IN THE COURT OF APPEALS OF IOWA

No. 9-490 / 08-1708
Filed October 7, 2009

HAWKEYE WOOD SHAVINGS and
GREAT WEST CASUALTY COMPANY,
Defendants/Petitioners-Appellants,

vs.

JAMES PARRISH,
Claimant/Respondent-Appellee.

JAMES PARRISH,
Cross-Appellant,

vs.

HAWKEYE WOOD SHAVINGS and
COMMERCE & INDUSTRY INS. CO.,
Cross-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Employer and insurance carrier appeal from a district court judicial review ruling affirming the workers' compensation commissioner's benefit award. Employee appeals the district court's credit award. **AFFIRMED IN PART AND REVERSED IN PART.**

Stephen W. Spencer and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., Des Moines, for appellants.

Martin Ozga of Max Schott and Associates, P.C., Des Moines, for appellee.

Jean Z. Dickson of Betty, Neuman & McMahon, P.L.C., Davenport, for cross-appellees.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Hawkeye Wood Shavings and Great West Casualty appeal from the district court's order affirming the Iowa Workers' Compensation Commissioner's decision awarding James Parrish permanent total disability benefits in a review-reopening proceeding. Parrish appeals the district court's grant of a credit under Iowa Code section 85.34(3) (2005). We affirm in part and reverse in part.

I. Background Facts and Proceedings.

Parrish worked as a truck dispatcher for Hawkeye and suffered a September 25, 2000 back injury resulting in Dr. Koontz performing a L4-L5 and L5-S1 fusion. In prior proceedings, *Hawkeye Wood Shavings, Inc. v. Parrish*, No. 03-1352 (Iowa Ct. App. Dec. 8, 2004), we concluded Parrish had a ten percent industrial loss. Parrish continued to work at Hawkeye after the September 2000 injury and, in May 2002, underwent a second back surgery in which Dr. Koontz extended Parrish's previous fusion to L3-L4. Parrish was off work from April 30, 2002 through June 25, 2002. After returning to work, Parrish's pain intensified and, in March 2003, he was in constant pain. In July 2003, Parrish resigned effective August 8, 2003.

Subsequently, Parrish initiated two new workers' compensation filings: (1) a petition alleging a new back injury in 2002; and (2) a review-reopening petition alleging his current condition was caused by his September 2000 injury.[1] The agency consolidated Parrish's two actions for hearing.

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[1] Between 2000 and 2002, Hawkeye changed workers' compensation carriers. Great West Casualty provides coverage for the September 2000 injury. Commerce and Industry provides coverage for any injuries occurring in 2002.

After a hearing, deputy Pohlman ruled in August 2006: The medical evidence indicates "the new herniation was sequela to the original injury and thus not a new injury." Further, the combined effects of Parrish's "depression, chronic pain, and physical limitations have left [him] effectively with no earning capacity." Therefore, Parrish "is now permanently and totally disabled." The deputy dismissed Parrish's new-injury petition and awarded benefits under the review-reopening petition.

The parties appealed and the workers' compensation commissioner, upon de novo review, issued a lengthy decision affirming the deputy's decision. The commissioner's discussion of the medical evidence detailed the opinions of five doctors, including Dr. Kaspar, Hawkeye's independent medical examiner. All five doctors related the second injury to the original injury. For example, Dr. Iqbal treated Parrish for chronic pain over the course of several years and opined:

> 2. I agree with Dr. Koontz as well as Dr. Kaspar that the problems at the lumbar 3-4 level are from the initial injury at the L4-S1 level . . . .
>
> 3. I also agree that the problems above the level of fusion of lumbar 3-4 are present because of the fusion at the levels below. Once you fuse one level, the mobile segment above or below has to work extra hard and degenerates faster because of the added stress produced from the fusion above or below.

After analyzing the medical evidence, the commissioner concluded: "The greater weight of the evidence supported the presiding deputy's conclusion that the second injury was related to the original injury." The commissioner next determined the change in Parrish's condition warranted an award of additional benefits and found Parrish to be permanently and totally disabled.

