BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOEL SIMS,		FILED
Claimant,	File No. 5041651	SEP 15 2015
vs.	APPEAL	WORKERS' COMPENSATION
SECOND INJURY FUND OF IOWA,	DECISION	
Defendant.	Head Note Nos.: 1402.20; 1703; 3203	

Claimant Joel Sims appeals from an arbitration decision filed on September 9, 2014. The case was heard on July 28, 2014, and it was considered fully submitted on August 22, 2014, in front of the deputy workers' compensation commissioner.

In his petition filed on October 5, 2012, claimant alleged work-related cumulative injuries to his bilateral lower extremities with an alleged injury date of March 7, 2012. Claimant also alleged he sustained a prior qualifying loss to his left upper extremity in May 1995 which entitles him to Second Injury Fund (hereinafter "SIF") benefits. Prior to hearing, claimant and defendant-employer entered into a full commutation settlement pursuant to Iowa Code sections 85.45 and 85.47. Pursuant to the terms of the commutation, defendant-employer paid claimant permanent partial disability for the bilateral feet injuries in the amount of eight percent, for a total of 40 weeks of permanent partial disability (PPD) benefits at the stipulated weekly benefit rate of $640.28.

At hearing, Claimant and SIF stipulated that SIF is entitled to a credit of 52.5 weeks of PPD benefits, which consists of the 40 weeks of PPD benefits paid pursuant to the commutation, along with an additional 12.5 weeks of PPD benefits for a five percent disability resulting from the 1995 injury to claimant's left upper extremity. The issues at hearing were:

1. Did claimant sustain a prior qualifying loss to his left upper extremity in May 1995 which entitles him to SIF benefits?

2. If claimant did sustain a prior qualifying loss, what is the amount of industrial disability claimant is entitled to receive because of the combined disability he sustained as a result of that prior qualifying loss and the stipulated loss of March 7, 2012, to his feet.

In the arbitration decision filed on September 9, 2012, the deputy commissioner determined claimant did sustain a prior qualifying loss to his left upper extremity in May 1995. The deputy commissioner determined claimant sustained industrial disability of

ten percent as a result of the combination of the two injuries, which entitles claimant to 50 weeks of PPD benefits. The deputy commissioner determined that because SIF was entitled to the stipulated credit of 52.5 weeks of PPD benefits, claimant was entitled to no additional benefits because the credit exceeded claimant's entitlement to industrial disability benefits.

Claimant asserts on appeal that the deputy commissioner erred in determining the industrial disability resulting from the combination of the two injuries is ten percent. Claimant asserts he is entitled to industrial disability of 40 percent. SIF asserts that the decision of the deputy commissioner should be affirmed in its entirety.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision of September 9, 2014, filed in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

In this appeal, claimant alleges he has sustained 40 percent industrial disability. I find that the evidence does not support this claim. I agree with the deputy commissioner's conclusion that claimant's combined disability is ten percent.

Industrial disability measures the extent to which an injury impairs the employee's earning capacity. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815 (Iowa 1994); Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 471 (Iowa 1990). Factors used in determining industrial disability include the degree of functional disability, the employee's age, education, qualifications, experience, and the ability of the employee to engage in suitable employment. Id, at p. 471. Another factor to consider is the injured worker's adaptability for retraining. Sherman v. Pella Corp., 576 N.W.2d 312, 320-321 (Iowa 1998). Claimant alleges the deputy commissioner did not give the "relevant factors correct weight and as a result, provided a lower disability award than Claimant should have been entitled to." (Claimant's Appeal Brief, p.3) A review of all of the industrial disability factors shows that the deputy commissioner's award of ten percent is reasonable.

Robert Neiman, M.D., and Robert Jones, M.D., both performed IMEs of claimant at claimant's request. Neither Dr. Neiman nor Dr. Jones gave claimant permanent restrictions for his left upper extremity. (Ex. 1, p. 3); (Ex. 2, p. 2) Joseph Galles, M.D., the authorized treating physician for claimant's bilateral feet, did not assign permanent restrictions for claimant's feet. (Ex. C, pp. 23-24) Dr. Neiman recommended minimal restrictions for claimant's feet of avoiding the wearing of smelter boots and change of position as needed. (Ex. 1, p.3) Dr. Jones also recommended minimal restrictions for

claimant's feet of avoiding work in the cold and avoiding prolonged walking. (Ex. 2, p. 2)

Claimant is 49 years old. After graduating from high school, he received infantry and combat training and he took lifesaving courses while in the military. (Tr., p. 7) In 2012, claimant returned to school at Indian Hills Community College (Tr., p. 8) and took courses in math, blueprint reading, resume building and welding labs. (Tr., p. 67) Claimant was an exemplary student and he made the president's list every quarter. (Tr., p. 67) In August 2013 he received a diploma in welding technology. (Tr., p. 9)

Claimant has a broad range of work experience. At hearing, he testified he has worked as a Pepsi Cola route salesman, he has applied graphics to motor homes, he ordered inventory, supervised other employees, prepared weekly work schedules, stocked store shelves, cut and packaged meat, did cleaning work, attended food shows, prepared and baked bread and pastries, packaged and palletized rolls of tape, worked as a grinder and pourer, worked as a lead man, forklift driver, punch press operator and a welding technician. (Id., pp. 9, 15-17, 71, 74-76) Contrary to claimant's assertions, I find with the exception of his last job at Clow Valve, which claimant voluntarily left, he could return to any of the positions listed herein. I find the minimal restrictions suggested by claimant's IME physicians would not prevent him from successfully performing these jobs.

