2015 IL App (5th) 140239WC-U

Order filed April 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ALLIANCE COAL COMPANY,	)	Appeal from the Circuit Court
	)	of White County, Illinois.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	Appeal No. 5-14-0239WC
	)	Circuit No. 13-MR-20
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Eric Clements,	)	Honorable
Defendant-Appellee).	)	T. Scott Webb,
	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission's award of permanent total disability benefits was not against the manifest weight of the evidence.

¶ 2 The claimant, Eric Clements, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)), seeking benefits for injuries to his lower left leg sustained while working for Alliance Coal Company (employer) on January 31, 2006. The employer stipulated to accident and notice. A section 19(b) hearing was held on October 13, 2011, before Arbitrator Andy Nalefski. The arbitrator found that the

claimant was entitled to permanent total disability (PTD) disability benefits of $559.94 per week for life commencing on December 8, 2008, pursuant to section 8(f) of the Act. 820 ILCS 305/8(f) (West 2004). The employer sought review before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's award with one dissent. The employer then sought judicial review of the Commission's decision in the circuit court of White County, which confirmed the decision of the Commission. The employer then filed a timely appeal with this court, maintaining that the Commission erred in finding that the claimant was entitled to benefits under the odd-lot theory.

¶ 3 FACTS

¶ 4 On January 31, 2006, the claimant, a 36-year-old mechanic, was working at the employer's Patiki mine in Carmi, Illinois, when a large reel branch slammed against his lower left leg, calf, and ankle, and pinned him against a large metal machine. The claimant suffered a severe crush injury and began experiencing severe pain and swelling. He was transported by ambulance to the emergency department at Deaconess Hospital in Evansville, Indiana.

¶ 5 The claimant was placed under the care of Dr. David King, who performed several surgical procedures in January and February of 2006, including a fasciotomy, debridement, as well as several skin grafts. In March 2008, Dr. King performed an additional surgical procedure to release compression around the peroneal nerve, which was causing additional pain in and around the scar tissue. Dr. King testified, by evidence deposition, that the claimant's diagnosis was compartment syndrome, reflex sympathetic dystrophy (RSD), chronic regional pain syndrome and vascular insufficiency. Dr. King further observed that the claimant's condition caused intermittent swelling and unremitting pain, and that his condition was permanent. Specifically, Dr. King opined that the claimant would continue to experience pain from the RSD, permanent muscle weakness and difficulty walking on uneven surfaces due to ankle weakness,

and swelling due to vascular insufficiency. He noted that the claimant's injured leg was 50% larger than the other leg due to swelling. He observed that the claimant's stability and gait would never be fully recovered. Dr. King opined that the claimant's current condition of ill-being was causally related to the January 31, 2006, crush injury. He further opined that, although the 2008 surgery had appeared to relieve some of the pain, the claimant would be in need of long-term pain management, including the need for prescribed narcotics. Dr. King testified that some individuals with similar crush injuries could do sedentary work, however, a person with the claimant's edema would need to be able to elevate his foot to above the level of his heart in order to control the edema. He further testified that he prescribed physical therapy after the 2008 surgery and the claimant had been very cooperative with the therapy. He also observed that the claimant had been one of his best patients at keeping narcotic medication to a minimum. As to the claimant's employability, Dr. King testified that he would defer to the physicians addressing the claimant's pain management. He noted, however, that the need for light sedentary work and the need to frequently elevate his foot to relieve symptoms of edema would be permanent restrictions. Dr. King also noted that the claimant would need to wear a compression stocking, which might be difficult due to the pain sensitivity caused by RSD.

¶ 6 After the 2008 surgery, Dr. King referred the claimant to Dr. Michael Roberts for pain management. The claimant testified that his pain medication at the time of the hearing was the same since 2008.

¶ 7 On November 12, 2008, the claimant was examined at the request of the employer by Dr. Jeana Lee, a board certified orthopedic surgeon. Dr. Lee imposed the following permanent work restrictions: (1) no standing longer than two hours and no walking more than two hours in any eight hour period; (2) no repetitive motions with the left leg; (3) no bending, squatting, kneeling, twisting, turning, climbing, or crawling; (4) no lifting or carrying more than five pounds in the

left hand and except for short distances and only on an occasional basis; (5) drive only vehicles with an automatic transmission; and (6) use of a cane and compression stocking when possible. Dr. Lee gave no opinion as to the claimant's ability to find employment within those restrictions.

¶ 8 The claimant entered into evidence the deposition of Catherine Duff, a vocational consultant hired by the employer to determine the claimant's work abilities. Duff testified that she met with the claimant on May 1, 2009, that he was a pleasant and cooperative subject, that he told her he had been employed all his life and wanted to return to work. She reported that the claimant had an excellent work history, primarily performing jobs within the medium to heavy physical demand level. Duff opined that Dr. Lee's work restrictions prohibited the claimant from performing even sedentary, light demand work. In making this determination, Duff compared Dr. Lee's work restrictions with U.S. Department of Labor physical demand job standards. Duff opined that as long as the claimant remained under Dr. Lee's permanent work restrictions "he would be unable to find a job in the open labor market." Duff did not perform a customary job availability search in a 50 mile radius due to her conclusion that Dr. Lee's restrictions alone, "by definition" precluded the claimant from any work. She further opined that as long as the claimant was under those restrictions he would not be able to return to work. Duff also testified that her opinion regarding the claimant's employability was based on Dr. Lee's restrictions, which she opined precluded the need to inquire whether the claimant could be trained for any other work.

