IN THE COURT OF APPEALS OF IOWA

No. 3-047 / 11-2068
Filed April 10, 2013

THOMAS MILLENKAMP,
Petitioner-Appellant,

vs.

MILLENKAMP CATTLE, INC.
and NATIONWIDE MUTUAL
INS. CO. d/b/a ALLIED,
Respondents-Appellees.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Thomas Millenkamp appeals the district court's ruling affirming the agency's denial of his request for alternate medical care. **AFFIRMED.**

William D. Currell of Currell Law Firm, Cedar Rapids, and James J. Roth of Roth Law Office, P.C., Dubuque, for appellant.

William Grell of Huber, Book, Cortese & Lanz, P.L.L.C., West Des Moines, for appellees.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Thomas Millenkamp appeals the district court's judicial review decision, which affirmed the agency's denial of Millenkamp's petition for alternate medical care. Millenkamp asserts the agency and the district court erred in (1) concluding the employer has the absolute right to change his medical care, (2) failing to apply agency precedent regarding his employer's ability to change his medical care, (3) failing to properly explain why it did not follow the agency precedent, (4) denying him due process by failing to follow agency precedent, (5) failing to require the employer to affirmatively monitor his medical care, and (6) concluding that the employer did not interfere with or abandon his medical care. We affirm the district court's decision, denying Millenkamp the alternate medical care he requested.

I. BACKGROUND FACTS AND PROCEEDINGS.

Millenkamp suffered a work-related traumatic brain injury in February 2001. Millenkamp Cattle, Inc. and Nationwide Mutual Insurance Co. (the employer) accepted liability following the agency's ruling in a contested case proceeding. Millenkamp was being treated by Dr. Sterrett, a neurologist, for his injury until Dr. Sterrett retired sometime in 2007 or 2008. The employer was not informed by Dr. Sterrett or Millenkamp of Dr. Sterrett's retirement. Following Dr. Sterrett's retirement, Millenkamp continued to receive the same medication, though the prescription was written by Dr. Compton, his primary care physician, who was also authorized by the employer to provide a prescription for Millenkamp's work-related high blood pressure. When the neurologic medication

was no longer efficacious, Millenkamp asked Dr. Compton to refer him to Dr. Neiman, another neurologist Millenkamp's wife had researched and selected. Dr. Compton complied with the request in August of 2008.

The employer paid for the initial prescription written by Dr. Neiman, and then advised Millenkamp that Dr. Neiman was not an authorized treating physician and future neurologic care would be handled by Dr. Rizzo, the employer's liability expert at the contested case hearing. Millenkamp objected to the designation of Dr. Rizzo, and the employer agreed to designate Dr. Young instead.

Millenkamp filed a petition for alternate medical care with the workers' compensation commission seeking to have Dr. Neiman designated as the authorized treating physician, rather than Dr. Young. Following a phone hearing, Deputy McElderry denied the petition, finding Millenkamp did not meet his burden of proving the authorized care was not effective in treating his injury. Deputy McElderry found, "The choice of a board certified neurologist that is relatively close to the claimant's residence appears very reasonable. The employer is permitted to choose the care provided, and changing authorized physicians (particularly where mandated by a physician's retirement) does not itself establish unreasonableness." Millenkamp sought reconsideration of this decision, which was denied, and ultimately, he filed a petition for judicial review.

Meanwhile, Millenkamp filed a second petition for alternate medical care approximately a month after the decision on the first petition, again challenging the employer's selected neurologist. Dr. Young had refused to treat Millenkamp,

so the employer authorized treatment with Dr. Cullen, another board certified neurologist. Deputy Pohlman rendered the decision for the agency on the second petition. He stated in his decision that he took notice of the prior alternate medical care proceeding. He found that the care provided by Dr. Neiman had been helpful to Millenkamp's condition, and "given the past conduct, it is unreasonable and unduly inconvenient for claimant to see [Dr. Cullen] given that Dr. Neiman is available, willing to treat claimant, and has already provided some care that has been effective."

The employer filed a petition for judicial review of Deputy Pohlman's decision. While that decision was on further review, it was discovered that Deputy McElderry's hearing was not properly recorded. Because Deputy Pohlman stated he took notice of Deputy McElderry's proceeding and that proceeding did not exist, the district court remanded both alternate medical care decisions back to the agency for a new hearing. Millenkamp dismissed his first alternate medical care petition without prejudice following the remand, so only the second alternate medical care decision was subject to rehearing in November of 2010.

