2021 IL App (2d) 200562WC-U
No. 2-20-0562WC
Order filed August 13, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

CDW CORPORATION,	)	Appeal from Circuit Court
	)	of Lake County
Appellant,	)	
	)	
v.	)	No. 19-MR-11
	)	
THE ILLINOIS WORKERS'	)	
COMPENSATION COMMISSION *et al.*	)	Honorable
	)	Jorge L. Ortiz,
(Ferdinaze Hajrullahu, Appellee).	)	Judge Presiding

JUSTICE CAVANAGH delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Because the Illinois Workers' Compensation Commission found that the claimant's work-related injury precluded her from returning to her usual and customary employment, section 9110.10(a) of the Commission's rules (50 Ill. Adm. Code 9110.10(a) (2016)) required a vocational rehabilitation assessment. (2) The appellate court reverses the circuit court's reversal of the Commission's reversal of the arbitrator's permanent total disability award. (3) The appellate court reinstates the Commission's denial of permanent total disability benefits and its award of $376.66 per week for 300 weeks.

¶ 2 The only dispute in this case is whether the claimant, Ferdinaze Hajrullahu, who injured her back at work, is entitled to permanent total disability benefits on an odd-lot theory (see 820 ILCS 305/8(f) (West 2018); *Pisano v. Illinois Workers' Compensation Comm'n*, 2018 IL App (1st) 172712WC, ¶ 73) or, alternately, whether she is entitled to vocational rehabilitation (see 820 ILCS 305/8(a) (West 2018); 50 Ill. Adm. Code 9110.10 (2016)). The arbitrator, Gregory Dollison, awarded her $376.66 per week in permanent total disability benefits, for life, on an odd-lot theory (among other forms of compensation). The Illinois Workers' Compensation Commission (Commission) vacated this award of odd-lot benefits and instead awarded the claimant $376.66 per week for 300 weeks, representing a 60% loss of the person as a whole. See 820 ILCS 305/8(d)2 (West 2018). In other words, the Commission substituted a loss-of-person award for the permanent total disability benefits. The reason for the switch was this: the Commission found that although the claimant's back injury "precluded her from returning to her usual and customary occupation," the injury "[did] not result in an impairment of her earning capacity."

¶ 3 The claimant appealed to the circuit court of Lake County. In the circuit court's view, the Commission's finding of no impairment of earning capacity was against the manifest weight of the evidence. Therefore, the court reversed the Commission's refusal to award the claimant odd-lot permanent total disability benefits.

¶ 4 The employer, CDW Corporation, now appeals to us, challenging the circuit court's reversal of the Commission's decision. We disagree with the circuit court that the Commission's decision is against the manifest weight of the evidence. Therefore, we reverse the circuit court's judgment. Even so, we remand this case to the Commission for a vocational rehabilitation assessment. See 50 Ill. Adm. Code 9110.10 (2016).

¶ 5 I. BACKGROUND

¶ 6 On March 14, 1962, the claimant was born in Kosovo or, to use the technically correct name, the Autonomous Region of Kosovo and Metohija, as the territory was then called. She graduated from high school there. In 1983, she began taking college courses on preschool education. In 1984, however, because of the birth of her son, she had to drop out of college. Consequently, she took only five college courses in Kosovo.

¶ 7 From 1981 to 1999, the claimant worked in Kosovo as a payroll clerk, writing down employees' hours and wages. She did not use a computer in that job—just pencil, paper, and a calculator.

¶ 8 In 1999, the claimant immigrated to the United States as a war refugee. Upon arrival, she took a three-month course on English as a second language, as her native language is Albanian. A humanitarian organization helped her obtain a job with the employer.

¶ 9 On December 6, 1999, the claimant commenced her job with the employer. She was employed as a picker/packer. Her duties were to pick computer components off the shelves of a warehouse, scan them, pack them into boxes, place the boxes on a conveyor, and at the end of her shift, clean up her work area.

¶ 10 On May 28, 2003, when she was 41 years old, the claimant was pulling some merchandise off a deep shelf when a deteriorating disc in her back gave out. She underwent medical treatment. Magnetic resonance imaging revealed disc degeneration at L4-L5 and L5 to S1. She also had degeneration in her cervical spine.

¶ 11 The employer's section 12 examiner (see 820 ILCS 305/12 (West 2018)), Dr. Edward Goldberg, opined that although the claimant's neck problems were not work-related, the workplace accident of May 28, 2003, had aggravated her lumbar spondylosis and her left-leg radicular pain.

He restricted her from lifting more than 10 pounds. She could not be a picker/packer anymore because some of the boxes in that job weighed 70 pounds.

¶ 12 Eventually, on November 6, 2006, the employer fired the claimant because physically she no longer could do the work. Her back could not take the lifting anymore.

¶ 13 There were more appointments with different doctors. She received steroid injections. She took nerve pain medicine and anti-inflammatories. Nothing afforded any lasting relief.

