

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID VIDAL,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

FILED

JAN 12 2016

WORKERS COMPENSATION

File No. 5035385

REVIEW-REOPENING

DECISION

Head Note No.: 2905

STATEMENT OF THE CASE

This is a review-reopening proceeding of a prior decision from this agency. The parties seek to review-reopen a March 1, 2012, arbitration decision, which was summarily affirmed by the Iowa Workers' Compensation Commissioner on April 23, 2013.

In the underlying arbitration proceeding the parties stipulated that Mr. Vidal sustained a compensable injury to his right upper extremity on December 8, 2009. There was a dispute as to whether defendant was responsible for the claimant's right shoulder. In the March 1, 2012, arbitration decision, another deputy workers' compensation commissioner concluded that Mr. Vidal's right shoulder was related to the December 8, 2009, work injury. The deputy further concluded that as a result of the December 8, 2009, work injury he was entitled to a 65 percent industrial disability award. Defendants appealed the arbitration decision, which was then affirmed on appeal.

On January 12, 2015, defendant filed a review-reopening, alleging a change of condition and seeking a decrease in claimant's permanent disability award. On September 3, 2015, claimant filed a review-reopening, alleging a change of condition and seeking an increase in his permanent disability award. The two petitions were consolidated and came on for hearing before the undersigned on October 20, 2015, in Des Moines, Iowa.

Claimant, David Vidal, was the only witness who testified live at trial. The evidentiary record also includes claimant's exhibits 1-12 and defendant's exhibits A-D. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations

are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations. Claimant requested an interpreter for the hearing. Evelyn Rudich was the interpreter provided by defendant.

The parties requested the opportunity for post-hearing briefs which were submitted on November 9, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant has sustained a change of condition warranting an award of additional or less permanent disability benefits than those ordered by the March 1, 2012, arbitration decision and the April 23, 2013, appeal decision.
2. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

In the underlying action, another deputy workers' compensation commissioner concluded that Mr. Vidal sustained injury to his right upper extremity and right shoulder as a result of the December 8, 2009, work injury. Claimant was awarded a 65 percent industrial disability. Defendant contends that there has been a change in Mr. Vidal's condition which warrants a decrease in his industrial disability. Specifically, defendant contends that since the time of the award Mr. Vidal has undergone surgery for his right shoulder, which has improved his condition. As previously noted, claimant has also filed a petition for review-reopening. Mr. Vidal contends that he has sustained a change of condition which warrants an increase in his award. Specifically, he is alleging that he now has a mental component to his injury and is entitled to an increase in his industrial disability award.

In the underlying action, the final agency decision found Dr. Bansal's medical conclusions to be the most credible. (Exhibit 9, page 125) With regard to Mr. Vidal's December 8, 2009, work injury, the arbitration decision established Mr. Vidal's permanent restrictions for his right hand were no lifting greater than 5 pounds with his right hand and no repetitive pushing, pulling, twisting, or gripping with the right hand. (Ex. 9, p. 121) Mr. Vidal's permanent restrictions for his right shoulder were found to be no lifting greater than 20 pounds; no repetitive lifting greater than 10 pounds; no pushing or pulling greater than 50 pounds; and no repetitive pushing or pulling. (Ex. 9, p. 121)

After Tyson discontinued its appeal process, it conceded the work-related nature of Mr. Vidal's right shoulder and initiated care with Brian D. Johnson, M.D. Mr. Vidal

underwent an MRI and was diagnosed with right shoulder impingement syndrome with tendinosis; no retracted full thickness tearing and right shoulder biceps tendinopathy. (Ex. 1, p. 1) Subsequently he was treated conservatively with injections, restricted activities, physical therapy, and home exercises. The conservative treatment provided temporary relief. However, ultimately the conservative treatment was not successful. (Ex. 1, pp. 1-18)

On May 22, 2014, Dr. Johnson operated on Mr. Vidal's right shoulder. The post-operative diagnosis was: right shoulder impingement syndrome, biceps tendinopathy from superior labral tear, and superior and anterior labral tearing. (Ex. 3, p. 40)

