IN THE COURT OF APPEALS OF IOWA

No. 2-243 / 11-1862
Filed May 23, 2012

ABF FREIGHT SYSTEM, INC. and ACE
c/o GALLAGHER BASSETT SERVICES,
Petitioners-Appellants,

vs.

MARVIN VEENENDAAL,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

An employer appeals the district court decision affirming the workers' compensation commissioner's award of disability benefits to respondent. **AFFIRMED.**

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

Matthew J. Petrzelka of Petrzelka & Breitbach, P.L.C., Cedar Rapids, for appellee.

Considered by Tabor, P.J., Mullins, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

ZIMMER, S.J.

An employer appeals the district court decision affirming an award of workers' compensation benefits to an employee by the workers' compensation commissioner. The employer contends there is not substantial evidence in the record to show the employee's back problems were causally related to a work-related injury. The employer also claims there is not substantial evidence in the record to show the employee had a twenty percent industrial disability. We affirm the decisions of the commissioner and the district court.

I. Background Facts & Proceedings.

Marvin Veenendaal is employed by ABF Freight System, Inc. as a truck driver. On October 23, 2006, he was unloading some furniture from his truck, when a crate started to fall over. He tried to catch the crate before it fell and testified he felt a pain in his back he had never felt before. Veenendaal informed his employer of the problem that same day.

Veenendaal went to a chiropractor, K. A. Ward, the next day complaining of intense low back pain. He continued treating with the chiropractor until he saw a company-chosen physician, Dr. Nate Brady, on October 27, 2006. Veenendaal was treated conservatively, with physical therapy and a muscle relaxant. He had an MRI on November 6, 2006, which showed a diffusely bulging disc in the L5-S1 level, a moderate diffuse disc bulge at the L4-5 level, and a moderate diffuse disc bulge at the L3-4 level. Dr. John Floyd, a radiologist, read the MRI and offered the following impression, "Moderate disc bulge L4-5 with some dominance posterolaterally and laterally on the right without definite displacement of the existing nerve root."

Dr. Brady referred Veenendaal to Dr. Chad Abernathey, a neurosurgeon. On November 17, 2006, Dr. Abernathey found Veenendaal presented "with a severe right L3 radiculopathy secondary to large right L3-4 far lateral disc extrusion." Dr. Abernathey offered to perform surgery and Veenendaal agreed. Before the surgery, however, Veenendaal decided to proceed with conservative treatment, and he canceled his scheduled surgery.

On December 21, 2006, Veenendaal had a lumbar epidural injection, which gave him temporary relief. Dr. Brady noted on January 4, 2007, "MRI done on 11/06/2006 showed a disc bulge at L4-L5, as well as asymmetric signal in the lateral recess on the right L5-S1 level." Veenendaal returned to work in March 2007. He continued to use pain medication and anti-inflammatory medication. Veenendaal had another epidural injection in September 2007.

On February 18, 2008, Veenendaal saw Dr. Brady complaining of low back pain. Dr. Brady ordered a new MRI, which was performed on February 25, 2008. Dr. R. A. Kottal reported Veenendaal had no change from November 6, 2006. Dr. Kottal also reported "Disc bulging/protrusion at L4-5 lateralizing to the right and extending into the right neural foramen at that level."

Dr. Brady again referred Veenendaal to Dr. Abernathey. In referring to 2006, Dr. Brady stated, "[h]is MRI indicated a 4-5 disc herniation to the right." He then noted, "[h]is most recent radiographic findings are from February of this year and again show the right-sided disc at 4-5." Dr. Brady concluded, "I think he would be an excellent surgical candidate. I think it is a bit of a shame this wasn't done sooner."

Dr. Abernathey saw Veenendaal on July 21, 2008, and reported "[h]is MRI demonstrates resolution of the far lateral L3-L4 disc extrusion. However, he now demonstrates more prominent stenosis and right-sided L4-5 disc extrusion." Surgery was scheduled for September 11, 2008. Shortly before the surgery, Veenendaal was informed by the employer's representative that the cost of the surgery would not be covered by workers' compensation because Dr. Abernathey had the opinion that the L4-5 disc herniation was not related to his October 23, 2006 work injury. In a note dated September 10, 2008, Dr. Abernathey stated "Mr. Veenendaal believes that his right L4-5 disc extrusion is related to his 2006 injury. Unfortunately, the disc extrusion at L4-5 was not present in 2006, and the L3-4 which was present in 2006 is no longer present." Veenendaal's surgery was canceled.

