



TENNESSEE BUREAU OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

Y.Z. Stocklin, Jr.) Docket No. 2017-08-1014
)
v.) State File No. 59533-2015
)
Barrett Distribution Centers, Inc., et al.)
)
)
Appeal from the Court of Workers')
Compensation Claims)
Joshua D. Baker, Judge)

Affirmed and Certified as Final

The employee suffered injuries to his left ankle, left knee, and back when a large metal entry gate he was opening at the employer's premises fell on him. The employer accepted the claim as compensable and provided medical and temporary disability benefits. At trial, the sole issue was the extent of the employee's vocational disability. The trial court awarded the employee permanent total disability benefits, and the employer has appealed. Finding no error, we affirm the trial court's decision and certify the compensation order as final.

Judge David F. Hensley delivered the opinion of the Appeals Board in which Presiding Judge Marshall L. Davidson, III, and Judge Timothy W. Conner joined.

Terri L. Bernal, Brentwood, Tennessee, for the employer-appellant, Barrett Distribution Centers, Inc.

Monica R. Rejaei, Memphis, Tennessee, for the employee-appellee, Y.Z. Stocklin, Jr.

Factual and Procedural Background

The facts underlying the work-related injury in this case are not disputed. Y.Z. Stocklin ("Employee") was injured while opening a gate on the premises of Barrett Distribution ("Employer"), where he worked as an operations supervisor. One of his job duties upon his arrival at work was to open the large metal gate allowing access to Employer's premises. He was opening the gate on the morning of July 17, 2015, when it fell from its hinges and landed on him, resulting in injuries to his left ankle, his left knee, and his back. He received immediate medical care, including surgery on his left ankle to

repair a complex fracture. Ultimately, Employee came under the care of Dr. Edward Perez for his left ankle, Dr. Frederick Azar for his left knee, and Dr. Francis Camillo for his back. In addition to the left ankle fracture surgically repaired by Dr. Perez, Dr. Azar performed arthroscopic surgery to repair a tear in Employee's posterior cruciate ligament resulting from the work accident. Dr. Azar also diagnosed Employee with an L5 transverse process fracture and provided care for Employee's back injury.

The three authorized physicians released Employee at maximum medical improvement and assigned impairment ratings for the injuries they treated. The parties stipulated that the impairment ratings combined to a fourteen percent anatomical impairment to the body as a whole. Employee has not sought additional treatment for his left ankle or left knee, as the physicians treating those injuries had nothing further to offer unless additional surgical intervention is needed. Employee has continued to receive medical care for his back injury.

The parties stipulated to the compensability of the claim, the impairment rating, the existence of an overpayment of temporary disability benefits, an advance on permanent disability benefits, and Employee's compensation rate. They additionally stipulated that Employer was unable to offer Employee a position after his work injury. The only dispute at trial was the extent of Employee's vocational disability.

Employee was fifty-nine years of age at the time of the trial and has an extensive work history involving manual labor. He testified to having worked a variety of jobs including an archeological dig, chopping cotton, picking cotton, working in hay fields, operating a tractor, and working as an order picker. He has an associate's degree in criminal justice and worked as a correctional officer for the State of Tennessee for approximately one year. He has worked as a machine operator, a printing press assistant, a general warehouse worker, and a material handler, which included operating a forklift. He started working in logistics with a temporary work agency as a "shipping lead" and was eventually promoted to shipping supervisor where he oversaw emergency shipping operations. He subsequently went to work at Meritex Logistics as operations manager, which involved both administrative duties as well as physical work. He worked for Meritex Logistics for approximately ten years until it was purchased by Employer. In his work with Employer, he eventually oversaw as many as 28 accounts and supervised up to six full-time employees.

At trial, Employee testified he was unable to work in his disabled condition. He contended the degree of pain with which he lives on a daily basis, accompanied by the side effects of the medications he takes to manage the pain, preclude him from finding full-time employment. He asserted he was no longer able to perform the types of jobs he previously performed, as he is unable to sit, stand, or walk for long periods of time, must change position frequently, cannot lift over twenty pounds, and experiences side effects from his medications that make him feel like he is in a "fog." He described having fallen

asleep in the carpool line when picking up or dropping off his daughter at school and having fallen asleep at a red light. He testified he cannot drive for long distances. He testified he has not sought work since his injury. He stated that he sometimes uses a cane when walking, although no medical provider has recommended or prescribed his use of a cane.

