

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH MILLER,

Claimant,

vs.

LENNOX INTERNATIONAL, INC.,

Employer,

and

ACE AMERICAN INS. CO.,

Insurance Carrier,
Defendants.

File No. 5044858.01

APPEAL

DECISION

Head Note No.: 2905, 2907

Claimant Joseph Miller appeals from a review-reopening decision filed on October 26, 2021. The case was heard on April 13, 2021, and considered fully submitted in front of the deputy workers' compensation commissioner on May 7, 2021.

On February 23, 2022, 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.

In October 2013, claimant filed a petition in arbitration seeking workers' compensation benefits for injuries to his cervical spine, right shoulder, and a mental health sequela. Claimant underwent right-sided foraminotomies at C4-5 and C5-6. Following a hearing, the deputy commissioner issued an arbitration decision on February 18, 2015, finding claimant sustained a 10 percent industrial disability, and awarding claimant 50 weeks of permanent partial disability benefits at the weekly rate of \$589.03.

Claimant filed a review-reopening petition. Following a hearing, the deputy commissioner who also presided over the first hearing issued a review-reopening decision on October 12, 2018, finding claimant had established a change of physical condition and concluding he sustained a 75 percent industrial disability. Defendants Lennox International, Inc. and Ace American Insurance Company appealed. The Iowa

Workers' Compensation Commissioner delegated authority to a deputy commissioner to enter a final agency decision in the matter. On April 5, 2019, the deputy commissioner issued an appeal decision finding claimant established a change of physical condition, but reducing claimant's industrial disability to 40 percent, based, in part, on claimant's lack of motivation to find work, and awarding claimant an additional 150 weeks of permanent partial disability benefits at the weekly rate of \$589.03.

Claimant filed a second review-reopening petition on March 13, 2020. Following a hearing, another deputy commissioner issued a review-reopening decision on October 26, 2021, finding claimant failed to establish a change of physical or economic condition and concluding claimant was not entitled to recover the cost of John Kuhnlein, D.O.'s independent medical examination under Iowa Code section 85.39. The deputy commissioner also declined to award the cost of the report under Iowa Code section 86.40 and rule 876 Iowa Administrative Code 4.33.

On appeal, claimant asserts the deputy commissioner erred in finding he did not meet his burden of proof that he has sustained a change in his physical condition or economic condition since the November 2017 review-reopening hearing. Claimant alleges the deputy commissioner erred in finding he was not entitled to recover the cost Dr. Kuhnlein's independent medical examination under Iowa Code section 85.39 or his report as a cost. Defendants aver the review-reopening decision should be affirmed in its entirety.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed review-reopening decision filed on October 26, 2021, which relate to the issues properly raised on intra-agency appeal, with my additional analysis.

Some of the findings by the deputy commissioner in the review-reopening decision were based on the deputy commissioner's findings regarding claimant's credibility. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

I affirm the deputy commissioner's finding claimant is not entitled to recover the cost of the independent medical examination or report prepared by Dr. Kuhnlein. I

affirm the deputy commissioner's findings claimant failed to establish a change of physical or economic condition, with the following additional analysis.

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Claimant contends the deputy commissioner erred in finding he failed to establish a change of physical condition because the cervical and right shoulder range of motion measurements taken by Dr. Kuhnlein and by Workwell changed between the November 2017 review-reopening hearing and the time of the April 2021 review-reopening hearing. Defendants contend the reports prepared by Dr. Kuhnlein and Workwell rely on claimant's subjective complaints and are unreliable.

Range of motion findings provide objective evidence of function. Dr. Kuhnlein's 2020 report lists his range of motion findings for claimant's cervical spine and right shoulder compared with the left shoulder. (Ex. 1, p. 4) The 2021 Workwell functional capacity evaluation report also lists the range of motion findings for claimant's cervical spine and right shoulder compared with the left shoulder. (Ex. 2, pp. 8-9) In his 2020

report, Dr. Kuhnlein noted claimant's "range of motion was generally decreased from that noted in 2017," but he did not list his earlier measurements. (Ex. 1, p. 4)

Claimant lists the alleged range of motion findings from 2017, 2020, and 2021 in his post-hearing brief. The comparison range of motion findings from Dr. Kuhnlein and Workwell from the 2017 proceeding are not contained in the record. The parties did not submit the earlier reports as exhibits in this case. The April 5, 2019 appeal decision, Joint Exhibit 2, and the October 12, 2018 public review-reopening decision do not list Dr. Kuhnlein's or Workwell's range of motion findings. The table in claimant's post-hearing brief is not evidence. I do not find claimant has established a change of condition based on Dr. Kuhnlein's or Workwell's functional capacity evaluation range of motion findings.

