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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-319

Filed 3 December 2024

North Carolina Industrial Commission, No. 21-015998

SHERIKA ARRINGTON, Employee-Plaintiff,

v.

MERCK PHARMACEUTICAL
MANUFACURING, Employer, BROADSPIRE, Carrier, Defendants.

Appeal by Plaintiff from Opinion and Award entered 24 January 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 September 2024.

Hardison and Cochran, PLLC, by Attorney J. Jack Hardison, for plaintiff-appellant.

Freedman Law Offices, by Attorney Brian M. Freedman, for defendant-appellee.

STADING, Judge.

Sherika Arrington (“Plaintiff”) appeals from an Opinion and Award entered on 24 January 2024 by the Full Commission of the North Carolina Industrial Commission (“Commission”). The Commission ordered, among other findings and

conclusions, that Merck Pharmaceutical Manufacturing (“Defendant”) pay Plaintiff’s medical expenses, including those to be incurred, because of Plaintiff’s compensable cervical spine injury. But the Commission denied Plaintiff’s request for disability compensation. Plaintiff appealed, contesting the latter ruling. Upon review, we discern no error and affirm the Commission’s Opinion and Award.

I. Background

Plaintiff began working for Defendant in May 2015 and continued until the work injury on 9 April 2021. Before the injury, Plaintiff was employed as a small bottles department operating technician, where her primary duties involved operating machines to fill medication packaging and bottles. She operated the “Marginal Modular Cremer,” a machine that requires the assistance of a worker pushing and pulling a component.

On 9 April 2021, Plaintiff had trouble pushing and pulling modules #3 and #4 on Line 8. She submitted a work order for a mechanic to diagnose the machine and sought assistance from a coworker. The coworker, an operations technician for Defendant, attempted to help by rearranging the modules, but this did not resolve the issue. Plaintiff and the coworker noticed that operating the machine required more force than usual.

A mechanic employed by Defendant responded to the work order and adjusted modules #3 and #4, demonstrating to Plaintiff how to break down the modules properly. The mechanic applied lubrication to help the modules slide more easily.

This was the first time Plaintiff experienced these difficulties; she later testified it was unusual.

After working with the coworker and mechanic to fix the modules, Plaintiff took a break. Upon returning, she noticed increasing discomfort in her right shoulder. She discussed her symptoms with the coworker and sought medical care from an on-site nurse. After reporting her symptoms, Plaintiff did not use the problematic machines again.

Defendant created a report documenting the 9 April 2021 incident: “Operator reported that the Cremer Filling Module Cart on Line 8 was extremely difficult to move and required more than usual exertion. The mechanic assessed the cart and applied lubricant. [Plaintiff] contacted Health Services and reported discomfort in their arm/shoulder approximately 2 hours after the pushing/pulling activity” The report included photo evidence of Plaintiff performing her duties with help from coworkers. Statements from witnesses confirmed that Plaintiff had difficulty pushing/pulling the modules on the day of the injury.

Upon experiencing shoulder discomfort, Plaintiff sought treatment from an occupational nurse. On the date of the injury, Plaintiff reported to the nurse, describing right shoulder soreness and pain after working with the modules. The nurse performed an examination; noted no prior injuries to the shoulder, back, or neck; and advised Plaintiff to avoid heavy lifting over the weekend. There were no initial complaints of neck pain.

Plaintiff also visited the Nash Emergency Department, where she again reported “right shoulder pain after moving heavy machinery.” The attending physician diagnosed acute right shoulder pain and prescribed anti-inflammatories and steroids. On 12 April 2021, Plaintiff returned to the on-site nurse, continuing to report right shoulder pain, and was referred to Wilson Immediate Care for further treatment.

At Wilson Immediate Care, a physician’s assistant evaluated Plaintiff, who reported a throbbing sensation in her right shoulder while pushing the modules. A right shoulder x-ray was taken, and the physician’s assistant prescribed medication and assigned light-duty restrictions, limiting the use of her right shoulder. The on-site nurse communicated these restrictions to Defendant, resulting in a “duty disposition letter” assigning Plaintiff to light-duty work.

