BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TESSA MURPHY,

Claimant,

vs.

GREAT RIVER MEDICAL CENTER,

Employer,

and

ARGENT/WEST BEND INS. CO.,

Insurance Carrier,
Defendants.

File No. 5039042

REVIEW-REOPENING and

COMMUTATION DECISION

Head Note Nos.: 2905; 3303.20

STATEMENT OF THE CASE

Defendants Great River Medical Center, (Great River), employer and Argent/West Bend Insurance Company, insurer, both as defendants, filed a petition in Review-Reopening. Claimant also filed a petition requesting a partial commutation of benefits. This matter was heard in Des Moines, Iowa, on June 7, 2017 with a final submission date of July 13, 2017.

The record in this case consists of Joint Exhibits A through E, Claimant's Exhibits 1 through 16, 19-23, Defendants' Exhibits AA through LL, and the testimony of claimant and Connie Oppedal.

Following the hearing, claimant filed an amended petition for partial commutation to comply with proof. Defendant did not object to the amendment. That amendment was granted.

ISSUES

1. Whether claimant has a change in condition resulting in a reduction of a permanent and total disability award;

2. Whether claimant has proven entitlement of an award of partial commutation of permanent and total disability benefits.

FINDINGS OF FACT

Claimant was 46 years old at the time of hearing. Claimant worked as a nurse for Great River from December 2005 until 2013. On September 10, 2011, claimant slipped at work. In February 2012, claimant had a fusion at the L4-5 levels. In September 2012, claimant had a second revision fusion surgery. (Exhibit 1, page 6)

In a 2013 report, Robin Sassman, M.D., found claimant had a 24 percent permanent impairment to the body as a whole. Dr. Sassman also limited claimant to pushing, pulling, and carrying 10 pounds. Dr. Sassman also allowed claimant to sit, stand, and walk occasionally as needed. (Ex. 1, pp. 7-8)

The October 25, 2013 Arbitration Decision accepted the opinions of Dr. Sassman. Based, in large part, on Dr. Sassman's opinions, claimant was found to be permanently and totally disabled. (Ex. 1) That decision was upheld on Appeal on May 27, 2014.

The Court of Appeals decision, filed September 23, 2015, upheld the agency's decision. (Ex. 4)

In a January 27, 2014 unsigned letter, claimant was noted to take 600 mg of Neurontin three times per day. Claimant was released from care and was found to be able to return to work. (Ex. B, p. 2)

On March 31, 2015, claimant underwent an MRI. It showed an intact fusion at the L4-5 levels and no other evidence of disc herniation. (Ex. B, pp. 14-15)

On June 22, 2015, claimant underwent an L5-S1 injection for pain. (Ex. B, pp. 17-18)

Beginning on January 4, 2016 through December 2016, claimant worked as a nurse practitioner at Rushmore Pain and Medical Clinic. Claimant earned $35.00 per hour and worked three days per week for a total of 18 hours a week. (Ex. BB, p. 1; Ex. E, p. 2)

In a February 8, 2016 note, Timothy Miller, M.D., noted claimant was taking gabapentin for pain. Claimant was also using hydrocodone while not at work. Claimant was allowed to work full time unrestricted. (Ex. C, pp. 1-2)

In a March 11, 2016 letter, written by defense counsel, Robert Foster, M.D., agreed that claimant could work as a nurse practitioner with no restrictions regarding the hours worked and had no restrictions performing the job as a nurse practitioner. (Ex. A, pp. 3-4)

In a March 15, 2016 letter, written by defense counsel, Dr. Miller indicated claimant could perform her duties as a nurse practitioner full time. (Ex. C, pp. 4-5) In a video dated April 2016, claimant was surveilled getting in and out of a car. (Ex. AA)

On May 19, 2016, claimant was evaluated by John Dooley, M.D., for lower back pain. Claimant was treated with medication. Claimant continued to see Dr. Dooley for low back pain off and on throughout 2016. (Ex. D, pp. 1-3; 7-11)

In an undated letter, faxed August 2, 2016, Tracy Bell, M.D., indicated that claimant was on a high-dose of gabapentin due to failed back syndrome with radiculopathy. Claimant was also prescribed Provigil to deal with symptoms of fatigue and loss of concentration due to use of high dose gabapentin. (Ex. B, p. 16)

