IN THE COURT OF APPEALS OF IOWA

No. 0-753 / 10-0813
Filed November 24, 2010

DES MOINES PUBLIC SCHOOLS,
Employer and EMC RISK SERVICES,
Petitioners-Appellants,

vs.

RONDA AULT,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Petitioner, the Des Moines Public Schools, appeals from the district court decision affirming the workers' compensation commission's finding that the respondent, Ronda Ault, was permanently and totally disabled. **AFFIRMED.**

Brian T. Israel and Jane V. Lorentzen of Hopkins & Huebner, P.C., Des Moines, for appellants.

Jason D. Neifert of Neifert, Byrne & Ozga, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

SACKETT, C.J.

Petitioner, the Des Moines Public School system, appeals from the district court decision affirming the workers' compensation commission's finding that the respondent, Ronda Ault, was permanently and totally disabled. The school contends (1) the commission's finding of permanent and total disability is not supported by substantial evidence, and (2) Ronda should not be entitled to permanent disability due to her misconduct. We find no error in the district court ruling on judicial review and affirm.

I. BACKGROUND AND PROCEEDINGS. Ronda was born in December 1962. In high school, she required extra assistance in math and reading, but successfully graduated. She received no formal education after high school. She worked part-time making sandwiches at fast-food restaurants or as a cashier, although she testified she sometimes made mistakes when making change. She also worked at a meat market for a period. In 1987 she began working for the Des Moines Public Schools part-time as a substitute food server and cook in school cafeterias. During this time she continued to also work part-time at fast-food restaurants. After working part-time for six years, she was hired as a full-time cook for the school system. Later she transferred into the custodial department. In 1993 she injured her back when she fell while working. She had surgery for a herniated disc and returned to work full-time with restrictions. The workers' compensation commissioner determined this injury resulted in a fifteen percent industrial disability.

On July 29, 1998, Ronda again injured her back at work while moving a filing cabinet. After three weeks of physical therapy, the doctor noted she had made excellent progress and released her to work without restrictions for this injury. Ronda returned to the doctor three days later, explaining after two days of work, her pain returned. The doctor told her to not work and to resume physical therapy. From September to November 1998, Ronda saw Dr. Daniel McGuire. He noted that Ronda was having increasing pain but recommended non-operative pain management as surgery would result in a lengthy recovery and most likely severe restrictions. He reported that he believed Ronda needed help dealing with her emotions and mood swings. Dr. McGuire predicted her symptoms would not improve over a few months but in theory non-operative care could decrease her pain over the course of two to three years.

In November 1998, Dr. McGuire performed a diskogram and determined from the results that an anterior diskectomy and fusion may correct the problem. On December 1, 1998, Ronda had the recommended surgery. Four months after the surgery, on April 2, 1999, Dr. McGuire stated,

> She is doing reasonably well and doing her therapy. She really wants to return to work. . . . I think she needs to get back to work, and get back into the flow of work and the idea of work. She will need some help from the job site.

Dr. McGuire authorized Ronda to perform light duty work in April of 1999. On April 21, 1999, Ronda saw Dr. McGuire because she again complained of pain. He recommended she stay off work for a few days and attempt light duty work again. When Ronda attempted to return to work with this restriction, she testified she had a great deal of back and leg pain. Ronda's increased pain and

increased frustration with the lack of improvement is documented in medical reports in May and June of 1999. On June 23, Dr. McGuire reported,

> Realistically speaking, I am not optimistic that she is going to be able to get back to work. We may reach a point where she just is declared stable, she is assigned an impairment and some restrictions, and she gets on with her life.

Ronda completed a functional capacity evaluation in July of 1999. Dr. McGuire reported the results showed she was qualified to perform medium duty work and she was capable of working. He explained she may need assistance "to address her cognitive difficulties." In follow-up correspondence with the school's insurer, Dr. McGuire qualified the functional capacity evaluation result, explaining he believed Ronda should only perform light duty work for no more than four hours per day and refused approval for custodial work. He released her from treatment in August 1999.

In addition to ongoing back problems after the surgery, Ronda's incision from the surgery repeatedly became infected. This wound infection would prove to be a long-term obstacle to Ronda's recovery. From August 1999 to August 2003, Dr. Bruce Murphy provided treatment for Ronda's surgical wound infections. At the time of the hearing in 2008, Ronda had had at least sixteen procedures to address infection and reopening of the incision and it continued to occasionally reopen and cause her pain. Dr. Murphy required Ronda to remain off work during some of this time but in April 2001, Dr. Murphy reported that her work status should resume to that recommended by Dr. McGuire.