Hawkeye, Great West, and Parrish all sought judicial review. The district court, acting in an appellate capacity, determined substantial evidence supported the commissioner's conclusions: (1) the symptoms necessitating Parrish's second surgery were a continuation of the symptoms of the first injury, and (2) Parrish is permanently and totally disabled. Additionally, the court ruled Great West is entitled to credit for actual payments made for the ten percent partial disability award Parrish received after his first surgery. This appeal followed.

II. Scope and Standards of Review.

Iowa Code section 17A.19 (2007) lists the instances when a court may, on judicial review, reverse, modify, or grant other appropriate relief from agency action. We do not apply a "scrutinizing analysis" to the commissioner's findings. *Midwest Ambulance Serv. v. Ruud,* 754 N.W.2d 860, 866 (Iowa 2008). Rather, we are bound by the agency's findings of fact if supported in the record as a whole and will reverse only if we determine substantial evidence does not support the agency's findings. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Id.* "The burden on the party who was unsuccessful before the commissioner is not satisfied by a showing that the decision was debatable, or even that a preponderance of evidence supports a contrary view." *Ruud*, 754 N.W.2d at 865.

Unlike the commissioner's findings of fact, "we give the commissioner's interpretation of the law no deference and are free to substitute our own judgment." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007). "On the

other hand, application of the workers' compensation law to the facts as found by the commissioner is clearly vested in the commissioner" and may be reversed "only if it is irrational, illogical, or wholly unjustifiable." *Id.*

III. Review-reopening Injury or New Injury.

Hawkeye and Great West argue the commissioner erred in finding Parrish's current condition was caused by his September 25, 2000 injury.

Review-reopening proceedings are authorized by Iowa Code section 86.14(2), which authorizes the commissioner to reopen an award to inquire whether the employee's condition justifies an increase in compensation. Parrish has the burden of establishing that, "subsequent to the date of the award under review," he has suffered a decrease in "earning capacity proximately caused by the original injury." *See Kohlaas v. Hog Slat, Inc.*, ___ N.W.2d ___, ___ (Iowa 2009) (emphasis omitted).[2] "A cause is proximate if it is a substantial factor in bringing about the result." *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 354 (Iowa 1980).

The commissioner extensively reviewed the medical evidence and specifically identified language in the reports of five doctors who opined Parrish's initial injury was a substantial factor in bringing about the subsequent fusion at L3-4, difficulties at L2-3, and chronic pain complaints. It is the role of the agency to determine 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,

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[2] The *Kohlass* court abrogated one element of the employee's review-reopening burden of proof as set out in *Acuity Insurance v. Foreman*, 684 N.W.2d 212 (Iowa 2004). An employee is not required to prove the current extent of disability was not contemplated by the commissioner in the original arbitration award. *See Kohlass*, __ N.W.2d at ___.

321 (Iowa 1998). It is not the role of the district court on judicial review, or 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). The district court ruled substantial evidence supported the commissioner's determination that Parrish's back problems subsequent to his initial fusion were related to the original injury and were not a new injury. When we review the district court's decision, "we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. If they are the same, we affirm; otherwise, we reverse." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004). We agree with the district court.[3]

IV. Permanent and Total Disability.

Hawkeye and Great West argue the commissioner's finding of permanent and total disability is unsupported by substantial evidence.

Total disability does not equate to a state of absolute helplessness. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000). Rather, "[s]uch disability occurs when the 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." *Id.* The issue is whether "there [are] jobs in the community the employee can do for which the employee can realistically compete." *Second Injury Fund v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994). "Thus, the 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." *Second Injury Fund*

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[3] This conclusion moots Parrish's appeal claiming he established he suffered a new injury in 2002 if the commissioner's review-reopening ruling is found to be incorrect.

v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995). “When [a] combination of factors precludes the worker from obtaining regular employment . . . the worker with only a partial functional disability has a total industrial disability.” *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985).

Hawkeye first claims Dr. Bashara’s increase of Parrish’s original impairment rating from twenty-six percent to only twenty-eight percent whole body impairment means “the ratings are essentially unchanged.” Hawkeye next contends this proves Parrish is not permanently and totally disabled. We disagree. Expert testimony showing an increased functional impairment rating is not required for a determination of permanent and total disability in a review-reopening. *See Acuity Ins.*, 684 N.W.2d at 219-220, *overruled on other grounds by Kohlaas*, ___ N.W.2d at ___.

