BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA JONES,

Claimant,

vs.

HENDERSON ENTERPRISES GROUP,

Employer,

and

TRAVELERS INDEMNITY COMPANY OF CT,

Insurance Carrier,
Defendants.

File No. 5062925

REVIEW-REOPENING

DECISION

Head Note No.: 2905

STATEMENT OF THE CASE

Pamela Jones, claimant, entered into an Agreement for Settlement pursuant to Iowa Code section 85.35(2), with her employer and their workers' compensation insurance carrier, which was approved by this agency on February 12, 2014.

On December 16, 2016, claimant filed her petition seeking to review-reopen the Agreement for Settlement. The matter proceeded to hearing on August 17, 2018. The parties filed post-hearing briefs on August 31, 2018 and the matter was considered fully submitted at that time.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits JE1 through JE5, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through D. All exhibits were received without objection. Claimant provided testimony.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether there has been a change in condition since the Agreement for Settlement was approved by this agency that warrants a review-reopening of claimant's industrial disability, and if so, the extent thereof.

2. Entitlement to and reasonableness of the cost of claimant's independent medical evaluation (IME).

3. Costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Pamela Jones, entered into an Agreement for settlement with her employer and their insurance carrier, which was approved by this agency on February 12, 2014. (Exhibit A, page 2) In that document the parties agreed that claimant sustained an injury arising out of and in the course of her employment on February 17, 2011. (Ex. A, p. 1) Claimant's injury was to her back. (Testimony) The parties agreed that the applicable weekly rate was $513.01. (Ex. A, p. 1) The parties further agreed that claimant had sustained 30 percent industrial disability entitling her to 150 weeks of permanent partial disability benefits. (Id.)

Claimant has worked for the defendant employer for over 14 years. She was employed by the defendant employer at the time of the Agreement for Settlement, and she continued to work there through the time of the hearing in this matter. At the time of the hearing, claimant was working as a particle painter, which is the same job that she held at the time the Agreement for Settlement was approved. (Testimony) She has continued to receive annual raises and she has had satisfactory job performance reviews since the settlement. (Testimony) In her job reviews since the Agreement for Settlement, claimant has received marks of "good," "very good," and "outstanding." (Ex. D, pp. 21, 24, 26, 28, 30) At the time of the hearing, claimant was earning $20.74 per hour. This was a higher hourly wage than she was earning at the time of the prior settlement. (Testimony) Claimant also agreed that her restrictions have not changed and she continues to work under the same restrictions that she had at the time of the Agreement for Settlement. (Testimony)

Claimant's medical treatment prior to the approval of the Agreement for Settlement included pain medication, chiropractic care, injections and radiofrequency neurotomy. (Testimony; Ex. E, pp. 1-2)

Claimant has never had surgery either before or after the Agreement for Settlement.

In February 2014, when the Agreement for Settlement was approved, the only work restrictions imposed on claimant were from Thomas Carlstrom, M.D., who recommended avoiding bending, twisting and work below her waist and above her shoulders, along with no lifting over 30 pounds and no lifting over 20 pounds repetitively. (Ex. A, p. 5) Claimant agreed that these restrictions have not changed and no new restrictions have been imposed by any other health care provider. (Testimony)

In February 2014, Dr. Carlstrom assessed claimant's permanent impairment due to the work injury and stated that claimant had "sustained an impairment because of this injury, that being I would say about 12% of the body as a whole." (Ex. A, p. 5) (emphasis added) This opinion is stated as an approximation without any specific reference to the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). Dr. Carlstrom was apparently not asked to reevaluate claimant for this review-reopening.

Claimant testified that since the Agreement for Settlement, she has continued to have regular back pain and she continues to receive medical care for her work injury. (Testimony) She stated that when she is working, her pain increases, but when she is not working on the weekends, she feels better. She also stated that she would like to find a different job that is easier on her body after her kids get out of school. (Testimony)

On February 25, 2014, close to the time of the Agreement for Settlement, claimant reported to Keith Barnhill, CRNA, ARNP that she was having an exacerbation of pain at a level of "8-9/10 especially at the end of work," but "that on the weekends she is actually doing fine." (Ex. JE1, p. 1) This is similar to claimant's current complaints described above.

In March 2015, claimant reported a similar pain level after a long day of 8/10. (Ex. JE1, p. 4) She again described her pain as 8-9/10 during the week and no pain on the weekends in October 2015. (Ex. JE1, p. 6) In December 2016, claimant had a lumbar injection, before which she reported her pain level as 4-5/10 and after the injection her pain level was 0/10. (Ex. JE1, p. 12) Her pain level returned to 8/10 in February 2017 and she underwent radiofrequency treatment. Following this treatment, she reported her pain level as 0/10. (Ex. JE1, p. 15) By June 27, 2017, her pain had returned to a level of 6/10, which she described as an "acceptable level." (Ex. JE1, p. 20) On April 2, 2018, claimant reported her pain to be 7/10 before a sacroiliac joint injection and 0/10 after the procedure.