Veenendaal filed a petition on October 2, 2008, seeking workers' compensation benefits. He had an independent medical examination on May 29, 2009, with Dr. Richard Nieman, a neurosurgeon. Dr. Nieman found:

> I reviewed the MRI scans, at least 2, back in 2006. He did have a lateral disc on the right L3-4, as well as some moderate stenosis at L4-5. The more recent scan in 2008 indicated the disk at L3-4 was cleared on the right side; however, he still has increase in stenosis.

Dr. Nieman also found, "I believe he had pre-existing stenosis at L4-5, and again it was materially aggravated by the accident, in my opinion it is ratable and treatable." Dr. Abernathey gave a written opinion on November 16, 2009, stating Veenendaal's back problems were not related to his work injury on October 23, 2006.

An administrative hearing was held on December 15, 2009. Veenendaal testified the pain in his back after the October 23, 2006 incident was different than any pain he had had in his back before that. He also testified his pain had not resolved. He stated he continued to work, but worked differently now, stating "I don't try to force the issue at all. I try to do it safely and wisely." Terry Johnson, a branch manager at ABF, testified Veenendaal was extremely trustworthy and honest.

A deputy workers' compensation commissioner found:

> The claimant's problems were asymptomatic before the work injury. Shortly after the work injury the claimant underwent an MRI and it was recommended the claimant undergo surgery. However, the claimant consented to a trial of conservative care which was unsuccessful. The second MRI showed no improvement in the underlying condition of his back. Considering the record as a whole and the close temporal relationship between the work injury and the onset of the claimant's symptoms as well as the opinion of the evaluating physician, Dr. Nieman, it is concluded that the claimant has established that he sustained permanent disability as a result of his work injury.

The deputy concluded Veenendaal had sustained a twenty percent industrial disability. The workers' compensation commissioner affirmed and adopted the deputy's decision as the final agency action in this case.

The employer filed a petition for judicial review. The district court affirmed the commissioner, finding that based on the 2006 MRI, it was undisputable an injury existed at L4-5 in 2006. The court found Dr. Abernathey's statement that the L4-5 injury was not present in 2006 was "false." The court concluded the commissioner's finding Veenendaal had a work-related injury was supported by substantial evidence. The court also found the commissioner's determination

that Veenendaal had a twenty percent industrial disability was supported by substantial evidence. The employer appeals the decision of the district court.

II. Standard of Review.

Our review of decisions of the workers' compensation commissioner is governed by Iowa Code chapter 17A. Iowa Code § 86.26 (2007). We review the commissioner's decision for the correction of errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). We review the district court's decision by applying the standards of section 17A.19 to the commissioner's decision to determine if our conclusions are the same as those reached by the district court. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

III. Causation.

The employer contends there is not sufficient evidence in the record to support the commissioner's finding Veenendaal sustained a permanent disability that was causally related to the October 23, 2006 injury. The employer notes Veenendaal had significant pre-existing problems with his back. It claims Veenendaal's problems arising from the October 23, 2006 incident resolved by October 2007 when he reported he had zero pain and was able to work without difficulty. The employer states that in February 2008, Veenendaal had new complaints relating to the left side of his back, where his previous complaints had related to the right side. The employer also relies upon the opinion of Dr. Abernathey.

We reverse the factual findings of the commissioner only if those findings are not supported by substantial evidence. *Midwest Ambulance Serv. v. Ruud*,

754 N.W.2d 860, 864 (Iowa 2008). Substantial evidence is "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue . . . ." Iowa Code § 17A.19(10)(f)(1). Evidence is substantial if a reasonable mind would accept it as adequate to reach the same conclusion. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The ultimate question is not whether the evidence might support a different finding, but whether it supports the findings actually made. *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 173 (2006).

