IN THE COURT OF APPEALS OF IOWA

No. 9-106 / 08-0945
Filed March 26, 2009

BONNIE FITZPATRICK,
Plaintiff-Appellant,

vs.

SQUARE D,
Employer-Appellee,

INSURANCE COMPANY, STATE OF PENNSYLVANIA,
Insurance Carrier/Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Employee appeals from a district court judicial review ruling affirming the appeal decision of the workers' compensation commissioner. **AFFIRMED.**

Thomas M. Wertz and Matthew D. Dake of Wertz Law Firm, P.C., Cedar Rapids, for appellant.

John M. Bickel and Sarah Anderson of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Considered by Vaitheswaran, P.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Bonnie Fitzpatrick appeals from a district court judicial review ruling affirming the appeal decision of the workers' compensation commissioner. She claims the agency erred in failing to award permanent partial disability benefits. We affirm the decision of the district court.

I. Background Facts and Proceedings.

Fitzpatrick was employed by Square D, an electrical breaker manufacturing company, for forty-one years. She worked on the assembly line as a breaker technician, which required her to rotate among different positions on the line assembling, inspecting, and packaging breakers. She frequently had to bend over and lift breakers weighing about thirty pounds each.

Fitzpatrick suffered from back pain throughout her employment with Square D. She first visited a physician due to low back pain in 1974. In 1979 she fractured two vertebras in her back after falling off a horse. She missed six weeks of work as a result of that accident. Fitzpatrick was thrown from a horse again in 1992, resulting in renewed low back pain. She was off work for approximately eight weeks due to that accident. By 1994, x-rays of Fitzpatrick's back revealed disc degeneration. Her complaints of back pain began to increase in the following years. She visited her family physician on multiple occasions from 1998 through 2002 due to pain in her low back, and she began seeing a chiropractor every three to four months in 1991. Her back pain was so severe in June and December 2002 that she missed several days of work.

On August 5, 2003, while lifting a breaker and leaning over a table, Fitzpatrick felt a "tremendous pain" "like a big burning sensation" in her lower

back. She completed her shift and attempted to work the following night, but the pain worsened. Fitzpatrick decided to seek treatment from her family physician on August 7. She told him she had been suffering from pain in her low back "over the past couple weeks." He removed her from work for one week.

Fitzpatrick reported her injury to Square D upon her return to work on August 15, 2003. She was referred to Dr. Jeffrey Westpheling at the Work Well Clinic in St. Luke's Hospital. At her first appointment with Dr. Westpheling on September 8, she told him her low back pain "began approximately 6 months ago" and "has become progressively worse." He ordered several diagnostic studies, all of which were "essentially negative." An x-ray of her lumbosacral spine was unremarkable, a bone scan revealed no abnormalities, and an MRI showed "mild degenerative disk disease at L2-L3 and L3-L4 with no disk herniations identified."

Dr. Westpheling implemented a conservative course of treatment, which included physical therapy. He placed Fitzpatrick at maximum medical improvement on March 29, 2004, opining that her "pain remains mechanical in nature, in that it is exacerbated with lifting and bending." Although he imposed permanent work restrictions, he did not believe she suffered any permanent impairment as a result of her August 5, 2003 work injury. He later characterized the restrictions as preventative and necessary due to her "age, degenerative disc disease, and general level of conditioning."

Square D accommodated Fitzpatrick's work restrictions and placed her in a light duty position at her customary wage. Fitzpatrick was subsequently offered

an early retirement package due to downsizing at the plant. She accepted the package and retired on February 18, 2005.

Fitzpatrick filed a petition with the Iowa Workers' Compensation Commissioner on May 25, 2005, alleging she suffered an injury to her whole body on August 5, 2003. Following an arbitration hearing, the deputy workers' compensation commissioner determined Fitzpatrick proved "that she sustained a temporary aggravation of her pre-existing low back condition" on August 5, 2003, and awarded her medical expenses related thereto. However, the deputy further determined she did not prove that she "sustained a permanent injury as a result of her work injury on August 5, 2003," and denied her request for permanent partial disability payments.

