2016 IL App (1st) 153307WC-U

Order filed: November 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CICERO SCHOOL DISTRICT #99,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	Appeal No. 1-15-3307WC
	)	Circuit No. 14-L-50146
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Dionysios Liarakos,	)	Honorable
	)	Kay M. Hanlon,
Defendants-Appellees).	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's finding that the claimant was permanently and totally disabled was not against the manifest weight of the evidence.

¶ 2 The claimant, Dionysios Liarakos, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), seeking benefits for injuries to his right eye allegedly sustained on December 1, 2007, while he was employed as a school bus driver by Cicero School District #99 (employer). Following a hearing, the arbitrator

found that the claimant's condition of ill-being related to his right eye was causally related to his employment. The arbitrator awarded maintenance benefits pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), temporary total disability (TTD) benefits for a period of 79 weeks pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2006)); and medical expenses pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (West 2006)). The arbitrator further found that the claimant was permanently totally disabled under the holding articulated in *E.R. Moore v. Industrial Comm'n*, 71 Ill. 2d 353 (1978), and awarded permanent total disability (PTD) benefits pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2006)).

¶ 3 The employer sought review of the arbitrator's award before the Illinois Workers' Compensation Commission (Commission), which unanimously affirmed and adopted the arbitrator's decision. The employer then sought judicial review of the Commission's decision before the circuit court of Cook County. Judge Kay M. Hanlon issued an order confirming the decision of the Commission. The employer filed this timely appeal.

¶ 4 BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on April 16, 2014.

¶ 6 The claimant testified that he was 79 years old on the date of the hearing. He was born in Greece and came to the United States in 1956, at the age of twenty-one. He began his employment as a school bus driver with the employer in 2003. His duties included driving a school bus on an assigned route each school day. He further testified that he was required to maintain a valid commercial driver's license and pass a physical examination, which included a vision test, on an annual basis. The claimant further testified that on December 21, 2007, he was cleaning the bus when he slipped and struck his right eye on the handle used to open and close the door bus. He immediately felt extreme pain in and around the right eye. He initially sought

treatment from his primary care physician, Dr. William Sarantos, reporting headache and eye pain resulting from an injury at work. Dr. Sarantos advised the claimant to seek treatment from an eye specialist.

¶ 7 On January 7, 2008, the claimant returned to work following the end of the Christmas holidays. He noticed continued right eye pain and loss of vision in the right eye. He sought treatment at Rezin Eye Center on that date, but was referred to Comprehensive Eye Care Physicians (CECP). He was given an appointment for the following afternoon. On January 8, 2008, the claimant reported for work, finished his shift, and then went to CECP, where he was examined by Dr. Amy Vanderbrook. Dr. Vanderbrook diagnosed giant cell temporal arteritis and instructed the claimant to go to the emergency department at Loyola University Medical Center for emergency steroid treatment.

¶ 8 The claimant was treated daily at Loyola University Medical Center from January 8, 2008, through January 15, 2008. He was diagnosed with traumatic giant cell arteritis and underwent various treatment procedures. The claimant testified that, after the treatment at Loyola, he lost all vision in his right eye.

¶ 9 On January 23, 2008, the claimant began treatment with Dr. Brian Larsen and Dr. Michael Savitt, both ophthalmologists associated with Eye Center Physicians, Ltd. in Chicago. They gave an initial diagnosis of traumatic glaucoma. The claimant remained under their care through December 4, 2008.

¶ 10 On February 22, 2008, the employer informed the claimant that it had no work available for him within his restrictions.

¶ 11 On February 10, 2008, Dr. Larsen issued a report in which he noted "[claimant] currently has lost functional vision from his right eye and can no longer operate a school bus (his occupation); his vision will most likely not improve." On November 12, 2008, Dr. Larsen

indicated that the claimant would be unable to maintain a commercial driver's license due to his vision limitations. In a report generated on December 4, 2008, Dr. Larsen further noted that the claimant had been stable for six months with a visual acuity of "count fingers." Dr. Larsen further reported that no additional treatment would improve the claimant's condition, which was not expected to improve or deteriorate from that point.

