IN THE COURT OF APPEALS OF IOWA

No. 0-727 / 09-0343
Filed January 20, 2011

NANCY LEE HENNIGAR,
Petitioner-Appellant,

vs.

SECOND INJURY FUND,
Respondent-Appellee.

Appeal from the Iowa District Court for Worth County, Stephen P. Carroll, Judge.

Nancy Hennigar appeals the district court's ruling on judicial review affirming the decision of the Iowa Workers' Compensation Commissioner denying her claim for benefits from the Second Injury Fund of Iowa. **AFFIRMED.**

Mark S. Soldat of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Joanne Moeller, Special Assistant Attorney General, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Nancy Hennigar appeals the district court's ruling on judicial review affirming the decision of the Iowa Workers' Compensation Commissioner denying her claim for benefits from the Second Injury Fund of Iowa. The commissioner concluded the Fund is not required to pay compensation under Iowa Code section 85.64 (2001) because the first injury sustained by Hennigar did not result in permanent loss of use of either eye, and the second injury sustained by Hennigar was to her body as a whole rather than a scheduled member. The district court affirmed the commissioner's decision. On appeal, we agree with the district court and conclude substantial evidence supports the determination that Hennigar did not meet her burden to prove a prior permanent loss of use of either eye as a first qualifying injury. We therefore affirm the district court order upholding the commissioner's denial of Hennigar's petition for Fund benefits.

I. Background Facts and Proceedings.

Between 1996 and 2001, Hennigar was employed at several businesses in the Mason City area as a cosmetologist and cosmetology teacher. During this time, she experienced various conditions in both eyes, including dry eye, conjunctivitis, and dacrocystitis, which she attributed to her cosmetology work. In or before November 2001, Hennigar also experienced contact dermatitis on her upper extremities, which she attributed to her cosmetology work.

In February and April 2002, Hennigar filed several petitions with the Iowa Workers' Compensation Commissioner seeking benefits from three former

employers and the Second Injury Fund of Iowa for her injuries.[1] Hennigar sought recovery from the Fund under the provisions of Iowa Code section 85.63 et. seq., alleging her eye condition constituted a first qualifying injury and her contact dermatitis constituted a second qualifying injury. The case went to hearing before a deputy commissioner on July 7, 2003, who rendered a proposed decision on September 5, 2003. The proposed decision held Hennigar's eye condition did not constitute a first qualifying injury under Iowa Code section 85.64, because Hennigar had failed to establish permanent loss of use of either eye. Without a qualifying first injury, Hennigar could take nothing from the Fund. The proposed decision further held that Hennigar's contact dermatitis did not constitute a second qualifying injury, because the injury was to the body as a whole, and not a scheduled member as required to invoke Fund liability.

Hennigar appealed to the workers' compensation commissioner, who adopted the proposed decision on December 23, 2003. Hennigar filed a request for rehearing, which was denied except for the request for additional analysis, in which the commissioner reiterated the deputy's finding that the contact dermatitis was a body as whole condition. Hennigar sought judicial review, and the district court affirmed the commissioner's decision. Hennigar now appeals.

II. Scope of Review.

An appeal of a workers' compensation decision is reviewed under standards described in chapter 17A. Iowa Code § 86.26. The agency decision itself is reviewed under the standards set forth in section 17A.19(10). *Gregory v.*

[1] Hennigar's workers' compensation claims against her employers were either settled or dismissed by the commissioner and are not at issue in this appeal.

Second Injury Fund of Iowa, 777 N.W.2d 395, 397 (Iowa 2010). The agency's decision in this case was based on an interpretation of Iowa Code section 85.64. "Interpretation of the workers' compensation statute is an enterprise that has not been clearly vested by a provision of law in the discretion of the commissioner." *Gregory*, 777 N.W.2d at 397. Thus, we will reverse the agency's decision if it is based on "an erroneous interpretation" of the law. Iowa Code § 17A.19(10)(c).

