BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

REX ETTEN, Claimant, vs. IOWA GOLD DISTRIBUTING, Employer, and COMMERCE & INDUSTRY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JUN 25 2015 WORKERS' COMPENSATION File No. 5028217 APPEAL DECISION Head Note Nos.: 1108, 1804

Defendants, Iowa Gold Distributing and its insurer, Commerce & Industry Insurance Company, appeal from the review-reopening decision filed in this matter on June 19, 2014, as modified by a ruling filed on July 7, 2014. Responding to the appeal is claimant, Rex Richard Etten.

In the review-reopening decision, claimant was found to have suffered a significant change in his physical and mental condition and he was awarded permanent total disability benefits. In the original arbitration decision filed on February 8, 2010, claimant was awarded industrial disability of 45 percent. That decision was summarily affirmed on appeal and defendants did not seek judicial review.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed review-reopening decision of June 19, 2014, as modified by ruling on July 7, 2014, with the following additional analysis:

Defendants complain in their appeal brief that the hearing deputy improperly considered claimant's mental condition in this review-reopening proceeding. They point out claimant did not mention any depression problems, either in his hearing testimony or in his prior deposition testimony in this proceeding. Defendants point out that the review-reopening petition does not allege a new mental injury or condition. Consequently, they claim lack of fair notice of this condition.

Defendants' assertion of lack of fair notice concerning claimant's mental condition lacks merit. Defendants failed to raise this issue before the presiding deputy commissioner either at hearing or in their post hearing brief. Furthermore, defendants did not object at hearing to the admission into evidence of a report from the psychologist and records from the family doctor both which reference the onset of mental depression and its causal relationship to the work injury. (Review-Reopening Transcript, 1-13, Review-Reopening Hearing Report, Exhibit. 1, pages 1 & 3, Exhibit 4) A party cannot raise an issue on appeal that could have been, but was not, presented to the hearing deputy. (876 IAC 4.28(7) Even if it was properly raised on appeal, defendants' claim of lack of notice lacks merit. Claimant asserts in the post-hearing appeal brief that these reports were properly provided to defendants prior to hearing and defendant's reply brief did not challenge that assertion.

Defendants assert that claimant failed to show by a preponderance of the evidence any change in his economic and physical condition. The claim of changed economic condition was based on increased financial difficulties caused by claimant's inability to work and contribute to family income, loss of savings, the need to borrow more money, and the inability of claimant's wife to get a raise. (RR Tr., pp. 24-28) The hearing deputy rejected that claim because claimant was unemployed and experiencing financial problems at the time of the arbitration hearing. Claimant continues to argue this claim in the post-hearing appeal brief. Although I agree with the presiding deputy's rejection of this portion of the claim, claimant did not cross-appeal and lost his right to challenge on appeal the deputy's ruling on the alleged economic change of condition.

The claimed change of physical condition was based on increased pain and total loss of function in the right wrist, arm and shoulder, with a total inability to work, with increased weakness, and increased arm muscle atrophy, with new numbness in the fingers of the right hand. (RR Tr., pp. 17-22, 31) Claimant also asserted he has increased pulling or shrinking of the tendons in his right arm and an increased indentation in his shoulder. (Id.)

Claimant's and his wife's testimony as to a physical change of condition was admittedly confusing. Their descriptions of claimant's right upper extremity problems in their depositions and in their hearing testimony in this proceeding were similar to their descriptions of those problems in the arbitration proceedings. (Arb. Tr., pp.43-48, 78-81, Arb. Ex. K, pp. 28, 32-35, 42-43) At the review-reopening hearing, during cross-examination, claimant admitted the following capabilities had not changed since the arbitration hearing: physician imposed physical activity restrictions, his ability to work, his ability to lift, the hopelessness of his situation, what he can and cannot do, and the total loss of use of his right arm. (RR Tr., pp. 18, 27-31 37) No new impairment ratings are contained in this record. Claimant offered no evidence of any treatment of his work injury since the arbitration decision other than medication management by his family doctor, Kirk Kilburg, M.D., who also treats claimant's hypertension and diabetes.

However, claimant's assertion of a significant increase in his pain since the arbitration hearing and decision is supported by medical evidence showing a significant change in the pain medications prescribed by Dr. Kilburg since the arbitration proceedings. Defendants assert there has been no change in the need for pain medication as claimant has been on such medications since the injury in 2005. This assertion is incorrect.