Deputy Elliot issued his ruling on remand on November 16, 2010, finding the evidence did not support Millenkamp's claim that the employer abandoned his care. He also found that the evidence did not show the employer was trying to "avoid treatment recommendations of an authorized doctor," or "interfere with the treatment recommendations of Dr. Neiman." Deputy Elliot found the employer was simply exercising its statutory right to select care after the

retirement of Dr. Sterrett, and even if it assumed Dr. Neiman was an authorized treating doctor by virtue of Dr. Compton's referral, the employer "still [has] the right to change care by changing doctors. A referral to a doctor is not a lifetime appointment." Deputy Elliot concluded the employer has offered care with a board certified neurologist and the evidence showed the employer had provided reasonable care.

Millenkamp again filed a petition for judicial review. The district court upheld the agency's ruling, finding

> The record is devoid of any evidence that Dr. Cullen would not provide reasonable treatment for [Millenkamp's] injuries. [Millenkamp] admitted that he does not trust Dr. Cullen solely based on [the employer's] approval of him. The court finds that there is substantial evidence in the record to support the deputy commissioner's conclusion that [the employer] has offered reasonable care.

The district court found the commissioner's decision was not arbitrary based on its failure to follow the agency precedent: "The fact that [the deputy] did not rely on the precedent [Millenkamp] would prefer does not render his decision arbitrary." Finally, the district court rejected Millenkamp's claim that the employer abandoned his care, stating, "Based on [the employer's] prompt response once notified of Dr. Sterrett's retirement and its payments for [Millenkamp's] care, the Court finds that a neutral and reasonable mind could find the record contains substantial evidence to conclude that [the employer] did not abandon [Millenkamp's] care." Millenkamp appeals.

II. SCOPE AND STANDARD OF REVIEW.

Our scope of review in judicial review cases is for correction of errors at law. Iowa R. App. P. 6.907. However, to the extent constitutional issues are discussed, our review is de novo. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004).

The district court acts in an appellate capacity when it decides a case on judicial review. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). 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)." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012). We apply the same standards under Iowa Code section 17A.19(10) (2009), as did the district court, to determine if we reach the same conclusions. *Neal*, 814 N.W.2d at 518. If our conclusions are the same as the district court, we affirm; otherwise we reverse. *Id*.

Our standard of review of the agency's action depends on the individual issues raised on appeal. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). "Because of the widely varying standards of review, it is 'essential for counsel to search for and pinpoint the precise claim of error on appeal.'" *Id*. Millenkamp's various claims challenge the substantial evidence to support the factual findings, the agency's application of law to those facts, and the agency's interpretation of the applicable law.

In analyzing a challenge to the agency's factual findings, we will disturb those findings only if they are not supported by substantial evidence, when the record is viewed as a whole. *Burton*, 813 N.W.2d at 256. Our review is "limited to the findings that were actually made by the agency, not other findings that the agency could have made." *Id.* We will only disturb an agency's application of law to the facts if the application is "irrational, illogical or wholly unjustifiable." *Id.* (citing Iowa Code § 17A.19(10)(m)). Finally, our review of an agency's interpretation of the law depends on whether the agency has been clearly vested with the authority to interpret the statute in question. *Id.*

> When a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency. This is especially true "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." However, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," or when the language to be interpreted is "found in a statute other than the statute the agency has been tasked with enforcing," we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute.

Id. at 257 (citing *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 12–14 (Iowa 2010)); *see also* Iowa Code § 17A.19(10)(c), (*l*).

III. ALTERNATE MEDICAL CARE.

Iowa Code section 85.27(4) provides, in part,

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested,

> following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. . . . The employer shall notify an injured employee of the employee's ability to contest the employer's choice of care pursuant to this subsection.

While the employer has the obligation to provide and the right to choose the medical care an injured worker receives for compensable injuries under the statute, the employee retains the right to request alternate medical care if he is dissatisfied with the care being offered. Iowa Code § 85.27(4). "If the treatment provided by the employer is not prompt, not 'reasonably suited to treat the injury,' or is unduly inconvenient to the employee, the commissioner has authority to order the alternate care." *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 195 (Iowa 2003); *see also West Side Transp. v. Cordell*, 601 N.W.2d 691, 693 (Iowa 1999) (stating the employer's right to select the medical care is "a qualified right because the treatment must be (1) prompt, (2) reasonably suited to treat the injury, (3) without undue inconvenience to the claimant"). But the employee has the burden of proof to show the care authorized by the employer is unreasonable. *R.R. Donnelly*, 670 N.W.2d at 195; *see also Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 436 (Iowa 1997) ("By challenging the employer's choice of treatment—and seeking alternate care—[the employee] assume[s] the burden of proving that the authorized care is unreasonable. Determining what care is reasonable under the statute is a question of fact.").