¶ 12 On July 13, 2009, the claimant sought treatment from another ophthalmologist, Dr. Robert Panton, following a referral by Dr. Sarantos. The referral was made after the claimant reported blurred vision in the left eye after using a computer during vocational training. Dr. Panton reported the following observation: "[claimant] has profound vision loss in the right eye and would not be eligible for a commercial driver's license. He also describes eye strain and headaches after computer work lasting over one hour. Since he has a cataract in his only functional eye (left eye) we agree with the need for more frequent breaks from prolonged computer or near work."

¶ 13 The claimant testified that he met with vocational counselors from April 22, 2009, until April 4, 2010. The record established that the employer arranged vocational placement services with Vocamotive, Inc.

¶ 14 Lisa Helma, a certified vocational counselor for Vocamotive, testified by evidence deposition. On direct examination, Helma testified that there was a stable job market for the claimant with available jobs including cashier and security guard existing within the relevant market. On cross-examination, however, Helma testified that there were several factors having a detrimental effect upon the claimant's employability that she was instructed to ignore in her direct testimony. Specifically, she was instructed by the employer's insurance claims manager to only consider the fact that he was unable to drive a school bus or engage in jobs requiring a commercial driver's license. Helma testified that if she were able to consider all relevant factors,

i.e., the claimant's age (over 70 years old), sixth grade math comprehension, below average auditory comprehension, limited transferable work skills, and the need for frequent breaks from prolonged computer or near work, her conclusion was: "I don't believe there is an access to a labor market for [the claimant]." Helma also testified that the claimant had undergone testing that demonstrated an inability to meet competitive production standards for most jobs under consideration without substantial employer accommodation.

¶ 15 Helma further testified that, under her supervision, the claimant had conducted a job search within his restrictions. She reported that the claimant contacted hundreds of prospective employers without a single offer of employment. Helma opined that the claimant was fully cooperative and sincere in his efforts to obtain employment.

¶ 16 The claimant testified that he continued his job search subsequent to the termination of services provided by Vocamotive. He testified that he made 10 to 15 contacts per week for several weeks without receiving a job offer.

¶ 17 On April 27, 2011, the claimant was examined at the request of the employer by Dr. Kathryn Duvall, a board certified occupational physician. Dr. Duvall diagnosed right eye acute traumatic glaucoma which could have been the result of the eye trauma occurring on December 21, 2007, as described by the claimant. She observed that the claimant had no function vision in the right eye and opined that the vision loss was irreversible.

¶ 18 The arbitrator found that the claimant was permanently and totally disabled commencing on April 5, 2010, the date upon which vocational services from Vocamotive ended. Citing *E. R. Moore*, the arbitrator found that, as of that date, the claimant established that no reasonably stable labor market existed for him considering his age, disability, work experience, training, skills, education, and capabilities. The arbitrator noted the claimant's permanent vision loss, Hemsa's extensive testimony regarding the claimant's limitations as well as Dr. Panton's

requirement that the claimant take frequent breaks were he to engage in computer or other "near" work. The arbitrator further noted that the claimant had engaged in an extensive job search, both on his own and with the assistance of Vocamotive, but had been unable to obtain employment.

¶ 19 The employer sought review before the Commission, which unanimously affirmed and adopted the decision of the arbitrator. The employer then sought review in the Circuit Court of Cook County, which confirmed the decision of the Commission. The employer then filed this timely appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, the employer's sole argument is that the Commission's finding that the claimant was permanently and totally disabled was against the manifest weight of the evidence. Specifically, the employer asserts the decision was against the manifest weight of the evidence because, contrary to Commission's finding, a reasonably stable employment market existed in which the claimant could have found employment.

