

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

KENNETH EITREIM,)

Petitioner-Appellant,)

Filed August 26, 1980

vs.)

ROBERT C. LANDESS, Iowa Industrial)
Commissioner, **FARMERS COOPERATIVE**)
ELEVATOR COMPANY, Employer, and)
FARMERS ELEVATOR MUTUAL)
INSURANCE COMPANY, Insurance)
Carrier,)

0-165
2-63856

Respondents-Appellees.

Appeal from Polk District Court - Theodore H. Miller, Judge.

Petitioner appeals district court order affirming as modified agency review-reopening decision on his claim for worker's compensation benefits. REVERSED AND REMANDED.

Fred D. Huebner of Hopkins & Huebner, Des Moines, for petitioner-appellant.

W. C. Hoffmann of Jones, Hoffmann & Davison, Des Moines, for respondent-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Petitioner, Kenneth Eittreim, appeals district court order affirming as modified agency review-reopening decision. On appeal, petitioner asserts agency's finding of partial rather than total, permanent disability was not supported by substantial evidence in the record when viewed as a whole. We reverse the trial court order and remand to the agency for further proceedings in accordance with this decision.

I.

In 1973 petitioner sustained employment-related injuries from a fall in which his femur and forearm were fractured. Pursuant to a Memorandum of Agreement filed May 9, 1973, defendants Farmers Cooperative Elevator and Farmers Elevator Mutual Insurance Company paid petitioner's medical expenses, healing period benefits of \$68 per week for sixty-four weeks, and partial, permanent disability benefits of \$63 per week for 127-1/2 weeks.

Petitioner subsequently initiated in December 1976 review-reopening proceedings with defendant Iowa Industrial Commissioner alleging his total and permanent disability warranted additional benefits. On January 20, 1978, the Deputy Industrial Commissioner filed his decision, finding petitioner's industrial disability to be forty percent of the body as a whole and ordering payment of 49-6/7 weeks of healing period compensation, 200 weeks of permanent partial disability compensation, and \$30 for a miscellaneous medical bill. The Industrial Commissioner adopted on March 21, 1978, the Deputy's decision as the final decision of the agency.

Petitioner and defendants both petitioned for judicial review of the agency's decision. The district court found the agency's determination of petitioner's healing period benefits was not supported by substantial evidence and ruled petitioner was entitled to seventy-nine weeks of healing period benefits. The district court affirmed the agency decision in all other respects. Petitioner appeals this ruling.

II.

The issue here on appeal is whether the agency's decision prejudiced petitioner's rights because it is "unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole", § 17A.19(8)(7), The Code 1979. In our review, we examine the district court decision to determine whether it correctly

applied the law. Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429 (Iowa 1979). Resolution of this question requires applying the "standards of section 17A.19(8) to the agency action to determine whether this court's conclusions are the same as those of the district court." Id. at 429-30. If the conclusions are the same, affirmance is appropriate; if the conclusions differ, reversal may be required. Id.; see Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979).

Our scope of review is limited to correction of errors at law and is not de novo. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139, 143 (Iowa 1978); see City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978); Iowa R. App. P. 4. The agency's fact-findings are regarded as tantamount to jury findings and binding if supported by substantial evidence in the record. Auxier, 266 N.W.2d at 143 (quoting Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 301 (Iowa 1974)).

Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. City of Davenport, 264 N.W.2d at 311, quoted in Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84, 87 (Iowa 1979). The presence of conflicting evidence or possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Auxier, 266 N.W.2d at 143; City of Davenport, 264 N.W.2d at 311. The entire record must be considered in determining whether the challenged finding has sufficient support. § 17A.19(8)(f), The Code.

Petitioner contends the Deputy Commissioner based his findings on grounds not supported by substantial evidence in the record. The grounds of the Deputy's finding of a lack of total, permanent industrial disability were petitioner's alleged failure to submit to an operation, failure to participate in any rehabilitative efforts, extreme lack of motivation, and negative attitude towards returning to work. With the exception of the first ground, we hold the deputy's findings are supported by substantial evidence. Although a close question, we defer to the deputy's expertise and assessment of the witnesses' credibility in support of the judgment he made on the latter matters, which might not be the judgment of this court on a de novo review.

We fail to find, however, any support in the record for the Deputy's finding as adopted by the agency that the existence of a surgical procedure to remove a potential source of petitioner's ongoing pain is a factor to be considered. The law of Iowa

recognizes that an unreasonable refusal to submit to offered medical or surgical treatment that does not endanger a claimant's life or health and that is shown to cure the disability for which compensation is sought will warrant reduction, suspension, or forfeiture of such compensation. Stufflebean v. City of Fort Dodge, 233 Iowa 438, 440-43, 9 N.W.2d 281, 283-84 (1943). See also Barton v. Nevada Poultry Co., 253 Iowa 285, 292-93, 110 N.W.2d 660, 664 (1961). However, the record does not establish the proposed surgical procedure was ever offered to or refused by petitioner.

Treatment of petitioner's fractured femur involved the placing of a plate in petitioner's hip. Part of this device was removed in a subsequent operation with the remainder of the device left in place. The Deputy Commissioner accepted the opinion of Dr. Blair, who after examining petitioner, reported the pain in petitioner's hip could be lessened or eliminated by removal of the plate and petitioner "could be released for the resumption of most of his normal physical activities."

Under the Stufflebean case, there must be substantial evidence petitioner was offered the opportunity to undergo this operation and refused. See Stufflebean, 233 Iowa at 440-43, 9 N.W.2d at 283-84. There is no evidence whatsoever petitioner was ever offered such an opportunity. On this point, there is no conflict in the record and reasonable minds could not draw differing conclusions. The Deputy Commissioner's finding on this matter is thus not supported by substantial evidence in the record and the district court erred in finding otherwise. Auxier, 266 N.W.2d at 143-44. Since the Deputy Commissioner apparently relied heavily on this finding, we hold petitioner's substantial rights were prejudiced by the agency's action and reversal is required. § 17A.8, The Code.

Accordingly, we reverse the district court's affirmance of the agency's action and remand this action to the agency to determine petitioner's industrial disability based on the evidence contained in the record.

REVERSED AND REMANDED.