In an October 24, 2016 letter, written by defendants, Dr. Miller indicated that claimant had no restrictions in doing her job as a nurse practitioner. He also opined it was not reasonable and necessary for claimant to have a dorsal column stimulator. (Ex. C, pp. 6-7)

In an undated note, Dr. Miller indicated he had treated claimant in the past but was not actually treating claimant at the present. Dr. Miller saw claimant walking out of his office and carrying an 8-10 pound container. Based on watching claimant, he believed claimant could continue to work as a nurse practitioner. He also opined that he believed claimant could continue to work as a nurse practitioner with no restrictions. (Ex. C, pp. 8-9)

On November 22, 2016, claimant was evaluated by Dr. Dooley for low back pain. Claimant was given an L3-4 injection. (Ex. D, pp. 14-16) Claimant returned to Dr. Dooley on December 20, 2016 with continued complaints of lower back pain. Claimant noted that the November 2016 epidural steroid injection (ESI) had helped leg and back pain briefly. Claimant was treated with medication. (Ex. D, pp. 17-19)

On December 28, 2016, claimant terminated her job with Rushmore Pain and Medical Clinic. (Ex. E, p. 2)

On January 10, 2017, claimant underwent a functional capacity evaluation (FCE) performed by Daryl Short, DPT. Testing found claimant gave valid effort. Claimant was found to be able to work in the sedentary category and was limited to a 5 pound front carry lifting occasionally. The FCE recommended claimant be allowed to alternate sitting, standing, and walking as needed. (Ex. 9)

In a February 22, 2017 letter, written by defendants' counsel, Dr. Dooley opined claimant could work full time as a nurse case manager without restrictions. He also opined that if claimant had a spinal cord stimulator, it would not affect claimant's work as a nurse practitioner or nurse case manager. (Ex. D, p. 23)

In a March 15, 2017 report, Rick Garrels, M.D., gave his opinions of claimant's condition following an IME. Claimant was taking hydrocodone as needed. Claimant

was also taking a high dose of gabapentin three times per day. Claimant complained of constant back and leg pain. Dr. Garrels suggested there was a disparity between the findings and the FCE in what would be expected of claimant following a fusion. He expected claimant should have a 25-50 pound occasional lifting restriction. He recommended claimant undergo another FCE. (Ex. KK, pp. 1-3) In the second report with the same date, Dr. Garrels recommended claimant have a 25 pound lifting restriction. He believed claimant could work full time as a nurse practitioner or nurse case manager. (Ex. KK, pp. 6-8)

In a March 23, 2017 report, Brian Murphy gave his opinions regarding a partial commutation for claimant. Mr. Murphy works as a financial advisor. Mr. Murphy noted that claimant and her husband's income was $4,839.00 per month. He noted they had $97,000 in debt for mortgage, a vehicle loan, and credit cards. Mr. Murphy opined a partial commutation would be in claimant's best interest, in part, because a partial commutation would allow claimant to pass her income to her family should she die. (Ex. 7, 8)

In an April 4, 2017 report, Dr. Sassman gave her opinion of claimant's condition following an IME. Claimant had pain in the right buttocks into the leg. Claimant also had pain in the anterior thigh and into the left heel. Dr. Sassman believed claimant's permanent impairment had increased from the previous 24 percent permanent impairment to 28 percent permanent impairment to the body as a whole. Dr. Sassman noted that claimant's symptoms had worsened since 2013 and that claimant was taking increased pain medication. Based on this, Dr. Sassman opined claimant's condition had worsened since 2014. She recommended claimant continue to work with Dr. Dooley for pain management. Dr. Sassman limited claimant to lifting, pushing and pulling up to 10 pounds occasionally. (Ex. 5, pp. 15-28)

In an April 14, 2017 letter, Dr. Foster gave his opinions of claimant's condition following an IME. Dr. Foster opined claimant's current FCE failed to correlate to her pathology. He saw no reason for a new FCE. He opined claimant could work full time as a nurse practitioner or nurse case manager. He noted claimant was released to work with no restrictions. (Ex. A, pp. 5-8)

Between May 1, 2017 and May 5, 2017, claimant was again put under surveillance. On May 1, 2017, claimant is shown in a video getting in and out of a car, carrying a half full garbage bag, and a container of what appears to be liquid laundry detergent. (Ex. AA)

Between April 2, 2017 and April 4, 2017 claimant was surveilled walking two dogs in her back yard on leashes. Claimant does not do a great deal of walking when walking the dogs. Claimant is also seen on the upper part of a back porch at the same home. (Ex. AA)

