ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-144

NOVEMBER TERM, 2009

Margaret Tassey	}	APPEALED FROM:
	}	
v.	}	Washington Family Court
	}	
Trevor Ayer	}	DOCKET NO. F349-8-99 Wndm
		Trial Judge: Thomas J. Devine

In the above-entitled cause, the Clerk will enter:

Father appeals pro se from the family court's child support order. He challenges the court's assessment of the evidence and its refusal to allow him to submit new evidence. We affirm.

The record indicates the following. Parents have one child who resides with mother. Pursuant to a June 2005 order, father was required to pay $366.45 per month in child support. In May 2007, following a workplace accident, father moved to modify his child support obligation. Hearings were held before a magistrate on four dates between July 2007 and July 2008. Both parties were represented by counsel, and evidence was presented as to the scope of father's back injury, his residual impairment, and his ability to work. Approximately one month after the final hearing, father sought to introduce additional medical evidence. The magistrate denied his request. She indicated that her decision would be based on the evidence already presented, noting that the case had gone on for many months and that a decision needed to be rendered. The magistrate further observed that changes in the parties' status could be addressed through motions to modify.

In September 2008, the magistrate issued her child support order. She found that father had demonstrated a change in circumstances, and she reduced father's child support obligation to a nominal amount between May 2007 and May 1, 2008. Following that date, however, the court found that father should pay the guideline amount of $361.67 per month. In reaching her conclusion, the magistrate relied on testimony from Dr. John Johannson, who conducted an independent medical exam (IME) of father. Dr. Johannson found nothing of significance in terms of a physical problem, and stated that he would expect improvement in symptoms of back strain within one month. He opined that father was capable of full-time work of a light duty/sedentary nature. Father's chiropractor, Dr. Heather Rice, found that father had made progress since his injury, but that his progress was slow. Dr. Rice was aware that father did other things during the day such as shoveling, lifting his child, and playing in a band, but she suggested that restricting father's working hours would allow father to control the amount of time that he was using his back, unlike his other activities of daily living. The magistrate found Dr. Johannson's testimony more credible, observing that, unlike Dr. Johannson, both father's

chiropractor and his physical therapist based their assessments primarily on father's subjective reporting of symptoms. The court did not credit father's testimony about the extent of his disability, or his assertion that working part-time caused a flare-up in his symptoms. The magistrate concluded that as of February 2, 2008, father, who was thirty-five years old, was capable of full-time, sedentary to light duty work. She also observed that other than attempting to find work to meet requirements for unemployment benefits, father had not made a good faith effort to be employed. She found that father was voluntarily underemployed and imputed full-time wages at $12 per hour to him, the hourly rate he was currently earning by doing medical billing for his chiropractor. Following the magistrate's decision, father again moved to introduce new evidence, and he also requested a new trial or relief from judgment. The magistrate denied these requests.

Father then appealed to the family court, challenging the merits of the magistrate's decision and again seeking to present additional evidence. The court denied father's motion as well as his on-the-record appeal. As in the proceedings below, the parties' arguments centered on the extent of the father's injury and his ability to work. The family court found that the magistrate's decision was supported by the evidence, and it affirmed her decision as to father's child support obligation, with a minor exception not relevant here. The court also concluded that the magistrate had acted within her discretion in refusing to accept additional evidence, and it found no good cause to allow father to introduce new evidence on appeal. Father appealed from this decision.

On appeal, father essentially asks this Court to reweigh the evidence and reach a different conclusion. He points to evidence that he presented at the hearing as to the flare-up of his back condition and asserts that the court should have found it credible. He challenges the finding that his efforts to find work had been perfunctory, and he maintains that the court erred by finding him capable of full-time work simply because he could shovel snow and pick up his child. He argues that the magistrate further erred in stating that Dr. Johannson's conclusion was based on objective tests that he performed, while father's witnesses based their opinions largely on father's self-reports.

We find no basis to disturb the decisions below. The magistrate acted well within her discretion in concluding that father was minimally impaired. The magistrate did not base her decision solely on the fact that father was able to engage in physical activities, although this evidence was certainly relevant. Dr. Johannson testified that it did not make medical sense that father was disabled and unable to work, and the court found him credible. The magistrate found, moreover, that both Dr. Rice and father's physical therapist conceded at the hearing that they relied almost entirely on father's self-reports of his pain levels. While father points to evidence that he believes supports his position, the magistrate was not persuaded by this evidence. The magistrate was certainly not obligated to credit father's testimony about the flare-up in his condition, as father suggests. In a similar vein, although father argues that he tried to find work, the magistrate concluded otherwise. As we have often repeated, it is exclusively the role of the fact-finder to assess the credibility of witnesses and weigh the evidence presented. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995). This Court will not reweigh the evidence on appeal. Father must show that the court's findings are clearly erroneous, meaning that they have no support in the record. See V.R.C.P. 52(a)(2); Mullin v. Phelps, 162 Vt. 250, 260 (1994). He fails to do so

here. The magistrate's findings are supported by the record, and the findings support her conclusion that father should pay the guideline amount of child support.