On 13 April 2021, Plaintiff followed up with the physician’s assistant, reporting increased shoulder pain and new symptoms, including “stinging in the back.” The physician’s assistant adjusted Plaintiff’s medication and continued the light-duty restrictions. Plaintiff continued working on light duty until her last day of work. Meanwhile, Plaintiff updated the on-site nurse about her treatment, and the nurse noted Plaintiff’s difficulty performing her light-duty work.

On 14 April 2021, Defendants denied Plaintiff’s claim on Form 61, citing no injury by accident, no occupational disease, and no disability. As a result, Defendant stopped providing medical compensation.

Plaintiff next sought treatment with Innerlogic Health Services on 15 April 2021, where she reported pain in her right shoulder, lower back, neck, and mid-upper back due to the work injury. The attending physician conducted a physical exam, diagnosed severe neck pain, and referred Plaintiff to an orthopedic doctor. Plaintiff was taken out of work pending further evaluation.

On 22 April 2021, Plaintiff saw a doctor at Vidant Orthopedics, where she reported a burning sensation in the right trapezius and tingling in her right hand. The doctor ordered x-rays of her right shoulder and cervical spine. The doctor also diagnosed right shoulder joint pain, recommending physical therapy and follow-up with the spine team for suspected cervical radiculopathy. The doctor assigned light-duty restrictions but noted that Plaintiff should remain out of work pending further evaluation.

Plaintiff continued treatment with Dr. David Miller of Vidant Orthopedics. On 5 May 2021, a physician's assistant working under Dr. Miller diagnosed Plaintiff with acute posterior neck pain with radiating pain into her right shoulder blade and arm, which he attributed to cervical spine issues. A cervical spine magnetic resonance imaging ("MRI") scan on 7 June 2021 revealed mild cervical spondylosis and disc extrusion at C5-C6, "impinging the C6 nerve root." Based on these findings, the physician's assistant recommended an epidural steroid injection at C5-C6. Plaintiff received the steroid injection on 7 July 2021 from Dr. Glenn MacNichol.

On 5 August 2021, Plaintiff followed up with Dr. Miller's office, complaining of ongoing right shoulder and neck pain from the work accident. The physician's assistant noted that Plaintiff experienced only one-to-two days of relief from the injection, with her symptoms returning, mainly as radiating arm pain. Having failed medication management and with the injections providing no lasting relief, the physician's assistant opined that surgery might be necessary. He ordered physical therapy before considering surgery to determine whether Plaintiff's symptoms would improve. Dr. Miller later stated that the recommended surgery would be an anterior cervical discectomy and fusion ("ACDF") at C5-C6.

At the 16 September 2021 follow-up, Plaintiff reported no improvement from physical therapy. As a result, Dr. Miller offered a repeat injection or surgical intervention. Plaintiff chose the repeat injection, administered on 11 October 2021 by Dr. MacNichol. On 11 November 2021, Plaintiff reported only minimal relief from the injection. A physician's assistant again offered surgery, but Plaintiff chose to continue with pain management.

In connection with his treatment, on 23 November 2021, Dr. Miller completed a Workers' Compensation Medical Status Questionnaire for Plaintiff, recommending the ACDF and assigning light-duty work restrictions, including no lifting over ten pounds. Dr. Miller testified that these restrictions had been appropriate since Plaintiff's initial visit on 22 April 2021.

On 12 January 2022, Plaintiff continued to experience unchanged cervical spine symptoms despite undergoing conservative treatments. Dr. Miller again recommended proceeding with ACDF. On 28 February 2022, Dr. MacNichol saw Plaintiff and diagnosed her with cervical disc disease. On 14 March 2022, Plaintiff received another cervical epidural steroid injection to treat spinal stenosis and spondylosis.

Dr. Miller continued to recommend ACDF surgery as medically necessary to relieve Plaintiff's cervical spine injury. He expressed that Plaintiff's symptoms would not subside without surgery. Dr. Miller also testified that Plaintiff's cervical spine and right shoulder pain were directly related to the 9 April 2021 work injury. His opinion on causation was based on the cervical spine MRI, his experience as an orthopedic spine specialist, and his physical examinations of Plaintiff. Additionally, Dr. Miller testified that Plaintiff could always work with restrictions of no lifting over ten pounds. He did not believe that Plaintiff was incapable of working in any capacity.