In a May 5, 2017 report Ms. Oppedal gave her opinions of claimant's vocational opportunities. Ms. Oppedal opined claimant could work as a nurse practitioner which

greatly would enhance claimant's employability. She opined that claimant could also work as a nurse case manager. She also opined that claimant could potentially work as a teacher or instructor. (Ex. LL)

Ms. Oppedal testified at hearing that she believed claimant could work as a nurse case manager. She also said claimant would be able to work, in some situations, in a sedentary job as a nurse practitioner. She said there were no sedentary jobs for a nurse practitioner in a clinical setting. Ms. Oppedal was not able to specify or identify any jobs for a nurse practitioner that was sedentary.

In an undated affidavit, Lorraine Bueker, indicated she was a patient of claimant's for approximately six to eight months and saw claimant one time per month. Ms. Bueker noted that her visits with claimant that claimant did not bend very well and swayed back and forth. Claimant did not appear to have flexibility with twisting. Claimant indicated she had chronic pain. (Ex. 11)

In an undated affidavit, Sandy McLaughlin, indicated she was also a patient of claimant's and saw claimant approximately one time per month. Ms. McLaughlin indicated she had chronic pain and would discuss chronic pain situations with claimant. Claimant told Ms. McLaughlin that she (claimant) needed to stop working to allow her body to heal. (Ex. 12)

In an undated affidavit, Michelle Prisner, indicated she was a nurse practitioner at the Pain Center of Iowa in Burlington. Ms. Prisner met claimant in 2014 when claimant was a nurse practitioner student. Ms. Prisner was claimant's preceptor. Ms. Prisner indicated that when she was claimant's preceptor, she saw claimant grimace in pain and there were times when claimant needed to take a break from seeing patients. (Ex. 13)

Ms. Prisner indicated that a nurse practitioner is a physically demanding and exhausting job even for a healthy person with no back problems. Ms. Prisner indicated that when claimant was a student, she did not believe claimant could work full time as a nurse practitioner. After claimant began working as a nurse practitioner part-time, claimant indicated she had difficulty keeping up with her job due to pain. Claimant asked Ms. Prisner for tips on how she could continue to work given her limitations. (Ex. 13)

Ms. Prisner opined that due to claimant's back problem, claimant could not work full time as a nurse practitioner. She believed it would be difficult for claimant to find a part time job as a nurse practitioner. (Ex. 13)

In an undated affidavit, Cindy DeHague, indicated she worked as a medical assistant with claimant at Rushmore. During the time they worked together, Ms. DeHague noticed the claimant was in pain. Claimant walked with a limp. As time went on, due to her limitations, claimant was getting slower in getting through her patient

appointments. Ms. DeHague indicated that it was apparent claimant was in more pain as the months passed on. (Ex. 14)

In a May 11, 2017 letter, written by defendants' counsel, Dr. Dooley indicated claimant's level of activity, as seen in surveillance videos, contradicted her presentation and subjective complaints found in physical therapy notes and the FCE. He opined that the results of the FCE did not accurately represent claimant's abilities. He believed claimant could work full time as a nurse practitioner or a nurse case manager. (Ex. D, p. 31)

In a May 31, 2017 report, Dr. Sassman indicated she had reviewed surveillance footage of claimant. Dr. Sassman also reviewed reports from Dr. Dooley, Dr. Foster, Dr. Garrels, and Dr. Miller. Dr. Sassman saw nothing in the surveillance that would change her mind regarding claimant's abilities as noted in her April 2017 report. (Ex. 5, pp. 30-31)

Dr. Sassman disagreed that claimant could return to work as a nurse practitioner or a nurse case manager. Claimant was under consideration for spinal cord stimulator, a treatment only done for those with limited and debilitating pain. Someone with that level of pain would be unable to perform the demands of a nursing job or as a nurse case manager. (Ex. 5, pp. 30-31)

Claimant testified at hearing that when she worked at Rushmore, she could walk to work. She testified that in 2016, she earned approximately $30,000.00. She testified she only worked 18 hours per week while at Rushmore.

Claimant testified she wanted to continue to work as a healthcare provider. She said the job at Rushmore was created just for her. Claimant testified she knew return to work at Rushmore would impact her workers' compensation benefits, but she wanted to return to work. She testified that work as a nurse practitioner was not sedentary.

