BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY McMURRAY,

Claimant,

vs.

VERMEER MANUFACTURING,

Employer,

and

EMC INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 5047980

APPEAL

DECISION

Head Note No.: 1800

Claimant appeals from an arbitration decision filed on February 5, 2016. The matter went to hearing on September 15, 2015, and was considered fully submitted on or about November 16, 2015. On November 15, 2017, Joseph S. Cortese II, Workers' Compensation Commissioner, issued an order of delegation of authority delegating the authority to issue the final agency decision to the undersigned.

In the arbitration decision, the deputy commissioner found claimant failed to carry his burden of proof that the work incident of January 3, 2014, was the cause of any permanent disability or permanent loss of earning capacity. The deputy further found that claimant was entitled to reimbursement of the independent medical examination (IME) expense assessed by Sunil Bansal, M.D. in the amount of $3,695.00 pursuant to Iowa Code section 85.39. Costs were assessed to claimant.

Claimant asserts on appeal that: 1) the work injury was the cause of permanent disability and claimant sustained substantial industrial loss; 2) claimant reached maximum medical improvement (MMI) on March 5, 2014; and, 3) claimant is entitled to reimbursement of costs including: a medical opinion letter from Daniel McGuire, M.D.; the filing fee; the certified mail expense; and, a deposition cost.

Claimant argues that the deputy commissioner erred in failing to find in favor of claimant on these issues.

Defendants argue that the deputy correctly found that claimant failed to prove entitlement to permanent disability benefits and that claimant should not be awarded costs.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner, with additional analysis.

Prior to the work injury, claimant underwent a cervical fusion at the C5-6 level, performed by David Boarini, M.D. on September 14, 2012. (Exhibit 1, page 1) The date of the stipulated work injury in this case is January 3, 2014.

This case involves the primary issue of not whether claimant had an injury that arose out of and in the course of his employment, but whether the injury resulted in any permanent disability or permanent loss of earning capacity.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

After the January 3, 2014, work incident, claimant received medical treatment from a number of sources. At Vermeer Health Services on the date of the incident, claimant initially reported an "injury to his left arm related to a fall," with pain "starting in his neck and radiating down to his elbow." (Ex. 3, p. 1) He rated his pain at 5/10. (Id.) On January 6, 2014, claimant reported worsening of his condition, but also reported his pain level was less than before at "4/10," and he was "able to demonstrate full range of motion to all affected areas without limitations" and his left elbow and wrist were noted to be "improved." (Ex. 3, p. 31) A cervical MRI was ordered by Matthew Doty, M.D. (Id.) The MRI revealed a moderate right/central herniation at the C6/C7 level. (Ex. 2, p. 20) Dr. Doty referred claimant to Dr. Boarini, who had done the prior C5-6 fusion. (Ex. 2, p. 22) Dr. Boarini saw claimant on January 16, 2014 and noted that he complained of pain in the neck, bilateral shoulders and down the left arm into his hand. (Ex. 1, p. 9)

Claimant relies heavily on the results of this MRI in support of his argument that he sustained permanent disability. The MRI indicated that claimant had a moderate sized central and right paracentral disc herniation at the level of C6/C7 with impression upon the anterior thecal sac. (Ex. 2, p. 20) However, the medical records as a whole demonstrate that although claimant had some complaints concerning the right arm, clearly his most significant complaints were to his left arm, shoulder and hand versus his right. On January 16, 2014, Dr. Boarini noted that both a CT and an MRI of the cervical spine had been done and he reviewed the results of both and stated that there was a "minor disk bulge" at the C7 level, "but that [it] is quite small and actually

asymmetrical to the right." (Ex. 1, pp. 9, 11) In other words, he concluded that the right sided bulge would not account for his predominantly left sided symptomology. In addition, Dr. Boarini, stated that "[u]pon examination, the patient is entirely neurologically intact with normal strength, normal gait, unremarkable tone, and normal reflexes." (Ex. 1, p. 15) He concluded that "I really don't see any sign of an objective abnormality . . . ." (Id.) Dr. Boarini concluded that claimant's symptoms are not consistent with any "physiological condition or dermatomal distribution in the neck." (Ex. A, p. 6) He further concluded that he did not "feel [claimant] suffered an acute injury or substantial aggravation of a pre-existing cervical condition in the 1/3/14 work incident." (Id.) This is the opinion of the surgeon who performed the prior C5-6 cervical fusion and had the most intimate knowledge and understanding of the particulars of claimant's cervical spine history compared to his condition after the January 3, 2014, work incident. Dr. Boarini was in the best position of any physician in this case to offer opinions concerning causation of permanent impairment.

