IN THE COURT OF APPEALS OF IOWA

No. 3-876 / 13-0636
Filed December 18, 2013

JAMES MCCARTHY,
Plaintiff-Appellant/Cross-Appellee,

vs.

JELD-WEN, INC.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

James McCarthy appeals from the Iowa Workers' Compensation Commissioner's findings that he is not permanently and totally disabled due to a respiratory injury and that his tinnitus did not arise out of his employment. The employer cross-appeals from an award of healing-period benefits for the respiratory injury. **AFFIRMED.**

Gary Nelson of Rush & Nicholson, P.L.C., Cedar Rapids, for appellant.

Joseph A. Quinn of Nyemaster Goode, P.C., Des Moines, for appellee.

Considered by Danilson, C.J., and Vogel and Tabor, JJ.

DANILSON, C.J.

James McCarthy appeals from the Iowa Workers' Compensation Commissioner's finding that he is not permanently and totally disabled due to a respiratory injury and that his tinnitus did not arise out of his employment. Jeld-Wen, Inc. cross-appeals from the commissioner's decision, claiming McCarthy was not entitled to healing-period benefits, and the evidence does not support the commissioner's finding that he had an eighty percent industrial disability due to the respiratory injury. We affirm the decision of the commissioner on the appeal and the cross-appeal.

I. Factual and Procedural Background

McCarthy worked for Jeld-Wen from 1978 until 2009. In late 2008, he was exposed to isocyanates and developed a chronic cough, shortness of breath, and exercise fatigue. After his employment was terminated on July 30, 2009, due to a reduction in force, he petitioned the Iowa Workers' Compensation Commissioner, alleging he had two separate injuries—an injury to his respiratory system and an injury to his hearing. Jeld-Wen admitted McCarthy suffered from a respiratory condition due to his exposure to isocyanates, but claimed he was not entitled to temporary total or additional permanent total disability benefits. As to the alleged hearing injury, tinnitus, the employer denied McCarthy sustained any damage arising out of and in the course of his employment.

After a hearing, a deputy commissioner issued a decision on September 1, 2011, finding McCarthy had not shown he sustained a tinnitus injury arising out of and in the course of his employment. The deputy determined McCarthy had reached maximum medical improvement on September 29, 2010. The deputy

concluded McCarthy was entitled to receive healing period benefits from July 31, 2009, to September 29, 2010. Finally, the deputy determined McCarthy's permanent partial disability rating was eighty percent. The employer appealed and McCarthy cross-appealed.

The commissioner affirmed and adopted the deputy's decision. Both McCarthy and the employer sought judicial review of the commissioner's decision. The district court determined there was substantial evidence in the record to support commissioner's findings. McCarthy appeals and Jeld-Wen cross-appeals the district court's decision.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act, as set forth in Iowa Code chapter 17A. *See* Iowa Code § 17A.19 (2011). We apply the standards of this section to the commissioner's decision and then decide whether the district court correctly applied the law in exercising its function of judicial review. *Lakeside Casino v. Blue*, 743 N.W.2d 169, 172–73 (Iowa 2007). "The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). Reviewing the record as a whole, we may reverse, modify, affirm, or remand to the agency for further proceedings if the agency's factual findings are not supported by substantial evidence, or its application of law to the facts is irrational, illogical, or wholly unjustifiable. *Westling v. Hormel Foods Corp.*, 810 N.W.2d 247, 251 (Iowa 2012); *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995).

III. Tinnitus

McCarthy contends the commissioner's decision that he failed to show his tinnitus arose out of and in the course of his employment is not supported by substantial evidence. He also claims there is not substantial evidence in the record to support the finding that he failed to prove a permanent disability as a result of the tinnitus.

We find substantial evidence supports the commissioner's decision McCarthy's tinnitus did not arise out of the course of his employment at Jeld-Wen, and that he does not have a permanent disability as a result of the tinnitus. Therefore, we affirm the district court's decision, which affirmed the commissioner's decision, pursuant to Iowa Rule of Court 21.26(1)(a), (b), (d), and (e).

IV. Respiratory Injury

A. Jeld-Wen contends McCarthy is not entitled to healing period benefits because he was medically capable of performing substantially similar employment. The employer claims McCarthy could perform all aspects of his job at Jeld-Wen, as long as they could be performed without exposure to isocyanates. It claims McCarthy was not restricted as to the types of work he could perform, but only as to the type of environment in which he could work. The employer asserts that at all times McCarthy was medically capable of substantially similar employment, and therefore, was not entitled to healing period benefits.

