

DIANE E. BERHOW, Employee/Appellant v. POLARIS INDUS., INC. SELF-INSURED/SEDGWICK JAMES OF MINN., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 29, 1999

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - DEPRESSION. Substantial evidence supports the compensation judge's decision that the employee did not prove entitlement to a permanent partial disability rating for her depression pursuant to Minn. R. 5223.0360, subp. 7.D.(4), and there was a lack of evidence of objective findings to support a Weber rating.

Affirmed.

Determined by Hefte, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Carol A. Eckersen

OPINION

RICHARD C. HEFTE, Judge

The employee appeals from the compensation judge's denial of her claim of additional permanent partial disability benefits for her psychological condition. We affirm.

BACKGROUND

Diane E. Berhow, the employee, sustained a work-related injury on June 21, 1995, while working for the self-insured employer, Polaris Industries, Inc. The injury occurred when a pallet fell, hitting the employee's left ankle and breaking open a surgical wound on her left ankle. The employee had a cyst surgically removed from her left ankle a week prior to her work injury. The cyst was not from a work-related incident. A metal staple from the pallet penetrated the wound in the employee's left ankle.

Thereafter, the healing of the wound to the employee's left ankle became a significant and continuing problem. The wound became infected and would not close. In September 1995, her local treating surgeon, Dr. Frederic Taylor, M.D. referred the employee to Dr. Robert Clayburgh of the Grand Forks Clinic. Dr. Clayburgh initially treated the employee by excising the wound in the employee's ankle; however, thereafter the employee's pain and draining from her left ankle continued. On January 29, 1996, Dr. Clayburgh did an exploration and biopsy of the wound area of the employee's the left ankle. Although Dr. James Hargraves of the Infectious Disease Department of the Grand Forks Clinic saw the employee and prescribed a

treatment of antibiotics for what he diagnosed as “left leg osteomyelitis,” of the employee’s left leg, the lack of healing of the employee’s wound in her left ankle did not resolve.

In March of 1996, physical therapy was prescribed for the employee’s left ankle and she was then seen by Dr. Charles Guernsey for pain management. He diagnosed a left distal dystrophy syndrome, also referred to as reflex sympathetic dystrophy (RSD) syndrome. A sympathetic blockade of the employee’s ankle by an indwelling catheter and a percutaneous placement of a lumbar epidural catheter for intermittent bolus of local anesthetics was done and then repeated in June of 1996. After a course of medication treatment the catheter was removed on June 7, 1996 and the employee noticed some temporary improvement. In July 1996 the employee had a percutaneous lumbar epidural catheter implanted for continuous infusion of a local anesthetic. In September 1996 the employee had a spinal cord stimulator implanted. On July 22, 1996, Dr. Guernsey referred the employee to Dr. Jeanine Kotschwar for a psychological consultation. The employee was also referred to Dr. Patrick Goodman for a psychiatric consultation. Dr. Goodman diagnosed the employee as having major depression, moderate to severe, possible recurrent. Dr. Goodman prescribed medication and continued to treat the employee.

On March 27, 1997 Dr. Clayburgh gave the employee a permanent partial disability rating of 19.5 percent for the employee’s RSD resulting from the employee’s left ankle injury.¹ On April 10, 1997, Dr. Goodman rated the employee as having a 75 percent permanent partial disability rating of the whole body for her depressive symptoms. Dr. John Truscheim, a neurologist, conducted an independent medical examination for the employer on March 25, 1997. Dr. Truscheim agreed with the diagnosis of RSD and depression of the employee. He rated the employee’s permanent partial disability at 19.5 percent as a result of the work injury to the employee’s left lower extremity based on the employee’s resultant RSD. He gave no permanent partial disability rating as to the employee’s claimed depressive disorder.

The employee filed a claim petition and later, an amended claim petition requesting, among other benefits, additional permanent partial disability benefits based on a 75 percent permanent partial disability rating for the employee’s depressive disorder. All issues except the claim for the additional permanent partial disability rating and benefits were settled prior to the hearing herein. Included in this settlement was the agreement by the parties that the employee was permanently totally disabled. After a hearing herein, the compensation judge denied the employee’s claim for an additional 75 percent permanent partial disability rating of the employee. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers’ Compensation Court of Appeals must

¹ The self-insured employer paid the employee benefits for the 19.5 permanent partial disability rating and there is no issue in this appeal as to this permanent partial disability rating for the employee’s left ankle and leg under the disability schedules.

determine whether “the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 176.421, subd. 1 (1998). Substantial evidence supports the findings if, in the context of the entire record, “they are supported by evidence that a reasonable mind might accept as adequate.” Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, “[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

DECISION

The employee sustained a work-related injury to her left ankle on June 21, 1995 which required extensive and lengthy treatment. Also, during the time the employee was being treated for her ankle injury, the employee was diagnosed with a psychological depressive disorder. The employer and insurer accepted liability and have been paying for the employee’s ongoing psychological treatment. Prior to the date of hearing the employer has paid the employee all benefits resulting from her work injury including the benefits for the 19.5 percent permanent partial disability (PPD) rating and ongoing permanent total disability weekly benefits.