Claimant testified that Jeff Juhl, M.D., the physician at Rushmore, wanted her to see three to four patient's per hour. Claimant said she was physically only able to treat two to three patients per hour. She said Dr. Juhl wanted her to work full time, but she could not.

Claimant said her job as a nurse practitioner made her condition worse. She said that as a result, she was unable to keep up with household chores.

Claimant testified she has not looked for work since leaving Rushmore.

Claimant testified she did not work as a nurse case manager. She said the job description she has indicates a nurse case manager spends 70 percent of the time traveling in a car. Claimant said she could not physically be in a car for that large amount of time.

Claimant testified her physical condition has not improved, but has worsened. She testified her left leg has weakened since her last hearing. She said her ability to sleep has worsened.

Claimant testified her level of pain varies depending on her activities. She testified at hearing that driving from Burlington to Des Moines for the hearing was very painful.

Claimant testified Dr. Dooley has recommended a trial spinal cord stimulator but defendants have denied this treatment.

Claimant testified she believes she underwent approximately 35 hours of surveillance from defendants.

Claimant testified that she desires a partial commutation to pay off her mortgage of approximately $66,000.00. (Ex. 19, p. 2) She indicated she also wants to pay off credit card debts of approximately $8,000.00. (Ex. 19, p. 3) Claimant testified that she also wants to pay off a vehicle, which she still owes approximately $30,000.00. (Tr. p. 132)

Claimant testified she has no investment plan if she would be granted a partial commutation. (Tr. p. 141) Claimant has no idea what rate of return she could get from a partial commutation. (Tr. p. 141) On direct exam, claimant did not identify approximately $45,000.00 student loan as a debt. (Tr. p. 130) On redirect, claimant admitted she had a $45,000.00 student loan. She indicated she believed the loan would be forgiven if she was found to be disabled for approximately three years. (Tr. pp. 145-147)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant has an improvement in her condition that would result in a reduction of the permanent and total disability award.

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).

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).

Iowa Code section 86.14(2) provides:

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.
>
> We now hold, cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award.

Gosek v. Garmer and Stiles Company, 158 N.W.2d 731, 735 (Iowa 1968)

Under a review-reopening a "redetermination of the condition of claimant as it was adjudicated by a prior award is inappropriate." Lawyer, Iowa Workers' Compensation Law and Practice, section 20.2 (2007-2008) citing to Stice v. Consolidated Independent Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940); Sheriff v. Intercity Express, Thirty-fourth Biennial Rep. of the Iowa Industrial Comm'r 302 (App. 1978) (Dist. Ct. aff'd).

A review-reopening may also be brought by a defendant/petitioner. Foreman v Foreman Electric and Hardware, File No. 865901(Review-Reopening November 17, 2008).

In brief, the legal standard in this case is, have defendants carried their burden of proof that claimant has a physical or economic change in condition, since the original award, that would indicate claimant is no longer permanently and totally disabled. Blacksmith v. All-American, Inc., 290 N.W.2d 378 (Iowa 1980).

A number of experts have opined regarding claimant's physical condition. Claimant underwent an FCE in January 2017. That FCE found that claimant was restricted to working in the sedentary work category and limited to lifting 5 pounds occasionally. (Ex. 9)

Dr. Sassman opined that claimant's physical abilities had worsened from the time she was evaluated in 2013. Dr. Sassman found claimant's permanent impairment had increased. She also found that claimant had an increased need for medication for pain, particularly a high dose of gabapentin. (Ex. 5, pp. 15-28)

Dr. Juhl noted claimant was taking high dosages of gabapentin for failed back syndrome. (Ex. B, p. 16) The record indicates that since the 2013 arbitration decision, claimant has had at least one ESI for lower back pain. (Ex. D, pp. 14-16)

Claimant did return to work for approximately one year as a nurse practitioner. She worked for 18 hours per week, working three six hour shifts per week. Claimant indicated her work as a nurse practitioner aggravated her pain. Affidavits from two patients and a coworker indicate that claimant had limitations in treating them related to back pain. The affidavits also indicated that claimant's pain and loss of functioning increased the longer she worked as a nurse practitioner. (Ex. 11, 12, 14)