Fitzpatrick appealed, and the workers' compensation commissioner affirmed and adopted the deputy's decision. Fitzpatrick then filed a petition for judicial review. Following a hearing, the district court affirmed the agency decision. Fitzpatrick now appeals the district court's ruling on her petition for judicial review. She claims the agency erred in failing to award her permanent partial disability benefits.

II. Scope and Standards of Review.

The Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, governs the scope of our review in workers' compensation cases. Iowa Code § 86.26 (2007); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. The district court acts

in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

"If the claim of error lies with the agency's findings of *fact*, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so we are bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004).

Because factual determinations are within the discretion of the agency, so is its application of law to the facts. *Clark*, 696 N.W.2d at 604; *see also Meyer*, 710 N.W.2d at 219 (stating the reviewing court should "allocate some degree of discretion" in considering the agency's application of law to facts, "but not the breadth of discretion given to the findings of facts"). We will reverse the agency's application of the law to the facts if we determine its application was "irrational, illogical, or wholly unjustifiable." *Meyer*, 710 N.W.2d at 218.

III. Discussion.

Fitzpatrick claims the deputy erred in determining that she did not suffer a permanent disability as a result of her work injury on August 5, 2003. She argues this decision was not based on substantial evidence and was illogical.

Permanent partial disability is determined by ascertaining the employee's industrial disability. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 673 (Iowa 2005). "Industrial disability is based upon a loss in earning capacity, which 'rests on a comparison of what the injured worker could earn before the injury as compared to what the same person could earn after the injury.'" *Id.* (citation omitted). Loss of earning capacity is determined by "considering the employee's functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent any of these factors affect the employee's prospects for relocation in the job market." *Id.*

The deputy's analysis of whether Fitzpatrick suffered permanent disability focused primarily on whether she suffered any permanent functional impairment to her back. "However, functional impairment is only one of the factors we consider when determining industrial disability."[1] *Id.* It is "not solely determinative." *Id.* We must therefore first analyze whether substantial evidence supports the deputy's finding that Fitzpatrick did not suffer a permanent functional impairment to her back as a result of her August 5, 2003 work injury. We will then analyze whether substantial evidence supports the deputy's ultimate conclusion that Fitzpatrick did not suffer a permanent disability of any type.

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[1] As our supreme court explained in *Bearce v. FMC Corp.*, 465 N.W.2d 531, 535 (Iowa 1999), functional and industrial disability are dissimilar.

> Functional disability is assessed solely by determining the impairment of the body function of the employee; industrial disability is gauged by determining the loss to the employee's earning capacity. Functional disability is limited to the loss of physiological capacity of the body or body part. Industrial disability is not bound to the organ or body incapacity, but measures the extent to which the injury impairs the employee in the ability to earn wages.

Bearce, 465 N.W.2d at 535.

A. Permanent Physical Impairment.

In concluding Fitzpatrick did not suffer a permanent functional impairment to her back as a result of her August 5, 2003 work injury, the deputy stated in relevant part:

> There is no dispute. Claimant has experienced prolonged back pain, dating back to 1974. The back pain has waxed and waned with time. Usually there is not a definitive diagnosis to accompany any treatment . . . . Claimant begins to improve after a course of conservative treatment.
>
> Subsequent to the date of her work injury, claimant has undergone extensive diagnostic testing. There are few objective findings to conclude claimant's condition has permanently changed since August 5, 2003.

Fitzpatrick argues that substantial evidence does not support the deputy's finding that she "experienced prolonged back pain" that "waxed and waned" in the years leading up to her work injury, instead characterizing her low back pain prior to August 5, 2003, as "minimal and intermittent." This argument is belied by her medical records, which reveal she suffered from back pain for many years prior to her work injury on August 5, 2003.

Fitzpatrick first began complaining of low back pain in 1974. She sustained a serious injury to her back in 1974 after she fell off a horse and fractured two vertebras. Fitzpatrick's back problems worsened in the 1990s following another horse accident. She began seeing a chiropractor every three to four months for her back pain and told her chiropractor in 1994 that she had been having problems with her back "off and on for years." Fitzpatrick consistently complained of low back pain to her family physician from 1998 through 2002. She missed several days of work in June 2002 and again in December 2002 due to pain in her low back. Her back began bothering her

again approximately six months before the incident at work on August 5, 2003. We believe a reasonable person could accept this evidence as sufficient to conclude, like the deputy did here, that Fitzpatrick had a long history of back problems preceding her work injury. *See* Iowa Code § 17A.19(f)(1) (defining substantial evidence); *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W2d 653, 657 (Iowa 2006) (stating evidence is substantial when a reasonable person could accept it as adequate to reach the same finding).

