BRUCE LOTTI, Employee/Appellant, v. ME INT'L, SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 21, 2000

No. [REDACTED SSN]

HEADNOTES

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. A finding of MMI is one of ultimate fact, requiring consideration of many factors, no single one of which is normally dispositive, cf. Hammer, 435 N.W.2d 525, 529, 41 W.C.D. 634, 639; and where the compensation judge did not base her decision solely on a single medical opinion or fail to evaluate the employee's condition as documented by medical records, medical opinions and other data and circumstances, and where it would have been reasonable to conclude that the improvement in the employee's condition subsequent to the MMI date found by the judge was not "significant," the compensation judge's finding of maximum medical improvement was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the employee's doctor upgraded the employee's restrictions category from "sedentary" to "light work" subsequent to date of MMI found by the judge.

Affirmed.

Determined by Pederson, J., Wheeler, C.J., and Rykken, J.
Compensation Judge: Peggy A. Brenden

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's determination that the employee reached maximum medical improvement from his May 5, 1999, injury effective November 22, 1999. We affirm.

BACKGROUND

On about May 5, 1999, Bruce Lotti sustained an injury to his low back in the course of his employment as a millwright/maintenance mechanic with ME International [the employer], which was self-insured at the time against workers' compensation liability. Mr. Lotti [the employee] was fifty-three years old on the date of his injury and was earning a weekly wage of $709.60. This was apparently the employee's third significant low back injury, the previous two having evidently happened about 1980 and about 1995. On May 10, 1999, the employee sought treatment with family practitioner Dr. Larry Lemaster, who diagnosed "[p]robably mild left low back pain with very slight neuropathy," restricted the employee to sedentary work with expressly no climbing, and prescribed physical therapy and medication.

By June 9, 1999, the employee's low back pain was reported to be "resolving," but physical therapy was continued, and the employee continued to be restricted to sedentary work. The employee subsequently experienced flare-ups in his pain, and on July 2, 1999, Dr. Lemaster diagnosed "possible neuropathy" and ordered an MRI scan. The scan, conducted on July 12, 1999, revealed moderate disc bulges at L4-5 and L5-S1, together with some mild disc bulging at L3-4 and higher, but no significant spinal canal encroachment. On July 28, 1999, Dr. Lemaster noted that the employee's low back pain was again "[r]esolving" and that he was now "about 70 percent improved," but physical therapy and work restrictions were continued, including the restriction to sedentary work. On August 18, 1999, the employee's low back pain had recently flared up again, and Dr. Lemaster again found "some evidence for neuropathy." On September 21, 1999, the employee was reported to be "continuing to improve" but with "occasional setbacks," and Dr. Lemaster diagnosed "[p]ersistent low back pain." Finally, on October 25, 1999, Dr. Lemaster reported that the employee claimed to be "pretty much symptom free now and has been that way for about two weeks." On that date Dr. Lemaster diagnosed the employee's condition as "[l]ow back pain with questionable residual neuropathy," continuing his recommendation of physical therapy and home exercises and restriction to sedentary work.

On October 27, 1999, the employer filed a Notice of Intention to Discontinue [NOID] the employee's temporary total disability benefits on grounds that the employee had failed to cooperate with medical care. Two days later, on October 29, 1999, orthopedic surgeon Dr. Stephen Barron conducted a medical examination of the employee for the employer. In his report on that date, Dr. Barron diagnosed the employee's work injury as a lumbar sprain, finding the employee's orthopedic examination normal and his subjective complaints minimal and unsubstantiated by any objective findings. The doctor also found that, "[b]ecause of his lack of objective findings," the employee had not sustained any permanent partial disability, was not subject to any restrictions, was unlikely to benefit from any additional treatment, and had obtained maximum medical improvement [MMI] with regard to his work injury.

