

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA12-422

ROBERTA GIBSON

APPELLANT

V.

WAL-MART ASSOCIATES, INC., and
CLAIMS MANAGEMENT, INC.

APPELLEES

Opinion Delivered October 10, 2012

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[No. F602589]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Roberta Gibson appeals the decision of the Workers' Compensation Commission finding that she failed to prove that she was permanently and totally disabled. Appellees Wal-Mart Associates, Inc. (Wal-Mart), and Claims Management, Inc., cross-appeal from the Commission's finding that Gibson was entitled to an eighteen-percent wage-loss disability. We affirm on direct appeal and cross-appeal.

Gibson sustained an admittedly compensable back injury on November 15, 2005, while employed by Wal-Mart. She received conservative medical treatment from her family physician, Dr. Kim Emerson, who ultimately referred Gibson to Dr. Luke Knox, a neurosurgeon. On September 29, 2008, Dr. Knox performed an L4-5 fusion. In April 2009, Dr. Knox recommended that Gibson undergo a functional capacity evaluation (FCE) to determine her work abilities. Based on that evaluation, Dr. Knox, on August 4, 2009, opined that Gibson could return to part-time work at a light-strength-demand level. On November 30, 2009, Dr. Knox

issued Gibson a twelve-percent impairment rating. Gibson continues to see Dr. Emerson, who prescribes medication for Gibson's back injury.

On May 3, 2011, a hearing was held before an administrative law judge (ALJ) to determine Gibson's entitlement to permanent-total-disability benefits or wage-loss-disability benefits. The testimony revealed that Gibson was a sixty-six-year-old woman who had graduated from high school and obtained an associate's degree in business management. She had a varied work history, including managing a hotel for four years and owning a ceramics store for thirteen years. Since 1999, Gibson worked at Wal-Mart in multiple capacities. Initially, she worked in different tax departments, wherein she calculated sales, use, tobacco, or product taxes for Wal-Mart on a national level. Thereafter, she worked as a Wal-Mart claims adjuster, which required her to sit at her desk for extended periods performing telephone work. At the time of her compensable injury, Gibson was working for Wal-Mart in the imaging department, another desk job, where she scanned documents, entered data, and barcoded items.

Gibson testified that as a result of her back injury and surgery, she still suffered from back pain; she was unable to walk, sit, or stand for any length of time; and she was unable to work. She said that she takes prescription narcotic medication for pain, which also prevented her from working. She admitted that she had not looked for a job but testified that she was able to serve as the secretary/treasurer of her church.

Dr. Emerson testified by deposition. She said that she had treated Gibson since February 2002, and found her to be a credible patient. Based on Gibson's complaints of back pain following surgery, Dr. Emerson continued to prescribe narcotics, which can cause difficulty maintaining focus, storing and accessing new memory, and can slow thinking and motor skills.

Due to these concerns, Dr. Emerson opined that Gibson was unable to work.

Gibson was evaluated by two vocation-rehabilitation experts, Tanya Rutherford Owens and Heather Taylor. Owens concluded that Gibson would be unable to complete a normal work day due to her need for pain medications, her cognitive difficulties, and her physical limitations. In contrast, Taylor concluded that Gibson was able to work within the restrictions of the FCE given her excellent work history and numerous transferable skills. In her report, Taylor listed ten categories of jobs and sixteen job openings within Gibson's restrictions.

In an opinion dated July 29, 2011, the ALJ found that Gibson failed to prove that she was permanently and totally disabled; however, he found that she was entitled to an eighteen-percent wage-loss-disability benefit. Gibson appealed the denial of permanent-total-disability benefits to the Commission, and appellees cross-appealed, challenging the wage-loss award. On January 19, 2012, the Commission affirmed and adopted the ALJ's decision. It is from this decision that both Gibson and appellees appeal.

In appeals involving claims for workers' compensation, we view the evidence in the light most favorable to the Commission's decision and affirm the decision if it is supported by substantial evidence. *Leach v. Cooper Tire & Rubber Co.*, 2011 Ark. App. 571. Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* The issue is not whether we might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm. *Id.*

On direct appeal, Gibson challenges the Commission's finding that she was not permanently and totally disabled. Pursuant to Arkansas Code Annotated section 11-9-519(e)(1) (Repl. 2012), permanent and total disability means the "inability, because of compensable injury

or occupational disease, to earn any meaningful wages in the same or other employment.” When a claimant has been assigned an anatomical-impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Milton v. K-Tops Plastic Mfg Co.*, 2012 Ark. App. 175, at 4, 392 S.W.3d 364, 368. The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Milton*, 2012 Ark. App. 175, at 4–5, 392 S.W.3d at 368. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. *Id.* at 5, 392 S.W.3d at 368. The burden of proof is on the employee to prove the inability to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(2). Permanent and total disability shall be determined in accordance with the facts. Ark. Code Ann. § 11-9-519 (c) (Repl. 2012).

