BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES HESSENIUS, Claimant, vs. GREAT PLAINS ORTHOTICS & PROSTHETICS, INC., Employer, and UNITED FIRE & CASUALTY CO., Insurance Carrier, Defendants.	File No. 5044228 APPEAL DECISION Head Note No: 3303.20

FILED
FEB 14 2019
WORKERS' COMPENSATION

STATEMENT OF THE CASE

On June 5, 2015, a deputy workers' compensation commissioner issued an arbitration decision finding claimant James Hessenius to be permanently and totally disabled from August 24, 2010, forward. The applicable weekly benefit rate was determined to be one thousand three hundred and 00/100 dollars ($1,300.00).

On June 26, 2015, defendants Great Plains Orthotics & Prosthetics, Inc., employer, and its insurer, United Fire & Casualty Co., filed a petition for review-reopening. On January 11, 2016, claimant filed a petition for partial commutation requesting all but the final week of benefits be commuted.

The two petitions were combined and proceeded to hearing on October 28, 2016. On March 23, 2017, the deputy commissioner issued the review-reopening decision and decision upon petition for partial commutation. The decision denied defendants' petition for review-reopening and it awarded a portion of the partial commutation sought by claimant in an amount equal to the amount needed to pay off claimant's home mortgage of approximately one hundred thousand dollars ($100,000.00) and attorney fees related thereto, at the appropriate discounted rate. Also, the deputy ordered the commuted benefits to be taken from the "front end" of claimant's permanent total disability award, such that claimant's weekly benefits would cease upon payment of the lump sum amount and would then restart approximately 115 weeks thereafter.

On April 3, 2017, claimant filed a motion for rehearing, which was denied on April 18, 2017.

On May 4, 2017, claimant filed his notice of appeal of the decision granting only a portion of the partial commutation, rather than the full amount sought in the petition for partial commutation.

Defendants did not appeal the decision denying their petition for review-reopening.

Claimant argues on appeal that the entire partial commutation as requested in his petition is in his best interest and claimant argues the deputy commissioner's decision should be reversed. Claimant further argues that the deputy commissioner lacked authority to grant only a portion of the partial commutation when no party requested such relief. Claimant further argues in the alternative that if the deputy commissioner's award is affirmed that the portion of the partial commutation awarded should be taken from the "back end" and not from the "front end" of his permanent total disability award.

Defendants argue on appeal that the deputy commissioner's decision should be affirmed in its entirety and that claimant failed to show the entire partial commutation he sought was in his best interest. Defendants further argue that the deputy has the authority to grant only a portion of the partial commutation, and that the partial commutation may be taken from the "front end" of the permanent total disability benefits.

ISSUE ON APPEAL

Whether it is in claimant's best interest to receive the full amount of the partial commutation of his prior permanent total disability award as requested in claimant's petition for partial commutation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I find and conclude as follows:

At the time of hearing on the petition for partial commutation, claimant was 64 years old. He had been married to his wife Shareen for 44 years. (Hearing Transcript p. 8) Claimant has two adult children who are financially independent. (Tr. pp. 8-9; Joint Exhibit 2, p. 2)

After completing high school, claimant worked in the plumbers and pipefitters union as a journeyman, until an injury in 1983. (Tr. p. 9) Claimant received a workers' compensation settlement as a result of that injury and used those funds to go to college. He obtained a bachelor's degree and became a certified prosthetist and orthotics

technician. (Tr. p. 9) He worked in that field for 25 years, until he sustained the work injury on January 25, 2010, which is at issue in this matter. (Tr. p. 10)

As a result of the January 25, 2010, work injury, claimant was awarded permanent total disability in the arbitration decision issued on June 5, 2015, as stated above.

Claimant now seeks a reversal of the deputy commissioner's decision to grant only a portion of his requested partial commutation. Claimant seeks an award on appeal of all but the final week of benefits as requested in his petition for partial commutation.

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 benefit 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.

