plaintiff”) appeals from an Opinion and Award entered for the full Commission on 27 January 2023, which reversed the deputy commissioner and restricted plaintiff’s remedy to permanent partial disability. This Court has jurisdiction pursuant to N.C.G.S. §§ 7A-29(a) and 97-86. Plaintiff raises five issues

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on appeal, which are appropriately consolidated into two: (i) whether the full Commission properly denied plaintiff temporary total disability benefits, and (ii) whether the full Commission abused its discretion in denying plaintiff's motion to introduce new evidence. Upon review, we affirm.

I.

On 27 November 2016, plaintiff "injured his back and left wrist while moving furniture" for Alliance Credit Counseling ("defendant-employer"). Defendant-employer and The Hartford (collectively "defendants") provided compensation for this injury, and plaintiff's doctors assigned work restrictions even though plaintiff continued to work. Defendants accepted plaintiff's worker's compensation claim through an Industrial Commission Form 63.

On 31 July 2019, plaintiff "was discharged from employment with defendant-employer due to funding concerns." These funding concerns were unconnected with plaintiff's compensable back injury. Approximately 50% of the employees for defendant-employer were terminated from employment at this time. Plaintiff agreed "the layoffs were necessary for the company to continue to exist." Prior to termination, plaintiff performed his normal job duties, "day-to-day accounting and processing of client payments, etc." with no performance issues. Following his termination on 31 July 2019, plaintiff began looking for new employment within his work restrictions.

On 25 May 2021, a deputy commissioner of the North Carolina Industrial

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Commission filed an Opinion and Award, allowing ongoing disability compensation under N.C.G.S. § 97-29 after plaintiff reached maximum medical improvement on 10 January 2019. Defendants appealed on 1 June 2021.

During the appeal, plaintiff received a favorable decision on his claim for disability insurance from the Social Security Administration (“SSA”) dated 19 August 2021. On 4 September 2021, plaintiff filed a motion to introduce new evidence consisting of the favorable SSA decision, the SSA claim file, as well as anticipated testimony from a vocational expert.

On 27 January 2023, the full Commission filed an Opinion and Award reversing the deputy commissioner and restricting plaintiff’s remedy to permanent partial disability as of 10 January 2019. The full Commission concluded, in part, that:

Plaintiff failed to show that his inability to find employment after being laid off was *because of* the work-related injury. Plaintiff’s testimony shows that his termination from employment was solely due to economic factors confronting defendant-employer when he was one of four employees laid off. Further, plaintiff has shown capability of earning his pre-injury wages at his pre-injury job before being laid off. Plaintiff returned to his pre-injury job immediately after the injury, where he continued to work for over two years. While plaintiff has conducted a significant job search following his termination, he has not otherwise presented evidence to establish that his inability to find employment is a result of is compensable injury as his permanent restrictions do not limit his ability to work in his prior position, or any other sedentary position. Having failed to establish a causal connection between his inability to find employment and his compensable back

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injury, the full Commission concludes that plaintiff is not entitled to disability compensation following his termination on 19 July 2019.

The full Commission also denied plaintiff's motion to introduce new evidence, stating, as is relevant here:

[I]n the case at bar, the medical records and documentation, excluding the SSA decision, which plaintiff seeks to introduce into the record were available to plaintiff prior to the close of the record on 26 November 2020 by the Deputy Commissioner. Furthermore, plaintiff could have presented vocational testimony before the close of the record.

Plaintiff timely filed notice of appeal to this Court on 13 February 2023.

II.

A.

Plaintiff asserts “the full Commission’s current findings of fact substantiate [plaintiff’s] disability under [N.C.G.S] § 97-29 after his termination on 31 July 2019, contrary to the Commission’s determination that he was no longer disabled after maximum medical improvement.” Plaintiff contends “the findings of fact by the full Commission compel a conclusion that he satisfied the second method of proving ‘disability’ under *Russell v. Lowe’s Prod. Distrib.*, 108 N.C. App. 762 (1993).” We disagree.

Appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. In weighing the evidence, the Commission is the

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sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission may reject entirely any testimony which it disbelieves. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This 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. Additionally, failure to assign error to the Commission's findings of fact renders them binding on appellate review. This Court reviews the Commission's conclusions of law de novo.

Raper v. Mansfield Sys., 189 N.C. App. 277, 281 (2008) (cleaned up).