Employee's vocational expert, David Ross Strauser, Ph.D., testified Employee was unable to maintain gainful employment. He described his approach in assessing Employee's vocational impairment and contrasted it with that of Employer's expert, David Earl Stewart. He described his process as a rehabilitative approach, part of which includes obtaining information "very much about the subjective issues regarding the individual" that may impact an individual's ability to function. He testified his approach also included a transferable skills analysis, stating:

If you just relied on the transferable skills analysis, you would . . . drop off these very important subjective issues because the transferable skills analysis can't take those into account. . . . It's not just the medical limitations that are the residual function capacity, but it is the blend of the objective medical records and any subjective complaints that the individual would have.

By not including subjective considerations, as Employer's expert, Mr. Stewart, described in his approach, Dr. Strauser stated, "he's leaving off a huge part of an equation and . . . seems like choosing not to use an appropriate methodology that would allow him to accommodate those issues." Dr. Strauser testified he found Employee to be "highly credible," stating that Employee "lives in significant pain and discomfort, [and] has a hard time of functioning on a daily basis."

Dr. Strauser was asked his opinion concerning jobs that Mr. Stewart identified in his report as being available to Employee and whether Employee would be able to perform the jobs. He stated Employee "would not be able to perform any of those positions on a consistent and persistent basis necessary to maintain employment." Addressing the job titles Mr. Stewart identified as being available to Employee, Dr. Strauser stated Employee "would not be able to meet the demands of these jobs as are typically performed on a daily or persistent basis, given the combination of his physical restrictions and pain and his . . . necessity or his preference . . . to take pain medication."

On cross-examination, Dr. Strauser was asked what his vocational assessment would be if the "component of pain" was taken out of the assessment, and he responded that his assessment "would range somewhere between 70 to 80 percent." If the subjective component of pain was included, he agreed he would "place [Employee] at permanent total disability." On further cross-examination, Employer's attorney stated: "you did not look at any individual job to do an analysis as to whether or not [Employee]

could potentially perform that job, according to your report and according to your prior testimony.” Dr. Strauser responded, “I did not look at a specific job because my opinion is that he is 100 percent vocationally impaired.”

Dr. Strauser agreed with Mr. Stewart that Employee has transferrable job skills, considering his lengthy history of having worked in management positions and his education level. However, Dr. Strauser distinguished between having transferrable job skills and being employable, explaining that, if Employee’s pain and the side effects he reports from his medications are taken into consideration, he would be unable to perform the job requirements of any position for which he might be qualified. Dr. Strauser testified it was important to consider factors such as an employee’s reports of pain and the medication side effects from which he suffers in order to form an accurate opinion of a person’s overall employability.

By contrast, Employer’s expert testified he used a transferable skills analysis in assessing Employee’s disability. He reviewed Employee’s medical, rehabilitation, and physical therapy records. He reviewed the depositions of Employee and Dr. Perez and reviewed Dr. Strauser’s report. He met with Employee for approximately two hours during which he interviewed Employee concerning his education, the skills he acquired in his work, his work history and job duties, and he administered vocational testing to assist with his analysis. Both he and Dr. Strauser agreed that Employer’s physician, Dr. Perez, imposed physical restrictions of sedentary to light duty work. Mr. Stewart testified he did not consider Employee’s complaints of pain or descriptions of his medication’s side effects, stating those factors are subjective and not subject to measurement and more appropriately fall within the scope of a medical expert’s opinion. He testified he performed a survey of the local job market as pertinent to Employee and identified eleven job positions with openings that were within Employee’s physical capabilities. Further, he testified that he calculated Employee had a 35% loss of access to the labor market and a 57% reduction in earning capacity, which he averaged to reach a 45% vocational impairment.

The trial court found Employee to be a credible witness and found him to be permanently totally disabled. The trial court concluded that Employee’s “constant pain, physical limitations, age, work history, and the local job market” prevent Employee from being able to find gainful employment. Employer has appealed the award of permanent total disability benefits.

