BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 02 2019
WORKERS' COMPENSATION

DONALD HOUSTON,	:	
Claimant,	:	
vs.	:	
	:	File No. 5052683
HARDING ENTERPRISES, LLC, d/b/a TUFFY AUTO SERVICE CENTER,	:	
	:	PARTIAL COMMUTATION DECISION
Employer,	:	
and	:	
ACCIDENT FUND NATIONAL INSURANCE COMPANY,	:	
Insurance Carrier,	:	
Defendants.	:	Head Note No.: 3303

STATEMENT OF THE CASE

Donald Houston filed his petition for partial commutation on June 26, 2017 concerning a prior permanent total disability award. The hearing on claimant's request for partial commutation was held on June 27, 2018. The record at hearing includes, claimant's exhibits 1 through 3 and defendants' exhibits A and B. Claimant provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties filed post-hearing briefs on or about July 16, 2018, and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to receive a partial commutation of his prior permanent total disability award.

2. Costs.

FINDINGS OF FACT

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

Claimant was awarded permanent total disability in an arbitration decision issued on July 15, 2016. The award of permanent total disability was affirmed on May 3, 2018 following an appeal to the commissioner. The award was affirmed again on October 3, 2018, following judicial review.

At the time of hearing claimant was 57 years old. He presented at hearing with a pleasant demeanor and appeared to be a rational and thoughtful individual.

Claimant testified that his education includes a G.E.D. and an ASE mechanic certification, which is no longer valid.

Claimant has been married for 9 years and has no dependent children. His wife, Tracey, works at an elementary school as a lead-cook. She has held that job for over 2 years and her future employment appeared stable. She has no plans to retire in the near future. Tracey earns about $1,200 per month, after taxes and withholdings. She is off work for three months in the summers.

Claimant presently receives Social Security Disability benefits of $1,036.00 per month. (Testimony; Exhibit 2, page 8) He also receives weekly workers' compensation benefit payments of $347.37 after attorney fees are withheld. (Ex. 1, p. 2) His total monthly income is therefore, about $2,425.00 per month. Claimant stated that he owns a collectable car with a value of $16,000.00. He also owns a 2001 Chevy Blazer. (Ex. A, p. 15)

Claimant rents the home he lives in with his spouse. They have lived in their current residence for 8 years. Claimant testified that he rents his home from a personal friend that he grew up with, does not have a written lease agreement, and is essentially renting month to month. However, claimant's 8-year history in the residence provides good evidence of his stability in that location.

Claimant testified that his father, age 87, intends to bequeath his home to claimant upon death. There is no mortgage on the home. Claimant is an only child. He testified that his father's health is slipping, but his death is certainly not imminent.

Claimant testified that he and his wife have separate bank accounts, and they each take responsibility for different regular monthly bills. Claimant testified that the monthly bills he pays are as follows:

Rent	$550.00
Car Loan	$325.00 (Tracey's car)
Auto Insurance	$175.00
Prescriptions	$125.00 (meds both related and unrelated to his W/C injury)
Electric	$250.00
Total	$1,425.00

Claimant testified that his spouse pays the following monthly expenses:

Groceries	$200.00
Pet Supplies	$ 20.00
Phone & Internet	$150.00
Gasoline	$ 20.00
Total	$390.00

I calculate that the total household expenses described by claimant are $1,815.00 per month. I note that the listed expenses appear to exclude a few items typically found in a household budget such as: medical expenses other than prescriptions; personal care/hygiene expenses; clothing; entertainment; emergency fund; and, general savings.

I note Brian Murphy of Stone Field Investment Advisory stated claimant's current annual budget to be $29,652.00, which when divided by 12 represents a monthly expense amount of $2,471.00. (Ex. 1, p. 4) This amount seems more likely to be accurate given the apparent missing items from the list of expenses above. Claimant's monthly expenses are very close to the amount of claimant's monthly income. However, the expenses would be reduced if the partial commutation is granted and claimant pays off the car loan. It will be further reduced when claimant inherits his father's home.