For her work-related neck and spine injury, Plaintiff elected to exhaust conservative measures before pursuing the ACDF surgery recommended by Dr. Miller. While undergoing treatment, on 13 April 2022, Dr. MacNichol recommended Plaintiff continue her "short-term no work status." At this time, Dr. MacNichol became the authorized treating physician providing pain management and conservative treatment until Plaintiff preferred to undergo surgery.

On 11 May 2022, Dr. MacNichol adjusted Plaintiff's medications and again kept her out of work due to the injury. An updated cervical spine MRI was ordered before considering further injections. Dr. MacNichol also ordered an electromyography ("EMG") study due to Plaintiff's ongoing right upper extremity issues. He again noted: "Continue short-term no work status." A 25 May 2022 MRI report further noted disc bulging at C5-C6: "Mild broad-based posterior disc protrusion creates mild broad-based compression of the anterior subarachnoid space" An EMG conducted on 31 May 2022 revealed normal findings in the right upper extremity.

On 8 June 2022, Dr. MacNichol kept Plaintiff entirely out of work and ordered a repeat cervical spine injection. The note included her work status: "Continue short-term no work status. Insurance form sent again; will ultimately need [a functional capacity evaluation] if not improving"

On 15 June 2022, Dr. MacNichol administered to Plaintiff a cervical epidural steroid injection to treat cervical spinal stenosis and spondylosis at C5-C6. By 30 June 2022, Dr. MacNichol noted that Plaintiff was "responsive in part" to the injection. Dr. MacNichol adjusted Plaintiff's medications and referred her to Dr. Miller for further evaluation. As noted earlier, Plaintiff last worked for Defendant on 15 April 2021. Since then, no modified duty work has been offered and she remains out of work.

Plaintiff has received short- and long-term disability benefits through an employer-sponsored, non-contributory plan. She received \$1,044.00 weekly in short-term disability benefits for twenty-six weeks from 15 April 2021 through 14 October 2021. After 14 October 2021, she received \$2,714.00 in long-term disability benefits every thirty days.

Plaintiff filed a Form 33, requesting a hearing because Defendant denied what she asserts is a compensable claim. After the hearing, a Deputy Commissioner found the neck/spine injury compensable, deemed the ACDF surgery medically necessary, and awarded temporary total disability benefits beginning on 15 April 2021, continuing until Plaintiff returns to suitable employment or until further order of the Commission.

Defendant appealed to the Commission. Following oral arguments, the Commission upheld the compensability of the neck/spine injury but reversed the award of total temporary disability benefits. The Opinion and Award did not mention that Dr. MacNichol had kept Plaintiff out of work as early as 13 April 2022. Plaintiff then appealed the total-disability-benefits issue. Defendant did not appeal any aspect of the Commission's Opinion and Award, making the compensability of the neck/spine injury final and uncontestable.

II. Jurisdiction

This matter is properly before the Court via N.C. Gen. Stat. § 7A-29(a) (2023) because it is a final decision of the North Carolina Industrial Commission.

III. Analysis

Plaintiff presents two issues for our review: (1) whether the Commission erred in concluding that Plaintiff is not entitled to temporary total disability benefits from 15 April 2021 onward, and (2) whether the Commission erred by disregarding Dr. MacNichol's work notes, which stated that Plaintiff was unable to work.

A. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006); *see also Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980).

Since the Commission "is the sole judge of the weight and credibility of the evidence," its "findings of fact are conclusive on appeal if supported by competent evidence[.]" *Blackwell v. N.C. Dep't of Pub. Instruction*, 282 N.C. App. 24, 25, 870 S.E.2d 612, 613 (2022) (citation omitted). Thus, "our function is not to weigh the evidence but is to determine whether the record contains any competent evidence tending to support the findings." *Strickland v. Cent. Serv. Motor Co.*, 94 N.C. App. 79, 82, 379 S.E.2d 645, 647 (1989). "Findings not supported by competent evidence are not conclusive and will be set aside on appeal. But findings supported by competent evidence are conclusive, even when there is evidence to support contrary findings." *Johnson v. Covil Corp.*, 212 N.C. App. 407, 408–09, 711 S.E.2d 500, 502

(2011) (citations and internal quotation marks omitted). Moreover, “[u]nchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 485–86, 771 S.E.2d 791, 793 (2015) (citation omitted).

