EUGENE J. EISENMENGER, Employee, v. RAVEN INDUS./GLASSTITE, INC., SELF-INSURED/RISK ADM'RS SERVS., INC., Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 15, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - ASTHMA. The record as a whole reasonably supported the judge's award of benefits for a 78% whole body impairment related to the employee's occupational asthma, where the evidence reasonably indicated that pulmonary function tests were conducted in a way contemplated by the rule, and the judge's decision was also supported by expert opinion. A judge lacks discretion to depart from the permanency schedules merely because the scheduled rating seems too "high" in view of the employee's ability to work and engage in his usual activities of daily life.

OCCUPATIONAL DISEASE. While the record supported the conclusion that the employee had ratable functional impairment related to his occupational asthma as early as December of 1992, the judge did not err, under the particular circumstances of this case, in concluding that the employee continued to experience additional significant lung damage until his June 2, 1995, removal from exposure to the hazard causing the asthma.

Affirmed.

Determined by Wilson, J., Rykken, J., and Pederson, J.
Compensation Judge: James R. Otto

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's decision as to the date of the employee's occupational disease injury and the extent of permanent partial disability attributable to that injury. We affirm.

BACKGROUND

The employee began working for Glasstite, Inc., now known as Raven Industries [the employer],[1] in 1972. The employer manufactures toppers for pickup trucks. The employee spent his first year or two in the employer's maintenance department and then went to work in the employer's tooling department, where he built patterns and molds used in the employer's manufacturing process.

[1] Glasstite was apparently purchased by Raven Industries in about 1991.

In September of 1981, the employee sought treatment at the emergency room of Fairmont Community Hospital, complaining of chest tightness and shortness of breath after spray painting "a car" earlier that day. The employee explained at hearing that his job at the time had included supervising some painting of toppers and that he had done some of the painting that day when one of the other workers failed to report for his shift. After his emergency room visit, the employee reported his respiratory problem to his managers, who then called the employer's supplier of respirators, 3M. According to the employee, the 3M representative informed the employer that they had been using the wrong respirators and informed the employee that he had probably been sensitized to isocyanates, hardeners in the paint, and should not paint anymore because enough isocyanates "would come through," even with a respirator, to affect the employee from then on. In part because of this information, the employer moved the painting work from a building known as the "old schoolhouse," where the employee was working, to the employer's main building. The employee then continued working in the old schoolhouse, with no apparent additional exposure to isocyanates, until about December of 1991, when the employer sold the old schoolhouse building and moved the tooling department into the employer's main building, where painting was still performed.

The employee began experiencing asthma-type respiratory symptoms shortly after his transfer to the main building. His physician prescribed an Albuterol[2] inhaler, a short-acting bronchodilator, and, several months later, after the employee's asthma symptoms worsened, a steroid inhaler was added to his treatment regimen. Pulmonary function tests conducted in December of 1992 showed significant respiratory dysfunction, and the employee eventually began taking Theophylline,[3] a bronchodilator in pill form, because the inhalers were not controlling his symptoms. However, he continued working for the employer, in its main building where painting was performed, without losing any time from work due to asthma symptoms, until the spring of 1995.

In May of 1995, the employer arranged for respiratory screening for its employees. The employee's pulmonary function testing was again abnormal, and he was advised to consult his own physician. The employee had in fact seen his physician, Dr. C. P. Anderson, not long before the company screening, and the doctor had noted at that time that the employee's condition had been "relatively stable recently" with "no recent exacerbation." However, on June 2, 1995, following the company screening, Dr. Anderson indicated that the employee had "been having chronically some mildly increased dyspnea on exertion" and suggested that the employee remain off work for at least two weeks, apparently to ascertain whether his symptoms would improve away from isocyanate exposure. Dr. Anderson also had the employee undergo another set of pulmonary function tests. Subsequently, on June 19, 1995, Dr. Anderson reported that the employee had been feeling "much improved" since going off work, and he recommended that the employee remain off "indefinitely," away from isocyanates, pending an industrial medicine consultation.

