IN THE COURT OF APPEALS OF IOWA

No. 1-121 / 00-872
Filed April 27, 2001

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CLERK SUPREME COURT

DOMINICK DAMIANO,
Petitioner-Appellant,

vs.

UNIVERSAL GYM EQUIPMENT and NATIONAL UNION INSURANCE,
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Thomas Horan, Judge.

Petitioner appeals from the district court ruling on judicial review affirming the agency's finding that he suffered a twenty percent disability and declining to award him penalty benefits. **AFFIRMED.**

Thomas M. Wertz and Matthew Dake of Wertz & Leehy, P.C., Cedar Rapids, for appellant.

Chad M. Von Kampen of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellees.

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

VAITHESWARAN, J.

Dominick Damiano filed a claim with the industrial commissioner for compensation based on a work-related injury. The district court affirmed the commissioner's determination that Damiano sustained an industrial disability of twenty percent and her conclusion he was not entitled to penalty benefits. On further judicial review, we affirm.

I. Background Facts and Proceedings

Damiano worked for Universal Gym Equipment in Cedar Rapids for twelve years. He put on traveling trade shows about half the time and installed exercise equipment the other half. One day, he fell off a crate and injured himself. He complained of back problems, headaches, and loss of feeling in his left arm and right leg. Damiano filed a claim for workers compensation benefits.

Over the next two years, Damiano was treated by a number of health care professionals, including a physician named Dr. Monsein. In 1994, Dr. Monsein assigned a seven percent permanent partial impairment rating to Damiano's entire body and concluded he was capable of returning to light or medium work. Damiano's attorney then referred him to Dr. Neiman, who concluded he was disabled for all occupations. In 1995, Dr. Monsein re-evaluated Damiano and issued a second opinion which assigning no impairment rating but concluding Damiano should be able to work in a light duty setting.

Damiano's workers' compensation claim proceeded to hearing before a deputy industrial commissioner. The parties stipulated to all issues except the level of Damiano's industrial disability and his entitlement to penalty benefits. The deputy determined Damiano's industrial disability was twenty percent. On

intra-agency appeal, the commissioner incorporated the deputy's findings and conclusions, supplemented the reasoning, and affirmed the decision. On judicial review, the district court affirmed. Damiano now seeks further review.

II. Standard of Review

On judicial review of administrative decisions, our function is not to examine the evidence de novo but to correct errors of law. *Manpower Temp. Servs. v. Sioson,* 529 N.W.2d 259, 262 (Iowa 1995). The findings of the industrial commissioner have the effect of a jury verdict. *Kostelac v. Feldman's, Inc.*, 497 N.W.2d 853, 856 (Iowa 1993). We will uphold those findings if they are supported by substantial evidence in the record made before the agency. *Id.* Evidence is substantial if a reasonable mind would find it adequate to reach a conclusion. *Quaker Oats Co. v. Ciha,* 552 N.W.2d 143, 150 (Iowa 1996).

III. Industrial Disability

Functional disability measures the impairment of an employee's bodily function. *Mortimer v. Fruehauf Corp.,* 502 N.W.2d 12, 14 (Iowa 1993). Industrial disability, in contrast, measures the employee's loss of earning capacity. *Klein v. Furnas Elec. Co.*, 384 N.W.2d 370, 374 (Iowa 1986). In determining a person's industrial disability, the person's functional disability is only one factor of many considered by the agency. *Mortimer,* 502 N.W.2d at 14-15. Other factors include the employee's age, education, qualifications, experience, and the inability of the employee to engage in suitable employment. *Id.* "When the combination of factors precludes the worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total

industrial disability." *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103-4 (Iowa 1985).

Damiano argues the industrial commissioner: (1) failed to make reasoned findings of fact to support an industrial disability of only twenty percent and (2) erroneously considered Dr. Monsein's 1994 opinion rather than his updated opinion, thereby compelling a conclusion as a matter of law that Damiano sustained more than a twenty percent industrial disability. Universal responds that the issue before us is one we routinely face: whether the agency determination that Damiano sustained industrial disability of twenty percent is supported by substantial evidence on the record as a whole.

We will first address Damiano's contention that the commissioner did not adequately support her ultimate finding concerning the extent of his industrial disability. Our court has required the commissioner to state the evidence relied upon and detail the reasons for her conclusion. *Armstrong v. State of Iowa Bldgs. & Grounds*, 382 N.W.2d 161, 166 (Iowa 1986). However, we have held an agency decision sufficient if it is possible to work backward from the decision to deduce the agency's findings and legal conclusions. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633 (Iowa 2000) (*citing Norland v. Iowa Dep't of Job Serv.*, 412 N.W.2d. 904, 909 (Iowa 1987)).

The commissioner adopted as the final agency decision the decision of the deputy commissioner. After extensively summarizing the medical and non-medical testimony in the record, the deputy commissioner stated the following:

> The evidence does not support a finding that claimant is permanently and totally disabled. After considering all the factors that comprise industrial disability, it is the determination of the

> **undersigned that claimant has sustained a 20 percent industrial disability.**

We conclude the deputy's ruling contains detailed and reasoned fact findings. *See Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996) (noting where commissioner has recognized and written about employee's condition, evidence is sufficient to support conclusion). Additionally, we note the commissioner supplemented the deputy's reasoning, stating she considered all the medical evidence, including all the physicians' impairment ratings, in her evaluation of Damiano's level of industrial disability. The commissioner also stated she considered Damiano's failure to assist in his own rehabilitation and his absence of motivation to return to work. Finally, the commissioner acknowledged Dr. Neiman's opinion that Damiano was totally disabled but noted the ultimate determination of industrial disability rested with her rather than with the physician. Her ruling is sufficiently comprehensive to permit appellate court review. *See Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995); *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 509-10 (Iowa 1973).

