

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TOMAS SALAZAR,

Claimant,

vs.

KINDER MORGAN, INC.,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

JAN 24 2019

WORKERS COMPENSATION

File No. 5049390

PARTIAL COMMUTATION

DECISION

Head Note Nos: 3303.20, 2907

STATEMENT OF THE CASE

Thomas Salazar, claimant, requests partial commutation of a prior permanent total disability award. Mr. Salazar's case was initially heard on December 4, 2015. On March 28, 2016 an arbitration decision was issued and claimant was awarded permanent total disability benefits. That award was affirmed on appeal to the Commissioner on February 13, 2018.

The hearing on claimant's request for partial commutation was held on October 30, 2018. Mr. Salazar was the only witness to testify live at the hearing. The evidentiary record also includes Claimant's Exhibits 1-7 and Defendants' Exhibits A-F. 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.

The parties request the opportunity for post-hearing briefs which were submitted on November 21, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether a partial commutation of claimant's permanent total disability award would be in his best interest.

2. Assessment of costs.

FINDINGS OF FACT

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

As a result of the February 28, 2011, work injury Mr. Tomas Salazar sustained an injury to his low back and body as a whole. The circumstances of his injury, treatment, and resulting permanent total disability are set forth in the underlying arbitration and appeal decisions and will not be reiterated.

Claimant now seeks to partially commute his permanent total disability award. He specifically requests to commute all but the last week of benefits using his life expectancy under the agency's life expectancy table.

Mr. Salazar was born on May 29, 1949. He was 69 years of age at the time of the partial commutation hearing. He has lived with his wife Carla in Burlington, Iowa since 1972. He has a high school education. He attended college where he received an auto mechanics certificate. (Testimony)

After the award of permanent total disability Mr. Salazar received an initial lump sum payment and since that time he has been receiving weekly workers' compensation checks. Mr. Salazar understands that if his petition for a partial commutation is successful, the weekly workers' compensation checks will stop. I find that he understands that the weekly checks will be converted to a lump sum payment. I further find that Mr. Salazar understands that his attorney fee will be deducted from the lump sum, similarly to the deduction from the weekly checks. Additionally, he understands that if he outlives his life expectancy his weekly checks would resume until the time of his death. He also understands that if he receives a partial commutation of his weekly benefits, his medical benefits will still continue. (Testimony)

Mr. Salazar's current income consists of his weekly workers' compensation benefits (after attorney fees \$748.00), his monthly Social Security retirement check (\$1,861.70), and withdrawals from his IRA account. He draws approximately \$12,000.00 per year from his IRA based on the advice of his accountant. Mrs. Salazar contributes to the income through her Social Security retirement (\$1,298.80 per month) She has an IRA with an approximate value of \$78,000.00 with an annual distribution of \$14,000.00. Thus, their annual income is around \$90,000.00. (Testimony)

Every month Mr. Salazar and his wife work together to manage their finances. They have demonstrated responsible money management. Each month they are able to meet their expenses and still have money left over each month. They have been able to save for retirement. (Testimony)

Mr. Salazar met with Brian Murphy prior to the partial commutation hearing. Mr. Murphy is a Certified Investment Management Analyst with Stonefield Investment

Advisory in Cedar Rapids. Mr. Murphy issued a report in this case. Mr. Murphy's report demonstrates that the Salazar's annual, regular expenses are less than \$60,000.00. Thus, their annual income is greater than their expenses. If Mr. Salazar were to receive the requested partial commutation, his monthly income would shift but he would still have the ability to meet and exceed his monthly expenses. Mr. Murphy's report indicates that the current income of the Salazars would exceed their monthly budget even without the workers' compensation benefits. Mr. Murphy ultimately concludes that a partial commutation is in the best interest of Mr. Salazar because it provides liquidity for immediate financial needs and the flexibility to invest the remaining funds to protect his and his wife's future. (Claimant's Exhibit 1)

