

STATE OF MICHIGAN
COURT OF APPEALS

MARTHA A. KUPPART,

Plaintiff-Appellee,

v

OAKLAND COUNTY HUMAN SERVICES,

Defendant-Appellant.

UNPUBLISHED

July 8, 1997

No. 189166

WCAC

LC No. 91 000063

Before: MacKenzie, PJ, Wahls and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted the August 29, 1995 decision of the Worker's Compensation Appellate Commission (WCAC), which affirmed a magistrate's award of disability compensation benefits to plaintiff. We reverse in part and remand for further proceedings.

I

Plaintiff is a licensed practical nurse (LPN) who worked for nearly 20 years in a variety of settings. At various times in her career plaintiff worked in surgery as a scrub nurse, passing instruments to the surgeon, as a floor nurse, performing a variety of duties including passing out medications, and at a psychiatric hospital, where her duties included physically restraining patients.

Plaintiff testified that her duties as a floor nurse included passing out medications. She also testified that she sometimes spent as much as five and one-half hours out of a normal eight-hour shift passing out medications. She testified that this often required her to use a mortar and pestle to grind pills into powder. Defendant sponsored testimony disputing the amount of time plaintiff allegedly spent dispensing medication and using a mortar and pestle.

Plaintiff testified that beginning in 1986 she began experiencing pain and swelling in her right hand, which she used to grip the pestle to crush the medication. Although she testified that the symptoms continued to worsen, she lost no time from work until her last day on March 10, 1989. On that date, she testified that after finishing her shift, she was unable to hold a gas nozzle to pump gas into

her car on the way home. After a telephone call to her supervisor, plaintiff was referred to a medical clinic where her hand was placed in a cast. She has not worked since.

Plaintiff filed an application for mediation or hearing, claiming continuing disability as a result of a work-related injury to her right hand and wrist. Following a hearing the magistrate issued an opinion and order finding plaintiff partially disabled because she could no longer perform some of the aspects of her job, such as crushing pills, lifting patients, and repetitively using her right hand. However, the magistrate found that plaintiff was not totally disabled because “there is work within her qualifications and training that she would still be capable of performing.”

On appeal the WCAC affirmed. Although the WCAC agreed with the magistrate that plaintiff remained capable of performing some nursing functions, it also found that the right-hand injury “would prevent [plaintiff] from performing any of the nursing jobs that she had ever performed in the past.” The WCAC found that the record contained no evidence showing any “real jobs in the real world that plaintiff could have obtained.”

II

Plaintiff contends that this Court lacks jurisdiction because defendant did not timely appeal an order of the WCAC refusing to reinstate defendant’s appeal¹. We disagree.

On July 18, 1991 the WCAC granted plaintiff’s motion to dismiss defendant’s appeal because it had not been timely perfected. Defendant applied to this Court for leave to appeal. Although the application was initially denied, after considering defendant’s motion for rehearing, this Court vacated the WCAC’s July 18, 1991 order of dismissal and remanded for reconsideration. On March 30, 1993 the WCAC voted 2-1 to grant defendant’s motion for an extension of time to file its brief. The WCAC thereby implicitly denied plaintiff’s motion to dismiss after reconsideration.

Plaintiff notes that after the WCAC initially granted plaintiff’s motion to dismiss on July 18, 1991, defendant filed a motion for immediate consideration and a motion for reconsideration. On September 9, 1991 the WCAC denied the motion to reconsider. Plaintiff argues that because defendant never appealed from that order, this Court is without jurisdiction to entertain the instant appeal. Plaintiff is mistaken. The issue was properly before this Court as a result of defendant’s timely application for leave to appeal the dismissal order and defendant’s timely motion for rehearing. Moreover, plaintiff previously raised this issue in a 1993 original action in this Court for writ of superintending control, in which plaintiff challenged the WCAC’s March 31, 1993 order. The complaint for superintending control was denied on the merits on September 27, 1993. The issue was and is without merit.

Defendant contends that the magistrate and WCAC applied an improper standard of disability. There is no dispute that the definition of disability applicable to this case is found in § 301(4) of the Worker’s Disability Compensation Act, MCL 418.301(4); MSA 17.237(301)(4):

As used in this chapter, “disability” means a limitation of an employee’s wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

The WCAC relied upon this Court’s decision in *Rea v Regency Olds*, 204 Mich App 516; 517 NW2d 251 (1994), which interpreted the definition of disability to include a worker’s inability to do the work he or she was doing at the time of the injury because a worker is “disabled even though he may be capable of performing other unskilled work which falls within his medical restrictions.” *Id.* at 524. On August 28, 1995 the Supreme Court remanded *Rea* to a magistrate for additional fact-finding while retaining jurisdiction. Although the Supreme Court did not vacate or reverse this Court’s decision in *Rea*, it expressed its disapproval of this Court’s interpretation of the definition of disability.

A majority of the Court is of the opinion that the 1987 definition of disability in the Worker’s Disability Compensation Act requires a claimant to demonstrate how a physical limitation affects wage-earning capacity in work suitable to the claimant’s qualifications and training. It is not enough for the claimant claiming partial disability to show an inability to return to the same or similar work. If the claimant’s physical limitation does not affect the ability to earn wages in work in which the claimant is qualified and trained, the claimant is not disabled. 450 Mich 1201; 536 NW2d 542 (1995).

