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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 11/08/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

ALEJANDRO M. HERNANDEZ,) No. 1 CA-IC 10-0079
)
Petitioner,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules
ARIZONA,) of Civil Appellate
) Procedure)
Respondent,)
)
CITY OF FLAGSTAFF,)
)
Respondent Employer,)
)
SCF ARIZONA,)
)
Respondent Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20030-700088

Carrier Claim No. 0306759

The Honorable Deborah A. Nye, Administrative Law Judge

AWARD AFFIRMED

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O R O Z C O, Judge

¶1 Claimant Alejandro M. Hernandez (Hernandez) seeks special action review of an Industrial Commission of Arizona (ICA) Decision Upon Review affirming the ICA's Decision Upon Hearing and Findings and Award (the 2010 Decision). Hernandez argues on appeal that the administrative law judge (ALJ) erred by finding that: (1) medical testimony on behalf of Hernandez was foundationally flawed; (2) Hernandez did not make a good-faith attempt to find suitable employment; and (3) Hernandez did not meet his burden of presenting evidence of his hypothetical earning capacity. Because the ALJ's findings were supported by substantial evidence in the record, we affirm.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.2 (2003) and 23-951.A (1995) and Rule 10 of the Arizona Rules of Procedure for Special Actions. In reviewing ICA decisions, we defer to the ALJ's factual findings but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most

favorable to upholding the ALJ's decision. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶13 In February 2003, Hernandez injured his left wrist while working for Respondent Employer City of Flagstaff. In October 2004, Respondent Carrier SCF Arizona (SCF) closed Hernandez's worker's compensation claim and paid him certain specified benefits. In September 2005, SCF accepted Hernandez's petition to reopen his claim, and Hernandez subsequently underwent additional treatment for his injury.

¶14 In October 2007, SCF closed Hernandez's claim, finding his injury to be medically stationary based on the opinion of his treating pain specialist. Hernandez protested the closing and requested a hearing¹ to review his claim. Following a hearing in 2008,² a Decision Upon Hearing and Findings and Award (the 2008 Decision) was issued in which the ALJ found that: (1) if Hernandez ever suffered from Reflex Sympathetic Dystrophy (RSD),³ the condition resolved effective May 2008; (2) Hernandez

¹ Hernandez actually filed three separate Requests for Hearing in January, June and July of 2008.

² The proceeding took place over the course of four days between August and October 2008.

³ The Merriam-Webster Online Medical Dictionary defines RSD as: "A painful disorder that usually follows a localized injury, that is marked by burning pain, swelling, and motor and sensory disturbances especially of an extremity, and that is associated

was entitled to benefits and supportive care for his wrist injury and a resulting mild permanent psychiatric impairment; and (3) Hernandez was not entitled to benefits for injuries to his head, neck or shoulders or reimbursement for 2008 emergency room bills.⁴ The ALJ also ordered Hernandez to make a sincere, honest and conscientious effort to find and perform work. Hernandez sought special action review of the 2008 Decision by this court; we affirmed the 2008 Decision in a November 2009 Memorandum Decision. *Hernandez v. Indus. Comm'n (Hernandez I)*, 1 CA-IC 09-0015, 2009 WL 3835039 (Ariz. App. Nov. 17, 2009) (mem. decision).

¶15 This court issued a Mandate in January 2010, in which we ordered the ICA to continue all necessary proceedings in the matter. Pursuant to this Mandate, the ICA issued a Notice of Hearing to dispose of all remaining issues related to Hernandez's claim. The proceeding took place over the course of three days of hearings during May, June and July of 2010. The unresolved issues that needed to be addressed included whether Hernandez made a good-faith effort to find employment and

with sympathetic nervous system dysfunction." *Reflex Sympathetic Dystrophy Definition*, Merriam-Webster Online Unabridged Medical Dictionary, <http://unabridged.merriam-webster.com/cgi-bin/medical?va=RSD&x=45&y=7> (2011) (last visited Oct. 31, 2011).

⁴ The 2008 Decision was affirmed by an ICA Decision Upon Review in January 2009.

whether he suffered a loss of earning capacity because of the wrist injury. It is the ALJ's rulings on these issues that are now before us.

¶16 At the hearing, Hernandez argued that: (1) he made a good-faith attempt to find employment; (2) he should not be required to make a good-faith attempt to find work because he suffers from RSD and debilitating pain causally related to his injury, which render him incapable of any gainful employment; and (3) he is entitled to a finding that he suffered a complete loss of earning capacity because the RSD and pain prevent him from working.