The Commission’s conclusions of law are reviewed *de novo*. *Blackwell*, 282 N.C. App. 24, 870 S.E.2d 612. Under *de novo* review, the court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Fields*, 240 N.C. App. at 486, 771 S.E.2d at 793–94 (citation omitted). Similarly, conclusions of law are reviewed *de novo* to determine whether the findings of fact support them. *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003). And “where findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal.” *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014).

B. Dr. MacNichol’s Work Notes

Plaintiff contends that the Commission committed error because “it appears the out of work notes provided by Innerlogic and Dr. MacNichol may have been completely ignored and disregarded.” Plaintiff argues that the Commission failed to mention anything about Dr. MacNichol’s notes about Plaintiff’s ability to work “as if it did not exist or was not in the evidence of record.” Dr. MacNichol placed Plaintiff on a “no work” status. In contrast, Dr. Miller opined that Plaintiff could perform work but was restricted to lifting ten pounds or less.

While the Commission is not required to make specific findings of fact on every issue the evidence raises, it is necessary to make findings on crucial facts upon which the right to compensation depends. *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). Specific findings on crucial issues are necessary if the reviewing court is to find out whether the findings of fact are supported by competent evidence and whether the findings support the conclusion of law. *Barnes v. O'Berry Ctr.*, 55 N.C. App. 244, 247, 284 S.E.2d 716, 718 (1981).

Contrary to Plaintiff's arguments, the Commission was not required to analyze every aspect of Dr. MacNichol's records before giving greater weight to the evidence from Dr. Miller and others. The evidentiary record shows that the Commission considered the medical records of Dr. MacNichol, as shown in its acknowledgment of his treatment in Finding of Fact No. 31.

Later, in Finding of Fact No. 38, the Commission found that Plaintiff had established that the incident caused her cervical spine condition on 9 April 2021, when Plaintiff had a tough time operating the Cremer module. The Commission, in reaching that finding, assigned "significant weight to Dr. Miller's testimony that the disc herniation in Plaintiff's neck was caused by her . . . work-related injury, and less weight to PA Fitch's testimony." The Commission also found that "there was overlap between Plaintiff's shoulder and neck symptoms, and to the extent Plaintiff reported shoulder rather than neck pain at initial post-injury medical visits, Dr. Miller

explained that such a presentation is common with cervical spine injuries and does not necessarily rule out a neck injury.”

Then, in Finding of Fact No. 40, the Commission found that “Plaintiff’s work restrictions were no use of her right shoulder and as of April 22, 2021, Plaintiff’s work restrictions were no lifting more than 10 pounds. In reaching th[at] finding, the Commission [gave] the most weight to the medical records and testimony of Dr. Miller and Wilson Immediate Care.”

The Commission reviewed the evidence and chose to assign greater weight to the testimony and medical records of Dr. Miller and Wilson Immediate Care, concluding that Plaintiff was capable of light-duty work after 12 April 2021. The fact that Dr. MacNichol opined that Plaintiff could not work is a contradiction “in the evidence [that] go[es] to its weight.” *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 206, 262 S.E.2d 830, 835 (1980). “[I]t is not within this Court’s authority to reweigh the evidence and credibility of the witnesses.” *Penegar v. United Parcel Serv.*, 259 N.C. App. 308, 318, 815 S.E.2d 391, 398 (2018). Plaintiff’s argument amounts to reweighing the evidence and prioritizing Dr. MacNichol’s medical records over the testimony and records of Dr. Miller and others. Yet the “Commission is the sole judge of the weight and credibility of the evidence[.]” *Blackwell*, 282 N.C. App. 24, 870 S.E.2d 612 (citation omitted); *see also Matthews v. Wake Forest Univ.*, 187 N.C. App. 780, 783–84, 653 S.E.2d 557, 560 (2007) (“Because the Full Commission is the sole arbiter of credibility, defendant’s arguments regarding alleged conflicts between

defendant's doctors' notes and deposition testimony are also futile."). Consequently, the Commission did not err on this basis alleged by Plaintiff.

