BETTY J. KULAS, Employee/Appellant, v. GEORGE MACK and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 29, 2000

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the compensation judge's determination that the employee's work-related low back injury is not a substantial contributing cause of the employee's permanent total disability.

Affirmed.

Determined by Wilson, J., Pederson, J. and Rykken, J.
Compensation Judge: Jeanne E. Knight

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of permanent total disability benefits. We affirm.

BACKGROUND

The employee has a history of low back treatment dating back to at least 1985. A February 1985 treatment record indicates that the employee had been seeing an osteopath for "sciatic nerve problems," and a May 1985 neurology consultation report states that the employee at that time had "a seven year history of low back pain," which she attributed "to having fallen on the ice." A CT scan taken shortly after the neurological evaluation disclosed bulging discs and/or degenerative changes at several levels of the employee's lumbar spine. Subsequently, in September of 1985, the employee sought treatment for pain in both feet, legs, and knees, and "at times in the low back," reporting that her symptoms had begun the previous November, when she kicked at a door that would not open. The employee's physician at the time diagnosed "fibrositis syndrome," along with depression and anxiety neurosis, and recommended bilateral arch supports, biofeedback, and weight reduction.

In January of 1990, after a fifteen year absence from the labor market,[1] the employee began working for George Mack, the employer herein, as a personal care attendant for

[1] The employee had been a stay-at-home mother from 1975 to January of 1990.

Mr. Mack's disabled wife, Helen. The employee's job duties included feeding, dressing, and bathing Mrs. Mack, as well as some housework, for a weekly wage of $166.79.

On December 18, 1990, the employee sustained a work-related injury while transferring Mrs. Mack from her bed to a wheelchair. The employee testified that she experienced immediate low back pain, into her right leg and foot, but that she continued working, without time off due to her symptoms, until about January 8, 1991, when she was unable to get out of bed due to her pain. A lumbar CT scan performed on January 23, 1991, was read as showing no change in comparison to the employee's 1985 scan. The employee received treatment for her low back symptoms and did not return to work for the employer.

On May 29, 1992, the matter came on for hearing before Compensation Judge J. E. Murray. According to his decision, dated July 28, 1992, the issues presented at hearing were "primary liability" and the "[e]xtent of temporary total disability." Judge Murray concluded in part that "[t]he nature of the employee's December 18, 1990, lumbar back injury was a lumbar strain/sprain superimposed on a degenerative disc at the L5-S1 level and a mildly bulging disc at L4-5 without herniation"; that the employee had reached maximum medical improvement [MMI] on April 25, 1992, effective with service of Dr. Paul Wicklund's report on May 14, 1992; and that the employee was entitled to temporary total disability benefits from January 9, 1991, to August 11, 1992, the end of the ninety-day post-MMI period. The judge also awarded reasonable and necessary low back treatment expenses, but he denied claims related to an alleged foot injury, concluding that the employee did not injure her right foot as a consequence of her December 18, 1990, lumbar injury. In his memorandum, the judge indicated that the employee had "work restrictions consisting of a 35 pound lifting limitation and not a lot of repetitive twisting or bending," as indicated in Dr. Wicklund's report, and that the employee would be best served by returning to employment within those restrictions. Permanent partial disability was not at issue in this proceeding. Neither party appealed from the judge's decision.

The employee apparently did not seek additional significant low back treatment again until 1994, when she was referred to Dr. Robert Ivers. Dr. Ivers concluded that the employee was suffering from fibromyalgia, a longstanding problem that had, in his opinion, been aggravated by the December 18, 1990, work injury, and he prescribed pool therapy and medication. He also referred the employee for a functional capacities evaluation [FCE], which was performed in May of 1995. The therapist conducting the FCE reported that the employee demonstrated arm tremors when lifting and carrying, rigid posturing of her trunk and legs, poor balance, a shuffling gait pattern, decreased standing tolerance, decreased strength and mobility, and very poor quality of movement. The therapist concluded that the employee would be capable of a "less than sedentary work level" given her carrying and lifting limitations, her inability to tolerate sitting, and the need to limit her walking to "very few feet."

The employee underwent physical therapy in July and August of 1995. The therapist found normal range of motion but noted that the employee continued to complain of pain and other symptoms. Therapy records characterize the employee's pain complaints as "very questionable" and the employee's presentation as "quite bizarre."

In October of 1995, Dr. Ivers reported that the employee did not feel any stronger, despite regular pool therapy, and noted that she had been losing her balance upon standing after getting out of the pool. He recommended that the employee continue pool therapy, "probably [for] the remainder of her life," advising also that she should undergo a psychological evaluation to determine whether she might benefit from cognitive therapy, biofeedback, or meditation. Two months later, in December of 1995, Dr. Ivers reported that, given the employee's symptoms, it was "kind of questionable how well [the employee] will be able to function in any kind of job even within the limitations that we have outlined for her."[2]

In February of 1996, the employee was seen at United Hospital in Grand Forks for complaints of leg weakness, "to the point of falling," and the physician's impression was "bilateral leg weakness" and "ataxia." An MRI of the employee's brain was interpreted as normal.

