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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-696

Filed 5 March 2024

N.C. Industrial Commission No. 20-009966

NICHOLAS FENTY, Employee-Plaintiff,

v.

WAKE COUNTY PUBLIC SCHOOL SYSTEM/NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, Employer, SELF-INSURED (SEDGWICK CMS, Third-Party Administrator), Defendant.

Appeal by plaintiff from opinion and award entered 11 April 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2024.

Hardison & Cochran, PLLC, by J. Adam Bridwell, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew E. Buckner, for defendant-appellee.

ARROWOOD, Judge.

Nicholas Fenty (“plaintiff”) appeals from the North Carolina Industrial Commission’s (“the Commission”) opinion and award denying his claims for temporary total disability benefits after 28 June 2021. Plaintiff contends the Commission erred in concluding that his employer Wake County Public School System and the Department of Public Instruction (together “defendant”) successfully

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rebutted plaintiff's disability, and the Commission erred in failing to conclude plaintiff was not at maximum medical improvement for his compensable injury. For the following reasons, we affirm the Commission's opinion and award.

I. Background

On 25 February 2020, plaintiff sustained an injury to his right ankle in the course of his employment as a head custodian at Vance Elementary School. Plaintiff was transported to WakeMed Cary where he was diagnosed with a closed bimalleolar fracture in his right ankle, and on 3 March 2020, Ramona Albrecht, PAC, wrote plaintiff out of work until he could be seen by an orthopedist. Defendant admitted plaintiff's right to compensation to the Commission and reported that they were compensating plaintiff temporary total compensation as of 4 March 2020. Plaintiff saw Dr. Paul Kerner ("Dr. Kerner") at EmergeOrthopedics for treatment on 6 March 2020 and had surgery on his ankle on 11 March 2020. On 24 March 2020, Dr. Kerner reported that plaintiff was to remain non-weight bearing and was not permitted to drive. Dr. Kerner removed the pin in plaintiff's ankle on 21 April 2020 and ordered plaintiff perform only seated work until a follow-up appointment. Plaintiff began physical therapy on 18 May 2020. On 2 June 2020, Dr. Kerner lifted all restrictions on plaintiff's activity, meaning he could return to full work duty.

Plaintiff returned to Dr. Kerner on 30 June 2020 because he complained of continuing pain and muscle spasms, and Dr. Kerner ordered plaintiff to light duty and seated work for six weeks. On 22 September 2020, plaintiff attended a follow-up

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appointment with Dr. Kerner, and Dr. Kerner noted plaintiff was not back to work and complained of pain in his ankle after prolonged periods of standing or walking. Dr. Kerner reported that he felt plaintiff was “at maximum medical improvement” and had “gone longer than most with this injury without returning to normal duties at work.” Dr. Kerner ordered a functional capacity evaluation (“FCE”) and that plaintiff remain on seated work restrictions pending the results of the FCE.

On 3 December 2020, plaintiff presented at EmergeOrthopedics to complete the FCE, and the results indicated plaintiff demonstrated “a full LIGHT capacity with abilities into the MEDIUM and HEAVY range. Positional limitations were demonstrated in standing for greater than an occasional basis.” Plaintiff’s abilities did not meet the job’s demands of frequently lifting 25 pounds, occasionally lifting 50 pounds, or occasionally pushing/pulling 50 pounds. The FCE ultimately “suggest[ed] the presence of fully reliable reports of pain and disability.”

Plaintiff saw Dr. Kerner on 15 December 2020, and Dr. Kerner ordered plaintiff to complete work conditioning for four weeks and authorized plaintiff to return to light work duty. On 12 January 2021, Dr. Kerner released plaintiff to full work duty without restrictions, reporting that plaintiff reached maximum medical improvement with a five percent permanent partial impairment due to his injury. Plaintiff sought a second opinion from Dr. Kevin Logel (“Dr. Logel”) at Raleigh Orthopaedic Clinic on 18 March 2021, and Dr. Logel reported that plaintiff had stiffness and pain in his ankle and likely would not have significant change in his

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function. Dr. Logel further opined that if plaintiff “fails to improve to a level he can tolerate returning to his previous job then it may be reasonable to consider vocational rehabilitation for job placement and something that he is more comfortable doing.”

On 25 March 2021, defendant submitted an application to terminate payment of compensation with the Commission. Defendant argued that because Dr. Kerner released plaintiff and Dr. Logel did not place any work restrictions on plaintiff, plaintiff was no longer disabled. Plaintiff argued in response that Dr. Logel reported plaintiff could not return to his pre-injury position and remains disabled.

Special Deputy Commissioner Lucy Austin (“Commissioner Austin”) disapproved defendant’s application to terminate compensation on 28 April 2021. Commissioner Austin determined that “[c]onsidering Dr. Logel’s indication that plaintiff may not improve to a level he could tolerate returning to his previous job, the documentation submitted was insufficient in the administrative forum to show that plaintiff was medically released without restrictions and is no longer totally disabled[.]”