Fitzpatrick next argues the deputy erred in failing to find her preexisting back condition was aggravated by her work injury and resulted in a permanent impairment. She is correct that it is "well settled that when an employee is hired, the employer takes him subject to any active or dormant health impairments incurred prior to this employment." *Ziegler v. United States Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1961). Our supreme court has therefore recognized that if an employee's preexisting condition was "aggravated, accelerated, worsened or 'lighted up' by the injury so it resulted in the disability found to exist," the employee is entitled to recover benefits from the employer. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 908, 76 N.W.2d 756, 761 (1956). However, there is substantial evidence present in the record that Fitzpatrick's preexisting back condition was not permanently aggravated by her work injury on August 5, 2003.

Dr. Westpheling, who began treating Fitzpatrick for her back condition in September 2003 following her injury at work, stated that although Fitzpatrick initially attributed her back pain "to lifting breakers at work and leaning over a table," during his "treatment of her over . . . 13 occasions, it became more clear

that her symptoms were related to a degenerative condition of the back and not related to a specific work injury." Although he imposed permanent work restrictions, he stated they were preventative and required due to her "age, degenerative disc disease, and general level of conditioning" rather than her work injury. He opined that she did not suffer a permanent partial impairment as a result of the incident at work on August 5, 2003.

Orthopedic surgeon Dr. Kevin Eck, who examined Fitzpatrick at Dr. Westpheling's request, agreed with Dr. Westpheling's assessment of Fitzpatrick's condition. He stated it was "clear . . . that Mrs. Fitzpatrick has had problems predating the date of her injury . . . with respect to her lumbar spine." He believed her "symptoms were referable to myofascial pain and possibly also relating to symptoms from underlying spondylosis." Dr. Eck thus concurred with Dr. Westpheling that "her need for restrictions [was] preventative" and that "she did not sustain any permanent partial impairment as a result of" her work injury.

Dr. Ray Miller, Square D's examining physician, likewise opined that Fitzpatrick had "chronic problems with her back for the past 30 years" with no indication from any of the diagnostic studies "of an injury to the spine that can be identified related to her activities in 8/2003." He further noted "[t]here was no evidence of any change in [her] low back from previous evaluations and previous occurrences of low back pain." Dr. Miller thus did not believe there was any "injury to the back that occurred related to Ms. Fitzpatrick's employment at Square D and there is no indication for permanent partial impairment." He agreed with Drs. Westpheling and Eck that her work restrictions "were not

precipitated by a new injury that occurred at Square D but were prescribed to try to lessen the occurrence of further flares of her chronic low back pain."

Dr. Nathan Brady examined Fitzpatrick on one occasion in Dr. Westpheling's absence and was the only physician to opine that she was suffering from "an unresolved strain rather than a degenerative condition." He characterized her need for "physician care between 1994 and 2002 for low back pain" as "quite minimal," finding "little evidence that she was having chronic, progressive back complaints due to disc degeneration or arthritis." Dr. Brady consequently determined Fitzpatrick suffered a five percent permanent impairment of her whole body due to her work injury on August 5, 2003.

Fitzpatrick asserts the deputy erred in disregarding Dr. Brady's opinion. However, it is the role of the agency to determine the credibility of the witnesses and the weight to be given to any evidence, and it may accept or reject an expert opinion in whole or in part. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). Thus, the deputy was free to accept the opinions of Drs. Westpheling, Eck, and Miller over that of Dr. Brady.[2] The deputy specifically found Dr. Westpheling's opinion was entitled to more weight than the contrary opinion of Dr. Brady because Dr. Westpheling "treated [Fitzpatrick] for more than six