On November 22, 1999, Dr. Barron's report of MMI was served on the employee. On November 24, 1999, the employer filed a second NOID, this one on grounds that the employee had reached MMI and was free of restrictions effective October 29, 1999, pursuant to Dr. Barron's report of that date, contending that the employee was presently off work due to a nonwork-related injury. The employee subsequently saw Dr. Lemaster again on December 6, 1999, in follow-up to some recent episodes of significant low back pain, although "[o]verall he seem[ed] to be getting along better." At that time, the employee's restriction to sedentary work was continued, with specific restrictions against lifting over ten pounds and against doing any climbing.

The discontinuance matter came on for an administrative conference on December 23, 1999, and on December 28, 1999, Compensation Judge Jane Gordon Ertl issued an Order on Discontinuance Pursuant to Minn. Stat. § 176.239. In that Order, Judge Ertl concluded that the employer had established reasonable grounds to discontinue benefits once ninety days had expired after service of Dr. Barron's October 29, 1999, MMI report. On January 18, 2000, the employee filed an Objection to Discontinuance, requesting a hearing in accordance with Minn. Stat. § 176.238. Dr. Lemaster saw the employee again on January 19, 2000, at which time he

noted that the employee "basically has been doing fairly well but he has some bad days where he has significant pain." The employee's clinical examination was essentially unimproved, and Dr. Lemaster indicated that he suspected that the employee "will continue to have intermittent problems with his back." He released the employee to "light work with no ladder climbing" and recommended follow-up in six weeks.[1] On February 14, 2000, the employer filed an Answer to the employee's Objection to Discontinuance, including a Motion to Dismiss the employee's Objection on grounds that the employee had failed to attach any medical evidence to refute Dr. Barron's MMI opinion. On February 20, 2000, ninety days after service of Dr. Barron's MMI report, the employer discontinued payment of the employee's temporary total disability benefits.

The matter came on for formal hearing on March 22, 2000. The sole issue at hearing was whether or not the employee had reached MMI on October 29, 1999, as indicated in Dr. Barron's report of that date. On the date of the hearing, the employee, although he had returned to work for the employer not long after his injury, hadn't worked since August 24, 1999, when his union had gone on strike. At the hearing, the employee testified in part that as of October 1999 he hadn't had a bad day in about six weeks, that his low back condition had been at least ninety-five percent resolved by October 25, 1999, and that if he had had any improvement since then it might be an additional one or two percent. The employee also acknowledged in testimony that Dr. Lemaster did not prescribe any medication after June 1999, that he did not recommend any treatment other than physical therapy and home exercise after July 1999, and that he had never referred him to an orthopedist, a neurologist, or a surgeon. He testified also that he continues to have occasional flare-ups in his low back condition, particularly while traveling long distances by car or airplane.

By Findings and Order filed April 3, 2000, the compensation judge concluded that the preponderance of the evidence failed to establish that any significant recovery or lasting improvement in the employee's low back condition had been reasonably likely after October 25, 1999, and that Dr. Lemaster's recommendation on that date that the employee continue physical therapy and home exercises was only to maintain the employee's condition at its improved level. On these findings the judge concluded that the employee had been at MMI at the time Dr. Barron's report was served on the employee on November 22, 1999. In her Memorandum, the judge explained that she had considered the fact that the employee had been released for only "sedentary" work in October 1999 and that Dr. Lemaster had apparently upgraded the employee's work restrictions in January 2000 to permit the employee to do "light" work. The judge indicated that she was nevertheless unpersuaded that this upgrading of restrictions represented a significant improvement in the employee's condition. "Based on the testimony of the employee, the notes of Dr. Lemaster and the report of Dr. Barron," she explained, "the employee was fully capable of light work [already] in October, 1999." The employee 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

[1] We find no report of this follow-up appointment.