During Ronda's recovery she was also diagnosed with major depressive disorder and was treated by several doctors for this condition. The diagnosing

physician stated in September 1999 that Rhonda's depression was causally related to her pain and physical limitations. Another psychiatrist evaluated Ronda in 2000, 2002, and 2003, at the request of the school district's insurer. This doctor confirmed Ronda had a major depressive disorder secondary to her physical problems. He noted that vocational rehabilitation may be helpful but it did not seem likely that Ronda would be able to return to any form of competitive employment. Another nurse practitioner concluded otherwise in August 2007 stating,

> Less than one-half of the ongoing depressive symptoms are related to her work injury, abdominal and/or back pain. I continue to believe it would be helpful for her to work and be productive and interact with people. From a psychological standpoint, I would not place any work restrictions on her.

Since September 1999, Ronda has also been treated for pain management. She has been prescribed various medications to treat the pain, including Morphine, Vicoden, and Oxycontin. She was also prescribed aquatic therapy. She attended three sessions but expressed her pain was worse afterward. Ronda often did not show up for appointments at the pain management center and elected to discontinue care with them. In his final report, the pain center physician reported "there may be a significant psychosocial barrier to further progress." Since that time Ronda has received pain medications through her family physician.

Ronda's physical and mental problems have been accompanied by other personal issues. Only weeks after the work injury of July 1998, she had a physical altercation with her husband where she kicked in a door, and he

subsequently beat her. She admits she also has been in physical fights with others and gets angry easily. She was arrested in December 2006 and April 2007 for possession of methamphetamines. She has gained over one hundred pounds since the surgery. At times she has not fully cooperated with treatment providers by leaving appointments before they are completed or canceling scheduled appointments. She failed to disclose to doctors her use of illegal drugs. Her father was terminally ill during this period. Despite the physical, emotional, and personal troubles in Ronda's life, she testified she has always wanted to return to work. She stated she met with the custodial leaders at the school and was told she was not allowed to return to work. Her medical records confirm her desire to work but also show that Ronda is unhappy with the results of the surgery and frustrated by her physical limitations and pain.

In November 2007, Ronda filed a workers' compensation claim and the school disputed among other things, the nature and extent of Ronda's disability. The matter came on for hearing on November 24, 2008. The deputy commissioner found Ronda was unable to work due to the injury and entitled to permanent total disability benefits. The school appealed and the commissioner[1] adopted the deputy's findings and provided additional explanation for the award of benefits. The school petitioned for judicial review at the district court arguing the findings were not supported by substantial evidence. The district court affirmed and the school appeals.

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[1] Another deputy entered the decision on behalf of the commissioner pursuant to a delegation of authority permitted by Iowa Code section 86.3 (2007).

II. SCOPE AND STANDARD OF REVIEW. Review of agency actions is for correction of errors at law. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). The Iowa Administrative Procedure Act directs our review of appeals from orders of the workers' compensation commissioner. Iowa Code § 86.26; *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 149 (Iowa 1996). Under the Act, the district court acts in an appellate capacity and we review its decision and apply Chapter 17A to determine if we reach the same conclusion as the district court. *Clark v. Vicorp Rest., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005); *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463-64 (Iowa 2004). The appellant is entitled to relief if the commission committed any of the errors listed in Iowa Code section 17A.19(10) and substantial rights were prejudiced by the error. Iowa Code § 17A.19(10); *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 671 (Iowa 2005). If particular matters have been vested in the discretion of the agency, we must give appropriate deference to the agency's view of such matters. Iowa Code § 17A.19(11)(c). Thus, the first step in determining our standard of review is to "identify the nature of the claimed basis for reversal of the Commissioner's decision." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

The school claims substantial evidence does not support the commissioner's conclusion Ronda suffered a permanent and total disability. It also argues the court should have determined Ronda's failure to cooperate with medical providers and negligent behavior should bar her from receiving benefits.

Factual determinations are vested by law in the workers' compensation commissioner's discretion. *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d

330, 334 (Iowa 2008). We will, however, reverse or modify a decision if the fact findings are not supported by substantial evidence when viewing the record as a whole. Iowa Code § 17A.19(10)(f); *Mycogen Seeds*, 686 N.W.2d at 465. Substantial evidence is evidence that both in quantity and quality would be found to be "sufficient by a neutral, detached, and reasonable person, to establish the fact in issue" when the results of the fact determination are viewed as serious and of great importance. Iowa Code § 17A.19(10)(f)(1).

