

IN THE COURT OF APPEALS OF IOWA

No. 0-960 / 10-1026
Filed March 21, 2011

LARRY K. FOX & ASSOCIATES
and NATIONWIDE MUTUAL
INSURANCE COMPANY,
Plaintiffs-Appellees,

vs.

MARY BETH O'BRIEN,
Defendant-Appellant.

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

Mary Beth O'Brien appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of permanent disability benefits. **AFFIRMED.**

John G. Sorensen of Stanton & Sorensen, Clear Lake, for appellant.

Kevin R. Rogers of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Heard by Vogel, P.J., and Doyle and Tabor, JJ. Mansfield, J., takes no
part.

DOYLE, J.

Mary Beth O'Brien appeals from the district court's ruling on judicial review reversing the workers' compensation commissioner's award of permanent disability benefits. She contends substantial evidence supports the commissioner's award. Upon our review, we affirm.

I. Background Facts and Proceedings.

O'Brien was born in 1947. She smoked about one and a half packs of cigarettes per day beginning in 1969 or 1970 until 1997 when she quit for approximately two years. She resumed smoking until 2005 when she quit for good. Her medical history includes self-reports of asthma.

In 1998, O'Brien reported cold symptoms to her physician. The doctor noted in his report that O'Brien had diminished breath sounds. The doctor's report suggested further testing be done to determine if O'Brien suffered from chronic obstructive pulmonary disease (COPD). O'Brien did not recall that the doctor made such suggestion to her, and no further testing was done at that time.

From 2002 to 2004, O'Brien saw her physician at least four times reporting cold symptoms involving respiratory symptoms. In May 2004, O'Brien reported difficulty breathing after she had coughing spasms and she had some chest tightness intermittently. She was found to have a lower respiratory infection.

On September 1, 2004, O'Brien began working for defendant-employer Larry K. Fox & Associates as a marketing director. She had her own office in the employer's office building. O'Brien testified that when she began working there, she noticed discolorations in the tiles in most of the office along a particular wall in the building, along with some discoloration up front in the reception area.

Beginning in June 2005, O'Brien saw a physician at Urgent Care complaining of a five-to-six-day history of upper respiratory symptoms. She had a scratchy throat, some nasal congestion, and facial pressure. In August 2005 she reported upper respiratory infection symptoms that had been going on for two weeks. It started as a cold with a little sore throat and nasal congestion that went quickly into her chest. Her lungs felt tight, and it was hard for her to take a deep breath. She was diagnosed with bronchitis.

On November 18, 2005, O'Brien presented to her physician with a chief complaint of dyspnea and a complaint that her chest was still congested. She stated her shortness of breath had been a slowly developing problem and that it took a less and less amount of activity to trigger it. At this point O'Brien was still smoking a half-pack of cigarettes a day. The physician diagnosed O'Brien with COPD. "Smoking cessation was expressed as being paramount to [O'Brien's] condition." Medications were prescribed to O'Brien, and O'Brien was referred to Dr. Ellen Sakornbut, a primary physician. O'Brien subsequently quit smoking.

O'Brien was seen by Dr. Sakornbut numerous times, starting in November 2005. O'Brien continued to complain of respiratory problems related to the COPD. In February 2006, O'Brien reported that her breathing was better, but when she saw Dr. Sakornbut the next month, she reported her condition had worsened over the past month, and she was unable to complete activities such as walking in from the parking lot without stopping to rest.

Angela Lund, a coworker, testified that she saw leaks and a broken ceiling tile in O'Brien's office in March 2006. On March 9, 2006, a roof drain and part of

the roof was replaced at the office building. Lund testified there were no leaks that she knew of before March 2006.

In September 2006, O'Brien submitted the filter of her air purifier, which had been used in her office, to a hygienic lab for testing. The lab results revealed the presence of cellulose, glass fibers, and some fungal elements including the common allergen *Alternaria* in the filter. After sharing the results with her employer, a new roof was installed at the employer's office.

