

IN THE COURT OF APPEALS OF IOWA

No. 3-912 / 13-0351
Filed November 6, 2013

DIANA LYNN HORN,
Petitioner-Appellant,

vs.

**CUMMINS FILTRATION-LAKE
MILLS, a/k/a CUMMINS, INC., f/k/a/
FLEETGUARD, INC.,**
Respondent-Appellee.

Appeal from the Iowa District Court for Winnebago County, Rustin T. Davenport, Judge.

Diana Horn appeals the ruling on judicial review affirming the workers' compensation commissioner's award of benefits. **AFFIRMED.**

Mark S. Soldat of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellant.

Richard G. Book of Huber, Book, Cortese & Lanz, P.L.L.C., West Des Moines, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, J.

DANILSON, J.

Diana Horn appeals the ruling on judicial review affirming the workers' compensation commissioner's award of permanent partial disability benefits. On appeal, Horn contends the agency failed to adequately explain its impairment determination. We find no error of law or misapplication of law to fact. We therefore affirm.

I. Background Facts and Proceedings.

Diana Horn was injured at work on April 3, 2003. She filed a petition seeking workers' compensation benefits from her employer, Cummins Filtration. An arbitration hearing was held on May 14, 2009, to address these issues: "(1) Extent of permanent disability, and commencement date; (2) Temporary partial benefits; (3) The claimant's rate of compensation at the time of injury; (4) Whether the claimant is entitled to payment of medical expenses; and (5) Whether the claimant is entitled to penalty benefits."

On September 11, 2009, a deputy commissioner noted the differing determinations of impairment made by Drs. Teri Formanek (ten percent permanent impairment), Brian Adams (twelve percent), and John Kuhnlein (six percent). The deputy "accepted" Dr. Kuhnlein's opinion and awarded Horn fifteen weeks of permanent partial disability benefits.

Horn filed an application for rehearing in which she vigorously contested all aspects of the deputy's ruling, including the deputy's finding as to permanent partial impairment. With respect to the deputy's finding of six percent permanent disability, Horn argued—among other things—the deputy had used the "wrong

legal standard,” and numerous aspects of the *Guides to the Evaluation of Permanent Impairment* used in workers’ compensation cases are faulty and unscientific. Horn also disagreed with specific portions of Dr. Kuhnlein’s evaluation and complained numerous aspects of her functional disability were not adequately considered. After an extensive recitation of Horn and her husband’s testimony, Horn concluded, “In sum then, taking the evidence as a whole, there is no credible way to hold that following her stipulated work injury, Horn retained 94% of her right arm functional ability.” The rehearing application was deemed denied by administrative rule.

On intra-agency appeal, which was delegated by the commissioner to another deputy commissioner, the impairment determination of the arbitration ruling was affirmed.

In her application for rehearing, Horn asserted;

12. In the appeal decision, p. 1, the commissioner by delegation affirmed and adopted the hearing deputy’s determination of the extent of permanent disability made by him merely choosing between doctors’ impairment ratings.

13. [The hearing deputy] did so, even though such a determination clearly violated Rule 876-2.4, I.A.C., and the court’s dictate that “[t]he determination of function disability is not limited to impairment ratings established by medical evidence.” *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 421 (Iowa 1994).

14. Even though Horn spent 27 pages of her 12/10/09 intra-agency appeal brief, pp. 7-33, discussing the evidence which plainly warranted an award of more than 15 weeks of [permanent partial disability] p.p.d. compensation, [the acting commissioner] also made no comment on this issue during a purported de novo review. This is just plain wrong, particularly when the deputy just as plainly erroneously applied the law. Consequently, upon rehearing, both the correct law should be applied and justice should be done.

The rehearing application was denied—the acting commissioner noted the “claimant makes no new arguments in its application for rehearing but instead reiterates previously made allegations,” which “arguments were considered prior to the rendering of the Appeal Decision.”

Horn filed a petition for judicial review in the district court, asserting “the grounds upon which relief are sought are those enumerated in petitioner’s intra-agency appeal briefs and those stated in Iowa Code § 17A.19(10)(b) (c) (f) (g) (h) (i) (j) (l) (m) (n) [(2011)].”¹

¹ Section 17A.19(10) provides in pertinent part:

The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:

• • • • •

(b) Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.

(c) Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

• • • • •

(f) Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.

• • • • •

(g) Action other than a rule that is inconsistent with a rule of the agency.

(h) Action 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 inconsistency.

(i) The product of reasoning that is so illogical as to render it wholly irrational.

(j) The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.

The district court ruled in pertinent part,

Horn's final argument is that the Commissioner was incorrect in awarding a six percent impairment regarding the injury to Horn's right arm/wrist. In her brief Horn exhaustively details the evidence she feels should have led the Commissioner to adopt a higher impairment rating. Specifically, Horn pointed to her own testimony regarding her arm's impairment. However, the Commissioner relied on the opinion of Dr. John Kuhnlein in assigning six percent impairment. Specifically the Commissioner stated that,

Dr. Kuhnlein opined that the claimant had a permanent impairment of six percent of the right upper extremity, and restriction of occasion lifting of up to five pounds with the right arm and to lift with palm up and be cautious with the other arm. Given Dr. Kuhnlein's greater familiarity with the AMA Guides and ratings, given his nearly exclusive practice of providing such ratings, and that this is a scheduled member case where the rating has more significance than a body as the whole industrial loss case, Dr. Kuhnlein's opinion that the proper rating is six percent will be accepted.

Accordingly, the Commissioner's decision was supported by substantial evidence. Finding no legal errors, the Commissioner's six percent determination is affirmed.

