

DIVISION III

ROBERT J. GLADWIN, Judge
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CA06-47

NOVEMBER 15, 2006

ETTA ODOM

APPELLANT

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F004667]

V.

BLYTHEVILLE SCHOOL DISTRICT,
ASBA WC TRUST and RISK
MANAGEMENT RESOURCES, INC.
APPELLEES

AFFIRMED

This appeal follows the July 20, 2004 decision of the Workers' Compensation Commission reversing the opinion of the Administrative Law Judge (ALJ) and finding that appellant Etta Odom failed to prove by a preponderance of the evidence that she is entitled to thirty-eight percent wage-loss-disability benefits above her twelve-percent anatomical-impairment rating. On appeal, appellant argues that the Commission's decision is not supported by substantial evidence. We affirm.

The compensability of appellant's left shoulder injury is undisputed. On April 14, 2000, appellant was conducting her usual job duties as a school bus driver for the appellees. She had driven a group of students to Little Rock on a field trip, and while exiting the bus,

appellant tripped and fell. The fall resulted in a dislocated left shoulder and torn left rotator cuff. Appellant received emergency medical treatment at UAMS before returning to Blytheville, where she was under the care of Dr. Joseph Yao. Dr. Yao determined that the injury required surgery and referred appellant to Dr. David Collins, an orthopedic surgeon in Little Rock, for a second opinion.

On July 7, 2000, Dr. Yao surgically repaired appellant's torn rotator cuff. Appellant continued to complain of pain and stiffness in her shoulder following the procedure, and returned to see Dr. Yao on October 2, 2000. After an MRI was taken on October 26, 2000, Dr. Yao referred appellant back to Dr. Collins. On January 29, 2001, Dr. Collins performed a second surgical procedure on appellant's shoulder, and on April 25, 2001, he released her to return to work without restrictions. He assigned her an impairment rating of eighteen-percent to the upper extremity and eleven-percent to the body as a whole. On April 27, 2001, appellant underwent a DOT examination and was found to be physically fit for any type of employment. She returned to her employment with appellees, performed her previous duties and even accepted extra bus routes.

Appellant continued to complain of residual pain from her shoulder injury and was examined by Dr. James Russell on August 24, 2001. He suspected that she might be having "some kind of TIA" and referred her back to Dr. Yao for an ultrasound of her carotids. Additionally, sometime in August 2001, appellant suffered a "mini-stroke" that affected the left side of her body.

On June 10, 2002, appellant applied for unemployment benefits, indicating on her application that she could begin work immediately and had no disabilities that limited her ability to work. On June 25, 2002, appellant underwent an MRI arthrogram, which revealed evidence of a recurrent rotator cuff tear. On July 19, 2002, appellant underwent a second DOT examination under the direction of Dr. Collins, and other than the evidence of her left rotator cuff surgery, the exam showed no significant findings.

In August 2002, appellant returned to work as a bus driver for appellees under a renewed contract. On the first day of school, appellant completed her normal¹ morning bus-route duties but failed to return to work for the afternoon shift. Her supervisor unsuccessfully attempted to contact appellant that day, but tracked her down the following morning after another employee recognized her driving a van for the EOC Head Start local office. She did not return to work for appellees at that time, but continued her employment with the EOC until she was terminated from that job on November 15, 2002.² Appellees did not replace appellant during that year, but instead utilized substitute drivers so that she could return to work if that was her ultimate choice. Appellee sent appellant an “intent to return to work” form in the mail for the following school year, but she failed to return it. It was at that time that appellant’s contract was not renewed.

¹Appellant testified that she was assigned to an older bus with hand-brakes, and the operation of the hand brakes was difficult due to her shoulder injury.

²Appellant filed another application for unemployment benefits on November 11, 2002, at which time she indicated that she could *not* begin work immediately and that she *did* have disabilities that limited her ability to do work.

Appellant was treated by Dr. Collins on September 23, 2002, at which time she requested further treatment be administered by Dr. Yao. On February 20, 2003, Dr. Yao instructed appellant to do “ROM exercises” and noted that appellant reported that another doctor told her that she might need an implant or surgery if the pain was significantly severe. Appellant again filed for unemployment benefits on April 1, 2003, at that point indicating that she was able to begin working immediately but that she did have disabilities that limited her ability to work.

Appellant remained under Dr. Yao’s care until June 19, 2003, at which time he recommended that she see Dr. Collins for consideration of additional rotator cuff repair surgery. About that same time, Dr. Yao’s “work status report” indicated that appellant was unable to return to work because of the recurrent left shoulder rotator cuff tear. On October 7, 2003, Dr. Collins performed the third rotator repair surgery.³ On February 23, 2004, he reported that appellant had made good progress in healing from the procedure, and that it was not a surprise that she had very slight crepitation.⁴ On April 19, 2004, Dr. Collins noted that appellant’s continuing complaints of pain and popping in the shoulder were attributable to subcromial scar tissue, and he released her to return to her former type employment as a bus driver at that time. He also increased her impairment rating to the upper extremity to twenty-percent, and to twelve-percent for her body as a whole, and he noted that she might need

³The contention is that this procedure was delayed due to an initial denial by the insurance carrier.