¶ 14 On August 15, 2012, a neurosurgeon, Dr. Sergey Neckrysh, performed a lumbar fusion of L4 to S1, with an iliac crest autograft, and laminectomies at L4 and L5. The causal relation between this surgery and the workplace injury is undisputed. After the surgery, Dr. Neckrysh imposed a permanent lifting limit of 10 pounds.

¶ 15 Dr. Goldberg opined that the lumbar surgery was reasonable and necessary. He also agreed with the 10-pound limit, although he recommended a functional capacity evaluation.

¶ 16 On June 23, 2014, the report of a functional capacity evaluation, addressed to Dr. Neckrysh, concluded that the claimant was at the sedentary to light physical demand level. Specifically, the report determined that she could lift up to 14.8 pounds and that she could carry 17 pounds.

¶ 17 On March 19, 2015, the claimant's vocational rehabilitation counselor, Edward Rascati, opined that no stable labor market existed for the claimant. He based his opinion on the claimant's medical restriction to sedentary labor (not lifting more than 10 pounds), her sparse vocational skills, her scanty education, her poor English, and her limited computer skills.

¶ 18 Rascati believed that, to vocationally rehabilitate the claimant, two immediate necessities would be (1) a course in English as a second language and (2) an introductory course on computers and keyboarding. "[C]omputers," Rascati explained, "would be highly critical" not only to perform a sedentary job but to acquire one in the first place since "most of the job search stage [was] done

online." Getting the claimant's English up to par would be "a little trickier" because, after having her take a placement test, it might be necessary to find an instructor who knew Albanian. Even after taking several months of English language training and even after learning how to use software and a keyboard, the claimant, having never looked for a job on her own, would need help from a professional vocational counselor.

¶ 19 On the other hand, there was the claimant's vocational expert, Sharon Babat. On June 15, 2015, she identified 14 job titles that, in her opinion, the claimant could fill: counter clerk, front desk clerk, grocery clerk, motel clerk, reservation clerk, shipping order clerk, production assembly, customer service clerk, administrative clerk, receptionist clerk, accounting clerk, appointment clerk, billing clerk, and car rental clerk. Babat opined that the claimant had transferable skills and positive factors for reemployment, including her high school education, her computer skills (*i.e.*, her professed ability to use Skype, Facebook, and e-mail), her solid work history, and her restriction to a sedentary or light physical demand level.

¶ 20 Rascati, by contrast, chose to honor Dr. Neckrysh's sedentary restriction as opposed to the sedentary to light physical demand level in the functional capacity evaluation. Even so, he admitted that, of 12 job listings that Babat's organization, CompAlliance, had identified in a labor market survey, 7 would be within a sedentary restriction. He noted, however, that the claimant, with the help of her daughter, had contacted all 12 of those potential employers and had received no response. (The claimant was still unemployed.) Rascati agreed that, typically, people looking for work applied to more than 12 potential employers before receiving a job offer. And yet, he reiterated that before the claimant had any hope of success in a job search, she would need several months of English tutoring and a course on computers and keyboarding. (In the arbitration hearing,

the claimant testified through an interpreter. Also, she had brought along an interpreter to her meetings with Rascati and Babat.)

¶ 21 On the basis of the foregoing evidence, Arbitrator Dollison found a work-related back injury and resulting permanent total disability. He awarded the claimant the following relief: (1) temporary total disability benefits of $152,904.03 or 492 2/7 weeks, minus a credit of $4561.38, for a net award of $148,342.65; (2) $91,478.05, to be paid per the fee schedule, minus a credit of $8182.52 for medical bills paid by Blue Cross; (3) temporary partial disability benefits of $9961.25 minus a credit of $664.60, for a net award of $9296.65; and (4) odd-lot permanent total disability benefits of $376.66 per week for life, commencing on June 12, 2014.

¶ 22 The Commission partly agreed and partly disagreed with the arbitrator's decision. Specifically, the Commission (1) affirmed and adopted the arbitrator's decision regarding causation, temporary total disability, and medical expenses; (2) vacated the award of temporary partial disability benefits because the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2018)) did not allow such benefits for accidents predating February 1, 2006; (3) vacated the award of permanent total disability benefits; (4) awarded to the claimant, in lieu of permanent total disability benefits, a 60% loss of use of the person as a whole pursuant to section 8(d)2 of the Act (*id.* § 8(d)2); and (4) affirmed the arbitrator's denial of penalties under sections 19(k) and (l) (*id.* § 19(k), (l)).

¶ 23 The Commission's reason for vacating the award of permanent total disability benefits and substituting a loss-of-person award was this. The Commission found that while "[the] injury precluded [the claimant] from returning to her usual and customary occupation," the injury "[did] not result in an impairment of her earning capacity." The Commission was convinced by Babat's "positive factors." The Commission gave greater weight to her opinions than to Rascati's opinions

because "Ms. Babat possessed a better understanding of [the claimant's] educational history as well as vocational history in making her determination that [the claimant] ha[d] transferable skills affording her access to a stable labor market."

