IN THE COURT OF APPEALS OF IOWA

No. 5-114 / 94-1210

DEBBIE ELLIS,

Petitioner-Appellant,

vs.

LIBERTY MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Respondents-Appellees.

FILED
APR 28 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, James W. Brown, Judge.

Debbie Ellis appeals from the district court's order affirming the industrial commissioner's finding that she sustained a twenty percent industrial disability as a result of a work-related injury to her upper right extremity. **AFFIRMED.**

Steven C. Jayne, Des Moines, for appellant.

Joseph S. Cortese II of Huber, Kelley, Book, Cortese & Happe, Des Moines, for appellees.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

SACKETT, P.J.

Petitioner-appellant Debbie Ellis appeals from the district court's order affirming the industrial commissioner's finding she sustained a twenty percent industrial disability as a result of a work-related injury to her upper right extremity. We affirm.

Ellis claims, on appeal, to have sustained bilateral carpal tunnel syndrome as a result of her work as a data entry clerk with respondent-appellee Liberty Mutual Insurance Company. She contends this disorder has resulted in chronic pain and has aggravated a preexisting psychological condition leading to a major depressive disorder. Ellis contends the condition is permanent, and she should be entitled to total industrial disability.

In reviewing an agency action, we apply the standards of section 17A.19(8) to determine if the agency action should be upheld. *See Teleconnect Co. v. Iowa State Commerce Comm'n*, 404 N.W.2d 158, 161-62 (Iowa 1987). To be upheld, the agency decision must be supported by substantial evidence when the record is reviewed as a whole. *See Fernandez v. Iowa Dep't of Human Servs.*, 375 N.W.2d 701, 705 (Iowa 1985).

Ellis has the burden of proving by a preponderance of the evidence that an alleged injury occurred and it rose out of and in the course of her employment. *See McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976); *Musselman v. Central Tel. Co.*, 154 N.W.2d 128, 130 (Iowa 1967).

Ellis first contends the commissioner failed to address what she terms unrebutted medical evidence from Dr. Misol that the disorder was developing bilaterally with symptoms simply manifesting at different times. While advancing this argument, Ellis has failed to direct us to where in the record this specific evidence was admitted. She does refer us to history taken at the Iowa Orthopaedic Center on

July 5, 1991, which states in part, "as she was released to go back to work on 7/3/91 and she states there was severe cramping type of pain in both hands, the right one always has been the worse. She also mentions to me that she told Dr. Kenney sometime before that when she was asked to return to work and use only her left hand that she had developed similar symptoms."

In her application for rehearing before the commissioner, Ellis made no reference to the deputy's failure to consider an injury to the left side of her body.

The deputy's decision, ultimately adopted by the commissioner as the agency's final decision, carefully outlined and considered all medical evidence, including the complaints about the left hand problem, before making its determination. We disagree with Ellis's argument the commissioner failed to address unrebutted medical evidence.

The trial court affirmed on this issue finding the left hand problem did not manifest itself until a date after the alleged occurrence of the injuries for which Ellis sought compensation. Ellis claims, in making this finding, the trial court engaged in de novo review. Because of our holding, we need not address this issue.

The next question is whether the industrial disability rating of twenty percent was supported by substantial evidence. Ellis claims it was not, and she is permanently and totally disabled and her claimed physical injuries have caused a permanent aggravation of a long-standing phobic-depressive condition. Ellis claims she is now precluded from any gainful employment at all. Liberty claims the rating is supported by substantial evidence.

Ellis contends the commissioner failed to consider her bilateral hand and arm problem. We have rejected the first argument. She further contends the commissioner erroneously considered the testimony of the vocational experts.

Records were introduced from the McFarland Clinic and United Behavioral Clinic. Those records show Ellis's psychological conditions were not caused by her work-related injuries as she alleges. These records support a finding her condition was not materially aggravated by the alleged injuries and Dr. Gallagher, a psychiatrist who evaluated Ellis, testified he believes Ellis is capable of engaging in some form of employment within her physical restrictions and her mental state can be improved.

Ellis went to Dr. Cavallin at the direction of her attorney, not for treatment but for an opinion. Cavallin gave the opinion she was not employable. The deputy rejected Cavallin's testimony because he determined Ellis is poorly motivated to return to work and Cavallin's conclusions are based on Ellis's comments. The vocational rehabilitation experts testified there are jobs within Ellis's restrictions that she can perform if inclined to do so.

Functional disability is one element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualification, experience and inability to engage in employment for which he or she is suited. *Olson v. Goodyear Serv. Stores*, 255 Iowa 1112, 1120-21, 125 N.W.2d 251, --- (1963).

The fact finder could accept or reject the opinion of Cavallin in whole or in part. *See Lithcote Co. v. Ballenger*, 471 N.W.2d 64, 66 (Iowa App. 1991). There is substantial evidence to support the decision reached.

The deputy analyzed the evidence and concluded the alleged injuries did not result in simultaneous bilateral upper extremity injuries but resulted only in disability to the right upper extremity.

AFFIRMED.