Following surgery, Mr. Vidal began physical therapy. According to the therapy notes, on June 2 and June 4, 2014, he had full, pain-free passive range of motion in his right shoulder. By June 6, 2014, Mr. Vidal reported that he was feeling really good and had no pain in his shoulder. These positive reports continued through June 13, 2014. At that point Mr. Vidal reported he was leaving for Mexico for 4 weeks. (Ex. 12, pp. 153-163)

When Mr. Vidal returned from Mexico he reported a setback, which was attributed to an exacerbation of underlying scar tissue causing inflammation and discomfort and mild adhesive capsulitis. On July 30, 2014, Kelley M. Voss, PA, a physician's assistant in Dr. Johnson's office, stressed the importance of physical therapy and home exercises to Mr. Vidal. He was also given an injection, which was effective in relieving the discomfort in his right shoulder. Mr. Vidal also resumed physical therapy. He was released to light duty work with only minimal overhead activity. (Ex. 1, pp. 25-28)

Mr. Vidal returned to Voss on September 10, 2014. The notes indicate that he had been working aggressively in physical therapy and his range of motion had improved, but he continued to have pain in the medial scapular border and some issues with trigger point tenderness. Voss noted that Mr. Vidal was doing much better since the booster injection. He was released without restrictions for his right shoulder. He was to follow-up in three months or sooner if he had problems. (Ex. 1, pp. 30-32)

On December 17, 2014, Mr. Vidal returned to see Dr. Johnson. According to the clinical notes, Mr. Vidal was doing very well. Mr. Vidal was better than he was prior to the surgery and he was glad he had the surgery. The notes indicate that his shoulder was much better, but not perfect. Mr. Vidal still experienced some occasional pain. He also noted some ongoing spasms in the back of his shoulder along the medial border of his shoulder. Dr. Johnson opined that because he had good motion and strength he did not require any restrictions for his right shoulder. Dr. Johnson noted that he did have some mild weakness in his right hand. Dr. Johnson placed Mr. Vidal at maximum medical improvement (MMI) and said he would see him on an as-needed basis. He

indicated it was possible that Mr. Vidal may need a booster injection at some point in the future. (Ex. 1, pp. 33-35)

Claimant has not requested any additional treatment since the December 17, 2014, visit with Dr. Johnson. At hearing, Mr. Vidal testified that at that appointment Dr. Johnson told him he had nothing further to offer him. Mr. Vidal also testified that he does not agree with the doctor's opinion of no restrictions for his right shoulder because he continues to have significant pain in his shoulder when he moves it. (Testimony)

On April 24, 2015, Dr. Bansal performed a second independent medical evaluation (IME). (Ex. 5) The first IME was performed on October 21, 2010. At that time, Dr. Bansal assigned 11 percent whole body impairment for the right shoulder injury. (Ex. 10, p. 171) There was some implication by Dr. Bansal that his opinions would change if Mr. Vidal had further treatment. (Ex. 9, p. 121) According to Dr. Bansal, the additional treatment that Mr. Vidal received resulted in a reduction in impairment. At the April 2015, IME Dr. Bansal assigned 4 percent whole body impairment for the right shoulder injury. Dr. Bansal also modified the permanent restrictions for his right shoulder. As of April 2015, Dr. Bansal felt appropriate restrictions were no lifting greater than 35 pounds, no repetitive lifting greater than 20 pounds, no overhead lifting or table to floor lifting more than 5-10 pounds, and no pushing or pulling more than 75 pounds. (Ex. 5)

With regard to Mr. Vidal's right hand and wrist, Dr. Bansal noted ongoing significant grip strength weakness. He measured 20 percent upper extremity impairment and his restrictions for his right hand remained the same or very similar. (Ex. 5, p. 76) At hearing, Mr. Vidal testified that his right hand/wrist had not improved since the 2011 arbitration hearing. (Testimony)

