STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARIA SILVA CABRAL)
)
VS.) W.C.C. 99-02844
)
CRYSTAL BRANDS)

DECISION OF THE APPELLATE DIVISION

CONNOR, J. This matter is before the Appellate Division pursuant to an order issued to the parties to appear and show cause why the appeal should not be summarily decided based upon the principle articulated in Parenteau v. Zimmerman Eng'g, 111 R.I. 68, 299 A.2d 168 (1973). After reviewing the record and considering the arguments of the parties, we find that cause has not been shown and we will proceed to render our decision in this matter without further argument.

On March 21, 1991, the employee sustained injuries to her left knee, upper leg, buttocks, and left wrist. She received weekly workers' compensation benefits for partial incapacity pursuant to a Memorandum of Agreement dated May 13, 1991. Subsequently, the left and right shoulders and the neck were added to the description of her injuries. On November 9, 1994, a consent decree was entered in W.C.C. No. 94-01950 which established an earning capacity of One Hundred Twenty-seven and 60/100 ($127.60) Dollars per week as a result of an offer of suitable alternative employment. Ms. Cabral actually returned to work in this suitable alternative employment position for a period of

time until she was terminated by the employer on January 15, 1999. The employer was ordered by the court to reinstate the employee's weekly benefits at the full rate for partial incapacity as the employer was unable to prove that the termination was due to misconduct on the part of the employee.

In W.C.C. No. 97-07436, the court found on January 7, 1998 that the employee's condition had reached maximum medical improvement. In W.C.C. No. 98-06441, the employee's petition requesting a finding of total disability pursuant to R.I.G.L. § 28-33-17(b)(2) was denied and dismissed on the grounds that the language she was attempting to rely upon applied only to injuries occurring on or after May 18, 1992.

The present case arises from the employee's petition to review requesting that the court order the continuation of the payment of weekly benefits for partial incapacity beyond the three hundred and twelve (312) week period in accordance with R.I.G.L. §§ 28-33-18.3(a)(1) and 28-33-18(d). The employer had notified Ms. Cabral that her weekly benefits would be discontinued on October 22, 1999 pursuant to the statute. The trial judge denied the petition at the pretrial conference and the employee duly claimed a trial. The trial judge, in a decree entered on January 21, 2005, found that the employee failed to establish by a fair preponderance of the credible evidence that her partial disability resulting from the work injury posed a material hindrance to obtaining employment suitable to her limitations. Accordingly, the trial judge denied the employee's request and ordered the employer to discontinue the payment of weekly benefits as of October 12, 1999. The employee then filed a claim of appeal.

The employee did not submit a transcript of any portion of the trial in this matter. The recitation of facts in this decision has been gleaned from the trial judge's decision.

Ms. Cabral was fifty-nine (59) years old at the time of her testimony and had been receiving Social Security Disability Insurance benefits since 1994. She was employed at Monet for seventeen (17) years carding jewelry, bagging jewelry, and filling orders. She stated that she performed part-time suitable alternative employment as a packer until she was terminated in 1996. Since that time, she has not sought any other type of employment.

The employee earned her General Education Diploma (G.E.D.) in the United States and attended a secretarial course for three (3) months in or around 1992. She left that program before completion in order to care for her ill mother. She reported continued complaints of pain in her back, left leg, knees and neck. Her shoulders were aggravated by extended periods of driving. In addition, she testified that she was diagnosed with rheumatoid arthritis several years ago. Ms. Cabral declared that her physical ailments, in the aggregate, prevent her from carrying out any type of work.

The medical evidence consisted of the affidavits and reports of Dr. Richard Bertini and Dr. Stanley J. Stutz. Dr. Bertini, an orthopedic surgeon, began treating the employee in 1993 and saw her approximately every two (2) months thereafter. The employee's complaints of pain in the neck area, both shoulders and low back appeared consistently throughout the reports. The doctor's findings were also fairly consistent, specifically, restricted motion of the shoulders and neck, and tenderness in the low back area and upper trapezius.

Dr. Bertini's reports do not contain any statement as to whether the employee's condition had reached maximum medical improvement, notwithstanding conservative treatment spanning more than six (6) years and the employee's refusal to undergo

shoulder surgery. The doctor also neglected to address whether the employee was capable of working or what type of restrictions, if any, the doctor would impose on her work activities.