Claimant agreed that she has received medication and injections both before and after the Agreement for Settlement was approved. (Testimony)

I find that claimant's course of medical treatment has not changed to any significant degree after the Agreement for Settlement in February 2014. I also find that claimant's current level of pain as reported to her medical providers is similar to her complaints reported prior to February 2014.

Concerning the pending petition, claimant was sent by the defendants to Kenneth McMains, M.D. on April 17, 2018. Dr. McMains reported that he reviewed medical records back to March 8, 2012, the date that he saw claimant for a second opinion in the underlying case. He discussed the medical records generally, but he does not identify or detail the actual records he reviewed until the records beginning with September 19, 2016. (Ex. JE2, p. 1) Therefore, it is unknown to the undersigned what specific records Dr. McMains reviewed prior to September 19, 2016. Dr. McMains

conducted a physical examination and interview of claimant and opined that claimant has no permanent impairment from the original work injury. (Ex. JE2, p. 3) Dr. McMains did not assign any work restrictions related to the work injury. (Id.)

Dr. McMains later responded to a letter prepared by defense counsel by marking "yes" and signing and dating the letter and adding what appear to be his handwritten comments. (Ex. JE5, pp. 1, 2) In the letter, Dr. McMains confirmed his opinions that radiofrequency nerve ablation is used to treat chronic pain and that claimant's pain management has been conservative in nature. (Id.)

On June 8, 2018, claimant was seen by Peter G. Matos, D.O., who was chosen by claimant, for an independent medical evaluation (IME). Mr. Matos reviewed medical records dating back to 2005, but he does not include any reference to the radiofrequency procedure performed in July 2012. (Ex. JE3, pp. 3-6) Dr. Matos stated that claimant's treatment since the injury has included physical therapy, injections and medications. (Ex. JE3, p. 1) Claimant agreed that all of these modalities were received both before and after the Agreement for Settlement was approved. (Testimony) Dr. Matos opined that claimant would be placed in DRE Category III of the AMA Guides pursuant to Table 15-3, and that she sustained 13 percent permanent partial impairment to the body as a whole. However, Dr. Matos provided no discussion of what factors mentioned in Box 15-1, page 382 of the AMA Guides, he relied upon to place claimant in DRE Category III. Neither did he explain his rationale for assigning 13 percent impairment, when the range for DRE Category III is 10 to 13 percent. (Ex. JE3, p. 2)

Dr. Matos stated that claimant did not require any additional work restrictions beyond those assigned by Dr. Carlstrom on January 28, 2013. (Id.)

Prior to and following the Agreement for Settlement, claimant received treatment with the authorized medical provider, Keith Barnhill, CRNA, ARNP, at the Pain Management Clinic. (Ex. JE1; JE4, p. 1) Mr. Barnhill is a nurse anesthetist. Mr. Barnhill responded to a letter dated July 13, 2018, from claimant's counsel by marking "yes" to confirm his opinion and signing his initials and dating a number of paragraphs presented to him. Mr. Barnhill confirmed that: (1) he has continued to provide treatment to claimant since February 2014 up to the current time; (2) claimant's back condition has progressed/deteriorated since February 2014, such that she was required to undergo a radiofrequency nerve ablation while under his care on February 13, 2017; and, (3) claimant has lost function and had increased limitations concerning her ability to perform physical aspects of her job. (Ex. JE4, p. 2) It does not appear that Mr. Barnhill was aware of claimant's prior radiofrequency procedure that claimant underwent in July 2012, and he offered no explanation why the need for the radiofrequency treatment in 2017 was different from the need that existed in 2012, prior to the Agreement for Settlement. Also, Mr. Barnhill does not provide any particular rationale or discussion to support his conclusion that claimant has "lost function in her back since February 2014" and has "increased limitations" concerning the physical aspects of her job. (Ex. JE4, p. 2) There is no reference to any particular ways that claimant has changed the way she does her job after the Agreement for Settlement, or statements attributed to claimant describing any change in condition, function or

perceived limitations. Given the failure to address the 2012 radiofrequency treatment and the lack of specificity and support of the stated opinions, I give little weight to Mr. Barnhill's opinions.

Considering the opinions of Dr. Matos, although he reviewed medical records, he was also apparently unaware of the radiofrequency procedure performed in July 2012. (Ex. JE3, pp. 3-6; Ex. E, pp. 1-2) He also failed to articulate the factors he relied upon for placing claimant in DRE Category III or why he believed 13 percent permanent partial impairment was appropriate when the range of impairment for DRE Category III is from 10 to 13. (Ex. JE3, p. 2) However, Dr. Matos did specifically state that claimant did not require any additional work restrictions beyond those assigned by Dr. Carlstrom on January 28, 2013. (Id.)