¶ 9 The claimant entered into evidence the deposition of Cassie Bias, the long-term benefit coordinator for the employer. Bass testified that she wrote and signed a letter addressed to the claimant dated May 22, 2009, stating the claimant was entitled to long-term disability based upon Dr. Lee's report and Duff's vocational evaluation, both of which supported the finding that the claimant was "unable to even perform sedentary physical demand level work" and was

"excluded from all work by definition of the U.S. Department of Labor and Dr. Lee's restrictions."

¶ 10 The claimant entered the deposition testimony of Timothy Lalk into evidence. Lalk, a vocational rehabilitation counselor since 1979, has a master's degree in rehabilitation counseling from the University of Missouri. Lalk first met with the claimant on October 28, 2008, at the request of the claimant's attorney. Lalk found the claimant to be credible and cooperative during his interview. He administered certain standardized academic tests which placed the claimant at a sixth grade reading level, which in Lalk's opinion would impose an impediment to any retraining program. Lalk further opined that any type of retraining would not likely be successful due to the claimant's physical limitations. Lalk opined that the claimant is not able to secure and maintain employment in the open labor market and would not be able to secure employment in the normal course of business in any market situation.

¶ 11 At the arbitration hearing, the claimant removed a compression stocking to reveal a scar eight inches in length and one inch across running the length of his calf. The arbitrator likewise noted a "football shaped injury running down the outside of the calf, six inches in length and three inches across at its widest." The claimant testified that his symptoms were the same as they were in 2008. His primary complaints were near constant pain and swelling. He testified that standing, lengthy walking, and sitting all cause his leg to swell. The swelling causes stinging sensation, cuts off circulation to his foot and causes the foot to go numb. He also testified that when the leg swells, the scar breaks open and the starts oozing blood. To stop the swelling, he testified that he must immediately elevate his foot. He testified that he has no ankle strength and has difficulty walking on uneven surfaces. He testified that he can sleep only 4 to 5 hours per night due to his leg pain. At the time of the hearing, the claimant was still taking prescription Lortab, Percocet, Prozac, Valium, and an anti-inflammatory, all of which he had

been taking since the accident. The claimant further testified that he is still under the work restrictions and limitations imposed in 2008.

¶ 12 The claimant also testified that, despite Dr. Lee's restriction, he had looked for employment. He entered into evidence an exhibit containing a list of employers that he had contacted regarding possible employment on March 8, 2010, March 9, 2010, July 5, 2011, and July 6, 2011. The claimant testified that none of the employers had work within his restrictions.

¶ 13 The arbitrator found that the claimant's current condition of ill-being was causally related to the accident on January 31, 2006. The arbitrator further found that the claimant was entitled to PTD benefits as a result of the accident. In support of this conclusion, the arbitrator found that the claimant "proved he is unable to perform any services for which there is a reasonably steady labor market, and the [employer] had not provided any persuasive evidence that some kind of suitable work is regularly and continuously available to [the claimant]." The arbitrator particularly noted the opinions of two vocational experts, one of whom was retained by the employer, both of which found that the claimant was unable to find work in a reasonably steady job market. The arbitrator found that the claimant's condition was permanent as of December 12, 2008, the date Dr. King first imposed restrictions on the claimant's activities and movements. The employer sought review of the arbitrator's decision before the Commission, which affirmed and adopted the arbitrator's award with one dissent. The dissenting commissioner would have awarded the claimant a permanent partial disability benefit equal to 75% loss of the use of the left leg. The employer then sought judicial review of the Commission's decision in the circuit court of White County which confirmed the decision of the Commission. The employer now appeals.

¶ 14 ANALYSIS

¶ 15 The employer maintains that the Commission erred in awarding the claimant PTD benefits under the odd-lot theory. In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993). An injured employee can establish entitlement to PTD benefits under the Act in one of three ways, namely: (1) by a preponderance of medical evidence; (2) by showing a diligent but unsuccessful job search; or (3) by demonstrating that, because of his age, training, education, experience, and condition, there are no jobs available for a person in his circumstances. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 1117, 1129 (2007). When the claimant cannot establish entitlement to PTD benefits by a preponderance of medical evidence, but instead relies upon establishing unavailability of employment, the claim is referred to as an "odd-lot" claim. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538,

546-47 (1981). Odd-lot claimants must establish that they are incapable of performing services except those for which there is no reasonably steady labor market. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87 (1983); *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007) (claimant must establish by preponderance of the evidence that he will not be regularly employed in any well-known branch of the labor market). Once a claimant establishes that he is "odd-lot" the burden then shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Valley Mould & Iron Co.*, 84 Ill. 2d at 547.

