IN THE COURT OF APPEALS OF IOWA

No. 8-330 / 07-1212
Filed October 1, 2008

WOODBURY COUNTY, IOWA,
Plaintiff-Appellant,

vs.

BECKY CLAUSEN,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Mary Jane Sokolovske, Judge.

Employer appeals an agency's denial of the employer's review-reopening petition for a workers' compensation claim. **AFFIRMED.**

Sharese Manker and Rene Lapierre of Klass Law Firm, L.L.P., Sioux City, for appellant.

William Horneber of Horneber Law Firm, Sioux City, for appellee.

Heard by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

The workers' compensation commissioner affirmed the dismissal of a review-reopening petition filed by an employer. Like the district court, we affirm the agency decision.

I. Background Facts and Proceedings

Becky Clausen sought workers' compensation benefits after experiencing a reaction to new carpet at the workplace. In 2001, a deputy workers' compensation commissioner concluded that a psychological disorder, rather than an allergic reaction, entitled her to permanent total disability benefits. The county asked to submit additional evidence in the form of a psychiatric opinion from Dr. Eli Chesen. The commissioner denied that request. The county then filed a review-reopening petition alleging that Clausen's benefits should be terminated on the basis of Dr. Chesen's opinion that Clausen sustained "no disability beyond a few hours after her exposure." A day after the petition was filed, the commissioner affirmed the deputy commissioner's decision that Clausen was entitled to permanent total disability benefits. The county sought judicial review and both the district court and this court affirmed the agency decision. *See Woodbury County v. Clausen*, No. 02-1347 2003, WL 21230543 (Iowa Ct. App. May 29, 2003).

The county's review-reopening petition proceeded to a hearing. A deputy commissioner concluded that the county failed to establish a "change in the claimant's medical condition following the arbitration decision in this case." On intra-agency appeal, the commissioner affirmed the deputy, concluding the

psychiatrist's views "were clearly offered to re-litigate the issues addressed in the 2001 arbitration decision and subsequent appellate decisions."

The county again sought judicial review. The district court affirmed the final agency decision and the county appealed.

II. Analysis

A. Request for Termination of Benefits

Iowa Code section 86.14(2) (2005) sets forth the parameters of a review-reopening proceeding. It states:

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.

The county concedes it had the burden of proving that Clausen's benefits should be terminated. To satisfy this burden, the county had to establish an increase in Clausen's earning capacity proximately caused by the original injury. *See Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999). The commissioner found that Clausen's earning capacity did not increase. The decisive question for us is whether that finding is supported by substantial evidence. *Id.* at 435.

The county cites the following evidence in support of its contention that the agency finding is not supported by substantial evidence: (1) Clausen's success in maintaining employment following her termination by the county; (2) two car accidents after Clausen's termination by the county; (3) an allergist's opinion that Clausen had no work restrictions; (4) a suggestion in the notes of Clausen's

counselor that her condition was improving; and (5) the opinion of Dr. Chesen, that Clausen was not restricted from returning to work.

We begin with Clausen's post-termination employment history. At the original arbitration hearing, the deputy commissioner considered evidence that Clausen had been employed. The deputy commissioner and commissioner still decided to award permanent total disability benefits. At the hearing on the county's review-reopening petition, the deputy commissioner again considered evidence that Clausen had sporadic, short-term employment. The deputy commissioner and commissioner found that this evidence did not warrant the termination of benefits. In its final review-reopening decision, the commissioner stated, "Evidence that claimant has earned some nominal income (the highest being less than $7,000 in 2002) during 2000-2002 is far from a showing that she has returned to gainful employment in the competitive labor market." That determination is supported by substantial evidence and is consistent with the law. As the county concedes, "[t]otal disability does not mean a state of absolute helplessness." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000).

We turn to the record evidence of two accidents involving Clausen following her termination by the county. The county does not explain how these accidents improved Clausen's earning capacity relative to the psychological injury. *See Simonson*, 588 N.W.2d at 435 (noting reduction of earning capacity based on circumstances "wholly unrelated to" work injury not grounds for change in compensation). Accordingly, the evidence does not support reversal.

Next is evidence that Clausen saw an allergist who did not place any restrictions on her ability to work. While this evidence might have been relevant

if Clausen's injury had been deemed physiological, it had no bearing on the psychological injury Clausen was found to have sustained. *Id.*

The fourth piece of evidence cited by the county is a statement in the notes of Clausen's counselor that her condition was improving. This evidence cannot be viewed in a vacuum. *See* Iowa Code § 17A.19(10)(f)(3) (requiring us to view record as a whole). Following the portion of the notes indicating improvement, the counselor explained that Clausen was "still responding to environmental stimuli in terms of odors and carpets and had an attack not very long ago that cause[d] her a great deal of stress and was scary to her how her throat closes up." The counselor's notes, therefore, did not necessarily support a finding that Clausen's earning capacity had increased.

Finally, the county points to Dr. Chesen's opinion that Clausen suffered no compensable disability. A large portion of his report addressed evidence presented at the original arbitration proceeding. As the agency found, that portion was clearly an effort to re-litigate an issue that was decided.

Dr. Chesen also made independent observations of Clausen and found that she was "obviously malingering." The substance of this opinion was also contemplated at the time of the original arbitration proceeding. *Cf. Bousfield v. Sisters of Mercy*, 249 Iowa 64, 69, 86 N.W.2d 109, 113 (1957) (finding substantial evidence of worsening condition "not contemplated at the time of the first award"). Specifically, the deputy commissioner in the original proceeding observed Clausen and made a finding that her "demeanor was markedly suggestive of fragility and nervousness." Dr. Chesen's "new" opinion, therefore, was also an effort to re-litigate an issue considered by the agency. *Id.*

(concluding review-reopening not appropriate when there is "a mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury").

As substantial evidence supports the commissioner's finding that there was no increase in Clausen's earning capacity proximately caused by her work injury, we affirm the agency decision denying the county's review-reopening petition.

B. Credit

The county next asserts it is entitled to a credit for wages earned by Clausen. At oral arguments, the county conceded that there is no statutory authority to support this claim, but suggested principles of fairness require a credit.

As a preliminary matter, we must decide whether this issue was preserved for our review. As noted above, the commissioner's final decision made reference to Clausen's "nominal income." The decision, however, did not mention a credit. We conclude, therefore, that we have nothing to review. *Meads v. Iowa Dept. of Soc. Servs.*, 366 N.W.2d 555, 559 (Iowa 1985) ("The district court may only review issues considered and decided by the agency.").

AFFIRMED.