

DENNIS MEYER, Employee/Appellant, vs. OLD DUTCH FOODS and ZURICH-AM. INS. CO., Employer-Insurer and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 22, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the compensation judge found the employee to be not credible and that the employee had give inaccurate histories for various medical and vocational reports, the compensation judge could reasonably conclude that there was no reliable evidence of the extent of the employee's emotional/psychological disability, therefore, substantial evidence supports the compensation judge's finding that the employee was not permanently and totally disabled.

Affirmed.

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

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's determination that the employee has not been permanently totally disabled since September 7, 1996 as a result of his work injury on May 4, 1971. He further appeals from the compensation judge's determination that certain medical treatments were neither reasonable and necessary, nor causally related to the employee's work injury of May 4, 1971. We affirm.¹

BACKGROUND

On May 4, 1971, the employee, Dennis Meyer, then age 18, sustained a severe injury to his right leg while working for Old Dutch Foods, the employer. He sustained an open commuted fracture of the distal one-third of the right tibia and fibula, and required multiple hospitalizations and surgeries. The employee was paid various workers' compensation benefits for a number of years. Subsequently, in 1977, the employee returned to work, and was employed

¹ The employee's Notice of Appeal listed both the compensation judge's denial of payment for certain medical expenses and denial of the employee's claim for permanent total disability benefits. The employee has briefed only the permanent total disability issue, however, and we therefore address only that issue. See Minn. R. 9800.0900 (issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court); see also Anderson v. Stremel Bros., 47 W.C.D. 99 (W.C.C.A. 1992).

in a number of different jobs until November 1990. The employee has not worked since. In 1991 or 1992, the employee applied for and was found eligible for Social Security disability benefits, effective November 16, 1990, based on severe alcohol dependence, depression, bulimia, and the residuals of his severe right leg fracture.

On May 4, 1995, the employee filed a claim petition seeking permanent total disability benefits from and after April 5, 1990. The employee alleged that he was totally disabled as the result of his May 4, 1971 “right leg fracture with non-union and chronic pain, resulting in chemical dependency, bulimia and depression.” The matter was heard by a compensation judge at the Office of Administrative Hearings on September 6, 1996. In her decision, served and filed October 3, 1996, the compensation judge found, among other things, (1) that the employee was not a credible historian; (2) that the employee’s bulimia had pre-existed his 1971 work injury, and that the work injury had not aggravated or accelerated the employee’s bulimic condition; (3) that the employee is an alcoholic and that his alcoholism from and after April 5, 1990 was causally related to his May 4, 1971 work injury; and (4) that the employee’s alcoholism significantly interfered with his ability to maintain substantial gainful employment. The compensation judge further found, however, that the employee was “ineligible” for workers compensation benefits on the basis that the employee had unreasonably failed to pursue treatment for his alcoholism by attending AA or a similar program. Both the employee and the employer and insurer appealed.

Additional background in this case is included in the court’s original decisions, served and filed June 23, 1997 and February 17, 1998, Meyer v. Old Dutch Foods, slip op. (W.C.C.A. June 23, 1997 and W.C.C.A. February 17, 1998). In a decision served and filed on June 23, 1997, this court affirmed the compensation judge’s findings with respect to the employee’s credibility, his bulimia, and the causal relationship between the employee’s alcoholism and his work injury. The compensation judge had not specifically addressed the employee’s claim that he suffered from depression causally related to his May 4, 1971 work injury, and so the court remanded that issue for determination. In addition, the court could not ascertain the factors considered by the compensation judge in determining that the employee had unreasonably refused recommended medical treatment. We further noted that this issue was intertwined with the employee’s claim of depression, and with the issue of whether the employee was totally disabled from work during any part of the period in dispute as a result of his work-related conditions, an issue on which the judge made no specific finding. The court therefore remanded those issues for reconsideration and redetermination.