Based on the deficiencies in Dr. Matos's report, I do not find it terribly persuasive concerning claimant's permanent impairment. However, if I did accept his opinion that claimant sustained 13 percent permanent impairment to the whole person, it is significant that his assessment was only one (1) degree higher than the percentage previously assigned by Dr. Carlstrom, (12 percent) which was relied upon by the parties at the time of the Agreement for Settlement. (Ex. A, p. 5) I also note that Dr. Carlstrom's assessment of impairment has its own vagaries based on his lack of any reference to the AMA Guides and his statement that claimant's impairment was "about 12% of the body as a whole." (Ex. A, p. 5) (emphasis added) Therefore, I conclude that even if I were to accept Dr. Matos's opinion of permanent impairment, there is no significant difference in the impairment ratings and opinions of Dr. Carlstrom and Dr. Matos. That is to say, there are no articulated factors from either physician that would allow one to distinguish one opinion from the other. The only difference is the conclusion of 12 percent versus 13 percent. It is significant that there is no identifiable difference in claimant's physical condition between the opinions of Dr. Carlstrom and Dr. Matos.

Considering the opinion of Dr. McMains, he was the only physician who opined that claimant had no permanent impairment attributable to her underlying work injury of February 17, 2011. It is unclear what particular medical records he reviewed prior to September 2016, which makes his opinion less reliable. I therefore give Dr. McMains' opinion little weight.

CONCLUSIONS OF LAW

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959).

A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award

on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

Although a review-reopening award is not precluded simply because evidence was considered or anticipated at the time of the arbitration hearing, this agency is not charged with re-determining the condition of the claimant, which was adjudicated in the former arbitration proceeding. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). A "condition that has already been determined by an award or settlement should not be the subject of a review-reopening petition." Id.

A change in circumstance that may justify an increase of a prior arbitration award can be a worsening of claimant's physical condition or an economic change in condition that reduces claimant's earning capacity. Id. In this instance, claimant seeks a review and reopening of her Agreement for Settlement based on an alleged deterioration of her physical condition. However, the medical treatment records and expert medical opinions as described above do not support this contention.

Applying Bousfield, I conclude that the primary if not only identifiable difference in this case when comparing claimant's condition at the time of the Agreement for Settlement and the hearing on the petition for review-reopening is the one percent difference in permanent impairment ratings as assigned by Dr. Carlstrom and Dr. Matos and a mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening.

I conclude that claimant has failed to carry her burden of proof that she sustained a change of her condition that warrants an increase of her industrial disability as set forth in the Agreement for Settlement approved by this agency on February 12, 2014.

The second issue is whether or not claimant is entitled to additional reimbursement for her IME with Dr. Matos on June 8, 2018, and whether the same is reasonable.

Defendants concede in their post-hearing brief that claimant is entitled to an IME in this case, but argue that the fee charged of $4,500.00 is unreasonable. Defendants paid $3,000.00 for the IME prior to the hearing.

Claimant included the invoice from Dr. Matos, which states: "IME=$3,000." (Ex. 2, p. 2) The parties agreed that defendants have paid $3,000.00 for the IME. However the invoice from Dr. Matos also includes the following language: "Additional medical at $500 an hour x 3 hour = $1500." (Id.) It is unclear to the undersigned what this additional charge is for particularly due to the separate and clear billing for the IME alone. Presumably this remains related to the IME as there is no other apparent basis for a charge apart from the IME. Therefore, concluding the additional $1,500.00 charge is a part of the IME expense, the question is whether a total amount of $4,500.00 is reasonable per Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

It is claimant's burden to prove the reasonableness of the IME fee. Claimant made no argument on this issue in her post-hearing brief.

I conclude that the amount of $4,500.00 is high compared to typical IME fees in many other cases. I also find that this specific IME was not particularly complex. For example: claimant has never had surgery; there were less than 50 pages of medical records for Dr. Matos to review; he did not require any additional testing to complete his assessment; and there was no new information or additional medical records provided after the initial evaluation that required Dr. Matos to revise his report or conduct a second evaluation of claimant. In this specific situation and limited to this particular file, I find that $4,500.00 is not a reasonable charge and defendants are not obligated to pay any additional amount beyond the $3,000.00 already paid. In some cases an amount of $4,500.00 may be reasonable, but not under these circumstances.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that each party should pay their own costs.

ORDER

IT IS THEREFORE ORDERED:

Claimant takes nothing further.

Each party shall pay their own costs.

Defendants shall file any necessary subsequent reports of injury (SROI) as may be required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 2nd day of January, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
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TJG/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.