IN THE COURT OF APPEALS OF IOWA

No. 9-462 / 08-2036
Filed October 7, 2009

WEST RIDGE CARE CENTER,
Plaintiff-Appellant,

vs.

ANNETTE JOHNSON,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

West Ridge Care Center appeals from the district court's judicial review decision that affirmed the agency decision awarding employee benefits for a permanent total disability. **AFFIRMED.**

Cynthia Scherrman Sueppel, Charles A. Blades, and Chris J. Scheldrup of Scheldrup Blades Schrock Sand Aranza P.C., Cedar Rapids, for appellant.

Thomas M. Wertz and Daniel J. Anderson of Wertz & Dake, P.C., Cedar Rapids, for appellee.

Heard by Vogel, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

West Ridge Care Center appeals from the district court's judicial review decision that affirmed the agency decision awarding employee benefits for a permanent total disability to Annette Johnson. West Ridge contends that the commissioner and district court erred in finding Johnson permanently and totally disabled under the traditional analysis and the odd-lot doctrine. We affirm.

I. Background Facts and Proceedings.

Annette Johnson began working at West Ridge (a residential care facility serving the elderly) as a housekeeper in 1994. Within a year, Johnson began working in the laundry department. Her job duties included loading and unloading washing machines and dryers, folding and ironing, picking up dirty laundry around the facility, and delivering clean laundry to residents. At the time of the arbitration hearing, Johnson was forty-three years old. She has an eleventh grade education and has not obtained a GED or high school diploma. Prior to working for West Ridge, Johnson worked briefly at a photography studio, but has no other work experience or marketable skills. Johnson's supervisors at West Ridge, however, have described her as hard-working, smart, and organized—a "star employee" with a perfect attendance record.[1]

In 2002, Johnson sustained a back injury when she maneuvered to catch a heavy laundry cart that was falling toward a wheelchair-bound resident. An MRI revealed a disk herniation at L4-5 on the right. Dr. Loren Mouw performed a diskectomy and partial facetectomy on Johnson on August 12, 2002, and

[1] Johnson's supervisors testified that her performance and work ethic remained exemplary even after her injury.

released Johnson to work without permanent restrictions on November 10, 2003. On October 20, 2005, Dr. Douglas Sedlacek, the pain management specialist in charge of Johnson's post-surgery care, declared Johnson to be at maximum medical improvement. Dr. Sedlacek gave Johnson several work restrictions:

(i) One eight-hour shift per day with a maximum of 32 hours weekly;
(ii) 20 lb lifting restriction;
(iii) No bending at the waist to the floor;
(iv) Sit as needed;
(v) Continue use of a helper 4 hours of the 8 hour shift; and
(vi) Possibly schedule to work only two days in a row.

On January 23, 2007, Dr. Sedlacek imposed a three-week trial restriction of six-hour shifts per day to see if Johnson's pain improved. Johnson continued to work six-hour shifts as of the time of the arbitration hearing.

Johnson was issued two different impairment ratings: Dr. William Roberts assigned an impairment of seven percent body as a whole on December 6, 2005, and Dr. John Kuhnlein assigned an impairment of fifteen percent body as a whole on November 29, 2006. At Johnson's request, vocational specialist Barbara Laughlin authored a report on January 3, 2007. Laughlin's report included the following findings:

> Ms. Johnson has significant restrictions and is currently being greatly accommodated by her employer. However, in terms of her employability, it is necessary to look beyond one employer. It is possible that she could be fired, her employer could be bought by another, or the company could go out of business. . . .
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> It is unlikely that any other employer would hire Ms. Johnson for comparable work and also hire a helper to assist her for four hours per day. This is particularly true in light of the fact that she has no unique or unusual skills to bring to the labor market.
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> If Ms. Johnson were to seek work elsewhere, it is my opinion that she would face extreme difficulty in obtaining employment. Additionally, she does not hold a high school diploma or GED,

> which is sought after by employers in even factory or unskilled work.

West Ridge accommodated Johnson's restrictions and she was able to maintain her employment.[2] However, Johnson continued to experience pain from her injury. Eventually, on June 14, 2006, Johnson filed for workers' compensation benefits. After an arbitration hearing on March 8, 2007, the deputy workers' compensation commissioner determined Johnson was permanently and totally disabled, under both the odd-lot doctrine and by traditional analysis. On April 28, 2008, the commissioner affirmed and adopted the deputy's decision as final agency action with additional analysis. On judicial review, the district court affirmed the agency's decision. West Ridge now appeals.

II. Scope and Standard of Review.

Iowa Code chapter 17A governs our review of the decisions of the workers' compensation commissioner. Iowa Code § 86.26 (2007); *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). The factual findings of the commissioner are reversed only if they are not supported by substantial evidence. Iowa Code § 17A.19(10)(f); *Midwest*, 754 N.W.2d at 864. Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion. *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 400 (Iowa Ct. App. 2007). 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 v. IBP, Inc*., 710 N.W.2d 213, 218 (Iowa 2006). In reviewing the district court's decision, we apply the standards of chapter 17A to

[2] By all accounts, the record indicates West Ridge was an exemplary employer.

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).

III. Merits.

West Ridge argues the commissioner and the district court erred in determining Johnson is permanently and totally disabled. West Ridge contends the decisions were based on an irrational, illogical, or wholly unjustifiable application of law to fact, when Johnson returned to physically demanding work full-time for several years after her surgery. West Ridge alleges that the undisputed facts of this case show Johnson has significant physical capacity even with her restrictions. West Ridge further argues the decisions were not supported by substantial evidence in the record, when Johnson continues to excel at her work and be a successful employee.

