BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEPHEN DRAKE,

Claimant,

vs.

MCCOMAS-LACINA CONSTRUCTION, LC,

Employer,

and

UNITED HEARTLAND,

Insurance Carrier,
Defendants.

FILED
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WORKERS' COMPENSATION

File No. 5038575

APPEAL

DECISION

Head Note Nos: 1804, 3701, 1403, 3303.20

Claimant Stephen Drake appeals from a review-reopening and partial commutation decision filed on November 22, 2017.

On March 21, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

Claimant sustained work-related injuries to his right shoulder and neck on July 11, 2008; left shoulder on August 28, 2009; and lower back on December 2, 2010. All claims were considered at hearing on February 7, 2013.

In the resulting March 12, 2014 arbitration decision, a deputy commissioner determined claimant sustained a 40 percent industrial disability due to the July 11, 2008 date of injury; a 50 percent industrial disability due to the August 28, 2009 date of injury (with credit for the 40 percent industrial disability awarded for the July 11, 2008 date of injury); and permanent total disability due to the December 2, 2010 date of injury. The deputy commissioner's March 12, 2014 arbitration decision was ultimately affirmed by the Iowa Court of Appeals.

Claimant eventually filed a petition for partial commutation of the permanent and total disability award, and defendants filed a petition for review-reopening of the permanent and total disability award. Claimant's petition for partial commutation and defendants' petition for review-reopening proceeded to hearing on July 19, 2017.

In the resulting review-reopening and partial commutation decision, which was issued on November 22, 2017, the deputy commissioner determined defendants carried their burden to prove claimant's condition improved since his 2013 arbitration hearing. The deputy commissioner determined claimant was no longer permanently and totally disabled but was instead 80 percent industrially disabled.

Because claimant was found to be less than permanently and totally disabled on review-reopening, the deputy commissioner also denied claimant's petition for partial commutation.

On appeal, claimant asserts defendants did not meet their burden to establish a change in claimant's condition. Claimant also asserts he is entitled to a partial commutation of his award of permanent and total disability.

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

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I respectfully reverse those portions of the proposed review-reopening and partial commutation decision filed on November 22, 2017 that relate to issues properly raised on intra-agency appeal.

FINDINGS OF FACT

In her March 12, 2014 arbitration decision, the deputy commissioner appropriately cited and discussed several factors that led to her determination that claimant was permanently and totally disabled due to the December 2, 2010 date of injury. (See Arbitration Decision, pp. 33-37) For example, the deputy commissioner noted claimant's age, education, qualifications, and experience, along with the fact claimant was assigned a 10 percent whole body impairment rating by both Ray Miller, M.D. (claimant's expert), and Patrick Hartley, M.D. (defendants' expert), as a result of the low back injury. (See Arb. Dec., pp. 33-34) She also seemingly adopted the 30-pound weight limit and restrictions of no climbing or overhead work assigned by Patrick

Hitchon, M.D. (claimant's treating physician), though she also acknowledged both Dr. Miller and Dr. Hartley offered additional restrictions for the combined effect of the July 11, 2008, August 28, 2009, and December 2, 2010 dates of injury. (See Arb. Dec., pp. 34-35) She specifically noted that Dr. Hitchon's restrictions were consistent, to the extent addressed, with those recommended by Dr. Miller, and that such restrictions "are clearly at odds with the physical requirements of claimant's pre-injury position with defendant employer." (See Arb. Dec., p. 35) She went on to state:

> Although defendant-employer maintains claimant was permanently laid off due to economic reasons, the fact remains claimant would be unable to perform the essential functions of his cement carpenter position, absent significant accommodations by defendant-employer.
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> Even with significant accommodation, the restrictions imposed and recommendations outlined by treating and evaluating physicians render it highly unlikely claimant would have been physically capable of continued employment on a long-term basis. This determination is supported by the vocational assessment of Mr. Jayne. Mr. Jayne performed a vocational assessment, including labor market survey, interview of claimant, and testing of claimant's abilities. Following a thorough analysis, Mr. Jayne opined claimant incapable of returning to any job in his work history.
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> Due to claimant's past grades and vocational testing, Mr. Jayne opined such measures rendered claimant an unlikely candidate for retraining and further opined a vocational assistance program was unlikely to be successful in returning claimant to competitive employment. Ultimately, Mr. Jayne opined claimant was precluded from competitive employment. Defendants' expert, Ms. McGuire, reached a contrary conclusion following a records review and labor market survey. Without meeting claimant, she opined claimant was teachable, trainable, and capable of returning to work.
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> In comparing the assessments completed by Mr. Jayne and Ms. McGuire, it is noted Mr. Jayne is a professional in vocational rehabilitation, with superior training in this field than that of nurse, Ms. McGuire. Furthermore, the report created by Mr. Jayne and entered into evidence is thorough and much more extensive in its discussion of claimant's overall vocational status. Ms. McGuire failed to interview claimant and perform, or consider, vocational testing. Ms. McGuire did not offer claimant vocational services, but rather, simply provided a list of positions available in the labor market for which she opined claimant may qualify. In performing this analysis, Ms. McGuire relied upon the FCE results as opposed to those restrictions opined by physicians.