Horn filed a motion to enlarge, contending the district court mischaracterized her complaint with respect to the impairment rating:

(15) . . . However, Horn's argument was that regardless of whether the commissioner accepted Dr. Formanek's, Dr. Adams', or Dr. Kuhnlein's ratings as the most accurate rating, there is overwhelming evidence, including the A.M.A., *Guides* itself, that only certain permanent impairments are ratable via the A.M.A., *Guides*, and the rest, though extant, are not. See, 5/16/12

. . . .
(l) Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.

(m) Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.

(n) Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

claimant's—judicial review brief, pp. 61-62. That is why both the commissioner's rule, [Iowa Administrative Code rule 876-2.4] and the supreme court have stood for the proposition that “[t]he determination of functional disability is not limited to impairment ratings established by the medical evidence.” *Miller*, 525 N.W.2d at 421.

(16) Consequently, although Horn assigned as error that the commissioner's determination of a 6% permanent partial disability of an arm was not supported by substantial evidence, as defined in Iowa Code §17A.19(10)(f), she also assigned as error the commissioner's limitation of his determination to a mere choice amongst impairments ratings made pursuant to the A.M.A., *Guides*. See, 9/11/09 arbitration decision, pp. 2-3; 4/27/11 appeal decision; 5/20/11 ruling. Therefore, request is made that the court enlarge its ruling to address this error assignment, and then reverse and remand to the commissioner, given that there was largely-uncontroverted evidence that Horn had permanent impairment from her work injury, (such as loss of pain-free function, endurance, fatigability, etc.), which simply was not ratable under the A.M.A., *Guides* that the commissioner was required to consider, but did not.

In ruling on the motion to enlarge, the district court rejected Horn's contention that the commissioner limited the disability determination to the impairment ratings.

Horn now appeals, again setting out evidence she believes requires a finding of greater impairment than determined by the commissioner.²

II. Scope and Standard of Review.

Judicial review of the decisions of the workers' compensation commissioner is governed by Iowa Code chapter 17A. A district court acts in an appellate capacity when it exercises its judicial review power. When reviewing a district court's decision “we apply the standards of chapter 17A to determine whether the

² Horn also contends—for the first time—that the commissioner's ruling fails to adequately “state the evidence he relies upon and specify in detail the reasons for his conclusions.” This claim was not presented to the deputy or commissioner and is thus not properly preserved. See *Boehme v. Fareway Stores, Inc.*, 762 N.W.2d 142, 146 (Iowa 2009) (discussing Iowa Administrative Code rule 876–4.28(7), which states “[a]n issue will not be considered on appeal if the issue could have been but was not presented to the deputy”).

conclusions we reach are the same as those of the district court. If they are the same, we affirm; otherwise, we reverse.”

. . . . 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., 814 N.W.2d 512, 518 (Iowa 2012) (citations omitted).

III. Discussion.

Horn suffered a scheduled disability, which is evaluated on a functional basis. See *Miller*, 525 N.W.2d at 420. Functional disability is a fact question for the commissioner. See *Sherman v. Pella Corp.*, 576 N.W.2d 312, 322 (Iowa 1998). “Functional disability is arrived at by determining the impairment of the employee’s bodily function and is limited to the loss of the physiological capacity of the body or body part.” *Miller*, 525 N.W.2d at 420. “The determination of functional disability is not limited to impairment ratings established by medical evidence.” *Id.* at 421. “The commissioner may use either medical or nonmedical evidence to determine the extent of disability of a scheduled member.” *Sherman*, 576 N.W.2d at 322. “[L]ay testimony could buttress the medical testimony and would be relevant and material in determining the cause and extent of the employee’s injuries.” *Id.* “[W]hen relying on medical evidence, the commissioner may use the *Guides* for determining the disability of a scheduled member.” *Id.* (citing Iowa Admin. Code r. [876]-2.4, which allows use of the *Guides* to determine “[t]he extent of loss or percentage of permanent impairment”).

In *Miller*, the court ruled the exclusion of three lay witnesses' testimony at the agency level was reversible error because "the commissioner is to consider all evidence, both medical and nonmedical." 525 N.W.2d at 421. In its essence, Horn complains that the commissioner failed to consider or give any credence to her and her husband's testimony regarding her functional disability. Horn analogizes the commissioner's finding of six percent disability here to the exclusion of lay witness testimony in *Miller*. She contends the commissioner thus applied an improper legal standard in determining functional disability.

We observe, however, the agency "considered all of the evidence and testimony." The arbitration ruling, adopted as final agency action in this regard, cites the proper legal standard, specifically stating that the "loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment." The ruling also acknowledges that a claimant's testimony and demonstration of difficulties may be considered in determining the actual loss of use. We find no legal error.

Our supreme court has noted "the task of judicial review is greatly facilitated when agency decisions are fully explained." *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293, 295 (Iowa 1992). Moreover, decisions not fully explained undoubtedly increase appeals of agency decisions. Here, the agency gave an explanation for accepting Dr. Kuhnlein's opinion, which is perfunctory at best, but not so completely devoid of any finding that we have nothing to review as in *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 264 (Iowa 2012). Upon our review of the record before us, we conclude that the

commissioner did consider all the evidence and found six percent disability, relying primarily on Dr. Kuhnlein's opinion. Dr. Kuhnlein's report notes Horn's complaints of pain and incapacity, which indicates Dr. Kuhnlein took those matters into consideration. There is thus substantial evidence supporting the agency's finding of six percent functional disability. See *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007) (noting it is not for the district court or court of appeals to weigh the evidence, rather "[i]t is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue").

Finding no legal error and concluding substantial evidence supports the agency's determination, we affirm.

AFFIRMED.