DORIS DEL RIO, Employee/Appellant, v. LUIGINOS, INC., and LUMBERMEN'S UNDERWRITING ALLIANCE, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 11, 2000

No. [REDACTED SSN]

HEADNOTES

REHABILITATION - CONSULTATION. Where the judge's findings implied a conclusion that the employee had no residual disability or restrictions relating to her work injury, and where the judge's decision was supported by expert medical opinion, the compensation judge's denial of a rehabilitation consultation, under the facts of this case, was neither legally erroneous nor unsupported by substantial evidence.

Affirmed in part and vacated in part.

Determined by Pederson, J., Rykken, J., and Johnson, J.
Compensation Judge: Ronald E. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of a rehabilitation consultation pursuant to Minn. Stat. § 176.102, subd. 4(a). We affirm in part and vacate in part.

BACKGROUND

On November 16, 1998, Doris Del Rio sustained an admitted work-related injury to her low back while employed as a general utility worker in the Pack Out Department at Luigino's, Inc.[1] On that date, Ms. Del Rio [the employee] was fifty years of age and was earning a weekly wage of $206.00. On December 29, 1998, the employee consulted with Dr. Earl Peterson, a specialist in occupational medicine at the St. Luke's Occupational Medicine Clinic. She described intermittent discomfort in her lower back and buttocks since falling at work and landing on her tailbone. She had minimal tenderness to percussion of the lumbar and sacral spine, but there was some tenderness at the region of the coccyx. Straight leg raising was negative and her deep tendon reflexes were symmetric. She was advised to avoid standing in the same position for extended periods of time. Dr. Peterson's assessment was of slowly resolving sacral and coccyx contusion.

[1] Ms. Del Rio claims that she sustained injuries also to both upper extremities as a consequence of this injury. Those upper extremity claims have been denied by the employer and insurer and are the subject of a separate proceeding.

In the spring of 1999, the employee underwent physical therapy at the Denfeld Medical Center with little reported improvement. On May 12, 1999, Dr. Peterson noted the employee's report that "about a month ago her back got worse and she has had pain in her left leg, especially the left anterior thigh. She states she has tried to sit, stand, etc and change her positions at work to alleviate this, but it is slowly but surely getting worse." Dr. Peterson limited the employee's work to three to four hours a day, three to four days a week, with no lifting or bending and with frequent position changes. He also ordered an MRI of the lumbar spine. The MRI, performed on May 25, 1999, showed moderately severe facet degenerative changes at L5-S1. At the L4-5 level, the radiologist reported, "there is moderate annular bulging and a small central and right paramidline broad-based posterior disc protrusion which mildly indents the thecal sac and mildly effaces the ventral aspect of the proximal right L5 nerve root sheath."

After discussing her MRI findings with her, Dr. Peterson referred the employee for a neurosurgical consultation. On June 7, 1999, the employee was evaluated by Dr. R. E. Freeman. After a physical examination and a review of the MRI study, Dr. Freeman's impression was of "[d]egenerative joint disease involving the lumbar spine with herniated nucleus pulposi at L4-5, L5-S1 and early spinal stenosis." Dr. Freeman apparently concluded the employee was not a surgical candidate and prescribed an additional medication.

On June 14, 1999, the employee reported that she now had pain radiating into both legs and was only able to work two hours a day. She claimed to be able to walk only six blocks before the onset of pain. Dr. Peterson's assessment on that date was of lumbar contusion strain with mild herniated disc and degenerative changes in the employee's low back. At that point he decided to refer the employee to Dr. Matthew Harrison at Northland Rehabilitation Associates. Following an examination on June 21, 1999, Dr. Harrison recommended a return to full-time employment with a restriction against lifting over twenty pounds and with opportunity to change positions frequently.

On July 9, 1999, the employee began seeing Dr. Richard Roach, also at St. Luke's Occupational Medicine Clinic. On that date, the employee advised Dr. Roach that she continued to work for the employer, doing an inspecting job, but could only handle the position for two to three hours a day. She informed him that, in addition, she was working at an Amoco station making cookies. She had previously worked twenty hours a week at this job but had cut her hours to two hours a day since January. Dr. Roach noted that the employee "has had five sessions of PT which she states were of no value." He reported that since the employee had not made any progress since January and since he had no other suggestions for improving her function, he believed that she had reached maximum medical improvement [MMI] and arranged for a functional capacities evaluation [FCE].