Dr. Boarini had no explanation for claimant's left arm symptoms and suggested that they might be related to a possible shoulder injury. (Ex. 1, p. 11) Dr. Boarini referred claimant to Steven Aviles, M.D., at Iowa Ortho for evaluation of the left shoulder. (Id.)

On February 3, 2014, claimant saw Dr. Aviles with a primary complaint of left shoulder pain. (Ex. 4, p. 51) Dr. Aviles found that claimant's shoulder seemed "quite strong'" and that he had "excellent motion albeit with pain." (Ex. 4, p. 53) Dr. Aviles obtained a shoulder MRI which he described as looking "excellent," and he stated that "there is no question that this is not his shoulder." (Ex. 4, p. 57) On July 13, 2015, Dr. Aviles authored a letter to defense counsel stating that following two separate visits with claimant in February 2014, and following x-rays and an MRI he "found absolutely no evidence whatsoever to suggest a left shoulder injury." (Ex. A, p. 14)

Claimant was later seen by Timothy Miller, M.D., at the Ottumwa Regional Health Center. (Ex. 6; Ex. A, pp. 26-27a) Dr. Miller stated on July 18, 2014, that "the left side is the symptomatic side," but his "neck is painful on both sides." (Ex. 6, p. 61) However, Dr. Miller then stated that "[h]e is complaining of really no symptoms that we said here, but with palpation he is tender in his neck over C3-4," although he had "good range of motion and felt normal in flexion and extension and side turning." (Id.) On August 11, 2014, Dr. Miller noted that claimant had "persistent neck pain," but with "limited structural findings . . . ." (Ex. 6, p. 62)

Claimant argues that Dr. Miller's professional opinion apparently became tainted and just before the arbitration hearing in September 2015, he "noted for the first time" that he was concerned with somatization. (Claimant's Brief, p. 7) Claimant also states that at the September 11, 2015 appointment, Dr. Miller "suddenly decided that McMurray [claimant] was exaggerating his symptoms . . . ." (Claimant's Brief, p. 15) This is simply incorrect. I note that on August 22, 2014, over one year earlier, and just about one month after first seeing claimant, Dr. Miller stated:

> It is difficult for me to really form an impression here. I think there are issues here that could be secondary game [sic - gain] or issues that could be sort of a somatoform presentation where he is concerned his arm is not working right so it seems like it is not for him. I do not think there is any evidence based on testing that there is indeed a functional deficit here.

(Ex. 6, p. 64) In addition, on February 13, 2015, Dr. Miller noted that this was not a simple matter, in part due to "[f]indings of pain versus the injury." (Ex. A, p. 26) On July 17, 2015, Dr. Miller stated that "[h]is exam is quite benign compared to complaints he is giving subjectively." (Ex. A, p. 27) Dr. Miller's statements concerning somatization in September 2015 were not sudden or new and had been a long standing concern since shortly after he began to treat claimant.

Further, claimant suggests in his brief that on July 17, 2015, when Dr. Miller indicated that a second opinion would be wise, it was simply due to concerns of claimant's potentially untreated medical condition. However, a fair reading of the recommendation in context reveals that Dr. Miller was more likely at a loss to explain claimant's symptoms because they did not match his complaints. (Ex. A, p. 27)

In July 2015, claimant was seen by Sunil Bansal, M.D. at the request of claimant's counsel for the purpose of an independent medical examination (IME).