Iowa Code section 85.45 provides that a commutation may be ordered when it 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.

As noted above claimant was 64 years old at the time of the hearing. Claimant's education includes a bachelor's degree and board certification as a prosthetist and orthotics technician. Claimant's intelligence and education weigh in favor of an award of partial commutation.

Claimant's underlying injury involved his left shoulder, which led to multiple surgeries, eventual shoulder replacement and additional revision surgery thereafter. Claimant was left with "problems that continue to increase." (Tr. p. 11) Claimant's left shoulder condition caused severe pain requiring narcotic medication. (Joint Exhibit 4, p. 10) He was referred to the QLI Program in Omaha, Nebraska, for the purpose of pain management through modalities other than narcotic pain medication. (Jt. Ex. 4, pp. 8-9) He was discharged from the program on May 15, 2015, without narcotic medication, but he remained on gabapentin and salsalate. (Jt. Ex. 4, p. 9) However, his shoulder pain has continued to worsen with time. (Jt. Ex. 4, p. 9) In his independent medical evaluation (IME) report of May 27, 2016, Mark Taylor, M.D., stated there has been no improvement of claimant's left shoulder condition and no improvement in claimant's restrictions. (Jt. Ex. 4, pp. 10-11)

On July 25, 2016, Michael March, Ph.D., a psychologist, stated he continued to provide treatment to claimant for depression caused by the work injury, and claimant's diagnosis has not changed. Dr. March stated claimant's pain and depression continue to affect his motivation, focus, endurance, cognition and concentration. (Jt. Ex. 12, p. 75)

However, claimant's mental and physical condition did not appear to negatively impact his ability to understand his personal financial matters. Brian Murphy, an investment advisor, met with claimant on July 12, 2016, and stated claimant "appeared alert and sound of mind. Throughout the interview, it became clear to me that he is very capable of making his own decisions concerning his finances and has a significant amount of experience doing so." (Ex. 2, p. 2) Claimant's physical and mental condition appear stable and weigh in favor of an award of partial commutation.

Claimant's investment experience referred to by Mr. Murphy above, includes accumulating over $500,000.00 in his 401(k) account, which he has invested with the assistance of a financial advisor. (Tr. pp. 75-76, 80) Claimant's spouse also has a 401(k) account in the amount of about $244,000.00. (Tr. p. 75) Claimant and his spouse have a savings account with a balance of $25,000.00. (Tr. p. 76) They own their home, which has an estimated value of $224,000.00, with a mortgage balance of $100,000.00. (Jt. Ex. 2, p. 3; Jt. Ex. 16, p. 105) Claimant and his spouse own five vehicles, including a Corvette, a 1967 Camaro, and an RV. (Tr. pp. 37, 45, 48, 71, 84) The mortgage on the home is claimant's only debt. (Tr. p. 72)

Claimant's investment experience, accumulation of assets and limited debt show his ability to make wise financial choices and not overspend, and those factors weigh in favor of an award of partial commutation.

Claimant's family circumstances include a long-term marriage of 44 years and two adult children who are not financially dependent on him. His family circumstances suggest a stable home and this stability, along with the lack of financially dependent children, weighs in favor of granting the partial commutation.

Claimant's income includes: workers' compensation benefits of $866.67 per week; monthly pension from the Pipefitters Union of $261.00; Social Security Retirement benefits of $2,465.00 per month; claimant's spouse's Social Security Retirement benefits of $1,153.00 per month; Roth IRAS distribution of $1,200.00 per month. (Tr. pp. 74-76) Claimant's income totals about $8,545.68 per month. (Tr. p. 77)

Claimant's monthly expenses are about $6,671.55. (Tr. p. 78) He is able to pay his monthly expenses from his current income and has never had to borrow money to do so. (Tr. p. 71)

Claimant has never filed for bankruptcy protection and does not gamble. (Tr. p. 71)

Claimant has limited his monthly spending to an amount less than his monthly income, which weighs in favor of demonstrating his ability over time to control his spending.