Section 85.34(1)[1] provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable . . . the employer shall pay to the employee compensation for a healing period . . . beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

The purpose of healing period benefits is to partially reimburse an employee for loss of earnings while recuperating from a work-related condition. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 604-05 (Iowa 2005); *Dunlap v. Action Warehouse*, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). "The healing period may be characterized as that period during which there is reasonable expectation of improvement in the disabling condition." *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 391 (Iowa 1993). An employee may have more than one healing period if ordinary and necessary medical care for the work-related injury temporarily removes the employee from the work force. *Waldinger*, 817 N.W.2d at 8-9.

Healing period benefits begin on the first day of disability after an injury, that is, the first day of incapacity to work because of an injury. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 466 (Iowa 2004). The healing period ends at the earliest of when (1) an employee has returned to work, (2) it is not anticipated there will be significant medical improvement from the injury, or (3) the employee

[1] The Iowa Supreme Court has determined the legislature has not clearly vested the commissioner with interpretive authority for section 85.34(1). *Waldinger Corp. v. Mettler*, 817 N.W.2d 1, 7 (Iowa 2012). For that reason, we review the commissioner's interpretation of section 85.34(1) for the correction of errors at law. *Id.*

is medically capable of returning to employment which is substantially similar to that which the employee had at the time of the injury. *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306-07 (Iowa 2010). "Healing period benefits are not payable when an employee returns to work." *Staff Mgmt. v. Jiminez*, ___ N.W.2d ___, ___, 2013 WL 6037119, at *15 (Iowa 2013).

"The commissioner, as finder of fact, is free to pick and choose from the record." *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 832 (Iowa 1994) (noting that while the record would have supported another date as the end of the employee's healing period benefits, the date chosen by the commissioner was supported by the record). "The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made." *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991).

Thus, the issue in this case is whether there is substantial evidence in the record to support the commissioner's finding that from July 31, 2009, to September 29, 2010, McCarthy was not medically capable to perform "work similar to that which he was performing prior to his injury." *See Rodda v. Vermeer Mfg.*, 734 N.W.2d 480, 484 (Iowa 2007). We note that in *Staff Mgmt.*, ___ N.W.2d at ___, 2013 WL 6037119, at *12, the Iowa Supreme Court found an employee was entitled to healing period benefits because substantial evidence showed she "was unable to do her prior job due to her work-related injury," notwithstanding the employer's claim she was unable to return to work due to immigration problems. Therefore, while McCarthy was laid-off from his job on July 30, 2009, the issue we must address is whether there is substantial

evidence that McCarthy could not have continued in his employment after that date due his work-related medical condition.

In a deposition on June 28, 2010, McCarthy testified that in July 2009, "I was getting by. I was not good at it anymore, but I was doing what I could." He also testified, "[T]here's no way I can hold down a full-time job at this point in time." He stated this was because he could not breathe and he would get lightheaded. McCarthy stated that when walking out to the mailbox, one-quarter mile away, he would need to stop because he was out of breath.

McCarthy started treating with Dr. Richard Schope, a physician, on August 31, 2009. Dr. Schope noted that since McCarthy was exposed to diphenylmethane diisocyanide at work he had problems with cough, shortness of breath, and wheezing. On October 23, 2009, Dr. Schope stated, "Prior to the past year, he had had good job descriptions apparently, good evaluations and then his performance evaluation went down once he started having more symptoms with cough, shortness of breath." Dr. Schope stated, "[A]ny time he does any activity at all, walking, if he goes outside in the cool air, the humid air, he starts to cough intractably."

Dr. Ihab Hassan noted in a medical report on December 31, 2009, that McCarthy was "only able to walk for about 200 yards or climb 2 to 3 flights of stairs before he has to rest and catch his breath. His cough is severe and persistent."

McCarthy began seeing Dr. Patrick Hartley in December 2009. In a deposition Dr. Hartley stated McCarthy had been diagnosed with reactive airway

disease. McCarthy was not to work in an environment with isocyanates or diisocyanates. During Dr. Hartley's deposition, the following exchange occurred:

> Q: So other than that, as far as the restrictions you gave him, he could have done any job where there wasn't any isocyanates? A: Yes.
>
> Q: So if Jeld-Wen could have taken isocyanates out of the manufacturing process, at that point he could have continued to work, and removed isocyanates or diisocyanates from the factory, he could have continued to work his job? A: Yes.
>
> . . . .
>
> Q: [I]t sounds like you believe Mr. McCarthy can go back to work as long as it's within these restrictions? A: Yes.

The district court determined, "McCarthy's testimony, as well as the medical evidence, supports the agency's award of healing period benefits." On appeal, we concur in the district court's assessment. McCarthy testified he was getting by in July 2009, and could no longer perform his job duties as he could in the past.[2] At the administrative hearing he testified he no longer had the physical ability to perform a full-time job. Additionally, Dr. Schope, in his medical report on October 23, 2009, stated McCarthy's "performance evaluation went down once he started having more symptoms with cough, shortness of breath."