Application of workers' compensation law to the facts is vested in the commissioner as well. *Lakeside Casino*, 743 N.W.2d at 173. We will only reverse the commissioner's application of law to facts "if it is irrational, illogical, or wholly unjustifiable." *Id.*

III. TOTAL AND PERMANENT DISABILITY. The school argues the finding of total and permanent disability is not supported by substantial evidence because (1) some doctors opined that Ronda would benefit from working, (2) there is no reliable evidence showing Ronda's functional capacity for work since she failed to complete some evaluations and did not participate in vocational rehabilitation, and (3) there is not substantial evidence to support a finding that Ronda has intellectual limitations.

The focus in an industrial disability case is on the ability of the claimant to be gainfully employed; it is not an evaluation of what the claimant can or cannot do. *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1995). We inquire whether "there are jobs in the community that 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). This requires consideration of those factors that bear on the claimant's employability, including "'age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work.'" *Id.* (quoting *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985)). Total industrial disability is not the equivalent of total helplessness. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000).

The school is correct that some doctors determined work, or some other activity, would be beneficial to Ronda's health. But as stated above, this is not the focus of the analysis for industrial disability. The issue is not whether work would help the injured party, it is whether the injured party is able to perform jobs available in the community and realistically compete for these jobs. One treating mental health counselor concluded Ronda's depression should not prevent her from working in any capacity. Another psychiatrist stated that Ronda continues to have major depressive disorder and has "a number of contributing physical problems which reduce her employment options further" and it was unlikely she could return to any form of competitive employment. The physicians treating Ronda's physical injuries indicated that Ronda may be able to physically perform some type of light duty work, perhaps on a part-time basis. But they also noted there were psychological limitations to the type of work Ronda could perform. Looking at the record as a whole, as we must under Iowa Code section 17A.19(10)(f), reveals the doctors' reports consistently show Ronda is not disabled exclusively due to her physical injuries or due to depression. It is the combination of her physical state, mental and emotional faculties, education, and

experience that severely limit her options for employment. Beyond the lifting limitations from the back injury, Ronda's pain prevents her from sitting or standing for extended periods of time. The doctors also noted any work place would need to be clean and temperature controlled due to her vulnerability to infections. Her education and experience limit her options also. The intelligence test performed by one psychologist showed she had borderline intellectual abilities. Her scores showed potential problems with her ability to focus and maintain attention and indicated Ronda may have learning disorders. Ronda's only work experience is in performing physical work that she can no longer do. Her attempts at performing more sedentary work were unsuccessful. She testified that she answered phones at the school but was unable to perform this duty properly because she mixed up phone numbers. The fact that doctors have differing views of a claimant's ability to work does not permit a court to substitute its judgment for the agency's officer who observed the testimony directly. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 501 (Iowa 2003).

The school also claims the finding of disability is not supported by substantial evidence because Ronda did not complete some functional capacity evaluations and participate in vocational rehabilitation. It stresses that on the completed functional capacity evaluation Dr. McGuire concluded Ronda could perform medium duty work.

Ronda's failure to complete functional capacity tests certainly does not aid the industrial disability determination. The indefinite record on Ronda's performance in vocational rehabilitation also raises doubts about her sincerity to

return to the workforce.[2] "Our task, however, is not to decide whether the evidence would support a finding contrary to that reached by the agency." *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 219 (Iowa 2004) *abrogated on other grounds by Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 391-92 (Iowa 2009). Rather, we defer to the commissioner's weighing of the evidence and "broadly and liberally apply those findings in order to uphold, rather than defeat, the industrial commissioner's decision." *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000).

The commissioner found the medical evidence suggested that even with vocational rehabilitation efforts, suitable full-time employment was still not a realistic possibility. In addition, the commissioner stated,

> the suggestion that claimant failed to cooperate in any way with vocational counselors retained by defendants is misleading. Such efforts were initiated in 2003 and according to the reports of counselors, claimant did work with them, but their efforts were frustrated by claimant's chronic pain and depression symptoms. Vocational counseling was discontinued in 2004 because they could not offer anything more to claimant.