Here, plaintiff has not challenged any of the full Commission's findings of fact as unsupported by competent evidence in the record. Unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Dreyer v. Smith*, 163 N.C. App. 155, 156–57 (2004) (quotation marks and citation omitted). Further, plaintiff argues "the full Commission's findings of fact compel the opposite conclusion than the one reached," yet plaintiff fails to identify any specific conclusion of law that is unsupported by the unchallenged — and therefore binding — findings of fact in the full Commission's Opinion and Award. Plaintiff must challenge "each conclusion it believes is not supported by the evidence. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112 (1999) (citations omitted).

For example, plaintiff fails to challenge any portion of the full Commission's

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conclusion of law 10 concerning the third element of showing disability under *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593 (1982). Under our Worker’s Compensation Act, “[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.G.S. § 97-2(9) (2022). Our Supreme Court has stated:

[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) *that this individual’s incapacity to earn was caused by plaintiff’s injury.*

Hilliard, 305 N.C. at 595 (emphasis added).

The Opinion and Award states plaintiff “failed to establish a causal connection between his inability to find employment and his compensable back injury.” Throughout his brief, plaintiff engages in lengthy discussion about alternative methods of proving disability under *Russell*. However:

[A] claimant seeking to establish that he is legally disabled must prove all three statutory elements as explained in *Hilliard*. He may prove the first two elements through any of the four methods articulated in *Russell*, but these methods are neither statutory nor exhaustive. In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury.

Medlin v. Weaver Cooke Constr., LLC, 367 N.C. 414, 422 (2014).

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As stated in *Medlin*, the *Russell* factors concern the first two elements of *Hilliard*, not the third element — causation. A discussion of alternative findings under *Russell* is irrelevant where the element of causation is prerequisite and uncontested. Plaintiff's failure to challenge any specific finding of fact as unsupported by competent evidence, or any specific conclusion of law (or portion thereof) as unsupported by the findings, constitutes waiver and acceptance of the full Commission's determination. See *Fran's Pecans*, 134 N.C. App. at 112. Thus, the full Commission's denial of temporary total disability benefits must be affirmed.

B.

Plaintiff also argues this case should be remanded because, in his view, “the new period of disability starting after his termination is a ‘change of condition’ under N.C.G.S. § 97-47.” Plaintiff acknowledges the issue of “change of condition” was never before the full Commission as plaintiff “had no need to file for a change of condition before the full Commission filed its Opinion and Award.” This issue was never litigated before the full Commission, and thus, is not properly before us on appeal. See *Morris v. E.A. Morris Charitable Found.*, 161 N.C. App. 673, 680 (2003) (cleaned up) (“This Court has long held that issues and theories of a case not raised below will not be considered on appeal, and these issues are not properly before this Court.”).

C.

Plaintiff argues the full Commission misapprehended the law, and therefore abused its discretion, in denying his motion to introduce new evidence consisting of:

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(1) a favorable decision on his claim for federal disability insurance benefits filed by the SSA on 19 August 2021; (2) vocational testimony relevant to the third method of proving disability under *Russell*; and (3) the SSA disability claims file. We disagree.

Under N.C.G.S. § 97-85, if a party gives proper notice of appeal from the decision of a deputy commissioner, “the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]” § 97-85(a) (2022). “Whether such good ground has been shown is discretionary and will not be reviewed on appeal absent a showing of manifest abuse of discretion.” *Keel v. H & V, Inc.*, 107 N.C. App. 536, 542 (1992) (quotation marks and citation omitted).

Plaintiff argues the full Commission “misapprehended the law” in denying his motion, but it is unclear based on plaintiff’s arguments, what law the full Commission misapprehended. The full Commission determined the *new evidence* that plaintiff sought to admit, excluding the SSA decision itself, was available prior to the close of evidence. Plaintiff could have presented that evidence; he elected not to. Additional documents, medical records, and testimony upon which the SSA based its decision did not suddenly materialize for the first time after the deputy commissioner closed the record.

As previously discussed, the first two statutory elements of disability as explained in *Hilliard* can be shown through the four methods articulated in *Russell*. See *Medlin*, 367 N.C. at 422. Plaintiff may not circumvent his burden of proof on the

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third, separate statutory element of causation. Moreover, conclusions of law in an SSA decision itself are not binding on the Commission. *See Lackey v. N.C. Dep't of Human Res.*, 306 N.C. 231, 236 (1982) (noting that “federal decisions . . . [are] persuasive authority on the relevant issues.”). Plaintiff fails to demonstrate the full Commission abused its discretion, or otherwise acted under a misapprehension of law, in denying his request to admit the SSA decision or other evidence that *was* available prior to the record closing.

III.

For the foregoing reasons, we affirm the full Commission’s Opinion and Award.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

Report per Rule 30(e).