¶17 Following the hearing, the ALJ issued the 2010 Decision, finding that: (1) the medical testimony on behalf of Hernandez was foundationally flawed because it was based on a diagnosis of RSD, which was deemed resolved effective May 2008; (2) Hernandez did not make a good-faith attempt to find suitable employment; and (3) in the absence of proof of a good-faith effort to find employment, Hernandez failed to meet his burden to demonstrate a loss of earning capacity because he failed to present any evidence of his hypothetical earning capacity. Accordingly, the ALJ concluded that Hernandez did not suffer a loss of earning capacity and was not entitled to disability benefits as of September 2, 2010.

¶18 Hernandez requested ICA review of the 2010 Decision, which the ALJ affirmed. Hernandez filed a timely Petition for Special Action Review with this court.

DISCUSSION

Medical Expert Testimony

¶19 Hernandez argues the ALJ erred by finding that the testimony of two of his medical experts was foundationally flawed. We disagree.

¶10 The ALJ based this finding on the 2008 Decision that if Hernandez ever suffered from RSD, the condition was resolved effective May 16, 2008. Because Hernandez's experts' testimony was based on their opinions that Hernandez suffers from RSD, the ALJ concluded that the testimony was foundationally flawed and irrelevant.

¶11 The resolution that Hernandez's RSD became stationary as of May 2008 became final when the mandate was issued in *Hernandez I*. Accordingly, the principle of res judicata prevents Hernandez from relitigating whether he suffered from RSD as of May 2008. See *Nunez v. Ariz. Milling Co.*, 7 Ariz. App. 387, 389-390, 439 P.2d 834, 836-837 (1968) (citations omitted) (factual determinations of the ICA are "'res judicata' when not upset on rehearing or appeal" and are "binding upon the

parties in subsequent litigation").⁵ The ALJ therefore correctly declined to consider medical expert testimony that Hernandez had lost earning capacity due to RSD. See *Kucko v. Indus. Comm'n.*, 116 Ariz. 530, 531-32, 570 P.2d 217, 219 (App. 1977) (a final and binding determination that a condition is unrelated to the covered injury is res judicata); *Aguiar v. Indus. Comm'n.*, 165 Ariz. 172, 173, 797 P.2d 711, 712 (App. 1990) (citation omitted) (medical expert testimony must be based on a factually accurate foundation).

Good-faith Effort to Find Employment

¶12 Next, Hernandez puts forth various arguments, all of which concern his general contention that the ALJ erred by finding he did not make a good-faith effort to find employment. It is the duty of the ALJ to resolve any conflicts in evidence, and we defer to the ALJ's factual findings if they are substantiated by competent evidence. *Preuss v. Indus. Comm'n.*, 15 Ariz. App. 515, 516-517, 489 P.2d 1217, 1218-1219 (1971). See also *Ortega v. Indus. Comm'n.*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979) (the ALJ is obligated to resolve conflicts

⁵ At various places in his petition, Hernandez also argues that medical expert testimony supports a finding of RSD and that experts testified that he "cannot currently work due to his psychiatric condition and how that is made worse by his pain and RSD." We do not address these arguments because we find Hernandez is precluded by the principle of res judicata from rearguing that he suffered from RSD as of May 2008. See *Nunez*, 7 Ariz. App. at 389-390, 439 P.2d at 836-837.

in evidence, and the ALJ's resolution will not be disturbed unless it is wholly unreasonable).

¶13 Furthermore, as the claimant seeking benefits, Hernandez has the duty to mitigate his damages. *Kelly Servs. v. Indus. Comm'n.*, 210 Ariz. 16, 18, ¶ 8, 106 P.3d 1031, 1033 (App. 2005) (citation omitted). He has the burden of proving he suffered a loss of earning capacity, which he may do by proving he is unable to return to the date-of-injury employment and that he made a good-faith effort to obtain other suitable employment. *Id.* Alternatively, Hernandez could meet his burden by presenting testimony from a labor market expert to establish his hypothetical earning capacity. *Id.*

Hernandez's Inconsistent Testimony

¶14 Hernandez argues the ALJ erred by "[making] a great deal about [his] inconsistent testimony about looking for work" because, according to Hernandez, such inconsistencies are explained by testimony that he has "extremely poor memory." However, Hernandez's "inconsistent testimony" created a contested issue of fact regarding whether he actually looked for work. Consequently, the question on review is "whether there is reasonable evidence to support the [ALJ's] contrary finding as to this fact." *D'Amico v. Indus. Comm'n.*, 149 Ariz. 264, 266, 717 P.2d 943, 945 (App. 1986) (citing *Arrowhead Press, Inc. v. Indus. Comm'n.*, 134 Ariz. 21, 653 P.2d 371 (App. 1982)).