Nurse Prisner was claimant's teacher/instructor when claimant was completing training as a nurse practitioner. Nurse Prisner indicated that a nurse practitioner had a physically demanding job even for a healthy person. She noted claimant had difficulty working as a nurse practitioner due to her limitations. Claimant sought tips from Nurse Prisner for working given her physical limitations. Nurse Prisner did not believe claimant could work full time as a nurse practitioner, and that claimant would be hard-pressed to find a part-time job as a nurse practitioner. (Ex. 14)

Dr. Foster opined claimant could return to work as a nurse practitioner and that claimant had no limitations. (Ex. A, pp. 3-8) This is essentially the same opinion that Dr. Foster offered in the 2013 arbitration hearing. That opinion was found not to be convincing. Murphy v. Great River Medical Center, File No. 5039042, pp. 7-8 (Arb. October 25, 2013). The record indicates that Dr. Foster did not actively treat claimant for approximately four years. (Ex. 8) Dr. Foster gave no explanation how claimant can return to work full duty as a nurse practitioner, given the permanent restrictions given by Dr. Sassman. Dr. Foster did not have an explanation how claimant could return to work full duty as a nurse practitioner given the opinions of Nurse Prisner. Based on this record, the opinions of Dr. Foster are found not convincing.

Dr. Miller opined that claimant could return to work full time with no restrictions. (Ex. C, pp. 1-7) Dr. Miller has not actively treated claimant for several years. (Ex. C, pp. 8-9) Dr. Miller offered no rationale how claimant can return to work with no restrictions given Dr. Sassman's accepted permanent restrictions. Dr. Miller also offered no explanation how claimant could return to work full duty given the limitations found in the 2017 FCE. Given these inconsistencies, Dr. Miller's opinions regarding claimant's functional abilities are found not convincing.

Dr. Garrels evaluated claimant on one occasion for an IME. He did not agree with the validity of the January 2017 FCE and recommended claimant undergo another FCE. Dr. Garrels found claimant could return to work full time as a nurse practitioner or a nurse case manager. (Ex. KK, pp. 1-3, 8) Dr. Dooley also opined that the FCE, performed in January 2017, was not an accurate reflection of claimant's abilities. Dr. Dooley also found claimant had no restrictions. (Ex. D, p. 23)

It does not appear defendants followed Dr. Garrels' advice and had claimant undergo a second FCE. Why this did not occur is unclear. Given that, the only FCE on record was the one that was performed in January 2017 that limited claimant to sedentary work. (Ex. 9) Dr. Garrels opined the FCE does not accurately reflect claimant's abilities. This opinion was also expressed by Dr. Dooley. Other than these conclusions, neither Dr. Garrels nor Dr. Dooley offer much evidence why the January 2017 FCE is invalid. Claimant has been recommended by Dr. Dooley to have a spinal cord stimulator. This treatment is recommended for individuals with limited and debilitating pain. Dr. Garrels' report recognized that claimant takes a high dosage of pain medication for back pain. The job description for a nurse case manager indicates extensive travel and 70 percent of the job requires travel. (Ex. L, p. 10; Ex. 23)

As noted above, neither Dr. Garrels nor Dr. Dooley offer much analysis why the January 2017 FCE is not valid. No other FCE was performed by defendants, despite Dr. Garrels' recommendations. Dr. Garrels offers no explanation of how claimant can work as a nurse case manager when 70 percent of the job requires travel. Dr. Garrels offers no rationale how claimant could return to work full time as a nurse practitioner given the large amounts of pain medication claimant uses. Given these discrepancies, both the opinions of Dr. Garrels and Dr. Dooley regarding claimant's ability to function are found not convincing.

Ms. Bueker and Ms. McLaughlin were patients of claimants. Ms. DeHauge worked with claimant. Ms. Bueker and Ms. McLaughlin noted claimant had pain and limitations when she worked at the Rushmore Clinic. Ms. DeHauge saw claimant nearly every day when claimant was at the clinic. Ms. DeHauge noted that claimant's pain increased the longer claimant worked at the Rushmore Clinic. I find the affidavits of these three women more convincing, than the more hypothetical opinions of Dr. Foster, Dr. Miller, Dr. Garrels, and Dr. Dooley. This is because these women routinely worked, or saw claimant in her actual work environment. The opinions of these three women are more practical and real as they give evidence of claimant's limitations when she tried to work as a nurse practitioner part time.