A complete indoor air quality assessment was performed at the office building in March 2007. The assessment stated that "[a]lthough analysis indicates that one indoor sample contains elevated mold concentrations, [the assessing company] does [not] believe that it is adversely affecting the air quality of the office space." The company did not recommend any corrections be made to the office space.

However, O'Brien continued to suffer respiratory symptoms. In March 2007, O'Brien reported to Dr. Sakornbut continued difficulty with respiratory symptoms and hoarseness and increased laryngitis when in the building at work and not when at home. O'Brien also stated she was concerned about molds in her office because of water leaking from the roof. Allergy testing was performed upon O'Brien, which showed sensitivity to mold, *Alternaria*, *Aspergillus*, and cat.

On September 27, 2007, O'Brien filed her original notice and petition before the Iowa Workers' Compensation Commissioner. She asserted she was injured in the course of her employment. Specifically, she claimed her respiratory and pulmonary systems, as well as her body as a whole, were injured

as a result to exposure to mold and allergens in her workplace environment on October 1, 2005 or subsequent dates.

At some point, the employer opened a satellite office in another location, and O'Brien began working there. O'Brien reported to a physician that since moving to a different office building, she had felt a lot of improvement. She reported a sudden flare up of respiratory problems with wheezing, swelling sensation in her throat, and hoarseness at work after she opened a box of old records.

A second indoor air quality assessment was performed on O'Brien's former office location in February 2008. That assessment noted high levels of *Stachybotrys Chartarum*, a black mold, were detected in the drywall in the main office. It recommended that all "water damaged drywall along the south wall of the former office of [O'Brien] should be remediated"

On May 15, 2008, O'Brien was seen by Dr. Brian Gross for an independent medical evaluation. Following the evaluation, Dr. Gross opined that O'Brien suffered from COPD, but he did not believe her COPD was caused by any work-related exposure. His report explained:

I do believe the mold exposure from her workplace caused some aggravation of the preexisting condition. She certainly had symptoms that were worse in the moldy office building that improved at home and when she transferred to a different workplace. . . .

I think she did have aggravation of her symptoms from the moldy environment. I do not think there is any proof that there was a permanent change in the preexisting condition secondary to work related exposures. She does clearly have a fixed airway obstruction her breathing testing from 2005 onward.

. . . .
. . . . I believe the COPD can be credited to her past smoking. I think she did have aggravation from the workplace, but I

don't believe that part of the reduction in her pulmonary function can be credited to the mold exposure.

. . . . She does have significant COPD with moderate impairment on our spirometry at the time of the appointment. I expect the COPD condition to be permanent.

Thereafter, Dr. Sakornbut reviewed Dr. Gross's report and offered the following response:

[O'Brien] consulted me first in November of 2005 for her lung symptoms, and I had not seen her as a patient before that. Indeed, my notes state she had one previous bout of bronchitis . . . but that she basically had very few visits to physicians for many years. She had clear cut symptoms of bronchospasm then that responded well to a change in medication with inhaled steroids. She quit smoking immediately upon physician advisement, and she had rapid response of her bronchospastic symptoms with the changes. Usually my smokers with chronic lung disease improve slowly, if we have caught them early enough, when they quit smoking. I have to attribute her initial rapid response to inhaled steroids, which speaks to an inflammatory component related to hypersensitivity of some kind. Parenthetically, most smokers with chronic lung disease due to tobacco experience slower onset of severe symptoms with waxing and waning during acute infections episodes.

Also, usually patients with chronic lung disease from tobacco do not have such dramatic changes in their condition when they are in one setting or another unless there is a distinct environmental component. While I cannot prove that [O'Brien] developed more damage to her lungs working in a contaminated building, I can say that there was a delay in figuring out what was going on with her reactions to mold. Since no one has done a pulmonary function test on her prior to her employment, it cannot be stated that [she] had significant obstructive lung disease before she worked there. All we have is a historical picture of her function.