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[2] Or Ventolin. The employee testified that Albuterol is the generic equivalent of Ventolin.

[3] Or Slo-vid.

The employee was evaluated for his asthma condition at the Mayo Clinic in July of 1995. After a trial of oral prednisone and additional pulmonary function studies, the Mayo physician concluded that it was unlikely that the employee's asthma was related to isocyanates, modified the employee's medications, and indicated that the employee could return to his job. Dr. Anderson then allowed the employee to return to work on about August 3, 1995. However, the employee's symptoms again increased, and, in late August or early September, Dr. Anderson recommended that the employee avoid further exposure to isocyanates. As a consequence, the employee went off work again until early 1996. At that time, he began performing his tooling job at a location off the employer's premises, in a building that he himself owned and that the employer eventually rented from him. The employee testified that he performs almost all of his usual job duties at this location but that he has not received salary increases since his move because the employer considers him underutilized. A performance evaluation submitted into evidence supports the employee's testimony in this regard.

The self-insured employer admitted liability for a personal injury, in the nature of occupational asthma, and eventually paid the employee various benefits, including temporary total disability benefits for his time off work and benefits for a 15% whole body impairment under the permanency schedules effective for injuries occurring prior to July 1, 1993.[4] When the matter came on for hearing on August 17, 1999, the primary issues were the effective date of the employee's occupational disease injury and the extent of permanent partial disability attributable to that injury. It was the employee's contention that he had sustained a compensable occupational disease injury on June 2, 1995, when he was first removed from work due to his condition, and that he had a 78% whole body impairment related to that injury under the schedules in effect on that date. The employer maintained that the appropriate date of injury was December 2, 1992, when pulmonary function tests first showed significant respiratory impairment, and that the employee had, at most, a 15% whole body impairment under the schedules in effect on that earlier date. Evidence included the employee's testimony and treatment records; the reports and deposition testimony of Dr. Mark Johnson, the employer's independent examiner; and the reports and deposition testimony of Dr. David Bonham, the employee's independent examiner.

In a decision issued on October 1, 1999, the compensation judge determined that the employee had sustained a personal injury in the nature of an occupational asthma condition, due to isocyanate exposure, on June 2, 1995, and that he had a 78% whole body impairment related to that condition, as claimed. The employer appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must 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 (1992). 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

[4] Minn. R. 5223.0180, subd. 2.

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

Date of Injury

The permanent partial disability benefits payable in this matter depend largely on the effective date of injury for the employee's occupational asthma condition, because the permanency schedules in effect on December 2, 1992, the date of injury alleged by the employer, are very different from the permanency schedules in effect on June 2, 1995, the date of injury alleged by the employee and accepted by the compensation judge.[5]

An occupational disease is generally not compensable until disablement occurs, and, historically, an employee was not considered disabled due to occupational disease until that employee was unable to earn full wages in the work in which he was last employed. See, e.g., Guggenberger v. Cold Spring Granite Co., 332 N.W.2d 655, 35 W.C.D. 301 (Minn. 1983); Notch v. Victory Granite Co., 306 Minn. 495, 238 N.W.2d 426, 28 W.C.D. 252 (1976); Fink v. Cold Spring Granite Co., 262 Minn. 393, 115 N.W.2d 22, 22 W.C.D. 158 (1962). Eventually, in Green v. Boise Cascade Corp., 377 N.W.2d 924, 38 W.C.D. 301 (Minn. 1985), the Minnesota Supreme Court indicated that an employee might have a compensable claim if the employee requested a job change on physicians' advice to avoid the hazard responsible for the employee's occupational disease, and employee argues in the present matter that June 2, 1995, is the appropriate date of injury because he was not forced or advised to change his work location until that date. However, subsequent to Green, the court clarified that "recovery of permanent partial disability compensation is not dependent upon loss of wages but upon functional loss or impairment." Schroeder v. Highway Servs., 403 N.W.2d 237, 239, 39 W.C.D. 723, 726 (Minn. 1987) (emphasis added). See also Moes v. City of St. Paul, 402 N.W.2d 520, 39 W.C.D. 675 (Minn. 1987). In Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1993), the Workers' Compensation Court of Appeals construed the supreme court's holdings on the "disablement" issue to mean that "an employee is 'disabled' for purposes of entitlement to permanent partial disability benefits when he or she can establish a ratable permanency." Krovchuk, 48 W.C.D. at 612. In other words, an employee has a compensable occupational disease as of the date that medical records reasonably establish ratable work-related permanent partial disability under applicable permanency schedules.