Next, we must determine whether the commissioner relied on outdated information, rendering her industrial disability determination erroneous as a matter of law. *See Klein*, 384 N.W.2d at 374. Damiano contends the commissioner did not take into account Dr. Monsein's 1995 opinion which, he contends, differed in material respects from the 1994 opinion. We disagree.

The deputy commissioner's decision, adopted by the commissioner, makes reference to Dr. Monsein's recommendation that Damiano undergo a discography to evaluate whether surgery would be successful. That

recommendation is contained in Dr. Monsein's 1995 opinion only. Therefore, we are not persuaded the deputy overlooked the more recent opinion.

In any event, we are not convinced Dr. Monsein significantly changed his opinion about Damiano. In his first opinion, Dr. Monsein stated Damiano was "capable of returning to light to medium work with approximately a 30-40 pound lifting restriction." In his second opinion, Dr. Monsein stated Damiano "should certainly be able to work in a light duty setting, as long as he is no [sic] required to do any repetitive bending, twisting or lifting, and he has the freedom to change positions frequently." Both opinions, therefore, made reference to light work and both placed a restriction on lifting.

For these reasons, we do not accept Damiano's assertion that the commissioner erroneously relied on an obsolete and significantly different opinion. Accordingly, we cannot conclude the commissioner was required as a matter of law to make a different determination concerning the level of Damiano's industrial disability.

We agree with Universal that the case boils down to whether the commissioner's determination concerning Damiano's level of industrial disability is supported by substantial evidence. Like the district court, we conclude it is.

Even after reviewing Dr. Neiman's opinion finding Damiano totally disabled for all occupations, Dr. Monsein opined Damiano would certainly be able to work in a light duty setting. Other treating physicians reached the same conclusion. Dr. Lawrence examined Damiano following the accident and, while noting mild degenerative changes to his spine, found no sign of a spinal injury. Similarly, Dr. Russell found no evidence of an acute injury after examining him on the same

day. Dr. Ballard, a psychiatrist who treated Damiano shortly after the fall, noted an MRI revealed nothing that would explain the headaches he was experiencing or the numbness in his left arm and right leg. Dr. Laurence Krain, a neurologist, also examined Damiano shortly after the injury. He found no neurological basis for Damiano's pain and concluded Damiano needed no further evaluation at that time. Similarly, Dr. Streib found no neurological basis for Damiano's symptoms and encouraged him to exercise and take his anti-depressants to increase his ability to function "in the near future." Dr. Lynn, a physician specializing in physical medicine and rehabilitation, stated her belief Damiano could start light work at some time or at least retrain for another job. Dr. Ginther, an orthopedic surgeon, opined Damiano "should be able to do at least sedentary activities, probably light level activities, and perhaps even a medium level of work", although he questioned whether he would in fact do so in light of his pain. This evidence suggests that, absent the pain, Damiano was capable of working despite the injury.

The question then becomes whether Damiano's pain alone precluded him entirely from working. *Cf. IBP, Inc.*, 604 N.W.2d at 635 (noting minimal functional impairment rating but extensive evidence of pain). There is substantial evidence in the record to suggest it did not. Many of the physicians alluded to Damiano's excessive weight, his need to exercise, and his reluctance to pursue pain therapy regimens. One psychologist charged with helping Damiano manage stress stated "[F]rom the first, Mr. Damiano seemed resistant to working with me." She concluded Damiano was not ready for therapy at that time. Given Damiano's

reluctance to make efforts to resolve his pain problems, we conclude his subjective complaints did not mandate a finding of 100% industrial disability.

Damiano's age, work history and unwillingness to retrain himself also support the commissioner's finding he was "capable of many different types of employment and is still at an age where retraining is possible, if he would make the effort." Damiano was forty-eight years old at the time of hearing and had worked as a tree-trimmer, plumber, general contractor, machine operator, front-desk manager, chef, and restaurant manager and owner. The record also reveals Damiano assisted with a family restaurant after the date of his injury. The deputy commissioner found history his work at the restaurant "evidences a lack of motivation to seek active employment outside the restaurant." *Cf. Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 437 (Iowa 1984) (noting commissioner's reliance on employee's "complete lack of motivation" in obtaining employment).

We conclude the deputy commissioner's determination that Damiano sustained only a twenty percent industrial disability is supported by substantial evidence in the record as a whole.

IV. Penalty Benefits

Damiano finally argues the commissioner should have awarded him penalty benefits on the ground Universal unreasonably terminated payment of his disability benefits. Iowa Code section 86.13 governs payment of penalty benefits. It states in pertinent part:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter . . . up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The parties agree the standard for determining whether the employer unreasonably delayed or denied benefits is whether the claim was "fairly debatable." *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). Damiano asserts the claim was not fairly debatable because it was clear he was entitled to benefits based on industrial disability, yet Universal insisted on paying him on the basis of his functional impairment only. Universal responds it "should not be penalized for debating a very debatable claim." We agree with Universal. As the deputy commissioner aptly stated:

> Claimant contends that defendants should pay penalty benefits because they have failed to accurately guess what a deputy would award for permanent partial disability benefits. Such a position is not supported by Iowa Code section 86.13. That section requires a delay in the commencement or termination of benefits without reasonable or probable cause or excuse. A disagreement between claimant and defendants as to amount of industrial disability to be awarded to claimant does not equal a delay in commencement without reasonable or probable or excuse.

We concur with this reasoning. *See Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W.2d 109, 111 (Iowa 1995) (stating unreasonable to assume delay after furnishing of medical evidence is unreasonable, as issues regarding percentage of disability may be fairly debatable). Accordingly, we affirm the commissioner's ruling on this issue.

We conclude the district court was correct in affirming the commissioner's decision.

AFFIRMED.