After reviewing all the evidence and listening to the testimony, I find that since the time of the arbitration hearing Mr. Vidal has had a physical change of condition. Specifically, since the time of the arbitration decision he has received extensive treatment, including surgery, for his right shoulder. The additional treatment has resulted in an improvement in his shoulder condition. The improvement in his shoulder condition is evidenced by several facts. Following surgery, the treating physician has released him without any restrictions for his right shoulder. (Ex. 1, pp. 33-35) Mr. Vidal's testimony demonstrates that the range of motion in his arm has improved. (Testimony) Dr. Bansal, the IME physician selected by claimant, has stated that his functional impairment has decreased. Furthermore, Dr. Bansal has lessened the restrictions he placed on Mr. Vidal; this demonstrates that Mr. Vidal is physically capable of doing more with his shoulder. (Ex. 10, p. 172; Ex. 5, p. 76) Defendant has carried its burden of proof to show by a preponderance of the evidence that Mr. Vidal has sustained a physical change of condition.

We now turn to claimant's allegation that he sustained a mental injury which is a sequela to the work injury. Mr. Vidal alleges that his onset of depression coincided with

his post-surgery setback. He testified that he developed depression approximately two months following his May 2014, shoulder surgery. Mr. Vidal argues this coincides with the setback that was noted in the July 29, 2014 clinical notes. (Ex. 1, pp. 25-28) Claimant testified that he treated for his depression with David R. Archer, M.D., his personal physician.

On August 8, 2014, Mr. Vidal saw Dr. Archer. According to the clinical notes, claimant reported an onset of depressive symptoms approximately six weeks ago; six weeks prior would be around June 28, 2014. He testified that he was depressed because he was not able to do the things that he used to do before because of his hand and shoulder injury. (Testimony) Dr. Archer assessed him as having depressive disorder probably related to his shoulder problem, rehab, and return to work issues. He was prescribed citalopram and temazepam. (Ex. 4, pp. 43-44)

Mr. Vidal saw Dr. Archer again on August 24, 2014. Dr. Archer noted that his depression symptoms remained in remission. (Ex. 4, pp. 45-46)

Mr. Vidal saw Dr. Archer again on September 5, 2014. According to the clinical notes he was there for depression and a foot drop examination. Evidently, Mr. Vidal had a history of post-polio syndrome and he felt his left foot drop was getting worse and starting to interfere with his gait. Dr. Archer's assessment was depression, post-polio syndrome involving the left lower leg. (Ex. 4, pp. 47-48) Dr. Archer saw him again at the end of September for follow-up on his post-polio syndrome. At that time, Dr. Archer noted Mr. Vidal's insomnia was in remission. (Ex. 4, pp. 49-50)

Mr. Vidal returned to Dr. Archer on November 11, 2014 for headache and neck ache exam. Dr. Archer assessed him with neck strain and cervical vertigo. The doctor ordered an MRI of his neck, which was carried out on November 14, 2015. (Ex. 4, pp. 51-59)

Dr. Archer saw Mr. Vidal again on December 20, 2014 and reported that his depression was not improving. He stopped his Restoril because he said it made his depression worse. He had also stopped taking pravastatin due to itching. He reported that his right hand was very painful, worse than his shoulder. He also complained of pain and tightness in his neck. Mr. Vidal was told he has arthritis in his neck and he is uncertain what pain medications he could take. Dr. Archer's assessment was cervical degenerative disc disease, hyperlipidemia, and depression. Dr. Archer prescribed fluoxetine. (Ex. 4, pp. 60-61)

Mr. Vidal returned to Dr. Archer on January 22, 2015, with upper respiratory symptoms. Dr. Archer assessed him with acute pharyngitis and sinusitis with post-nasal drip. Mr. Vidal also requested a refill of tramadol for his post-polio syndrome, neck and leg pain. He was prescribed antibiotics. (Ex. 4, pp. 62-63)

On July 24, 2015, Mr. Vidal was seen at Dr. Archer's office by Pamela S. Claussen, R.N., for refills of his medications and for right shoulder pain. The assessment at that time was shoulder pain, depression, and hyperlipidemia. (Ex. 4, pp. 64-67)