On July 21, 1999, the employee filed a Rehabilitation Request with the Department of Labor and Industry, seeking a rehabilitation consultation with a QRC of her choice. On July 27, 1999, the employer and insurer filed a response contesting the employee's request, on grounds that the employee had no actual work restrictions necessitated by the claimed injury.

On July 28 and 29, 1999, the employee underwent the FCE requested by Dr. Roach. The therapist who conducted the evaluation reported inconsistencies in the testing represented by marked symptom magnification and discrepancies in motivation and effort. The therapist had administered the Waddell Inappropriate Symptoms questionnaire and indicated in his report that a score of three out of five is indicative of the presence of symptom magnification. The employee's score was five. The employee's estimated functional capacities were found to be occasional lifting of up to ten pounds and occasional standing, walking, bending, or reaching. She was determined to be never able to squat, kneel, or crawl. The therapist concluded, however, that the FCE results may be an underestimate of her actual abilities due to the inconsistencies reported, particularly with her subjective reports of symptoms.

On July 14, 1999, the employee had been examined on behalf of the employer and insurer by orthopedist Dr. Elmer Salovich. Dr. Salovich obtained a history from the employee, reviewed her medical records, and performed a physical examination. In a report dated September 3, 1999, he concluded that the employee's diagnosis was degenerative disc disease of the lumbar spine. He stated that the employee had preexisting degenerative changes at L4-L5 as reflected in the x-ray taken on December 29, 1998. It was his opinion that the employee's condition was aggravated by her fall on November 16, 1998. He rated the employee as having sustained a 7% permanent partial disability of the body as a whole pursuant to Minn. R. 5223.0390, subp. 4C(1). Dr. Salovich opined that the employee should be restricted from lifting objects weighing over thirty pounds from floor level and that she should avoid repetitious bending, twisting, pushing, and pulling with her low back. He also recommended that she avoid placing her low back in unusual positions for prolonged periods of time. He concluded that "[t]hese are restrictions that any patient of her age with her body build and early degenerative changes of her lumbar spine should follow. These restrictions should be followed irrespective of their cause."

On September 7, 1999, the employee saw Dr. Roach again and reviewed a work-hardening schedule proposed by the employer in an effort to return her to full-time employment. The proposed schedule provided that the employee would work four hours a day at duties that included cleaning the lunchroom, wiping down tables and sinks, dusting, mopping floors, and other miscellaneous cleaning duties as needed. The employee would be allowed to work at her own pace and to alternately sit or stand as necessary. The employee's hours were to increase to six a day by September 20 and to full-time by October 4. The employee reported to Dr. Roach that she did not feel that she could perform the described job functions. Specifically, the employee and Dr. Roach discussed the mopping activities, and the employee advised the doctor that she had tried doing mopping in her own home and had been unable to do this job. After discussing that particular task with the employer, the employee was advised that she would not have to mop. Between September 7, 1999, and October 27, 1999, the employee never worked five days in any one week and never progressed to working more than five hours in any day. During this period in which she was on her work-hardening schedule, the employee missed twenty-one days from work. Of the fourteen days that she did work during this period, she left work early on six because of alleged back problems. She was terminated by the employer on October 28, 1999, for excessive absences.

An administrative conference was held on the employee's rehabilitation request for a consultation on September 10, 1999, and the request was granted pursuant to a Decision and Order filed September 23, 1999. On October 6, 1999, the employer and insurer filed a Request for Formal Hearing, contending that the employee was capable of performing suitable work without restrictions and therefore was not entitled to a rehabilitation consultation.

During October 1999, the employee continued to see Dr. Roach, who attempted to manage her symptom complaints with various medications, including Norgesic, Darvocet, Daypro, Relafen, Lodine, and Soma compound. During this time the employee also complained of side effects related to the medication she was taking. On November 9, 1999, the employee reported to Dr. Roach that Soma compound made her so lightheaded that she could not function. She also reported that Darvocet and Norgesic "dulls my senses" and that she felt too lightheaded to perform her work duties. On November 24, 1999, the employee was seen also by Dr. Edward Martinson at the Duluth Clinic. Dr. Martinson diagnosed low back pain secondary to the work-related injury of November 16, 1998, and recommended four to six weeks of physical therapy. He also advised that the employee remain off work while undergoing the therapy.

