

TIMOTHY L. MILLER, Employee/Appellant, v. NW. AIRLINES and KEMPER NAT'L INS. CO., Employer-Insurer, and HARTFORD LIFE & ACCIDENT INS. CO., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 16, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE; WITHDRAWAL FROM THE LABOR MARKET. Where the employee made no job search of any kind and moved from the Twin Cities metropolitan area to a small Wyoming town, which had no reasonable employment opportunities for him, almost immediately after leaving his job with the employer, it was not unreasonable for the judge to conclude that the employee had voluntarily withdrawn from the labor market and that he had not established entitlement to permanent total disability benefits, despite his substantial restrictions.

Affirmed.

Determined by: Wilson, J., Johnson, J., and Pederson, J.
Compensation Judge: Bernard Dinner

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of permanent total disability benefits and from his finding that the employee voluntarily withdrew from the labor market by moving from his home in Minnesota to a small town in Wyoming.¹ We affirm.

BACKGROUND

The employee was born in 1959 and was raised primarily in Greybull, a small ranching and farming community in Wyoming. His early employment experience included work as a ranch hand for his father and as an auto mechanic. At some point he obtained a certificate in

¹ In his brief, the employee also contends that the compensation judge erred by excluding certain evidence at hearing. However, the employee's notice of appeal contains no reference to the judge's evidentiary rulings, and "the workers' compensation court of appeals' review is limited to the issues raised by the parties in the notice of appeal or by a cross-appeal." Minn. Stat. § 176.421, subd. 6. Moreover, it is apparent from the hearing transcript that the judge also rejected the evidence in question as simply unpersuasive with regard to the contested issues. In any event, to the extent that the judge's evidentiary rulings are properly before us, we see no error or abuse of discretion.

“airframe” and “power plant,” after which he worked for three years as an aircraft mechanic for Boeing.

On February 5, 1990, the employee obtained a job as a mechanic for Northwest Airlines, the employer herein. About three years later, on January 12, 1993, the employee sustained a work-related lifting injury to his low back. He initially underwent conservative care and was placed in a light-duty job in the employer’s reclamation department, where he inspected parts for defects and made refund and warranty claims. Much of the employee’s work in reclamation required computer use.

The employee continued to experience low back and leg pain, despite extensive conservative care, and in March of 1994 he underwent posterior fusion surgery, with instrumentation, from L4 to sacrum, to treat severe degenerative changes. His condition initially improved, and he returned to his light-duty job in the reclamation department. However, in March of 1996, after his symptoms returned, he underwent a second surgical procedure, this time to remove the instrumentation and revise the fusion. This second operation relieved the employee’s pain again for a time, allowing him to resume work in the reclamation department, but his condition worsened again after a number of months, leading to yet a third surgery in July of 1997, a laparoscopic anterior fusion at the same levels as before. The employee subsequently experienced another period of decreased leg and back pain before his symptoms again recurred with their previous severity. Following this third procedure, the employee again returned to work in the employer’s reclamation department, but, due to his continuing symptoms, he was never able to resume a full-time schedule, despite substantial accommodation by his supervisor.

On June 2, 1999, the employee’s treating physician, Dr. James Ogilvie, issued a report, permanently restricting the employee to working twenty hours a week maximum, “as tolerated,” and limiting the employee’s lifting to ten pounds occasionally, with no twisting, kneeling, squatting, overhead reaching, ladder or stair climbing, a twenty to thirty minute one-way driving limit, and restrictions on sitting, standing, and walking. Although indicating in his report that the employee could work subject to the listed restrictions, Dr. Ogilvie also wrote that the employee was permanently and totally disabled. The reclamation department would not or could not accommodate the permanent restrictions to part-time hours, and on June 10, 1999, the employee was “disqualified” from his job. Subsequently, the employer provided the employee with internal job listings, but all of the listings were for full-time work, and the employee did not bid for or otherwise pursue any of the openings or any other work with the employer.