Claimant alleges that the deputy erroneously disregarded Dr. Bansal's IME report in part due to the deputy's finding that Dr. Bansal did not test claimant's right shoulder in his evaluation of the left shoulder. Claimant correctly points out that Dr. Bansal does reference the right shoulder in his report stating that "[t]here is no tenderness to palpation," and "[f]ull range of motion." (Ex. 9, p. 96) However, the deputy stated in the arbitration decision that his concern was the failure to follow the directions of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) at page 451, which states that when assessing range of motion in a joint, both extremities should be measured in order to obtain a comparative range of motion for the non-effected joint. Although Dr. Bansal described the right shoulder as having full range of motion, no measurements were recorded and therefore no meaningful comparisons can be made as directed by the AMA Guides. The deputy correctly pointed out this shortcoming of Dr. Bansal's report.

Claimant also argues that it was inappropriate for the deputy to fault Dr. Bansal's report for failing to acknowledge the findings of Dr. Miller and ignoring those of Dr. Boarini. Claimant argues that Dr. Miller and Dr. Bansal provided reports at about the same time and therefore it is not unreasonable for Dr. Bansal to have been unaware of Dr. Miller's findings and conclusions. However, I note that on February 13, 2015, Dr. Miller wrote that "there is no reasonable degree of medical certainty that the fall injury of January 2013 has significantly or substantially worsened his condition." (Ex. A, p. 26) Dr. Bansal noted in his report a series of appointments with Dr. Miller and the dates of

those appointments from July 18, 2014, through and including July 17, 2015. This included the February 13, 2015 visit. (Ex. 9, p. 91) The opinion of Dr. Bansal was signed on August 12, 2015, and presumably issued shortly thereafter. I am not persuaded that Dr. Bansal had reasonable basis due to the timing of their respective reports to ignore the findings of Dr. Miller, which were issued about six months prior to Dr. Bansal's report. Also, claimant argues that Dr. Bansal did consider Dr. Boarini's findings before issuing his report, contrary to the deputy's finding. I note that Dr. Bansal does reference claimant's treatment with Dr. Boarini and his opinions expressed in response to letters from defense counsel, stating that claimant did not suffer an acute injury or a substantial aggravation of any pre-existing condition of his cervical spine as a result of the January 3, 2014 work incident. (Ex. 9, pp. 85-88; Ex. A, p. 6) However, when addressing causation, Dr. Bansal does not discuss or distinguish Dr. Boarini's opinions or findings.

Claimant also argues that the FCE should not be relied upon. I note that the FCE was done on March 20, 2014, about one and one half years prior to the hearing. Defendants point out that claimant had ample opportunity to seek out his own competing FCE or otherwise seek to disprove the findings of the FCE, but claimant testified that he was willing to live with the findings of the FCE. (Tr. pp. 77-78) Although Dr. Bansal disagrees with the finding that the FCE is invalid, it is significant to the undersigned that the treating physicians did not offer similar concerns. (Ex. 9, pp. 103-104)

On August 12, 2015, Dr. McGuire in a response to defense counsel, stated that he could not say within a reasonable degree of medical certainty whether any change in the C6-7 disc was caused by the work incident, the natural aging process, or post-surgical changes from the C5-6 fusion in 2012. (Ex. A, pp. 44-45) However, on the same date, Dr. McGuire sent a letter to claimant's counsel indicating that claimant has worsening symptoms that are related to the work incident, and that "it is possible that the disk at C6-C7 is contributing to his worsening pain." (Ex. 8, p. 79) Dr. McGuire then stated in multiple locations that he only saw claimant on one occasion and he further stated that "I believe the neck pain could come from, perhaps, some of the irritation of this spondylosis at C6-C7. His neck pain could also come from muscles, ligaments, and tendons." (Id.) Dr. McGuire then stated that he:

> [w]ould not have assigned any impairment as pertains to the surgical fusion done in September 2014 because this was not a work-related situation. If somebody has a work-related anterior cervical fusion, they are typically given an impairment. Typical impairment for an ACF in Central Iowa is around 15%. Sometimes they are given restrictions."