. . . . While I agree with Dr. Gross that [O'Brien's] lung disease is partly due to tobacco use, I also believe she has had . . . well-documented flares relative to her mold exposure and has done everything a prudent person would do to optimize her health and function. Mold is a common cause of respiratory symptoms in patients I have seen since the floods, and I do not believe it should be discounted in her case. Additionally, there was substantial delay encountered in addressing this at the work site, and there was even, within the last year, an exacerbation of her lung problems related to contaminated materials brought to her office from the

work site. Hence, these issues should be addressed in consideration of a safe and hygienic work site for all.

On December 30, 2008, following a hearing, the deputy workers' compensation commissioner issued his arbitration decision. The deputy found O'Brien's injury, allergy induced asthma and/or COPD, was an injury under Iowa Code chapter 85 (2007). The deputy further found that O'Brien's injury arose out of and in the course of her employment, noting that both Doctors Sakornbut and Gross agreed that the mold in her workplace aggravated her preexisting COPD condition. Additionally, the deputy found that O'Brien's injury was a "substantial factor in causing her permanent disability." The deputy explained:

The only doctors who offered opinions on this issue are Dr. Sakornbut and Dr. Gross. Dr. Sakornbut and Dr. Gross and other doctors have diagnosed [O'Brien] with chronic, permanent significant COPD. Dr. Gross does not think [O'Brien's] injury caused a permanent disability and believes her current COPD is due to her past smoking habit. Dr. Sakornbut opines that [O'Brien's] current condition is due to both tobacco use and mold exposure. Although Dr. Gross's opinion is entitled to be given weight given his specialties of internal medicine and pulmonary disease, Dr. Sakornbut's opinion will be given more weight for the following reasons. Dr. Sakornbut was a long time treating doctor. Her explanation regarding how [O'Brien's] allergic symptoms waxed and waned based on possible exposure to an allergen and smokers' recovery is slower certainly is consistent with [O'Brien's] situation and is logical. Dr. Gross's opinion does not explain [O'Brien's] rather sudden onset of symptoms and aggressive treatment after the onset. While [O'Brien's] work injury may not have been the only cause of her permanent disability, the work injury was nonetheless a substantial factor in causing her permanent disability.

The deputy then awarded O'Brien permanent partial disability benefits.

The employer subsequently appealed the deputy's decision. On November 13, 2009, the workers' compensation commissioner affirmed the

deputy's decision and adopted the decision as its final agency action. The employer then filed a petition for judicial review in district court.

On June 2, 2010, the district court entered its ruling affirming the worker's compensation commissioner in part, reversing in part, and remanding. The district court found the commissioner correctly determined O'Brien sustained a work-related injury; specifically, that a connection between O'Brien's work environment and her respiratory symptoms was supported by substantial evidence. However, the district court found the commissioner's conclusion that O'Brien's work-related aggravation caused a permanent disability was not supported by substantial evidence. The court concluded:

The only physician who discussed the issue of causation in any manner favorable to [O'Brien] was Dr. Sakornbut; however, her commentary on this subject was equivocal at best. When she states that she "cannot prove [O'Brien] developed more damage to her lungs working in a contaminated building," she is saying that she is unable to make the required connection between [O'Brien's] work exposure and any claimed disability ("more damage to her lungs"). In the absence of expert testimony on the issue of causation, the commissioner's conclusions regarding [O'Brien's] disability must fail.

O'Brien now appeals.

II. Scope and Standards 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 decisions of the workers' compensation commissioner. Iowa Code § 86.26; *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 149 (Iowa 1996). 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). When 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 they are the same, we affirm. *Id.* Otherwise, we reverse. *Id.*

“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 v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006); *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). We therefore must first identify the nature of the claimed basis for reversal or affirmance of the commissioner's decision. *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

O'Brien claims substantial evidence supports the commissioner's conclusion that she suffered a permanent disability. 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 v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). 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). “Our assessment of the

evidence focuses not on whether the evidence would support a different finding than the finding made by the commissioner, but whether the evidence supports the findings actually made.” *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557-58 (Iowa 2010) (citing *Meyer*, 710 N.W.2d at 218).