As we understand it, the Supreme Court requires something more than this Court did in *Rea*, when it held that a worker is partially disabled if he or she is no longer capable of performing her old job, even though she may be capable of performing other work falling within her medical restrictions. The Supreme Court requires that the employee demonstrate that she lost wage-earning capacity in work suitable to her qualifications and training, i.e., even if she can no longer do her old job, she is not even partially disabled if she can earn the same or greater wages in other work suitable to her qualifications and training. In this regard see *Michales v Morton Salt Co*, 450 Mich 479; 538 NW2d 11 (1995), where the Supreme Court held that the plaintiff was not disabled within the meaning of the current definition, even though he suffered a work-related high frequency hearing loss, because he was still able to monitor and check gauges to ensure the proper operation of boilers and the turbine, which was work suitable to his qualifications and training. Although the hearing loss would affect his ability to earn wages in the entire labor market, he was not disabled because he “continued to perform his regular jobs under the same conditions as all other employees.” *Id.* at 493.

In this case plaintiff was found to suffer from a fairly serious hand condition which prevented her from doing some work that she used to do as an LPN. However, the magistrate found and the WCAC agreed that plaintiff remains able to perform other LPN duties. Because the WCAC did not have the benefit of the Supreme Court’s peremptory order in *Rea* or its opinion in *Michales* when analyzing this case, we remand for reconsideration.

Defendant sponsored the testimony of Carolyn Parker, the chief of nursing services for defendant. Although she had worked for defendant for only a little more than three years at the time of

the hearing, she had been employed in the health care field for approximately thirty-eight years. Defendant sought to question Ms. Parker regarding the different types of jobs that an LPN can perform and the prevalence of such jobs. Although defendant admits that LPNs perform only two functions for defendant, passing out medication and caring for patients by doing such things as changing dressing on bed sores and assisting patients in and out of their beds, defendant contends that Ms. Parker would have testified that LPNs do a wide variety of other work at other facilities. However, the magistrate limited Ms. Parker's testimony to the work performed by LPNs at defendant's facility, and the WCAC affirmed.

Defendant argues that the magistrate and the WCAC erred in limiting Ms. Parker's testimony, because by doing so they prevented defendant from developing a record regarding the extent of any limitation on plaintiff's wage-earning capacity within the meaning of the current definition of disability. Indeed, defendant speculates that the magistrate and the WCAC erred because of their mistaken understanding of the definition. Moreover, defendant complains that as a result of the limitation of Ms. Parker's testimony, defendant was unable to demonstrate what, if any, residual wage-earning capacity plaintiff retains within the meaning of *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994). The WCAC rejected defendant's request for a partial rate of compensation based on a partial disability and residual wage-earning capacity, citing the "absence of some evidence to establish a connection between whatever jobs this witness may have testified an LPN could do and their availability in plaintiff's community." But, defendant argues, that is precisely the type of evidence defendant tried to introduce through the testimony of Ms. Parker.

We agree with defendant. The magistrate and WCAC improperly limited defendant's efforts to prove the extent of plaintiff's residual wage-earning capacity, which may affect the finding of disability as noted above, and which is relevant to defendant's claim that it should be required to pay at most a partial rate of compensation based on plaintiff's partial disability and her remaining wage-earning capacity.

Defendant contends that the WCAC erred by deferring to the magistrate's determination that plaintiff is a credible witness where the magistrate made no such determination. Defendant is mistaken. A magistrate need not make a specific finding that he found plaintiff to be a credible witness. Accepting plaintiff's testimony in part and citing it in support of the award constitutes an implicit finding of credibility.

Defendant also contends that the magistrate erroneously relied upon the testimony of Dr. Jaffe, even though Dr. Jaffe opined that plaintiff's condition is congenital. We reject defendant's claim of error for the reasons given by the WCAC:

First, Dr. Jaffe did not state that plaintiff's ability to use her hand is congenital, only that the lack of a "second" palmar arch is. Dr. Jaffe equivocated when asked what caused the "problem" plaintiff complained of. Second, the magistrate specified that he was not relying only on Dr. Jaffe's testimony in making his findings, but also that of Dr. Blau, Dr. Goldman and plaintiff herself.

For the reasons given above, we reverse and remand to the WCAC, which shall in turn remand to the magistrate with instructions to hold a supplemental hearing to allow defendant an opportunity to create a record regarding plaintiff's alleged residual wage-earning capacity. The magistrate shall make supplemental findings of fact and conclusions of law in a written opinion. The WCAC shall review the magistrate's supplemental decision, as well as the magistrate's original decision finding plaintiff partially disabled, in light of the Supreme Court's peremptory order in *Rea* and its opinion in *Michales*, *supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ Myron H. Wahls

/s/ Janet T. Neff

¹ Although plaintiff has not filed a cross-appeal, we will address this issue for the benefit of the parties. MCR 7.216(7).