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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-835

SECOND INJURY FUND, DEATH & PERMANENT TOTAL DISABILITY TRUST FUND, ANDERSON ENGINEERING CONSULTING, and ONE BEACON INSURANCE COMPANY APPELLANTS V. CLEVELAND OSBORN APPELLEE	**Opinion Delivered** February 11, 2010 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [Nos. F107011, F304582] REVERSED AND REMANDED ON DIRECT APPEAL; AFFIRMED ON CROSS-APPEAL

LARRY D. VAUGHT, Chief Judge

The Second Injury Fund (the Fund) appeals the decision of the Workers' Compensation Commission finding that it is not entitled to a credit for benefits it pays to appellee Cleveland Osborn against the disability benefits he receives from the Veterans Administration (VA). On cross-appeal, Osborn contends that there is a lack of substantial evidence supporting the Commission's decision that he failed to prove that he was permanently and totally disabled and only entitled to a fifty-percent wage-loss-disability benefit. We reverse and remand the direct appeal and affirm the cross-appeal.

Osborn, sixty-one years old, graduated from high school and earned a technical-school degree in foundation engineering. He served in the United States Army from 1967 to 1984, when he was medically discharged after receiving a thirty-percent disability rating from the VA (ten

percent for his neck and twenty percent for his back). After his discharge, Osborn worked five years for a company performing concrete, asphalt, and soil inspections. In 1992, Osborn began working for Anderson Engineering Consulting, performing the same type of work. In 2003, Osborn retired from Anderson due to his disability.

While working for Anderson on June 1, 2001, Osborn was injured when he fell backward into a nine-foot hole. Anderson accepted the incident as compensable relating to Osborn's thoracic fractures and paid a five-percent-impairment rating for that injury.[1] Osborn received further injuries to his back on March 10, 2003, while he was moving thirty-pound concrete cylinders. Thereafter, Osborn received medical treatment, including low-back surgery in 2003 performed by Dr. Robert Abraham, who subsequently issued Osborn a three-percent-impairment rating as a result.

In April 2004, Dr. Abraham opined that Osborn had suffered an aggregate low-back impairment of seventeen percent and issued a forty-five-pound lifting restriction. In Dr. Abraham's 2008 deposition, he reiterated that Osborn had a total of a seventeen-percent impairment rating in his low back, but the doctor was unable to assign individual ratings for the various injuries suffered by Osborn. Dr. Abraham further testified that Osborn also had a seventeen- to twenty-percent impairment to his cervical spine.

At the hearing, Osborn contended that he was permanently and totally disabled as a

[1]Anderson did not accept neck and elbow injuries that Osborn claimed he suffered as a result of the 2001 fall. Osborn had right-elbow surgery in October 2003, and was issued a five-percent-impairment rating to his upper extremity as a result. The administrative law judge found that these injuries were compensable and ordered Anderson to pay benefits relating to same. This finding was not appealed to the Commission.

result of the injuries he sustained at Anderson. He testified that he can sit and stand for limited periods of time and that he takes medication for pain. While he would like to return to work, he testified that there was no work that he knew he could do. He stated that he was able to drive a motor vehicle for short distances, operate a riding lawn mower, and perform small projects around his house. He testified that he draws $1100 per month in social security disability benefits, $2200 per month in VA disability benefits, and $3000 per month from an investment.

Relevant to this appeal, the administrative law judge found that Osborn was permanently and totally disabled and that the Fund was not entitled to a credit pursuant to Arkansas Code Annotated section 11-9-411 (Supp. 2009). The Fund appealed both of these findings. The Commission reversed the ALJ's finding that Osborn was permanently and totally disabled and instead awarded Osborn a fifty-percent wage-loss disability. However, the Commission affirmed the ALJ's finding that the Fund was not entitled to the credit. The Fund appeals the latter finding, and Osborn cross-appeals the former.

On direct appeal, the Fund contends that the Commission erred in concluding that it was not entitled to a credit, pursuant to section 11-9-411, for benefits it pays to Osborn against the benefits Osborn receives from the VA. Section 11-9-411 provides in relevant part that

> [a]ny benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

Ark. Code Ann. § 11-9-411(a)(1). One of several arguments made by the Fund is that the

Commission provided no facts in support of its conclusion that the Fund was not entitled to an offset pursuant to section 11-9-411(a)(1). We agree. The Commission's entire analysis on this issue is

> [The Fund] is not entitled to an offset, in accordance with Ark. Code Ann. § 11-9-411, for [Osborn's] Veterans Administration benefits. The overriding purpose of Ark. Code Ann. § 11-9-411 is to prevent a double recovery by a claimant for the same period of disability. [Citation omitted.] [Obsorn's] VA benefits are not related to the period of disability covered by [the Fund] and are not subject to the offset provided for in Ark. Code Ann. § 11-9-411.

We hold that this conclusion lacks sufficient findings of fact for us to determine whether substantial evidence supports the decision to deny the offset. This court relies upon the Commission to clearly articulate its findings of fact because we do not review the Commission's decisions de novo. *Sonic Drive-In v. Wade*, 36 Ark. App. 4, 6, 816 S.W.2d 889, 890–91 (1991). It is beyond the power of an appellate court to make findings of fact. *Burkett v. Exxon Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2. When the Commission fails to make specific findings on an issue, it is appropriate to reverse and remand the case for the Commission to make such findings. *Flynn v. Southwest Catering Co.*, 2009 Ark. App. 641. Accordingly, we reverse and remand for additional findings of fact on this issue.

As for Osborn's cross-appeal, he contends that substantial evidence does not support the Commission's decision that he failed to prove that he was entitled to permanent and total disability benefits and only a fifty-percent wage-loss disability. When reviewing decisions from the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by

substantial evidence. *Averitt Exp., Inc. v. Gilley*, 104 Ark. App. 16, 18, 289 S.W.3d 118, 120 (2008). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*, 289 S.W.3d at 120. The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we are required to affirm. *Id.* at 18–19, 289 S.W.3d at 120.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Henson*, 99 Ark. App. at 134, 257 S.W.3d at 912. 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.*, 257 S.W.3d at 912. Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage-loss disability. *Id.*, 257 S.W.3d at 912. To be entitled to any wage-loss-disability benefit in excess of permanent-physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent-physical impairment as a result of a compensable injury. *Id.*, 257 S.W.3d at 912. Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*, 257 S.W.3d at 912–13.

The Commission denied Osborn permanent and total disability but awarded him a fifty-percent wage-loss disability. In so finding, the Commission acknowledged that Osborn has physical limitations as a result of his compensable injuries as noted by Dr. Abraham. However, the Commission also noted that Osborn was only sixty-one years old, articulate, and intelligent.

The Commission found that no physician, including Dr. Abraham, opined that Osborn was permanently and totally disabled. The Commission also found that Osborn lacked motivation to return to work based on the fact that he received approximately $5000 per month in disability benefits and investment income. And while Osborn testified that he wanted to return to work, he made no effort to find employment within his restrictions. On this record, we hold that the Commission's decision to award fifty-percent wage-loss disability is supported by substantial evidence, and we affirm the cross-appeal.

Reversed and remanded on direct appeal; affirmed on cross-appeal.

PITTMAN and ROBBINS, JJ., agree.