At his attorney's request, Mr. Vidal saw Catalina D. Ressler, Ph.D., for an independent psychological evaluation on August 14, 2015. She conducted her examination in Spanish. She did not administer a formal assessment to Mr. Vidal because he is illiterate and she felt administering a psychological assessment would not be adequate. She believed Mr. Vidal was suffering from major depressive disorder that was recurrent and mild. She opined that from a psychological perspective she did not feel that his current limitations were permanent. Rather, she believed that his limitations would only prevail to the extent that his depressive symptoms persisted. Dr. Ressler was asked for her opinion regarding causation in this matter. She stated, "I do believe that there is a causal connection between Mr. Vidal's 12/08/2009 injury to his right arm and right shoulder and his major depressive disorder. The injury is a substantial factor mediating Mr. Vidal's depression." (Ex. 6, p. 87) Unfortunately, Dr. Ressler does not provide us with her rationale for her opinion. Furthermore, it is not clear from the report if Dr. Ressler was aware of other factors in Mr. Vidal's life which may or may not have contributed to his symptoms. For example, it is not known if Dr. Ressler was aware of Mr. Vidal's post-polio condition and his issues with altered gait. It is also not known if Dr. Ressler was given his history of cervical spine problems. Even if she was aware of these other conditions, her report fails to explain if or how these factors affected his depressive symptoms. I find that Dr. Ressler's opinions are not well-reasoned and appear to be based on an incomplete history. Therefore, I do not find the opinions of Dr. Ressler to be persuasive. (Ex. 6)

On September 15, 2015, claimant was seen by Rosanna M. Jones-Thurman, Ph.D. for a psychological evaluation at the request of the defendant. There was a professional interpreter present during the entire interview. The interpreter read the Spanish version of the MCMI-III to Mr. Vidal and Mr. Vidal indicated that he understood the questions. With regard to Mr. Vidal and his right shoulder injury, Dr. Jones-Thurman stated:

Subsequently, he reports that he has depression as a result of those problems although certainly a record review gives a very mixed picture of this. He told the surgeon he was glad he had the surgery and felt much better. It does not seem to make sense that as his pain and functioning improved his depression worsened. If his depression was due to pain and injury then he should have noted significant mental health issues from 2009-2014. . . .

The examiner would respectfully disagree that the work injury has resulted in a major depressive episode. Mr. Vidal Sanchez may have some mild episodes of depression or anxiety at times; however he

appears to have a great deal of difficulty with somatoform problems and tends to convert psychological issues into physical complaints.

(Ex. A, p. 14)

Dr. Jones-Thurman offered the diagnosis of somatoform disorder with periods of adjustment disorder with anxiety and depression. (Ex. A, p. 15)

On September 28, 2015, Dr. Archer had a phone conversation with defense counsel. As a result of that conversation, Dr. Archer sent a missive to defendant's attorney wherein he stated:

I have been the primary care provider for David Vidal Sanchez since about 2009. I had treated him for depression with commonly prescribed anti-depressant medication. The last time I saw him for this was August of 2014 and he was in remission at that time. At no time, including currently, have I felt that the depression condition or symptoms warranted releasing Mr. Vidal Sanchez from work or that depression specifically required work restrictions. I do not believe that the depression condition is causally related to the December 2009 shoulder injury or trigger fingers. I have reviewed the psychological reports of Dr. Catalina Ressler and Dr. Rosanna Jones-Thurman. I concur with the opinion set out by Dr. Jones-Thurman's report that he does have depression symptoms but that they are not work related. Notably, I'm not sure why his condition would worsen as his physical condition improved. I specifically concur with the opinion of Dr. Jones-Thurman that "Mr. Vidal Sanchez may have some mild episodes of depression or anxiety at times. However, he appears to have a great deal of difficulty with somatoform problems". In support of this opinion, I would direct your attention to the results of my December 8, 2011 Social Security Disability examination, I specifically disagree with the assertion by Dr. Ressler that "There is a causal connection between Mr. Vidal's December 8, 2009 injury to his right arm and right shoulder". I disagree with Dr. Ressler that Mr. Vidal should have work limitations or restrictions.

(Ex. C, p. 21)

Like, Dr. Jones-Thurman, Dr. Archer does not see a link between claimant's depressive symptoms and his improved physical condition.

At the review-reopening hearing Mr. Vidal testified that he does not feel he is physically capable of returning to work due to his permanent restrictions for his right hand/wrist and right shoulder. He also felt that his depression affected his concentration and that would also prevent him from working.

