BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
FEB 24 2016
WORKERS' COMPENSATION

JAMES LORENZEN,	
Claimant,	File No. 5024990
vs.	REVIEW REOPENING
SECOND INJURY FUND OF IOWA,	DECISION
Defendant.	Head Note No.: 3200

STATEMENT OF THE CASE

James Lorenzen, the claimant, seeks in this review-reopening proceeding, additional workers' compensation benefits from defendant, the Second Injury Fund of Iowa, as a result of a work injury on June 13, 2006. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on January 6, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on January 15, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Joint Exhibits were marked numerically, 1-23. Claimant's exhibits were marked numerically, 24-26. Defendants' exhibits were marked alphabetically A-G. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4"

In this case, claimant is seeking to review and reopen a prior award of permanent partial disability benefits for a 60 percent industrial loss against the Second Injury Fund of Iowa in an arbitration decision filed February 3, 2011. The award was based on a finding that the industrial loss was the combined result of the work injury of June 13, 2006 and a prior knee injury consisting of a 2 percent loss of use to the left leg. Also, in that decision, 60 weeks of permanent partial disability benefits for a 12 percent scheduled member loss of use to the body as a whole was also awarded against the employer, Gates Rubber Company, due to a simultaneous bilateral injury to both extremities on June 13, 2006 pursuant to Iowa Code section 85.43(2)(s).

ISSUE

The only issue is the extent, if any, of claimant's entitlement to additional permanent disability benefits from the Second Injury Fund of Iowa.

FINDINGS OF FACT

In these findings, I will refer to claimant by his first name, James.

The agency file shows the following:

On February 5, 2013, James initiated review-reopening proceedings against both the employer, Gates Rubber Company and the Second Injury Fund of Iowa.

On March 24, 2014, this agency approved a settlement only between claimant and Gates Rubber Company providing for a full commutation of an additional 289 weeks of permanent partial disability benefits as a result of the June 13, 2006 work injury and allocated $24,609.72 for payment of future medical expenses. (Ex. D) The only supportive documentation attached to the commutation petition was a report, dated January 18, 2014 of a disability evaluation on December 9, 2013 by Sunil Bansal, M.D. This report will be discussed later on in these findings.

In the prior arbitration decision on February 3, 2011, the presiding deputy found that claimant had a 10 percent permanent partial impairment to each arm as a result of his work-related injury which converted to a 12 percent permanent partial impairment to the body as a whole. This finding was based upon the views of James' IME physician, Delwin E. Quenzer, M.D. There was no mention of any impairment rating by Dr. Bansal in this decision. However, an evaluation by Dr. Bansal on October 4, 2010 was placed into evidence at the arbitration hearing which will be discussed below.

With respect to the Fund liability, the presiding deputy commissioner in the arbitration decision concluded that claimant sustained a full-thickness meniscus tear to his left knee in 1998, and that claimant continued to have problems with cracking and popping in the knee as well as difficulty kneeling and getting up. The presiding deputy concluded that claimant had a 2 percent prior permanent partial impairment to the leg.

On the issue of the combined industrial disability from the first and second injuries, the presiding deputy concluded as follows:

> The claimant, after he left his job at Gates, was able to obtain employment at Dr. Pepper that he is able to perform, earning $10.25 per hour. At Gates he was earning $14.00 per hour, thus he had an actual loss of earning of 27 percent. The claimant's credible testimony regarding his difficulty in using his hands and his failure in his ability to return to his employment a Moffitt's demonstrate that his industrial loss is even greater than his already recognized actual wage loss. The undersigned concludes that the claimant has sustained a 60 percent industrial loss, entitling him to 300 weeks of permanent partial disability benefits. The Fund is entitled to a credit for the prior loss of 4.4 weeks and 60 weeks for the subsequent loss.

(Arb., February 3, 2011, p. 9)

There was no specific finding concerning physician imposed permanent work restrictions in the arbitration decision, but the deputy found as follows concerning his limitations:

> The claimant continues to have difficulties with hand pain. The claimant complains that his elbows are very tender and that there is one spot on his left elbow that is numb. The claimant also complains that he has experienced a loss of grip strength and that he drops things such as towels, glasses, hammers or screwdrivers. The claimant finds that activities such as snow shoveling, yard work or other household activities make these problems worse. The claimant is a deer hunter but can no longer use a compound bow because of his bilateral hand and arm problems. He has had to get a special permit to be able to use a crossbow and he has to have help getting a deer out of the woods if he is able to shoot one.