In July of 1999, the employee underwent a two-day vocational evaluation, at MRC, at the suggestion of his then QRC, Kristin Peterson. While citing home-based employment as a possibility for “meaningful part-time work that would be a good match to [the employee’s] current skills and potentials,” the evaluators concluded that “it was questionable whether or not [the employee] could obtain and maintain competitive gainful employment.” They also reported that part-time, home-based work would first require some additional training and would in any event “not return [the employee] to substantial gainful employment, or return him to anywhere near the wage he was earning as an airline mechanic,” which was \$725.36 a week on the date of his injury. Accordingly, given the nature of the employee’s limitations and vocational prospects, the

evaluators recommended, among other things, that the employee apply for social security disability benefits.

In mid to late August, about a month after his vocational evaluation, the employee moved with his wife and children from his home in Farmington, Minnesota, back to Greybull, Wyoming, where other members of his family still lived. He testified that he moved back to Greybull for financial reasons, because he could not afford to stay any longer in his home in Farmington, and that members of his church had been paying his mortgage for him. However, rehabilitation records from as early as 1993 indicate that the employee had considered moving back to Wyoming even then had he been unable to continue working for the employer. In any event, shortly after his move to Greybull, the employee began receiving \$2,492.95 a month in private long-term disability benefits, having also received a \$10,000 lump sum payment from a life insurance policy. Also following his move, the employee's QRC essentially suspended rehabilitation services, except for monitoring. She later testified that "[t]he intention was to refer [the employee] for a vocational evaluation for direction and assistance with placement [but that] after we received the [MRC] report back [the employee] was in the process of moving, and I did not recommend a job search . . . because he was moving to Wyoming." The employee did not seek any vocational assistance of any kind in Wyoming. At some point, he looked into the possibility of working in his brother-in-law's computer-assisted drafting business, but he was not qualified and felt that the work would be too stressful. The employee's father, who owned a small auto repair shop in Greybull, was similarly unable to offer the employee any work. The employee applied for but was initially denied social security benefits; final disposition of that claim was pending as of the hearing date.

The employee claimed entitlement to permanent total disability benefits from and after June 11, 1999, and the matter came on for a two-day hearing before a compensation judge in March of 2000. Evidence included the employee's medical and rehabilitation records; the report of Dr. Gary Wyard, the employer and insurer's independent medical examiner²; the testimony of the employee and QRC Peterson; and the report and testimony of Alden Bjorklund, the employer and insurer's vocational expert. QRC Peterson testified that the employee was permanently and totally disabled due to his work-related condition; Mr. Bjorklund disagreed, testifying that the employee had the skills and aptitudes to obtain employment that would pay more than insubstantial income.

In a decision issued on May 23, 2000, the compensation judge concluded that the employee had withdrawn from the labor market and that he was not entitled to permanent total disability benefits. The employee appeals.

² Dr. Wyard found that the work injury was merely a temporary aggravation of a preexisting condition. However, medical causation was not at issue at hearing. Dr. Wyard also set more liberal restrictions than Dr. Ogilvie, indicating, for example, that the employee could work full time and lift up to 40 pounds.

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

In general, an employee is permanently and totally disabled "if his physical condition, in combination with his age, training, experience, and type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in 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). However, "[o]ne who has voluntarily retired and withdrawn from the labor market is not eligible for total disability benefits." McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 541, 36 W.C.D. 133, 138 (Minn. 1983). Injured workers have the right to choose where they will live, but it does not follow that, if an employee chooses to live in an area where "employment opportunities for him are virtually nonexistent, an employer-insurer must subsidize him by continued payment of total disability benefits." Paine v. Beek's Pizza, 325 N.W.2d 812, 815, 35 W.C.D. 199, 205 (Minn. 1982). "Whether an employee has removed himself from the labor market is a question of fact, the resolution of which will not be disturbed on appeal unless manifestly contrary to the evidence." Schroeder v. Highway Servs., 403 N.W.2d 237, 238, 39 W.C.D. 723, 725 (Minn. 1987).