Claimant avers the deputy commissioner erred in failing to find he sustained a change of physical condition because his treating physician, Steven Scurr, D.O., found he cannot return to sedentary level work due to the worsening of his neck symptoms and pain. The deputy commissioner correctly found claimant sees Dr. Scurr, a family practice physician, approximately once a year and Dr. Scurr has made no changes to claimant's prescription regimen. Dr. Scurr's records do not contain any documentation regarding claimant's pain ratings over the course of his treatment, or any objective measurements concerning his alleged decreased range of motion in his neck supporting his summary conclusions. (JE 5, pp. 87-100) Like the deputy commissioner, I do not find his opinion persuasive.

Claimant contends the deputy commissioner erred in finding Dr. Kuhnlein's impairment rating remained the same between 2017 and 2020. The deputy commissioner found, "[t]here is no change in the percentage of disability arising from the 2014 injury. Dr. Kuhnlein has kept the impairment rating at 13% of the whole person and Dr. Rondinelli has issued no change." (Arb. Dec. p. 11)

In his 2020 report, Dr. Kuhnlein opined:

Mr. Miller's 13% whole person impairment for the cervical spine is unchanged.

If he has developed adhesive capsulitis, that would be a sequela to the injury. The following impairment would be provisionally assigned for administrative purposes should no further treatment be approved, or Mr. Miller decides not to participate in further treatment. Turning to Figures 16-40, 16-43, and 16-46, and when comparing the right to the unaffected left shoulder, there is a total of 4% right upper extremity impairment for deficits in range of motion. Turning to Table 16-3, page 439, this would convert to a 2% whole person impairment.

Turning to the Combined Values Chart on Page 604, when these values are combined (13% x 2%), this is a 15% whole person impairment.

(Ex. 1, p. 6) Dr. Kuhnlein's rating is "provisional," as he notes in his report. He notes he would assign the rating "[i]f he has developed adhesive capsulitis." I find Dr. Kuhnlein's provisional opinion speculative. I do not find claimant has sustained an additional two percent whole person impairment caused by the work injury.

Claimant alleges the deputy commissioner erred in finding he did not sustain a change of physical condition because his restrictions have increased and his functional ability has decreased since the November 2017 review-reopening hearing. Dr. Scurr, claimant's treating family doctor did not recommend any additional restrictions following the November 2017 review-reopening hearing. Dr. Kuhnlein's report does not differentiate the purposed need for restrictions related to claimant's cervical condition or his provisional diagnosis and function related to his right shoulder condition. I agree with the deputy commissioner's finding much of Dr. Kuhnlein's opinion and the functional capacity results rely on claimant's subjective complaints of pain and loss of function. I also agree with the deputy commissioner finding claimant's functional limitations with respect to his ability to perform activities of daily living have remained largely the same since 2017. I do not find claimant has met his burden of proof that he has sustained a change of physical condition.

Claimant avers the deputy commissioner erred in failing to prove he sustained a change of economic condition. The deputy commissioner correctly noted claimant was not working at the time of the November 2017 hearing, or at the time of the October 26, 2021 hearing. Likewise, claimant was receiving Social Security Disability Insurance benefits at the time of the November 2017 hearing and at the time of the October 26, 2021 hearing.

In support of his contention, claimant relies on an unpublished case, Mlady v. Searle Petroleum, Inc., 2011 WL 6778648, File No 5024091 (Iowa Workers' Comp. Com'n. Dec. 15, 2011). Following a review-reopening hearing, Deputy Commissioner Ronald Pohlman found Mlady sustained a change of physical and a change of economic condition in a brief opinion. Mlady v. Searle Petroleum, Inc., 2011 WL 331457, File No. 5024091 (Iowa Workers' Comp. Comm'n Feb. 3, 2011). In the original arbitration decision the deputy commissioner found Mlady had sustained an 80 percent industrial disability. Following a review-reopening hearing, Deputy Pohlman awarded Mlady permanent total disability benefits, finding Mlady's pain and physical restrictions "serve to obliterate" the limited occupational base previously available to him in "an extremely rural area of northeastern Nebraska," his recreational activities changed because he could no longer tolerate boating and fishing due to pain and discomfort, and "his inability to maintain prolonged postures renders him unemployable."