Second, Hawkeye and Great West claim “nothing had substantially changed at the time of the second hearing” to justify an award of permanent total disability benefits. Our review of the record shows otherwise. First, Parrish’s condition detrimentally changed to point where he needed another fusion surgery. Second, there was a substantial change in Parrish’s restrictions following the second surgery; specifically, the lifting restriction alone was changed from forty to fifty pounds to ten to fifteen pounds. Additionally, the resulting pain required the implantation of a spinal cord stimulator and also caused Parrish to develop depression and anxiety. There was no indication of a mental-condition issue at the first hearing and no evidence was presented at review-reopening to dispute Dr. Heiss’s diagnosis of major depressive disorder.

The commissioner concluded: "Psychologically, [Parrish] was not able to handle his job duties."

Further, there was no vocational evidence to rebut the expert's conclusion Parrish was unable to return to the competitive labor market. In fact, Parrish applied for social security disability benefits on August 8, 2003, and was awarded benefits as of that date.

Finally, the commissioner expressly found Parrish to be credible, ruling:

> [Parrish] credibly testified he could no longer physically tolerate all the sitting at work. Eventually, the sedentary dispatching job proved to be too difficult for [him] to handle. If [he] is unable to perform the duties of a truck dispatcher, he is not going to tolerate any other position in the competitive labor market. . . . Gainful employment is not within [his] grasp.
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> [Parrish] has lost his earning capacity. At [sixty-four], retraining is not a viable option.

We agree with the district court's conclusion substantial record evidence supports the agency's finding of permanent and total disability.

V. Parrish Cross-Appeal: Great West's Credit Entitlement.

Great West, after the commissioner issued the appeal decision, argued for the first time it was entitled to a credit for benefits already paid for the September 2000 injury.[4] Parrish argued the credit issue had been waived because it was not presented to the agency as an issue in the parties' prehearing report. The district court granted the requested credit.

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[4] The deputy stated: "The parties submitted the following issues for determination: [Review-reopening file] 1. Whether claimant has sustained a change of condition, which warrants the award of additional healing period; permanent partial or total disability; and medical expenses." The commissioner stated: "Defendants . . . submitted the following issues on appeal: 1. The deputy erred in finding claimant's current condition was caused by his injury of September 25, 2000; and 2. The deputy erred in finding claimant permanently and totally disabled."

The workers' compensation agency's rules require all parties to complete a hearing report prior to the commencement of the hearing. James R. Lawyer & Judith A. G. Higgs, *Iowa Practice Series—Workers' Compensation* § 21:24, at 262-63 (2008-09 ed.). This report gives the parties the opportunity to either stipulate to or dispute case issues, including the issue "that credit is given for benefits paid." *Id.* "The prehearing report must be signed by the parties and approved by the deputy commissioner." *Id.*

Here the parties' appropriately-signed hearing report disputed entitlement to permanent disability, but stipulated: "If the injury is found to be a cause of permanent disability, the disability is an industrial disability." The hearing report is an agency form that includes a section specifically addressing—"Credits Against Any Award." Great West and Parrish stipulated: "Prior to hearing, claimant was paid _0_ weeks of compensation at the rate of $ ____ per week. No credit re: 2002 lost time." The hearing report therefore shows that permanent total disability was an issue at the time of hearing and a credit issue was not being raised by Great West. Consequently, because the hearing report signed by Great West stipulated "0 weeks" of credit, neither the deputy nor the industrial commissioner addressed credit entitlement based on payments for the September 2000 back injury.

The district court reviews workers' compensation agency decisions in an appellate capacity. *Al-Gharib*, 604 N.W.2d at 627. We conclude the district court's award of credit was in error because "[o]ur review of contested case decisions is limited to those questions considered by the agency." *See St.*

Luke's Hosp. v. Gray, 604 N.W.2d 646, 650 (Iowa 2000) (holding defendant waived issue raised for the first time on appeal of deputy's decision to commissioner and not raised "in the parties prehearing report as required by the agency's rules"). Great West waived its newly-argued credit issue and we reverse the district court's credit award.

AFFIRMED IN PART AND REVERSED IN PART.