[5] Compare Minn. R. 5223.0180, subps. 2 and 3 (1991) (effective through June 30, 1993), with Minn. R. 5223.0560, subp. 3 (1995) (effective after July 1, 1993).

In the present case, the evidence easily establishes that the employee had a compensable occupational disease injury by December 2, 1992, the date of injury alleged by the employer, in that, by that date, the employee had been diagnosed with asthma, he was regularly taking medications to treat his condition, and pulmonary function tests showed sufficient impairment of lung function to justify a permanent partial disability rating.[6] Even the employee's expert, Dr. David Bonham, agreed that the employee had sustained an injury as of December 2, 1992. However, the fact that the employee may have had compensable injury as of December 2, 1992, is not necessarily inconsistent with the conclusion that the employee suffered additional permanent injury, through his continuing exposure to isocyanates at work, until he was removed from his job by Dr. Anderson on about June 2, 1995. And, if indeed the employee sustained additional permanent occupational disease injury effective June 2, 1995, the employer's liability for benefits here is for all practical purposes governed by the law, including the permanent partial disability schedules, in effect on that date in any event.[7]

The evidence as to whether the employee continued to sustain additional injury through June 2, 1995, due to continued isocyanate exposure, is not extensive. Depending on which pulmonary function studies are compared, it could be argued that the employee did not sustain any additional ratable permanent functional impairment between December of 1992 and June of 1995. However, the employee and his wife testified that his condition, meaning his symptoms, worsened over that period. More importantly, Dr. Bonham testified that "any ongoing exposure to isocyanates is significant" and that the employee's exposure to isocyanates after 1993 caused permanent deterioration in his functional capabilities, which contributed to the functional changes demonstrated by Dr. Bonham's pulmonary function studies in 1998. As Dr. Bonham explained it, "we know that the more people get into isocyanates when they're already sensitized, the worse

[6] However, the employee's condition might not have fit neatly into the schedules in effect on that date, Minn. R. 5223.0180, subps. 2 and 3, because the employee's actual symptoms did not match up neatly with the pulmonary function test results listed in the table in the rule, and the employee has not required any hospitalizations for his condition. Nevertheless, the employee would have qualified for at least 15% permanent partial disability under Table 1 of subpart 2.

[7] The employer argues that, in the event that the compensation judge's finding of a June 2, 1995, date of injury is upheld, the matter must be remanded for apportionment, pursuant to Minn. Stat. § 176.101, subd. 4a, of the permanent impairment clearly evidenced by medical records existing as of December 2, 1992. The employer's argument in this regard may have some technical merit, because, arguably, the absence of any finding of a December 2, 1992, work injury means that the employer should not be responsible for any permanent impairment that existed as of that date. Therefore, the argument goes, the permanency rating applicable to the employee's condition as of December 2, 1992, should be subtracted from the rating applicable to the employee's current condition, lessening the employer's liability for permanent partial disability benefits. See Minn. R. 5223.0315 A. However, this argument elevates form over substance, as the record firmly establishes that the employee's asthma condition in 1992 was substantially caused by exposure to isocyanates at work. Moreover, according to the employer's counsel, the employer was self insured on both dates of injury. As such, we see no grounds for relieving the employer of liability, through apportionment, for the employee's permanent impairment.