By a cursory review of the position postings provided by Ms. McGuire, the undersigned observed several inconsistencies between the job requirements and claimant's abilities. Contrary to Ms. McGuire's apparent belief, the undersigned believes speculation as to whether a prospective employer would waive such requirements or preferences to be inappropriate in a vocational evaluation. Such required speculation severely reduces the weight properly provided to Ms. McGuire's report. The inappropriate nature of such speculation is supported by claimant applying unsuccessfully for three of the 17 identified positions.

Even should the undersigned adopt Ms. McGuire's listed positions as ones available to claimant within the labor market, it is relevant these positions carried wage ranges far below that earned by claimant at the time of his termination by defendant-employer. The proposed available positions carried hourly wages ranging from $8.00 to $20.00 per hour. Such wages represent earnings at approximately 30 to 75 percent of claimant's earnings at defendant-employer.

As a result of claimant's termination, claimant sustained an obvious loss of earnings. Claimant has not engaged in full-time employment since his layoff by defendant-employer in December 2010. During his final year of employment at defendant-employer, claimant earned over $41,000.00. In the years following his permanent layoff, claimant has demonstrated motivation to continued employment, securing work consistent with his own abilities and limitations. Claimant's continued employment is limited in nature, and accordingly, earns claimant wages incomparable to those he earned at defendant-employer. In the year 2012, claimant earned $1,900.00 mowing and $120.00 per month vacuuming.

Claimant testified he continues to suffer with pain and corresponding decreased range of motion of the bilateral shoulders, neck, and low back. Claimant credibly testified these continued symptoms may also flare to levels severe enough to prevent him from working for up to one week at a time. The evidentiary records supports a finding these flares occur on more than rare occasions and the resultant unreliability in claimant's attendance is unlikely to be tolerated by many employers.

. . . .

It must be noted the opinions of claimant's IME physician, Dr. Miller, and defendants' IME physician, Dr. Hartley, are highly consistent across the spectrum of each of claimant's injuries. Such consistency is not often seen in evidence presented for consideration, especially given each physician was retained by opposing parties. This consistency and the thorough and well-reasoned reports provided by each physician leads

> the undersigned to provide these consistent reports significant weight in the analysis of claimant's permanent impairment.
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> Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant is currently permanently and totally disabled. . . .

(Arb. Dec., pp. 35-37)

Just after the deputy commissioner's March 12, 2014 arbitration decision was affirmed by the Iowa Court of Appeals in 2016, defendants initiated surveillance of claimant. (See Defendants' Exhibit C) Over the course of nine days in May, June, and August of 2016, defendants acquired roughly five hours of footage. (See Def. Ex. C, pp. 2, 12, 19, 28)

Of particular relevance is the footage from May 14, 2016 and June 14, 2016. On May 14, 2016, claimant is seen attending an estate sale and carrying several small boxes to his truck. (May 14 & 15, 2016 Disc; see Ex. C, pp. 2, 6-7) He can also be seen carrying a wooden dresser, approximately five feet long, on his shoulder and then lifting the dresser into his truck. (May 14 & 15, 2016 Disc; see Ex. C, pp. 2, 6-7) Claimant testified the dresser weighed roughly 20 pounds. (Tr., p. 30)

On June 14, 2016, claimant can be seen loading three large bags of feed and dog food into his car from a farm supply store. (June 2016 Flash Drive; see Ex. C, pp. 12, 15) He is later seen unloading and carrying the bags of food at his home by putting one bag on his right shoulder and another bag under his left arm. (June 2016 Flash Drive; see Ex. C, pp. 12, 15-16)

Claimant testified at hearing that the feed bags seen in the video weigh 40 pounds each. (Hearing Transcript, p. 16) He also acknowledged he can lift more than one bag of feed at a time. (Tr., pp. 17-18)

Defendants sent the surveillance footage from May, June, and August of 2016 to Robbin Epp (hereinafter "Sassman"), M.D., Dr. Hartley, and John Kuhnlein, M.D.