These findings are supported by substantial evidence. Even if one functional capacity evaluation showed Ronda could perform medium duty work, bodily impairment is only one of the factors used to gauge industrial disability. *Caselman*, 657 N.W.2d at 495; *Guyton*, 373 N.W.2d at 103. As detailed above, Ronda's employability is severely limited in many ways, including the

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[2] It appears Ronda did participate in vocational rehabilitation services in 2003 and 2004 but her ongoing medical complications interrupted the process and no progress was made. The school attempted to reinitiate Ronda's participation in vocational rehabilitation in 2008 but Ronda appears to never have responded to the school's request.

environment, hours, tasks she is able to perform, as well by as her limited education and experience.

The school contends the commissioner's finding that Ronda has intellectual limitations is not supported by substantial evidence. It urges that the evidence used to demonstrate Ronda's intellect is not reliable or of sufficient quality. It notes no physician diagnosed Ronda as dyslexic and the IQ testing performed by one psychologist was conducted for the purpose of aiding Ronda in obtaining social security disability. It adds that the results of this testing should be questioned because Ronda lied to the psychologist by stating she had never used recreational drugs or had trouble with the law. In determining whether evidence is substantial, we must view all of the evidence, including that which detracts from the agency's finding, as well as that which supports it. *Caselman*, 657 N.W.2d at 499.

We find the commissioner's finding is supported by substantial evidence. The commissioner was free to accept or reject Ronda's testimony about her learning difficulties. *See Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 558 (Iowa 2010). The reports of some physical care providers support her testimony. Even with physical improvement, the doctors suspected Ronda's recovery and return to the workforce may be limited due to psychosocial or cognitive disabilities. We affirm on this issue.

IV. REFUSAL OF TREATMENT AND NEGLIGENT BEHAVIOR. The school claims Ronda should be prohibited from being awarded total industrial disability benefits because she has refused treatment and has engaged in

improper behavior. It argues Ronda failed to attend aqua therapy appointments and rehabilitation visits, and did not complete functional capacity evaluations. To support its claim, the school argues that refusal of treatment may bar a claimant from recovering benefits if the refusal is unreasonable. It cites an unpublished Iowa Industrial Commissioner decision, a treatise, and a case from another state for support. *See Larson's Workers' Compensation Law* § 10.10(2), at 10-28 (2000); *Greene v. Mackle Co.*, 142 So. 2d 283, 285-86 (Fla. 1962).

We find this argument fails in two respects. First, Ronda's behavior, as a whole, does not rise to the level of willful refusal of care. Although Ronda did regularly cancel and reschedule appointments, most of the time it appears she had valid reasons for doing so. Many times Ronda needed to cancel or reschedule due to health complications, her need to tend to other members of her family, or her lack of transportation. We do agree however, that on several occasions Ronda abruptly left appointments without completing requested testing. But this behavior does not rise to the level of unreasonable refusal of treatment, particularly when her explanations for leaving the appointments were in part attributable to her depression and anxiety.[3] We also find this argument fails because the unreasonable refusal of care alone does not bar recovery. Instead, the unreasonable refusal of treatment operates as proof that one's

[3] Ronda's testimony showed that she left some appointments when she became angry or frustrated with the doctors and the way they treated her. She testified that she stopped the functional capacity evaluation and left "because I was bawling." Her failure to provide a urine sample, according to her, was because of miscommunication between herself and the doctor's receptionist.

aggravated condition is not causally connected to the employment or is an intervening act breaking the chain of causation.

> When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results," and of claimant's own conduct as an independent intervening cause.

See Larson's Workers' Compensation Law § 10.01, at 10-2. The school does not argue that Ronda's failure to cooperate with treatment providers or complete tests is an intervening cause that makes her injuries no longer a direct and natural consequence of her employment related injury. For this same reason, we reject the school's claim that Ronda's history of illegal drug use and physical altercations should bar her from recovering disability benefits. The school cites *Kill v. Industrial Commission of Wisconsin*, 152 N.W. 148, 149-50 (Wis. 1915), for support; however, again in this case the claimant's negligence in performing in a boxing match while his hand was still healing from a work injury became an intervening cause and the claimant could not recover for infection of the wound that occurred after the boxing match. The school makes no claim that Ronda's drug use or physical altercations were an intervening cause aggravating her injuries. We find no error in the commissioner's rejection of this argument and affirm on this issue.

V. CONCLUSION. We affirm the commissioner's finding that Ronda is totally and permanently disabled and entitled to benefits. Substantial evidence supports the finding that Ronda is not able to be gainfully employed. Ronda is still entitled to benefits even though she missed several appointments, did not

complete some medical evaluations, and has used drugs and been in physical fights. None of these matters rose to the level of willful refusal of treatment or became an intervening cause aggravating her injuries.

AFFIRMED.