Concerning claimant's debts, he testified that he owes about $12,000.00 on an automobile loan. (Testimony; Ex. 1, pp. 3-4) Claimant testified that his only other debt is $3,000.00 owed to Matco Tools, which remains from the time of his prior employment before his work injury. He has had similar debts to other tool manufacturers in the past, which he has paid off. He has no other debt. Claimant stated that he does not have a credit card and has not had one in the past. He has refrained from getting a credit card to avoid the potential of accumulating consumer debt. Claimant should be commended in this decision. He also testified that his wife does not have a credit card either.

Claimant stated that he has in the past, fallen behind on the electric and gas bills. He also stated that there was a period of time after his work injury that he was not working, had no workers' compensation benefits, and no Social Security benefits, and that during this time he had fallen behind on bills. Claimant testified that the last time he was behind on his electric and gas bills was about one and one half years ago. He stated that since receiving workers' compensation benefits and Social Security Disability benefits, he has not been behind on his regular monthly bills.

Claimant stated that he pays nearly all his bills via a debit card and that he keeps a close eye on his account balance and his checking account has never been overdrawn.

Claimant stated that he has ongoing medical care needs related to his workers' compensation injury, which is a back injury, and he is seen at the pain clinic every six weeks. He is aware that the partial commutation will not infringe upon his right to continue to seek covered medical care for his work injury.

Claimant stated that he understood if the partial commutation is granted, the weekly checks he currently receives would cease, a lump-sum would be paid, and that no additional monetary benefits would be paid to him unless he lived past age 81.

Claimant testified that he has no diagnosed mental health conditions or treatment.

Claimant testified that his intention upon receiving the partial commutation is to pay off his car loan and purchase a used daily driver vehicle limited to a cost of no more than $20,000.00. He also wants to build a handicapped ramp at his father's home that he expects to inherit. Claimant testified that the porch on the house is elevated about four and a half feet above the ground and it is hard for him to climb the stairs. Claimant generally estimated the cost of building the ramp to be $1,000.00. No professional bids were submitted. Concerning claimant's longer-term goals, he wanted to use about $20,000.00 for remodeling his father's home after it was inherited to improve its condition. Defendants are critical of this number because there are no specific bids for any specific jobs. However, this number is understood by the undersigned to be a maximum amount that claimant is willing to spend to conduct the desired remodeling. Claimant intends to invest the remainder of the money, following the advice of Brian Murphy of Stone Field Investment Advisory. Claimant testified that an additional reason for seeking the partial commutation was his desire to provide for his wife in the event of his untimely death and the end of his weekly benefits and the resulting financial hardship on his wife.

Brian Murphy, an investment adviser, with Stone Field Investment Advisory has a B.S. in Economics, holds a professional certification as a Certified Investment Management Analyst and Senior Investment Consultant and is licensed in insurance and securities and investments via Series 7, 9 &10, and 63 & 65 licensure. (Ex. 1, p. 7) Mr. Murphy submitted a proposal at claimant's request, wherein he calculated that as of

late April, 2018, the partially commuted lump sum amount, after a reduction for attorney fees, would be $275,293.00. This amount reduced by claimant's stated financial needs of $58,000.00 left a balance of $217,293.00. (Ex. 1, p. 4) I note that Brian Murphy's report indicates claimant's intent to spend $25,000.00 on a new/used vehicle. However, claimant testified credibly at hearing that the amount would actually be $20,000.00. I note that this $5,000.00 difference compared to the time between Mr. Murphy's calculations and the issuance of this ruling, an offset would occur such that this $5,000.00 difference will not materially impact the figures and calculations in Mr. Murphy's report.