The employee was seen by Robert Cooper, M.B., B.S., in February of 1997 for "evaluation of fibrositis syndrome."[3] Mr. Cooper noted good cervical and lumbar range of motion and normal straight leg raising but "pronounced give-way phenomenon" on manual muscle testing. He also found positive "over-reaction signs" and reported that, on testing Romberg's sign, the employee staggered across the office to the wall. Mr. Cooper concluded that the employee was suffering from fibromyalgia syndrome "with significant psychosocial stress and prominent symptom magnification and pain behavior." He noted that the employee's FCE results were not entirely objective and that the employee was probably capable of more than sedentary work. In fact, Mr. Cooper recommended that the employee return to employment but noted that, "in view of the psychosocial situation, [the employee's] perceived sense of disablement and the number of years she has been out of work, the prognosis for return to work must be somewhat guarded."

The employee was seen by Dr. Ryan Harrington in August of 1997. Dr. Harrington noted that the employee's complaints by then included "continuous lumbar pain bilaterally radiating into both legs and myofascial type pain involving the chest, neck, shoulders, and arms periodically." Dr. Harrington also reported that the employee had had "episodes where she will suddenly fall," indicating that he was unsure as to what was causing this phenomenon and that the employee had difficulty even describing it.

In December of 1997, the employee was evaluated by Dr. D. F. Person. During a portion of the examination, the employee's legs began to buckle, and she reported that she could not stand. Dr. Person concluded that the employee was suffering from a chronic musculoligamentous strain with multilevel lumbar degenerative disc disease and "a neurologic disorder, etiology undetermined." He explained that he could not diagnose the apparent

[2] The employee apparently had rehabilitation assistance at this point. Dr. Ivers noted that the employee was working on a job search, which was reportedly making her so uncomfortable that it was interfering with her pool therapy.

[3] Mr. Cooper, an employee of United Hospital, is not a medical doctor. The record indicates that the employee's then treating physician, Dr. Charlotte Hovet, referred the employee for a physical medicine consultation.

neurological disorder and recommended that the employee be evaluated by a neurologist or, if necessary, a psychiatrist.

In August of 1998, the employee was examined again by Dr. Wicklund, who had also evaluated her, on the employer's behalf, prior to the 1992 hearing before Judge Murray. Dr. Wicklund noted, in part, a "collapsing-like effort" when the employee tried to stand on her heels or toes, and he concluded that the employee was exaggerating her complaints, in that there were "no objective findings to indicate that [the employee] has any neurological problem with her lower extremities." Diagnosing a psychosomatic functional lower extremity weakness and lumbar degenerative disc disease, Dr. Wicklund stated that the employee had recovered from her work-related low back sprain of December 18, 1990; that she was able to work full time, subject to restrictions related to her underlying degenerative disc disease; and that she should undergo a thorough psychological evaluation "since her psychological condition is unstable creating this psychophysiologic problem." Subsequently, in May of 1999, Dr. Wicklund's deposition was taken. At that time, he repeated and expanded upon the conclusions contained in his August 1998 report, adding that, in his opinion, the employee was consciously exaggerating her complaints.

The matter came on for hearing on June 15, 1999, before Compensation Judge Jeanne Knight, for resolution of the employee's claims for permanent partial and permanent total disability benefits due to her December 18, 1990, work-related back injury. Evidence submitted in connection with these claims included the employee's medical records and reports, documentation pertaining to the employee's claim for social security disability benefits,[4] the deposition of Dr. Wicklund, and the testimony and reports of vocational experts Jack Casper and David Berdahl.

In a decision issued on August 18, 1999, the compensation judge denied the employee's claims in their entirety. The employee appeals.

STANDARD OF REVIEW

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 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, 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

[4] The employee's claim for Social Security benefits was initially denied, by order dated February 22, 1995, but was subsequently granted following a hearing, and the employee was found to be disabled, for benefit purposes, after July 27, 1997.

as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

The compensation judge concluded that the employee has a 10.5% whole body impairment, pursuant to Minn. R. 5223.0070, subp. 1.A.(3)(b), but that this permanent impairment was clearly evidenced in medical records prior to the employee's work injury, and the judge accordingly denied the employee's claim for permanent partial disability benefits. See Minn. Stat. § 176.101, subd. 4a. This decision is undisputed on appeal. The judge also concluded that the employee is permanently and totally disabled from employment but that her permanent total disability is not causally related to her December 18, 1990, work injury, and the judge therefore denied the employee's claim for permanent total disability benefits as well.

