IN THE COURT OF APPEALS OF IOWA

No. 2-376 / 11-1636
Filed June 27, 2012

WENDY LEAVENS,
Petitioner-Appellant,

vs.

SECOND INJURY FUND OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Wendy Leavens appeals from the district court's ruling on judicial review, affirming the denial of benefits under the Second Injury Fund. **AFFIRMED.**

Steven C. Jayne, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Julie A. Burger, Assistant Attorney General, for appellee.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Wendy Leavens appeals from the district court's ruling on judicial review, affirming the denial of benefits under the Second Injury Fund. We agree with the Fund that: (1) the May 2008 settlement agreement entered between Leavens and her employer, Maytag, would not be given preclusive effect in establishing whether Leavens sustained a second injury because the Second Injury Fund did not have an opportunity to fully and fairly litigate the issue; (2) the agency did not act in an unreasonable, arbitrary, or capricious manner, or abuse its discretion, when the application for rehearing was deemed denied under Iowa Administrative Code rule 876-4.24, because the commissioner's affirmance of Leavens's appeal to the commissioner met the requirements of Iowa Code section 17A.16(1) (2011); and (3) substantial evidence supports the agency's determination that Leavens did not sustain a permanent disability as a result of her December 20, 2006 injury. We therefore affirm.

I. Background Facts and Proceedings

Wendy Leavens began working for Maytag in 1994. On October 15, 2007, Leavens filed an arbitration petition before the Iowa Workers' Compensation Commissioner based on a December 20, 2006 injury. She alleged the injury was caused by cumulative and repetitive employment duties, resulting in bilateral carpal tunnel syndrome.[1] This petition was resolved through a compromise settlement under Iowa Code section 85.35(3) (2007) and approved by the

[1] On Leavens's motion, this matter was consolidated with a previous matter, where Leavens alleged an injury from May 26, 2005.

agency on May 20, 2008. The settlement stated Leavens suffered a permanent disability of six percent of the body pursuant to Iowa Code section 85.34(2)(s).

On June 2, 2008, Leavens filed a Second Injury Fund petition, alleging a first qualifying injury to her right hand in 2000, and a second qualifying injury of bilateral carpal tunnel syndrome, from December 20, 2006.[2] After a hearing, the deputy commissioner issued an arbitration decision on August 6, 2009. In this decision, the deputy found the approved settlement from May 2008 was presumptively valid and because the disputed issues "involve[d] mutuality of interest between Maytag and the Fund," the Fund was without recourse. The deputy concluded Leavens's hand and wrist losses resulted in an industrial disability of twenty percent of the whole body and that Leavens was entitled to 56.4 weeks of Fund benefits.

Asserting the deputy did not appropriately consider all of her injuries, Leavens applied for rehearing.[3] An amended and substituted arbitration decision was filed on November 30, 2009. In this decision, the deputy stated that subsequent to the original arbitration decision the controlling agency authority on the preclusive effect of settlement agreements was expressly reversed and the previous controlling authority was restored. The deputy noted that under the new authority, "The only preclusive effect of an agreement for settlement between

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[2] We note that the actual Second Injury Fund petition stated the injury was on or about May 26, 2005. In the August 6, 2009 arbitration decision, however, it was noted that at the hearing, "it became apparent that Leavens had filed her petition against the Fund under the wrong file number, actually intending to file the claim under [the file number related to the December 20, 2006 injury]" and that for purposes of the arbitration decision, all disputes in the claim related to the December 20, 2006 injury and not the May 26, 2005 injury.

[3] Leavens also alleged the deputy did not follow the "fresh start rule" or consider her alternative argument under the odd-lot doctrine.

worker and employer is upon the parties who entered into that agreement, and the settlement does not establish the compensability of any injury or the extent of entitlement to disability benefits in a subsequent claim against the Second Injury Fund." The deputy then recited that Leavens had the burden of proving by a preponderance of the evidence that the injury was a proximate cause of the disability on which her claim was based. He concluded Leavens failed to meet this burden of proof and therefore was not entitled to an award of Fund benefits.

Leavens appealed to the commissioner, asserting her settlement with Maytag resolved the issue as to whether she sustained permanent disability as a result of the December 20, 2006 injury and as such, she was entitled to Fund benefits. In a February 15, 2011 appeal decision, the commissioner concluded the deputy appropriately relied on the new authority regarding the effect of settlement agreements and that the deputy did not err in finding certain medical opinions regarding Leavens's permanent functional impairment more persuasive than others. Leavens filed an application for rehearing on February 16, 2011; as it was not granted within twenty days, the application was deemed denied. Iowa Admin. Code r. 876-4.24.

On March 31, 2011, Leavens filed a petition for judicial review; a hearing was held on July 22, 2011. On September 9, 2011, the district court ruled that (1) the commissioner did not err in declining to give limited preclusive effect to the settlement agreement for the December 20, 2006 injury; (2) the commissioner's failure to address the issue regarding the weight given to certain medical reports in Leavens's motion for rehearing was not "unreasonable, arbitrary, capricious, or an abuse of discretion"; (3) there was substantial

evidence in the record to support the deputy's finding that Leavens did not sustain a permanent scheduled loss of use of the right and left arms as a result of the December 20, 2006 injury; and (4) there was no merit in Leavens's argument that the deputy's finding that she did not sustain a permanent scheduled loss of use of the right and left arms as a result of the December 20, 2006 injury was irrational, illogical, or wholly unjustifiable application of law to fact. Leavens appeals.

II. Standard of Review

Leavens sought judicial review of the decision of the workers' compensation commissioner.

> Iowa Code section 17A.19(10) governs judicial review of agency decision making. We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n).

Evercom Sys., Inc. v. Iowa Utilities Bd., 805 N.W.2d 758, 762 (Iowa 2011).

The agency's decision in this case was based on an interpretation of Iowa Code section 85.64 (2011). "The level of deference afforded to an agency's interpretation of law depends on whether the authority to interpret that law has clearly been vested by a provision of law in the discretion of the agency." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012) (internal citation omitted). The court must now examine each statute to determine whether discretion is vested in the commissioner. *Id.* at 256–257. We will reverse the agency's decision if it is based on "an erroneous interpretation" of the law. Iowa Code § 17A.19(10)(c).

> To the extent the commissioner's decision reflects factual determinations that are "clearly vested by a provision of law in the discretion of the agency," we are bound by the commissioner's findings of fact if they are supported by substantial evidence. Further, the commissioner's application of law to the facts as found by the commissioner will not be reversed unless it is "irrational, illogical, or wholly unjustifiable."

Neal v. Annett Holdings, Inc., ___ N.W.2d ___, 2012 WL 676991, at *2 (Iowa 2012) (citation omitted).

III. Iowa Code section 85.64

The Second Injury Fund was established in 1945 "to encourage the employment of disabled persons by making the current employer responsible only for the disability the current employer causes." *Gregory v. Second Injury Fund*, 777 N.W.2d 395, 397–98 (Iowa 2010). The Fund provides 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. Leavens's entitlement to benefits from the Fund is dependent upon proof of the following:

> (1) [S]he 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 injury exceeds the compensable value of "the previously lost member."

Gregory, 777 N.W.2d at 398–99.

IV. Settlement Agreement

Leavens asserts the district court erred because the settlement agreement with Maytag is entitled to "limited preclusive effect" on the issue of whether she sustained a permanent disability as a result of the December 20, 2006 injury—

the second qualifying injury—and the extent of her disability. Leavens alleged her first qualifying injury occurred to her right hand in 2000.

In May 2008, Leavens settled, and the commissioner approved, the December 20, 2006 injury claim with Maytag pursuant to Iowa Code section 85.35(2). Under this code section, "The parties may enter into an agreement for settlement that establishes the employer's liability, fixes the nature and extent of the employee's current right to accrued benefits, and establishes the employee's right to statutory benefits that accrue in the future." Iowa Code § 85.35(2). The settlement agreement also commuted all remaining benefits pursuant to sections 85.45 and 85.47. *See id.* §§ 85.45 (providing for future payments of compensation in a present lump sum payment if certain conditions are met), 85.47 (explaining basis of commutation). The settlement agreement stated Leavens had a permanent disability equal to six percent of the body.

In each of the decisions subsequent to the original arbitration decision, the deputy, commissioner, and district court cited the agency's recent decision in *Grahovic v. Second Injury Fund*, File No. 5021995 (Oct. 9, 2009), to support the conclusion that the May 2008 settlement agreement would not be given preclusive effect. This change in policy articulated in *Grahovic* was based on the rationale in *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123–26 (Iowa 1981). In *Hunter*, our supreme court held,

> [T]he absence of mutuality will no longer invariably bar the offensive application of issue preclusion. In cases where the four general prerequisites[4] of the doctrine are satisfied, *issue*

[4] The four general prerequisites that must be met are: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and

> *preclusion may be applied offensively where mutuality is lacking if the party sought to be precluded was afforded a full and fair opportunity to litigate the issue in the action relied upon and that no other circumstances justify affording him an opportunity to relitigate the issue*.

Hunter, 300 N.W.2d at 126 (emphasis added). In this case, Leavens seeks to employ issue preclusion offensively because in the second action, Leavens "relies upon a former judgment as conclusively establishing in [her] favor an issue which [s]he must prove as an essential element of [her] cause of action or claim." *Id.* at 123.

While *Hunter* provides parties an avenue to utilize offensive issue preclusion if certain elements are met, it is critical to note that "[o]ne important element of issue preclusion is that the issue to be precluded must have been 'raised and litigated' in the previous proceeding." *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 195 (Iowa 2007). In *Hedlund*, the claimant filed a first petition with the commissioner for alternate medical care. *Id.* at 194. In a written dismissal order, the deputy indicated that during the course of the alternate medical care hearing, Tyson Foods was asked whether liability was accepted on this claim and Tyson Foods' attorney stated it was. *Id.* Hedlund then filed a second petition for alternate medical care; the deputy determined Tyson Foods was precluded from contesting liability of the injury after it admitted liability in the first proceeding. *Id.* However, on further review, our supreme court held that "because liability was admitted in the first proceeding, the issue was not actually raised and litigated. Consequently, the district court erred by holding Tyson

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(4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Hunter*, 300 N.W.2d at 125–26.

Foods was precluded from contesting liability based on issue preclusion." *See id.* at 195 (citation omitted).

"Iowa law is clear that issue preclusion requires that the issue was 'actually litigated' in the prior proceeding." *See Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 572 (Iowa 2006) (citation omitted). Here, Maytag and Leavens stipulated a compensable injury to Leavens's bilateral arms arising out of and in the course of her employment on December 20, 2006. The issue of liability, however, was never actually raised and litigated before the agency. Further, even if Leavens established the first four prerequisites under *Hunter*, she would still need to establish "the party sought to be precluded"—the Fund—"was afforded a full and fair opportunity to litigate the issue in the action relied upon." *Hunter*, 300 N.W.2d at 126. The Fund was not a party to the settlement agreement; it therefore did not have an opportunity to fully and fairly litigate the issue of liability. Therefore, Leavens is unable to satisfy the conditions required in order to utilize offensive issue preclusion in the proceeding against the Fund, as set forth in *Hunter* and adopted by the agency in *Grahovic*. Because the agency's decision was not based on an "erroneous interpretation" of the law, we affirm the district court on judicial review. Iowa Code § 17A.19(10)(c).

