

IN THE COURT OF APPEALS OF IOWA

No. 6-170 / 05-1291
Filed April 26, 2006

STEVEN C. SHOWMAN,
Petitioner-Appellant,

vs.

**PLASTECH STAMPING DIVISION and
ZURICH NORTH AMERICA INSURANCE COMPANY,**
Respondent-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

An employee appeals the district court's decision which partially affirmed
the workers' compensation commissioner's ruling on his review-reopening
claims. **AFFIRMED IN PART, AND REVERSED IN PART.**

Christopher J. Godfrey of Max Schott & Associates, P.C., Des Moines, for
appellant.

Andrew D. Hall and Lisa R. Perdue of Grefe & Sidney, P.L.C., Des
Moines, for appellees.

Considered by Zimmer, P.J., and Hecht, J., and Beeghly, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206
(2005).

BEEGHLY, S.J.***I. Background Facts & Proceedings***

Steven Showman was employed by Plastech Stamping Division in a maintenance position. He has an associate's degree in robotics automation. In September 1997, Showman injured his back when he fell off a ladder. He continued to work for Plastech until the company closed in December 1999. He then worked at Five Star Industries in a sales position until December 2000. Showman obtained a similar position at Pella Machine.

On May 17, 2001, Showman entered into a settlement agreement on his workers' compensation claim against Plastech based on the September 1997 injury. The agreement provided that Showman had sustained a permanent partial industrial disability of thirty percent of the body as a whole.

Showman had been experiencing increased back pain and pain radiating into his left leg. Dr. Mary Hlavin recommended a spinal fusion. He had this back surgery in June 2001. He did not return to work at Pella Machine after his surgery. The first surgery was not entirely successful, and a second surgery was performed by Dr. Hlavin in July 2001. Showman continued to have chronic back pain, and pain radiating into his legs.

Dr. Hlavin released Showman to return to work in January 2002, with the restrictions that he could not lift more than eight pounds, stand or sit for more than forty-five minutes, and not engage in repetitive lifting, pulling, pushing, twisting, bending, or stooping. On the employer's request, Showman had a psychiatric evaluation in March 2002. Dr. Scott Jennisch diagnosed him with

major depressive disorder and chronic back pain. Dr. Jennisch found that while Showman had the ability to sit at a desk for a short period of time, he was “not able to concentrate or focus well enough to sustain these activities.”

Showman obtained a part-time job at a bait shop in June 2002. He worked there until September 2002, when he had a dorsal column stimulator implanted. The stimulator helped with the pain in Showman’s legs, but he continued to have pain in his back. Dr. Hlavin has diagnosed Showman with failed back syndrome and arachnoiditis, which is an inflammation of the membrane around the spinal column. Showman receives Social Security disability benefits. He has not sought any employment since leaving the bait shop. On August 14, 2003, Dr. Jennisch found Showman was at or near maximum medical improvement regarding his depression.

In October 2002, Showman filed a petition for a review-reopening of the settlement agreement. He claimed he was permanently and totally disabled due to his back pain and depression. After an administrative hearing, a deputy workers’ compensation commissioner found Showman was not credible. The deputy found Showman had the ability and skills to return to work, but that he was not especially motivated. The deputy concluded Showman had suffered a permanent partial disability in the amount of sixty percent. She also concluded he was entitled to temporary benefits based on his mental injury and penalty benefits. Showman and Plastech appealed the deputy’s decision. The deputy’s decision was affirmed and adopted as final agency action by the workers’ compensation commissioner.

Showman and Plastech sought judicial review of the commissioner's decision. The district court determined there was substantial evidence in the record to support the commissioner's finding that Showman was not credible. The court also found there was substantial evidence to support the finding that Showman had an industrial disability of sixty percent, and not one hundred percent as he was claiming. The court reversed the award of temporary benefits based on Showman's mental condition, finding there was no evidence that his depression impeded his ability to work. For this reason, the award of penalty benefits was also reversed. Showman appeals the decision of the district court.

II. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code § 17A.20 (2003); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of chapter 17A to the agency action to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosp. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

We may reverse, modify, or grant other relief if a party shows the agency's action is "[b]ased 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." Iowa Code § 17A.19(10)(f). "Substantial evidence" is 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.