¶15 In this case, the ALJ's finding that Hernandez did not make a good-faith effort to find employment is supported by reasonable evidence, including: (1) Hernandez's own deposition testimony that he did not attempt to search for suitable employment; (2) his inability to recall any specific details about his search for employment when questioned on cross-examination; and (3) his wife's testimony that Hernandez "has not done anything except sit on [a] couch for an 8 hour period since May of 2008."

¶16 Consequently, the ALJ did not err when she resolved the conflict in evidence by disbelieving Hernandez's testimony that he looked for employment.⁶

Testimony of Doctors

¶17 In the alternative, Hernandez also claims the ALJ failed to give "appropriate weight" to the testimony of doctors who opined that Hernandez is unable to work and should be excused for failing to search for employment in the last two years. Accordingly, he argues, "the [ALJ] should have found as a matter of law the pain and related restrictions [were] work

⁶ Hernandez also claims he "was described" as "looking for work and try[ing] to get better to get back to work, but unable to do so due to his impairments." He provides no citation to evidence for this assertion, and we cannot find this information in the record.

related . . . and good cause for not looking further for work.”⁷ As a corollary, Hernandez contends the ALJ erred by adopting the opinions of other medical experts who testified that Hernandez is not prevented from working due to his wrist injury or psychiatric impairment.

¶18 We disagree with Hernandez’s arguments for several reasons. Although Hernandez argues that the ALJ should have given greater weight to the opinions of his treating physicians, as we stated in *Hernandez I*, in which we addressed the same contention, we have repeatedly rejected any per se rule that the opinions of certain medical experts are automatically given greater weight than others.⁸ See, e.g., *Walters v. Indus. Comm’n*, 134 Ariz. 597, 599, 658 P.2d 250, 252 (App. 1982). Therefore, the ALJ did not abuse her discretion in declining to give the testimony of Hernandez’s medical experts greater weight than the testimony of other medical experts.

¶19 Second, to the extent Hernandez argues the ALJ incorrectly adopted the opinions of medical experts who testified that Hernandez is not prevented from working with various work restrictions, because of his injury, the resolution

⁷ We note this argument necessarily contradicts Hernandez’s factual assertion that he did attempt to search for work.

⁸ Hernandez cites *Gudgel v. Barnhart*, 345 F.3d 467 (7th Cir. 2003), in support of his contention that the ALJ should have given superior weight to his treating physicians. We note that the Seventh Circuit opinion is not controlling on this court.

of that issue became final in *Hernandez I*.

¶20 Third, the medical experts on whom Hernandez relies testified RSD prevented him from working. As previously discussed, Hernandez is precluded from rearguing the issue of RSD because the ALJ found that condition resolved as of May 2008, and any testimony about his inability to find employment due to RSD is now legally irrelevant. *Hernandez*, 1 CA-IC 09-0015, 2009 WL 3835039, at *2, ¶¶ 7-8; see *Kucko*, 116 Ariz. at 532, 570 P.2d at 219.

¶21 Additionally, we defer to the ALJ's findings of fact to resolve conflicting testimony of experts. *Perry v. Indus. Comm'n.*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975); *Ortega*, 121 Ariz. at 557, 592 P.2d at 391; *Preuss*, 15 Ariz. App. at 516-517, 489 P.2d at 1218-1219. In this case, the ALJ made explicit factual findings in the 2008 Decision that the experts who opined that Hernandez is not prevented from work, with various work restrictions, because of his injury were more probably correct than Hernandez's experts. We affirmed the findings in *Hernandez I* and the ALJ readopted them in the 2010 Decision. Accordingly, the ALJ did not err by failing to give "appropriate weight" to the testimony of Hernandez's medical experts.

Hernandez's Ability to Work

¶22 Hernandez also argues that even without finding that he suffered from RSD, the ALJ should have found that he cannot

work because Hernandez's experts (Dr. [K.], Ph.D. and Dr. [N.], M.D.) testified that he suffers severe pain in his left arm and is psychologically unable to perform a full-time job. Accordingly, he contends, the ALJ should have excused him from looking for employment or found his limited searches for work to be in good-faith.

¶23 The ALJ found that the doctors' work restriction recommendations "were solely based on the RSD diagnosis and/or . . . its related sequelae." We examine the evidence "in the light most favorable to sustaining the finding." *Salt River Project v. Indus. Comm'n*, 128 Ariz. 541,544-45, 627 P.2d 692, 695-96 (1981); *Lovitch*, 202 Ariz. at 105, ¶ 16, 41 P.3d at 643. We presume the ALJ considered all relevant evidence. *Perry*, 112 Ariz. at 398, 542 P.2d at 1097.

