

IN THE COURT OF APPEALS OF IOWA

No. 6-636 / 05-2116
Filed September 7, 2006

STEVEN JAMES HARFORD,
Petitioner-Appellant,

vs.

ENVIROMENTAL MANAGEMENT SERVICES,
Employer, and **ILLINOIS GUARANTY**
FUND, as liquidator for CREDIT GENERAL
INSURANCE CO., an insolvent insurer,
Respondents-Appellees.

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

Workers' compensation claimant appeals from the district court's ruling on a petition for judicial review. **AFFIRMED.**

Daniel D. Bernstein of William J. Bribresco and Associates, Bettendorf, for appellant.

Brendan T. Quann and Christopher C. Fry of O'Connor & Thomas, P.C., Dubuque, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Stephen Harford appeals from a district court ruling on judicial review affirming the workers' compensation commissioner's appeal decision. We affirm.

I. Background Facts and Proceedings

Harford was twenty-five at the time of the arbitration hearing in 2003. He completed ninth grade and obtained his GED. Harford began working for Environmental Management Services (EMS), a firm engaged in asbestos abatement, in May 2000. He obtained certification in asbestos abatement procedures and worked full time, earning \$10.50 or \$10.75 per hour. Prior to his employment with EMS, Harford held a variety of full-time and part-time positions with numerous employers. These positions included food preparer and maintenance worker at fast-food restaurants, maintenance worker at a casino, clerk at a convenience store, manual laborer at a water jetting company, and installer of cable television.

In June 2000 Harford suffered injuries to his left knee and shoulder. After conservative treatment, he underwent surgery for the knee injury in August 2000, followed by surgery for the shoulder injury in July 2002.¹ He was released to return to work by January 2003. He contacted EMS but was told his position had been filled. He applied for unemployment but was denied. He applied with a vocational rehabilitation agency service and was still waiting to hear from them at the time of the arbitration hearing.

Harford sought benefits for permanent partial disability for his injuries under Iowa's workers' compensation statute. The deputy workers' compensation

¹ Some delays in treatment occurred due to the insolvency of EMS's insurer.

commissioner filed an arbitration decision in March 2003, concluding Harford sustained a sixty-percent permanent partial disability as a result of the injuries to his left knee and left shoulder.

The deputy commissioner relied on ratings and restrictions provided by Henri Cuddihy, M.D., a board certified occupational medicine specialist, and one of three physicians to evaluate Harford for the permanency of the injury to his left knee and left shoulder. Dr. Cuddihy combined his impairment ratings for Harford's left knee (four-percent impairment of the whole person) and left shoulder (two-percent impairment of the whole person) to arrive at a finding of six-percent impairment of the whole person. Dr. Cuddihy found some loss of range of motion in the left shoulder, but found the strength in Harford's left shoulder equal to that in his right. The doctor imposed permanent restrictions against lifting over twenty-five pounds with no repetitive use of the left shoulder and no repetitive reaching. As for the left knee, the doctor limited Harford's use of the knee at unprotected elevations, due to the possibility the knee could give out. The doctor noted that rehabilitation of Harford's knee "was quite successful," as evidenced by Harford's normal gait and his ability to squat repetitively and walk on his heels and toes without difficulty.

The deputy commissioner further concluded,

Clearly, Steven is prohibited from much of his past labor work, due to his permanent restrictions. Manual labor work is the work for which he is best suited, given his limited education and work history.

Although Steven remains unemployed, this is not evidence of total disability. Given his lack of employment applications and no vocational evidence, Steven has not shown that suitable work is not available to him within his restrictions. However, these restrictions

would be a serious impediment for any young man with such limited education and work experience.

EMS and its insurer appealed the arbitration decision to the workers' compensation commissioner. The commissioner affirmed and modified the arbitration decision, concluding,

The record in this case does not support a finding of 60 percent permanent partial disability. The claimant's state of unemployment is not fairly representative of his earning capacity because the record does not show that he has made reasonable efforts to resume work. The record does not show any reason why he could not be employed at jobs paying in the range of \$7.00 per hour as he had performed in much of his pre-injury employment. His impairment rating and activity restrictions as found by the deputy are not indicative of a large degree of disability. Considering his age, education, qualifications, physical health, and all the other factors that affect earning capacity, I find that he has a 30 percent loss of earning capacity. That finding results in 30 percent permanent partial disability and entitlement to 150 weeks of compensation.