Workers' Compensation Commissioner Christopher Godfrey affirmed Deputy Pohlman's findings Mlady established a change of physical and a change of economic condition and award of permanent total disability benefits. In support of his conclusion, Commissioner Godfrey found Mlady's ability to walk and ambulate had decreased, causing him to have problems walking on uneven ground, using stairs, and walking up a hill, he had developed debilitating headaches that feel like they never go away, his ability to sleep had changed, he had lost the ability to bend, his lumbar pain had increased, and he reported the radiculopathy in his right lower extremity had extended from his knee to his foot. From a vocational standpoint, Commissioner Godfrey found after Mlady learned Searle Petroleum had terminated his employment he was unsuccessful in securing employment after applying for 13 jobs. Mlady, 2011 WL 6778648. Following an appeal to the district court, the court of appeals affirmed the commissioner's findings Mlady sustained a change of economic condition and he was permanently and totally disabled, reversed the agency's finding the permanent total disability benefits commenced as of the date of the injury, reversed the district court's award of costs associated with the independent medical examination and remanded the case for an order providing that benefits should commence as of the date of the review-reopening petition was filed. Mlady v. Searle Petroleum, Inc., No 12-2008, 2013 WL 6405393 (Iowa Ct. App. Dec. 5, 2013).

In this case, claimant offered the vocational report of Phil Davis, M.S. In May 2020, Davis opined claimant has lost 100 percent of his ability to perform physical work activities he previously performed and is precluded from engaging in greater than 90 percent of all occupations in the general labor market and economy, noting claimant had applied for "greater than 70 plus jobs located with [sic] the geographic area in which he lives." (Ex. 3, pp. 3-4) In a letter to claimant's counsel dated March 31, 2021, he modified his finding noting claimant is precluded from engaging in 100 percent of all occupations in the general labor market and economy. (Ex. 3, p. 8)

Defendants offered the vocational report of Lana Sellner, M.S. Sellner provided vocational services to claimant and opined that she believes he remains employable, even if he is limited to sedentary work. (Exs. G, pp. 25-26; H, p. 29)

The deputy commissioner noted at hearing claimant testified before the Covid 19 pandemic he received four job interviews, but no offers, and he admitted he shared his work restrictions with prospective employers. As noted by the deputy commissioner, claimant had not followed up with some job suggestions made by defendants and between December 2020 and March 2021, he applied for no jobs. Sellner documented claimant became upset when she mentioned looking for work. She relayed she provided him with 20 job leads between December 2020 and February 2021. (Ex. G, p. 25) Claimant did not provide a response regarding his job search efforts until March 21, 2021. There is no evidence he applied for any jobs between December 2020 and early March 2021. (Ex. G, p. 26) Sellner also noted claimant's response documented he made applications for duplicate jobs and earlier job leads from 2019. (Ex. G, p. 26)

I find claimant remains unmotivated to work, as evidenced by his resistance to working with Sellner and his communication with a prospective employer in March 2021. (Exs. G, H) Claimant submitted an application to TLC Associates on March 4, 2021. (Ex. G, p. 26) TLC Associates sent claimant an e-mail on March 8, 2021, requesting an interview. (Ex. G, p. 26) Claimant sent an e-mail response, as follows:

[b]efore I interview I want to make you aware of some medical issues regarding my health. I'm currently on SSDI disability rated at 100%. I have suffered a work related neck injury that has caused me to lose some use of my right hand and arm. I am not a candidate of a second operation as I was informed there was a great risk for little or no benefits. I am currently on narcotic pain medication and muscle relaxers. The side effects are loss of concentration, a weakened focus with some loss of memory. I have several restrictions lifting, sitting, standing, twisting, turning, lifting, up or down my head and range of motion in my arms and shoulders, and to number of hours I am able to work. This information I feel you needed to be aware of before you interview me.

(Ex. G, p. 25) There is no evidence TLC Associates requested any information concerning any accommodations claimant needed. Such a discussion occurs later in the process. I find claimant remains unmotivated to return to work, just as he was at the time of the 2017 review-reopening hearing.

As discussed above, I found claimant did not establish he sustained a change of physical condition from the time of the 2017 review-reopening hearing to the time of the 2021 review-reopening hearing. From a vocational standpoint, I do not find he has established his functional limitations or residual capacities have changed from the time of the 2017 review-reopening hearing. I find the deputy commissioner correctly found claimant has not established a change of economic condition with my additional analysis.


ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 26, 2021, is affirmed with the above-stated additional analysis.

Claimant shall take nothing in this proceeding.

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

Signed and filed this 10th day of March, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Robert Gainer (via WCES)