Claimant was initially given morphine injections and other opioid medications. (Arb. Tr., p. 28, Ex. 5-1) However, all pain medications ended in late December, 2005. (Arb. Ex. 4, pp. 1-2; Ex 5, p. 1) In reporting current medications in August 2006, Dr. Kilburg listed only Toprol and Hydrochlorothiazide. These medications are for treatment of hypertension. (RR Ex. D, p. 7) In February, 2006, claimant was still not taking pain pills. (Arb. Ex. 4, p. 3) He likely had pain medications after surgery in October 2006, but that apparently ended as claimant was not taking pain medications in October 2008, when Dr. Kilburg began prescribing Meloxicam, a non-steroidal, anti-inflammatory medication for pain. (Arb. Ex. 5, p. 2) At the arbitration hearing in 2009, claimant stated he also used over-the-counter medication such as Aleve and extra strength Tylenol, but he had to limit use of those OTC medications due to stomach problems. He also was taking a prescribed pain medication at the time of the arbitration hearing, but he could not recall its name. (Arb. Tr., p. 48; Ex K, p. 35). The last record by Dr. Kilburg prior to the arbitration hearing was the office visit in October 2008, which prescribed Meloxicam. (Arb. Ex. 5, p. 2)

In March 2010, claimant was continuing to take Meloxicam. (RR Ex 1-1) However, on March 18, 2011, Dr. Kilburg discontinued the Meloxicam and prescribed Tramadol (which is now considered a narcotic). (RR Ex. 1, p. 6) On September 19, 2011, the doctor resumed the Meloxicam to be taken in conjunction with Tramodol. (RR Ex. 1, p. 9) On May 1, 2012, Dr. Kilburg changed the pain medication to hydrocodone. (RR Ex. 1, p. 15) On November 5, 2012, the doctor began a prescription for oxycodone. (RR Ex. 1, p. 19) All of these changes in medication were in response to claimant's increased pain complaints in the right upper extremity. At the review-reopening hearing, claimant testified that Dr. Kilburg is now prescribing Oxymycin for pain. He stated that the Oxycodone was not working and he requested a different medication and was given an "oxy" medication with Tylenol. (RR Tr., p. 21) This cannot be correct because Oxymycin is an antibiotic according to my internet search. The last record in evidence authored by Dr. Kilburg is a visit on November 5, 2012, where the doctor prescribed Oxycodone-Acetaminophen. Acetaminophen is the generic name of Tylenol. This is the same medication Dr. Kilburg began in November 2012. Possibly claimant is referring to Oxycontin, but that would only be a guess. Claimant testified that he was told that the pain medications had to be changed because his body became used it and it was no longer working. (RR Tr., pp. 20-21) It is clear that since the arbitration proceeding, claimant began taking strong opioid medications prescribed by his physician in response to his increased pain from the work injury.

Defendants also complain in this appeal that the hearing deputy found a new injury or condition of untreated mental depression which contributes to claimant's industrial disability, despite claimant's testimony that he had no new diagnosis since the arbitration decision. (RR Tr., p. 31) Apparently, the deputy felt claimant misunderstood the question and I agree. In a report after his examination of claimant on August 4, 2010, Harlan Stientjes, Ph.D., a clinical psychologist, diagnosed claimant as suffering from an untreated major depressive disorder after his evaluation of claimant in 2010 due to residual pain from the work injury. (RR Ex. 4, p. 3) Dr. Stientjes went on to opine that claimant's prospects for sustained fulltime employment are poor. Id. Claimant's family doctor has been the only physician to treat claimant's pain from his work injury since the arbitration proceeding. In March 2010, Dr. Kilburg noted the onset of depression symptoms which he attributes to the work-related arm problems. (RR Ex. 1, pp 1 & 3). The opinions of these providers as to claimant's condition after the arbitration hearing and decision are essentially unrebutted.

Defendants assert that Dr. Stientjes did not provide a causation opinion. I disagree. Even though Dr. Stientjes doesn't specifically address causation, his causation opinion is clearly inferred in the report. Defendants also point out that there was no reference to depression symptoms in the testimony from claimant and his wife in this proceeding. Indeed, the only testimony from claimant and his spouse which does discuss depression is their hearing testimony at the arbitration hearing. (Arb. Tr., pp. 51, ln 1 & 78, ln 18) However, there was no medical evidence submitted in the arbitration decision reporting the onset of depression. The first diagnoses of depression appeared after the arbitration proceeding. The record in this case supports a finding that a pre-existing depression condition was significantly aggravated by a change in symptomology since the arbitration proceedings.

Therefore, I agree with the presiding deputy's conclusion that claimant's increased pain which has led to dependence on opioid medications and claimant's mental depression has resulted in permanent total disability.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of June 19, 2014, as modified by a ruling filed July 7, 2014, is AFFIRMED.

The defendants pay claimant permanent total disability benefits at a rate of five-hundred ninety and 56/100 dollars ($590.56) commencing the date his review-reopening petition was filed, October 23, 2012.

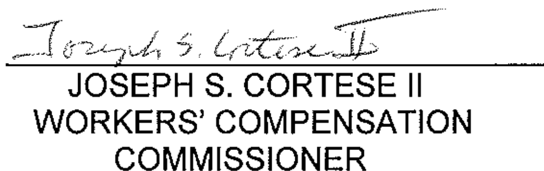
Defendants shall have credit for two-hundred twenty-five (225) weeks of permanent partial disability benefits they have previously paid at the rate of five-hundred ninety and 56/100 dollars ($590.56).

Defendants shall reimburse claimant the cost of the filing fee and service costs pursuant to 876 IAC 4.33(3) and (7).

Defendants shall pay any past due amounts in a lump sum with interest.

Defendants shall file subsequent reports of injury as required by this agency.

Signed and filed this 25th day of June, 2015.



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