BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRADLEY EMMERTH,

Claimant,

vs.

LINWELD,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

FEB 24 2015

WORKERS COMPENSATION

File No. 5034410

REVIEW-REOPENING

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Bradley Emmerth, claimant, seeks a review-reopening of an award of industrial disability benefits in a final arbitration decision by this agency on February 15, 2012. Responding are defendants, Linweld, the employer, and its insurer, New Hampshire Insurance Company. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on January 21, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on February 4, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically (15-23). Defendants' exhibits were marked alphabetically (P-Z). Exhibits 1-14 and A-O were received in the arbitration proceeding. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4." References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript.

The final arbitration decision established the following:

1. On June 2, 2010, claimant received an injury to the low back arising out of and in the course of employment with Linweld.

2. The June 2, 2010 injury was a cause of a 30 percent permanent, industrial disability to the body as a whole.

3. Claimant's weekly rate of compensation is $442.72 according to the workers' compensation commissioner's published rate booklet for this date of injury.

In the hearing report submitted at hearing, the parties agreed that the commencement date of any additional permanent disability benefits would be September 16, 2013.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant is entitled to a review-reopening, and,

II. The extent of claimant's current industrial disability.

FINDINGS OF FACT

Defendants challenged claimant's credibility in this proceeding. I observed nothing about claimant's demeanor at hearing to suggest he was untruthful. I believe claimant honestly believes that his condition has worsened since the arbitration proceedings. However, this decision is largely based on expert opinion, not claimant's testimony.

The initial work injury consisted of a compression fracture at the L1 vertebral level in the low back which occurred when a large, heavy cylinder rolled over claimant's body. Claimant's initial complaints to the treating orthopedist, David Hatfield, M.D. involved not only the low back, but bilateral numbness and pain in both arms, right leg pain, and neck pain. (Exhibits 7-5, U-36) However, the main focus of the treatment and complaints after the initial treatment was the low back pain, which was attributed to the compression fracture.

In the arbitration decision, claimant was found to have suffered a 13 percent permanent partial impairment to the body as a whole based on a rating by William Boulden, M.D. Claimant was found to have permanent lifting restrictions as a result of this work injury as set forth in a functional capacity evaluation (FCE) conducted on January 31, 2011, which limited claimant to jobs which require only light physical demands. Claimant was restricted to lifting up to 20 pounds occasionally. (Ex. 9) In this FCE, claimant's listed abilities included sitting, standing, walking and crouching. The listed limitations included lifting, carrying, elevated work, squatting, forward bending and ladder climbing. (Id.)

The presiding deputy in his arbitration decision, despite rather severe restrictions, found that claimant returned to his job on a full-time basis and was earning more money

than at the time of injury because Linweld accommodated for the permanent restrictions.

In this case, claimant asserts that he has suffered a worsening of his physical condition as well as a worsening of his economic condition. The asserted economic loss is based on the fact that his employment at Linweld was terminated by Linweld management on March 1, 2012, only two weeks after the arbitration decision was filed. There is no dispute that claimant has been unemployed since that termination.

Change of Medical Condition:

Claimant relies upon the views of two physicians to show a worsening of his physical condition. On February 13, 2013, Basil Hassan, M.D., who performed an evaluation for the Social Security Administration, opined that claimant cannot tolerate standing or sitting more than 20 minutes, walking more than 2 blocks and lifting more than 25 pounds. (Ex. 16-6)

On January 18, 2013, claimant's family doctor reported as follows:

> Symptoms: back pain, stiffness and radiating down the posterior right lower extremity. The patient presents with complaints of sudden onset of constant episodes of moderate back pain. The symptoms resulted from a direct blow. The injury occurred at work. Episodes started about 18 months ago. Symptoms are not improved by rest. Symptoms are made worse by standing and sitting. Symptoms are unchanged.