(Id.) Dr. McGuire then goes on to assign an impairment of 5 percent to the whole person. Dr. McGuire's response to defense counsel and his letter to claimant's counsel, leads the undersigned to the same conclusion that the deputy reached in the arbitration decision, which is that "[o]verall, the opinions of Dr. McGuire are ambiguous." (Arb.

Dec., p. 3) I also note that Dr. McGuire's opinions are primarily offered as statements of *possibility* not *probability.*

Claimant argues that the MRI findings and claimant's continued complaints of pain must mean that claimant sustained permanent disability from the work incident. However, the most credible expert medical testimony does not reach that conclusion as noted by Dr. Boarini, Dr. Miller and Dr. Aviles.

Claimant argues that Dr. Boarini and Dr. Miller placed too much weight on the FCE and the determination that the evaluation was invalid. This argument is rooted in Dr. Bansal's criticism of the FCE invalidity determination, which is based on claimant's pain questionnaire indicating symptom magnification, and claimant's failure of 6 out of 7 validity criteria regarding grip strength assessment. (Ex. 9, p. 91) Dr. Bansal dismissed any reliance on using the pain questionnaire as a tool for consideration of whether there may be symptom magnification. Dr. Bansal also criticized the grip strength testing as a basis for assessing validity and cited to two articles, presumably critical of the method. Claimant argues that the XRTS hand strength assessment "has detractors." (Claimant's Brief, p. 19) However, the FCE report includes numerous references to articles that presumably support the grip strength testing method. (Ex. A, p. 25) The treating physicians, Dr. Boarini, Dr. Aviles and Dr. Miller, did not indicate that they shared Dr. Bansal's concerns regarding the finding that the FCE was invalid.

However, assuming arguendo that the FCE resulted in a valid finding and claimant legitimately demonstrated physical limitations, the larger question of causation of those limitations is not resolved by the FCE findings alone. An FCE attempts to assess physical abilities and limitations, not the cause of the limitations. Claimant has still failed to carry his burden of proof concerning the causal relationship of those limitations to the work injury.

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the

duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Claimant argues that the deputy failed to compare claimant's condition before and after the work injury and that the only reasonable conclusion one can arrive at when making said comparison is that claimant sustained permanent injury and significant industrial disability. I disagree that the deputy failed to consider claimant's pre-injury and post-injury condition. (Arb. Dec., p. 4) Nevertheless, I find that considering claimant's reported symptoms before and after the injury, one must also weigh those reported symptoms against the significant medical evidence that claimant sustained no permanent injury and no loss of earning capacity from the work injury. The deputy and I rely on three treating physicians opinions that there is no permanent disability. (Arb. Dec., p. 4)

I conclude that the weight of the medical evidence requires that the arbitration decision be affirmed, finding and concluding that claimant has failed to carry his burden of proof that he has sustained permanent disability or permanent loss of earning capacity from the January 3, 2014 work incident.

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 exercise my discretion and affirm the deputy's taxation of costs to the claimant. I further determine that the costs of this appeal shall also be taxed to the claimant.

I affirm the arbitration decision in its entirety. The remaining issue raised by claimant of the appropriate date of MMI is moot.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 2, 2015, which relate to the issues properly raised in this appeal.

I find the deputy commissioner provided sufficient analysis of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact, rationale, and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that he sustained a permanent disability or permanent loss of earning capacity from the work injury of January 3, 2014, and concluding that other issues, excluding the issue of IME reimbursement, are moot, including claimant's request for reimbursement of requested medical care expenses and other costs. I also affirm the deputy commissioner's order taxing claimant with costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions, and analysis regarding those issues.

To the extent that findings made by the deputy commissioner in the arbitration decision included consideration of claimant's credibility, while this review is de novo, I

give deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of February 5, 2016, is affirmed in its entirety.

Defendants are ordered to reimburse/pay the IME expense of Dr. Bansal in the amount of three thousand six hundred ninety five and 00/100 ($3,695.00) dollars.

Claimant shall take nothing further.

Costs of the arbitration and this appeal are taxed to claimant.

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

Signed and filed this 26th day of March 2018.

TOBY J. GORDON
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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