PEGGY SUE AVERY, Employee/Appellant, v. FARMSTEAD FOODS/SEABOARD CORP. and THE HARTFORD, Employer-Insurer, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 7, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee had started working with a new placement vendor and had obtained part-time very light work just prior to hearing, and where a vocational expert indicated that the employee was not permanently and totally disabled, substantial evidence supported the compensation judge's decision that a finding of permanent total disability was premature, despite the severity of the employee's work injury and her lack of education and work history.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Rykken, J.
Compensation Judge: John E. Jansen.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of benefits for permanent total disability. We affirm.

BACKGROUND

The employee was born in 1971 and dropped out of high school after completing the tenth grade. She subsequently obtained a certificate as a registered nursing assistant and then worked in this capacity in nursing homes for several years.

The employee began working for Farmstead Foods [the employer] in the summer of 1992, grading pork loins, a line job that entailed inspecting, weighing, wrapping, and boxing hundreds of pork loins in an eight-hour shift. In October of 1992, the employee began experiencing neck, back, right shoulder, and right arm pain. Diagnoses of her condition ranged from overuse syndrome to reflex sympathetic dystrophy [RSD]. The employee went off work due to her symptoms on about October 26, 1992, and was terminated by the employer shortly thereafter. The employer and insurer admitted liability for a work injury and paid the employee various benefits. In September of 1993, the employee and the employer and insurer entered into a stipulation for settlement, settling the employee's claims for temporary total, temporary partial, and rehabilitation benefits through September 1, 1995. An award on stipulation was issued on October 13, 1993.

On September 20, 1994, the matter came on for hearing before Compensation Judge Danny P. Kelly for resolution of the employee's claim for permanent partial disability benefits as a result of her October 26, 1992, work injury. Issues included the nature of the injury and the extent of permanency, if any, attributable to the injury. In a decision issued on December 5, 1994, Judge Kelly determined that the employee had sustained an overuse injury to her right upper extremity, resulting in the development of RSD; that the employee had a 35% whole body impairment related to the injury; and that economic recovery compensation was payable for the permanent impairment. On subsequent appeal to this court, the judge's decision was affirmed in its entirety. Avery v. Farmstead Foods, slip op. (W.C.C.A. Apr. 24, 1995).

The employee began receiving rehabilitation assistance from QRC Kurt Lidke in about September of 1995. QRC Lidke initially concluded that the employee was not likely to benefit from rehabilitation services because no restrictions had been established, and the employer and insurer eventually agreed to pay for a functional capacities evaluation [FCE], which was performed in March of 1996. The evaluation indicated that the employee was capable of full-time work but was essentially unable to use her right hand or arm. The month prior to the FCE, in February of 1996, the employee obtained her GED.

In June of 1996, the employee began working with Mike Kahnke, the first in a series of placement vendors who attempted to assist the employee in finding work in the Albert Lea area, where she lived. These efforts resulted in some interviews but no offers of employment. In late 1996, the employee's attorney inquired into the possibility of retraining. However, while vocational tests were subsequently performed, QRC Lidke's records from this period contain no further notations about retraining.

In the spring of 1997, Richard McCluhan, the employee's then placement vendor, apparently told QRC Lidke that he and the employee had essentially exhausted job possibilities in the Albert Lea-Austin labor market without finding the employee any work that she could do, largely because she could not do any lifting or carrying with her right hand. During the same period, the employee's attorney suggested that the employee should apply for social security disability benefits [SSDI], and he asked the rehabilitation providers to assist the employee in that process. However, the employee continued to receive ongoing placement assistance through the summer of 1997.

In August of 1997, a claims representative of the employer instructed the placement vendor to close his file and asked QRC Lidke to put further rehabilitation assistance on hold, pending discussions with the employee's attorney. Subsequently, through the fall of 1997, the parties were apparently attempting to negotiate a final settlement of the employee's claims. No settlement was reached, however, and, in November of 1997, the employee filed a claim petition alleging entitlement to permanent total disability benefits from and after September 2, 1995. In January of 1998, rehabilitation services were again extended, the employee began working with placement vendor Timothy Morgan, and the insurer's claim representative asked the QRC to assist

the employee in completing an SSDI application.[1] Despite continued placement services, the employee received few interviews and no job offers. In the spring of 1999, the employee's placement vendor suggested that computer or keyboard training might enhance the employee's employability. However, the insurer subsequently refused to pay for such training pending the scheduled hearing on the employee's claim petition.