(Ex. 15-1)

At his attorney's request, claimant was evaluated on September 20, 2013, by Marc Hines, M.D., a neurologist. Dr. Hines provided a higher permanent impairment rating of 23 percent. The doctor agreed with the limitations on lifting found in the 2011 FCE, but added limitations on any vibration or extreme temperature exposure; no climbing of ladders due to upper extremity tremors and back pain; and no driving or riding long distances. (Ex. 17-11)

Claimant initially was denied social security disability benefits based only on Dr. Hassan's views (Ex. P & Q), but later was granted these benefits with the addition of Dr. Hines' report. The Social Security administrative law judge based his determination on a finding of severe impairment from the L1 compression fracture in 2010 along with left-side sciatica; hand tremors, and major depressive disorder. The judge found these impairments to preclude even sedentary work. The date of disablement was March 1, 2012, the date he was terminated from Linweld.

Based on the limitations found in the 2011 FCE and the additional restrictions by Drs. Hassan and Hines, Lewis Vierling, M.S., a vocational rehabilitation consultant, opined claimant is not employable in the competitive labor market. (Ex. 18)

The fighting issue is whether the views of Drs. Hassan and Hines represent a worsening of his physical condition caused by the injury or just a different opinion of his same disability. Neither Dr. Hassan, nor Dr. Hines, evaluated clamant before the arbitration decision of February 2012.

Dr. Hassan attributes the limitations he recommends to not only back pain, but pain that extends to the arms and left leg at times and the use of narcotics for pain control. In addition to the compression fracture, Dr. Hines stated as follows:

> The patient also has disk bulging that seems to be new compared to older films and these occur at multiple sites below the L1 level. Obviously, the major complaint is continued difficulties with back pain, but the patient has had neck pain throughout, but less severe and now has increasing tremor that is a concern to him.

(Ex. 17-10)

Dr. Hines' impairment rating was the same 13 percent for the compression fracture as before, but 5 percent was given for the new disc bulges, 5 percent for cervical or neck pain and 10 percent for depression and anxiety. He did not provide a rating for the hand tremors until there was a more complete evaluation of the cervical injury. Dr. Hatfield also reported complaints of "shakiness" in both hands in May 2013, but could not provide an opinion on the etiology of this hand condition without an MRI of the cervical spine and neurological evaluation. With reference to the hand tremors, Dr. Hines stated as follows:

> It does seem quite curious from a timing onset that this has developed, however there is a strained reasoning to easily assume that this is related to the injury and I have therefore avoided this category at this time.

(Ex. 17-11)

Claimant's problems with sitting, standing and climbing are not new. In his hearing testimony in October 2011 in the arbitration proceeding, claimant stated that one of the accommodations he was provided at Linweld was the ability to sit, "if he had to." (Ex. X-28) Also he stated that he cannot drive for a long periods of time due to difficulties with sitting. (Ex. X-36:37) He also stated that he had difficulty climbing ladders. (Ex. X-32)

Although claimant is currently taking narcotic medication which adversely impacts his concentration, awareness and ability to drive, he was taking narcotic pain medications at the time of the arbitration hearing. (Ex. X-30)

I do not find a clear opinion in Dr. Hines' report that the new bulging discs and the neck pain he rated are causally related to the June 2, 2010 injury or compression fracture at L1. He was reluctant to provide a cause for the hand tremors.

Claimant now is complaining of left-sided or left leg pain. He clearly complained of this soon after the injury to Dr. Hatfield. However, Dr. Hatfield's records do not show left-sided complaints after that time. At the hearing in October 2011, claimant testified that his pain only extended at times into his right leg. (Ex. X-40) There is no medical opinion in evidence causally relating left-sided pain to the work injury.

Another neurologist, Michael Jacoby, M.D., opines that any of the complaints beyond the low back pain are not related to work injury. (Ex. V-47)

I cannot find the restriction against exposure to vibration or extreme temperatures to be related to the original back injury without more clarification by Dr. Hines. They more resemble a restriction due to hand problems.