Standard of Review

The standard we apply in reviewing a trial court’s decision presumes that the court’s factual findings are correct unless the preponderance of the evidence is otherwise. *See* Tenn. Code Ann. § 50-6-239(c)(7) (2018). When the trial judge has had the opportunity to observe a witness’s demeanor and to hear in-court testimony, we give

considerable deference to factual findings made by the trial court. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). However, “[n]o similar deference need be afforded the trial court’s findings based upon documentary evidence.” *Goodman v. Schwarz Paper Co.*, No. W2016-02594-SC-R3-WC, 2018 Tenn. LEXIS 8, at *6 (Tenn. Workers’ Comp. Panel Jan. 18, 2018). Similarly, the interpretation and application of statutes and regulations are questions of law that are reviewed *de novo* with no presumption of correctness afforded the trial court’s conclusions. *See Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013). We are also mindful of our obligation to construe the workers’ compensation statutes “fairly, impartially, and in accordance with basic principles of statutory construction” and in a way that does not favor either the employee or the employer. Tenn. Code Ann. § 50-6-116 (2018).

Analysis

Employer’s sole contention on appeal is that the trial court erred in awarding Employee permanent total disability benefits. An individual is permanently and totally disabled when an injury “totally incapacitates the employee from working at an occupation that brings the employee an income.” Tenn. Code Ann. § 50-6-207(4)(B) (2018). The burden is on the employee seeking permanent total disability benefits to establish that he or she is unable to work at any job that would produce an income in the open labor market. *See Prost v. City of Clarksville*, 688 S.W.2d 425, 427 (Tenn. 1985).

Prior to the 2013 Workers’ Compensation Reform Act, the Tennessee Supreme Court determined that to assess whether an individual is permanently and totally disabled, it must look to “a variety of factors such that a complete picture of an individual’s ability to return to gainful employment is presented.” *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006) (citing *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 386 (Tenn. 2002)). Factors to be considered by a court include “the employee’s skills and training, education, age, local job opportunities, and his [or her] capacity to do work at the kinds of employment available in his [or her] disabled condition.” *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000) (quoting *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986)). Although this assessment is usually made and presented at trial by a vocational expert, “it is well settled that despite the existence or absence of expert testimony, an employee’s own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is ‘competent testimony that should be considered.’” *Vinson*, 92 S.W.3d at 386 (quoting *Cleek*, 19 S.W.3d at 774).

In its brief, Employer identifies particular evidence or the lack of evidence as indicating the trial court erred in determining Employee is permanently totally disabled. In particular, Employer argues that: (1) Employee failed to attempt to obtain any employment within his physical restrictions; (2) Employer’s vocational expert located

multiple jobs within Employee's permanent restrictions; (3) no physician opined that Employee was unable to physically perform any job; and (4) Employee was never prescribed use of a cane. We address each separately.

1. Employee's Failure to Seek Employment

Employee testified he did not apply for work after he was released by his doctors and Employer terminated him. He testified he was unable to work due to his inability to sleep well, his pain and the effects of medication he takes for pain, and his inability to sit, stand or walk for extended periods of time. Employee's own assessment of his physical condition and his ability or inability to return to gainful employment is an appropriate consideration for the court in assessing his vocational disability. *See Vinson*, 92 S.W.3d at 386. The trial court found Employee credible, concluding his "extensive, unblemished work history leads the Court to believe that [Employee] would work if he could." We defer to the trial court in its credibility determination. *See Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008) ("When the trial court has heard in-court testimony, considerable deference must be afforded in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony."). Although Employee's failure to attempt to return to gainful employment is a factor to be considered in assessing his vocational disability, we conclude the trial court did not err in its analysis of Employee's vocational disability with respect to Employee's failure to seek employment following the work accident.

2. The Availability of Jobs within Employee's Permanent Restrictions

Employer's vocational expert, Mr. Stewart, testified he performed a survey of the local job market as pertinent to Employee and identified eleven open job positions that were within Employee's physical capabilities. As previously noted, Dr. Strauser was asked his opinion concerning the positions Mr. Stewart identified and whether Employee would be able to perform the work. Dr. Strauser stated Employee "would not be able to perform any of those positions on a consistent and persistent basis necessary to maintain employment," and further testified Employee "would not be able to meet the demands of these jobs as are typically performed on a daily or persistent basis, given the combination of his physical restrictions and pain and his . . . necessity or his preference . . . to take pain medication."

The trial court determined there were very few jobs available to Employee. Addressing the positions Mr. Stewart identified as being within Employee's restrictions, the trial court concluded five of those jobs involved security work Employee "could not perform," adding "no proof suggested that [Employee] could perform the duties of the warehouse management position" that had been included. Thus, while Employer's vocational expert identified jobs within Employee's permanent physical restrictions, we

conclude the evidence does not preponderate against the trial court's determination that Employee could not perform the positions on a full time basis.