Dr. Sassman had previously performed a Social Security Disability evaluation for claimant in October of 2011. At that time, she recommended lifting and carrying 10 pounds rarely from floor to waist and 20 pounds occasionally from waist to shoulder, along with no activity over shoulder height. (Def. Ex. D, p. 1) The deputy commissioner acknowledged these restrictions in her 2014 arbitration decision, though she appeared

to give more weight to Dr. Hitchon's restrictions, at least as they related to claimant's low back injury. (See Arb. Dec., p. 34) Regardless, after reviewing the surveillance footage, Dr. Sassman opined that the footage depicted claimant performing activities outside of her 2011 work restrictions. (Def. Ex. D, p. 1) She went on to state:

> This would suggest that there has been an improvement in [claimant's] condition since the time I evaluated him. To be clear, I have not had a chance to re-evaluate [claimant] since 2011 (which would allow me to compare range of motion and other physical examination findings I found in 2011); but, the activities he engages in on the surveillance tape would suggest that his condition has improved.

(Def. Ex. D, p. 1)

Dr. Hartley opined in a February 20, 2017 letter that claimant appeared in the surveillance footage to periodically exceed the range of motion in his right shoulder that he demonstrated during his independent medical examination (IME) in November of 2012. (Def. Ex. E, p. 1) Dr. Hartley also noted claimant's activity in the videos appeared to exceed Dr. Hartley's recommended restrictions. (Def. Ex. E, p. 1) Regarding whether claimant's condition had improved, Dr. Hartley opined as follows:

> Whether the observations noted above indicate there has been a clinical improvement in [claimant's] condition since November 2012 is difficult to state with certainty, without reevaluating him and/or referring him for an updated functional capacity evaluation (FCE). Depending on the outcome of such an evaluation, it may be appropriate to reconsider his permanent restrictions, to determine if they are consistent with his current functional status.

(Def. Ex. E, p. 1)

Dr. Hartley then evaluated claimant on May 5, 2017. (Def. Ex. E, p. 2) In the notes from that visit, Dr. Hartley indicated claimant appeared to have greater shoulder range of motion in the surveillance videos than what he exhibited during the examination. Dr. Hartley again noted that claimant's "periodic physical activity" in the surveillance likely exceeded his work restrictions. (Def. Ex. E, p. 3) Dr. Hartley then provided, "At this time, pending reassessment by the pain clinic, and a subsequent FCE . . ., I have not made any changes to his current work restrictions." (Def. Ex. E, p. 4)

Claimant was also evaluated by Dr. Kuhnlein for purposes of an IME. After evaluating claimant and reviewing the surveillance footage, Dr. Kuhnlein stated:

> [I]t appears that [claimant's] functional impairment has decreased since the time of the February 7, 2013 arbitration. It is not appropriate to use the range of motion measurements obtained during this examination, as [claimant] exhibited greater shoulder range of motion with both shoulders during the videos without any apparent pain or issues. There was no evidence of any pain with greater range of motion. Therefore, it is not possible to assign any objective impairment rating given the discrepancies between the physical examination here, and his apparent range of motion in the videos I reviewed. Impairment ratings must be based on objective findings, and, given the differences in Mr. Drake's appearance during this examination as opposed to when he did not know he was being observed, I'm not able to objectively assign impairment for any of these conditions, but it appears that he is less impaired than thought at the original arbitration hearing.
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> . . .
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> [Claimant] is still disabled, based on objective findings in this examination . . . . However, the stated disability does not match the examination consistently.

(Def. Ex. F, p. 10-11) Regarding restrictions, Dr. Kuhnlein opined that claimant "may be more functional than stated during the examination," which "makes it impossible to objectively determine what permanent restrictions he might need." (Def. Ex. F, p. 11)

On June 30, 2017, after reviewing Dr. Kuhnlein's report, Dr. Hartley stated in a letter that he agreed with Dr. Kuhnlein "that there may be improvement in Mr. Drake's functional limitations." (Def. Ex. E, p. 6)

Claimant offered no expert medical opinions to rebut the opinions of Dr. Sassman, Dr. Hartley, or Dr. Kuhnlein.