In a findings and order issued on remand on November 3, 1997, the judge found that the employee suffered from depression, in varying degrees, from at least October 1975 to the date of hearing, and that the May 4, 1971 work injury was a substantial contributing factor in the employee’s depression. This finding was not appealed. The judge also found that the employee had failed to prove that he was temporarily or permanently totally disabled as a result of his May 4, 1971 injury from April 5, 1990 through the hearing on September 6, 1996. The compensation judge further found that employee had unreasonably failed to pursue recommended medical treatment for his alcoholism, and that his failure to undertake such treatment suspended any entitlement to wage loss benefits during this same period. The employee appealed from that decision. This court affirmed the compensation judge’s determination that the employee had unreasonably failed to pursue medical treatment for his alcoholism, and that such failure suspended

any entitlement he might otherwise have had to wage loss benefits during that same time period. This court therefore affirmed the compensation judge's denial of the employee's claim for permanent total disability benefits from April 5, 1990 through the date of the original hearing on September 6, 1996. By order served and filed July 23, 1998, the Minnesota Supreme Court affirmed the decision of this court.

The employee has undergone significant additional medical treatment and evaluations since the original hearing in this matter on September 6, 1996, as outlined below. The evidence submitted into the record at hearing is very extensive, and includes reports outlining medical treatment, psychological and psychiatric evaluations and vocational evaluations the employee has undergone since the original hearing in 1996. The record also includes testimony from the employee, Brian Scanlon, a friend and Alcoholics Anonymous sponsor of the employee, Richard Ugland, a vocational and rehabilitation psychologist, and Marilyn Bronner, M.S.W., the employee's therapist at the Ramsey County Mental Health Center.

On September 10, 1996, the employee started a chemical dependency treatment program at Unity Hospital. According to intake records, the employee apparently started the program, at least in part, to ensure the continued payment of Social Security disability benefits. (Ee Ex. C, Clinical Summary and Treatment Recommendation Notes: "Required by Social Security to complete [treatment] or lose benefits;" Presenting Problem/Reason for Assessment section: "Social Security's Rule #25 compliance.) (Finding No. 2.) A patient information sheet from Unity Hospital states that "treatment again the fifth time is no [sic] recommended by two treatment centers and three doctors. Social Security sent me here without seeing my medical records.")² The employee discontinued that program before completion. On March 5, 1998, the employee enrolled in another chemical dependency program at Unity Hospital after he experienced some "DT's." (Ee. Ex. D, patient admission statement that "DT's scared [patient], he wants to come into [treatment].") On March 15, 1998, the employee checked himself out, against medical advice. (Ee Ex. D.) According to the chart notes, the employee left this program because he believed it did not adequately address his eating disorder; he intended to enroll in a program at Fairview-University Medical Center, better suited to his needs.

In late June 1998, the employee began the Dual Disorder Treatment Program, to treat his bulimia and alcoholism, at Fairview-University Medical Center. He successfully completed that program in January 1999, (Ee Ex. U), remaining abstinate from alcohol during this six-month program and significantly curtailing his bingeing and purging during this period. (Ee Ex. G.) While he was in the dual disorder program, the employee was also evaluated for chronic pain treatment at Fairview-University Medical Center. Upon completion of the dual disorder

² On June 21, 1996, the Social Security Administration sent the employee a notice of termination advising him that his disability benefits would end, effective January 1, 1997. That notice stated that a "new law says that effective January 1997, we can no longer pay Social Security disability benefits to people whose disability is based on drug addiction and/or alcoholism." (Ee Ex. B.) The employee appealed by filing a claim with the Social Security Administration on June 26, 1996, marking a preprinted statement that "I am disabled without considering drug addiction or alcoholism." Ee Ex. B.)

program at Fairview-University Medical Center, the medical staff recommended that the employee participate in Overeaters Anonymous or Bulimia Anonymous, and that he consider living in a structured living setting, such as a half-way house. The employee did not follow up with any of these suggestions. He did, however, commence treatment at the Ramsey County Mental Health Clinic in August 1998, at the recommendation of Fairview-University Medical Center staff.