Dr. Hines does causally relate the depression and anxiety due to continued chronic pain. Dr. Jacoby did not address claimant's mental status. Claimant had depression problems many years ago, but he was not being treated for this at the time of his injury. Although some of the chronic pain (bulging discs, left side pain, and neck pain) has not been shown to be work related, the work injury remains a major source of his ongoing chronic pain and the resulting depression and anxiety. Therefore, I do find that claimant has suffered the onset of depression and anxiety due to the work injury. However, I do not find any permanent activity restrictions precipitated by the depression and anxiety.

Therefore, I find that claimant has suffered a mild worsening of his condition due to work related depression and anxiety, but this alone has not caused any new impediment to return to the work force.

Economic Change of Condition:

From my reading of the arbitration decision, it is clear to me that claimant's continued work status at Linweld was a substantial factor in awarding only a 30 percent industrial disability for a worker whose only work experience involved manual labor and who is now restricted to only light physical demand employment. The fact that he was returned to work by Linweld only because Linweld accommodated for claimant's work activity limitations was mentioned several times in the decision.

Therefore, the loss of claimant's job at Linweld constitutes a significant change in his industrial disability.

Industrial Disability:

Claimant is now 56 years of age. He is a high school graduate. Most of his work history consists of manual labor jobs in construction and manufacturing. He is now unable to return to medium or heavy manual labor, the type of jobs for which he is best suited given his age, education and experience. He has never held a permanent light duty job.

Claimant is a manual laborer who now can only perform light duty or no lifting over 20 pounds and no bending or twisting. He cannot sit, stand or walk for prolonged periods of time. He is dependent on narcotic pain medications and has been since the injury.

Lastly, the views of the vocational rehabilitation consultant that claimant is not employable in the competitive labor market given his age, education, experience and residual functional capacities appears reasonable given the facts of this case. They are also uncontroverted.

Therefore, I find that claimant currently has no discernable earning capacity and is totally disabled. I also find that the work injury of June 2, 2010 was a significant factor, although not the only factor, in causing claimant's permanent and total disability.

CONCLUSIONS OF LAW

I. A review-reopening claim initiated pursuant to Iowa Code section 86.14(2) requires proof that, after the award or settlement, the claimant's physical disability has increased in a scheduled member case, or his earning capacity has changed in an industrial disability case as a result of a worsened physical or non-physical condition caused by the original work injury. Although we do not require the claimant to demonstrate his change in condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply—that the agency, in a review-reopening petition, should not reevaluate an employee's level of physical impairment or earning capacity, if all of the facts and circumstances were known at the time of the original action. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

A refusal by the employer to return an injured worker to work following a work injury due to new permanent restrictions is evidence of a significant loss of employability. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995); Vosberg v. A.Y. McDonald Mfg. Co., 519 N.W.2d 405, 408 (Iowa App. 1994); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980).

In the case sub judice, I found that claimant suffered a 100 percent or total loss of his earning capacity as a result of impairments caused by the original injury along with other impairments not shown to be work related. However, permanent total disability benefits are not subject to apportionment under section 85.34(7). Drake University v. Davis, 769 N.W.2d 176, 184 (Iowa 2009).

A finding of total disability entitles claimant to weekly permanent total disability benefits as a matter of law under Iowa Code section 85.34(3). Absent a change of condition, such benefits last a lifetime.

ORDER

1. Defendants shall pay to claimant permanent total disability benefits at a rate of four hundred forty-two and 72/100 dollars ($442.72) per week from the stipulated date of September 16, 2013.

2. Defendants shall pay accrued weekly benefits with interest in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein from the date of this decision.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 24th day of February, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Randall P. Schueller
Attorney at Law
1311 – 50th St.
West Des Moines, IA 50266
randy@loneylaw.com

Aaron T. Oliver
Attorney at Law
5th Fl. US Bank Bldg.
520 Walnut St.
Des Moines, IA 50309-4119
aoliver@hmrlawfirm.com

LPW/srs

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.