Harford filed a petition for judicial review in the district court. The district court affirmed the commissioner's appeal decision. Harford appeals, arguing the commissioner's decision is arbitrary and capricious, an abuse of discretion, and is not supported by substantial evidence. See Iowa Code § 17A.19(10)(f), (i), (j), (m), (n) (2003).

II. Scope and Standard of Review

Our review is governed by the Iowa Administrative Procedure Act, Iowa Code chapter 17A. See Iowa Code § 86.26 (2001). We apply the standards of Iowa Code section 17A.19(10) to the agency's decision to determine whether 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). Our review, like that of the district court, is limited to correcting legal error. *Second Injury Fund of*

Iowa v. Shank, 516 N.W.2d 808, 812 (Iowa 1994). The findings of the commissioner are akin to a jury verdict, and we broadly apply them to uphold the commissioner's decision. *Id.* We are bound by the commissioner's findings of fact if supported by substantial evidence in the record as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Therefore, the question on appeal "is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence 'supports the findings actually made.'" *Id.* (citation omitted).

III. Discussion

Harford contends the commissioner offered no rationale for the decision to drastically reduce the industrial disability decision of the deputy commissioner, and that the commissioner ignored important and relevant evidence. He further argues the commissioner's determinations of a six-percent impairment rating and thirty-percent industrial disability are not supported by substantial evidence.

Permanent partial disability is determined by determining the employee's industrial disability. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 673 (Iowa 2005). Industrial disability is based upon a loss in earning capacity, which is determined by considering "the employee's functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent any of these factors affect the employee's prospects for relocation in the job market." *Id.* "The law requires the commissioner to consider all evidence, both medical and nonmedical, in arriving at a disability determination." *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 273 (Iowa 1995).

The commissioner's findings, as quoted above, were based on the appropriate considerations, and are supported by substantial evidence. The commissioner provided several reasons in support of his decision, including Harford's unemployment and efforts to resume work, and his impairment rating and activity restrictions. Harford was twenty-five at the time of the hearing, with a GED education and a varied work history. At his relatively young age, he is qualified for a number of jobs and has demonstrated an ability to adapt to various types of work. He is not prevented from seeking further education. He has rehabilitated his knee to a condition close to that which existed prior to the injury. Harford is right-handed, and has no problems with his right arm and shoulder. As the commissioner and the district court noted, several of Harford's pre-injury employments remain within his ability to perform.

Nothing in the record suggests the commissioner ignored relevant evidence. The commissioner is not required to "discuss each and every fact in the record and explain why or why not he has rejected it." *Terwilliger*, 529 N.W.2d at 274. The commissioner set forth several reasons in support of his decision and provided sufficient detail to follow the process of his analysis. See *id.*

To the extent Harford's arguments on appeal relate to the commissioner's reliance on Dr. Cuddihy's opinions, such complaints "go to the weight and credibility of the experts' testimony." *Dunlavy v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). "[I]t is the commissioner's role as finder of fact to determine the weight to be afforded expert testimony." *Terwilliger*, 529 N.W.2d at 272. As trier of fact, the commissioner has the duty to determine the credibility

of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. *Dunlavy*, 526 N.W.2d at 853. The deputy commissioner concluded Dr. Cuddihy's opinions "were the most convincing," and found his restrictions "the most credible." The commissioner accepted these conclusions in the appeal decision. We will not disturb the agency's assessment of the expert opinions. See *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996) ("The court must not reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain.").

We conclude Harford has failed to meet his burden of proving the required prejudice and invalidity of agency action. See Iowa Code § 17A.19(8)(a). The commissioner's decision was not arbitrary, capricious, or an abuse of discretion, and is supported by substantial evidence. We have considered all Harford's arguments, whether specifically addressed in this opinion or not, and find them to be without merit. Accordingly, we affirm the district court.

AFFIRMED.