ELAINE FEALY, Employee, v. AM. LUTHERAN CHURCH and U.S. FIRE INS. CO., Employer-Insurer/Petitioners, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 27, 2000

No. [REDACTED SSN]

HEADNOTES

VACATION OF AWARD - SUBSTANTIAL CHANGE IN CONDITION; PERMANENT TOTAL DISABILITY. Because the evidence was conflicting, the matter was referred to the Office of Administrative Hearings for creation of a record and factual finding concerning whether the employee's condition had substantially changed since the issuance of an administrative determination of permanent total disability, sufficient to justify vacating that decision. Following issuance of the judge's decision, the matter is to be returned to this court for consideration of the employer and insurer's petition.

Referred to OAH for hearing.

Determined by Wilson, J., Rykken, J., and Pederson, J.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer petition to vacate an administrative determination of permanent total disability based on a substantial change in condition. We refer the matter to the Office of Administrative Hearings for an evidentiary hearing and findings as to change in diagnosis, change in ability to work, and change in permanent partial disability.

BACKGROUND

The employee sustained a work-related injury to her left leg on May 15, 1973, while employed by the American Lutheran Church [the employer]. As a result of that injury, she underwent several surgeries and developed a chronic osteomyelitis affecting her left leg and left iliac crest. The employee was paid temporary total disability benefits from December 8, 1975, through January 18, 1976, and February 24, 1977, through May 24, 1977, and weekly benefits continuing from June 22, 1977. The employee has apparently received Social Security disability benefits since August of 1977.

On April 2, 1990, the employer and insurer filed a request for finding of permanent total disability, based on the March 25, 1981, report of Dr. Robert A. Wengler.[1] When the Department of Labor & Industry requested additional information, the employer and insurer filed a May 16, 1990, report from Dr. Wengler, in which he indicated that the employee had been totally disabled "as of January of 1978 and probably since the time of surgery which was done in December of 1975." The request for finding of permanent total disability was approved by the Department of Labor and Industry on May 30, 1990.

Periodically, the employer and insurer have contacted the employee to inquire as to her status. When interviewed on June 18, 1993, the employee indicated that she continued to take medications for her condition and that she could not sit, stand, lay or walk for more than a couple of hours without experiencing severe pain.

On or about June 26, 1997, the employee was apparently attacked by two German shepherd dogs in Arizona. In connection with a lawsuit filed by the employee against the dogs' owner, the depositions of the employee and of Marcia Gunderson, a friend of the employee, were taken. Based on representations made by the employee and Ms. Gunderson in their depositions, as well as medical records generated after the dog attack, the employer and insurer petition this court to vacate the finding of permanent total disability based on a substantial change in the employee's medical condition.

DECISION

For awards issued prior to July 1, 1992, "cause" to vacate includes a substantial change in condition. The employer and insurer contend that a substantial change in condition has occurred because the employee testified, in her deposition, that she had fully recovered from the 1973 work injury, because treatment records after the employee's 1997 dog bite injury contain histories indicating that the employee had recovered from the 1973 work injury, and because the testimony of Ms. Gunderson establishes that the employee was physically active and, therefore, fully recovered by 1997.

The employer and insurer's arguments of substantial change in condition are somewhat compelling. In her 1998 deposition, the employee testified that she had an eight-year bout with osteomyelitis from 1979 until 1987, but, in response to the question "[h]ave you had any reoccurrence of that condition since 1987?" the employee responded, "No. The leg is all closed; the hip is all closed. I have gone back to biking and rollerblading and everything that I have ever done before . . . ."[2] The employee also testified that, prior to the 1997 dog attack, her hobbies

[1] In that report, Dr. Wengler stated, "[the employee] is unequivocally disabled at the present time. I have serious doubts as to whether or not we are ever going to be able to get this infection cleared up."

[2] However, a review of the medical records establishes that the employee was seen by Dr. Gerald Pitzl in January of 1991 for ongoing problems with drainage in the proximal tibia, and the employee called in for refills of medication due to an acute flare-up in April of 1991.

included rollerblading, biking and rock climbing, and that she did all of her own yard work and snow shoveling. Ms. Gunderson testified that, prior to the 1997 dog attack, she observed that the employee "was not limited in any way, shape or form as far as her physical abilities. She did a lot of swimming, a lot of walking, biking, you know, those kinds of exercises."

The medical records generated after the dog attack, which were attached to the petition to vacate, are also suggestive of an improvement in the employee's medical condition since 1990. The October 1, 1997, report from Orthopaedic Partners, P.A., contains a history of a bone graft of the left leg "which subsequently got infected and finally after eight or nine years the infection vanished." At the time of that 1997 exam, it was noted that there were scars on the employee's left leg, but there was no mention of any ongoing infection or osteomyelitis. Dr. William Call examined the employee on October 7, 1997, and recorded a history of draining osteomyelitis for eight years, which "has resolved." Similarly, the December 23, 1998, report of Dr. Orrin Mann indicates that the employee had a history of osteomyelitis but that all of the surgical sites had eventually "healed without residual."

In opposition to the employer and insurer's petition, the employee contends that osteomyelitis is a condition that produces flare-ups at intervals of months or years. In her sworn affidavit, she represented that she has continued to experience flare-ups, since 1990, where she develops painful open sores. The employee also contends that she has only rollerbladed for ten minutes or so at a time, that she has used a riding lawn mower to do her yard work, and that she has only shoveled snow once in a while "to clear off her steps or help her get to her car . . . ."

The evidence is conflicting as to whether there has been a substantial change in the employee's condition, and no medical evidence was submitted specifically addressing whether there has been a change in the employee's work injury-related diagnosis, ability to work, or permanent partial disability,[3] since the issuance of the administrative determination of permanent total disability. See Fodness v. Standard Cafe, 41 W.C.D. 1054, 1060-61 (W.C.C.A. 1989). Because it is necessary for a compensation judge to create a record and resolve these factual issues, we refer this matter to the Office of Administrative Hearings for an evidentiary hearing and findings. Discovery necessary to resolution of these questions should be allowed, and either party may of course appeal from the factual findings made by the judge following the hearing. This court will make a determination as to whether there has been a substantial change in condition, sufficient to vacate the finding of permanent total disability, upon return of the requested findings from the Office of Administrative Hearings.

Obviously, the employee's condition had not cleared up by 1987. Neither party submitted any medical records regarding treatment for osteomyelitis after April of 1991.

[3] The judgment roll reflects that the employee was paid for a 37.5% permanent partial disability of the left leg, with a close out to 50%, pursuant to two stipulations for settlement.