3. The Absence of Expert Medical Proof that Employee was Physically Unable to Perform Any Job

Employer next asserts that no physician opined that Employee was unable to physically perform any job. While the record does not include an expert medical opinion that Employee was physically unable to perform any job, the absence of such an opinion is not determinative. As previously noted, the assessment of permanent total disability is based on numerous factors that include an injured employee's capacity to work at the kinds of employment available in the employee's disabled condition. *See Roberson*, 722 S.W.2d at 384.

The treating physician for Employee's ankle injury, Dr. Perez, testified as follows:

I think essentially being on his feet for nine hours is really not going to be possible. Closing heavy doors and gates will be very difficult. I'm [sic] not really realistic doing lots of heavy lifting or loading of trucks [sic]. At this point I'll make permanent restrictions [of] sedentary duty with no lifting and carrying more than twenty pounds.

Dr. Perez admitted that he had little information about the physical demands of jobs in the logistics industry. However, he was asked, based upon his knowledge of the logistics industry, whether he could state that Employee "is unable to find any employment," and he responded, "no, I didn't say that. He just couldn't - - what I thought he couldn't do was warehouse supervisor, being on his feet all day, climbing and heavy lifting." Dr. Perez signed a Physician's Certification Form that stated Employee was unable to return to his pre-injury occupation.

Dr. Camillo treated Employee's back injury. He was not asked about Employee's ability to perform any particular work. Dr. Azar treated Employee's left knee injury. Addressing work restrictions, he recommended Employee "should be on level ground with no climbing," stating he was "concerned about him climbing." Dr. Azar was not asked about Employee's ability to perform any particular job.

Accordingly, although no physician opined that Employee was unable to physically perform any job, there was substantial lay and expert testimony from which the trial court could conclude that Employee's injuries totally incapacitated him from working at an occupation that brings him an income.

4. *Employee's Non-Prescribed Use of a Cane*

Finally, Employer asserts that Employee was never prescribed the use of a cane. Employee admitted that no physician prescribed or recommended that he use a cane. The only medical doctor asked about instructing Employee to use a cane or a brace was Dr. Azar. He testified he did not instruct Employee to use a cane or brace.

Both vocational experts addressed Employee's use of a cane and both noted that no physician had prescribed the use of a cane. Dr. Strauser testified that Employee's use of a cane impacted Employee's ability to be placed and was a factor in his opinion that Employee was 100 percent vocationally impaired. He testified that a cane "is going to preclude [Employee] from doing a lot of jobs that will require him to get up and move around on a consistent basis," adding that "his capacity to be able to ambulate and move around would be significantly limited" by the use of a cane. By contrast, Employer's expert, Mr. Stewart, testified that Employee's use of a cane "just doesn't have a place to go into the process or formula" for assessing vocational impairment if it was not prescribed by a physician.

We note, however, that Employer provides no argument in its brief addressing the significance, if any, of the fact that no physician prescribed or recommended that Employee use a cane. Considering the facts and circumstances in the record, we do not find the absence of a physician's prescription or recommendation for Employee to use a cane to be significant in determining whether Employee is permanently totally disabled.

In reaching its decision, the trial court analyzed the factors set out in *Hubble*, concluding each factor favored a finding that Employee is permanently totally disabled. The court observed that Employee is unable to sit or stand for long periods of time, noted that he uses a cane to walk, and that he takes medication that affects his cognitive functioning. The court also noted that although Employee has an associate's degree in criminal justice, he "worked in the field for only one year as a prison guard, so he has no managerial experience in criminal justice," adding that Employee's physical limitations "would prevent him from performing law enforcement or security work." Likewise, the court concluded Employee's physical limitations prevent him from returning to the type of work he performed before his workplace injuries. Moreover, the court noted that Employee's age and constant pain would hamper his ability to be retrained. We conclude the preponderance of the evidence supports these findings of the trial court.

Conclusion

For the foregoing reasons, we conclude the trial court did not err in determining Employee is permanently totally disabled as a result of his workplace injury and in awarding Employee permanent total disability benefits. Accordingly, the trial court's decision is affirmed and certified as final. Costs on appeal are taxed to Employer.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appeals Board's decision in the referenced case was sent to the following recipients by the following methods of service on this the 10th day of June, 2019.

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