BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMBER HALL,

Claimant,

vs.

APPLE CREEK KENNEL,

Employer,

and

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5044786

REVIEW-REOPENING

DECISION

Head Note No.: 2905

STATEMENT OF THE CASE

Petitioner/defendants, Apple Creek Kennel (Apple Creek) and Travelers Property Casualty Company of America (Travelers), filed a petition for review-reopening seeking modification of an arbitration and an appeal decision in this matter.

The record in this case consists of petitioner's exhibits 1 through 8, claimant's exhibits A through D, and the testimony of claimant, Amber Hall, and Lana Sellner. This matter was heard in Des Moines, Iowa, on September 7, 2016 and fully submitted on September 28, 2016.

ISSUE

Has there been a change in claimant's condition that would change the underlying arbitration and appeal decision findings that claimant is permanently and totally disabled?

FINDINGS OF FACT

Claimant was 34 years old at the time of the hearing. Claimant graduated from high school. Claimant received an Associate of Arts Degree in business and art.

Claimant has worked in veterinary clinics, horse stables, and kennels. Claimant has also worked at Subway.

On April 21, 2013, claimant injured her left shoulder. She was assessed as having a labral tear on the left. Claimant underwent left shoulder surgery. She was ultimately found to have a 4 percent permanent impairment to the body as a whole as a result of the injury. Claimant was given work restrictions. The appeal decision found that claimant's actual work restrictions is essentially one-arm duty with only very light work for the left hand and arm (Appeal decision, page 10). Claimant was found to be permanently and totally disabled in a December 18, 2014 arbitration decision. That decision was affirmed on appeal in a May 12, 2016 decision.

In a July 2, 2015 report, Lana Sellner, M.S., CRC, issued an initial vocational assessment of claimant. Ms. Sellner was hired by defendants to provide vocational counseling for claimant and to give vocational counseling to claimant. Claimant indicated that her company, Friendly Critters, LLC, was no longer in business, but she continued to provide volunteer services for customers. (Exhibit 7, pages 24-31)

Between August 5, 2015 and August 8, 2015, claimant was put under surveillance. The surveillance report is found at Exhibit 1. A copy of the surveillance footage is found on a flash drive marked as Exhibit 8, and on a CD marked Exhibit D.

On August 5, 2015, claimant was surveilled getting in and out of a car. Claimant was also seen going in and out of an auto parts store. Surveillance from this day shows that claimant worked in a garage, identified in the surveillance report as being Walton's Auto Sales (Walton's). (Ex. 1, p. 7) Claimant is seen on surveillance for approximately an hour and one-half lying on a creeper, wiping down the inside of a car door, and wiping windows in a car. Claimant also appears to be vacuuming the front seat of the car with a hand vacuum. (Ex. 1, pp. 6-9)

On August 7, 2015, claimant was surveilled getting in and out of a car and going in and out of the auto parts store. (Ex. 1, pp. 10-11; Ex. 8)

On August 8, 2015, claimant was surveilled getting in and out of a car. Claimant was also surveilled shopping at a grocery store. The video shows claimant using the right arm to grab fruit and other items. Claimant's son pushes the grocery cart. When unloading the grocery cart, claimant only uses her right arm. The video shows claimant having minimal use of her left arm and the left arm is kept close to her body throughout most of the video. (Ex. 1, Ex. 8, Ex. D)

The claimant testified that on the surveillance video, she was seen going to Walton Auto Sales. She said that prior to going to Walton's, in the surveillance, she is also seen stopping at O'Reilly's Auto Parts. Claimant was unable to recall why she stopped at O'Reilly's before going to Walton's on two separate occasions. (Transcript 24-27)

Claimant acknowledged, that on the video, she is seen lying on a creeper next to a car and wiping windows. She also acknowledges that she is seen vacuuming the car. The claimant testified she was not detailing the car shown in the video. (Tr. pp. 27-29)

Claimant testified that she is at Walton's 6 to 7 days a week, from 5 to 12 hours per day. She says she goes to the auto shop almost daily because she is involved in a romantic relationship with the owner. She said the owner lets her use the internet and computer at the shop. Claimant said she does not work at Walton's. She said she does not detail cars. She said she is not an employee of Walton's and does not receive a paycheck from Walton's. Claimant said she was not detailing a car in the surveillance. Claimant testified she believes she spends between 30 to 84 hours per week at Walton's. (Tr. pp. 27-32, 51-52)

In a November 25, 2015 status report, Ms. Sellner gave her opinions of her work with claimant. Ms. Sellner provided job leads to claimant, provided job seeking skills, and resources to claimant, and encouraged claimant to refresh her computer abilities. Claimant indicates she would only work at jobs paying $10.00 to $11.00 per hour and would not work on the weekends. (Ex. 7, pp. 32-35)