In workers' compensation cases, medical causation is essentially within the domain of expert testimony. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). The commissioner, as the finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. *See Arndt v. City of LeClair*, 728 N.W.2d 389, 394-95 (Iowa 2007). "Acceptance or rejection of an expert's testimony is within the 'peculiar province' of the industrial commissioner." *Morrison v. Century Eng'g*, 434 N.W.2d 874, 877 (Iowa 1989). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). We do not reweigh the evidence, but instead our review is limited to determining whether the commissioner's findings are supported by substantial evidence, viewing the record as a whole. *Id*. at 854.

Following our review, we determine there is substantial evidence in the record to support the commissioner's finding that Veenendaal's physical

condition was causally related to the work injury of October 23, 2006. While Veenendaal's medical records show he was treated for back pain prior to October 23, 2006, the records also show that on October 24, 2006, he informed his chiropractor he was experiencing pain that was "restricting and sharp in character," and the problem had arisen the day before. Furthermore, on October 31, 2006, Dr. Brady reported Veenendaal told him, "[t]he pain he is experiencing today is not at all similar to the back pain that he experienced [in the past]." In addition, Dr. Neiman's opinion, based on the independent medical examination, was that Veenendaal's pre-existing back problems were materially aggravated by the accident on October 23, 2006. Thus, there is substantial evidence in the record to show Veenendaal's current back problems were related to the October 23, 2006 injury, rather than his pre-existing back problems.

We also conclude there is substantial evidence to support a finding Veenendaal's back problems were not fully resolved in 2007, when he returned to work. The MRIs in 2006 and 2008 showed Veenendaal had a disc bulge/protrusion at L4-5 in 2006 that remained in 2008. The medical records of Dr. Brady show Veenendaal reported on September 11, 2007, that his back pain had never entirely resolved. Additionally, a medical report from June 2, 2008, noted although Veenendaal had temporary relief from epidural injections, "he is never pain free." Again, Dr. Neiman's report related his current back condition to the accident of October 23, 2006.

We find it unnecessary to further discuss the medical evidence and expert opinions supporting and detracting from the commissioner's conclusions regarding medical causation. It is sufficient to say we believe those conclusions

are supported by substantial evidence in the record. In reaching this conclusion, we are influenced by the deference we afford administrative agencies regarding this issue.

We affirm the decision of the district court, which determined there was substantial evidence in the record to support the commissioner's finding that Veenendaal had "established that he sustained permanent injury as a result of his work injury."

IV. Industrial Disability.

The employer contends there is insufficient evidence in the record to support the commissioner's award of benefits based on a twenty percent industrial disability. The employer points out Veenendaal has the same job he had at the time he was injured on October 23, 2006. His job duties have not changed. He has not had any loss of income. Furthermore, no physician has imposed work restrictions.

An employee, such as Veenendaal, who has suffered an unscheduled injury that has resulted in a permanent disability is entitled to compensation based on his earning capacity. See Iowa Code § 85.34(2)(u); *Broadlawns Med. Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010). The commissioner may consider not only an employee's functional disability, but also his age, education, qualifications, experience, and ability to engage in similar employment. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 137-38 (Iowa 2010). The commissioner may find there has been a diminution in earning capacity, even when there has not been a diminution in actual earnings. *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824, 831 (Iowa 1992) ("[A] showing of actual

diminution in earnings will not always be necessary to demonstrate an injury-induced reduction in earning capacity.").

Veenendaal was fifty-eight years old. He had graduated from high school and attended two years of college. His work experience included over-the-road truck driving, local truck driving, and auto and truck parts sales. The district court found, "Veenendaal has clearly suffered a loss of bodily function. He testified that he performs his work in a more cautious and careful manner and is forced to rest in his off-hours just to be able to work." The court also noted, "[w]hile he has lost no income at his current employer, the evidence is clear that should he find himself in the job market, his earning capacity has been significantly diminished."

We determine there is substantial evidence in the record to support the commissioner's finding that Veenendaal had a twenty percent industrial disability. Although Veenendaal is performing the same job he had at the time of the injury, his testimony was that he had to approach his job in a more cautious manner. In addition, he no longer was able to engage in activities outside of work. He testified that in order to keep his strength up for work, he just sat down when he came home.

We affirm the decision of the district court, which affirmed the decision of the workers' compensation commissioner.

AFFIRMED.