We may reverse, modify, or remand to the commissioner for further proceedings if the agency's action was affected by an error of law, or if it is not supported by substantial evidence when the record is viewed as a whole. *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). Evidence is substantial if reasonable minds would find it adequate to reach the same findings. *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 17 (Iowa 1997). The commissioner's conclusions do not lack substantial evidential support merely because inconsistent conclusions could be drawn from the same evidence. *Id.* The ultimate question is not whether the evidence supports a different finding, but whether it supports the finding the commissioner actually made. *Id.*

III. Merits.

Iowa Code section 85.64 governs liability for Second Injury Fund benefits, providing in relevant part:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the

> "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

The Fund was conceived by the legislature to encourage the employment of disabled persons by making the current employer responsible only for the disability the current employer causes. *Gregory*, 777 N.W.2d at 398; *Second Injury Fund v. Shank,* 516 N.W.2d 808, 812 (Iowa 1994). The purpose of the Fund is accomplished by an award of compensation after a second qualifying injury to "an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye." Iowa Code § 85.64. Thus, to trigger the application of section 85.64 in this case, Hennigar must establish: (1) she sustained a permanent disability to a hand, arm, foot, leg, or eye (a first qualifying injury); (2) she subsequently sustained a permanent disability to another such member through a work-related injury (a second qualifying injury); and (3) the permanent disability resulting from the first and second injuries exceeds the compensable value of "the previously lost member." *Id*.; *Gregory*, 777 N.W.2d at 398-99. It is the employee's burden to prove some permanent disability resulting from both the initial injury and the injury of a second scheduled member. *See Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 547-48 (Iowa 1995).

Hennigar argues that substantial evidence in the record supports the finding that she does in fact have a permanent disability to her left eye, and that the commissioner erred in determining otherwise. Hennigar contends the commissioner failed to properly consider the three surgeries she had on her

eyes, the changes and alterations to her left eye, and the testimony of her daughter with regard to her symptoms. The Fund concedes there is some lay evidence in the record that Hennigar's eye problems meet the standard necessary to constitute a first qualifying injury. The Fund contends, however, that the commissioner was correct in placing more weight on medical testimony and records in reaching its conclusion that Hennigar's eye condition was not a loss of use or permanent disability.

The deputy commissioner heard testimony from Hennigar and Hennigar's daughter, Amy Durgin. Hennigar explained she got bleach and coloring in her left eye on May 7, 1999, while she was working as a cosmetologist, and stated that was treated with antibiotics at the hospital. According to Hennigar, her eye problems continued, so she sought a different treatment and in 1999 had two surgeries to remove the blocked or infected tear ducts in both eyes. Since November 1999, she has been treated for chronic conjunctivitis. Hennigar noted that she still has "a lot of watering" from her eyes and that she believes her dry eye "has gotten a lot worse." She also stated that her "vision has gotten worse" in her left eye. She attributes her eye condition to her work with bleach and chemicals. Hennigar's daughter, Durgin, observed that her mother "still has flare-ups" where her eyes water and get "mattery" and she has pain behind the eye. Durgin also testified that her mother is able to drive, but it is more difficult for her to drive at night "because of the glare."

As the deputy commissioner noted:

> It is acknowledged claimant has had difficulties with conjunctivitis, dry eye and dacrocystitis for many years. The left eye was affected several years prior to difficulties in the right eye.

> Claimant has also experienced seasonal sinusitis. On occasion, the sinusitis has left claimant with red, mattered and watery eyes.
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> The lay witness, Amy Durgin, testified to the observations she made relative to claimant's eye condition. She is claimant's daughter. She has no medical training. She observed the red and watery eyes. Ms. Durgin, however, readily admitted claimant's condition has improved from its previous state. Ms. Durgin testified her mother is still able to drive a motor vehicle in this state.
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> Claimant has been advised to refrain from the use of cosmetics around her eyes. There is insufficient evidence in the record to support the conclusion the eye condition is permanent or that the condition permanently limits claimant's use of her eyes. While claimant testified her vision has definitely deteriorated since she had conjunctivitis, objective eye testing does not corroborate claimant's testimony. Claimant holds a valid Iowa driver's license. She drives a vehicle during the evening hours. Her license is not restricted to day driving. She holds a valid license as a cosmetologist.