In the present case, the compensation judge found that the employee had withdrawn from the labor market by moving to Greybull and that he had not proven entitlement to permanent total disability benefits. The employee contests the judge's conclusion on both points. Certainly there is evidence in the record, beyond the employee's own testimony, that would support the conclusion that he is permanently and totally disabled, regardless of where he lives. For example, although setting specific work restrictions, Dr. Ogilvie went on to report that the employee is permanently and totally disabled, and medical records contain repeated references to severe pain symptoms, weakness, and lack of stamina. In addition, the vocational evaluation from MRC indicates that the employee has few transferrable skills and that, given his substantial restrictions, including the limit on driving and hours, it is questionable whether he can reasonably expect to "obtain and maintain sustained competitive gainful employment," even while living in Farmington. QRC Peterson also testified that she had not "identified any area that [the employee]

could return to work at that would yield anything but insignificant income.” However, there is also substantial evidence in the record that supports the compensation judge’s denial of the employee’s claim.

The compensation judge expressly adopted the expert vocational opinion of Alden Bjorklund, who testified that the employee was employable, at least on a part-time basis, perhaps after certain skill enhancements, and that, contrary to the MRC report, the employee does in fact have transferrable skills. According to Mr. Bjorklund, given the employee’s relative youth, intelligence, and interests, it is “much too early” to find the employee permanently and totally disabled, especially since training and alternate employment opportunities were never investigated. The compensation judge was entitled to accept Mr. Bjorklund’s opinion on this issue. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

As for the compensation judge’s finding that the employee had withdrawn from the labor market by moving to Greybull, the evidence is somewhat less compelling. Mr. Bjorklund testified that Greybull is a much smaller labor market than Farmington, but that fact is not dispositive. The issue is not whether the employee’s new location offers fewer job opportunities but whether the employee can reasonably expect to secure appropriate employment there. See, e.g., Paine, 323 N.W.2d 812, 35 W.C.D. 199; Blaeser v. American Hoist & Derrick Co., 40 W.C.D. 389 (W.C.C.A. 1987); Hill v. Mackay Envelope, No. [REDACTED SSN] (W.C.C.A. July 10, 1998). However, in addition to the vocational evidence regarding the relative size of the Greybull labor market, there was testimony, by the employee, indicating that he had never had any reasonable expectation of finding work in that community. According to the employee, the town of Greybull, with a population of 2,500 or less, has about a dozen small businesses, a railroad, a bentonite plant, and farming operations, all of which either have no need for additional workers or have only jobs that exceed the employee’s physical capabilities. The employee also testified that, beyond talking to his father and brother-in-law, he did not look for any work of any kind after leaving the employer and relocating to Greybull. In fact, the employee evidently knew prior to moving that he was unlikely to find work even with his relatives, and he acknowledged that he pursued the move for financial reasons without any consideration of his ability to find employment in or around Greybull. As for work in the surrounding area, there are apparently no communities of any size within the driving limit set by Dr. Ogilvie.

The employee has a serious condition with restrictions that would unquestionably hinder his ability to find employment. However, contrary to the employee’s position, the issue is not whether he can expect to find work at or approaching his pre-injury wage but whether he can expect to find work paying more than insubstantial income. See Detmar v. Kasco Corp., No. [REDACTED SSN] (W.C.C.A. Apr. 28, 2000). Vocational expert Bjorklund indicated that the employee may reasonably expect to obtain such work, at least after some additional training, but neither alternate work nor additional training have been investigated. Rather, rehabilitation efforts ended because the employee moved to Greybull, only two months after ceasing work with the employer and less than one month after completion of the vocational evaluation. It is also worth noting that the employee was only forty years old on the date of hearing and that vocational testing revealed high aptitude and interest in areas, such as clerical work, that very well might fit the employee’s restriction to sedentary employment. Given this evidence and the testimony concerning the lack of potential employment opportunities in Greybull, the record reasonably

supports the compensation judge's findings as to withdrawal from the labor market and the employee's ineligibility for permanent total disability benefits. We therefore affirm the judge's decision in its entirety.