A. Right to Change Care. Millenkamp first argues both the agency and the district court erred by concluding the employer had the absolute

right to "change" his medical provider. He claims the agency made this erroneous conclusion when it stated, "Assuming arguendo Dr. Neiman is an authorized treating doctor, the defendants still have the right to change care by changing doctors. . . . The defendants are exercising their statutory right to select care." He likewise asserts the district court's error occurred when it stated, "Under Iowa Code section 85.27, the employer is authorized to choose the claimant's care. Iowa Code § 85.27(4). An employer must 'furnish reasonable services.'" He asserts the district court left out the word "promptly" from its quote of Iowa Code section 85.27(4). We find both assertions unpersuasive.

Nowhere in either the agency or district court opinion does it say the employer has an absolute right to choose or change the medical care of an injured employee. The district court *accurately* quoted a portion of the first sentence of section 85.27(4)—"[T]he employer is obliged to *furnish reasonable services* and supplies to treat an injured employee, *and has the right to choose the care*." (Emphasis added.) Later in the opinion, the district court stated that the right to choose the care is limited to the care being offered promptly and without undue inconvenience to the employee—"Iowa Code section 85.27 requires the employer to offer prompt treatment without 'undue inconvenience' to the employee." The agency likewise quoted the same portions from section 85.27(4). We see no error in either the district court's or the agency's recitation of the applicable law regarding the employer's ability to select medical care.

Millenkamp then asserts the district court made an improper factual finding when it stated, "Once [the employer] became aware of the retirement, [the

employer] took prompt action to authorize other physicians." We conclude this statement was not an improper factual finding, but was simply a summary of the factual findings of the agency, which found—"The record shows Dr. Sterrett retired and the [employer] did not know that he had retired. . . . When the [employer] learned the claimant was seeing Dr. Neiman, the [employer] contacted the claimant, informed the claimant Dr. Neiman was not an authorized doctor and offered another doctor to the claimant."

Millenkamp ends his argument by asserting that the employer lost the ability to change the medical care due to more than four years of "indifference, inattentiveness, and inactivity." The agency found otherwise, concluding, "The claimant alleges the [employer] abandoned care and therefore he is entitled to choose his treating doctor. The evidence does not support this argument." As will be discussed later in this opinion, substantial evidence supports the agency's conclusion that the employer did not abandon Millenkamp's care. *See Burton*, 813 N.W.2d at 256 (holding that our review is "limited to the findings that were actually made by the agency, not other findings that the agency could have made").

B. Agency Precedent. Millenkamp's next set of claims center on the use of agency precedent. He claims the agency ignored applicable agency precedent regarding the employer's ability to change medical providers and also failed to give an adequate explanation of why it did not follow that precedent. Millenkamp claims the agency's action violates Iowa Code section 17A.19(10)(h).

Section 17A.19(10)(h) was intended by the legislature to amplify judicial review "under the unreasonable, arbitrary, capricious, and abuse-of-discretion standards." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005).

> The reporter-draftsman for the 1998 amendments has written that paragraph (h) provides a specific example "of agency action that any reviewing court should overturn as unreasonable, arbitrary, capricious, or an abuse of discretion." Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions* 69 (1998). The author suggests that this language does not really change the law, "but it should result in somewhat more structured, informed, and systematic review by the courts under the unreasonable, arbitrary, capricious, and abuse of discretion standards, and clearer arguments by and instructions to litigants with respect to the arguments that may be made with respect to such matters."

Id. Our supreme court has explained that

> [a]n agency's action is "arbitrary" or "capricious" when it is taken without regard to the law or facts of the case. . . . Agency action is "unreasonable" when it is "clearly against reason and evidence." An abuse of discretion occurs when the agency action rests on grounds or reasons clearly untenable or unreasonable. We have said an abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence.

Dico, Inc. v. Iowa Emp't Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998) (internal quotation marks and citations omitted).

In response to an appeal issue similar to the one presented by Millenkamp, the *Finch* court refused to remand a workers' compensation case to require the commissioner to explain possible inconsistencies between agency decisions, and the court explained: "We do not believe that Iowa Code section

17A.19(10)(h) establishes an independent requirement that the commissioner identify other agency rulings and explain possible inconsistencies between those rulings and the agency's decision in a case not reviewable under an abuse-of-discretion standard." *Finch*, 700 N.W.2d at 332–33.

In addition, even if *Finch* was wrongly decided as Millenkamp asserts, we find Millenkamp has failed to satisfy his burden to show the agency's decision in this case is inconsistent with the twenty-two different "agency precedents" he contends the agency and the district court ignored. He merely quotes single sentences out of thirty-three different agency decisions and contends the agency's decision in this case runs afoul to them all.

Paragraph (h) "requires consistency in reasoning and weighing of factors leading to a decision tailored to fit the particular facts of the case." *Office of Consumer Advocate v. Iowa Utils. Bd.*, 770 N.W.2d 334, 341–42 (Iowa 2009). It does not require the "application of rigid rules based solely on prior decisions," especially where the statutory scheme calls for a case-by-case analysis. *Anthon-Oto Cmty Sch. Dist. v. Pub. Emp't Relations Bd.*, 404 N.W.2d 140, 144 (Iowa 1987). The agency decision is not unreasonable, arbitrary, or capricious because it failed to distinguish this case from all alternate care decisions that found in favor of the injured worker. Accordingly, we find no error on this issue.