In determining whether the commutation is in the best interest 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). 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.

In this case, claimant has expressed a desire to receive a partial commutation of all but the last week of benefits under the award of permanent total disability. Claimant testified his intent upon receipt of the commuted funds is to pay off his home mortgage and conservatively invest the remainder to provide a stream of income and to provide financial security for his spouse in the event of his untimely death. (Tr. pp. 79-82)

Claimant has spent time considering "different investments," and has stated he wants to "stay very, very conservative." (Tr. p. 79) Claimant spoke to State Farm financial planners who recommended an annuity and low-risk mutual fund combination investment strategy. (Tr. pp. 79-80) Claimant received a client portfolio report detailing the recommendations from State Farm. (Jt. Ex. 18)

Claimant also met with Mr. Murphy a financial advisor, to discuss the possible partial commutation. (Jt. Ex. 2) Mr. Murphy concluded based on claimant's circumstances of a "solid marriage, grown children who require no financial assistance and the ability to make life decisions, James is an excellent candidate for a partial commutation." (Jt. Ex. 2, p. 2) Mr. Murphy noted claimant and his spouse have saved money throughout their working lives and their only debt is on their home. (Jt. Ex. 2, p.

3) He reiterated claimant's desire to pay off his mortgage, which would reduce his monthly expenses. Mr. Murphy also noted that although claimant would cease to receive workers' compensation benefits, "the income produced from their investments would greatly increase." (Jt. Ex. 2, p. 3) Mr. Murphy stated claimant currently invests with State Farm and would intend to invest the partial commutation funds with them as well. He noted claimant's current asset allocation with State Farm is "in line with James's risk tolerance and the mutual funds themselves rank favorably when compared to their peers." (Id.) He further agreed that the investment advice and strategy recommended by State Farm "is prudent and completely in line with sound financial planning guidelines." (Id.)

Ultimately, the determination of whether the commutation is within the best interest of the claimant is a factual determination based upon the factors being balanced in each case. Dameron, 339 N.W.2d at 163 ("Where, as here, the industrial commissioner in a contested case proceeding has determined that commutation was in the best interests of the claimant, the trial court and this court are now bound by that determination unless it is 'unsupported by substantial evidence in the record.'") As the party moving for the partial commutation, claimant bears the burden to prove that the commutation is in his best interest. Iowa R. App. P. 6.14(6).

In this case, one of the stated reasons claimant asserts for desiring the partial commutation is to provide financial security to his wife should he pass away before his anticipated life expectancy. The commissioner has concluded that a commutation can be appropriate even if the sole purpose for commuting the benefits is to ensure the security of a spouse. See Sporleder v. Crouse Cartage Company, File No. 1254033 (App. May 5, 2011). I conclude claimant's stated purpose of seeking to leave assets for his wife, should he die prior to his calculated life expectancy, is a legitimate purpose for a commutation and it supports claimant's current petition for commutation.

Considering the factors set forth in Dameron, discussed above, and claimant's stated desire to receive the partial commutation and his desire to provide financial security for his spouse, I note claimant's age, education, family circumstances, living arrangements, and lack of debt beyond his mortgage, weigh in favor of granting the partial commutation. In addition, claimant's demonstrated ability to handle money, including a prior lump sum workers' compensation award which claimant used to obtain a bachelor's degree and embark on a 25-year career as a certified prosthetist and orthotics technician, as well as his prior investments that have accumulated into substantial retirement accounts, all weigh heavily in favor of granting the requested partial commutation.

