BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARCY MCGUIRE, Claimant, vs. NORWOOD PROMOTIONAL PRODUCTS, LLC, Employer, and AMERICAN HOME ASSURANCE COMPANY, Insurance Carrier, Defendants.	FILED APR 20 2016 WORKERS' COMPENSATION File No. 5035776 APPEAL DECISION Head Note Nos.: 1804, 2905

STATEMENT OF THE CASE

Upon written delegation of authority by the Workers' Compensation Commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on the behalf of the Iowa Workers' Compensation Commissioner.

Defendants, Norwood Promotional Products, LLC (Norwood), employer, and American Home Assurance Company, insurer, both as defendants, filed a notice of appeal on January 2, 2015.

This case was heard on October 9, 2014, by Deputy Workers' Compensation Commissioner Erin Pals. A review-reopening decision was filed on December 23, 2014. That decision found, in part, claimant was permanently and totally disabled.

Defendants contend on appeal the deputy erred in finding claimant was permanently and totally disabled.

The detailed arguments of the parties have been considered, and the record of the evidence has been reviewed de novo.

ISSUES

1. Did the deputy err in finding claimant was entitled to additional benefits under review-reopening proceeding?

2. Did the deputy err in finding claimant was permanently and totally disabled?

It appears from defendants' brief the sole issue on appeal is whether the deputy erred in finding claimant was totally and permanently disabled. (Defendants' post-hearing brief, page 5) However, the last page of defendants' brief indicates: "Claimant's 25 percent industrial disability should not be significantly modified."

Based on the last sentence of defendants' brief, this appeal will also discuss whether claimant is entitled to additional benefits under a review-reopening procedure.

FINDINGS OF FACT

Claimant was 53 years old at the time of hearing. Claimant graduated from high school. She attended some college but did not graduate. Claimant has worked as a certified nurse's assistant (CNA), a daycare provider and did embroidery work for a shirt company. Claimant was employed by Norwood from 1999 until the plant closed in 2008. (Exhibit A, pages 60-61; Ex. 2, pp. 5-7; Transcript pp. 41-46)

The parties stipulated claimant had a work-related injury on August 30, 2008, to the right shoulder. Claimant had undergone a right shoulder surgery in 2009 consisting of a rotator cuff repair. (Ex. 4, p. 1) The parties reached an agreement for settlement (AFS) dated November 28, 2011. That agreement stipulated claimant had a 25 percent industrial disability. That AFS was based, in part, on an opinion by David Tearse, M.D. that claimant had a 7 percent permanent impairment to the body as a whole for her right shoulder. (Ex. B)

At the time of the AFS, claimant had permanent restrictions of no lifting or carrying more than 50 pounds floor to waist occasionally, and a two-handed lift of 23 pounds frequently. This restriction placed claimant in the medium work category. (Ex. A, pp, 1, 60)

At the time of the AFS, claimant worked as a medication aid at Villages of Marion. (Tr. pp. 47-48)

On November 11, 2011, claimant returned to Dr. Tearse due to increased pain and clicking in the right shoulder. Dr. Tearse recommended an MRI. (Ex. 4, p. 1)

An MRI arthrogram was done on the right shoulder on February 29, 2012. It suggested a partial thickness tear of the supraspinatus. (Ex. 5, pp. 1-3)

Claimant underwent conservative treatment by Dr. Tearse. When conservative treatment failed, surgery was discussed and chosen as a treatment option. (Ex. 4, pp. 6-7)

In a September 9, 2012, letter Dr. Tearse opined claimant's continued right shoulder problems were related to her 2008 work injury and surgery done in 2009. (Ex. 4, p. 8)

On October 18, 2012, claimant underwent an arthroscopic rotator cuff repair on the right. Surgery was performed by Dr. Tearse. (Ex. 4, pp. 9-10)

The record indicates claimant went to physical therapy approximately three to five times a week for over six months. (Tr. pp. 49-51)

