BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

MAR 19 2015

WORKERS' COMPENSATION

MARIA MURGUIA,	:	
Claimant,	:	File No. 5025867
vs.	:	APPEAL
HON OAK STEEL (HNI CORPORATION),	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1803; 2904

Defendant, Hon Oak Steel (HNI), appeals from a review-reopening decision filed March 14, 2014. The case was heard on August 29, 2013, and it was considered fully submitted on September 26, 2013, in front of the deputy workers' compensation commissioner. The presiding deputy commissioner found that claimant Maria Murguia's industrial disability resulting from a work-related injury which occurred on October 15, 2007, has increased from the 30 percent industrial disability awarded by a deputy commissioner in an arbitration decision dated August 27, 2009, to 60 percent industrial disability as a result of a worsening of claimant's condition which occurred following the issuance of the arbitration decision. Defendant asserts on appeal that the presiding deputy erred in finding that claimant is entitled to review-reopening and in finding that claimant is entitled to an increase in her industrial disability from 30 percent to 60 percent. Claimant asserts that the findings of the deputy commissioner should be affirmed on appeal. The detailed arguments of the parties have been considered and the record of the evidence has been reviewed de novo.

The factual background and the factual findings of the presiding deputy commissioner are comprehensive and well-supported by reference to the record. Therefore the factual findings of the presiding deputy commissioner are incorporated herein by reference to the findings in the review-reopening decision.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a

manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

To prove a change in condition in order to support a review-reopening petition, an injured worker must prove by a preponderance of the evidence that his current condition is proximately caused by the original injury. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

A review-reopening is not based upon a reevaluation of the prior evidence to determine whether the award provided the claimant was too high or too low, but rather an examination as to whether the claimant's medical condition has changed for the worse since the arbitration decision.

Claimant has undergone four surgeries on her right shoulder. The first two surgeries were on November 6, 2000, and March 30, 2005. Claimant then suffered a cumulative injury to her right shoulder in the form of an aggravation of her preexisting condition. That injury is the subject of this action and it was determined in the arbitration decision dated August 27, 2009, that the correct injury date is the date claimant underwent surgery, which was the third surgery on her right shoulder. The date of that surgery was October 15, 2007. The surgery consisted of arthroscopic examination and rotator cuff repair. (Exhibit D, p. 22)

The fourth surgery on claimant's right shoulder took place on March 28, 2011, which was a year and a half after the arbitration decision was issued on August 27, 2009. That surgery, which was performed by John Langland, M.D., of the Steindler Orthopedic Clinic, PLC, included rotator cuff repair and biceps tenodesis. (Ex. D, p. 25)

On October 13, 2011, Dr. Langland noted that while he was not certain claimant would ever be pain free given her four surgeries, her function seemed to be improving and it was now better than it was prior to surgery. (Ex. D, p. 33)

On March 8, 2012, Dr. Langland noted that, "Overall, she is better than she used to be, but still has some shoulder symptoms, especially with reaching out and overhead activity." Dr. Langland noted that claimant should follow the restrictions outlined in a functional capacity examination (FCE), which was performed on March 2, 2012. (Ex. D, p. 37). The FCE was deemed valid and it determined claimant is capable of performing work in the light category for eight hours per day, 40 hours per week. (Ex. E, pp. 52-55)

On June 12, 2012, Dr. Langland found claimant to be at maximum medical improvement (MMI). He noted claimant, on examination, was missing range of motion and provided a 3 percent rating for the fourth surgery. Dr. Langland provided a 10

percent rating for claimant's prior surgeries for a total rating of 13 percent. (Ex. D, p. 42)

One year later, on June 20, 2013, Dr. Langland examined claimant for right shoulder pain. Dr. Langland provided claimant with an injection of Marcaine and Celestone into the right shoulder subacromial space. Dr. Langland noted claimant's restrictions might have to be "tweaked" to avoid aggravating her shoulder. Dr. Langland stated claimant may benefit by seeing a pain care specialist. Dr. Langland noted, "She is going to stay on her permanent restrictions as of now and see the occupational health physicians to possibly have them modified there." (Ex. D, p. 45)