Relying on the opinions from Dr. Sassman, Dr. Hartley, and Dr. Kuhnlein, the deputy commissioner in his November 22, 2017 review-reopening decision found that the restrictions considered by the deputy commissioner in the 2014 arbitration decision were no longer applicable. (Review-Reopening Decision, p. 10) More specifically, he

stated the "restrictions given by Dr. Hitchon no longer apply." (Rev.-Reop. Dec., p. 10) For the reasons that follow, I respectfully disagree.

First, none of these three physicians went so far as to say that claimant's restrictions "no longer apply." Dr. Kuhnlein only provided that he could not objectively determine what restrictions were appropriate. (See Def. Ex. F, p. 11) Dr. Sassman and Dr. Hartley only stated that claimant appeared to exceed their respective restrictions during the "periodic" physical activity as seen in the video. (See Def. Ex. D, p. 1; Def. Ex. E, pp. 1, 3) Significantly, none of these physicians offered modified or adjusted restrictions. To the contrary, after his evaluation of claimant on May 5, 2017, Dr. Hartley specifically indicated he was making no changes to his recommended restrictions until claimant participated in an updated FCE, which apparently did not occur. (Ex. E, p. 4)

Further, claimant's ability to periodically or occasionally lift or carry items that exceed his restrictions does not render his previous restrictions unconvincing or unnecessary. Claimant does not dispute that he is capable of lifting two 40-pound bags of feed at one time. Lifting 40-pound feed bags admittedly exceeds the 30-pound lifting restriction assigned by Dr. Hitchon and the restrictions assigned by Dr. Hartley. Claimant, however, explained that he gets roughly six bags of feed every one to two weeks, and that he and his wife "once in a while go to an auction." (Tr., pp. 16, 32) (emphasis added) In other words, lifting feed bags or carrying furniture is not an hourly or even daily occurrence. The evidence reveals claimant only exceeds his restrictions on an intermittent or periodic basis; as such, I respectfully disagree with the deputy commissioner's finding that the restrictions considered in the 2014 arbitration decision no longer apply. Instead, I find that the restrictions for claimant's low back condition, as considered by the deputy commissioner in her 2014 arbitration decision, remain credible and appropriate.

Dr. Sassman, Dr. Hartley, and Dr. Kuhnlein all opined, with varying degrees of confidence, that claimant's functional impairment appeared to be less severe in the video than in 2013, though none offered opinions as to how much it had improved. Even assuming claimant's permanent functional impairment did, in fact, decrease since 2013, however, this factor is not to be considered in a vacuum; instead, it must be considered in the larger context of the industrial disability analysis.

As discussed above, the deputy commissioner in her 2014 arbitration decision considered numerous factors before finding claimant to be permanently and totally disabled. Claimant's 10 percent whole body impairment was one of them, but it was claimant's inability to return to his pre-injury employment and to the workplace without a

significant loss of earnings that appeared to carry the greatest weight in the deputy commissioner's decision. (See Arb. Dec., pp. 35-37) While defendants in the review-reopening hearing offered evidence of claimant periodically exceeding his restrictions, they offered no evidence that claimant could or should do so on a more regular basis in a workplace environment. In other words, even assuming claimant's 10 percent whole body impairment has since decreased, defendants offered no evidence that claimant could now return to his pre-injury position with defendant-employer, return to other work without a significant loss of earnings, or find continued employment that is not so limited in nature. (See Arb. Dec., pp. 35-36) The deputy commissioner in her arbitration decision noted claimant's work experience consists "entirely of heavy, manual labor positions in construction fields" (see Arb. Dec., p. 24), and there is no evidence in the record on review-reopening that claimant's work history changed or that he is now physically capable of returning to such heavy, manual labor work. Defendants also neglected to offer any updated vocational evidence. In sum, defendants offered insufficient evidence showing claimant's earning capacity has increased in any tangible way since the arbitration decision.

For these reasons, I respectfully disagree with the deputy commissioner and find insufficient evidence of an increase in claimant's earning capacity or change in condition that renders claimant no longer permanently and totally disabled. The deputy commissioner's finding that claimant is no longer permanently and totally disabled is therefore reversed.