Claimant testified the Villages agreed to terminate her employment based on an acknowledgment claimant could no longer physically perform her job duties. (Ex. 9, p. 6; Tr. pp. 74-75)

On August 14, 2013, claimant was evaluated by Nancy Agenend, M.D. Claimant had treated for depression in 2010 for prior shoulder problems. Claimant did okay until her recent rotator cuff surgery. Claimant was depressed. Claimant was assessed as having depression and treated with medication. (Ex. 6, pp. 1-3)

On October 11, 2013, claimant returned in followup with Dr. Tearse. Claimant was one year out from surgery. Claimant still had weakness in the right shoulder and could not progress. Dr. Tearse recommended a second MRI arthrogram. (Ex. A, pp. 5-6)

An MRI arthrogram was done on November 5, 2013. (Ex. 5, pp. 4-5) It suggested a recurrent tearing in the right shoulder. (Ex. 5, pp. 4-5; Ex. A, p. 33)

In January of 2014 claimant was evaluated by Harlan Stientjes, Ph.D., for a psychological evaluation concerning an application for Social Security Disability benefits. Claimant was assessed as having a major depressive disorder due to pain and symptoms from her right shoulder. Dr. Stientjes opined the prospect of claimant's return to full-time gainful employment was marginal, at best. (Ex. 8)

On June 10, 2014, claimant was evaluated by James Nepola, M.D. Claimant indicated right shoulder pain and weakness. Claimant believed her right shoulder condition had deteriorated. Conservative treatment was chosen. Claimant was given an injection in the right shoulder. (Ex. A, pp. 33-37)

In a June of 2014 determination letter, claimant was found not to be disabled under the Federal Social Security Act.

Claimant returned to Dr. Nepola on August 5, 2014. Dr. Nepola found claimant at maximum medical improvement (MMI). He restricted claimant to lifting no more than 3 pounds on the right and no repetitive lifting, pulling or pushing from the body. Dr. Nepola recommended a functional capacity evaluation (FCE) to determine permanent restrictions. (Ex. A, pp. 44-51)

The record indicates defendants did not schedule or authorize an FCE for claimant. (Tr. pp. 15-21)

Claimant testified at hearing that Dr. Nepola recommended against a third shoulder surgery, as he did not believe surgery would be successful. (Tr. pp. 53-54)

On September 18, 2014, claimant underwent an FCE conducted by Amy Wenger, OTR/L. Claimant was found to have given maximal effort. Claimant was found to fit in the sedentary work category. Claimant was found to be able to frequently carry up to 5 pounds and rarely lift more than 3 pounds on the right. (Ex. 3)

In a September 4, 2014, report, Susan McBroom, MS, CRC, gave her opinions of claimant's vocational opportunities. The record indicates defendants attempted to have Ms. McBroom meet with claimant. However, claimant's counsel refused to let Ms. McBroom meet with claimant, as counsel questioned Ms. McBroom's impartiality. Ms. McBroom identified jobs she believed claimant was qualified to perform within the light to sedentary job category. These jobs paid between $9.00 to $12.00 an hour. (Ex. A, pp. 70-83)

Ms. McBroom testified, at hearing, she only reviewed claimant's 2010 FCE for her report. (Tr. pp. 106, 139) She did not review Farid Manshadi MD's independent medical evaluation (IME) or Dr. Nepola's September of 2014 letter, as both those documents were generated after her report. (Tr. p. 105) Ms. McBroom testified she did review those documents and the 2014 FCE prior to testifying. She said after reviewing those documents, including the 2014 FCE, her opinions regarding claimant's employability, found in her September of 2014 report, had not changed. (Tr. p. 131)

Ms. McBroom testified the jobs she identified in her reports were sedentary and within claimant's job restrictions. (Tr. p. 116) She said the job titles listed in her report were not actual job openings, but job titles. (Tr. pp. 142-144)

Ms. McBroom testified she believed claimant's mental condition was independent of her work injury. (Tr. pp. 148-150) She testified claimant worked as a CNA at the Villages. (Tr. p. 150)