Gibson argues that “substantial evidence supports [her] being permanently and totally disabled because of her compensable back injury suffered while she was working for [Wal-Mart].” She cites the opinions of Dr. Emerson and vocation-rehabilitation expert Owens that Gibson cannot work due to her physical restrictions and the prescription medications she takes. Gibson argues that it was error for the Commission to “not give [Dr. Emerson’s] opinion great weight in deciding permanent and total” disability benefits.

While there may be substantial evidence in support of Gibson’s claim, this is not the correct standard of review. Our task is not to determine whether there is substantial evidence to support Gibson’s claim for permanent-total-disability benefits. Rather, as set forth above, our task is to determine whether substantial evidence supports the Commission’s finding that

Gibson is not entitled to such benefits.

In support of its decision to deny Gibson permanent-total-disability benefits, the Commission, in adopting and affirming the ALJ's decision, gave considerable weight to the opinion of Gibson's neurosurgeon, Dr. Knox, who, based on his treatment of Gibson and on the objective testing performed during the FCE, concluded that she was able to work with restrictions. The Commission also afforded great weight to the opinion of vocation-rehabilitation expert Taylor, who based her opinion that Gibson was able to work on the FCE results and Dr. Knox's opinion. In contrast, the Commission found that the opinion of Dr. Emerson was entitled to little weight because she relied upon subjective and generalized information to reach her conclusion that Gibson was unable to work. The Commission also gave little weight to the opinion of vocation-rehabilitation expert Owens because her opinion was based "primarily on the opinions of Dr. Emerson."

Moreover, in finding that Gibson could return to work, the Commission stated, "given [Gibson's] limit to initially part time light duty work activities by Dr. Knox and his [twelve-] percent rating to the body as a whole, [we] find that she could find some form of employment given the vast experience in administrative work that [her] work history reveals." The Commission continued by finding that Gibson seemed like a "very likeable person who could meet the public well and was able to articulate answers to questions well." The Commission noted that she had completed an associate's degree in business and graduated from high school. It further found that she was a very smart individual, had many skills, and had a history of performing secretarial and professional work. Additionally, she demonstrated the ability to work as evidenced by the performance of her duties as the secretary/treasurer of her local church.

The Commission properly considered the factors relevant to a permanent-total-disability claim. In considering these factors, the Commission chose to rely upon the opinions of Dr. Knox and Taylor and the results of the FCE, all of which concluded that Gibson could work with restrictions. It is the Commission's duty rather than ours to make credibility determinations, to weigh the evidence, and to resolve conflicts in medical opinions, evidence, and testimony. *Vincent v. Maverick Tube*, 2012 Ark. App. 460, at 2. Thus, we hold that there is substantial evidence supporting the Commission's denial of Gibson's permanent-total-disability claim.

While the Commission denied Gibson's claim to permanent-total-disability benefits, it found that her compensable injury did affect her ability to earn wages and awarded her an eighteen-percent wage-loss-disability benefit. On cross-appeal, appellees challenge this finding, arguing that the award is not supported by substantial evidence.

As set forth above, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood, taking into consideration the medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Milton*, 2012 Ark. App. 175, at 4-5, 392 S.W.3d at 368. In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, because a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.*, 392 S.W.3d at 368.

We hold that there is substantial evidence to support the Commission's conclusion that Gibson is entitled to an eighteen-percent wage-loss benefit. The Commission specifically noted Gibson's age; associate's degree; and extensive secretarial and administrative work history, which included jobs that required her to sit and concentrate for lengthy periods of time. The

Commission continued to rely on the opinion of Dr. Knox and the results of the FCE regarding Gibson's physical limitations, and it minimized the opinion of Dr. Emerson because she did not perform any objective testing on Gibson in order to determine her abilities. While ultimately concluding that Gibson was able to work, the Commission acknowledged that Gibson's ability to do secretarial and administrative work was limited due to her pain medications, which likely caused loss of concentration and the need to change positions from standing to sitting. These findings are supported by the record and constitute substantial evidence to support the award of wage-loss benefits.

Like Gibson's argument on direct appeal, appellees' argument on cross-appeal merely challenges the weight given to the evidence by the Commission. Specifically, appellees argue that for the purpose of determining wage loss, the Commission gave too little weight and consideration to Gibson's education, work experience, and lack of motivation to work, and instead placed too much weight on the subjective opinions of Gibson and Dr. Emerson. Again, it is the Commission's duty rather than ours to make credibility determinations, to weigh the evidence, and to resolve conflicts in medical opinions, evidence, and testimony. *Vincent*, 2012 Ark. App. 460, at 2. Accordingly, we affirm on cross-appeal.

Affirmed.

GLOVER and MARTIN, JJ., agree.

Tolley & Brooks, P.A., by: *Evelyn E. Brooks*, for appellant.

Bassett Law Firm, LLP, by: *Dale W. Brown*, for appellee.