C. Due Process. Millenkamp's next claim flows from the previous. He asserts the agency violated his due process rights by failing to follow agency precedent. It appears he is making both a procedural and substantive due

process claim. As explained above, the commissioner's duty was to follow applicable statutes and case law, not its own precedent. *See id.* He has no substantive due process rights to have the agency follow incorrect standards. He was afforded an evidentiary hearing at the agency in which he was permitted to admit evidence and make argument. *See Bowers v. Polk Cnty. Bd. of Supervisors*, 638 N.W.2d 682, 690–91 (Iowa 2002) ("Procedural due process requires that before there can be a deprivation of a protected interest, there must be notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'"). We find no substantive or procedural due process violations in this case.

D. Duty to Monitor Medical Care. Millenkamp asks us for an affirmative ruling that an employer has an obligation to monitor the care provided under the statutory mandate of section 85.27. He claims both the agency and the district court erroneously found that the employer acted promptly once it became aware of the retirement of Dr. Sterrett because the agency and district court focused on the wrong timeframe. Had the district court and agency considered the years prior to the retirement of Dr. Sterrett, Millenkamp claims they would have reached a different conclusion.

It is unclear whether Millenkamp is challenging the factual findings of the agency or is attempting to make a statutory interpretation claim. However, we reject both contentions. Under a factual finding challenge, we will disturb those findings only if they are not supported by substantial evidence, when the record is viewed as a whole, and our review is "limited to the findings that were actually

made by the agency, not other findings that the agency could have made." *Burton*, 813 N.W.2d at 256. The agency concluded that the employer had not abandoned the care but instead continued to authorize the prescriptions of the treating doctors until Millenkamp sought the referral to Dr. Neiman, after Sterrett's retirement, without consulting with the employer. When the employer learned of the referral and of Dr. Sterrett's retirement, it contacted Millenkamp with a referral to Dr. Young and eventually Dr. Cullen. The agency found the referral prompt, and substantial evidence supports such a finding.

Nowhere in the agency opinion or in the district court decision does it state the employer has no obligation to monitor the medical care of the injured worker. Millenkamp's assertion that the agency and district court rulings in this case could be interpreted as such is rejected. If Millenkamp wished to see a neurologist after Dr. Sterrett retired, he could have and should have contacted the employer for a referral instead of seeking a referral on his own, in an attempt to thwart the employer's right to choose the medical care under section 85.27. The evidence supports the agency's conclusions, and we find no error in the agency's interpretation of the applicable law.

E. Interfere/Abandon Medical Care. Millenkamp's final claim on appeal is that substantial evidence does not support the agency's conclusion that the employer did not abandon or interfere with his medical care. He finds error in the agency's failure to make a finding regarding the employer's actions prior to the retirement of Dr. Sterrett, which he claims compels a different result in the alternate care proceeding. He claims the agency acted unreasonably in rejecting

the opinions of Dr. Compton and Dr. Neiman regarding the beneficial care he received from Dr. Neiman. In addition, he claims the agency's findings are unsupported in the record, conclusory in nature, erroneous, and patently inaccurate.

Again, we will disturb the factual findings of the agency only if they are not supported by substantial evidence, when the record is viewed as a whole, and our review is "limited to the findings that were actually made by the agency, not other findings that the agency could have made." *Id.* The insurance adjuster for the employer testified at the hearing that she was never notified of Dr. Sterrett's retirement by the doctor's office or by Millenkamp, nor was she ever asked to identify or authorize a new neurologist after Dr. Sterrett's retirement. Once the prescription written by Dr. Neiman came to her attention, she attempted to identify a neurologist for Millenkamp to see. She authorized Dr. Young, who ended up refusing to see Millenkamp through no fault of the employer.[1] She then set up an appointment for Millenkamp to see Dr. Cullen, a board certified neurologist, and Millenkamp refused to attend the appointment. Millenkamp asserted during the hearing that he refused to see Dr. Cullen because the doctor was selected by the employer. This evidence supports the agency's factual findings that the employer did not abandon Millenkamp's care nor did the employer attempt to interfere or avoid the treatment recommendations of Dr. Neiman by seeking to change medical providers. As found by the agency, the

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[1] The adjuster testified Dr. Young's office was concerned about the litigated nature of the claim and had received several calls from Millenkamp's attorney asking to set up a meeting and requesting information. Dr. Young's office indicated he did not feel comfortable seeing Millenkamp.

employer was simply “exercising [its] statutory right to select care” after the retirement of the authorized treating neurologist.

AFFIRMED.