In a September 9, 2014, report Dr. Manshadi gave his opinions regarding claimant's condition following an IME. Claimant indicated her shoulder was painful even at rest. She indicated difficulty with dressing and washing her hair due to right shoulder condition. (Ex. 1)

Dr. Manshadi opined claimant's depression was a result of her work injury. He found claimant had an additional 5 percent permanent impairment to the body as a whole as a result of her recent surgery. He recommended claimant lift no more than 3 pounds on the right and avoid overhead activity. (Ex. 1)

In a September 18, 2014, letter, Dr. Nepola indicated when claimant was released from care she was given a 3 pound lifting restriction on the right with no repetitive lifting from the body. He indicated permanent restrictions were supposed to be determined by an FCE. Dr. Nepola anticipated claimant eventually would be able to lift more than 3 pounds on the right. (Ex. A, p. 57)

In a September 23, 2014, note, Dr. Manshadi indicated claimant needed permanent restrictions on frequent lifting and repetitive reaching. (Ex. 1, p. 6)

Claimant testified she had difficulty bathing and doing activities of daily living due to her shoulder problems. (Tr. p. 58) She said she has difficulty doing household chores. (Ex. 9, p. 7; Deposition p. 22) Claimant testified she takes prescription medications for shoulder pain and depression. (Tr. p. 57)

Claimant testified she applied for jobs recommended by Ms. McBroom. She testified she has not gotten any offers from those applications. She testified some of the jobs recommended by Ms. McBroom did not exist. (Tr. pp. 58, 62) Claimant testified she has also applied for jobs independent of those recommended by Ms. McBroom. (Tr. p. 93) She testified she would like to return to work. (Tr. p. 63)

Claimant testified she went to the State Vocational Rehabilitation Services. She said her counselor in vocational rehabilitation, Bruce McConnis, said he could not find any jobs for claimant she was qualified to do given her restrictions. Claimant's case file with vocational rehabilitation was closed in December of 2013. (Tr. pp. 59-60; Ex. A, p. 84)

Claimant testified she did not believe she could return to work as a CNA. She testified she did not believe she could return to work as a childcare provider or work at Norwood. (Tr. 97)

CONCLUSIONS OF LAW

The first issue to be determined is did claimant sustain an impairment in earning capacity caused by the original injury, which would entitle her to additional benefits under a review-reopening proceeding.

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).

At the time of the 2011 AFS claimant was classified as being able to work in the medium work category. At the time of the hearing, claimant was classified to work in the sedentary work category. Claimant had an additional surgery since her AFS. She has had severe restrictions placed on her ability to lift.

At the time of the AFS claimant was employed with the Villages of Marion. At the time of hearing, claimant was unemployed and unsuccessful in her attempts to find work. Given this record, claimant has carried her burden of proof she sustained a decrease in earning capacity proximally caused by the original injury.

The next issue to be determined is if the deputy erred in finding claimant was entitled to permanent and total disability benefits.

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).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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).

Claimant was 53 years old at the time of the hearing. She graduated from high school. Claimant has worked as a CNA and a daycare provider.

Claimant has undergone two shoulder surgeries. Her unrebutted testimony is Dr. Nepola told her a third surgery would not be successful.

The record indicates claimant had a prior depressive condition caused by her initial right shoulder injury. (Ex. 6, pp. 1-3) The record indicates claimant's prior mental health condition was materially aggravated by her most recent surgery, and her inability to fully use her right upper extremity. (Ex. 1, p. 5; Ex. 6; Ex. 8) It is true no expert has opined claimant's mental health condition, at the time of the hearing, was permanent. However, it is also clear claimant did have a depressive disorder that was materially aggravated by her most recent shoulder problems at the time of hearing. This problem also affected her ability to be employed. (Ex. 8, p. 3)