[2] Fitzpatrick argues that the deputy erred in relying on the opinions of Drs. Westpheling, Eck, and Miller because their opinions lacked "legal foundation" as there was "no indication that they were provided the knowledge that the workplace injury only needed to be one cause, not the only cause, in Fitzpatrick's disability." Fitzpatrick, however, did not raise such an objection at the time of the arbitration hearing when these physicians' opinions were admitted into evidence. She therefore did not afford Square D an opportunity "to remedy the alleged defect." *See McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 187 (Iowa 1980). Her argument concerning the admission of their opinion was thus not preserved. *Id.* Furthermore, as long as a logical basis exists for an expert's opinion, any supposed weaknesses in that opinion "goes to its weight, not to its admissibility." *Williams v. Hedican*, 561 N.W.2d 817, 831 (Iowa 1997).

months and had ample opportunity to observe [her] over the course of her treatment." Dr. Brady, on the other hand, "examined [Fitzpatrick] on one occasion" and "holds a specialty in public health" while Dr. Eck, who agreed with Dr. Westpheling's assessment of Fitzpatrick, is an orthopedic surgeon. Furthermore, as Square D notes, Dr. Brady was not provided with Fitzpatrick's entire medical history as the other physicians were.

It is not the role of the district court on judicial review, nor this court on appeal, to reassess the weight and credibility of any of this evidence. *See Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). We accordingly conclude substantial evidence supports the deputy's finding that Fitzpatrick did not suffer a permanent functional impairment to her back as a result of the incident at work on August 5, 2003.

B. Industrial Disability.

Having found substantial evidence to support the deputy's finding that Fitzpatrick suffered no permanent injury to her back, we turn to the remaining industrial disability factors to determine whether she suffered a permanent disability. *See Hill*, 705 N.W.2d at 675. Before doing so, we must first address Fitzpatrick's argument that "an award of industrial disability may be appropriate even in the absence of a physical impairment." In support of this argument, she relies on our supreme court's opinions in *McSpadden*, 288 N.W.2d at 192, and *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 354 (Iowa 1980).

We agree with Fitzpatrick that those two cases stand for her above-stated proposition: a permanent partial disability award may be proper where there is no functional impairment. *See Blacksmith*, 290 N.W.2d at 354; *McSpadden*, 288

N.W.2d at 192. In *McSpadden*, 288 N.W.2d at 192, our supreme court indicated an award of permanent partial disability benefits would be justified even in the absence of functional impairment if an employer refused to provide an employee work, or if an employee could not find "other suitable work after making bona fide efforts." In light of the principles enunciated in *McSpadden*, the court in *Blacksmith*, 290 N.W.2d at 354, determined an employee was "not barred from recovery by failure to prove an increased functional disability of his leg" where the employee was precluded from working at the job he had before "because his employer believes the past injury disqualifies him, resulting in a palpable reduction in earning capacity." However, the key to determining disability in both cases remained the employee's "capacity to perform his work or to earn equal wages in other suitable employment." *See McSpadden*, 288 N.W.2d at 192; *Blacksmith*, 290 N.W.2d at 350, 354.

We do not believe either *McSpadden* or *Blacksmith* controls the result in this case as Fitzpatrick made no showing that Square D refused to provide her work or that she could not find "other suitable work after making bona fide efforts." *See McSpadden*, 288 N.W.2d at 192. Rather, the record establishes Square D provided Fitzpatrick with employment within her work restrictions at her same wage until she accepted its early retirement offer in February 2005. *See Hill*, 705 N.W.2d at 675 (stating the fact that the employee "continued to work the same amount of hours, at the same rate of pay, weighs against any finding of reduced earning capacity"). Furthermore, although Fitzpatrick continually asserts in her appellate brief that she was "unable to return to her 41 year position at Square D" following her injury on August 5, 2003, the facts presented at the

arbitration hearing show she was offered and voluntarily accepted an attractive early retirement package due to downsizing at the plant. *See Clark*, 696 N.W.2d at 606 (finding no injury-caused reduction in earning capacity where employee was terminated because she did not return to work within the time required by company policy); *U.S. West Commc'ns, Inc. v. Overholser*, 566 N.W.2d 873, 877 (Iowa 1997) (determining employee did not show a reduction in earning capacity caused by her work injury where she was terminated as a result of company downsizing). A representative of Square D testified that if Fitzpatrick had chosen not to accept the early retirement package, the company would have been able to continue to employ her within her work restrictions.