¶ 22 A person is permanently and totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). The claimant need not, however, show that he has been reduced to total physical incapacity before being entitled to a permanent and total disability award. *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 176 (1981). Where an employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of permanent total disability, the burden is on the employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, "that is, one who, although not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market." *Westin Hotel v. Illinois Workers' Compensation Comm'n*, 372 Ill. App. 3d 527, 544 (2007). A claimant may establish

he is permanently and totally disabled under the odd lot theory by showing that: (1) considering his age, education, skills, training, physical limitations and work history he would not be regularly employable in any well-known branch of the labor market; or (2) following a diligent job search, he was unable to find gainful employment. *Id.*, at 544-45. When a claimant proves by a preponderance of the evidence that he falls into the odd lot category, the burden shifts to the employer to show that a reasonably stable job market nevertheless exists for that employee. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091 (2007).

¶ 23 Whether the claimant is permanently and totally disabled, including whether he has established that he falls within the odd lot, and whether the employer has met the burden of proving that a reasonably stable labor market exists for the claimant are all questions of fact for the Commission to resolve, and its determinations regarding those matters will not be disturbed on appeal unless they are against the manifest weight of the evidence. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 288-89 (1983). It is within the exclusive purview of the Commission to assess credibility, weigh competing evidence, and draw reasonable inferences from the evidence, and its findings in those regards are against the manifest weight of the evidence only when the opposite conclusion is clearly apparent. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009).

¶ 24 In the present case, the evidence supports the Commission's finding that the claimant established that he fell within the odd lot category. The record contains sufficient facts for the Commission to reach that conclusion under either of the two methods available to a claimant for establishing permanent total disability under that theory. The record established that the claimant was 73 years old at the time of the injury, with no special vocational skills or training, extremely impaired vision, limited hearing, some limitations with regard to the ability to read and comprehend written instructions, and physical restrictions that required frequent breaks from

computer or other close work. The employer's vocational counselor testified that these limitations made it unlikely that the claimant would be employable in any known labor market. While the employer challenges the degree to which these factors limited the claimant's employability, and challenges the weight and inferences the Commission adduced from Ms. Helma's testimony, it cannot be said that the opposite conclusion to that reached by the Commission was clearly apparent.

¶ 25 The employer also maintains that the Commission erred in finding that the claimant established that he made a diligent job search. A diligent but unsuccessful job search is another method by which a claimant may establish entitlement to an award of permanent and total disability benefits. *Westin Hotel*, 372 Ill. App. 3d at 545. Here, the Commission found sufficient evidence of a diligent but unsuccessful job search from Ms. Helma's testimony regarding the job search conducted by the claimant while receiving her services, as well as the claimant's testimony that his job search continued after Vocomotion's services terminated. The employer challenges the weight and credibility of this evidence. Nothing in the record, however, would establish that the Commission's findings in these regards were against the manifest weight of the evidence.

¶ 26 Regarding the diligence of the claimant's job search, the employer cites *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC in support of its contention that the claimant failed to perform a diligent job search. We find *Professional Transportation* to be clearly distinguishable from the instant case. In that case, this court held that a claimant who applied for nine jobs and perused job listing in the local Sunday newspaper had failed to establish a diligent job search. *Id.* at ¶ 35. In the instant matter, the evidence of the extent of the claimant's job is sufficient to support the Commission's finding.

¶ 27 The employer further maintains that it carried its burden of establishing that a reasonably stable job market nevertheless existed for the claimant. It points out that Helma testified that the defendant could work as a ticket taker, mail clerk, messenger, job coach, security guard or host. While there was testimony regarding those types of jobs, the record established that Helma's opinion regarding the claimant's ability to perform those jobs was based upon the instructions given to her by the employer's insurance claims manager to not consider several relevant factors. The weight and credibility of that testimony was eroded by Helma's subsequent testimony that when all relevant factors were considered the claimant did not have accesses to any stable labor market. There is nothing in the record to indicate that the weight and credibility accorded to Helma's entire testimony was against the manifest weight of the evidence. Thus, the Commission's finding that the employer failed to establish that a viable labor market existed for the claimant was not against the manifest weight of the evidence.

¶ 28 For the foregoing reasons, the Commission's determination that the claimant established entitlement to PTD benefits was not against the manifest weight of the evidence.

¶ 29 CONCLUSION

¶ 30 We affirm the judgment of the circuit court, which confirmed the Commission's decision.

¶ 31 Affirmed; cause remanded.