they are." The compensation judge expressly accepted Dr. Bonham's opinion on this issue and indicated in his memorandum that the employee "continued to experience significant lung injury until he was removed from his employment exposure on June 2, 1995." We find no basis to overturn the judge's reliance on Dr. Bonham's opinion in this regard. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Therefore, whether or not the employee also had a compensable occupational disease injury as of December 2, 1992, substantial evidence in the record supports the conclusion that the employee sustained additional significant injury through June 2, 1995, and the judge accordingly properly applied the law, including the permanency schedules, in effect as of the latter date.

Permanent Partial Disability

The employee underwent at least eleven sets of pulmonary function studies between late 1992 and the date of hearing. Most test results were quite similar; however, the tests ordered by Dr. Bonham, conducted in November of 1998, demonstrated significantly greater pulmonary impairment than the others. Choosing Dr. Bonham's tests upon which to base his permanent partial disability rating, the compensation judge concluded that the employee has a total whole body impairment rating, relative to his occupational asthma, of 78%, pursuant to Minn. R. 5223.0560, subp. 3, which reads in part as follows:

> **Subp. 3. Asthma and pulmonary conditions with an asthmatic component**. Asthma and pulmonary conditions with an asthmatic component may be rated only under this subpart. Ratings under subpart 2 may not be substituted for or combined with ratings under this subpart.
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> A. Ratings under this subpart are based on:
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> (1) the level of bronchial obstruction as measured by pulmonary function tests done when the individual is on an optimum treatment regimen but without the addition of inhaled bronchodilator immediately preceding the pulmonary function testings;
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> (2) the level of bronchial responsiveness as measured by standardized methacholine challenge testing;
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> (3) the need for bronchodilator therapy. Each element in subitems (1) to (3) must be present for the rating under that subitem to be assigned.
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> B. The permanent partial disability for asthma and pulmonary conditions with an asthmatic component is:
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> * * *
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> (14) class XIV: FEV1 OR FEV1/FVC is less than 40 percent but greater than or equal to 30 percent of predicted, 75 percent;[8]

[8] FEV1 means forced expiratory volume in one second, Minn. R. 5223.0310, subp. 27; FVC means forced vital capacity, id., subp. 30.

* * *

C. Additional impairment occurs if persistent steroid therapy is required for the treatment of the asthma or asthmatic component:

(1) only inhaled steroids required, add three percent to the otherwise appropriate class in item B, but the total impairment cannot exceed 95 percent;

In his memorandum, the compensation judge explained his decision as to the employee's permanency rating as follows:

> While a rating of 78 percent to the body, as a whole, appears inconsistent with the overall picture of Mr. Eisenmenger's physical abilities, including his ability to perform daily living activities, it nevertheless appears to be the correct rating based upon the testing performed by Dr. Bonham (see p. 70 of Dr. Johnson's deposition taken August 6, 1999). While I agree with Dr. Mark Johnson that Mr. Eisenmenger does not seem to have the physical impairments of an individual with a three-fourth loss of his normal bodily function due to lung disease, a 78 percent rating nevertheless appears correct based on the schedule to be applied and the pulmonary function test results. See Minn. Rule 5223.0560, Subp. 3, pertaining to asthma and pulmonary conditions with an asthmatic component, and Subp. 3.C. A Workers' Compensation Judge is required to apply the rule that most closely approximates the condition Mr. Eisenmenger has regardless of his ability to perform daily living and work activities. They are not merely guidelines to be considered. The Rule has the force and effect of law. (See, U.S. West Material Resources, Inc. v. Commissioner of Revenue, 511 N.W.2d 17, 20 and Minn. Stat. § 14.38 (1996). Minn. Rules 5223.0560, Subp. 3.[B](14) and C(1) apply. It has been noted in applying the rule in effect on June 2, 1995, that under the previous rules that expired June 30, 1993, that Mr. Eisenmenger's disability would not have exceeded 30 percent of the body as a whole with dyspnea occurring during some usual activities, such as using a snow blower. I am bound, however, to apply the permanent partial disability rule in effect on June 2, 1995.