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. Discussion.

“Injured employees are entitled to compensation ‘for permanent disabilities.’” *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010) (citing Iowa Code § 85.34). The burden is upon the claimant to “prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability.” *Grundmeyer*, 649 N.W.2d at 752. For workers’ compensation purposes, a cause is proximate if it is a substantial factor in bringing about the result. *Ayers v. D & N Fence Co., Inc.*, 731 N.W.2d 11, 17 (Iowa 2007). “It only needs to be one cause; it does not have to be the only cause.” *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 64 (Iowa Ct. App. 1981). “A preponderance of evidence exists when the causal connection is probable rather than merely possible.” *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). Whether there is a causal connection between the injury and the impairment is in the domain of expert testimony. See *Grundmeyer*, 649 N.W.2d at 752; *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995).

So, in our analysis here, we must first determine whether an expert has opined a causal connection between O'Brien's injury and the claimed permanent impairment. If we find no such opinion, our analysis stops there and we affirm the district court. If we find there is such an opinion, we then proceed to the next step to determine whether or not that opinion is supported by substantial evidence.

There is no dispute O'Brien suffered a work-related injury. Nor is there a dispute that O'Brien has been diagnosed with chronic, permanent, and significant COPD. However, the burden was on O'Brien to establish the workplace mold exposure was a significant factor in her claimed permanent disability. The commissioner determined Dr. Sakornbut's opinion should be given more weight, but Dr. Sakornbut merely opined:

While I agree with Dr. Gross that [O'Brien's] lung disease is partly due to tobacco use, I also believe she has had . . . well-documented flares relative to her mold exposure and has done everything a prudent person would do to optimize her health and function.

Although Dr. Sakornbut attributes part of O'Brien's lung disease to tobacco use, she does not expressly attribute O'Brien's exposure to mold in the workplace as contributing to the lung disease. At most, Dr. Sakornbut only refers to "flares" in O'Brien's condition as a result of the exposure to mold; "flares" necessarily being temporary events. Furthermore, Dr. Sakornbut stated although "she could not prove that [O'Brien] developed more damage to her lungs working in a contaminated building, [she could] say that there was a delay in figuring out what was going on with her reactions to mold." The commissioner found: "Dr. Sakornbut opines that [O'Brien's] current condition is due to both tobacco

use and mold exposure.” The commissioner concluded: “While [O’Brien’s] work injury may not have been the only cause of her permanent disability, the work injury was nonetheless a substantial factor in causing her permanent disability.” There is simply nothing in Dr. Sakornbut’s report that specifically articulates the mold exposure was a significant factor in O’Brien’s claimed permanent disability, and we cannot extrapolate such a conclusion from the report. At best, the doctor’s opinion supports a conclusion the mold exposure aggravated a preexisting condition.

The only other expert to weigh in on the subject was Dr. Gross. He expressly opined that although the mold exposure from O’Brien’s workplace caused some aggravation of O’Brien’s COPD, he did not think there was any proof there was a permanent change in her condition secondary to work-related exposures.

Upon our review, we find O’Brien failed to present expert testimony establishing a causal connection between her injury and her claimed permanent impairment. We therefore agree with the district court’s conclusion that, in the absence of such expert testimony, the commissioner’s conclusion regarding causation of O’Brien’s permanent disability must fail. Accordingly, we affirm the ruling of the district court.

IV. Conclusion.

The commissioner awarded permanent disability benefits, and the district court reversed on finding O’Brien failed to prove her permanent disability was caused by her work injury. In view of the absence of expert testimony

establishing a causal connection between O'Brien's injury and her claimed permanent impairment, we affirm the ruling of the district court.

AFFIRMED.