Matthew L. Peoples, a Certified Financial Planner reviewed the proposal for Mr. Salazar from Stone Field Investment Advisory. Mr. Peoples issued a letter on September 28, 2018. He stated that he was familiar with Tom and his family and had worked with them as their financial planner for more than a decade. Mr. Peoples indicated he had a thorough understanding to Tom's financial situation. He stated Tom had "always been a good saver, a frugal spender, and demonstrates a sound understanding of the investments he owns and the strategies we have helped him implement for his retirement income." (Cl. Ex. 3) Mr. Peoples agreed with the proposal that a partial commutation is in the best interest of Mr. Salazar. He stated there were many investment options what would potentially offer a higher rate of return than the commutation discount rate. A commutation would also provide more security for Mrs. Salazar's retirement income if she were to outlive Tom. Mr. Peoples also felt a commutation would provide a greater degree of protection against inflation if one or both of the Salazars outlived their life expectancy. (id.)

Defendants offer a report from Peter Mattila, LAS, Ph.D. (Defendants' Ex. A) Dr. Mattila's report carries less weight because has never met or even talked to Mr. Salazar. Additionally, his report contains erroneous information. In Dr. Mattila's report he fails to account for the 1/3 attorney fee reduction in the weekly benefits. It appears he bases his opinions on the assumption that attorney fees are only taken if the partial commutation is approved; this is not correct. Mr. Salazar's yearly income from weekly workers' compensation benefits is actually \$13,000.00 less than Dr. Mattila's calculations. Dr. Mattila's report also fails to consider that Mr. Salazar's monthly expenses would actually decrease if he receives the commutation because Mr. Salazar would pay off some of his debts. For these reasons, I find that Dr. Mattila's report carries little to no weight. I find the opinions of Mr. Peoples and Mr. Murphy to be more persuasive.

Mr. Salazar testified that if he were awarded the partial commutation he would like to pay off some of the remaining debts he has on his vehicles. He would also use some of the money for home improvement projects. These projects include a new roof, replacing his air conditioner and furnace, new windows, and modifying his home to better accommodate some of the physical limitations he has as a result of the work injury. He would like to invest the remaining funds to provide financial security for himself and for his family in the event he was to die prematurely. Mr. Salazar has

looked into potential investment options. Mr. Salazar prefers more conservative to moderate risk investments. For several years Mr. Salazar has worked with Rick Peoples and now Rick's son, Matthew Peoples to help manage his large funds. These funds include his IRA which has a value of nearly \$800,000.00. Historically, Mr. Salazar has also retained the services of an accountant to help him maximize his investment funds. Mr. Salazar already has a team of individuals who provide him with financial advice and he credibly testified that he would continue to rely on such advice if he were to receive the partial commutation. (Testimony)

It is important to note that when Mr. Salazar was awarded permanent total disability benefits he received a relatively large lump sum of money. When the Commissioner affirmed the award of permanent total disability Mr. Salazar received approximately \$82,000.00, after attorney fees. He testified that he used the money to pay for his daughter's funeral. He also used the money to upgrade a recreational vehicle. He paid off another vehicle and paid off the mortgage on the home. I find that Mr. Salazar was responsible with the lump sum amount he received after the appeal decision. (Testimony)

I find that Mr. Salazar's age and education, are detriments that weigh against an award of a partial commutation.

Factors that weigh in favor of granting Mr. Salazar's request for a partial commutation include allowing him greater financial flexibility and his desire to use the commuted funds to pay down debt, improve his home, and provide greater financial stability for his family. Additionally, Mr. Salazar has an established relationship with a financial advisor and credibly testifies that he plans to continue to seek and follow the advice of financial experts. Additionally, when Mr. Salazar received a relatively large lump sum after his award of permanent total disability he demonstrated that he can responsibly manage a lump sum of money. I further find that if the commuted funds are mismanaged Mr. Salazar does have the financial means to overcome such a loss. I find that the benefits of claimant's proposed partial commutation outweigh the detriments that might be obtained. The preponderance of the evidence in this case indicates that there a high likelihood of success if the partial commutation was granted at this time. Therefore, I find that it is in Mr. Salazar's best interest to grant the petition for the partial commutation.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. I find that claimant was successful in his claim and therefore, I exercise my discretion to assess costs against the defendants.