At Ramsey County, the employee received counseling from Marilyn Bronner, L.S.W., a clinical social worker, until January 2000. Ms. Bronner diagnosed the employee as having major depressive disorder, recurrent, moderate; bulimic nervosa (purging type); and alcoholic dependency. Ms. Bronner terminated the therapeutic relationship in January because she thought the employee was no longer benefitting from it. Ms. Bronner testified that

I think the pattern was so ingrained and had been going on so long that anything and everything I tried did not seem to make any difference. It was emotional support for him but it wasn't enough to change any of the behaviors.

(Ee. Ex. U, Depo, Marilyn Bronner, p. 19.)

Since the initial hearing on this matter in June 1996, the employee has also undergone additional psychiatric and psychological evaluations, and vocational evaluations. On November 27, 1999, he underwent a psychiatric examination by Alford S. Karayusuf, M.D., who previously examined the employee on April 12, 1991. According to Dr. Karayusuf's 1999 examination report, the employee's chief complaints were of chronic pain, depression, eating disorder and alcoholism. Dr. Karayusuf's conclusions concerning the employee were as follows:

He is able to understand, retain, and follow simple instructions. He is restricted to brief, superficial interactions with fellow workers, supervisors and the public. He is generally restricted to performing simple, routine, repetitive, concrete, tangible tasks. The claimant would not be able to maintain pace and persistence as a consequence of the fact that he would take time off in the middle of a workday to go and gorge himself with food and take the time after gorging himself with large amounts of food to proceed to vomit. This will take up so much of his time that no employer would allow him to stay on the job and he would be fired.

(Ee. Ex. K.)

On February 16, 2000, Richard Ugland, EdD, L.P., conducted an employability assessment on the employee. Dr. Ugland concluded that the employee has been incapable of doing more than sporadic employment, producing insignificant income, since September 6, 1996. He stated that "At no time in that period could he have been considered to have a positive prognosis for improvement in his employability." Dr. Ugland concluded that, based upon the employee's constant complaints of leg pain, the employee's 1971 work-related injury continues to contribute to his behavioral and psychological dysfunction. Dr. Ugland also determined that based upon the

employee's psychological history, he is unable to sustain rehabilitation progress, and therefore requiring the employee "to go through a job search in order to determine whether he is employable is unnecessary and wasteful." Finally, Dr. Uglund concluded that "[I]f mature and disciplined participation in rehabilitation is expected from [the employee] as a condition of judging his worthiness for financial aid, I believe that the effort will fail. He will at best participate briefly, with long periods of withdrawal and self-isolation. His patterns are now quite fixed and to suddenly expect these to change is now probably futile." (Ee. Ex. O.)

On April 8, 2000, Paul T. Wicklund, M.D., conducted an orthopedic evaluation of the employee at the request of the employer and insurer. Dr. Wicklund diagnosed the following: alcoholism, bulimia, healed right tibia fracture and fibula fracture, restricted right ankle motion secondary to fractured tibia, healed right clavicle fracture, and healed anterior cervical fusion. Dr. Wicklund concluded that the only physical work restrictions he would assign to the employee would be avoiding standing for more than two hours at a time without a five minute break, and avoidance of climbing or lifting more than 50 pounds. In Dr. Wicklund's opinion, the "sequelae that have resulted including his alcoholism and bulimia in my opinion are totally unrelated to the fracture or any of the treatment that he received as a result of that fracture." In terms of the employee's orthopedic condition, Dr. Wicklund recommended home exercise to maintain good lower extremity strength, and concluded that the employee does not have a physical problem which would prevent him from working, and that he is fully employable.