Dr. Stutz, an orthopedic specialist, evaluated the employee on three (3) occasions at the employer's request. In April 1997, the doctor diagnosed the employee with work-induced bilateral rotator cuff tendonitis. He found her to be partially disabled and restricted from lifting above shoulder level. He stated that her condition had reached maximum medical improvement. After the second evaluation on August 22, 1997, the doctor again found partial disability due to bilateral rotator cuff tendonitis and added the restriction of no heavy lifting to the previous limitation on lifting above chest level. His final evaluation, on March 29, 1999, revealed no significant changes in her complaints or his findings. He maintained his opinion that the employee could work provided she refrained from lifting more than ten (10) pounds and avoided arm use above chest level.

Subsequently, Dr. Stutz viewed videotape portraying the job duties of a receptionist, a security guard, and a jewelry packer. In a November 15, 1999 written correspondence, the doctor indicated that the employee could perform the jobs as shown in the videotape because they did not involve work above chest level.

Carl Barchi, a vocational specialist, testified on behalf of the employee. After interviewing Ms. Cabral, he opined that the employee was not capable of returning to regular employment based on the physical restrictions imposed by the doctors, the employee's age, limited education, limited work experience, limited English-speaking skills, and the lack of marketable transferable skills.

In January 2000, Mr. Barchi updated his initial evaluation after another interview with Ms. Cabral and communication with employers regarding jobs listed in a labor market survey prepared by the employer's vocational expert. Mr. Barchi maintained his opinion that the employee could not secure and maintain employment of any type. He explained that he factored into his determination the physical restrictions imposed by Dr. Stutz as well as Dr. Bertini's physical findings of pain and restriction of motion in the neck and shoulders. Mr. Barchi also concluded that the employee's work experience had not provided her with any transferable skills because her lengthy period of employment at Monet involved unskilled, repetitive manual labor and her prior work experience in Cape Verde before she came to the United States in 1973 was irrelevant.

Janine P. Byron-DeLisle, a vocational rehabilitation counselor, testified on the employer's behalf. Her reports prepared in July 1998, November 1998, and October 1999 were introduced into evidence. Ms. Byron-DeLisle interviewed the employee without the aid of an interpreter and also read the transcript of her discovery deposition. In forming her opinion whether suitable work was available for Ms. Cabral, she utilized the physical restrictions set forth by Dr. Stutz and transferable skills the employee learned from her work experience as a secretary and postal worker in Cape Verde over twenty (20) years ago, as well as from her employment at Monet.

Ms. Byron-DeLisle determined that the employee could perform semi-skilled employment, such as a greeter at a department store such as Wal-Mart, an usher or ticket sales cashier in a movie theater, a telemarketer, a night auditor in a hotel, an access control security guard and a companion to an elderly or disabled person. She conceded that the exact duties required of a position in a particular company would have to be

determined in order to assess whether Ms. Cabral was actually capable of performing a particular job. Ms. Byron-DeLisle believed that the employee's age, limited English-speaking ability, lengthy period of unemployment and receipt of Social Security Disability Insurance benefits would not hinder her ability to procure gainful employment.

At the conclusion of the evidence, the trial judge chose to accept the medical opinions of Dr. Stutz over the opinions offered by Dr. Bertini regarding the employee's ability to work. The trial judge stated that although the employee treated with Dr. Bertini for several years with significant regularity, the doctor failed to address the employee's physical restrictions or ability to work. Dr. Stutz, on the other hand, addressed the aforementioned details and had concluded that the employee could work within specified boundaries.

Additionally, the trial judge chose to accept the opinion of the employer's vocational expert, Ms. Byron-DeLisle over the opinion of Mr. Barchi, the employee's vocational expert. The trial judge noted that Ms. Byron-DeLisle identified jobs in the local market that fit the employee's physical restrictions as established by Dr. Stutz, while Mr. Barchi opined that the employee could not work given her age, limited English proficiency, physical problems related to her lower back and minimal work experience. The trial judge ruled, and befittingly so, that the additional factors relied upon by Mr. Barchi in formulating his opinion do not pertain to a petition for continuation of partial incapacity benefits beyond three hundred and twelve (312) weeks. *See* R.I.G.L. § 28-33-18.3(a)(1). The trial judge thus found that the employee failed to prove that she was materially hindered in her search for employment solely by the effects of her work injury, as required by the statute. The trial judge then denied the employee's request for

continuation of her weekly benefits and entered the decree ordering the employer to cease payment of weekly benefits as of October 12, 1999.