The deputy commissioner also reviewed the deposition and report of Dr. Elizabeth Stoebe, as well as the reports of four physicians specializing in ophthalmology and/or eye surgery: Dr. David Dwyer, Dr. Bradley Isaak, Dr. Douglas Shulte, and Dr. Mick Vanden Bosch. None of the physicians opined that Hennigar had any impairment, loss of use, or permanent disability in regard to her eye condition. In his July 2001 report, Dr. Dwyer opined that Hennigar's surgeries and hospital treatment for infection in 1999 were not correlated to bleach exposure. And in his July 2001 report, Dr. Isaak found "no evidence of any permanent injury or impairment to Ms. Hennigar's eye, eyelids or visual system."

The physicians opined that Hennigar had allergic conjunctivitis and chronic dry eye conditions. Hennigar acknowledged she has seasonal allergies that flare up during certain times of the year. As Dr. Shulte noted in May 2002, "Allergies certainly are a potential and common cause of conjunctivitis and I

found no other reason for conjunctivitis for Ms. Hennigar . . . ." Dr. Shulte further stated that "[c]onjunctivitis is not generally a permanent condition," and attributed no "permanent impairment" to Hennigar. As Dr. Vanden Bosch stated in his May 2003 report, "I did not see enough evidence on my examination or on the history at this past visit to suggest that the dry eye signs or symptoms are causing any impairment of her activities."

Hennigar underwent an independent medical examination in April 2003, conducted by Dr. Stoebe, a board-certified independent examiner. Dr. Stoebe specializes in family and emergency room medicine, but has no formal training in ophthalmology. After examining Hennigar and reviewing Hennigar's medical records, Dr. Stoebe rated her dry eye condition at a one percent permanent impairment. However, when discussing the impairment rating during a June 2003 deposition, Dr. Stoebe retracted the one percent impairment rating she had given. Dr. Stoebe reported that Hennigar was having no visual problems and that she had no functional impairment or vision loss because of her eye condition. As Dr. Stoebe stated during the deposition, "It is fair to say I have made an error and [the impairment rating] should have been a zero, yes." As the deputy commissioner observed:

> There is only one physician who attributes permanency to the conjunctivitis. The physician is Elizabeth Stoebe, D.O. Claimant selected Dr. Stoebe as her independent medical examiner. Dr. Stoebe is an emergency room doctor who conducted an independent medical examination for claimant pursuant to section 85.39 of the Iowa Code. Dr. Stoebe does not routinely treat eye conditions. However, she took a one-week course on the correct methods for using the AMA Guides to the Evaluation of Permanent Impairment. Initially, Dr. Stoebe rated claimant's eye condition as a one percent permanent impairment but with no loss of vision. However, in her deposition, Dr. Stoebe recanted her

> impairment rating for claimant's eye. Dr. Stoebe did not find a loss of vision attributable to claimant's conjunctivitis. . . .
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> There is the opinion of Mick E. Vanden Bosch, M.D. He is an ophthalmologist who examined claimant on April 4, 2003. His specialty is the condition of the eye and eye surgery. In his report of May 16, 2003, Dr. Vanden Bosch writes there is no permanent impairment to the eyes.

The deputy commissioner went on to determine Hennigar's eye condition did not result in a permanent disability and a loss of use to either eye. *See Anderson v. Second Injury Fund*, 262 N.W.2d 789, 791 (Iowa 1978) (noting that the first injury "must be permanent and must tend to act as a hindrance to the individual's ability to obtain or retain effective employment"). In determining Hennigar's eye condition was not a qualifying first injury for Fund purposes, the deputy commissioner aptly concluded:

> In light of the opinions of the aforementioned doctors, and considering the observations made by claimant's daughter, it is the conclusion of this deputy that claimant's conjunctivitis is not a permanent condition. There is no loss of use of either eye. Since there is no loss of use of either eye, claimant has failed to provide a qualifying first injury. Without a qualifying first injury, claimant can take nothing from the Second Injury Fund of Iowa.