⁴Crepitation is defined as a crackling or popping sound.

surgery in the future to address the “painful crepitation.” Dr. Collins treated her painful shoulder again on June 21, 2004, and indicated that he would consider appellant a candidate for operative treatment.

Dr. Yao opined on July 9, 2004, that an MRI showed evidence of a full thickness rotator cuff tear that was apparently not seen at the October 2003 surgery, and he recommended that appellant have surgery. His note dated July 16, 2004, indicated that appellant could not return to work driving a bus because of the rotator cuff syndrome. Appellees refused payment of the suggested fourth surgical procedure, and as of the time of the hearing, it had not been performed.

Appellees accepted the initial injury as compensable and paid appellant’s medical expenses, temporary total disability benefits, as well as the anatomical impairment rating. They denied her claim to wage-loss benefits based on her voluntary abandonment of the job, as well as her failure to seek work in other areas of employment despite never having been restricted by any medical provider.

In appeals involving claims for workers’ compensation, our court views the evidence in a light most favorable to the Commission’s decision and affirms the decision if it is supported by substantial evidence. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, ___ S.W.3d ___ (2006). Substantial evidence exists if reasonable minds could reach the Commission’s conclusion. *Foster v. Express Personnel Servs.*, 93 Ark. App. 496, ___ S.W.3d

__ (2006). We will not reverse the Commission’s decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, __ S.W.3d __ (2005).

Our workers’ compensation statutes provide that “[i]n considering claims for permanent partial disability benefits in excess of the employee’s percentage of permanent physical impairment, the Workers’ Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee’s age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.” Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002). Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission may increase the disability rating based upon wage-loss factors, which consider the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). The Commission determines disability based upon medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. *Id.* Further, the Commission may also consider the claimant’s motivation to return to work, because a lack of interest or a negative attitude impedes assessment of the claimant’s loss of earning capacity. *Id.*

Appellant argues that the documentary evidence submitted by Dr. Yao supports the findings of the ALJ and that the medical records confirm Dr. Yao's opinion. Appellant asserts that appellees rely solely on those statements made by Dr. Collins that support their position, despite evidence that she is in constant pain and unable to lift her arm in certain ways or to certain levels, as well as the problems with the "surgical debris" left in her shoulder after the second procedure performed by Dr. Collins. She contends that the evidence presented provided sufficient proof that her condition prevented her from pursuing any significant employment and that the Commission incorrectly relied upon inconsistent opinions and records presented by Dr. Collins.

Appellant points out that the Commission failed to address whether she had the ability to perform the duties required in her position as a bus driver for appellees in light of the three shoulder surgeries. She asserts that this is an integral part of the burden of proof pursuant to Ark. Code Ann. § 11-9-522(b)(2) which states that an offer of employment must be "reasonably attainable." She claims that appellees failed to meet their burden of showing that they made her a bona fide offer of employment that was reasonably attainable in her present condition.

With regard to the wage-loss benefits, it appears that the Commission relied on testimony from appellant's co-workers and supervisor at the school district regarding her return to work during the Spring of 2001. There was also testimony that she abandoned her work with the school district on the first day of the 2002-2003 school-year. Evidence was

presented that demonstrated that appellant chose to keep the position with the EOC rather than the school district at that time. She further chose not to return to the school district even when the job with the EOC had terminated, despite the fact that the opening for her position was kept vacant for the entire year.

Appellant specifically testified that she had not looked in the classified advertisements in the Sunday newspapers for employment opportunities, including, but not limited to, sedentary employment positions. It is undisputed that she failed to contact the school district regarding available accommodations that might have allowed her to be able to return to work as a bus driver, instead simply abandoning her post.

Under Ark. Code Ann. § 11-9-522(b)(1), the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as appellant's age, education, work experience, and other matters reasonably expected to affect her future earning capacity. The Commission may also consider the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes assessment of the claimant's loss of earning capacity. Appellant abandoned her position without explanation to the school district, then continued doing similar work driving a van for the EOC for the next few subsequent months. She then failed to seek out either similar employment or positions as a 911 operator or other sedentary clerk-type work for which she had previously received training.

When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Lee, supra*. Although the Commission is not bound by medical testimony, it may not arbitrarily disregard witness testimony and is required to consider all the evidence in arriving at its decision. *See Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony; the Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *DeQueen Sand & Gravel v. Cox*, ___ Ark. App. ___, ___ S.W.3d ___ (May 17, 2006). Based upon the record before us, we cannot say that the Commission erred in finding that appellant failed to prove entitlement to wage-loss benefits resulting from her compensable injury. Here, the Commission's decision displays a substantial basis for the denial of benefits; accordingly, we affirm.

Affirmed.

BIRD and ROAF, JJ., agree.