(Arb., February 3, 2011, p. 4)

Although not mentioned in the arbitration decision, James most recent treating orthopedist, Eugene Cherny, M.D., at the time of the arbitration hearing in November 2010, did not believe permanent activity restrictions were necessary. (Claimant's Ex. 20-58 submitted at the arbitration hearing)

After the arbitration hearing, James testified that he continued to have difficulties with his bilateral hands and arms, but continued to work for Dr. Pepper until September 2012. (Ex. 26-185) Prior to his departure from Dr. Pepper, James underwent additional surgeries by Eugene Cherny, M.D. on the left arm on February 8, 2012 and the right arm on Apri14, 2012. (Ex. 6-18, Ex. 12-101) Following these surgeries, James returned to work at Dr. Pepper. James then began to develop what appeared to be seizures and was told by his physicians that he could not drive. James said that this was eventually diagnosed as a mental condition due to stress. (Ex. 18) James testified at hearing that although the reason given by the employer for his termination from Dr. Pepper was his inability to drive, the condition of his hands and arms played a major role in his departure.

Following his termination by Dr. Pepper, James testified that his hands continued to cause him a great deal of difficulty. On June 19, 2013, Dr. Cherny, performed another round of carpal and cubital tunnel surgeries, as well as a neuroplasty of the ulnar nerve at the palm on James' right hand and arm. (Ex. 6-30) A neuroplasty of the ulnar nerve at the wrist and cubital tunnel surgery was subsequently performed by Dr. Cherny on the left side on November 13, 2013. (Ex. 6-44)

At hearing, in this proceeding, James testified he continues to have pain in both his left and dominant right hands and arms. He also complains of continued numbness in the little finger, ring finger, middle finger, and a portion of the palm of his hand after significant activity. He indicated that even something as simple as scratching his wife's back results in numbness and pain in the hand. He states his base pain level is 4/10

(10 being the highest level), but increases as his activities increase. The left side is somewhat better, with pain between 2-5/10. Claimant testified that he believes the condition of his arms has worsened since the time of his arbitration hearing. He stated that he attempts to perform activities around the house such as washing and drying dishes, laundry, and simple household tasks, but he develops pain when he does these activities. He stated that he could lift things such as a gallon of milk only by holding the gallon with his index finger and thumb.

James testified that he cannot perform any of the jobs that he had performed in the past. He indicated that after he left Dr. Pepper, he did not apply for any other jobs, primarily because he knew that any jobs that were physical in nature were the types of jobs that he would no longer be able to do. He also noted that because of his learning difficulties, he would have problems doing any type of job other than manual labor. James testified that although he can now drive, he must alternate his hands on the steering wheel to do so. He stated that driving 90 minutes from his home to attend the review-reopening hearing caused severe pain in his right hand. He also testified that he had to use pillows to keep his hands elevated at night to reduce his pain.

In his report dated August 30, 2013, Dr. Cherny opines that James is not capable of working in any capacity which would require work with his upper extremities, including work at the sedentary level. (Ex. 6-40) However, this report was prepared prior to James' last surgery and prior to reaching MMI (maximum medical improvement) from Dr. Cherny's latest round of surgeries. The evaluation was based on James condition at the time. The last report from Dr. Cherny in evidence is a note of a visit on February 25, 2014 when James plateaued after left arm surgery. At this time, Dr. Cherny discharged James from his care. He encouraged James to attempt to return to work, but he will be "limited from manual labor jobs." The doctor states that James will be unable to tolerate repetitive work such as repetitive grasping, pinching, or twisting of the upper extremities. He adds that any repetitive work greater than 10 pounds will be difficult for James. (Ex. 6-53)

Scott Neff, D.O., an orthopedic surgeon, evaluated James' bilateral arm conditions on September 18, 2013. In his report, Dr. Neff states that he could not find evidence of any "specific injury" in June 2006 to James' hand or elbows relating to his work at Gates. Dr. Neff opined that James' ongoing complaints are related to an ongoing progressive new circumstance and not related to his prior employment at Gates and considered the treatment James received eliminated his symptoms and any recurrent problems in 2006 were due to prior surgeries done in 1995 and 1996. The doctor felt that it was significant that James' worsened despite being unemployed. Also, he stated that James does not require work restrictions which would relate to his old work at Gates. (Ex. 21-47)

As stated above, Sunil Bansal, M.D., an occupational medicine physician, evaluated James in December 2013. In his report, Dr. Bansal takes issue with Dr. Neff's views stating that Dr. Neff's findings were inconsistent with objective testing. Dr. Bansal dismisses the significance of a worsening of condition while unemployed because the condition worsened due to additional scarring from the multiple surgeries.