The commissioner may award permanent total disability benefits pursuant to Iowa Code section 85.34(3). Total industrial disability occurs when an injury "wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000). Total disability does not require a state of absolute helplessness. *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 219 (Iowa 2004). The issue is whether there are jobs in the community the employee can do for which the employee can realistically compete. *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994).

Industrial disability means reduced earning capacity. *McSpadden v. Big Ben Coal Co*., 288 N.W.2d 181, 182 (Iowa 1980). Many factors are considered

in determining industrial disability, including the employee's age, intelligence, education, qualifications, experience, bodily impairment, and the injury's effect on the employee's ability to find suitable work. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 495 (Iowa 2003). A worker with only a partial functional disability has a total industrial disability, when the combination of factors precludes the worker from obtaining regular employment to earn a living. *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985); *see also Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1996) ("[T]he focus is not solely on what the worker can and cannot do; the focus is on the ability of the worker to be gainfully employed.").

The deputy workers' compensation commissioner determined as follows:

> Johnson is 43 years old and without either a high school diploma or GED. Her work experience is entirely in unskilled or semi-skilled work including medium physical demand requirements. Due to the restrictions imposed by Dr. Sedlacek, she cannot lift over 20 pounds, cannot bend, must be able to sit whenever necessary, and is limited to a 32-hour week—and must have a dedicated helper for half of each work day. Vocational specialist Laughlin's opinion is persuasive in this case: it is highly unlikely that another employer will provide this laundry worker similar work along with a dedicated assistant on a half-time basis. While West Ridge argues that Johnson has experience in the "ever-growing field of residential care," it is more accurate to note that she has experience only as a laundry worker and housekeeper. There is no showing, for example, that she has medical or administrative skills. Any evaluation of her industrial loss must take into account the skills and experience that Johnson actually has, not an overly-optimistic view of skills and experience that she does not have.

Thereafter, the commissioner affirmed and adopted the deputy's decision as final agency action with additional analysis:

> I must admit that an award of total disability to a person who was working up to eight hours per day, 32 hours a week, shortly before hearing is a bit unusual. The restriction at the time of

> hearing limiting her work hours to six per day was only temporary. However, the permanent restriction that claimant can only work half of the time without a helper, even when she is following the other significant restrictions in her job at West Ridge is the most obvious impediment to employment outside of West Ridge.

The district court affirmed the agency decision, stating in part:

> West Ridge argues that the Deputy's total disability finding is not supported by substantial evidence because the Deputy relied too heavily on Johnson's accommodations and disregarded the evidence that Johnson's work activities remained physically strenuous even with the accommodations, Drs. Roberts' and Kuhnlein's impairment ratings are not severe enough to support total disability, and the permanent restrictions imposed by Dr. Sedlacek in October 2005 are not severe or onerous. After reviewing the record as a whole, this Court finds that the Deputy's total disability finding is supported by substantial evidence. It was the Deputy's responsibility to weigh the industrial disability factors along with all the other evidence in the record. Moreover, the Deputy considered the industrial disability factors appropriate to Johnson's situation before arriving at a finding of industrial disability.
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> . . . .
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> The question on judicial review is not whether the evidence supports a different finding, but whether it supports the finding the Deputy actually made. The possibility that the Deputy could have found that Johnson is not permanently and totally disabled does not prevent the finding that she is from being supported by substantial evidence.
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> . . . .
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> The Court understands Petitioner's frustration and argument that it does not seem logical that the Respondent can be found permanently totally disabled and yet continue to work within restrictions for 32 hours per week at a position provided by Petitioner. However, as this Court's analysis shows, under the law, this conclusion may be properly reached by the Workers' Compensation Commissioner, when, as here, it is supported by both substantial evidence in the record and the application of law to those facts as found by the Commissioner.

Our review of the record confirms the nature and substance of the evidence cited in the commissioner's findings of fact. Like the district court, we conclude substantial evidence supports the commissioner's resulting decision

awarding Johnson permanent total disability benefits. Nonetheless, West Ridge contends substantial evidence does not support the commissioner's finding that Johnson cannot successfully be employed at a physically demanding job when the evidence shows that she was similarly employed at West Ridge until shortly before the hearing.

Johnson's continued employment at West Ridge after her back injury is not evidence that employment existed for her in the job market. The only reason she was able to continue in that job is because West Ridge accommodated her numerous restrictions and limitations (she was allowed to work shorter shifts, an assistant helped her with heavy lifting for half of her shift, she was allowed to sit when necessary, she used a spring-loaded cart to pick up and deliver laundry, etc.). Such accommodations were not normally associated with the laundry job, or any other job at the care center. In order for an accommodated job to be considered a factor in discerning a worker's earning capacity, it must appear the accommodation would be available to the worker in the competitive job market. *See Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 18 (Iowa 1997). There is no evidence in the record suggesting the accommodation is available in the competitive job market. As such, we cannot consider the fact that Johnson continued her employment at the care center after her injury as probative on the issue of her employability or earning capacity.

Substantial evidence in the record supports the determination made by the commissioner in this case. *See* Iowa Code § 17A.19(10)(f). A reasonable person would find the evidence adequate to reach the same conclusion. We

cannot therefore say the commissioner's decision was irrational, illogical, or wholly unjustifiable. *Id.* § 17A.19(10)(m). We therefore affirm.

Because we found substantial evidence supports the award of permanent total disability benefits based on the theory of industrial disability, it is unnecessary to address the odd-lot doctrine. We affirm the district court's order affirming the commissioner's decision awarding Johnson permanent total disability benefits.

AFFIRMED.