¶ 16 In this case, the Commission adopted the arbitrator's conclusion that the claimant proved he was "unable to perform any services for which there is a reasonably stable labor market." A claimant can show inability to work in a reasonably stable labor market by showing either a diligent job search or that due to his particular circumstances (age, training, experience, education, and physical condition) there are no jobs readily available to him without serious risk to his health or life. *Federal Marine Terminals, Inc.*, 371 Ill. App. 3d at 1129. Here, while the record contains some evidence that the claimant conducted a job search, there is no evidence to establish that his search was diligent. However, the record contained sufficient evidence that the claimant's particular circumstances precluded his finding gainful employment. The record established that both Dr. King and Dr. Lee had placed the claimant on significant work restrictions which were likely to be permanent. Evidence regarding the opinions of the employer's vocational experts, Duff and Bias, established that the claimant's restrictions rendered the claimant unemployable. The claimant's vocational expert, Lalk, opined that the claimant's condition, skills and education rendered him unemployable in any stable labor market, and further opined that the claimant could not undergo any training that would make him employable.

¶ 17 The employer raises three objections to the Commission's determination that the claimant established entitlement to PTD under the odd-lot theory. First, it challenges the finding that the claimant was credible. The employer focuses on the claimant's use of a cane at the hearing. It maintains that there is no documented prescription that the claimant use a cane, and no documentation that the claimant in fact used a cane prior to the hearing. Specifically, the employer points out that Mr. Lalk made a notation on his report that "[claimant] told me that he uses a cane, but did not bring [it] with him to the office." The employer further maintains that the claimant made incorrect statements to Lalk about whether the employer was still in business. It also maintains that the claimant was not sincere in returning to work since he had applied for and received social security disability benefits. Ultimately, it is the province of the Commission to determine the credibility of witnesses, including the claimant, and that determination will not be overturned unless it is against the manifest weight of the evidence. *O'Dette*, 79 Ill. 2d at 253. Here, we cannot say that the Commission's finding that the claimant was credible was against the manifest weight of the evidence. The claimant testified that he sometimes used a cane and that his cane use was dependent upon the surface upon which he had to walk. The arbitrator observed the claimant's demeanor and determined him to be credible. The Commission adopted that determination, and employer has posited nothing to establish that the opposite conclusion is clearly apparent. We further note that receipt of social security disability benefits does not conclusively establish that a claimant has removed himself from the work force and does not preclude eligibility for benefits under the Act. *Schmidgall v. Industrial Comm'n*, 268 Ill. App. 3d 845, 849 (1994).

¶ 18 The employer next maintains that the Commission erred in the weight it gave to the conclusions of its experts, Catherine Duff and Cassie Bias. It notes that the conclusions reached by these two individuals regarding the claimant's ability to find employment were based on

standards applicable to long-term disability benefits and it was error to apply their findings to whether the claimant was entitled to PTD benefits. We disagree. It may be true that these individuals were addressing the claimant's long-term disability eligibility and not his eligibility for PTD. However, statements such as Duff's that the claimant "would be unable to find a job in the open labor market" and Bias's that the claimant was "unable to even perform sedentary physical demand level work" and was "excluded from all work by definition of the U.S. Department of Labor and Dr. Lee's restrictions" could reasonably be taken as independent statements of these experts' opinions regarding the question of the claimant's employability by any objective standard. The Commission's reliance upon these and other statements in the record support a finding that the claimant was unable to find work in a reasonably stable labor market. Moreover, the claimant's vocational expert, Timothy Lalk, relying upon the same facts contained in the reports of Duff and Bias, reached the same conclusion regarding the claimant's employability.

¶ 19 The employer also maintains that there is no medical evidence in support of the Commission's finding that the claimant was unable to work. The employer misapprehends the nature of the odd-lot theory of recovery. Odd-lot is how a claimant proves entitlement to PTD benefits when there is no medical opinion testimony regarding the nature and extent of the claimant's injuries. *Valley Mould & Iron Co.,* 84 Ill. 2d at 546-47. The fact that there is no medical evidence regarding the permanent nature of the claimant's injuries is, while true, irrelevant to the Commission's determination.

¶ 20 By way of a final argument, the employer attacks the Commission's reliance upon the arbitrator's award despite its alleged "failure to specifically delineate the rationale behind its decision." We disagree. It appears that the employer is objecting to the fact that the arbitrator's award finds that the claimant is entitled to PTD benefits under the odd-lot theory without using

the term "odd-lot" in the decision. While it is true that the award does not refer to "odd-lot" by name, the decision recites the standard definition of "odd-lot" *i.e.*, the claimant "proved he is unable to perform any services for which there is a reasonably steady labor market, and the [employer] had not provided any persuasive evidence that some kind of suitable work is regularly and continuously available to [the claimant]." We find that the award provided sufficient rationale and factual support for the Commission's decision.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court which confirmed the decision of the Commission.

¶ 23 Affirmed.