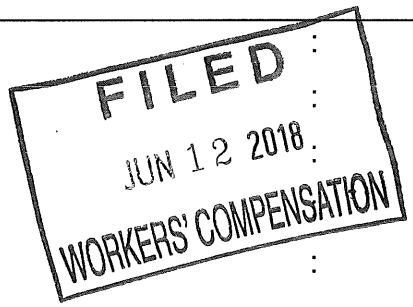
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



GREG RICE,	:	
	:	File No. 5049190
Claimant,	:	
	:	REVIEW - REOPENING
vs.	:	
	:	DECISION
SECOND INJURY FUND OF IOWA,	:	
	:	
Defendant.	:	Head Note: 2905

STATEMENT OF THE CASE

Greg Rice, claimant, filed a petition for arbitration against his former employer, Sachs Electric and the Second Injury Fund of Iowa. The arbitration petition proceeded to hearing before another deputy commissioner and resulted in the filing of an arbitration decision on August 17, 2016. The arbitration decision awarded claimant weekly benefits for a scheduled member left leg injury against the employer and found that claimant was entitled to additional industrial disability benefits from the Second Injury Fund. Specifically, the arbitration decision awarded claimant 15 percent industrial disability, less the Second Injury Fund's credits.

Claimant now seeks review-reopening of the prior arbitration decision and an increase in his Second Injury Fund award. The Second Injury Fund contends that there has been no change in condition warranting an increase in the prior arbitration award.

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 either file. The parties are now bound by their stipulations.

The evidentiary record includes Claimant's Exhibits 1 through 8 and Defendant's Exhibits A through D. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses were called to testify.

The evidentiary record closed at the conclusion of the review-reopening hearing. However, counsel requested an opportunity to file post-hearing briefs. Their request was granted. Both parties filed timely post-hearing briefs. This case was considered fully submitted to the undersigned as of March 16, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether there was a change in condition warranting an increase of claimant's prior arbitration award?

2. Whether this claim for review-reopening is barred by the principles of res judicata, or issue preclusion.

3. The extent of claimant's entitlement to permanent disability benefits, if a change in condition warranting an increase in his award is established.

FINDINGS OF FACT

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

Claimant, Greg Rice, sustained a left leg injury that arose out of and in the course of his employment on August 24, 2014. That injury resulted in an award of benefits against his former employer for a scheduled member injury to his left leg. (Claimant's Exhibit 4)

Mr. Rice also sustained a right ankle fracture in November 1998. The combination of the November 1998 and August 24, 2014 injuries resulted in an award of 15 percent industrial disability in the prior arbitration decision. (Claimant's Ex. 4)

Claimant presents no new medical evidence in this review-reopening proceeding. He makes no allegations or claims that his physical condition has changed or worsened. I find that there is no change in claimant's physical condition between the arbitration hearing and the review-reopening hearing that would justify an increase in his industrial disability award.

Instead, claimant asserts that he has sustained an economic change in condition that warrants an increase in his industrial disability award. Specifically, claimant asserts that he has applied for and received an award of disability benefits through the Social Security Administration. (Claimant's testimony; Claimant's Ex. 5-6) Mr. Rice has been an electrician since 1993. He is a member of a local union in Missouri and also received assignments from a local union in Des Moines.

However, after he received the Social Security disability award, claimant was required to be removed from the active roles at his union. He is no longer able to receive work assignments through his union. (Claimant's testimony) Mr. Rice contends that his removal from the local union books prevents him from working as an electrician and results in a significant increase in his industrial disability. In fact, Mr. Rice introduced a vocational expert report opinion that he "is currently physically unable to return to the majority of his prior occupations." (Claimant's Ex. 8, p. 89)

The Second Injury Fund appropriately notes that Mr. Rice was not working at the time of the arbitration hearing. Yet, he had worked between the date of his injury and up to approximately four weeks before the arbitration hearing. Mr. Rice testified before this agency in the arbitration hearing that he was physically capable of continuing to work in his various electrician positions he held shortly before the arbitration hearing. In fact, claimant conceded that he was laid off from those various electrician positions because the jobs were finished, not because of his physical injuries.

At the time of the arbitration hearing, claimant was intending to seek employment locally in Missouri. He believed that there was a power plant that was to be constructed and he thought he might be able to obtain a job as an electrician in that new power plant. Therefore, although he was not working at the time of the arbitration hearing in September 2015, claimant intended to return to work as an electrician and testified that he was capable of doing so. Claimant testified that he was drawing unemployment benefits at the time of the September 2015 arbitration hearing. (Claimant's testimony)

Mr. Rice's testimony was found to be credible by the presiding deputy commissioner at the arbitration hearing. (Claimant's Ex. 4, p. 51) In fact, the deputy commissioner specifically found, "Mr. Rice testified under oath at hearing. He presented credibly. His hearing testimony was consistent with his deposition testimony and the medical records in this case. His demeanor gave the undersigned no reason for concern." (Claimant's Ex. 4, p. 51)

On September 21, 2015, seven days after the arbitration hearing, Mr. Rice applied for Social Security disability benefits. Despite offering testimony before this agency that he remained capable of working as an electrician on September 14, 2015, he told the Social Security Administration seven days later that he had the "inability to function and/or work as of 04/08/2015." (Claimant's Ex. 6, p. 65)

During a phone interview claimant gave to the Social Security Administration on November 6, 2015, he stated that he only continued to work because he needed to pay his bills. (Claimant's Ex. 6, p. 67) He also told the Social Security Administration that he "[w]as unable to continue [working] due to significant increase in knee pain." (Claimant's Ex. 6, p. 67) This statement claimant made to the Social Security Administration directly contradicts his testimony to this agency in September 2015.

In September 2015, claimant testified to this agency that his jobs ended and he was laid-off because the work was completed. He testified before this agency that he could have physically continued working for the various employers if he had not been laid-off. He agreed that his lay-offs were not related to his knee injury. (Claimant's testimony) I am bound by claimant's September 2015 testimony before this agency, particularly given the credibility findings of the prior deputy commissioner.

At the review-reopening hearing, Mr. Rice testified that he did not tell the Social Security Administration that he quit his prior employment because of knee pain. In essence, Mr. Rice testified in the review-reopening hearing that the factual basis upon which the Social Security disability decision was rendered is inaccurate. Assuming this

is true and that claimant did not tell the Social Security Administration that he quit working because of knee pain, it is apparent that claimant remains capable of working as an electrician. Yet, it appears that he has not corrected the Social Security Administration's understanding, declined their benefits, or attempted reinstatement and a resumption of work as an electrician. In either event, any changes in circumstances caused by the Social Security Administration award are based upon erroneous evidence or information.

The Social Security Administration only lists the medical opinion of William Humphrey, M.D. as having been considered. The decision maker for the Social Security Administration also makes findings pertaining to claimant's residual functional abilities that contradict claimant's demonstrated work leading up to the arbitration hearing and his testimony about his ability to continue to perform that level of work at the September 2015 hearing. (Claimant's Ex. 4; Claimant's Ex. 6)

The Social Security Administration's decision-maker assigned "great weight" to Dr. Humphrey's opinions, but apparently was not aware of other medical opinions such as the claimant's independent medical evaluation report from Irving Wolfe, D.O. The Social Security Administration specifically found that claimant does not have the ability to perform the required duties of his prior employment, particularly as an electrician. (Claimant's Ex. 6, p. 72) However, the Social Security Administration had less medical evidence available to render its decision, even though it rendered its decision after this agency did so. Additionally, the Social Security Administration received information from claimant that contradicted his sworn testimony before this agency in September 2015.

After the Social Security Administration awarded benefits, claimant was removed from the union hall's books. He is no longer eligible for work assignments through the electrician's union. Therefore, claimant was not working at the time of the review-reopening hearing.

Claimant contends that he has sustained an economic change in condition since the arbitration hearing. Specifically, he contends that he is no longer eligible for assignment through his local union hall. While I find that claimant is no longer eligible for such assignments as a result of the award of Social Security disability benefits, I do not find that he has proven an economic change in condition sufficient for an increase in his industrial disability award.

Claimant presented limited medical evidence to the Social Security Administration in pursuit of their benefits. Either the Social Security decision maker misunderstood claimant's statements or claimant offered statements to the Social Security Administration that contradict the sworn testimony he offered to this agency only a week or a few months prior. While the Social Security Administration decision awards claimant benefits and disqualifies him from further assignment through the electrician's union, the Social Security Administration's award of benefits is based upon a more limited record and contradictory statements of the claimant.

If claimant offered accurate and credible testimony before this agency in September 2015, as was specifically found by the prior deputy commissioner, claimant remained physically capable of performing work as an electrician at the time of the arbitration hearing. That fact did not change seven days later when he applied for Social Security disability benefits. With no significant additional medical care and no change in his restrictions since the arbitration hearing, his ability to perform work as an electrician did not change between the September 2015 arbitration hearing and the November 2015 phone interview he provided to the Social Security Administration.

Claimant also presented a vocational expert opinion in this review-reopening proceeding that he asserts constitutes a change in condition. However, the vocational opinion relies upon medical opinions already considered and introduced at the prior arbitration hearing. The only other evidence considered by the vocational expert is the Social Security Administration disability determination. For the reasons outlined in this decision, I conclude the Social Security decision is not based upon accurate facts.

To the extent the claimant's vocational expert relies upon previously introduced and considered medical opinions, there is no physical change of condition that would warrant an increase in industrial disability. The vocational expert's opinion may disagree with the prior award of this agency, but it is not a change in condition.

To the extent that the claimant's vocational expert relies upon the Social Security disability determination for his opinions, I have found that decision to be based upon less than accurate information. To the extent that the claimant's vocational expert relies upon this decision and inaccurate information, his opinion is not credible and is rejected. It certainly does not constitute a basis for a finding of an economic change in condition that is related to claimant's first qualifying injury or his work injury.

I find that there has not been a change in circumstances that is causally related to claimant's first qualifying injury, his work injury, or that warrants an increase in claimant's industrial disability benefits. The change that has occurred in this case is not a change in condition related to the work injury. Rather, it is a change in claimant's version of the events between his arbitration hearing testimony and the version of events and facts he presented to the Social Security Administration. The economic change that has occurred is caused by a change in claimant's story between two administrative agencies, whether an actual change or a perceived or misunderstood change.

I find that claimant has not proven any factual changes that warranted him changing his version of the events when speaking with the Social Security Administration. I find that claimant has not proven that there was a change in facts that required him to quit working as an electrician. If he had proceeded as he testified he intended at the time of his arbitration hearing in September 2015, claimant would have returned to work through the electrician's union. He testified he was specifically capable of doing so in September 2015.

The change that occurred in this instance is claimant's version of events or a misunderstanding of facts by the Social Security Administration decision maker. Before this agency in September 2015, claimant testified he remained capable of and intended to return to work. He testified that his prior lay-offs were not related to his knee injury. Shortly thereafter, claimant changed his story (or at least was misunderstood to have changed his story) to claim before the Social Security Administration that he was unable to work and that his inability to work was specifically because of this work knee injury.

I accept the prior findings and facts, as found by a deputy commissioner of this agency. I find that claimant has not proven a change in economic condition related to his August 2014 work injury or his qualifying first injury in November 1998. I find that the change in claimant's economic condition is the result of a misunderstanding by the Social Security Administration or by claimant changing his version of events, neither of which justifies an increase in claimant's industrial disability award.

Claimant has obviously not corrected his changed version of events or the Social Security Administration's misunderstanding of his statements. Instead, he seeks to capitalize upon the Social Security Administration's misunderstanding of the facts by claiming it caused an economic change of circumstances. At this juncture, claimant is unable to obtain work assignments through the electrician's union because he elects to accept benefits from the Social Security Administration that appear to be based upon an erroneous understanding of claimant's circumstances. In this sense, claimant's inability to obtain work through his electrician's union is a voluntary choice, rather than some economic change that justifies an increase in his industrial disability award.

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 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 has proven that he is no longer eligible for assignment of work through his local electrician's union hall. However, that change is the result of a misunderstanding by the Social Security Administration or by claimant providing information to that agency that contradicts what he testified to before this agency.

While I acknowledge that claimant is no longer eligible to obtain work as a union electrician, that economic change is not the result of his work injury. Instead, it is the result of a misunderstanding (and failure to correct the misunderstanding) by the Social Security Administration or by claimant deliberately changing his version of the events underlying this claim. Claimant has elected to accept Social Security benefits based on an award made based upon erroneous facts. Claimant could correct the Social Security Administration's understanding, decline that agency's award of benefits, and seek to be reinstituted on the union books for assignment of future work. Therefore, I conclude that claimant's current inability to obtain work through his union is a voluntary condition that could be corrected, if claimant so chose.

I accept the credibility findings of the prior deputy commissioner, as well as claimant's prior testimony that he was capable of continuing to work as an electrician. In fact, claimant acknowledged he was receiving unemployment benefits at the time of the September 2015 arbitration hearing and only one week before he applied for Social Security disability benefits. Pursuant to Iowa Code section 96.4(3), claimant was required to certify he was ready, willing and able to work, or be only temporarily unemployed to qualify for unemployment benefits. In either event, claimant was clearly certifying to the State of Iowa that he remained capable of working in order to receive unemployment benefits as of September 14, 2015. Seven days after the arbitration hearing, claimant was requesting disability benefits from the Social Security Administration.

If claimant offered accurate testimony before this agency in September 2015, he may correct the Social Security Administration's understanding, decline his award of Social Security disability benefits, return to the union books, and re-enter the workforce as an electrician. Therefore, I conclude that claimant failed to prove an economic change of condition that is causally related to his first qualifying injury, causally related to his work injury, or that warrants an increase in his industrial disability award.

All other arguments advanced by the Second Injury Fund are rendered moot by this conclusion.

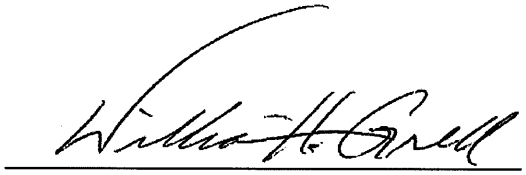
ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing further.

Claimant shall bear the costs of this proceeding.

Signed and filed this 12th day of June, 2018.



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DEPUTY WORKERS'
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WHG/sam

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.