The only medical provider who treated Mr. Vidal for his depressive symptoms was his family physician, Dr. Archer. Dr. Archer does not causally relate the condition to the work injury. Claimant's IME psychologist, Dr. Jones-Thurman does causally relate the depression to the work injury. However, for the reasons stated above, I have found that her opinions are flawed and not persuasive. Furthermore, Dr. Ressler's opinion does not fit with the overall medical picture. As previously noted, I found that claimant did sustain a physical change of condition which actually resulted in an improvement of his right shoulder condition. Mr. Vidal's depression seems to have developed after his right shoulder surgery. This is at a time when the clinical notes indicate that his physical condition had improved. Dr. Ressler fails to explain how his depression could be related to his improved physical condition. I find that claimant has failed to carry his burden of proof to show that any depressive symptoms he may have are related to the December 8, 2009 work injury. Thus, I find that the preponderance of the evidence does not support his claim that he sustained a change of condition as the result of mental sequela. Claimant has failed to carry his burden of proof.

Having found that claimant has sustained a physical change of condition, we now turn to whether the 65 percent industrial disability award should be modified. In other words, has defendant shown that claimant has an increase in his earning capacity that would warrant a decrease in his permanency benefits?

At the review-reopening hearing Mr. Vidal testified that he does not feel physically capable of returning to work due to the permanent restrictions he has for his right hand/wrist and right shoulder. There is no medical evidence in the record to show that Mr. Vidal has had any change of condition with regard to his right hand/wrist since the time of the arbitration hearing. I find that claimant's right hand/wrist condition has not changed since the time of the arbitration award. With regard to his right hand/wrist his restrictions remain unchanged. His restrictions are: no lifting greater than 5 pounds with his right hand and no repetitive pushing, pulling, twisting, or gripping with the right hand. (Ex. 9, p. 121)

With regard to Mr. Vidal's right shoulder injury, I find that his restrictions and his functional impairment have changed. In the present case, Dr. Bansal is the only physician who evaluated Mr. Vidal before and after his shoulder surgery. He is the only one who evaluated and/or addressed permanent impairment and permanent restrictions before and after the surgery. Dr. Bansal's opinions were found to be the most credible in the underlying arbitration decision. I find Dr. Bansal's opinions regarding impairment and restrictions to be persuasive. I find that as a result of the right shoulder injury, Mr. Vidal has sustained 4 percent impairment to his body as a whole. I also find that as a result of the right shoulder injury his permanent restrictions are: no lifting greater than 35 pounds, no repetitive lifting greater than 20 pounds, no overhead lifting or table to floor lifting more than 5-10 pounds, and no pushing or pulling more than 75 pounds. (Ex. 5)

At the time of the review-reopening, Mr. Vidal was 55 years of age. His formal education consists of schooling in Mexico until the 3rd grade. He testified that he does not know how to use a computer, nor does he know how to type. Since the arbitration hearing he has not received any education nor have his English skills improved. (Testimony)

At the review-reopening hearing Mr. Vidal testified about his work experience. His work history is limited to building fences for livestock in Mexico. He testified he does not believe he could do this type of work anymore because it requires repetitive pushing, lifting, and requires him to bend downward to get posts into the ground.

When he lived in Pennsylvania, he worked at a mushroom plant. He said he is no longer physically capable of performing this job because it requires lifting 50-pound boxes of mushrooms.

His work history also includes working at a fruit farm. He testified he can no longer perform this job because it requires him to lift 50 to 75 pounds of fruit. Also, he does not believe he is capable of performing the required lifting, pulling, twisting, and turning of bags.

Mr. Vidal also has experience working with horses. He did this while working at a race track in Pennsylvania. He testified that he is not physically capable of performing this job because it requires lifting 50 pounds and pulling little carts.

Mr. Vidal's work history includes working for IBP. At IBP, he removed fat from pork loins. To do this he used a wizard knife in his right hand; he does not believe he could do this now. Also that job required repetition pushing, pulling, and twisting with his wrist. He testified he could not perform those tasks either.

While living in New Orleans, Mr. Vidal performed construction work. However, he testified that he could no longer do this type of work because it required him to lift 100 to 150 pounds.

Mr. Vidal worked as an electrician's assistant in Tennessee. He could not perform that job now due to the heavy lifting that is required. He testified he had to lift and carry rolls of wire or cable that weighed 100 to 150 pounds each.

Mr. Vidal testified that he is no longer capable of performing any of his prior jobs, including the jobs he performed for Tyson.

As previously noted, I found Mr. Vidal's restrictions for his right hand/wrist are no lifting greater than 5 pounds with his right hand and no repetitive pushing, pulling, twisting, or gripping with the right hand. (Ex. 9, p. 121) For his right shoulder his restrictions are no lifting greater than 35 pounds, no repetitive lifting greater than 20 pounds, no overhead lifting or table to floor lifting more than 5-10 pounds, and no pushing or pulling more than 75 pounds. (Ex. 5)

I acknowledged that while claimant's employment opportunities may be limited, he has not applied for a single job since the time of the arbitration hearing. After the arbitration, hearing claimant did apply for and was awarded social security disability (SSD) benefits. (Ex. 8) At his deposition, claimant testified that he receives approximately \$929.00 per month in SSD benefits. Additionally, he receives weekly workers' compensation benefits in the amount of \$584.29. Thus, claimant receives over \$41,000.00 per year in workers' compensation and SSD benefits. Claimant noted that a portion of his workers' compensation benefits go to his attorney for his legal services.

Although claimant's shoulder condition has improved and he is physically capable of performing more strenuous activities, I cannot look at his shoulder condition in isolation from his right hand/wrist condition, which is all part of the same date of injury. Mr. Vidal's right hand/wrist condition remains unchanged. Because claimant is still restricted to no lifting greater than 5 pounds with his right hand, the fact that he can now lift 35 pounds instead of 20 pounds with his right shoulder does not change his earning capacity. In light of the wrist/hand restrictions, the preponderance of the evidence does not show that the change in his shoulder condition has increased his earning capacity. Considering Mr. Vidal's age, educational background, employment history, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that his earning capacity has not changed since the time of the arbitration proceeding. There has not been the requisite showing that his earning capacity has changed due to the improvement in his right shoulder. Therefore, I find there has not been a change in claimant's earning capacity and his award of industrial disability should not be modified.

Claimant is also seeking an assessment of costs as set forth in Exhibit 11. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was not successful in his claim to increase his benefits, I find it is not appropriate to assess costs against the defendant. I find it is appropriate for each party to bear their own costs.

CONCLUSIONS OF LAW

Claimant and defendant have each filed a petition for review-reopening. A review-reopening proceeding is appropriate whenever there has been a change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

Upon review-reopening, the party who filed the petition 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 since the time of the initial award or settlement. 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).

The petitioning party 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).

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. 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).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined 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."

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Based on the above findings of fact, it is concluded that Tyson carried its burden of proof to show by a preponderance of evidence that Mr. Vidal sustained a change of condition. Specifically, since the time of the arbitration decision his right shoulder condition has improved. However, Tyson did not carry its burden of proof to show that Mr. Vidal's earning capacity has increased since the time of the arbitration proceeding. Therefore, I conclude that Tyson has not established entitlement to reopening, or a decrease, of Mr. Vidal's prior industrial disability award. Iowa Code section 86.14(2).

It is further concluded that Mr. Vidal failed to show by a preponderance of the evidence that he sustained a mental injury as a result of the work injury. Thus, I conclude that Mr. Vidal has not proven that he sustained a change in his condition. Claimant has not established entitlement to reopening, or an increase, of his prior industrial disability award. Iowa Code section 86.14(2).

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was not successful in his claim, I find it is not appropriate to assess costs against the defendant as set forth above. Thus, defendant shall not reimburse claimant's costs.

ORDER


THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings nor should claimant's benefits be decreased as a result of these proceedings.

Each party shall bear their own costs.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 12th day of January, 2016.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James C. Byrne
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266-1309
jbyrne@nbolawfirm.com

Timothy A. Clausen
Attorney at Law
4280 Sergeant Rd., Ste. 290
Sioux City, IA 51106-4647
clausen@klasslaw.com

EQP/srs

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.