In an affidavit, Ms. Sellner indicates that she met with claimant a number of times between June 2015 and March 2016. Ms. Sellner also communicated with claimant by phone or e-mail a number of times between August 2015 and May 2016. Ms. Sellner reviewed deposition testimony from claimant, indicating claimant was spending 4 to 12 hours per day, 6 to 7 days per week at Walton Auto. Claimant did not give Ms. Sellner any information she was spending a significant amount of time at Walton's. Ms. Sellner opined that claimant was capable of working at a call center, performing customer service, or as a cashier or receptionist. (Ex. 7, pp. 42-44)

Ms. Sellner testified that she has worked for approximately 20 years in vocational rehabilitation. She testified she was hired to work with claimant in an attempt to help claimant find work. Ms. Sellner testified claimant did not tell her she spent 30-80 hours per week at Walton's. She says that the time claimant spends at the auto shop is an indication of claimant's ability to return to work. (Tr. pp. 76-80)

Ms. Sellner opined claimant was employable in the Cedar Rapids area. She agreed claimant had some loss of earning capacity due to her left shoulder problem. She opined the claimant was still employable. Ms. Sellner could not explain why claimant has not yet managed to get a job, despite filing over 100 job applications. (Tr. pp. 93-98)

In a May 5, 2016 letter, Winthrop Risk, M.D., indicated he believed claimant had developed complex regional pain syndrome (CRPS) on the left upper extremity secondary to her left shoulder injury. (Ex. A, p.1)

On June 14, 2016, claimant was evaluated by David Tearse, M.D. Claimant had shoulder girdle pain. Claimant complained her arm became cold and purple. Claimant was assessed as having left shoulder girdle myofascial pain with hypersensitivity. Dr. Tearse recommended claimant be seen by a physiatrist. (Ex. 6, p. 22)

On June 29, 2016, claimant was evaluated by Sunny Kim, M.D., with complaints of left shoulder pain. Notes indicate claimant worked for herself and occasionally worked with animals. Claimant was assessed as having a possible left arm CRPS. A sympathetic nerve block was advised. (Ex. 5, pp. 19-21)

In a July 6, 2016 letter, Dr. Tearse indicated that in December 2013 he gave claimant work restrictions of no above shoulder work and no lifting more than 2 pounds on the left. He had not given claimant any new restrictions. He recommended claimant undergo a functional capacity evaluation (FCE) to determine new work restrictions. (Ex. 6, p. 23)

On July 6, 2016, Ms. Sellner sent claimant job leads. She also sent claimant additional copies of her résumés. (Ex. 7, p. 45)

In a July 20, 2016 letter, defendants counsel noted claimant's counsel had informed them that claimant was no longer interested in pursuing vocational rehabilitation. (Ex. 3) On that same date, claimant's counsel also informed defendants that claimant would not attend an FCE as recommended by Dr. Tearse. (Ex. 2)

Claimant testified she has difficulty with grasping and grabbing with her left arm. She says she keeps her left arm by her side. At hearing, claimant used a yellow pillow for her left arm. She said she carries the pillow with her most of the time to help her with shoulder pain. Claimant was not seen holding a pillow in any surveillance footage.

Claimant testified her left shoulder has gotten worse since her arbitration hearing. She said her left shoulder pain affects her life. She says that because of limitations with her left shoulder she needs to have her son help her do her hair, get dressed, and prepare food.

Claimant testified she ended her pet sitting business. She said she told Ms. Sellner she stopped her business. On August 10, 2015, claimant dissolved her business with the state. (Ex. 5, p. 45)

Claimant testified that in the surveillance video, she is seen visiting the home of Chris Doty and going inside the house. (Tr. p. 23) She testified that Ms. Doty was one of her pet sitting clients. (Tr. p. 26) Claimant testified Ms. Doty gave her approximately $1,250.00 in checks between February 2015 and October 2015 as gifts to her son. (Tr. p. 29, Ex. 4, Ex. C, pp. 2-44)

Records indicate that between February 2015 and October 2015 she received $898.00 from George Cherry. She said Mr. Cherry was a former pet sitting client. She said the money received from February 2015 through October 2015 were gifts from Mr. Cherry to her son. (Tr. pp. 21-24; Ex. 4; Ex. C, pp. 2-44) Claimant said she also received checks from other former pet sitting clients between February 2015 through October 2015. She said these checks were given to her son. (Tr. pp. 21-25; Ex. 4; Ex. C, pp. 2-44)

Claimant testified she filled out over 100 job applications with Ms. Sellner. She said she has not yet received any job offers from those applications. She said that when meeting with employers she also has her arm supported with a pillow and has told prospective employers that she has a work injury. She testified Ms. Sellner told her to down play her injury. (Tr. pp. 41-43; Ex. B) Claimant testified she did not believe she could work as a receptionist, cashier, hostess, clerk, or security guard because of her left shoulder issues.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

In a review-reopening procedure the claimant has the burden of proof to prove whether she has suffered an impairment of earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994).