Iowa Code § 17A.19(10)(f)(1); *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

III. Credibility

A. When an employee seeks additional benefits in a review-reopening proceeding, the employee must show by a preponderance of the evidence that subsequent to an original award, the employee suffered an impairment or lessening of earning capacity proximately caused by the original injury. *Simonson v. Snap-On Tools, Inc.*, 588 N.W.2d 430, 434 (Iowa 1999); *Blacksmith v. All-American Inc.*, 290 N.W.2d 348, 350 (Iowa 1980). The supreme court has stated:

Logic dictates that the circumstances giving rise to a decrease in earning capacity must not have been within the contemplation of the decision maker at the time of the original award. That is so because if these circumstances were known or anticipated at the time of the initial award, they would logically be reflected in the original determination of industrial disability.

Acuity Ins., 684 N.W.2d at 217.

An issue in this case is whether it was “anticipated” at the time of the settlement agreement, on May 17, 2001, that Showman would be having back surgery in June 2001. During cross-examination during the review-reopening hearing, Showman testified his surgery was not anticipated in May 2001. The commissioner found Showman’s statement was not true, and questioned his credibility. The medical records show Dr. Hlavin discussed the surgery with Showman on May 3, 2001. Showman began suffering acute back pain on May

11, 2001, and Dr. Hlavin's notes on that date state Showman was scheduled for surgery in early June. There is clearly substantial evidence in the record to support the commissioner's conclusion that Showman was not credible on this issue.

B. Showman also claims that other findings by the commissioner regarding his credibility and motivation were not supported by substantial evidence. The commissioner found Showman (1) failed to follow through with recommendations of a vocational consultant, (2) misstated his employment history at times, (3) feared losing his Social Security benefits if he resumed employment, and (4) was capable of returning to school. These issues are relevant to a determination of Showman's industrial disability.

It is well within the province of the commissioner to determine the credibility of witnesses. *E.N.T. Assocs. v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994). Thus, we give deference to the commissioner's credibility determinations. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 315 (Iowa 2002). We will affirm if there is substantial evidence in the record to support the commissioner's credibility findings. See *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 500 (Iowa 2003).

We find substantial evidence in the record to support the commissioner's findings regarding Showman's credibility. The record is clear that Showman did not follow all of the vocational consultant's recommendations. Also, he did not reveal all of his employment history on his Social Security application, or to the vocational counselor. The evidence is less than clear regarding whether

Showman feared losing his Social Security benefits, but he had not sought information about the limits of his employment while retaining benefits. Furthermore, Showman had not sought information about possible accommodation for his back pain if he returned to school.

We additionally note that after the administrative hearing the deputy stated, “The undersigned had ample opportunity to observe the claimant’s demeanor. When he testified at the hearing, he did not instill confidence that he had a propensity to tell the truth.” Based on the deputy’s ability to observe Showman’s demeanor while testifying, we give deference to the deputy’s findings on this issue. See *Clark*, 644 N.W.2d at 315 (noting we give deference to the commissioner’s credibility determinations). We conclude the credibility findings are supported by substantial evidence.

IV. Industrial Disability

Showman contends the commissioner’s conclusion that he is entitled to a sixty percent industrial disability rating is not supported by substantial evidence. He asserts there is overwhelming evidence to show he is permanently and totally disabled. We consider whether there is substantial evidence to support the decision made by the commissioner. *Trade Prof’ls, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003). We do not consider whether the evidence would support a contrary result. *Acuity Ins.*, 684 N.W.2d at 219.

Industrial disability is determined by the effect the injury has on the employee’s earning capacity. *Trade Prof’ls*, 661 N.W.2d at 123. The commissioner considers an employee’s functional impairment, age, education,

intelligence, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining. *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 306 (Iowa 2005). The factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so long as the facts are supported by substantial evidence. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 670 (Iowa 2005).

We find there is substantial evidence in the record to support the commissioner's determination that Showman was entitled to benefits based on sixty percent industrial disability. The commissioner found:

Claimant has the requisite skills to maintain a position in sales. He has experience quoting the costs of jobs. He has good customer service skills. His personality is pleasant when he meets the public. His social skills are excellent. Claimant has some supervisory and management skills. He has a two-year technical degree in robotics. He understands the field of electricity. His technical skills will make him a viable candidate for employment in machine shops. His forte will not be on the shop floor but in the sales or engineering departments.