Claimant is seeking the \$100.00 filing fee as a cost. I find that this is an appropriate cost under 876 IAC 4.33(7).

Claimant is also seeking the deposition fee in the amount of \$96.25. The claimant's deposition is contained at Defendants' Exhibit C. I find this is an appropriate cost under 876 IAC 4.33(1).

Additionally, claimant is seeking service of process fees in the amount of \$11.45. I find this is an appropriate cost under 876 IAC 4.33(3).

Finally, claimant is seeking expert witness fees in the amount of \$1,500.00 for the opinions of Brian Murphy. Defendants argue this requested cost should be denied because Mr. Murphy does not qualify as a practitioner whose report may be taxed under rule 4.33. See Heim v. A.Y. McDonald, File No. 5052066 (Arb. Oct. 5, 2018). Defendants' argument is found to be persuasive. I find Mr. Murphy does not qualify as a practitioner whose report may be taxed under rule 4.33. Therefore, defendants are not taxed the cost of \$1,500.00.

Defendants are taxed costs totaling \$207.70.

CONCLUSIONS OF LAW

The primary legal issue for determination is whether claimant should be granted his partial commutation request. Iowa Code section 85.45(1) provides in relevant part:

Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:

a. When the period during which compensation is payable can be definitely determined.

b. When it shall be shown to the satisfaction of the workers' compensation commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation

Mr. Salazar has requested a partial commutation of all but the last week of benefits owed pursuant to the life expectancy table adopted in agency rule 876 IAC 6.3. 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 to determine the amount to be paid a claimant in commutation proceedings. Rule 6.3 states, "The life expectancy is determined by taking the age of the person, set forth in the 'age' column and comparing it to the 'weeks' column, which indicates the weeks an

individual at the age indicated will be expected to continue to live.” The Commissioner’s adoption of agency rule 876 IAC 6.3 provides a presumption of life expectancy and makes the number of weeks owed claimant under his permanent total disability award definitely determinable.

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

In determining whether the commutation is in the best interests 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). The Dameron court went on to state that 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.

Ultimately, the determination of whether the commutation is within the best interests 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 Rule of Appellate Procedure 6.14(6).

In my factual findings, I recited and weighed the relevant legal factors to be considered in determining whether the requested partial commutation is in claimant’s best interest. Having found that the requested commutation is in claimant’s best interest, I conclude that claimant carried his burden of proof and further conclude that

the partial commutation requested should be granted. Iowa Code sections 85.45; 85.48.

As noted above, I recited and weighed the pertinent legal factors to be considered to determine whether the requested partial commutation is in claimant's best interests. Having found that the requested partial commutation was in Mr. Salazar's best interests, I conclude that he has carried his burden of proof and further conclude that the partial commutation request should be granted.

Claimant is also seeking an assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Exercising the agency's discretion I assess costs as set forth above.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's original notice and petition for partial commutation is granted.

Defendants shall pay a lump sum of the commuted benefits for all of claimant's remaining lifetime benefits, except for the final week of his life expectancy, utilizing 876 IAC 6.3.

Benefits shall be commuted using the weekly rate of two hundred eighty and 31/100 dollars (\$280.31).

Defendants shall be entitled to a discount rate on the commuted benefits pursuant to Iowa Code section 85.47 and Iowa Code section 535.3.


The parties shall cooperate to calculate the applicable value of the commuted benefits.

If the parties cannot reach an agreement on the commuted value, they should file a request for appointment of a financial expert to calculate the value of the partial commutation with the expense of that financial expert to be assessed as a cost against whichever party(ies) presented inaccurate calculations of the commuted value.

Claimant shall remain entitled to causally related medical expenses pursuant to Iowa Code section 85.27.

Defendants are assessed costs in the amount of two hundred seven and 70/100 dollars (\$207.70).

Signed and filed this 24~~th~~ day of January, 2019.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

SALAZAR V. KINDER MORGAN, INC.

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