Henningar argues and the Fund concedes, that the AMA Guides do not conclusively determine the issue of impairment. The Guides acknowledge the difficulty in factoring in subjective complaints:

> Subjective concerns, including fatigue, difficulty in concentrating, and pain, when not accompanied by demonstrable clinical signs or other independent, measurable abnormalities, are generally not given separate impairment ratings . . . . The Guides does not deny the existence or importance of these subjective complaints to the individual or their functional impact. The Guides recommends that the physician ascertain and document subjective concerns. Because the presence and severity of subjective concerns varies among individuals with the same condition, the Guides has not yet identified an accepted method within the scientific literature to

> ascertain how these concerns consistently affect organ or body system functioning.

AMA Guides to the Evaluation of Permanent Impairment 10 (5th ed. 2000). Here it is clear that the agency considered the Guides, the expert medical testimony, as well as the nonmedical evidence of Hennigar's complaints.

It is well settled that the agency is free to accept or reject, in whole or in part, an expert's medical opinion. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). It is also the purview of the agency to accept or reject the claimant's opinion testimony. *See Ritchey v. Iowa Employment Sec. Comm'n*, 216 N.W.2d 580, 583 (Iowa 1974). Such judgment calls are clearly within the province of the agency and should be left for the agency to make. *IBP, Inc. v. Harpole,* 621 N.W.2d 410, 420 (Iowa 2001). "[T]he question is not whether the evidence might support a different finding, but whether it supports the findings actually made." *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000). We "should broadly and liberally apply those findings to uphold, rather than defeat, the [worker's compensation] commissioner's decision." *Id.* The agency, and not the court, weighs the evidence. *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109, 111 (Iowa 1995).

Applying these standards to the case at hand, we conclude it was reasonable for the deputy commissioner to conclude Hennigar had not proven a prior permanent loss or loss of use to her eyes. The expert medical evidence before the agency included reports of five physicians. The physicians' reports were consistent with each other, and none found Hennigar had a permanent impairment. The agency stated that it also considered the testimony from

Hennigar and Hennigar's daughter that conflicted with the reports of the physicians, except Dr. Stoebe's in part. Although Dr. Stoebe's testimony lent some support to the existence of Hennigar's eye conditions, Dr. Stoebe ultimately agreed there was no impairment. Upon these facts, it was reasonable for the agency to place more weight on the medical evidence in reaching its conclusion. *See Kostelac v. Feldman's, Inc.*, 497 N.W.2d 853, 856 (Iowa 1993) ("In the case of conflict in the evidence we are not free to interfere with the commissioner's findings.").

Accordingly, we, like the district court, conclude substantial evidence supports the commissioner's determination that Hennigar did not meet her burden to prove a prior permanent loss or loss of use from her earlier injury.[2] Even assuming, *arguendo*, that Hennigar had proven a first qualifying injury, we agree with the well-reasoned conclusions of the deputy commissioner and district court, including the additional analysis of the workers' compensation commissioner, in finding that Hennigar's contact dermatitis did not constitute a second qualifying injury for Fund purposes. We therefore affirm the district court order upholding the commissioner's denial of Hennigar's petition for Fund benefits.

AFFIRMED.

[2] Because substantial evidence clearly supports this finding, we decline to delve into Hennigar's contention that not only did the agency misinterpret the proper meaning of key terms such as "permanent," "disability," "loss," and "loss of use," but also that these terms have been used incorrectly and inconsistently by the courts for a number of years. The language in section 85.64 is clear and unambiguous, and both the agency and the district court interpreted the meaning of the words fairly and sensibly. *See Havill v. Iowa Dep't of Job Serv.*, 423 N.W.2d 184, 186 (Iowa 1988) ("In interpreting statutes, a court must take account of both the language employed and the object sought to be accomplished and attempt to arrive at an interpretation that will effect the intended purpose.").