C. Entitlement to Temporary Total Disability Benefits

Plaintiff also contends that the Commission committed error by not granting her temporary total disability benefits from the incident onward.

Under N.C. Gen. Stat. § 97-2(9) (2023), a 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.” To support a conclusion of disability, the Commission must find the following:

(1) that [the] plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that [the] 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 [the] plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

An employee may meet this burden in several ways, four of which were enumerated in *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765–66, 425 S.E.2d 454, 457 (1993) (internal citations omitted):

(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.

Id. “Our Supreme Court has held that the determination whether a disability exists is a conclusion of law, and, as such, must be based upon findings of fact supported by competent evidence.” *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985).

Applying these factors to the case at bar, we note that Plaintiff’s previous argument about Dr. MacNichol’s work notes undergirds his application of the first *Russell* factor. Even so, we hold that competent evidence supports the Commission’s decision. *See Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (holding that the determination that an employee is disabled is a conclusion of law that must be based on findings of fact supported by competent evidence). “This 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, 474 S.E.2d 793, 794 (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. *Adams*, 123

N.C. App. at 682, 474 S.E.2d at 795 (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981)).

In its decision, the Commission made the following findings of fact:

39. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the treatment Plaintiff has received for her cervical spine condition has been reasonably necessary to effect a cure, provide relief, or lessen the period of Plaintiff's disability. The Full Commission further finds, based on the testimony of Dr. Miller, that additional medical treatment for Plaintiff's cervical spine condition is reasonably necessary to effect a cure, provide relief, or lessen the period of Plaintiff's disability.

40. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that as of April 12, 2021, Plaintiff's work restrictions were no use of her right shoulder and as of April 22, 2021, Plaintiff's work restrictions were no lifting more than 10 pounds. In reaching this finding, the Full Commission gives the most weight to the medical records and testimony of Dr. Miller and Wilson Immediate Care.

41. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the computer job that Plaintiff was performing as of April 12, 2021, was within Plaintiff's restrictions. The tasks Plaintiff was assigned on April 12, 2021, only required her to sit and press a button on a computer and did not require Plaintiff to use her right shoulder. Further, Dr. Miller explained that the job would have been within Plaintiff's restrictions of no lifting over ten pounds.

42. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that after Plaintiff left work on April 15, 2021, Plaintiff never returned to work for Defendant-Employer. The Full Commission further finds that Plaintiff did not conduct a

reasonable job search to find employment within her work restrictions after April 15, 2021. Specifically, Plaintiff did not contact Defendant regarding any other potential alternative jobs, and she made no attempt to contact other potential employers or to submit job applications with other potential employers.

43. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to establish that she has preexisting conditions that impact her ability to work.

44. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to establish that it would be futile for her to seek alternate employment. Plaintiff was 41 years old at the time of the hearing before the Deputy Commissioner and has a long and consistent employment history.

Based on these findings, the Commission concluded, in part, as follows:

7. Regardless of whether the computer job Plaintiff was performing on April 12, 2021, was suitable employment, Plaintiff has light-duty work restriction of no lifting more than 10 pounds. She has not returned to work, has not made a reasonable effort to obtain employment, and has failed to establish that other factors impact her wage-earning capacity, such as her age, education, experience, or pre-existing conditions. Accordingly, Plaintiff is not entitled to total disability compensation after April 15, 2021.

This conclusion is supported by the underlying findings of fact and Dr. Miller's testimony, where he stated that Plaintiff could work with restrictions of no lifting over ten pounds after her injury. We cannot reweigh the evidence despite Plaintiff's plea to the contrary. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411,

414 (1998) (quotation marks and citation omitted) (“[T]his 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.”); *see also Deese v. Champion Int’l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted) (“The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.”). We thus conclude the Commission did not err in concluding Plaintiff is not entitled to temporary total disability benefits dating back to 15 April 2021.

IV. Conclusion

Having thoroughly reviewed the record and briefs, we conclude that the Commission did not err and affirm its Opinion and Award entered 24 January 2024.

AFFIRMED.

Judges CARPENTER and FLOOD concur

Report per Rule 30(e).