Defendant appealed the decision, and a hearing occurred on 23 September 2021, Chief Deputy Commissioner Tamara R. Nance (“Chief Commissioner Nance”) presiding. Claims examiner Rachel Lowe (“Ms. Lowe”) testified regarding plaintiff’s treatment, noting that Dr. Logel did not assign any work restrictions to plaintiff in March 2021. Ms. Lowe told the Commission that she

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reached out to Wake County Public Schools to confirm plaintiff could return to work on 8 March 2021, and plaintiff did not return on that date nor at any point since.

Ms. Lowe testified that 10 August 2021, plaintiff returned to Dr. Kerner for re-evaluation, and Dr. Kerner ordered an EMG nerve conduction. Plaintiff returned to Dr. Kerner on 24 August 2021, and Dr. Kerner ordered an evaluation for complex regional pain syndrome (“CRPS”) but maintained plaintiff’s work status as full duty without restrictions. Plaintiff had never been diagnosed with CRPS. Martha Freeman (“Ms. Freeman”), the Director of Worker’s Compensation for Wake County Public Schools, testified that plaintiff had not attempted to return to his position as head custodian and had not contacted the school system about any concerns about the position. Plaintiff also testified at the hearing, describing his pain and his previous job responsibilities as head custodian. Plaintiff also presented the Commission with a log of his job applications from 28 June 2021 to 17 September 2021.

A deposition of Dr. Kerner occurred 16 November 2021. Dr. Kerner described the care he provided plaintiff and reiterated his opinion that in January 2021, plaintiff had reached maximum medical improvement and could return to his job as a custodian full duty without restriction. He noted that for purposes of this determination, pain levels do not “play a significant role in determining what people can or can’t do.” Dr. Logel also gave testimony on 8 November 2021. He testified that plaintiff had “excellent care” and he felt “everything had been done appropriately”

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with regard to plaintiff's treatment. Dr. Logel noted that plaintiff's work restrictions should be based on plaintiff's FCE results, but he did not change Dr. Kerner's assignment of full duty, no restrictions. Additionally, Dr. Logel stated that Dr. Kerner's estimation of a five percent permanent disability was reasonable without a diagnosis of CRPS.

A deposition of Kim Deal, MS, CRC, IPEC, CEAS ("Ms. Deal"), occurred 11 November 2021. Ms. Deal conducted a Labor Market Survey assessing plaintiff's previous job description, his medical and work history, the general labor market in Wake County, and what jobs would be appropriate for plaintiff given that information. Ms. Deal identified 22 jobs in Wake County that she believed plaintiff was qualified for, and Ms. Deal ultimately opined that plaintiff is employable in one of those positions based on his education, work experience, and capabilities.

On 7 April 2022, Chief Commissioner Nance entered an award for plaintiff but concluded plaintiff was not entitled to temporary total disability after 12 January 2021. Both plaintiff and defendant appealed the decision to the full Commission.

The full Commission entered an opinion and award on 11 April 2023 containing the following relevant findings of fact:

38. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff reached MMI on January 12, 2021, and has a five percent (5%) permanent partial impairment rating to his right ankle as a result of his February 25, 2020, injury. . . .

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39. . . . Plaintiff has permanent work restrictions of only occasional standing and walking, as those terms are defined in the FCE[.] . . .

40. . . . [T]he physical demands of the head custodian position exceed Plaintiff's permanent work restrictions. . . .

41. . . . Plaintiff did not refuse suitable employment when he did not return to his position as head custodian for Defendant. . . .

42. . . . Plaintiff failed to conduct a reasonable job search following his medical release on January 12, 2021. Specifically, Plaintiff failed to look or apply for any jobs for approximately five months, and he did not follow up with any potential employers after submitting applications. . . .

43. . . . [S]uitable jobs were available for Plaintiff and . . . he was capable of getting one, taking into account his physical and vocational limitations. . . .

The opinion also contained the following relevant conclusions of law:

5. In the present matter, because of Plaintiff's compensable injury and his subsequent medical treatment, he was incapable of returning to work until January 12, 2021, when he reached MMI and Dr. Kerner released him to return to work in accordance with the results of the FCE. Accordingly, Plaintiff is entitled to temporary total disability compensation from the date of his injury on February 25, 2020, until January 12, 2021. Moreover, Plaintiff did not refuse suitable employment when he did not return to his position after January 12, 2021, because the position was not within his work restrictions and Defendant did not offer alternative employment. Given Plaintiff's restrictions, however, he did not establish that he was incapable of any employment as of January 12, 2021, and he did not begin searching for other employment until June 28, 2021. Accordingly, Plaintiff is not entitled to disability compensation from January 12, 2021, to

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June 28, 2021.