¶ 24 The claimant appealed to the Lake County circuit court, which reversed the Commission's denial of permanent total disability benefits as against the manifest weight of the evidence. The court concluded that, "given the claimant's very basic level of English proficiency here and her clear limitations, as the arbitrator observed and specifically pointed out, there [was] no stable labor market for the claimant." Although Babat had opined that the claimant would be qualified to work as a hotel reservation clerk, a car rental reservation clerk, and a billing clerk, "all of these occupations would require more than a limited proficiency in the English language" as well as "computer skills"—both of which, in the court's view, the claimant clearly lacked.

¶ 25 II. ANALYSIS

¶ 26 The Commission's decision is against the manifest weight of the evidence only if it is clearly apparent that Rascati was more believable than Babat. See *Sunny Hill of Will County v. Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, ¶ 22. It is *reasonably arguable* that Rascati was more believable than Babat, but it is not *clearly apparent* that he was more believable than she. Although the claimant brought along an interpreter to her meetings with Babat and Rascati and to the arbitration hearing, it does not follow that the claimant was incapable of communicating in English. Babat testified that she spoke directly with the claimant in English and that they understood one another. Also, Babat seemed to suggest that anyone who could find their way around in Facebook, Skype, and an email program could handle the computer programs in, for example, a receptionist job. To be sure, reasonable minds could disagree about Babat's credibility compared to Rascati's credibility. Nevertheless, Babat was not *obviously* unbelievable.

Her opinions were not inherently incredible. Because Babat knew about the claimant's college coursework and Rascati did not, that could suggest more thoroughness compared to Rascati and, therefore, it was not unreasonable of the Commission to believe Babat's opinion over Rascati's opinion. "[I]t is the responsibility of the Commission to judge the credibility of witnesses[,] and we cannot substitute our judgment for that of the Commission merely because different or conflicting inferences may also be drawn from the same facts." *Lefebvre v. Industrial Comm'n*, 276 Ill. App. 3d 791, 798 (1995).

¶ 27 Notwithstanding their disagreement on whether a stable labor market existed for the claimant, Babat and Rascati were in agreement on one thing: the claimant might benefit from vocational rehabilitation. In her testimony, Babat admitted that the claimant "[p]otentially" would benefit from job placement services—which were one form of vocational rehabilitation. See 820 ILCS 305/8(a) (West 2018) (providing that "[v]ocational rehabilitation may include, but is not limited to, counseling for job searches" and "supervising a job search program"). On January 15, 2014, the claimant, through her attorney, made a demand on the employer for vocational rehabilitation. In the request for hearing, dated December 13, 2016, the parties identified vocational rehabilitation as an issue, and at the beginning of the arbitration hearing, Arbitrator Dollison acknowledged that vocational rehabilitation was one of "the issues before us." In his decision, the arbitrator noted the claimant's demand for rehabilitation services and continued, "[The employer] offered no such services[,] without explanation. [The employer] did not provide [the claimant] with the vocational rehabilitation services she demanded. Having done so would have served to remove any doubt as to [the claimant's] present employability."

¶ 28 Section 9110.10(a) of the Commission's rules provides as follows:

> "(a) An employer's vocational rehabilitation counselor, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation required to return the injured worker to employment. The vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury." 50 Ill. Adm. Code 9110.10(a) (2016).

The Commission found that the claimant's injury "precluded her from returning to her usual and customary occupation." Under section 9110.10(a), "[t]he vocational rehabilitation assessment is *required* when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged at the time of injury." (Emphasis added.) *Id.* The Commission so determined. We are supposed to interpret the Commission's rules the same way we interpret statutes, giving effect to "the specific language of the rule" (internal quotation marks omitted) (*Farrar v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 143129WC, ¶ 16) and refraining from reading into the rule any unexpressed conditions or exceptions (see *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16). In section 9110.10(a), the only condition for a vocational rehabilitation assessment is that the work-related injury rendered the claimant unable to resume her regular duties. The Commission explicitly found that condition to exist. Therefore, a vocational rehabilitation assessment, which was never done in this case, is "required." 50 Ill. Adm. Code 9110.10(a) (2016).

¶ 29 III. CONCLUSION

¶ 30 We reverse only that portion of the circuit court's decision that reversed the Commission's reversal of the arbitrator's award of permanent total disability benefits. In all other respects, we affirm the circuit court's judgment. We reinstate the Commission's reversal of the arbitrator's award of permanent total disability benefits and its award of $376.66 per week for 300 weeks. We remand this case to the Commission for a vocational rehabilitation assessment.

¶ 31 Affirmed in part, reversed in part; Commission decision reinstated; remanded to Commission with directions.