Between September 8, 1999, and October 1, 1999, the employer and insurer had conducted videotaped surveillance of the employee, and they subsequently submitted the videotape to Dr. Salovich and to Dr. Roach for their review. In a letter directed to the employer on November 1, 1999, Dr. Roach noted an apparent discrepancy between the behaviors of the employee as he had observed her in his office and the behaviors of the employee as he observed her on the surveillance tape. He stated, "The surveillance tape is certainly shocking to me in terms of the patient performing activities as documented above which she assured me that she could not perform and secondly the lack of apparent discomfort in the postures as described." In a report dated November 12, 1999, Dr. Salovich opined that, after reviewing the surveillance videotape and the employee's medical records, he did not believe that the employee had sustained a permanent injury to her low back as a result of the incident of November 16, 1998. He stated that, "[h]er activities on the video are not consistent with subjective complaints she gave to me. There are no abnormal objective physical findings to substantiate this patient's subject[ive] complaints. The degenerative changes present on her x-rays pre-existed her incident on November 16, 1998." On November 23, 1999, Dr. Salovich indicated that in his opinion the employee had no work restrictions regarding her low back.

The employee's claim for a rehabilitation consultation came on for formal hearing before a compensation judge on December 29, 1999. Evidence presented at the hearing included the live testimony of the employee, a co-worker, the employee's supervisor, and the private investigator who had conducted the surveillance, together with the deposition testimony of Dr. Richard Roach. Also submitted into evidence were the employee's medical records and the surveillance videotape. In a Findings and Order issued on January 28, 2000, the compensation judge determined that the employee was not entitled to a rehabilitation consultation. 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 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

The sole issue before the compensation judge was whether the employee was entitled to a rehabilitation consultation. The judge denied the employee's claim for a consultation on essentially three grounds: (1) the employee did not have any valid or reasonable restrictions limiting her work activities; (2) rehabilitation services would not be "useful in returning this employee . . . to employment at this time"; and (3) the employee failed to establish that she was a "qualified employee" entitled to rehabilitation services.[2]

"A rehabilitation consultation must be provided by the employer to an injured employee upon request of the employee." Minn. Stat. § 176.102, subd. 4(a) (emphasis added). The purpose of a rehabilitation consultation is to determine whether an employee is a "qualified employee" entitled to rehabilitation services. We have previously held that an employer and insurer may not challenge an employee's right to a rehabilitation consultation on the basis that the employee is not qualified for rehabilitation services. See, e.g., Goodwin v. Byerly's, Inc., 52 W.C.D. 90 (W.C.C.A. 1994); Wagner v. Bethesda Hosp., slip op. (W.C.C.A. Jan. 4, 1995). At Findings 12 and 13, the compensation judge determined that rehabilitation services were not necessary because the employer had work available that the employee was fully able to perform, that the employee was not precluded from engaging in the job that she had held at the time of the work injury, and that the employee failed to establish that she was a qualified employee. The employee's eligibility for rehabilitation services was not, however, properly before the compensation judge, and it was premature for the judge to address this question. See Schierman v. Diversified Printers, slip op. (W.C.C.A. Jan. 13, 1998) (where the employee requested only a rehabilitation consultation, his eligibility for rehabilitation services was not an issue properly before the compensation judge); see also Steichen v. R.D. Offutt Co., slip op. (W.C.C.A. Aug. 3, 1992) (where the employee's right to rehabilitation or retraining benefits was not an issue raised

[2] See Minn. R. 5220.0100, subps. 22 and 26.

by the parties or litigated before the compensation judge, the judge's determination of that issue was reversed and vacated). We therefore vacate Findings 12 and 13 to the extent that they presume to address the employee's eligibility for rehabilitation services.