The commissioner also found Showman had the necessary intelligence to complete additional schooling.

We note that although Showman was claiming in the review-reopening proceeding that his physical condition was worse than at the time of the settlement agreement, he also testified that if he could go back and do things again, he would still have had back surgery. He testified his back pain was better now than before he went in for surgery in June 2001. Based on these factors, we conclude the record supports the commissioner's conclusion that Showman was not permanently and totally disabled.

V. Healing Period Benefits

Showman claims the district court erred in reversing the commissioner's award of healing period benefits for the time period of July 3, 2002 to August 14, 2003, based on his mental condition. Showman states that his depression affected his ability to work. The district court found the award of healing period benefits was not supported by the evidence. The court stated, "There is no evidence that the depression Showman suffers is an independent limitation on his ability to work beyond the limitations caused by the pain associated with his physical injury."

Our review of the record shows the commissioner's decision is supported by substantial evidence. In Dr. Jennisch's report of March 14, 2002, he states:

[H]e has had relatively chronic depressive symptoms since that time of diminished mood, diminished interest, feeling that he had a very short temper, becomes easily frustrated, is able to do some things such as sit at the desk at his computer for short periods of time, or read the paper, but is not able to concentrate or focus well enough to sustain these activities.

From this report, we can find evidence that even though Showman's physical condition would allow him to sit at a desk for short periods of time, he was not able to focus or concentrate due to his mental injury. Thus, the district court was incorrect in finding there was no evidence that the depression caused an independent limitation on Showman's ability to work beyond his physical limitations.

On July 8, 2002, Dr. Jennisch noted that although Showman continued to be in pain, he had a marked improvement in his coping strategies. Dr. Jennisch stated that Showman's pain had "psychological overtones affecting his

concentration functioning, his mental stamina and his overall outlook and ability to perhaps manage in a more complicated work environment as well as in an academic setting.” On August 14, 2003, Dr. Jennisch found Showman was at or near maximum medical improvement regarding his depression. He determined Showman did not have a permanent impairment with respect to his psychiatric condition.

Based on the reports of Dr. Jennisch, we find there was substantial evidence in the record to support the commissioner’s award of healing period benefits from July 3, 2002, until August 14, 2003, based on Showman’s mental injury. In addition to his physical pain, Showman’s pain had psychological overtones, which impaired his ability to work. We determine the commissioner’s decision awarding Showman healing period benefits based on his mental injury should be reinstated.

VI. Penalty Benefits

The award of penalty benefits was linked to the award of healing period benefits based on the mental injury. Showman asserts that his award of healing period benefits should also be reinstated. Under Iowa code section 83.13 (2001), “an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse.” *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996).

Showman received healing period benefits from June 1, 2001, through September 1, 2002, and then from October 7, 2002, until October 31, 2002. He did not receive any benefits after that time. The commissioner found:

According to Dr. Jennisch's ambiguous opinion, claimant did not reach maximum medical improvement until August 14, 2003. Up until that date, claimant's major depressive disorder prevented him from engaging in employment substantially similar to the employment he held at the bait shop. Defendants failed to produce any evidence to support their decision to withhold weekly benefits after October 31, 2002. No reason for the failure was provided. The failure to pay the benefits was not reasonable. There was no excuse for the failure to pay temporary benefits.

On appeal, the employer claims it was fairly debatable whether Showman was prevented from returning to work due to his mental injury. The employer has the burden to establish a reasonable basis for denying a claim. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 330 (Iowa 2002). A reasonable basis for denying a claim is present if the claim is fairly debatable. *Christensen*, 554 N.W.2d at 260. However, "an employer's bare assertion that a claim is 'fairly debatable' does not make it so [T]he employer must assert *facts* upon which the commissioner could reasonably find that the claim was 'fairly debatable.'" *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502, 505 (Iowa 1996), *abrogated on other grounds by Keystone Nursing Care Center*, 705 N.W.2d at 308-09.

In the present case, the employer did not present any facts or reasoning at the administrative hearing to support its claim that Showman's claim based on mental injury was fairly debatable. For this reason we affirm the commissioner's award of penalty benefits.

We affirm in part and reverse in part the decision of the district court. We reinstate the decision of the workers' compensation commissioner.

AFFIRMED IN PART, AND REVERSED IN PART.