Defendants' primary argument is simply that claimant does not need the partial commutation in order to successfully move forward in his financial life. However, defendants admit that "[t]here is no requirement that a claimant must need the commutation requested in order for commutation to be deemed appropriate," citing Paulsen v. Central State Power, Ltd., 2 Iowa Indus. Comm'r Rep. 304, 305 (appeal dec.. 1982). (Defendants' Appeal Brief, p. 9)

The deputy commissioner in the underlying decision stated claimant's income from his investments would become taxable. This is rightly stated as a potential negative effect of a partial commutation to be considered in almost every partial commutation request. However, one must not overlook the available investment potential that may likely exceed the discount rate and therefore, produce a higher lifetime income compared to a stagnant worker's compensation benefit that will not have inflationary adjustments. Given claimant's existing solid financial footing, and those factors discussed above, I do not find the taxation issue, on balance, to be a sufficient detriment to overcome a finding that the partial commutation is in claimant's best interest.

The deputy commissioner also noted in the decision that claimant did not seem to have a clear picture for investing the balance of the commuted funds after the home mortgage was paid off. I find claimant demonstrated by his prior savings and investments, and through his testimony concerning his understanding of the recommended investment strategy proposed by State Farm, along with his prior reliance on investment professionals in conjunction with his 401(k), that claimant has sufficient understanding of his intended investment strategy. Claimant's investment strategy was reviewed by a second financial advisor, Mr. Murphy, who concluded that the strategy is "in line with sound financial planning guidelines." (Jt. Ex. 2, p. 3)

While it is possible claimant could spend commuted monies foolishly, his history of managing money and his stated plans to pay off his mortgage and invest excess funds in a conservative manner, lead me to find this is unlikely. I find it likely claimant would handle any commuted funds in a conservative manner, limiting the amount of risk these funds would be exposed to moving forward. I find the risk of claimant spending the commuted funds foolishly is minimal. I find there is minimal risk that claimant's funds will be significantly depleted through his stated investment plan.

Although claimant's fixed income will be reduced if the partial commutation is granted, I note claimant has the opportunity, through wise investing, to attempt to keep pace with inflation and he could realize an increase in his annual payout from his investments. Also, with a lump sum, claimant has the opportunity to reduce his monthly expenses thereby reducing his needed income.

Claimant has clearly expressed a preference to commute all but the last week of his permanent total disability award. Claimant's medical benefits regarding his work injury will not be disturbed.

I find claimant has proven by a preponderance of the evidence that his expressed preference and the probable benefits of the requested partial commutation outweigh the potential detriments of commuting all but the final week of claimant's permanent total disability award. I find the partial commutation as requested by claimant in his petition is in his best interest and I find the partial commutation should be awarded.

Considering the facts and applicable law discussed above, I respectfully disagree with the deputy commissioner and I do not find it appropriate to grant only a portion of claimant's requested partial commutation. In so finding, I reverse the deputy's commissioner's decision to grant only a portion of the requested partial commutation and I award the partial commutation in the full amount requested by claimant in his petition.

Considering the above findings and conclusions, it is unnecessary for me to determine whether the presiding deputy had legal authority to grant only a portion of the partial commutation requested by claimant, in an amount not specifically discussed by any exhibit, nor recommended by any witness or requested by any party. It is likewise unnecessary to address the issue of ordering benefits from the "front end' versus the "back end" of permanent disability benefits, which is allowed under the plain language of Iowa Code section 85.4, as stated above.

ORDER

IT IS THEREFORE ORDERED that the deputy commissioner's decision upon petition for partial commutation filed on March 23, 2017, is reversed and Claimant's original notice and petition for partial commutation in the full amount requested is granted.

Defendants shall pay claimant the remaining weekly benefits for his life expectancy as of the date of this decision as determined under 876 IAC 6.3(1), except for the final week, after the amount is reduced to present value according to the applicable discount interest rate provided by law.

If claimant lives beyond the expiration of the period being commuted, defendants shall resume payment of weekly benefits and continue paying claimant permanent total disability benefits on a weekly basis so long as claimant's total disability continues.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the partial commutation proceeding in the amount of two thousand one hundred sixty-nine and 50/100 dollars ($2,169.50), and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 14th day of February, 2019.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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