¶24 Our review of the record supports the ALJ's interpretation of the testimony. Dr. K. testified that an increased level of activity tends to increase Hernandez's pain and that Hernandez is incapable of full-time employment. However, Dr. K.'s testimony was based on his psychological evaluation and treatment of Hernandez's RSD and his opinion that Hernandez's pain and psychological condition were associated with RSD and its sequelae.⁹ In addition, Dr. K. testified that

⁹ We also note that Dr. K. is a clinical health psychologist, not a medical doctor, and is not qualified to express an opinion

Hernandez's pain, depression and general medical conditions are all related to RSD.

¶125 Dr. N. testified that he treated Hernandez for pain in his left arm and that the pain negatively affected Hernandez's daily life in a number of ways, including causing him to feel depressed and anxious and limiting his ability to be active or use his left arm. However, when asked specifically about his diagnosis, Dr. N. testified that Hernandez was suffering from "a left upper extremity neuropathy, reflex sympathetic dystrophy." In addition, Dr. N. testified that due to Hernandez' RSD diagnosis, Hernandez was unable do any activity for more than three hours without debilitating pain. Finally, Dr. N. testified that Hernandez's related conditions, including pain and decreased function, were the result of RSD, and that these conditions would not exist if Hernandez did not suffer from RSD.

¶126 Accordingly, the ALJ did not err when she found that the conclusions of Drs. K. and N. that Hernandez could not work were based on their opinions that he suffers from RSD, an issue already resolved against Hernandez.

¶127 Moreover, even assuming for the sake of argument that Hernandez's experts did testify that pain and/or inability to use his left arm, independent of his RSD, prevented Hernandez

regarding Hernandez's work restrictions due to physical impairments.

from working, SCF presented evidence from other medical experts who opined that no medical condition prevented Hernandez from working with minor restrictions. In the face of conflicting evidence, the ALJ is to resolve the conflict. See *Preuss*, 15 Ariz. App. at 516-517, 489 P.2d at 1218-1219. Here, the ALJ resolved the conflict, in both the 2008 and 2010 Decisions, by adopting the work restrictions of SCF's experts and finding that Hernandez is not medically prevented from seeking employment. This finding is clearly supported by evidence in the record, and we will not disturb it.

¶28 Therefore we defer to the ALJ's determination that Hernandez did not make a good-faith effort to find employment.

Loss of Earning Capacity

¶29 Lastly, Hernandez contends "the ALJ failed to follow the law when she found that . . . Hernandez was not entitled to a finding of complete loss of earning capacity." Hernandez argues that because Drs. K. and N. testified that he was unable to work because of medical work restrictions, the ALJ should have found that he had no earning capacity "as a matter of law."

¶30 A claimant seeking worker's compensation benefits has the burden of proving a loss of earning capacity. *Kelly Servs.*, 210 Ariz. at 18, ¶ 8, 106 P.3d at 1033. Although a claimant may prove a reduced earning capacity by showing an unsuccessful attempt to find employment, the claimant may also present

testimony from a labor market expert to establish his hypothetical earning capacity. *Id.* The hypothetical earning capacity measures, as nearly as possible, whether the claimant is able to sell his services in the open, competitive labor market and, if so, for how much. *Id.* In the absence of proving a good-faith effort to find employment, the claimant has the burden of producing some evidence that his or her hypothetical earning capacity is less than the pre-injury earning capacity. *Id.*; *D'Amico*, 149 Ariz. at 266, 717 P.2d at 945 (citations omitted).

¶31 In this case, the ALJ found that Hernandez “failed to produce any vocational evidence of hypothetical earnings or lack thereof based on work restrictions related to his permanent impairments.” Because she also found that Hernandez did not make a good-faith effort to find employment, the ALJ ruled that Hernandez failed to meet his burden of proving he suffered a loss of earning capacity as of September 2, 2010.

¶32 Our review of the record supports the ALJ’s findings and award. Hernandez did not present the opinion of a labor market expert regarding his earning capacity. Instead, he relied on the testimony of Drs. K. and N. that he could not work to argue that he suffered a complete loss of earning capacity. However, the testimony of Drs. K. and N. did not entitle Hernandez to a finding of lost earning capacity as a matter of

law because: (1) they based their opinions on their diagnoses of RSD, which as already noted made their testimony irrelevant to the hearing; and (2) their testimony was contradicted by medical experts presented by SCF, which created, at a minimum, a contested issue.

¶33 Therefore, we reject Hernandez's argument that, as a matter of law, he was entitled to a finding that he suffered a loss in earning capacity.

CONCLUSION

¶34 For the foregoing reasons, we affirm the ICA's November 2010 Decision Upon Review.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Presiding Judge

/S/

JOHN C. GEMMILL, Judge