Father next argues that the magistrate erred by not accepting evidence after the final hearing, and by stating that "there will always be changes and those can be addressed by motions to modify." Father asserts that his new evidence did not relate to a change in his medical condition, but rather, it concerned his existing medical condition. In a related vein, father argues that the family court should have found good cause for accepting additional evidence. He asserts that the evidence he offered was the only objective evidence available, and he suggests that this evidence was delayed due to the nature of workers' compensation proceedings.

We find no error. As the family court explained, father sought to present evidence of a functional capacity evaluation (FCE) conducted by Dr. George White prior to the July 2008 hearing. Dr. White's report was not issued until after the hearing, but it was not clear if Dr. White had reached his findings by the hearing date. It was clear, however, that father did not call Dr. White as a witness at the hearing. In August 2008, following the magistrate's decision, Mark Coleman, an occupational therapist, also performed an FCE of father. According to father, Mr. Coleman found that he was not ready to return to full-time work.

The family court agreed that both reports were not reasonably available at the time of the fourth hearing before the magistrate. But in considering the emergence of this evidence, the court also found it necessary to consider the extent of the prior record, the length of time the proceedings had already consumed, the nature of the new evidence, and the probative value of the new evidence in light of the evidence already in the record. After weighing all of these factors, the court concluded that the magistrate reasonably denied father's request.

The court next considered father's request that it accept the new evidence as part of the appeal. It noted that appeals from the magistrate were generally on the record "except that where, for good cause shown, the record is found to be incomplete[,] additional evidence may be submitted and review shall be de novo." V.R.F.P. 8(g)(4). Relying on the Reporter's Notes to Rule 8, the court found numerous drawbacks in allowing an appeal that was in large part based on a cold record, but that also contained the presentation of live testimony. Given that two years had already elapsed from the original date of father's injury, moreover, it acknowledged the danger that taking additional evidence on appeal would trigger requests from both parties for numerous other specialists to "update" the court on father's status. After careful consideration, the court concluded that it would not take additional evidence, but would instead confine its review to the record below.

Father fails to show that the court erred in reaching these decisions. The court weighed father's arguments, and concluded that the motions should be denied. It identified numerous reasonable grounds for its decision. As stated above, the hearings before the magistrate had stretched out over a year's time, and the magistrate rationally decided to base her decision on the evidence that had been presented during that period. She did not err in observing that there would always be changes in the parties' status, and that such changes could be addressed through motions to modify. Father's concern about the court's treatment of future motions to modify is speculative. Certainly, as both the magistrate and family court found, there comes a time where proceedings must come to an end. This is particularly true for child support hearings, which are

supposed to be resolved promptly. Cf. V.R.F.P. 8(f) (all proceedings to establish or enforce child support before a magistrate shall be completed within three months of the filing of the initial pleading). Additionally, as the family court observed, father had also seen numerous doctors who were familiar with his condition, but he chose not to call these doctors as witnesses, despite ample opportunity to do so. Indeed, father could have called Dr. White to testify, but he did not do so.

Moreover, the record before the magistrate was not "incomplete," so as to warrant a de novo hearing before the family court. See Reporter's Notes, V.R.F.P. 8 (explaining that Rule 8 authorizes submission of additional evidence upon appeal but only when the record from the magistrate is incomplete and good cause has been shown for its incompleteness, and providing as an example of good cause cases where the "failure to comply with discovery by one party caused the other party to proceed before the magistrate with incomplete information"). Both parties presented extensive evidence, including medical evidence, and they had over a year to do so. It was reasonable to conclude that a de novo hearing was not appropriate under these circumstances and that enough of the court's resources had already been expended on this case. See Reporter's Notes, V.R.F.P. 8 (stating that allowing de novo appeals before the family court diminishes the role of magistrates, squanders the resources expended to create magistrate proceedings, and seriously undermines the statutory and federal goal of concluding such proceedings promptly). While father disagrees with the court's conclusion, he fails to show that the court abused its discretion in denying his requests. As the court observed, given the nature of father's injury, this is the type of case that could stretch on indefinitely, with continual "updates" from father as to his condition. The court did not err in rejecting such an approach, and denying father's requests to present additional evidence.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice