IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DYERSVILLE FOOD BANK and DONEGAL MUTUAL INS. CO. d/b/a LEMARS INSURANCE COMPANY, **Petitioners,** **v.** **APRIL HALVERSON,** **Respondent.**	**Case No. CVCV059735** **RULING ON JUDICIAL REVIEW**

This is a judicial review action from a decision of the Workers Compensation Commissioner (the commissioner) on a petition for partial commutation and a petition for review-reopening. The court held a hearing on June 5, 2020. Thomas Read represented petitioners Dyersville Food Bank and Donegal Mutual Ins. Co. d/b/a LeMars Insurance Company (jointly referred to as DFB). Daniel Anderson represented respondent April Halverson (claimant).

STATEMENT OF THE CASE

Procedural background: The facts are largely taken from the decision of the deputy workers' compensation commissioner, but also directly from the administrative record. Claimant injured her back on June 1, 2013, while working for DFP. The employer did not initially deny workers' compensation coverage and was able to direct care. It directed claimant to Dr. Joseph Chen at the Spine Rehabilitation Program with the University of Iowa Hospital and Clinics. Claimant attended the two-week program in February of 2014. The program provided some relief and taught exercises that claimant has continued to use. Dr. Chen entered maximum

medical improvement (MMI) on April 2, 2014. He found an 8 percent impairment to the body as a whole.[1]

An arbitration hearing was held September 9, 2015. At that hearing, DFB denied liability. The deputy entered a decision on December 1, 2015, finding that claimant suffered an injury, the injury arose out of and in the course of employment, and the injury caused permanent aggravations to claimant's pre-existing back and mental health conditions. The deputy awarded permanent total disability benefits. DFB appealed. On June 29, 2017, the commissioner entered an order affirming all of the above findings.

On June 30, 2017, claimant filed a petition for partial commutation. She sought to convert some of her future benefits to a present worth lump sum payment to pay primarily for home modifications and a used car. On November 3, 2017, DFP filed a petition for review-reopening, alleging that claimant refused to submit to medical treatment designed to minimize her disability.[2] DFP argued that claimant's benefits should be reduced, suspended, or forfeited.

The two petitions were consolidated and set for hearing before a deputy commissioner on May 3, 2018. On September 25, 2018, the deputy entered a decision granting the commutation and denying the review-reopening. DFP filed an intra-agency appeal. On January 13, 2020, the commissioner affirmed the deputy's decision in its entirety.

On judicial review, DFP does not challenge the substantive finding on the petition for commutation. It argued that claimant failed to attend an independent medical examination (IME) with Dr. Chen on January 9, 2017, and such failure to attend justified its decision to suspend

[1] Dr. Chen also saw claimant on September 28, 2015, following the arbitration hearing. Dr. Chen did not change his treatment recommendations or finding of MMI.
[2] At hearing, DFP focused on the failure to attend the failure to attend an IME, as discussed further in this ruling.

payment of workers' compensation benefits. DFP also claimed that the failure to attend the IME should serve as a basis to deny a commutation of benefits.

Statement of facts relating to the IME: Claimant continued to receive mental health treatment as the parties waited for the appeal decision from the commissioner. In August of 2016, claimant agreed to see a psychiatrist suggested by DFP, Dr. Abdur Rahim. Dr. Rahim indicated in his notes that claimant's depression might be worsening because she could not engage in activities she enjoyed due to her back problem. That prompted DFP to want to schedule claimant for another back evaluation. In September of 2016, a representative of DFP contacted claimant's counsel to attempt to schedule an appointment with an orthopedic doctor in Waterloo, where claimant was then residing. The request did not specify whether the appointment was for treatment or an IME. Claimant's attorney interpreted it as a request for treatment and responded that the employer had no right to direct care because it had denied liability at hearing and continued to do so on appeal.

DFP then changed tactics. On November 18, 2016, DFP sent a letter to claimant directing her to attend an appointment with Dr. Chen on November 28, 2016, to conduct an IME. After receiving a response from claimant's counsel, DFP cancelled the appointment due to the short notice (including the Thanksgiving holiday). The IME appointment was reset for January 9, 2017. Claimant's attorney contacted the DFP's attorney to inform him that claimant would not attend that appointment. The basis for that decision was that Dr. Chen had already stated he had no further care to offer. Claimant's counsel expressed his belief that DFP was simply trying to create evidence it might use in a review-reopening hearing. DFP suspended payment of benefits to claimant after she failed to attend the appointment.

On July 11, 2017, DFP sent another message to claimant's counsel trying to set an appointment with Dr. Chen for August 25, 2017. This communication was made approximately two weeks after the commissioner's decision to award benefits. The appointment was not to obtain an IME, but was purportedly set pursuant to Iowa Code section 85.27 for treatment purposes. The letter stated that they wanted to evaluate her to determine whether she should attend the spine clinic a second time. Claimant did not attend that appointment because she did not believe participation in the spine clinic program again would improve her condition.

The agency decision: The deputy commissioner first found that a review-reopening was not warranted because DFP was not alleging a change in claimant's physical or employment condition. DFP had stipulated that her physical condition remained the same. The deputy questioned whether DFP could bring an action challenging a refusal to submit to treatment under section 85.27 or an IME under section 85.39 in a review-reopening procedure. Therefore, she found that the review-reopening should be denied for failure to meet the standard in the statute.

The deputy proceeded to discuss the merits of DFP's claims. She found that the failure to attend the IME appointments on November 28, 2016, and January 7, 2017, were reasonable "[e]ven assuming the appointments were for [IME's]." The deputy noted that claimant had previously been evaluated and treated by Dr. Chen. He had previously released her with instructions to continue the exercises she had learned during her two weeks at the pain clinic in 2014. She had continued to do the exercises as instructed. She also found that section 85.27 did not justify reopening because the appointments in November of 2016 and January of 2017 were set to do an IME and not for treatment. Even if they were for treatment, there was no evidence of a change of condition and Dr. Chen had previously released claimant without further

treatment recommendations. As a result, she found DFP's decision to suspend payment of benefits to be unjustified.

STANDARD OF REVIEW

Iowa Code chapter 17A governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)." *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)).

The courts use a substantial evidence standard when considering challenges to findings of fact in agency decisions. A reviewing court can only disturb factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(*f*)). The Iowa Supreme Court has outlined the court's guidelines when reviewing substantial evidence claims under the 17A.19 standard as follows:

> When reviewing a finding of fact for substantial evidence, we judge the finding in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it. Our review of the record is fairly intensive, and we do not simply rubber stamp the agency finding of fact.
>
> Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotation marks omitted).

CONCLUSIONS OF LAW

A party to a workers' compensation settlement or award may filed a petition for review-reopening to determine whether the condition of the employees warrants an increase, a decrease, or an end of benefits. *Gallardo v. Firestone Tire & Rubber Co.*, 482 N.W.2d 393, 395–96 (Iowa 1992) (citing Iowa Code § 86.14(2)). The moving party carries the burden of establishing by a preponderance of the evidence that, subsequent to the date of the award under review, there was a change to the employee's impairment or earning capacity caused by the original injury. *Id*. This standard implements principles of res judicata, that is, the agency "should not reevaluate an employee's level of physical impairment or earning capacity if all of the facts and circumstances were known or knowable at the time of the original action." *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 393 (Iowa 2009). The standard implements the legislative intent to "avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act." *Id*.

This case seems to exemplify the concerns that the legislature wanted to avoid. The deputy commissioner entered a decision finding permanent disability on December 1, 2015, following a contested hearing. That was two and a half years after the injury occurred. The discovery and evidence gathering stage of the case should have been done. DFP kept going.

Three years after the injury, while the case was on intra-agency appeal, DFP tried to send claimant to an orthopedic specialist to evaluate her back, ostensibly for treatment purposes. However, because DFP had denied liability at hearing and on appeal, it lost the ability to direct care. *See Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 575 (Iowa 2006); Iowa Code § 85.27. As a result, claimant turned down the request. DFP then tried to send claimant back to Dr. Chen for an IME. However, the purpose of an IME is to determine "the extent and character

of the injury for purposes of paying benefits in the event of a disability resulting from the injury." *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 843 (Iowa 2015) (cites and internal quotes omitted). This case had been heard and decided at the time DFP made this request. There was no legitimate purpose for an IME at that point in the proceedings.

Moreover, DFP wanted to use Dr. Chen to conduct the IME. Dr. Chen had previously treated and evaluated claimant in 2014. He found that claimant was at MMI and made an impairment rating at that time. He saw claimant again in September of 2015 for a review. He did not change his findings. He had already determined and reaffirmed the "extent and character" of the back injury. There was no reason to send claimant back to Dr. Chen for an IME in 2017, more than three and a half years after the injury.

DFP was obviously trying to use the statutory process to attempt to gain evidence to support a petition for review-reopening. The statute does not work that way. The requesting party must have evidence to support a review-reopening, not use a meritless IME request to support review-reopening. The only basis for DFP's review-reopening was claimant's refusal to attend the IME. That placing the process in reverse.

The supreme court discussed this issue in a different context in *Kohlhaas*. In that case, the employee filed a petition for review-reopening and then sought an IME to attack the employer's physician's report from the prior proceeding. *Kohlhaas*, 777 N.W.2d at 394. The court held that the review-reopening is a "new and distinct proceeding apart from the original arbitration action[.]" If the employer had obtained a new evaluation during the review-reopening, the employee might have the right to obtain an IME to challenge the new evaluation. *Id*. However, he could not use section 85.39 to obtain an IME to challenge an evaluation used at the arbitration hearing three years earlier. *Id*. at 395.

In this case, the parties had not even got to the point of the new and distinct proceeding. The case had been decided by the deputy, so the evidentiary stage of the arbitration hearing was complete. The petition for review-reopening had not been filed, so there were no grounds to ask for an IME as part of a new proceeding. DFP essentially tried to weaponized section 85.39 to create a reason to relitigate the disability issue. DFP did not have any right to use section 85.39 at that stage of the proceedings.

The agency's decision was correct. There was no evidence to support a review-reopening. Claimant's refusal to attend the IME was reasonable and not required by law. Because the review-reopening was not supported by any evidence, all of DFP's other arguments necessarily fail. The suspension of benefits was improper and there is substantial evidence to support the partial commutation. Accordingly, the agency decision is affirmed in all respects.

RULING

The agency decision is affirmed. Petitioner shall pay any court costs.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV059735	DYERSVILLE FOOD BANK INC ET AL VS APRIL HALVERSON

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa