

IN THE COURT OF APPEALS OF IOWA

No. 3-081 / 12-1472
Filed March 13, 2013

LARRY GALLO,
Petitioner-Appellant,

vs.

**PENFORD PRODUCTS COMPANY
and ZURICH AMERICAN INSURANCE,**
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill,
Judge.

An injured employee appeals from the district court's decision affirming the agency's determination that he suffered a sixty percent loss of earning capacity and the denial of his claim that the work injury caused his depression.

AFFIRMED.

Emily Anderson and Pressley W. Henningsen of Riccolo & Semelroth,
P.C., Cedar Rapids, for appellant.

Jessica Cleereman and Patrick McNulty of Grefe & Sidney, P.L.C., Des
Moines, for appellees.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

We consider whether substantial evidence supports the workers' compensation commissioner's decision that employee Larry Gallo suffered a loss of earning capacity of sixty percent and that his depression was not caused by his work injury. The district court affirmed the commissioner's ruling and so do we.

I. Background Facts

On February 5, 2005, Gallo injured his lower back dislodging a fifty-pound bag of product from a palletizer machine while at work for Penford Products Company (Penford). He treated with Dr. Brady at the St. Luke's Work Well Clinic, was taken off work for one week, and put on Percocet, a narcotic pain reliever. Gallo suffered additional back strains at work on March 8 and March 16, 2005, for which he continued to see Dr. Brady. An MRI showed minor disk bulging. On referral, Dr. Muow determined surgery was not necessary at that time.

In April 2005, Gallo saw Dr. Urbi, a physician in the same clinic as his personal physician, Dr. Boyles. Gallo stated he experienced extreme back pain when he bent over to pick up clothing at home. Dr. Urbi prescribed another painkiller. Four days later Gallo returned to the clinic and saw Dr. Boyles, who prescribed hydrocodone and muscle relaxants.

On May 16, 2005, Gallo again saw Dr. Brady with complaints of worsening symptoms after lifting at work. A senior production manager from Penford had accompanied Gallo to his initial hospital visit two days earlier, apparently

concerned because Gallo had just finished his last prescription of Percocet when he reinjured himself in the first half-hour of his shift. An MRI revealed a new right side disk fragment and a herniated disk at L4-L5. On referral, Dr. Mouw assessed Gallo as a surgical candidate and performed a discectomy on May 18, 2005.

Gallo continued to report worsening pain after his surgery. On July 5, 2005, he underwent a trial transforaminal nerve block. That same month Dr. Boyles prescribed Lortab after Gallo claimed he hurt his back moving a refrigerator at home. Approximately one week later, Gallo returned stating he strained his back when he sneezed at home. Dr. Boyles again prescribed Lortab with one refill. On August 5, Gallo saw his wife's physician, Dr. Alberts, claiming Dr. Brady was out of town and he was unable to get a refill of his pain medication. Dr. Alberts prescribed Lortab. On August 10, 2005, Gallo had a second nerve block. On August 22, he returned to Dr. Boyles' office for more pain medication and received another prescription for Lortab.

On or about September 25, 2005, Gallo was arrested for impersonating a physician to obtain prescription pain medication. Both Drs. Boyles and Brady refused to continue treating Gallo after his arrest.

Gallo has a history of drug abuse. He underwent treatment in 1997 for addiction to narcotic pain relievers dating back to 1995. He has also admitted to abusing recreational and prescription drugs including marijuana, morphine, and

hydrocodone. After Gallo's arrest, Dr. Brady noted Gallo had specifically asked for Percocet during his first appointment on February 7, 2005. Dr. Brady believed Gallo's addiction to Percocet was likely a problem before that visit.

On October 11, 2005, Gallo checked into the Sedlacek Center for substance abuse treatment. On October 21, 2005, he saw Dr. Alberts for symptoms of depression. Gallo told Dr. Alberts about his drug rehabilitation program. Gallo began taking prescription anxiety medication, an antidepressant, and a sleep aid.

On multiple occasions between March and June 2006, Gallo treated for lower back pain in the Mercy Medical Center emergency room and received prescriptions including Lortab, ibuprofen, and hydrocodone. He did not report his history of prescription medication abuse to Mercy staff and claimed he did not have a family physician, even though Dr. Alberts was treating him at that time.

Gallo continued to work at Penford in a light capacity until January 21, 2007. He worked approximately fifty-six hours per week. On January 22, 2007, Penford terminated Gallo's employment upon discovering his criminal conviction for impersonating a physician to obtain prescription medications for a work-related injury, which constituted "falsifying company records."

Several physicians and therapists evaluated Gallo to determine his level of impairment. Neurologist Richard Neiman, M.D., gave Gallo an independent medical examination pursuant to Iowa Code section 85.39 (2009) on October 25, 2006, and assigned a 19.5 percent permanent whole body impairment rating. Dr. Brian Johns at Mercy Medical Center Occupational Health began treating Gallo

for back pain on December 4, 2006. He performed a functional capacity evaluation on March 6, 2007, and found Gallo was at maximum medical improvement (MMI) and capable of working in the medium category as defined by the U.S. Department of Labor.

Dr. Garrells examined Gallo for his medical disability determination for the Social Security Administration. Dr. Garrells found Gallo could occasionally stoop, climb, crouch, and lift up to twenty pounds, and he could frequently lift up to ten pounds. He advised Gallo to alternate sitting and standing, and to limit pushing and pulling to the weights listed for lifting. Dr. Uy examined Gallo for his disability determination for the Railroad Retirement Board and placed him at MMI. Both Dr. Garrells and Dr. Uy determined Gallo's education and skills were not transferable to work other than the manual labor he had performed in the past.¹

Gallo met with two vocational experts who reached conflicting opinions regarding his employability. At Penford's request Gallo met with vocational consultant Steve Mootz in November 2007. Mootz stated he found several job openings in the medium category that matched Gallo's qualifications and instructed him to apply. Mootz found Gallo unwilling to fully participate. Gallo claims several of those jobs were not appropriate for his limitations. The commissioner noted that at that time Gallo was receiving more than \$5000 per month in disability benefits from the Railroad Retirement Board, Social Security

¹ Deputy Commissioner McGovern did not elaborate on why she did not assign much weight to Dr. Garrells's and Dr. Uy's opinions. The arbitration decision focuses primarily on vocational expert Mootz's frustrations working with Gallo to find employment, and the final agency decision adds no clarification.

disability, and workers' compensation. The commissioner believed those substantial benefits may have contributed to Gallo's lack of cooperation and motivation to find work.

Gallo retained Kent Jayne as an expert witness to conduct a vocational assessment. He did not hire Jayne to help him find work. Jayne concluded that Gallo's age, limited skill set, and physical limitations made it unlikely that he could return to competitive employment.

At his attorney's request Gallo saw psychiatry and neurology specialist Dr. Agesen to evaluate the cause of his depression. These visits took place on December 11, 2008, and March 30, 2009. Dr. Agesen found Gallo suffered from major depressive disorder, panic attacks, and social anxiety disorder. Dr. Agesen attributed Gallo's depression and substance abuse to his February 5, 2005 work injury. During his earlier visits with Dr. Alberts, Gallo had at various times reported difficulty sleeping, feeling up and down, and lacking ambition to do anything. Dr. Alberts, however, did not treat Gallo for depression until after his September 2005 arrest.

II. Prior Proceedings

On June 9, 2008, Gallo filed a petition in arbitration for workers' compensation benefits for his February 5, 2005 back injury. The parties stipulated Gallo sustained a work-related injury arising out of and in the scope of his employment on February 5, 2005. The parties disputed the nature and extent of the permanency benefits at issue and other medical benefits to which Gallo may have been entitled. On November 30, 2010, the deputy workers'

compensation commissioner found that Gallo suffered a “permanent partial disability”² of sixty percent. The deputy found that Gallo’s work injury was not a significant cause of his depressive disorder.

Gallo appealed the arbitration decision claiming the deputy commissioner erred in failing to find that he was permanently and totally disabled, in finding that he was not a credible witness, and in finding that his depression was not work-related. On November 8, 2011, without additional comment, the commissioner issued a final agency decision adopting the portions of the November 30, 2010 arbitration decision relating to the issues on intra-agency appeal.

Gallo petitioned the district court for judicial review. On August 7, 2012, the district court affirmed the final agency decision.

III. Standard of Review

Iowa Code chapter 17A governs judicial review of the decisions of the workers’ compensation commissioner. Iowa Code § 86.26; *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). In reviewing a district court’s decision on appeal, we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. *Mycogen Seeds*, 686 N.W.2d at 464.

The court is bound by the agency’s factual determinations when they are supported by “substantial evidence in the record before the court when that record is viewed as a whole.” Iowa Code § 17A.19(10)(f). “Substantial evidence”

² The deputy referred to the award as “permanent partial disability.” However, the deputy analyzed the case under the industrial disability factors and the parties do not dispute that the award was for industrial disability.

is statutorily defined as: “[T]he 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.” *Id.* § 17A.19(10)(f)(1). The question is not whether evidence might support a different finding but whether the evidence supports the finding actually made. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Our role as a reviewing court is not to weigh the evidence or credibility of witnesses but to ensure that substantial evidence supports the finding according to the witnesses whom the commissioner believed. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). Evidence is not insubstantial merely because it would have supported contrary inferences. *Norland v. Iowa Dep’t of Job Serv.*, 412 N.W.2d 904, 913 (Iowa 1987).

Medical causation presents a question of fact that is vested in the discretion of the workers’ compensation commission. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844 (Iowa 2011). The commissioner’s finding of medical causation may only be reversed if it “is not supported by substantial evidence in the record before the court when the record is viewed as a whole.” Iowa Code § 17A.19(10)(f); *Pease*, 807 N.W.2d at 844.

IV. Analysis

A. Permanent Disability Benefits

Total disability occurs when an injury wholly disables an employee from performing work that the employee’s experience, training, intelligence, and

physical capacities would otherwise permit the employee to perform. *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 (Iowa 2009). It does not require a state of absolute helplessness. *Id.* The pertinent question is whether there are jobs in the community that the employee can do for which the employee can realistically compete. *Id.* We focus on the injured worker's ability to obtain gainful employment, not merely on the worker's physical disability. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995).

Gallo suffered a work-related back injury on February 5, 2005, requiring a discectomy. Gallo has a high school education. He worked for several railroad companies in manual labor positions and later as a switchman, a brakeman, and a railroad car inspector. He began working for Penford in 1988 and was employed there as a warehouse worker until his termination in 2007. He was terminated for falsifying company documents when he impersonated a doctor to obtain prescription pain relievers for a work-related injury.

The commissioner concluded the only permanent injury Gallo sustained was his February 5, 2005 injury to his spine, an industrial disability. Industrial disability refers to a "loss of earning capacity, and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man." *Diederich v. Tri-City R.R. Co.*, 258 N.W. 899, 902 (Iowa 1935). "Functional impairment is an element to be considered in determining industrial disability, but consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because

of the injury, to engage in employment for which he is fitted.” *Olson v. Goodyear Serv. Stores*, 125 N.W.2d 251, 257 (Iowa 1963).

The commissioner concluded Gallo suffered a sixty percent loss of earning capacity due to his injury based on the factors relating to industrial disability and an assessment of the credibility of the witnesses who testified. The commissioner highlighted that Gallo is an older worker with a high school education whose training has solely been on the job. He has a substantial work history, but the commissioner found he did not seem motivated to secure other employment. Penford’s vocational expert, Mr. Mootz, opined employment was a realistic goal, but Gallo’s vocational expert, Mr. Jayne, concluded he was not employable.

The question before us is not whether evidence might support a different finding, but whether the evidence supports the finding the commissioner actually made. *Thorson*, 763 N.W.2d at 850. Our role as a reviewing court is not to weigh the evidence or credibility of witnesses but to ensure that substantial evidence supports the finding according to the witnesses whom the commissioner believed. *Arndt*, 728 N.W.2d at 394-95.

Substantial evidence in the record supports the commissioner’s conclusion that Gallo suffered a sixty percent loss of earning capacity. An issue in every case is the credibility of both lay and expert witnesses. *Second Injury Fund v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990). “Making a determination as to whether evidence ‘trumps’ other evidence or whether one piece of evidence is ‘qualitatively weaker’ than another piece of evidence is not an assessment for the

district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision.” *Arndt*, 728 N.W.2d at 395. The commissioner found Mr. Mootz’s testimony regarding Gallo’s employment prospects convincing and credible. Mootz found Gallo had realistic employment prospects but was unwilling to fully participate in the job search. The commissioner also assigned weight to the fact Gallo continued working fifty-six hours per week for more than two years after his injury, a time he claims he was permanently and totally disabled.

The commissioner did not assign any persuasive force to the opinions of Dr. Garrells and Dr. Uy, who determined Gallo’s education and skills were not transferable to work other than the manual labor he had performed in the past. “While it is true that the commissioner’s decision must be ‘sufficiently detailed to show the path he has taken through conflicting evidence,’ . . . the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it.” *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995). “Such a requirement would be unnecessary and burdensome.” *Id.* The commissioner’s decision not to rely on these opinions does not undermine the substantial evidence in the record supporting the final agency decision.

B. Medical Causation

Medical causation “is essentially within the domain of expert testimony.” *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The weight to be given to those opinions is for the commissioner and “that may be

affected by the completeness of the premise given the expert and other surrounding circumstances.” *Id.* Generally, the commissioner may accept or reject expert testimony entirely or in part. *Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa Ct. App. 1991). The commissioner may not arbitrarily or totally reject the testimony but must weigh the evidence and assess the credibility of the witness. *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 509 (Iowa 1973). If a medical expert’s opinion is based on an incomplete history, the commissioner may give it less weight or reject it. *Musselman v. Cent. Tele. Co.*, 154 N.W.2d 128, 133 (1967). We are reluctant to allow the commissioner totally to reject expert testimony which is the only medical evidence presented. *Langford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667, 668 (Iowa 1971); *Poula v. Siouxland Wall & Ceiling, Inc.*, 516 N.W.2d 910, 911-12 (Iowa Ct. App. 1994); *Leffler v. Wilson & Co.*, 320 N.W.2d 634, 635 (Iowa Ct. App. 1982).

Based primarily on a review of Dr. Alberts’s medical records as well as the factual circumstances affecting Gallo’s life at the time of his diagnosis, the commissioner found Gallo’s depression was not related to his February 5, 2005 work injury. The commissioner gave little credence to Dr. Agesen’s opinion that Gallo’s work injury led to his depression. The assessment of credibility is solely within the discretion of the fact finder. *Arndt*, 728 N.W.2d at 394-95. Dr. Agesen only met with Gallo on two occasions, and the purpose of those evaluations was to render an opinion on the cause of his major depressive disorder. The commissioner noted the examinations did not occur until more than three and four years after the February 5, 2005 work injury. The

commissioner considered Dr. Alberts's medical records, which show that Gallo's inability to sleep, panic attacks, and social anxiety disorder predated his work injury.

The commissioner found a number of factual circumstances which might explain Gallo's depressive behavior:

He did not want to face issues involving substance abuse and he was unwilling to acknowledge his problems when he met with his medical providers. Due to stress, claimant had commenced smoking tobacco products after having quit for four years. He was involved with the criminal justice system and had been incarcerated for one day. There was a fine to pay into the court system. He had the stress of his protracted workers' compensation case. There was his adult daughter who was distraught over her father's criminal behavior. She was estranged from her father. His youngest daughter was a minor child with serious rheumatoid arthritis and debilitating pain. Claimant lost his job because he had impersonated a physician and obtained pain medications illegally. His union would not take claimant's grievance to the arbitration level. There were financial woes until claimant could obtain his disability checks from the Railroad Retirement Board and the Social Security Administration. Claimant's wife had been hospitalized. He told his physical therapists, his wife's illness interfered with his ability to attend physical therapy sessions. According to claimant, he had experienced an undesirable relationship with his father who physically and mentally abused claimant. All of those factors had been pending prior to the time claimant was examined by Dr. Agesen.

The commissioner considered all the evidence, not just the evidence urged by Gallo. Although he presented evidence in support of his claim, substantial evidence supports the commissioner's conclusion that Gallo did not carry his burden to prove that the work injury caused his depression.

V. Conclusion

For the foregoing reasons, we find there is substantial evidence to support the commissioner's conclusions that Larry Gallo suffered a sixty percent loss of earning capacity and that his work injury did not cause his depression.

AFFIRMED.