Pursuant to R.I.G.L. § 28-35-28(b), the Appellate Division must strictly adhere to the trial judge's findings on factual matters absent clear error. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). If the record before the Appellate Division reveals evidence sufficient to support the trial judge's findings, the decision must stand. Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the ensuing reasons, we find no merit in the employee's appeal, and we, accordingly, affirm the trial judge's decision and decree.

The employee has filed two (2) reasons for appeal. First, the employee contends that the trial judge committed error by discounting Dr. Bertini's medical opinions. We disagree.

A careful review of the record demonstrates that the trial judge was presented with affidavits and reports of Dr. Richard Bertini and Dr. Stanley J. Stutz. After assiduously reviewing the medical opinions offered by each doctor, the trial judge, as is her prerogative, chose to rely on the opinions tendered by Dr. Stutz as opposed to those opinions offered by Dr. Bertini.

Our Supreme Court held in Parenteau v. Zimmerman Eng'g, 111 R.I. 68, 299 A.2d 168 (1973), that where conflicting medical opinions of competent and probative value exist, it is the prerogative of the trial court to accept the medical opinions of one (1)

provider over another. The employee has raised no issue with respect to the competency of the opinions of Dr. Stutz. Thus, the trial judge could rely on his opinions in denying the employee's petition.

Dr. Stutz, after examining the employee on three (3) occasions, found that the employee suffered a partial disability as a result of a work-related incident on March 21, 1991. Though he found the employee impaired from bilateral rotator cuff tendonitis, Dr. Stutz concluded that the employee could work so long as she refrained from lifting more than ten (10) pounds and avoided use of her arms above chest level. Dr. Stutz viewed videotapes depicting various jobs and he determined that the employee was capable of performing these jobs as they fell within the guidelines of his restrictions. Dr. Bertini, on the other hand, failed to quantify the limits of the employee's incapacity. Therefore, the trial judge determined that only Dr. Stutz's opinion afforded the court assistance in rendering a decision regarding the employee's vocational ability.

In her second reason of appeal, the employee argues that the trial court erred in relying on Ms. Byron-DeLisle's opinion because it rested on a faulty foundation. Again, we disagree.

As the trial judge correctly noted, only the employee's partial incapacity resulting from the work-related injury is considered in determining whether an employee qualifies for the continuation of weekly benefits beyond the three hundred and twelve (312) week limit. Pursuant to R.I.G.L. § 28-33-18.3(a)(1), an employee's age, education, and training are not considered in evaluating whether the employee's partial disability constitutes a material hindrance to obtaining employment. Mr. Barchi's determination that the employee was incapable of performing any type of work was predominantly

grounded on these factors. Ms. Byron-DeLisle, on the other hand, testified that the employee was capable of certain semi-skilled employment positions such as a greeter, usher, cashier, telemarketer, night auditor, access control security guard, and a companion to a disabled or elderly person. She stated that she relied on the physical restrictions Dr. Stutz imposed, conversations with the employee, and information from the employee's deposition transcript in arriving at these conclusions. As disability presents the only justification for continuation of benefits, Ms. Byron-DeLisle's assessment of the employee's employability is adequately supported by medical opinion and the employee's own assertions.

Based on the foregoing, we find no error on the part of the trial judge in finding that the employee failed in her burden to prove by a fair preponderance of the evidence that her partial incapacity caused by a work-related injury on March 21, 1991 posed a material hindrance to obtaining suitable employment. Consequently, the employee's appeal is denied and dismissed and the decision and decree of the trial judge is affirmed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Healy, C. J. and Sowa, J. concur.

ENTER:

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Healy, C. J.

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Sowa, J.

_____
Connor, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on January 21, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Healy, C. J.

_____
Sowa, J.

_____
Connor, J.

I hereby certify that copies were mailed to John Harnett, Esq., Joseph M. Beagan, Esq., and Denise Lombardo Myers, Esq., on

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