Claimant alleged he was fired from his employment with Clow Valve. (Ex. B, p. 18; Tr., pp. 30-31, 46-47). However, in the full commutation settlement documents, claimant stipulated he voluntarily quit his employment with Clow Valve. (Ex. F, p. 35)

After claimant voluntarily quit his job at Clow Valve, he returned to school and received his diploma in welding technology. (Id., p. 9) As a welding technician, claimant receives a higher hourly wage than he did as a factory worker at Clow Valve leading up to his injury, and he is likely to receive additional increases in his hourly wage in the future. (Ex. A, pp. 9-10)

At the time of hearing, claimant was working as a welder and fabricator at Relco in Albia. (Tr., pp.36-37) He apparently has no restrictions and he apparently needs no accommodations in this job because no evidence of restrictions or accommodations in this employment was offered at hearing. At Relco, claimant works full time, earning $16.50 per hour with periodic overtime. (Tr., pp. 40-41, 65) He also has benefits through Relco, including health insurance. (Tr., pp. 65-66) When claimant left his employment with Clow Valve he was making $16.42 per hour and he did have the opportunity to work substantial overtime. (Ex. B., p. 18; Tr., p. 41) I find that pursuant to all of the relevant industrial disability factors and the evidence in the record in this case, claimant has not shown a loss of earning capacity greater than the ten percent industrial disability awarded by the deputy commissioner.

At hearing, claimant expressed some dissatisfaction with his employment at Relco. (Tr., pp. 38-40) However, claimant did not state he could not perform his job duties at Relco. Despite his alleged dissatisfaction with his employment at Relco, claimant testified that welders are in demand and there are numerous positions available for someone with a welding degree and experience. (Tr., p. 67) At the hearing, claimant testified he is considering making a job change. (Tr., p. 68) When asked what kind of jobs he could do, Claimant stated, "Any job that involves welding." (Tr., p. 67) He indicated he was considering applying for jobs at John Deere, Vermeer and Weilers. (Tr. pp. 67-68)

Claimant's testimony concerning his potential job prospects is supported by the report of vocational expert Shannon Ford (hereinafter "Ford") which was introduced into evidence by SIF. (Ex. A) Ford reviewed claimant's background, education, work history, potential marketable and transferable skills, as well as the physical demands of jobs for which claimant is qualified. (Id.) After reviewing all of that information, Ford determined claimant's March 2012 injury may have resulted in a small loss of access to pre-injury jobs, approximately 10 percent, but claimant does not have any earnings loss and is likely to earn more as a welding technician that he earned in his prior employment. (Ex. A, pp. 9-10). Claimant did not provide any vocational opinions to counter Ford's report, and claimant's hearing testimony as it pertains to his job prospects is in line with Ford's findings. (Tr. pp. 67-68)

The finding by the deputy commissioner that claimant sustained ten percent industrial disability was based, in part, on the finding that claimant's testimony that he has sustained greater loss of earning capacity was lacking in credibility. (Tr., pp. 42-46) While I performed a de novo review, I give considerable deference to findings of fact that are impacted by credibility findings, expressly or impliedly, made by the deputy who presided at the hearing. The deputy commissioner in this case clearly stated the reasons why she found claimant's testimony regarding his employment prospects to be lacking in credibility:

> I do not find the testimony of Sims to be terribly persuasive. Sims' demeanor at hearing was disrespectful, glib, and overall, simply not credible. It is noted that throughout the Fund's questioning of claimant, Sims would oftentimes shake his head and laugh at questions before providing a flippant, superficial response. For example, when Sims was asked if he could perform particular jobs he laughed at the question and testified that he could do any job that pays. At another point, Sims' testimony seemed to indicate that if a document did not have a notary on it then the document was not reliable. At yet another point in his testimony, he admitted that his signature on a stipulation does not mean that the stipulation is true. Overall, I do not find Sims' testimony to be terribly persuasive.

(Arb. Dec., p. 4)

I find the deputy commissioner's detailed analysis regarding claimant's lack of credibility regarding his employment prospects to be convincing and I find that it supports the deputy commissioner's determination that claimant has sustained ten percent industrial disability as a result of the combination of his work-related injury to his bilateral feet on March 7, 2012, and his prior qualifying injury to his left upper extremity in May 1995.

ORDER

THEREFORE, IT IS ORDERED:

The September 9, 2014, arbitration decision is affirmed in its entirety.

All costs of this appeal are taxed against claimant.

Signed and filed this 15th day of September, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
IOWA WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Ryan T. Beattie
Attorney at Law
4300 Grand Ave.
Des Moines, IA 50312-2426
ryan.beattie@beattielawfirm.com

Amanda R. Rutherford
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
amanda.rutherford@iowa.gov