Dr. Bansal opines James was suffering from continuing right and left arm conditions causally related to the June 13, 2006 work injury which he assigned as constituting an 8 percent permanent partial impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. D-51) The doctor recommended permanent work activity restrictions consisting of no lifting greater than 8 pounds occasionally, 5 pounds frequently with the right arm and no lifting greater than 10 pounds occasionally, 5 pounds frequently, with the left arm. He is unable to frequently squeeze, pinch or grasp. (Ex. D-52) Although not mentioned in the 2011 arbitration decision, Dr. Bansal evaluated claimant in October 2010 and a report of that evaluation was placed into evidence at the arbitration hearing. In that prior report, Dr. Bansal opined that James' bilateral arm conditions result in an 18 percent permanent partial impairment to the whole person for the right arm and a 14 percent permanent partial impairment to the whole person for the left arm with a combined bilateral permanent partial impairment to the whole person of 32 percent. (Ex. 9-75:77) Dr. Bansal did not recommend any permanent work activity restrictions in his prior report.

James applied for Social Security Disability benefits, which were granted in a decision dated November 21, 2014. (Ex. 25) James based his claim on limited use of his arms and hands, seizure disorder, inability to read and spell, wearing away of the left knee, lower back problems, bulging disc in the neck, hearing loss and carpal tunnel in both hands. (Ex. 25-180) Although the administrative law judge in his decision discussed chronic pain from other parts of the body, the opinion was largely based on Dr. Cherny's view that claimant could not return to any work in August 2013; Dr. Bansal's permanent restrictions in the January 2014 report; and, a vocational expert's view that given James' residual functional capacity, he was unable to complete any of his past work activity. (Ex. 25-181:182) Finally, the decision found that claimant had been disabled under Social Security standards since September 24, 2012. (Ex. 25-183) James receives approximately $1,100.00 per month in Social Security benefits.

I find that there is insufficient evidence of a worsened leg condition.

However, I find that claimant has suffered a significantly worsened physical condition as a result of the original work injury of June 13, 2006 to the extent that he has suffered a total loss of his earning capacity. This is based on the causal connection and disability evaluation of Drs. Cherny and Bansal. I do not find convincing the views of Dr. Neff who apparently bases his views on the lack of any evidence of a prior work injury. That work injury was established in the final agency decision in 2011. Also, I find convincing Dr. Bansal's criticism of Dr. Neff's views. Finally, the changed views of Dr. Cherny are the most convincing because he was familiar with James' clinical presentations before and after the arbitration hearing and decision. Dr. Cherny has been familiar with James' bilateral arm conditions since 2007.

At the time of the arbitration hearing in November 2011, James had no formal work restrictions as a result of his work related bilateral arm condition. While Dr. Cherny's August 2013 opinion was before James' reached MMI, Dr. Cherny now clearly excludes all manual labor. James now can only lift 5 pounds frequently and only occasionally lift up to 8-10 pounds. He is unable to frequently squeeze, pinch or grasp.

The only jobs he has ever held were manual labor jobs. James is over 50 years of age. Given his learning disabilities, retraining is not likely. Unlike at the time of the arbitration decision, the work injury of 2006 now excludes manual labor jobs for which he is best suited given his age, lack of education and educational skills.

CONCLUSIONS OF LAW

Claimant seeks additional disability benefits from the Second Injury Fund under Iowa Code sections 85.63-85.69. This fund was created to compensate an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. The purpose of such a scheme of compensation was to encourage employers to hire or retain handicapped workers. Anderson v Second Injury Fund, 262 N.W. 2d 789 (Iowa 1978). There are three requirements under the statute to invoke second injury fund liability. First, there must be a permanent loss or loss of use of one hand, arm, foot, leg or eye. Secondly, there must be a permanent loss or loss of use of another such member or organ through a compensable subsequent injury. Third, there must be permanent industrial disability to the body as a whole arising from both the first and second injuries which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries. If there is greater industrial disability due to the combined effects of the prior loss and the secondary loss than equals the value of the prior and secondary losses combined, then the fund will be charged with the difference. Id.

The Iowa Supreme Court has ruled that to invoke Second Injury Fund liability, both the first and second injuries must be scheduled member injuries. Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995). Scheduled member injuries are those parts of the body specifically listed in Iowa Code section 85.34(2)(a-t). Unscheduled injuries are those not specifically listed and are covered by Iowa Code section 85.34(2)(u). See generally, Martin v. Skelly Oil Co., 252 Iowa 128, 133 106 N.W. 2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W. 2d 116 (Iowa 1983); Simbro v DeLong's Sportswear, 332 N.W. 2d 886, 887 (Iowa 1983).