On appeal, the employee contends initially that causation of the employee's permanent total disability was not at issue, arguing that "[t]he parties assumed, and rightfully so, given the prior Findings and Order of Judge Murray and the absence of any intervening accidents or significant diseases, that if the employee was permanently and totally disabled, that disability was substantially caused by the now admitted work injury of December 18, 1990." Accordingly, the employee argues, the compensation judge impermissibly denied the employee's claim based on a noncontested issue, in contravention of Minn. Stat. § 176.371.

The employee's argument on this point is not entirely without merit. It is evident, from the opening statements at hearing, that the employer and insurer's primary position was that the employee was not in fact permanently totally disabled because she was capable of obtaining employment, within the restrictions established by the 1995 FCE, as evidenced by the report and testimony of vocational expert Berdahl. However, we are satisfied that causation was also at issue here, at least implicitly, in view of the record as a whole. We note, for example, that, in their answer to the employee's claim petition, the employer and insurer alleged in part that the employee had already been fully compensated for her work injury. In addition, in his deposition, taken less than a month prior to hearing, Dr. Wicklund, the employer's expert, explained in some detail as to why he thought that the employee's December 18, 1990, work injury was merely temporary, why he thought that the injury was unrelated to any restrictions that the employee should observe due to her pre-existing lumbar degenerative changes, and why he thought that the employee was intentionally exaggerating her symptoms. And, in his opening statement, counsel for the employer and insurer pointed to Dr. Wicklund's testimony in this regard. We would also observe that nothing in the hearing transcript or in the remainder of the record expressly indicates that causation was in fact undisputed. Finally, and importantly, we note that both parties submitted evidence on the causation issue. Therefore, while the hearing record is not as clear as we might like as to the parties' positions, we find insufficient justification to reverse the judge's decision to determine the employee's claim on causation grounds.

The employee also argues that substantial evidence does not support the judge's decision, in that Judge Murray found permanent restrictions, related to the employee's work injury,

in 1992, and in that there is no evidence of any intervening superceding cause of the employee's permanent total disability. There is, according to the employee's argument, no evidence "of anything that could have broken the chain of causation from the admitted injury to the ultimate finding of permanent total disability." Therefore, the employee maintains, the judge's denial of benefits must be reversed. We are not persuaded.

We note initially that Judge Murray did not make any express "finding" as to the employee's restrictions in his 1992 decision; he addressed the subject only in his memorandum. Moreover, contrary to the employee's contention, Judge Murray did not find that the employee's restrictions were in fact permanent, and he did not clearly relate the listed restrictions to the employee's work injury, as opposed to the employee's pre-existing underlying degenerative changes. Even if the judge had made an express finding connecting specific restrictions to the employee's work injury, whether that finding could be considered binding on the issue, in a proceeding more than seven years later, is debatable. Finally, whether or not the employee has permanent restrictions causally related to her work injury of December 18, 1990,[5] the employee is still not eligible for permanent total disability benefits unless she establishes, by a preponderance of the evidence, that those restrictions are a substantial contributing factor in her inability "to secure anything more than sporadic employment resulting in insubstantial income." Schultz v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967).

In her findings, the compensation judge detailed most of the medical record entries reflecting the employee's possible symptom magnification and otherwise unexplained symptomatology, noting also those instances in which physicians could not correlate the employee's complaints with any clinical findings. The judge also noted findings indicating that the employee had normal range of motion. In her memorandum, after citing Dr. Person's opinion that the employee's symptoms were related to some unknown neurological disorder, the judge went on to explain as follows:

> The FCE, performed in 1995, noted poor performance at less than sedentary work level due to arm tremors, and problems with balancing. Again there was no indication that the reduction of her work level to less than sedentary was attributable to the low back injury. The problems that were found are not typical of a lumbar condition. Dr. Wicklund found the employee had psychological issues, rather than physical problems. The employer and insurer also introduced into evidence the decision of the Social Security Administration on the claim for SSI (Respondent's Exhibits 7 and 8). The administrative law judge found the employee was not wholly credible as to her restrictions and limitations and denied the benefits. On appeal, ... [t]hat judge also found the employee's complaints were exaggerated, but relied on the FCE in finding her disabled.

[5] Judge Knight made no finding in this regard.

> The burden is on the employee to prove her work injury is a substantial contributing factor in her disability. She has failed to meet this burden.

Contrary to the employee's suggestion, Judge Knight was not required to assume, in the absence of some specific intervening cause, that the limitations listed in the 1995 FCE were substantially attributable to the employee's 1990 work injury.

Given the inconsistencies and aberrations noted in the employee's medical records, the compensation judge was not persuaded that the employee's work-related low back injury was a substantial contributing cause of her permanent total disability. Because the record as a whole supports the judge's decision on this issue, we must affirm it.