In the present matter, the employee claims an additional PPD rating benefits for her depressive disorder. She claims that she is entitled to an additional 75 percent PPD rating pursuant to either Minn. R. 5223.0360, subp. 7.D.(4) or as a Weber² rating as codified under Minn. Stat. § 176.105, subd. 1(c). The employer and insurer assert that the employee did not meet the prerequisites or the requirements of the specific scheduled disability for entitlement to her claimed 75 permanent partial disability rating and benefits as a result of her depressive disorder. The compensation judge concluded that the employee is not entitled to a 75 percent PPD rating as a result of her psychological depressive disorder condition. We affirm the compensation judge.

In order to receive a permanent partial disability rating, the employee must prove each element of the scheduled disability. Knudson v. Twin City Hide, Inc., 40 W.C.D. 336, 338 (W.C.C.A. 1987) (citing Davies v. Marriott-Host Int’l, 39 W.C.D. 631, 633 (W.C.C.A. 1987)). A compensation judge’s finding regarding the rating of permanent partial disability is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987). As trier of fact, a compensation judge is responsible for determining the degree of disability after considering all evidence and relevant legal factors in a case. Erickson by Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40,

² Weber v. City of Inver Grove Heights, 461 N.W.2d 918, 43 W.C.D. 471 (Minn. 1990).

43, 35 W.C.D. 523, 528 (Minn. 1983); see Jensen v. Best Temporaries, 46 W.C.D. 498, 500-01 (W.C.C.A. 1992). Accordingly, medical testimony is considered helpful but not dispositive on the issue of disability. Id.; see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 640 (Minn. 1989) (determination of degree of permanency rests with compensation judge not member of medical profession).

The employee claims a PPD rating and disability benefits under Minn. R. 5223.0360, subp. 7.D.(4), which states, in part:

Rule 5223.0360. Central Nervous System.

Subdivision 7. Brain Dysfunction. Signs or symptoms of organic brain dysfunction due to illness or injury must be present and persist with anatomic loss or alteration or objectively measured neurological deficit. A rating under this part is the combination as described in part 5223.0300, subp. 3, Item E, of the ratings assigned by items A through I.

D. Emotional disturbances and personality changes must be substantiated by medical observation and supported by psychometric testing. These disturbances may include irritability, outbursts of rage and aggression, absence of normal emotional response, inappropriate euphoria, depression, abnormal emotional interaction with others, involuntary laughing and crying, akinetic mutism, an uncontrollable fluctuation of emotional state. Primary psychiatric disturbances, including functional overlay shall not be rated under this part:

(4). Moderate to severe emotional disturbances are present at all times, and require sheltering with some supervision of all activities, 75 percent;

Dr. Goodman, who treated the employee for her psychiatric complaints, is the only medical provider who opined that the employee is entitled to a 75 percent PPD rating. (EE Ex. 2.) Prior to giving his PPD opinion, Dr. Goodman, a North Dakota physician, indicated that he was not familiar with the Minnesota disability schedules. In his April 10, 1997 report, Dr. Goodman gave his PPD opinion based on “Minnesota Rules part: 5223.0310.” The compensation judge in her findings notes that Dr. Goodman only refers to this rule in his report of a PPD rating. This rule is a definition section to the disability schedules. The employee’s attorney argued that Dr. Goodman’s disability rating is supported by the requirements of Minn. R.

5223.0360, subp. 7.D.(4) and by the evidence and record in this case.

Dr. Goodman's impression in his reports was that the employee's problem was depression. Minn. R. 5223.0360, subp. 7.D.(4) states that "primary psychiatric disturbances, including functional overlay, shall not be rated under this part [D]." We conclude that, under the circumstances of this case, the employee's depression is a primary psychiatric disturbance as described in this rule and therefore not rateable under the disability schedules. We affirm the compensation judge's conclusion that the employee "does not have a rateable permanency under the permanent partial disability schedules for the condition of depression." (Findings & Order, Conclusion 1.)

Also, the compensation judge was not clearly erroneous in denying the employee a permanency rating pursuant to the Weber case and Minn. Stat. § 176.105, subd. (1)(c). There is a lack of evidence as to objective findings to support a Weber rating for the employee's disability claim of a depressive disorder. Therefore, we affirm on this issue.