There is no dispute that the employee's FEVI and/or FEV1/FVC levels, as measured by Dr. Bonham's tests, warrant a 75% rating under Minn. R. 5223.0560, subp. 3B(14), and that the employee's condition merits an additional 3% rating, due to his need for inhaled steroids, pursuant to subpart 3C(1). However, the employer contends that the compensation judge erred, on several grounds, in using Dr. Bonham's test results to determine the extent of the employee's functional impairment under the rules. More specifically, the employer argues that the judge erroneously interpreted the requirements of the schedules, that Dr. Bonham's test results are an unreliable

aberration given the results of the employee's other pulmonary function testing, and that the judge erred in concluding that he lacked authority to weigh all of the evidence concerning the employee's level of impairment in determining the employee's permanent partial disability award.[9] After review of the record in light of the applicable law, we find insufficient basis to reverse or modify the judge's decision on this issue.

The employer argues, initially, that Dr. Bonham's pulmonary function testing cannot be used to establish the level of the employee's permanent impairment because (1) the employee was not "on an optimum treatment regimen" as required by Minn. R. 5223.0560, subp. 3A(1), and (2) no methacholine challenge test was conducted as required by Minn. R. 5223.0560, subp. 3A(2). We are not persuaded.

Taking the employer's arguments as to the methacholine challenge testing first, Minn. R. 5223.0560, subp. 3A(2), does indicate that ratings for asthma are to be based in part on "standardized methacholine challenge testing." However, all physicians offering an opinion on the subject have indicated that the employee is not an appropriate candidate for such testing because, given the level of his respiratory impairment, such a study would be very dangerous, if not fatal. Moreover, Dr. Johnson, the employer's expert, explained that methacholine challenge testing is used to determine whether a patient has asthma to begin with, which is not at issue here. Perhaps more importantly, the first thirteen rating categories in the schedules applicable to asthma, Minn. R. 5223.0560, subp. 3B(1) through 3B(13), list "PD20" testing values, which relate to methacholine challenge testing, but the last two asthma rating categories, Minn. R. 5223.0570, subps. 3B(14) and (15) - - which include the rating category applied by the judge - - contain no reference to PD20 levels at all. The absence of this language reasonably indicates that the schedules themselves do not contemplate methacholine challenge testing for individuals otherwise falling under categories (14) and (15), with FEV1 or FEV1/FVC less that 40% of predicted. Under these circumstances, we cannot conclude that the absence of methacholine challenge testing is fatal to the judge's award.

The employer's other argument regarding interpretation of the asthma permanency schedules has somewhat more merit. As previously indicated, Minn. R. 5223.0560, subp. 3A(1), specifies that ratings are to be based on "the level of bronchial obstruction as measured by pulmonary function tests done when the individual is on an optimum treatment regimen but without the addition of inhaled bronchodilator immediately preceding the pulmonary function testings." In this case, the employee abstained from using his inhaled bronchodilator for four to six hours prior to testing, in accordance with the instructions issued by Dr. Bonham's office, but otherwise followed his usual treatment regimen.[10] The employer argues that, because the

[9] The employer also raised constitutional arguments, to preserve those issues for possible appeal to the Minnesota Supreme Court.

[10] At oral argument, counsel for the employer suggested that the employee had also skipped his oral, pill-form bronchodilators for as much as 24 hours prior to testing. This assertion is directly contrary to the employee's testimony and is unsupported by any other evidence in the record.

employee failed to take his inhaled bronchodilator on his usual schedule, he was not on his "optimum treatment regimen," "taint[ing] the test results." According to the employer, the rule's direction that the employee not use "inhaled bronchodilators immediately preceding the testing" means only that - - immediately, with nothing intervening.