At Finding 8, however, the compensation judge concluded that, "[b]ecause of symptom magnification and exaggeration by the employee, any restrictions on limitations interposed that limit her work activities are not considered valid or reasonable." At Finding 14, the judge specifically adopted the conclusion of Dr. Salovich that the employee "has no objective physical findings to substantiate her subjective complaints." We have recognized that employers and insurers may challenge an employee's request for a rehabilitation consultation on the basis that the employee has no underlying entitlement to any benefits. See, e.g., Kennedy v. Falls Memorial Hosp., slip op. (W.C.C.A. Sept. 9, 1998) (where the employee had been released to return to work without any physical restrictions attributable to her work injury, the compensation judge's denial of a rehabilitation consultation was proper, pursuant to Judnick v. Shalom Home West, slip op. (W.C.C.A. Aug. 4, 1995)). If the employee has no residual disability or restrictions relating to her work-related injury, the employee has no underlying entitlement to benefits. See Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987).

On appeal, the employee contends that the employer and insurer failed to establish that the employee has completely recovered from her work injury without any residual disability or restrictions. Nor, she argues, did the compensation judge make any specific findings to that effect. Moreover, she argues, Dr. Salovich's opinion that there is no objective evidence to support the employee's subjective complaints of pain is without foundation and directly contrary to the treatment records of Dr. Roach, Dr. Martinson, and the employee's MRI scan of May 25, 1999. She further argues that there is no indication from the judge's Findings and Order that he gave any consideration to the deposition testimony of Dr. Roach or to the opinions of Dr. Martinson. We cannot agree.

First of all, we believe that the compensation judge's finding that the employee's restrictions "are not considered valid or reasonable," especially when viewed in conjunction with the judge's other findings, does constitute a specific finding of no residual disability or restrictions relating to the work injury. This finding, together with the judge's ultimate conclusion that the employee is not entitled to a rehabilitation consultation, is supported by substantial evidence in the record.

The credibility of the employee was obviously a very significant issue in this case, and the compensation judge heard and observed the live testimony of the employee, co-worker Barbara Devich, the employee's supervisor, Carlene Ware, and the private investigator who conducted the surveillance. The surveillance video depicted the employee walking, riding in a golf cart, working at a bar, and performing activities without visible restrictions, all contrary to her presentations to her employer and her medical providers. The videotape was also shown to both Dr. Roach and Dr. Salovich. Although, after viewing the tape, Dr. Roach was reluctant to state in his deposition that the employee was totally unrestricted, he did find what he observed of the employee on the tape "shocking" in comparison with what he observed of her in his office, and he

did state that he was not capable of forming an opinion as to what her restrictions would be. Dr. Salovich, after reviewing the video, concluded that the employee's activities were "not consistent with subjective complaints she gave to me." In an addendum report dated November 23, 1999, Dr. Salovich opined that the employee had no restrictions regarding her low back related to the work injury. The compensation judge expressly accepted Dr. Salovich's opinions.

We agree that the evidence offered at the hearing is subject to differing interpretations, but we do not agree that the compensation judge's acceptance of Dr. Salovich's opinions is unsupported by substantial evidence. It was the responsibility of the compensation judge to resolve conflicts in testimony and ultimately to weigh all of the evidence in the case to decide whether the employee's restrictions were valid or reasonable. The trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). In this case, in addition to the opinions of Dr. Salovich, the judge's decision was very clearly based on a credibility assessment. Assessment of a witness's credibility is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978)). The compensation judge expressly found the employee's subjective physical complaints to be not credible, and the judge was within the clear parameters of his discretion in so finding. A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989).

It is clear from the compensation judge's Findings and Order that he carefully reviewed the evidence in this case. While the judge does not specifically mention Dr. Martinson's opinion or comment on Dr. Roach's deposition testimony, reference to that evidence was unnecessary, given that the judge's conclusion was evidently based very amply on the opinions of Dr. Salovich and on the employee's credibility in light of the surveillance videotape. See Rothwell v. Minn. Dep't of Natural Resources, slip op. (W.C.C.A. Dec. 6, 1993) (a compensation judge is not required to discuss every piece of medical evidence introduced at trial). Because the judge's findings imply a conclusion that the employee has no residual disability or restrictions relating to her work injury, and because substantial evidence exists to support the opinions of Dr. Salovich on which the judge relied, we affirm the judge's denial of a rehabilitation consultation under the facts of this case. See Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235.