I also find the opinions of Nurse Prisner more credible than the opinions of Dr. Foster, Dr. Miller, Dr. Garrels, and Dr. Dooley, for essentially the same reasons. Nurse Prisner has far more practical and real experience working as a nurse practitioner than do the above named physicians. Nurse Prisner saw claimant was limited in her work as a nurse practitioner due to her pain. She opined claimant could not work full time as a nurse practitioner and that part-time jobs as a nurse practitioner are difficult to find.

Surveillance was also taken of claimant. The surveillance does little to show that claimant had an improvement in her physical ability since the 2013 hearing. The record indicates claimant was put under surveillance for approximately 35 hours and that only approximately a half hour is shown on the surveillance DVD found at Exhibit AA. Most of the footage in Exhibit AA shows claimant walking two dogs in the back yard. The footage shows claimant doing very little actual walking of the dogs.

Dr. Sassman found claimant's condition worsened since 2013. This is based on the increased permanent impairment, and a history showing that claimant relied on a greater amount of pain medications in 2017 than she did in 2013. (Ex. 5, pp. 15-28)

The affidavits of Ms. Bueker, Ms. McLaughlin, and Ms. DeHauge are found convincing evidence regarding claimant's limitations when she worked as a nurse practitioner, and how claimant's pain increased the longer she worked as a nurse practitioner. Nurse Prisner opined claimant could not work full time as a nurse practitioner and that claimant would have difficulty working part time as a nurse practitioner. Claimant had an FCE that was found to be valid. It indicates that claimant can only work a sedentary job and occasionally lift 5 pounds. (Ex. 9) Although a few of the experts dispute the accuracy of the FCE, no expert offers much analysis why the January 2017 FCE is invalid. The opinions of Dr. Foster, Dr. Garrels, Dr. Miller, and Dr. Dooley are found unconvincing. Given this record, defendants have failed to carry their burden of proof that claimant's physical condition has improved since the 2013 arbitration decision, that indicates claimant is no longer permanently and totally disabled.

Defendants also allege that claimant has had an improvement in economic condition indicating that claimant is no longer permanently and totally disabled.

Claimant did return to work part time as a nurse practitioner between January 2016 through December 2016. Claimant testified she quit her part-time job as she could no longer take the pain associated with working 18 hours per week. The affidavits of Ms. Bueker, Ms. McLaughlin, Ms. DeHauge, and Nurse Prisner support claimant's testimony. As noted above, the opinions of Dr. Dooley, Dr. Miller, Dr. Foster, and Dr. Garrels are found not convincing regarding claimant's ability to return to work as a nurse practitioner.

Ms. Oppedal testified claimant could return to work as a nurse case manager or a sedentary nurse practitioner. I value the opinions of Ms. Oppedal. However, Ms. Oppedal was unable to define what a sedentary nurse practitioner did, or if there is even a job for a sedentary nurse practitioner. Ms. Oppedal testified and opined that claimant could work full time as a nurse case manager. However, Ms. Oppedal was not able to adequately explain how claimant could work full time in a job that required extensive travel or travel 70 percent of the time. (Ex. 23; Ex. L, p. 10) Given this, I find Ms. Oppedal's opinion regarding that claimant has a potential improvement in economic condition not convincing.

Claimant did work for approximately a year in 2016. This was a part-time job for 18 hours per week. I appreciate defendants' position regarding a change in economic condition. Claimant did earn $35.00 per hour for an 18-hour job for approximately one year in 2016. If this case were held in 2016, when claimant was still working, it potentially could have been found that claimant did have an improvement in her economic condition.

However, the hearing in this matter was heard in June 2017, nearly seven months after claimant left her job with Rushmore. The record indicates claimant tried to work at a job for 18 hours per week and was not able to do so. The record also suggests that claimant worked in an accommodated job at Rushmore. The record indicates that part-time jobs as nurse practitioners are not readily available. Based on the above, I find defendants have failed to carry their burden of proof that claimant had an improvement in her economic condition that result in a change or reduction, of the underlying agency's decision, that claimant is permanently and totally disabled.

Based on the above, I find that defendants have failed to carry their burden of proof that claimant had a physical or economic change in condition, since the original award, that indicates claimant is no longer permanently and totally disabled.

The next issue to be determined is did claimant carry her burden of proof that she is entitled to a partial commutation of benefits.