In his report, Mr. Murphy proposed two scenarios. The first option is to purchase a single premium life annuity for $215,000.00, which produces an annual payout of $12,192 for a single life annuity and $10,488 for a joint life annuity. To fulfill his goal of providing for his wife, it is expected that claimant would chose the joint life annuity, which would equal $201.69 per week ($10,488.00 divided by 52 equals $201.69). This weekly amount is over 40 percent less than his current weekly benefit, but would offer the opportunity to take care of immediate and reasonably near future financial needs and would provide supplemental income to claimant's spouse upon his untimely death. Mr. Murphy notes that typically about 1/3 of the annuity payments would be subject to tax, but claimant's household income "does not meet the threshold for federal taxability." (Ex. 1, p. 5)

The second scenario Mr. Murphy proposes is described as a very conservative combination of exchange traded funds and a fixed annuity with an average expected annual yield of 4.1 percent. This second scenario includes the potential for higher or lower returns depending upon market performance.

Claimant testified that he met with Brian Murphy and discussed the risks associated with investments and that he wanted to be conservative in his investment plan and that he intends to follow the advice of Mr. Murphy if the partial commutation is granted. However, he was unable to articulate how Mr. Murphy would charge or collect his fee. Mr. Murphy did charge $2,400.00 for his services in meeting with claimant and preparing the report. (Ex. 1, p.1) Defendants argue that claimant's lack of understanding of Mr. Murphy's fees is significant and should prevent the granting of the requested partial commutation. However, I note that defendants' expert made no mention of this concern in his report.

Concerning claimant's investment history, he has only $30.00 in a savings account and has never had an investment account in the past.

Claimant has had 10 prior workers' compensation claims over his lifetime beginning in 1983 with a neck surgery in 1986. (Ex. A, pp. 4-5) His various claims have included three different settlements and total benefits of more than $50,000.00. Claimant stated that he did not invest the prior settlement amounts because he needed to pay off bills that accrued while he was injured. For example, claimant fell behind in child support after his first injury and used the settlement to pay off the balance owed

and to pay off personal loans from his father. Claimant no longer owed child support at the time of the hearing.

Claimant testified that neither he nor his wife drink alcohol or take illicit drugs. However, claimant has served a prison sentence for manufacture of a controlled substance. He was released from prison in 2008 after serving 8 years. He has had no similar charges since. While his criminal history is concerning, I also consider claimant's past decade of avoiding illegal drugs.

Claimant stated that neither he nor his wife has any past or present gambling issues and they have never filed for bankruptcy protection. Also, claimant has never had a car repossessed.

Defendants asked claimant to meet with their financial expert, and unfortunately, he refused. This refusal is not well received by the undersigned. There was no persuasive reason given for the refusal.

Zach Eubank, Director of Financial Advisory Services at RSM, US, LLP, was retained by defendants and prepared a report. (Ex. B) Mr. Eubank stated that he was retained to "review information and provide an opinion on whether or not the Claimant will make sound decisions in managing a lump sum award." (Ex. B, p. 2) In preparing his report, Mr. Eubank reviewed: the arbitration decision of July 15, 2016; claimant's responses to discovery; claimant's tax returns; defendants' responses to discovery; defendants' appeal brief dated September 13, 2016; and, the letter/report from Brian Murphy. (Ex. B, p. 5) Mr. Eubank is not critical of Mr. Murphy's recommended investment strategy, but he does point out that the lump sum payment would produce a lower annual income. Also, Mr. Eubank is not apparently concerned about Mr. Murphy's fees.

However, Mr. Eubank does question whether claimant would actually invest the lump sum, noting that he has never invested in the past. Mr. Eubank is also critical of claimant's criminal history and relies on this to conclude that his future actions may mirror his past decisions. However, Mr. Eubank does not discuss claimant's more recent decisions of avoiding illegal drugs for nearly a decade, not accumulating significant consumer debt, avoiding credit cards, and recent history of staying current with his recurring bills. Nor does he discuss the benefits of receiving a lump sum, such as paying off existing debt, allowing for continued income to his wife in the event of his untimely death, and the ability to pay for things like improving accessibility to his father's current home and his future home with a handicapped ramp and other modifications.

While it is possible that claimant could spend commuted monies foolishly, his stated plan is to invest any commuted funds with Brian Murphy after paying off debt and taking care of immediate needs. Claimant testified credibly that he would likely choose investments that are more conservative in nature and are recommended by the financial expert. I find it likely that claimant would handle any commuted funds in a conservative manner, limiting the amount of risk these funds would be exposed to moving forward.