I turn now to claimant's petition for partial commutation. Claimant testified he wants a partial commutation to pay off roughly $75,000.00 of debt, which includes the piggyback loan he acquired for his home, his credit card debt, and a vehicle loan. (Tr., pp. 37-38; see Claimant's Ex. 1, p. 2) He explained that if he paid off these debts, he would have no need for a weekly workers' compensation check. (Tr., p. 39) He and his wife, who was employed full time at the time of the hearing, are not living paycheck-to-paycheck. (Tr,. pp. 33, 40) Claimant also testified he understood that there is no cost-of-living increase included in his workers' compensation benefits, so he would like to use that money now to pay off debts and invest. (See Tr., p. 39)

Claimant consulted a financial advisor, Mike Murray, who prepared a retirement illustration and investment proposal for claimant. Mr. Murray indicated the retirement illustration "plans for [claimant] paying off current debts of $75,000, setting aside $75,000 into savings for a liquid emergency fund, and investing the remaining amount of $200,000 with an income with moderate objective." (Cl. Ex. 1, p. 2) The illustration

also "shows a monthly withdraw of $600 to supplement [claimant's] social security and cover monthly expenditures." (Cl. Ex. 1, p. 2)

The investment proposal "is a diversified portfolio with income with moderate growth objective" with a goal of providing "inflation adjusted income." (Cl. Ex. 1, p. 2) Mr. Murray's letter indicates he discussed with claimant the risks associated with investing, including fluctuating investment returns. (Cl. Ex. 1, p. 2)

Claimant's debt is limited to a mortgage and piggyback loan, a truck loan, a lawn mower payment, and credit cards. (Tr., p. 36) Claimant has never filed for bankruptcy and has never suffered from any drug or alcohol dependency. (Tr., p. 32) While there is no evidence that claimant is experienced in sophisticated financial dealings, and the 2014 arbitration decision provides that claimant is not a high school graduate and does not have his GED, it appears claimant has a good grasp of his household income, long-term debt, and monthly expenses.

Defendants did not offer a report of a financial advisor, and their brief cross-examination during the partial commutation portion of the hearing was limited to the amount of claimant's credit card debt and claimant's understanding of the tax benefits of workers' compensation benefits. (Tr. pp. 40-41)

After considering the evidence, I find claimant's education level and lack of experience with any sophisticated financial dealings weigh against claimant's request for partial commutation.

However, factors weighing in favor of claimant's request for partial commutation include: his desire to commute the funds; the ability for claimant to pay off debts; the fact that inflation will eventually erode the spending power of his permanent total disability benefits without cost of living adjustments; and that claimant's investment plan suggests claimant will continue to have monthly income to cover monthly expenditures even after his debts are paid off. Claimant also has an established relationship with Mr. Murray, a financial advisor. Finally, claimant's wife's full-time position and claimant's Social Security Disability benefits would help offset any mismanagement of commuted funds, if any such mismanagement were to occur.

Under the circumstances of this case, I find that the benefits of claimant's proposed partial commutation outweigh the detriments that might be faced. Therefore, I find it is claimant's best interest to grant the petition for partial commutation.

CONCLUSIONS OF LAW

The threshold issue to be resolved on appeal is whether there has been a change of condition since the original arbitration hearing in 2013 that necessitates a diminishment of claimant's permanent and total disability award.

Iowa Code section 86.14 provides that in a review-reopening, "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."

The party bringing the review-reopening proceeding has the burden of showing that the employee's condition has changed since the original award or settlement was made. See Iowa R. App. P. 6.14(6). 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 is not sufficient to justify a different determination on a petition for review-reopening. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 393 (Iowa 2009).

In this instance, because defendants assert claimant's condition has improved to the point that he is no longer permanently and totally disabled, defendants carry the burden of proof. See Iowa R. App. P. 6.14(6); Woodbury County v. Clausen, 759 N.W.2d 2 (Iowa Ct. App. 2008) (table).