There is substantial evidence in the record to support a finding that McCarthy was laid off because he could no longer fully perform his job duties as

[2] The dissent contends that healing period benefits should be denied because there was no medical opinion declaring that McCarthy could not work. McCarthy was laid-off due to the reduction in work force but the reduction fell upon the two lowest productive workers in the plant. The evidence reflects that McCarthy was suffering from an injury on the day of his lay-off, July 30, 2009. In fact, the employer stipulated that McCarthy sustained an injury to his respiratory system on July 30, 2009, and the injury caused permanent disability. Dr. Hartley concluded McCarthy did not reach maximum medical improvement until September 29, 2010. The employer never offered McCarthy any similar work. We, like the agency, decline to give weight to Dr. Hartley's testimony that McCarthy could have done any job after July 30, 2009, where isocyantes did not exist in the environment. McCarthy sought out work and there was no evidence that he refused to perform substantially similar work.

a result of work-related injury, his exposure to isocyanates. The evidence supports a finding that from July 31, 2009, to September 29, 2010, McCarthy was not medically capable of returning to employment which was substantially similar to that which he had at the time of the injury. While there may have been evidence in the record to support other factual findings, we review only to determine whether there is evidence to support the findings actually made by the commissioner. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 527 (Iowa 2012) ("[F]actual findings are not insubstantial merely because evidence supports a different conclusion or because we may have reached a different conclusion."); *Pitzer*, 507 N.W.2d at 393 (noting that the reference to some evidence does not mean the commissioner failed to weigh all of the evidence).

B. On appeal, McCarthy claims he is totally and permanently disabled as a result of his respiratory injury. He asserts the commissioner should have found his industrial disability was one hundred percent, not eighty percent. In its cross-appeal, Jeld-Wen contends there is not substantial evidence in the record to support the industrial disability rating of eighty percent, and argues the rating should be twenty percent.

Upon review of the record, we agree with the district court that substantial evidence supports the commissioner's finding McCarthy has an eighty percent industrial disability. On this issue, as with the issue involving McCarthy's tinnitus, we affirm the district court's decision and the commissioner's decision pursuant to rule 21.26(1)(a), (b), (d), and (e).

We affirm the decision of the district court and the workers' compensation commissioner. Costs on appeal are assessed one-half to each party.

AFFIRMED.

Tabor, J., concurs; Vogel, P.J., concurs in part and dissents in part.

VOGEL, P.J. (concurring in part, dissenting in part)

Though I agree with most of the majority's conclusions, I respectfully disagree with the portion of the opinion finding substantial evidence supports the award of healing period benefits.

Under the Iowa Code, healing period benefits shall be awarded:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, [and] the employer shall pay to the employee compensation for a healing period . . . *beginning on the first day of disability after the injury*, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1) (emphasis added). Thus, I agree with the majority's characterization that healing period benefits begin on the date the employee is injured. *See Broadlawns Med. Ctr.*, 792 N.W.2d at 306–07. However, I do not agree substantial evidence supports the finding McCarthy was unable to return to work due to his injury on July 31.

In order to qualify for healing period benefits, there must first be a "first day of disability after the injury." *See Waldinger*, 817 N.W.2d at 8 (holding healing period benefits can start and stop as a result of periods of "physician-directed time off work"). The record in this case is devoid of a medical opinion declaring McCarthy could not work. The only doctor to have addressed the issue of McCarthy's ability to work following the July 30, 2009 lay-off was Dr. Hartley, who stated in his deposition McCarthy could have done any job where there were

not any isocyanates. The doctor further testified these restrictions would have been reasonable for McCarthy back in December of 2009.

There are no other medical opinions in the record supporting July 31, 2009, as the basis for when McCarthy was unable to work. Nor was it disputed he was laid off due to a reduction in work force. Without a definitive expert report indicating McCarthy could not work as of July 31, 2009, I find it was an error for the agency to have awarded healing period benefits commencing on that date. McCarthy simply failed in his burden of production on this issue. *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 849 (Iowa 1995) (stating the burden rests on the worker to show an injury arose out of and in the course of his employment); *Flint v. City of Eldon*, 183 N.W.2d 344, 346 (Iowa 1921) (holding the burden of proof rests upon the claimant to establish his claim for benefits by a preponderance of the evidence). Termination due to a reduction in work force is not enough to support the finding McCarthy was entitled to healing period benefits, and therefore I would reverse the award of healing period benefits.