Although claimant's fixed income will be reduced, I note that claimant has the opportunity through wise investing to attempt to keep pace with inflation and that 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 expense thereby reducing his needed income. I accept Mr. Murphy's conclusion and opinion that "[a] [p]artial [c]ommutation is in the best interest of Mr. Houston because it provides liquidity for his immediate financial needs, as well as, the flexibility to invest the remaining funds in a manner that would allow him to cover his monthly budget while also protecting his wife's financial future." (Ex. 1, p. 6)

Claimant 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.

Claimant's physical and mental conditions are neither benefits nor detriments to commuting his award. Claimant's physical condition appears stable at this time. Mentally, claimant is aware of the proposed commutation plans. Although neither he nor his wife have specific education in financial investing or management, claimant appears rational and capable and has testified credibly of his intent to employ the assistance of a professional investment counselor to manage his money.

I find that the risk of claimant spending the commuted funds foolishly is minimal. I find that there is minimal risk that claimant's funds will be significantly depleted through his stated investment plan.

I find that claimant has proven by a preponderance of the evidence that his expressed preference and probable benefits of the requested commutation outweigh the potential detriments of commuting all but the final week of claimant's permanent total disability award.

CONCLUSIONS OF LAW

The primary legal issue for determination is whether claimant should be granted a partial commutation. 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.

Claimant 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 benefits 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. According to that life expectancy table, claimant, who was 57 years old at the time of the hearing, has a remaining life expectancy of 1269 weeks.

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 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.

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.

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 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 unexpectedly before his life expectancy. I note that 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 therefore, conclude that claimant's stated purpose of seeking to leave assets for his wife, should he perish unexpectedly and prior to his calculated life expectancy, is a legitimate purpose for a commutation and supports claimant's current petition for partial commutation.

I further conclude that the remaining bases asserted by claimant and the factors outlined by the Iowa Supreme Court create sufficient benefit to outweigh any potential detriments to claimant. In other words, I do not rely upon the claimant's stated purpose of leaving assets for his spouse in the case of his untimely demise as the primary basis for awarding this commutation. Rather, I conclude that claimant has proven sufficient bases and benefits for commutation even if the stated intent to leave assets for his spouse was not considered.

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 interests. I found that the claimant's preference, coupled with the benefits that can be derived from the commutation (with or without the benefit of leaving assets for his wife in case of his untimely demise) outweigh the foreseeable detriments that may be caused by the requested commutation. Therefore, I conclude that claimant has proven by a preponderance of the evidence that the requested partial commutation is in his best interest and that he is entitled to the requested partial commutation.

The parties shall establish claimant's life expectancy as of the date of this decision. 876 IAC 6.3(1). They shall apply the applicable discount interest rate provided by law and subtract one week at the end of claimant's life expectancy and apply the discount rate to the claimant's remaining benefit entitlement resulting in a present value of the commuted benefits.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I assess costs in this matter against the defendants. However, in reviewing

Claimant's Exhibit 3, he has identified the costs to include the full amount of his financial expert in addition to the cost of service of the petition. 876 IAC 4.33 and Iowa Code section 622.72 limit the cost taxable for expert witnesses to $150.00. Therefore, I award $150.00 for the cost of Mr. Murphy's report and an additional $13.12 for the cost of service via certified mail, for a total of $163.12.

ORDER

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

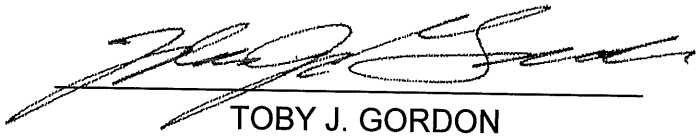
2) Defendants shall pay to claimant the remaining weekly benefits for his life expectancy as of the date of this decision as determined under 876 IAC 6.3(1), except for the final week, after the amount is reduced to present value according to the applicable discount interest rate provided by law.

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

4) Defendants shall pay costs of one hundred sixty-three and 12/100 dollars ($163.12).

5) Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 2nd day of January, 2019.



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TJG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.