We believe this case is more akin to the facts presented in *Hill*, 705 N.W.2d at 675. Like the employee in *Hill*, Fitzpatrick did not prove she had any permanent restrictions caused by her work-related injuries, contrary to her arguments otherwise. 705 N.W.2d at 675. Drs. Westpheling, Eck, and Miller all stated her restrictions were preventative and necessary due to her preexisting back condition, rejecting the notion the restrictions were "precipitated by a new injury that occurred at Square D."[3] Only Dr. Brady, whose opinion was dismissed

[3] Fitzpatrick argues that labeling the work restrictions as preventative does not change their detrimental impact on her earning capacity, which is the proper focus of an industrial disability inquiry. She is correct that our supreme court in *Excel Corp. v. Smithart*, 654 N.W.2d 891, 901 (Iowa 2002), stated it is the impact of a restriction on the worker that is important rather than its supposed preventative nature. However, there is substantial evidence present in the record to support the agency's conclusion that Fitzpatrick's work restrictions were not related to her August 5, 2003 work injury and were instead required due to her preexisting back condition. *See Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995) ("The mere fact that we could draw inconsistent conclusions from the same evidence does not mean that substantial evidence does not support the commissioner's determinations.").

by the agency, believed her permanent restrictions were necessitated by her August 5, 2003 work injury.

It is the agency's duty as the trier of fact "to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue." *Arndt*, 728 N.W.2d at 394-95. Our job as the reviewing court is simply to determine whether substantial evidence supports a finding "*according to those witnesses whom the [commissioner] believed*." *Id.* at 395. We thus reject Fitzpatrick's attempts on appeal to argue that the permanent restrictions imposed by Dr. Westpheling were related to her injury on August 5, 2003.

"Without proof of permanent restrictions caused by work-related injuries, the additional factors of age, limited vocational experience, and education lose their importance." *Hill*, 705 N.W.2d at 675. This is especially so in light of the fact that Fitzpatrick continued to work the same amount of hours at the same rate of pay prior to her voluntary early retirement. *Id.* In addition, like the employee in *Hill*, Fitzpatrick's "only remaining proof of industrial disability comes from her testimony that she could perform many activities before" August 5, 2003, but now is unable to perform many of those same activities. *Id.* Although this may be a persuasive argument, when it is viewed in light of the medical evidence, lack of impairment rating, and Fitzpatrick's past medical problems, we cannot say the agency's findings are not supported by substantial evidence. *See id.*

In light of our conclusion that substantial evidence supports the agency's determination that Fitzpatrick did not establish she suffered a permanent disability, we must reject her remaining argument that the agency erred in its application of the apportionment rule as articulated in *Second Injury Fund v.*

Nelson, 544 N.W.2d 258, 264 (Iowa 1995). That rule provides that "[w]hen a prior injury, condition or illness, *unrelated to employment, independently* produces an *ascertainable* portion of an injured employee's cumulative industrial disability, the employer is liable only for that portion of the industrial disability attributable to the current injury." *Nelson*, 544 N.W.2d at 264.

However, there are two limitations on this rule. *Id.* The first is that relied upon by Fitzpatrick:

> [T]he prior injury or condition must cause an "ascertainable portion" of the ultimate industrial disability. Thus, if the portion of the industrial disability resulting from the pre-existing, nonwork-related injury or condition cannot be determined, the employer is liable for the full industrial disability of the employee.

Id. (internal citation omitted). Fitzpatrick interprets this limitation as meaning "unless the preexisting condition was acting to prevent the subsequently injured employee from working," which she asserts was not the case here, "the preexisting condition does not allow the employer to avoid its liability." But as Square D correctly observes, in order for the apportionment rule to even apply, there must be a finding of industrial disability. *See id.* Because the agency determined Fitzpatrick did not prove she was permanently disabled, it did not and could not have applied the apportionment rule or its exceptions as articulated in *Nelson*. We therefore disagree with Fitzpatrick's assertions that the agency incorrectly, or otherwise, applied the apportionment rule in this case.

IV. Conclusion.

We, like the district court, conclude there was substantial evidence to support the agency's determination that Fitzpatrick did not establish an industrial

disability and she was thus not entitled to permanent partial disability benefits. We therefore affirm the decision of the district court.

AFFIRMED.