V. Weight Given to Certain Medical Reports

Leavens claims the commissioner's "refusal" to respond to her application for rehearing[5] and explain why he declined to follow agency precedent in considering the weight to be given to "summary, leading, wish-list medical reports

[5] Leavens filed an application for rehearing on February 16, 2011; the application was deemed denied as it was not granted within twenty days. Iowa Admin. Code r. 876-4.24.

essentially written by an attorney" is unreasonable, arbitrary, capricious, or an abuse of discretion. *See* Iowa Code § 17A.19(10)(h) (allowing reversal for "[a]ction other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the consistency"); *Id.* § 17A.19(10)(n) (allowing for reversal if claimant has been prejudiced if the agency's action has been unreasonable, arbitrary, capricious, or an abuse of discretion).

In the amended and substituted arbitration decision, the deputy outlined various reports and assessments provided by orthopedic surgeons Delwin E. Quenzer, M.D., Teri S. Formanek, M.D., and neurosurgeon Robert C. Jones, M.D. in treating Leavens. Leavens began seeing Dr. Quenzer in February 1999, and he last evaluated her in February 2007. Leavens began seeing Dr. Formanek in November 2005, when she sought a second opinion regarding her left shoulder. Finally, Leavens requested an independent medical evaluation with Dr. Jones; the initial consultation was in September 2007.

Included in the "non-procedural findings" section of the amended and substituted arbitration decision were defense inquiries answered by Dr. Quenzer and Dr. Formanek. Also included was a letter from Dr. Jones to Leavens's counsel, in which Dr. Jones expressed disagreement with the impairment ratings assigned by Dr. Quenzer and Dr. Formanek. Dr. Jones expressed concern with Dr. Formanek's failure to provide a rationale regarding his impairment rating of Leavens at zero percent; he also believed that Dr. Quenzer's conclusion of a

zero percent rating was "a misreading of my report to say there is no evidence of carpal tunnel residuals."

The deputy concluded, "Taking the record as a whole, Dr. Jones's opinion does not outweigh the opinions of Drs. Formanek and Quenzer. It is accordingly held that Leavens has failed to establish permanent impairment to a second qualifying scheduled member, and is therefore not entitled to an award of fund benefits." In the appeal decision, the commissioner stated, "The presiding deputy commissioner did not err in finding the medical opinions of Teri S. Formanek, M.D., and Delwin E. Quenzer, M.D., regarding permanent functional impairment resulting from the injury on December 20, 2006, more persuasive than the opinion of Robert C. Jones, M.D."

The Fund argues that in reviewing the amended arbitration decision, the commissioner complied with Iowa Code section 17A.16(1) because he "gave sufficient reason for considering the evidence as [he] did." Section 17A.16(1) requires a proposed or final decision of an agency to include separate statements of findings of fact and conclusions of law. In addition, "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of underlying facts supporting the findings. The decision shall include an explanation of why the relevant evidence in the record supports each material finding of fact." Iowa Code § 17A.16(1). With respect to the agency's task of setting forth findings of fact, our supreme court has articulated,

> This court has long held that the commissioner must state the evidence relied upon and detail reasons for his conclusions. Moreover, the commissioner's decision must be sufficiently detailed to show the path he has taken through conflicting evidence. We have refrained, however, from reading unnecessary and

> burdensome requirements into the statute. Thus we have held the commissioner need not discuss *every* evidentiary fact and the basis for its acceptance or rejection so long as the commissioner's analytical process can be followed on appeal. So also have we held the commissioner's duty to furnish a reasoned opinion satisfied if it is possible to work backward and to deduce what must have been the agency's legal conclusions and its findings of fact.

Bridgestone/Firestone v. Accordino, 561 N.W.2d 60, 62 (Iowa 1997) (internal citation omitted).

With respect to this issue in the appeal decision, the commissioner—without further elaboration—stated the deputy did not err in finding the medical opinions of Drs. Formanek and Quenzer more persuasive than that of Dr. Jones, and affirmed the deputy's conclusion that Leavens failed to prove permanent impairment. In *Accordino*, the industrial commissioner affirmed an appeal by simply stating, "The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy . . . is affirmed and is adopted as the final agency action in this case." *Id.* at 61. Our supreme court held the agency's affirmance met the standards set forth in Iowa Code section 17A.16(1). *Id.* at 62.