6. . . . In the present matter, Plaintiff's restrictions are causally related to his compensable ankle condition, and beginning on June 28, 2021, he conducted a reasonable, but unsuccessful job search for work within his restrictions. Accordingly, Plaintiff has met his burden of proving disability related to his compensable injury as of June 28, 2021. . . .

7. . . . Defendant met its burden of proving that there are suitable jobs available to Plaintiff, taking into account his physical and vocational limitations, and that he would be capable of obtaining sought employment. Because Defendants rebutted Plaintiff's evidence of disability, Plaintiff is not entitled to ongoing total disability benefits after June 28, 2021, pursuant to N.C. Gen. Stat. § 97-29 (2022).

8. . . . [I]n the discretion of the Commission, Defendant is entitled to a credit for any overpayment of temporary total disability compensation paid to Plaintiff after January 12, 2021.

Plaintiff entered timely notice of appeal 9 May 2023.

II. Discussion

On appeal, plaintiff argues that the full Commission erred in concluding that plaintiff was not entitled to temporary total disability after 28 June 2021. For the following reasons, we affirm.

Defendant argues that plaintiff did not explicitly challenge the Commission's findings of fact, making them binding on appeal. *See Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423 (2014) (“[W]here findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal.”). We note that plaintiff does

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not specifically enumerate each finding and conclusion he challenges in his argument; however, it is not necessary for us to determine whether plaintiff is bound by the findings because “[t]his Court’s review [of opinions and awards rendered by the Industrial Commission] is limited to a consideration of whether there was *any competent evidence* to support the Commission’s findings of fact and whether these findings of fact support the Commission’s conclusions of law.” *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 682 (1996) (citing *McLean v. Roadway Express*, 307 N.C. 99, 102 (1982)). The “any competent evidence” rule provides that the Commission’s findings of fact are conclusive on appeal if they are supported by any competent evidence, even if there is evidence supporting a finding to the contrary. *Id.* at 682–83 (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 49 (1981)).

To establish disability for purposes of workers’ compensation, a plaintiff can show the following:

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

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765 (1993) (citations omitted). When an employee presents substantial evidence of disability, the burden shifts to the employer to rebut the employee's showing with "evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one*, taking into account both physical and vocational limitations." *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73 (1994) (emphasis in original) (citations and internal quotation marks omitted).

Here, the Commission described the basis for each of its findings of fact. The Commission found that plaintiff reached maximum medical improvement on 12 January 2021 and has a five percent permanent partial impairment rating as a result of the injury. The Commission stated that in making this finding, it considered "the medical records demonstrating that on January 12, 2021, Dr. Kerner determined that Plaintiff was at MMI and released him to return to work[.]" "the testimony of Dr. Kerner reiterating his documented opinion[.]" and "Dr. Logel's opinion that he agreed with Dr. Kerner's assessment of Plaintiff's impairment rating." The Commission also found that plaintiff had permanent work restrictions of only occasional standing and walking based on the FCE, and the physical demands of the head custodian position exceeded these work restrictions based on the job description as well as plaintiff's testimony that "he was required to stand or walk for roughly seven hours each day." The Commission further found that plaintiff did not refuse suitable employment by not returning to his job that was outside his work restrictions

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but that he did not conduct a reasonable job search from 12 January 2021 to 28 June 2021. Plaintiff submitted a log of job applications beginning 28 June 2021, and the record suggests that plaintiff did not search for a job from the time Dr. Kerner released him in January until June. The Commission also found that, based on Ms. Deal's testimony and job market report, suitable jobs were available for plaintiff and he was capable of getting one. Accordingly, all of the relevant findings of fact were supported by competent evidence in the record, and these findings are conclusive on appeal.

Additionally, the Commission's conclusive findings support its conclusions of law. The Commission's conclusion that plaintiff was not entitled to disability compensation from 12 January 2021 to 28 June 2021 is supported by the finding that plaintiff did not conduct a reasonable job search after he was medically released. While plaintiff met his burden of showing disability after 28 June 2021, the Commission concluded defendant "met its burden of proving that there are suitable jobs available to Plaintiff, taking into account his physical and vocational limitations, and that he would be capable of obtaining sought employment." This conclusion of law is supported by the Commission's finding the same. Finally, the Commission's conclusion that defendant "is entitled to a credit for any overpayment of temporary total disability compensation paid to Plaintiff after January 12, 2021" is supported by its finding that plaintiff was not entitled to benefits after 12 January 2021.

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Accordingly, the Commission's findings of fact support its conclusions of law, and the Commission did not err in its opinion and award.

III. Conclusion

For all the foregoing reasons, the Commission's opinion and award is affirmed.

AFFIRMED.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).