Iowa Code section 86.14(2) provides:

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.
>
> We now hold, cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award.

Gosek v. Garmer and Stiles Company, 158 N.W.2d 731, 735 (Iowa 1968).

Under a review-reopening a "redetermination of the condition of claimant as it was adjudicated by a prior award is inappropriate." Lawyer, Iowa Workers'

Compensation Law and Practice, section 20.2 (2007-2008) citing to Stice v. Consolidated Independent Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940); Sheriff v. Intercity Express, Thirty-fourth Biennial Rep. of the Iowa Industrial Comm'r 302 (App. 1978) (Dist. Ct. aff'd).

A review-reopening may also be brought by a defendant/petitioner. Foreman v Foreman Electric and Hardware, File No. 865901(Review-Reopening November 17, 2008).

Claimant testified that she is not an employee of Walton's and she has not received any paychecks from Walton's. (Tr. pp. 51-52) Surveillance taken over three days in August 2015 indicate that in two of those days, claimant was surveilled going to an auto parts store and then going to Walton's. Video footage shows claimant lying on a creeper by a car, cleaning the inside of the door in the vehicle, and vacuuming the front of the vehicle. (Ex. 1, Ex. 8)

Claimant testified she spends between 6 to 7 days per week at Walton's and is at Walton's 5 to 12 hours per day. She said that the reason she spends so much time at Walton's is because she is involved in a romantic relationship with the owner of Walton's. She said she also spends a lot of time at Walton's because she is allowed to use the computer and the internet at Walton's.

It may be that claimant spends a great deal of time at Walton's because she is involved in a romantic relationship. However, the records also suggest claimant runs errands for Walton's and does some sort of car cleaning or detailing at Walton's. Whether claimant is paid for this work by Walton's is unclear.

Claimant also contends she no longer runs a pet sitting business. Records from the Secretary of State show that claimant dissolved her pet sitting business. Between February 2015 and October 2015, claimant received approximately $2,500.00 from past customers for her pet sitting business. Video shows claimant going to the home of one of her prior clients. Claimant testified the checks summarized at Exhibit 4 were gifts to her son. Given the record in this case, this is not believable. The record indicates that claimant still is performing some pet sitting duties on the side.

The record indicates the claimant is not a credible witness. The record suggests she performs some kind of work or errands at Walton's. It is unclear if she is paid for these services. The record also indicates that claimant continues to perform some sort of pet services, for pay, from prior clients.

If the burden of proof was, is claimant not a credible witness, defendants would prevail in this matter. However, the legal standard in this case is, have the defendants carried their burden of proof that claimant has a physical or economic change of condition, since the original award, that indicates claimant is no longer permanently and totally disabled. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

The record is clear claimant has not had an improvement in her physical condition since the arbitration and appeal decision. There is no evidence that claimant's permanent impairment has decreased. Claimant's permanent restrictions have not changed since the appeal decision. The appeal decision notes that claimant's restrictions are essentially one-arm duty with very limited work with the left hand and arm. (App., page 9, May 12, 2016) Video surveillance shows claimant rarely uses her left arm. In the video surveillance of claimant at the grocery store, claimant's left arm is held close to her side and claimant only used her right arm to grab or carry items. (Ex. D, Ex. A)

There is also scant evidence that claimant's economic condition has changed or improved. The record does indicate claimant performed some errands and duties at Walton's. The record is unclear if claimant receives compensation for those errands and duties. It is also clear that claimant continues her pet sitting business on the side. The record at the time of the arbitration hearing found that claimant earned approximately $400.00 from her pet sitting business in 2014. The record on the review-reopening indicates that claimant received approximately $2,500.00 in 2015 for her pet sitting business.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The record indicates that claimant has applied for 100 jobs with Ms. Sellner's help. Despite this help, and the filing of over one-hundred applications, claimant has still failed to find full time employment.

Claimant earned approximately $300.00 per month in 2015 for her pet sitting business. She has applied for over 100 jobs and has had no success in finding a job. Claimant does errands for Walton's, but there is little evidence she is compensated for those errands. Given this record, defendant/petitioner has failed to carry its burden of proof that there has been an improvement in claimant's economic condition since the original award, that would indicate a finding that claimant is not permanently and totally disabled.

I appreciate defendants' position in this case. Claimant has not shown herself to be a credible witness in this review-reopening proceeding. However, for the reasons

detailed above, defendants have failed to carry their burden of proof that claimant has had a change in either physical or economic condition that would suggest that claimant has sustained an improvement in her earning capacity.

ORDER

THEREFORE IT IS ORDERED:

Defendants/petitioner's petition for review-reopening is dismissed.

That defendants shall continue to pay claimant permanent and total disability benefits at the rate of two hundred eighty-six and 32/100 dollars ($286.32) per week.

That defendants shall pay the costs of this matter under Iowa Code section 876 IAC 4.33.

Signed and filed this 2nd day of December, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
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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.