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).

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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Industrial disability was 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

In this case, I found that claimant's condition has significantly worsened since the arbitration decision to the extent that the original work injury is now a cause of a 100 percent or total loss of earning capacity. This finding then leads us to the question of whether the Second Injury Fund of Iowa is liable for all or any part of claimant's current total disability.

In its post-hearing brief and argument, the Fund raises three defenses. First, the Fund argues that claimant is not entitled to a review-reopening of a prior award against

the Fund; that the agency approved commutation ends claimant's right to pursue additional compensation against the Fund; and finally, that the employer, not the Fund, is the only entity liable under law for a total disability under Iowa Code section 85.34(2)(s).

On the issue of whether claimant is allowed to review-reopen a prior award against the Fund, the Fund asserts a sort of equitable issue in that Iowa Code section 85.26(2) does not allow the Fund to initiate a review-reopening proceeding. The Code section specifically states that such proceedings can only be initiated by "the employer or the employee." Therefore, the Fund asserts it would be unfair to subject the Fund to proceedings it cannot pursue on its own. This is a constitutional, equal protection argument and this agency has no authority to address such issues and we are bound by the statute's plain wording.

The Fund next argues that claimant in agreeing to the settlement with the employer, Gates Rubber Co., which fully commutes the employers' liability for the work injury in this case pursuant to Iowa Code section 85.47, has given up all rights to further recovery of any kind for this work injury and is functionally equivalent to a special case settlement under Iowa Code section 85.35. I cannot agree because the statutory language of these Code sections are quite different. In section 85.35(9), the statute specifically states that an agency approved special case settlement is a "final bar" to any further rights arising under our workers' compensation statutes regarding the subject matter of the settlement. On the other hand, section 85.45, states that upon payment of the fully commuted amount only the "employer" shall be discharged from all further liability from a work injury.

Lastly, the Fund argues the claimant is permanently and totally disabled only as an "exclusive result of his bilateral injuries" under Iowa Code section 85.34(2)(s) which is the responsibility of the employer not the Fund. The Fund points out industrial factors were clearly present in the commutation agreement which paid out benefits far in excess of a potential scheduled member benefits. Although inarticulate, this argument has merit. In other words, the payments made by the employer in the commutation and settlement, which are far less than its liability for the work injury, cannot be used to transfer the employer's liability to the Fund. The Fund failed to cite the controlling agency precedent applicable to this case. An agency's approval of a settlement is not adjudication on the merits of the claim. The only preclusive effect of an agreement for settlement approved by this agency is upon the parties who entered into that agreement. Such an agreement does not establish the compensability of any injury or the extent of claimant's entitlement to disability benefits in a subsequent claim against the Second Injury Fund of Iowa. The claimant still must prove these matters to obtain Fund benefits. See Grahovic v. Second Injury Fund of Iowa, File No. 5021995 (App., October 9, 2009). As clearly stated in Iowa Code section 85.64, the Fund's liability does not begin until expiration of the full period provided by law for the payments thereof by the employer.

In his post-hearing brief, claimant asserts that the Fund agreed in the hearing report to a credit of only the amounts paid in the settlement agreement. This is not the case. The Fund in the hearing report only agreed that the payments were made. I see no agreement in the hearing report that the Fund cannot raise the issue that it has no further liability after assessing the employers' liability.

Therefore, I hold that the employer's liability for the worsened bilateral condition under Iowa Code section 85.34(2)(s) is permanent and total disability and there is no further liability that can be assessed against the Fund.

I also hold that the worsened condition converted the injury from a scheduled member disability to an industrial disability case, thereby negating Fund's liability under Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995).

Furthermore, as stated above, the purpose of the Second Injury Fund is to minimize an employers' liability for prior injuries. Its purpose was not to transfer an employers' liability for a work injury to the Fund.

Lastly, claimant asserts that these defenses are affirmative and not raised at hearing in the hearing report. I cannot agree. It is the responsibility of claimant in a claim against the Fund to show the compensability of a work injury and a Fund liability in excess of the liability of the employer for a work injury.

Therefore, claimant is not entitled to further benefits from the Second Injury Fund of Iowa.

ORDER

1. Claimant shall take nothing further.

2. Claimant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 24th day of February, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/kjw

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.