Only one expert, Dr. Manshadi, has given an opinion regarding claimant's permanent impairment rating following her second shoulder surgery. Dr. Manshadi opined claimant sustained an additional 5 percent permanent impairment to the body as a whole. (Ex. 1, p. 5) The AFS indicated Dr. Tearse found claimant had a 7 percent permanent impairment to the body as a whole following her first surgery. (Ex. B, p. 90) The combined values charts of the Guides (Fifth Edition) indicates a 7 percent permanent impairment to the body as a whole combined with a 5 percent permanent impairment to the body as a whole results in a 12 percent permanent impairment to the body as whole. (Guides, p. 604) Based on this record, it is found claimant has a 12 percent permanent impairment to the body as a whole.

Four experts have given claimant permanent restrictions regarding lifting. Dr. Tearse prescribed a 3 pound lifting restriction on the right. He also restricted claimant from above shoulder reaching. (Ex. A, p. 6-7)

Dr. Manshadi gave claimant similar restrictions. (Ex. 1, p. 5)

Dr. Nepola's notes from August of 2014 indicate claimant had been on a 3 pound lifting restriction for 1-1/2 years. (Ex. A, p. 44) He continued claimant on a 3 pound

lifting restriction at that time after he prescribed an FCE for claimant. (Ex. A, p. 46) Dr. Nepola indicated, in a 2014 letter, he anticipated claimant would "likely" be able to lift more than 3 pounds. Dr. Nepola indicated permanent restrictions would be given following an FCE. (Ex. A, p. 57) That FCE was never authorized or directed by the defendants. In brief, the record is unclear if Dr. Nepola would have given claimant a less restrictive lifting restriction, as defendants never authorized an FCE prescribed by the treating doctor.

Claimant did undergo an FCE, based on her attorney's recommendation. It was found from that FCE claimant was limited to frequently carrying 5 pounds on the right and rarely lifting up to 3 pounds. (Ex. 3)

The FCE, Dr. Tearse and Dr. Manshadi all gave claimant a 3 pound lifting restriction. Dr. Nepola's last lifting restriction was 3 pounds. Based on this, it is found claimant has a 3 pound lifting restriction on the right, along with the other restrictions detailed in the FCE found at Exhibit 3.

Claimant's unrebutted testimony is she has lost the strength and range of motion in her right shoulder. Her unrebutted testimony is her shoulder condition affects her activities of daily living. (Tr. pp. 57-58; Ex. 1, p. 4; Ex. 3, p. 1)

Claimant's unrebutted testimony is both she and her employer agreed she could not physically perform the duties of her job at the Villages of Marion. (Tr. pp. 74-75; Ex. 9, p. 6)

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. If the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Claimant went to the State Vocational Rehabilitation Services. Claimant's unrebutted testimony is a counselor told her given her restrictions, they could not find her work. Claimant's file with the Vocational Rehabilitation Services was closed. (Tr. pp. 59-60; Ex. A, p. 84)

A psychological assessment of claimant, performed at the request of the Social Security Disability Services, opined given claimant's condition, any return to gainful employment would be marginal. (Ex. 8) At the time of hearing claimant was not found to qualify for Federal Social Security Disability benefits. The law of the Federal Social Security Act is different from that of the Iowa Workers' Compensation Act. The finding

of the Social Security Administration's denial is useful in determining claimant's industrial disability, but not controlling.

Claimant went through approximately 150-200 physical therapy sessions in order to rehabilitate her shoulder. (Tr. pp. 49-51) Claimant looked for jobs recommended by Ms. McBroom. (Tr. pp. 58, 62) Her unrebutted testimony is she also looked for jobs independent of the recommendations made by Ms. McBroom. (Tr. p. 93) Claimant credibly testified she wanted to return to work. (Tr. p. 63) Claimant's motivation to return to work is supported by the fact claimant actively looked for work, and found employment, after leaving defendant Norwood's employment following her initial shoulder injury. Given this record, it is found claimant was motivated to return to work and made efforts to find work after being asked to leave the Villages of Marion.

