

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-317

CATHY WRIGHT

APPELLANT

V.

McMILLAN, TURNER, McCORKLE &
CURRY; EMPLOYERS MUTUAL
CASUALTY COMPANY; DEATH &
PERMANENT TOTAL DISABILITY
TRUST FUND

APPELLEES

Opinion Delivered November 12, 2008

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. E609015]

AFFIRMED

JOSEPHINE LINKER HART, Judge

This case returns after remand to the Arkansas Workers' Compensation Commission for reconsideration of its award of a twenty-percent wage-loss disability to appellant, Cathy Wright. On remand, the Commission awarded appellant a forty-percent wage-loss disability. She again appeals, arguing that she is permanently and totally disabled, or alternatively, that she suffered a wage-loss disability greater than forty percent. We hold that substantial evidence supports the Commission's decision.

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). In considering factors that may affect a claimant’s future earning capacity, the Commission may 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. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004).

In reviewing decisions from the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission’s findings, and we affirm if the decision is supported by substantial evidence. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission’s opinion displays a substantial basis for the denial of relief. *Id.* The Commission determines the credibility of the witnesses and the weight to be given their testimony. *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998).

According to the Commission’s opinion, appellant is fifty-four years old, attended high school through the eleventh grade, and attended college for two years where she took business courses. Appellant previously has worked as a legal secretary, office manager, and bookkeeper in a lawyer’s office. In 1996, appellant suffered a compensable back injury while working as a legal secretary. In 1999, she was assigned a ten-percent permanent-impairment rating. In 2000, she underwent back surgery, and her healing period ended in 2002.

The Commission further noted that appellant testified in her 2003 deposition that she was still suffering from significant physical restrictions and did not think that she was physically

able to return to work. Also in 2003, she was seen by a physician, who, after observing that studies showing postoperative changes and some bulging at various levels, opined that surgical intervention was not indicated. She began lumbar epidural injection treatments in 2004.

As noted by the Commission, appellant was seen in 2006 by a vocational rehabilitation consultant, who noted that appellant told her that she had not made any attempt to return to the workforce and did not have any plans to return to the workforce in the future. The consultant further noted that appellant was working in a sedentary occupation at the time of the injury and that the medical records she reviewed indicated that appellant was still capable of performing at least sedentary work. The consultant opined that appellant was capable of returning to her former occupation as a secretary or some type of similar, related sedentary occupation.

According to the Commission, at the 2006 hearing, appellant testified that she suffered from continual back pain, pain in her left hip and leg, and problems with her right side as well. She further testified that she could not promise a prospective employer that she could be at work every day, that she would be “totally useless” on a bad day, and that she had not made an effort to return to work. The vocational rehabilitation consultant testified that she did not have any reason to believe that appellant could not return to work in a full-duty capacity. On cross-examination, the consultant noted that if various subjective factors were considered, then it would be practically impossible for appellant to return to gainful employment. Also, she testified that she did not contact appellant’s physicians.

The Commission found that appellant sustained a forty-percent wage-loss disability but

was not permanently and totally disabled. In reaching its decision, the Commission noted that she sustained a compensable injury, was assigned a ten-percent anatomical impairment in 1999, underwent lower back surgery in 2000, and reached maximum healing in 2002. The Commission also noted that no examining or treating physician opined that appellant was permanently and totally disabled. Also, while observing that appellant had not worked since 1997, the Commission further noted that appellant was only fifty-four years old, had taken college-level courses, had several years of experience in professional workplace settings, and had transferrable work skills within her physical abilities. The Commission also relied upon the testimony of the vocational rehabilitation consultant, who identified several appropriate jobs that fit within appellant's physical restrictions, though appellant told the consultant that she was not interested in securing gainful employment.

On appeal, appellant argues that she is permanently and totally disabled, or alternatively, that she suffered a wage-loss disability greater than forty percent. She notes her age, her education, her impairment rating, her continuous low back and left leg pain, her use of pain medication and injection therapy, her lack of employment for several years, and her inability to participate in her past activities. She also argues that, for several reasons, the vocational rehabilitation consultant's conclusions should be discounted.

Here, the Commission properly considered several relevant factors on wage-loss disability. Based on its weighing of the factors, the Commission found that appellant was entitled to a forty-percent wage-loss disability, finding further that there was no probative evidence demonstrating that she was permanently and totally disabled. Furthermore, the

Commission reviewed the consultant's conclusions and found her testimony credible and her conclusions entitled to weight. We hold that, given the evidence presented and the Commission's analysis, the Commission's opinion displays a substantial basis for the denial of wage-loss disability in excess of forty percent. Accordingly, we affirm the Commission's decision.

PITTMAN, C.J., and GRIFFEN, J., agree.