In this case, claimant was not compensated for a scheduled member injury; instead, he was compensated for his industrial disability due to his low back injury. As explained by the Iowa Supreme Court, "industrial disability is the product of many factors, not just physical impairment." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) Thus, upon review-reopening, other factors bearing claimant's industrial disability—such as age, education, experience, and inability, because of an injury, to engage in employment for which the employee is fitted—must also be considered when determining whether claimant's earning capacity has changed. See id.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The surveillance offered by defendants in this case is more substantial than the surveillance in Cedar Rapids Community School District v. Pease, 807 N.W.2d 839 (Iowa 2011), wherein the court described footage of a claimant performing tasks outside his restrictions as "hardly a smoking gun." The surveillance in Pease was fragmented and less than 40 minutes long, and it depicted claimant for only brief intervals in time. Id. at 849. In this case, defendants obtained roughly five hours of footage, including some footage that depicted claimant for significant stretches of time. Still, however, defendants in the instant case have a burden to prove that claimant is no longer permanently and totally disabled—not just a burden to show claimant periodically exceeds his permanent restrictions.

The surveillance at issue here, while admittedly more influential than the footage in Pease, had little bearing on the question of whether claimant can go back to work in the heavy manual labor industry in which he worked prior to his low back injury. Defendants offered no other evidence that claimant can now return to his pre-injury jobs or return to the workforce without a substantial loss of earnings. Ultimately, while defendants offered some evidence that claimant's functional impairment may have lessened since the 2013 arbitration hearing, I found insufficient evidence of any increase in claimant's earning capacity.

For these reasons, I conclude defendants failed to prove that claimant's earning capacity has increased or that he is no longer permanently and totally disabled. The deputy commissioner is therefore respectfully reversed. Defendants' review-reopening claim is denied.

Having denied defendants' petition for review-reopening, claimant's outstanding petition for partial commutation must be addressed.

The primary legal issue for determination is whether claimant should be granted his partial commutation request. Iowa Code section 85.45(1) provides in relevant part:

> Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:

> a. When the period during which compensation is payable can be definitely determined.
>
> b. When it shall be shown to the satisfaction of the workers' compensation commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation . . . .

Claimant requested a partial commutation of all but the last week of benefits owed pursuant to the life expectancy table adopted in agency rule 876 IAC 6.3. Iowa Code section 85.48 provides:

> 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.

Agency rule 876 IAC 6.3 provides a life expectancy table that is to be used in determining the amount to be paid a claimant in commutation proceedings. Rule 6.3 provides, "The life expectancy is determined by taking the age of the person, set forth in the 'age' column and comparing it to the 'weeks' column, which indicates the weeks an individual at the age indicated will be expected to continue to live." The Commissioner's adoption of agency rule 876 IAC 6.3 provides a presumption of life expectancy and makes the number of weeks owed claimant under his permanent total disability award definitely determinable.

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.

In determining whether the commutation is in the best interests of claimant, this agency cannot act as a conservator and disregard claimant's desires and reasonable plans just because success of the plans is not assured. Diamond, 256 Iowa 915, 129 N.W.2d 608 (1964). The Dameron court went on to state that a request for commutation should be approved unless the potential detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation. Dameron, 339 N.W.2d at 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 Rule of Appellate Procedure 6.14(6).

In my factual findings, I recited and weighed the relevant legal factors to be considered in determining whether the requested partial commutation is in claimant's best interest. Having found that the requested commutation is in claimant's best interest, I conclude claimant carried his burden of proof and further conclude that the partial commutation requested should be granted. Iowa Code sections 85.45; 85.48.

ORDER

THEREFORE, IT IS ORDERED:

The review-reopening and partial commutation decision filed on November 22, 2017 is reversed.

Defendants' original notice and petition for review-reopening is denied.

Claimant's original notice and petition for partial commutation is granted.

Defendants shall pay a lump sum of the commuted benefits for all of claimant's remaining lifetime benefits, except for the final week of his life expectancy, utilizing 876 IAC 6.3.

Benefits shall be commuted using the weekly rate of five hundred eighty-two and 81/100 dollars ($582.81).

Defendants shall be entitled to a discount rate on the commuted benefits pursuant to Iowa Code section 85.47 and Iowa Code section 535.3.

The parties shall cooperate to calculate the applicable value of the commuted benefits.

If the parties cannot reach an agreement on the commuted value, they should file a request for appointment of a financial expert to calculate the value of the partial commutation with the expense of that financial expert to be assessed as a cost against whichever party(ies) presented inaccurate calculations of the commuted value.

Claimant shall remain entitled to causally related medical expenses pursuant to Iowa Code section 85.27.

Signed and filed this 1st day of April, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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