Defendants contend the report of Ms. McBroom indicates claimant is employable and claimant is not permanently and totally disabled. Defendants also contend the deputy erred in not giving Ms. McBroom's report greater weight. (Defendants' post-hearing brief, pp. 5-7)

Ms. McBroom did opine, both in her report and at hearing, that claimant was employable. (Tr. pp. 116-131; Ex. A, pp. 70-83; Ex. D)

However, as noted in the arbitration decision, there are a number of flaws in Ms. McBroom's opinion regarding claimant's employability and potential earning capacity.

Claimant's unrebutted testimony at hearing is several of the jobs identified by Ms. McBroom, of the jobs claimant applied for, did not actually exist. (Tr. p. 62)

Ms. McBroom's report, as noted, applied claimant's 2010 FCE and not the 2014 FCE. (Tr. pp. 106, 139) Ms. McBroom testified that after reviewing the 2014 FCE, her opinions found in the report, found at Exhibit A, pages 70-83, were unchanged. (Tr. p. 131)

The 2010 FCE is not a part of the record. However, according to Ms. McBroom, the 2010 FCE found claimant could work in the medium job category. According to Ms. McBroom's report, a person in the medium work category can exert 20-50 pounds of force occasionally and 10-25 pounds of force frequently to move objects. (Ex. A, p. 72)

Under the 2014 FCE, claimant is limited to carrying 5 pounds frequently. (Ex. 3) As noted, Drs. Tearse, Manshadi and Nepola all limited claimant to lifting up to 3 pounds on the right. Given this record, how is it possible the opinions of claimant's employability, found at Exhibit A, pp. 70-83, based on an FCE that claimant can exert 20-50 pounds of force occasionally, do not change when claimant can actually only carry 3-5 pounds on the right frequently?

Ms. McBroom opined claimant could work in the light to sedentary job category. (Ex. A, p. 76) Claimant is actually only able to perform in the sedentary work category. (Ex. 3, p. 1)

Ms. McBroom opined claimant's mental health condition was independent of her work injury. (Ex. A, p. 78) As noted above, claimant's mental health condition is found to have been materially aggravated by her work injury.

I respect Ms. McBroom's opinions. However, for the reasons detailed above, it is found her opinions regarding claimant's employability are found not convincing.

Claimant has had two shoulder surgeries. The unrebutted testimony is Dr. Nepola did not recommend a third surgery, as it would not be successful. Claimant has a 3 pound lifting restriction on the right. She has a 12 percent permanent impairment to the body as a whole. Claimant's employer agreed with claimant that claimant could not perform her job duties given her restrictions. Claimant is motivated to return to work. The unrebutted testimony is the State Vocational Rehabilitation Services could not find work for claimant. Claimant has looked unsuccessfully for work. Claimant's mental health condition was materially aggravated by her most recent shoulder problems, and it affects her ability to be employed. Ms. McBroom's opinions regarding claimant's employability were not convincing.

Given this record, claimant has carried her burden of proof she is permanently and totally disabled. Claimant is due permanent and total disability benefits.

Assuming, for arguments sake, claimant is not found to be permanently and totally disabled, claimant is still found to be an odd-lot employee, applying the same factors to an odd-lot analysis.

ORDER

THEREFORE, IT IS ORDERED:

That the decision of December 23, 2014, is affirmed in its entirety.

Defendants shall pay claimant permanent and total disability benefits at the weekly rate of four hundred four and 53/100 dollars ($404.53) commencing on October 17, 2012, and throughout the period she remains permanently and totally disabled.

That defendants shall pay interest as provided in Iowa Code section 85.30.

That all accrued benefits shall be paid to the claimant in lump sum plus interest.

That defendants are entitled to credit for any weekly workers' compensation benefits previously paid to the claimant.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

That defendants shall pay costs of the appeal, including costs of the hearing transcript under rule 876 IAC 4.33.

Signed and filed this 20th day of April, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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