Working backward in this case from the commissioner's appeal decision to the deputy's amended and substituted arbitration decision, we are able to "deduce what must have been [the agency's] legal conclusions and [its] findings of fact." *Id.* The deputy considered the evidence before him and concluded the opinion provided by Dr. Jones did not outweigh the opinions of Drs. Formanek and Quenzer. Further, he noted that he considered the record as a whole. Leavens asserts the deputy improperly relied on reports wherein Drs. Formanek and Quenzer responded to defense inquiries. She alleges she was "winning her

case until the deputy came to the summary, leading, wish-list reports." While Leavens is correct that the deputy analyzed Dr. Formanek's and Dr. Quenzer's responses to the defense inquiries, there is nothing in the record to indicate these inquiries and responses constituted the entire basis on which the deputy's decision was founded.

Although the application for rehearing was deemed denied as it was not granted within twenty days, this was not "unreasonable, arbitrary, capricious, or an abuse of discretion" by the agency as to this issue because the commissioner affirmed the deputy's decision in compliance with an allowable procedure found in section 17A.16(1). Iowa Code § 17A.19(10)(m); *see also* Iowa Admin. Code r. 876-4.24 (stating application for rehearing deemed denied if not granted within twenty days). We therefore affirm as to this issue.

VI. Permanent Disability

Leavens next asserts substantial evidence does not support the conclusion that she did not sustain a permanent disability as a result of the December 20, 2006 injury. This issue is a mixed question of law and fact. *Neal*, 2012 WL 676991, at *9. We review the agency's finding of fact for substantial evidence. *Id.* "Evidence is not insubstantial merely because a contrary inference is supported by the record." *Id.* at *10. "Because the challenge to the agency's industrial disability determination challenges the agency's application of law to facts, we will not disrupt the agency's decision unless it is irrational, illogical, or wholly unjustifiable." *Id.*

Where the agency's determination of fact is "clearly vested by a provision of law in the discretion of the agency," substantial evidence means "the quantity

and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). The deputy and commissioner both concluded that Leavens failed to prove a permanent impairment resulting from her December 20, 2006 work injury. On judicial review, the district court held,

> The fact that Dr. Quenzer and Dr. Formanek contradicted earlier statements does not prevent those opinions from forming substantial evidence upon which the deputy can rely in deciding the case. The deputy was well within his discretion as the trier of fact to find the later opinions to be more reliable. . . . Deputy Commissioner Rasey carefully outlined the medical history of the Petitioner, noting the discrepancies in the record between the treating physicians' opinions and that of the hired medical examiner, Dr. Jones, regarding her physical status. The issue the deputy answered was whether there was an impairment to a second qualifying scheduled member so as to qualify for benefits from the Fund, which the deputy answered in the negative. Upon this review, the court finds that there is substantial evidence in the record to support this deputy's finding.

We agree with the district court that substantial evidence supports the agency's denial of Fund liability because Leavens failed to prove before the agency an impairment to a second qualifying scheduled member. We further recognize that the evidence relied on by the agency was "not insubstantial merely because a contrary inference is supported by the record." *Neal*, 2012 WL 676991, at *10. Factual findings were vested in the discretion of the agency, and because the findings in this case are supported by substantial evidence, we are bound by these findings. *Id.* at *2. Moreover, the agency's application of these

facts to the law was not irrational, illogical, or wholly unjustifiable. We therefore affirm.

VII. Conclusion

In conclusion, we agree with the Fund that: (1) the May 2008 settlement agreement does not have preclusive effect in establishing whether Leavens sustained a second injury; (2) the agency did not act in an unreasonable, arbitrary, or capricious manner, or abuse its discretion, when the application for rehearing was deemed denied because the commissioner's affirmance of Leavens's appeal met the requirements of Iowa Code section 17A.16(1); and (3) substantial evidence supports the agency's determination that Leavens did not sustain a permanent disability as a result of her December 20, 2006 injury. We therefore affirm.

AFFIRMED.