Under Iowa Code section 85.48:

> When partial commutation is ordered, the workers' compensation commissioner shall fix the lump sum to be paid at an amount which will equal the future payments for the period commuted, capitalized at their present value upon the basis of interest at the rate provided in section 535.3 for court judgments and decrees. Provisions shall be made for the payment of weekly compensation not included in the commutation with all remaining payments to be paid over the same period of time as though the commutation had not been made by either eliminating weekly payments from the first or last part of the payment period or by a pro rata reduction in the weekly benefits amount over the entire payment period. .

Iowa Code section 85.45 provides that a commutation may be ordered when the commutation is shown to be in the best interests of the person who is entitled to the compensation. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964). The factors relied on in determining if a commutation is in the best interests of the claimant include: the claimant's age, education, mental and physical condition, and actual life expectancy; the claimant's family circumstances, living arrangements and responsibilities to dependents; the claimant's financial condition, including sources of income, debts, and living expenses; the claimant's ability to manage the funds or arrange for someone else to manage them; and the reasonableness of the claimant's plan for investing the lump sum sought. Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 164 (Iowa 1983).

In determining whether the requested commutation is in the best interests of the claimant, a benefit-detriment analysis is employed. The above recited factors, along with the claimant's preference and the benefits of the claimant receiving a lump-sum payment, are balanced against the potential detriments that could result if the claimant invests unwisely, spends foolishly, or otherwise wastes the funds to the point where

they no longer provide the wage substitute intended by the workers' compensation law. Diamond, 256 Iowa at 929, 129 N.W.2d at 617; Dameron, 339 N.W.2d at 163-164.

Ultimately, the determination of whether the commutation is within the best interests of the claimant is a factual determination based upon the factors being balanced in each case. Dameron, 339 N.W.2d at 163 ("Where, as here, the industrial commissioner in a contested case proceeding has determined that commutation was in the best interests of the claimant, the trial court and this court are now bound by that determination unless it is 'unsupported by substantial evidence in the record.'")

As the party moving for the partial commutation, claimant bears the burden to prove that the commutation is in his best interest. Iowa R. App. P. 6.14(6).

Claimant testified she wants a partial commutation to pay off her mortgage, credit card debt, and her car. Claimant had a meeting with a financial advisor. However, Mr. Murphy did not suggest an investment plan for claimant. Claimant has no investment plan. Claimant has no idea what her rate of return on an investment would be. Claimant believes a partial commutation would affect her Social Security benefits, but has no idea what that effect would be. On direct exam, claimant did not indicate she had a student loan or $45,000.00 as a debt. The student loan was also not identified in claimant's exhibits as a debt. The student loan is not mentioned in Mr. Murphy's evaluation of claimant's finances. On cross-exam, claimant testified that she did have approximately $45,000.00 in student debt. Claimant testified she believed this loan would be forgiven if she was unable to work for three years. Other than claimant's own testimony, there is no evidence in the record that details the $45,000.00 student loan, or claimant's understanding regarding loan forgiveness.

In the Dameron case, one of the factors identified by the courts in determining if a partial commutation is in claimant's best interest is the reasonableness of claimant's plan for investing the commutation, and the ability to manage the proceeds. (Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 164 (Iowa 1983). Claimant has provided no evidence for this agency to use in determining the reasonableness of an investment plan.

According to claimant's petition, if she would be granted a partial commutation, claimant would be awarded approximately $515,000.00. Claimant has no investment plan. Claimant has no idea of what the rate of return on an investment plan would be. Claimant has no idea what the effect of a partial commutation would be on her Social Security benefits. Claimant testified she has a $45,000.00 debt in student loans. Claimant thinks that debt would be extinguished after three years of disability. There is no evidence other than claimant's testimony, at all to support this understanding. Based on these facts, it is found claimant has failed to carry her burden of proof she is entitled to a partial commutation.

ORDER

THEREFORE, IT IS ORDERED:

That defendants have failed to carry their burden of proof that claimant had a change of condition resulting in a reduction of the permanent and total disability award.

Claimant shall continue to receive permanent and total disability benefits as dictated under the appeal decision dated May 27, 2014.

That claimant's application for partial commutation of her permanent and total disability benefits is denied and dismissed.

That both parties shall pay their own costs.

Signed and filed this 13th day of November, 2017.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Emily Anderson
Attorney at Law
425 2ND St SE, Ste. 1140
Cedar Rapids, IA 52401
eanderson@fightingforfairness.com

Nathan R. McConkey
Attorney at Law
2700 Westown Pkwy., Ste. 170
West Des Moines, IA 50266-1411
nmcconkey@desmoineslaw.com

JFC/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.