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, "[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 compensation judge concluded that the employee "was at maximum medical improvement at the time Dr. Barron's report was served on November 22, 1999." The judge explained in her Memorandum that, although Dr. Lemaster had technically upgraded the employee's work limitations from "sedentary" to "light" in January 2000, it was her conclusion that the employee had already been "fully capable of light work in October 1999," "[b]ased on the testimony of the employee, the notes of Dr. Lemaster and the report of Dr. Barron." The employee contends that neither law nor substantial evidence supports this conclusion, in that, as of October 29, 1999, the employee's "treating physician had a continuing recommendation for physical therapy which [the employee] was abiding by with success in terms of improvement." He suggests that, in reaching her decision, the compensation judge relied "solely on the opinion of the adverse examiner," arguing that "maximum medical improvement is **not** to be determined based solely on a physician's opinion" (emphasis in original). Rather, he argues, a finding of MMI is to be determined "upon medical proof that the employee's condition has stabilized and will likely show little further improvement with consideration of factors including history of improvement, current treatment and proposed treatment." We are not persuaded that the compensation judge erred in her conclusion or that her conclusion is clearly erroneous.

Minn. Stat. § 176.011, subd. 25, defines MMI as "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability" (emphasis added). A finding of MMI is one of ultimate fact, Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528, 41 W.C.D. 634, 639 (Minn. 1989), and we agree that the statutory phrase "medical probability" does mean more than the opinion of a single physician. Id., 435 N.W.2d at 529, 41 W.C.D. at 639. "MMI is a controlling legal standard and, therefore, it is the responsibility of the compensation judge to evaluate the employee's condition as documented by medical records, medical opinions and other data and circumstances," such as the history of the employee's improvement, his current treatment, his pre-existing conditions, his proposed treatment, vocational experts' statements, and testimony at the hearing. Id.

The compensation judge in this case explained expressly in her Memorandum that she based her conclusion not only on the opinion of Dr. Barron but also on the clinical findings of both that doctor and the employee's treating physician, Dr. Lemaster. These findings and the records in which they are contained very reasonably support the judge's decision. Dr. Lemaster's treatment notes for October 25, 1999, indicate that the employee had been "pretty much symptom free" for about two weeks, could "forward flex and touch the floor with his hands," had "good dorsiflexion, good side to side motion," had "no palpable tender areas," and had "[n]o motor sensory deficit in the lower extremities," although he did have markedly reduced knee jerks on the left compared to the right. At his examination by Dr. Barron four days later, the employee was found to be walking without any limp, to be able to "jump in the air without any pain in his lumbar spine," and to have apparently normal range of lumbar motion, including flexion, extension, and right and left side bending. Further, leg raising tests and sensory examinations of both lower extremities were normal, all motor groups in the lower extremities were found to have excellent strength, there were no areas of acute tenderness, and there was no evidence of spasm. Dr. Lemaster's diagnosis of the employee at the time remained what it had been from the date of injury - - "low back pain," and so it remained up to the date of hearing. By that date, by an unappealed finding based on the employee's testimony, the employee had experienced at best a 1% to 2% improvement in his subjective low back complaints since October 25, 1999. With regard to treatment that was being proposed on October 25, 1999, we would only note the judge's express inference that Dr. Lemaster's recommendation of continued physical therapy was merely to maintain the employee's condition at its current level. This was not an unreasonable conclusion, given the slow but steady improvement in the employee's condition over the course of forty-six physical therapy treatments over a four month period and the apparent plateau of that condition by October 25, 1999.

It is clear from the evidence that the compensation judge did not erroneously base her decision solely on a single medical opinion. Nor, we conclude, did the judge fail "to evaluate the employee's condition as documented by medical records, medical opinions and other data and circumstances." This is true notwithstanding the fact that Dr. Lemaster nominally upgraded the employee's restrictions category from "sedentary" to "light work." We would reiterate in this regard that a finding of MMI is one of ultimate fact, requiring consideration of many factors, no single one of which is normally dispositive. Cf. Hammer, 435 N.W.2d at 529, 41 W.C.D. at 639. In light of all of the evidence of record, we conclude that substantial evidence supports the judge's finding that the employee did not experience any significant improvement in his condition after October 25, 1999. Therefore, it was not unreasonable for the judge to find that the employee reached MMI on November 22, 1999, with service of Dr. Barron's report dated October 29, 1999. See Perry v. Combustion Engineering, slip op. (W.C.C.A. Oct. 29, 1997) (minimal improvement which may have occurred, or which might conceivably occur, after service of MMI does not necessarily constitute "significant" improvement under the statute). And therefore we affirm. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.