On September 20, 2012, Robin Epp, M.D. (now known as Robin Sassman, M.D.) performed an IME. (Ex. 9, pp. 30 – 39) Dr. Epp stated in her report that claimant's right shoulder condition had worsened since the arbitration decision as evidenced by the March 28, 2011, surgery and the assignment of permanent restrictions. (Ex. 9, p. 37) Dr. Epp noted that claimant's range of motion had not worsened since 2009, but claimant's symptoms had worsened. (Ex. 9, p. 37) Dr. Epp provided a 7 percent whole body rating and recommended lifting restrictions of occasionally lifting 20 pounds waist to shoulder and 10 pounds rarely from floor to waist. (Ex. 9, p. 38)

Richard Kreiter, M.D., performed an IME on July 3, 2013. Dr. Kreiter did not believe claimant was at MMI and recommended additional testing. Dr. Kreiter provided a rating of 20 percent to the whole person for claimant's right shoulder. He recommended a 20 to 25-pound lifting restriction and no work on her right side above the shoulder. (Ex. 4, pp. 20, 21)

On August 8, 2013, Rhea Allen, M.D., performed an independent medical examination (IME). (Ex. H, pp. 74 – 78) Dr. Allen stated that claimant's right shoulder pain is causally related to all of claimant's surgeries. (Ex. H, p. 77) Dr. Allen recommended conservative medical treatment. Dr. Allen stated claimant's current job is within her restrictions except the restrictions were written for an 8-hour day, 40 hours per week. Dr. Allen stated claimant should work within these restrictions or the FCE should be redone to consider 10-hour days, up to 58 hours per week. Dr. Allen also recommended claimant perform no forceful activities (grip, lift, push, pull) with her right arm above the shoulder level. Dr. Allen also recommended that claimant not perform repetitive reaching more than 18 inches away from her body. Dr. Allen recommended that claimant limit her work to 8 hours a day. (Ex. H, p. 78)

Claimant was seen by Frederick Dery, M.D., on August 14, 2013, for examination of her shoulder pain. (Ex. D, pp. 48 – 50) Dr. Dery's impression was, "Chronic right shoulder and peri-glenohumeral muscular pain after multiple right shoulder surgeries. She does not meet the criteria for CRPS." (Ex. D, p. 50) Dr. Dery prescribed Cymbalta and a topical medication for Claimant's shoulder. (Ex. D, p. 50)

I agree with the deputy commissioner's finding that the medical evidence and claimant's testimony support a finding that claimant's right shoulder condition has worsened following the issuance of the arbitration decision and that the worsening of claimant's condition was proximally caused by her right shoulder injury of October 15, 2007, and her subsequent work related surgeries.

As claimant has proven by a preponderance of the evidence that she is entitled to have her claim review-reopened, a new determination of the extent of her industrial disability needs to be made.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34.

Claimant continues to work for the defendant as an inspector, the same position she has held since 2005, two years before the injury in question occurred. Claimant continues to perform this job without any special accommodation. Claimant was earning $14.53 at the time of the review-reopening hearing, which is $1.09 per hour more than the $13.44 per hour she was earning at the time of the arbitration hearing on May 13, 2009.

After consideration of the record, and based upon the facts and the medical evidence, it is concluded that claimant's industrial disability has increased from 30 percent to 45 percent as a result of the work injury of October 15, 2007. Such a finding entitles claimant to 225 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 45 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

In the hearing report filed at the review-reopening hearing, the parties stipulated that defendants are entitled to credit in the amount of 175 weeks of PPD benefits. Defendants shall therefore pay claimant an additional 50 weeks of PPD benefits.

The date of the commencement of additional weekly permanent benefits in a review-reopening case is the date the review-reopening petition was filed. See Verizon Business Network Services, Inc. v. McKenzie, No. 2-394/11-1845 (Iowa Ct. App. Oct. 17, 2012) and Searle Petroleum, Inc. v. Mlady, No. 3-480/12-2008 (Iowa Ct. App. Dec. 5, 2013). But see, Caven v. John Deere Dubuque Works, File No. 5023051 (App. May 23, 2013). The date the review-reopening petition was filed in this case is October 2, 2012.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision of March 14, 2014, is MODIFIED as set forth herein and that:

Defendant shall pay unto claimant fifty (50) weeks of permanent partial disability benefits at the weekly benefit rate of four hundred sixty-four dollars and 95/100 ($464.95) per week from October 2, 2012.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on accrued weekly benefits awarded herein pursuant to Iowa Code section 85.30.

Defendant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Defendant shall file reports with this agency on the payment of this award pursuant to rule 876 IAC 3.1.

Signed and filed this 19th day of March, 2015.

Joseph S. Cortese II

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IOWA WORKERS'
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