In May of 1999, the employee underwent an independent vocational evaluation by vocational expert Jane Moncharsh. After performing additional vocational testing, Ms. Moncharsh concluded that the employee was not permanently and totally disabled, and she offered suggestions to increase the employee's chances of obtaining work. One of these suggestions was that the employee begin working with a more "pro-active" placement vendor, such as Gary Novitsky, and Mr. Novitsky began providing placement services for the employee almost immediately thereafter. Within a few weeks, Mr. Novitsky found the employee very part-time light work at Wendy's, which she began on June 7, 1999. The employee's job involves wiping tables and handing out beverage cups to customers over the noon hour. The employee is apparently able to perform this work without using her right arm. She works about an hour and a half a day, five days a week, for about $5.50 an hour, and it does not appear that more full-time employment will develop with this employer.

The employee's claim petition for permanent total disability benefits came on for hearing before Compensation Judge John Jansen on June 10, 1999. Evidence submitted by the employee at hearing included the employee's testimony, medical records, rehabilitation records, and reports from QRC Lidke, who indicated that the employee was permanently totally disabled from employment. Evidence submitted by the employer and insurer included surveillance videotapes of the employee,[2] several reports by Ms. Moncharsh, and records from Mr. Novitsky. In a decision issued on September 3, 1999, the compensation judge denied the employee's claim for permanent total disability benefits. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts

[1] Subsequent rehabilitation records indicate that SSDI benefits were denied because the employee had not worked enough quarters following her twenty-first birthday. However, the employee appealed from this determination, and the results of the appeal were apparently pending as of the workers' compensation hearing date.

[2] The compensation judge apparently returned the videotape to the employer and insurer's attorney at the close of hearing, requiring this court to request its return for review purposes. Evidence submitted at hearing should remain with the file until the end of the appeal period.

or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

An employee is permanently and totally disabled "if his physical condition, in combination with his age, training, experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967). In the present case, the record contains evidence that might have persuaded a factfinder that the employee is permanently totally disabled as claimed. The employee, who is right-handed, has little work experience or education and has little use of her right hand and arm.[3] Three previous placement vendors tried for nearly three years, without success, to find the employee some kind of gainful employment. The pertinent labor market is small, and, according to QRC Lidke, the employee lacks the training or intellectual capacity to obtain employment that does not require her to use her right hand and arm. QRC Lidke also indicated that the employee's handwriting, for which she now uses her left hand, is so poor that the placement vendors have had to complete her job applications. Also, as QRC Lidke noted, while the employee obtained a job at Wendy's shortly prior to hearing, she works only minimal hours, and the job will not develop into more substantial employment, because the employee's manager has no more work that the employee can do without using her right hand and arm.

On the other hand, there is also evidence that minimally but adequately supports the judge's conclusion, stated in his memorandum, that a finding of permanent total disability is "premature" here. The employee was only twenty-eight years old on the date of hearing, she has at least some limited use of her right upper extremity, she has learned to do many tasks with her left hand,[4] she obtained her GED, she wants to work, and she believes that there are jobs that she would be able to perform. According to Ms. Moncharsh, the employee is a very attractive and pleasant woman "who communicates well verbally," does well in social interactions, and possesses an "intellect at least in the average range." Ms. Moncharsh also indicated that the Wendy's job was a good work-hardening type position that would be an excellent first step for the employee's

[3] While surveillance videotapes indicate that the employee may have some use of her right hand and arm, contrary, perhaps, to assumptions by some of the medical and rehabilitation providers involved in this matter, the tapes by no means establish that the employee can use her right hand and arm to an extent that would be significantly useful in any kind of work.

[4] While her handwriting may be poor and slow, it is generally legible. Ms. Moncharsh indicated that the employee should be completing her own job applications.

reentry into the labor market. The employee started working with Mr. Novitsky and obtained the Wendy's position only weeks prior to the hearing, and Ms. Moncharsh reported that it would be a disservice to the employee to find her permanently and totally disabled, suggesting that the employee simply needs more aggressive assistance to pursue, obtain, perform, and maintain employment. While the compensation judge did not expressly adopt Ms. Moncharsh's opinion to this effect, it is evident from his memorandum that he adopted Ms. Moncharsh's rationale. We would also note that there is no evidence that retraining has ever been thoroughly explored, and both Ms. Moncharsh and a previous placement vendor have indicated that the employee might benefit from computer or keyboard training, which she has not as yet received.

The employee has a serious impairment that affects her employability very substantially, and it is possible that, despite more aggressive rehabilitation assistance, she will be unable to secure anything other than sporadic employment at an insubstantial wage. At the same time, it was not unreasonable, especially given developments just prior to hearing, for the compensation judge to conclude that a finding of permanent total disability is premature under these particular circumstances. We therefore affirm the judge's finding on this issue.