Inhaled bronchodilators are generally considered effective for four to six hours, so the effect of the employee's last dose prior to testing would have worn off by the time of the tests. The employee testified that he has always been instructed to abstain from using inhaled bronchodilators for four to six hours prior to pulmonary function testing, except with respect to the tests ordered by Dr. Johnson,[11] and Drs. Johnson and Bonham acknowledged that withholding inhaled bronchodilators in this fashion is consistent with standard pulmonary testing practices. However, Dr. Johnson also testified that, given the language of the permanency rules, the goals of those rules are not the same as the goals of medical providers screening for diagnostic and treatment purposes. Therefore, according to Dr. Johnson, pulmonary function tests conducted for the purpose of rating permanent partial disability under the disability schedules should be conducted differently than those studies conducted for treatment. This is the gist of the employer's argument on this point. There is, however, evidence that supports the conclusion that standard pulmonary function testing practices, which include the withholding of oral bronchodilators, adequately measure pulmonary function in a way contemplated by the rules. Dr. Bonham explained in some detail why the tests are conducted as they are and indicated that such testing practices are consistent with the guidelines of both the American Thoracic Society and the American Medical Association. Standard pulmonary function tests generally measure the employee's pulmonary function "pre-bronch" and "post-bronch," that is, prior to and after administration of inhaled bronchodilators, and without the withholding of the inhalants, such comparison cannot be made. Finally, as the employee notes, the rules direct that spirograms used in the rating of permanent partial disability be "technically acceptable," Minn. R. 5223.0310, subps. 27 and 30, and Dr. Bonham's testimony reasonably indicates that his testing methods meet this criteria. In this particular case, the language of the rule must be construed in light of the medical evidence bearing on the probable meaning of that language; in other words, we see this as a question of fact, not law. Given the conflicting evidence on the issue, we cannot say that the judge erred in concluding that Dr. Bonham's testing was consistent with the requirements of the rule at issue.

With regard to the employer's argument that Dr. Bonham's test results are an unreliable aberration that should be rejected given the other pulmonary function testing in this case, we would note that Dr. Bonham is a specialist in the field and testified as to the appropriate protocol for pulmonary impairment studies. This is really no different than a case in which a judge chooses to rely on one physician's opinion in the face of numerous other opinions to the contrary. In such cases, as in this one, nothing in the law requires a judge to accept the majority view. See, e.g., Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

[11] In a letter to the employee's attorney, providing notification of Dr. Johnson's independent examination, the employer's counsel wrote, "As you know, [the employee] should take his usual medications on the exam date."

Finally, we reject the employer's argument that the judge should have considered other, nonmedical evidence of the employee's functional abilities in determining the appropriate permanent partial disability rating. The legislature authorized the Commissioner of Labor and Industry to devise the permanency schedules. See Minn. Stat. § 176.105, subd. 1. The fact that the employee may not "seem" to have a 78% whole body impairment, in view of his ability to hunt, walk long distances, and perform his job, provides no justification to deny the employee a rating for which he otherwise qualifies under the applicable rules. To hold otherwise would subvert the legislature's grant of authority to the commissioner and the stated legislative intent to "promote objectivity and consistency in the evaluation of permanent functional impairment." Id., at subd. 4(b). The judge clearly had the discretion to base the employee's rating on other pulmonary function studies, or to accept Dr. Johnson's opinion over that of Dr. Bonham's. However, having accepted Dr. Bonham's opinion and test results, the judge properly applied the schedules to that evidence.

This is a difficult case for many reasons. However, while we might well have decided the matter differently, we cannot conclude that the judge's decision is clearly erroneous and unsupported by substantial evidence in the record as a whole. As such, we must affirm it.