On May 10, 2000, Dr. Keith E. Hartman conducted a psychiatric evaluation of the employee at the request of the employer and insurer. He initially conducted an evaluation on June 3, 1996. In his report, Dr. Hartman concluded that he did not find that the employee's efforts at Ramsey Hospital or Fairview-University Medical Center were aimed at making any substantial changes, but instead were aimed in satisfying court mandates that he at least "try." Dr. Hartman concluded that he found no psychiatric barrier to employment for the employee and that the employee's current social function is adequate for employment. Dr. Hartman further determined that:

If orthopedics finds no barrier to his employment, to the best of medical certainty I see no psychiatric barrier either. Mr. Meyer may benefit from Zoloft. That he claims to take this popular medication proves neither he was once depressed nor that he is currently disabled by mood disorder. Current social function seems adequate for employment. Mr. Meyer seems to care about his health these days, as shown by his use of many medications for chronic physical conditions. His appearance and physical examinations are not that of a heavy drinker or compulsive vomiter.

What does stop the patient is years of idleness and ingrained dependency on "The System." Admitting any improvement in alcoholism or bulimia puts at risk his Social Security benefits, not to mention the Worker's Compensation claim. The long pattern of lying for secondary gain continues.

(Er. Ex. 3.)

On March 15, 1999, the employee filed a claim petition, claiming entitlement to permanent total disability benefits from September 7, 1996 to the present and continuing, and entitlement to various medical expenses. In their answers to the employee's claim petition, the employer and insurer and the Special Compensation Fund denied liability for the employee's claims. The Minnesota Department of Human Services intervened for reimbursement of payment of Medical Assistance/Minnesota Care and payments of general assistance. In addition, Fairview-University Medical Center intervened for reimbursement of medical care provided to the employee.

Hearing was held on August 1, 2000. In her Findings and Order served and filed August 30, 2000, the compensation judge determined that the evidence did not establish that the employee had been incapable of sustaining substantial gainful employment as a result of his work injury on May 4, 1971, during the period of September 7, 1996 to the date of the hearing on August 1, 2000. The compensation judge did not find the employee's history to be credible. She noted discrepancies in the employee's self-reported history. In an unappealed finding, she found that the employee had made no search for work between September 7, 1996 and the hearing on August 1, 2000. She also concluded that it appeared the employee's current unemployment was "at least as likely to be a result of an unwillingness to work as it is to be the result of restrictions/limitations associated with his May 4, 1971 work injury." Finally, the compensation judge also concluded that "secondary gain appears to be a strong motivator in the employee's self-assessment. Working puts his Social Security benefits at risk and would impact his claim for workers' compensation benefits." (Memo. p. 7.)

The compensation judge concluded that the medical treatment that the employee received in the dual disorder treatment program and the pain clinic at Fairview-University Medical Center was reasonable, necessary and causally related to the employee's work injury of May 4, 1971. The compensation judge also concluded that the treatment the employee underwent at Ramsey County Mental Health Clinic between August 1998 and August 2000 had been reasonable, necessary and causally related to the employee's work injury of May 4, 1971.

The compensation judge determined that the work injury of May 4, 1971, was not a substantial contributing factor in the employee's participation in chemical dependency treatment at Unity Hospital in 1996 and 1998. She concluded that curing or relieving the consequences of that injury was not a factor in the employee's decision to enroll in those programs, and that the employee participated in those programs solely to satisfy Social Security requirements. The compensation judge also concluded that the chemical dependency treatment at Unity Hospital in March 1998 was not reasonable, in view of the employee's lack of commitment to the program and his unwillingness to follow through with that program. She therefore denied reimbursement of those medical expenses to the intervenors.

The employee appeals the denial of permanent total disability benefits. The employee also appealed Findings Nos. 4 and 8 regarding denial of medical expenses but did not brief those issues and therefore waived his appeal of those issues. See Minn. R. 9800.0900.

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 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 denied the employee's claim for permanent total disability benefits from September 7, 1996 to date of hearing. "[A] person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income." Schulte v. C. H. Peterson Constr., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967); see also Minn. Stat. § 176.101, subd. 5a(1) and (b). The compensation judge concluded that "[t]he preponderance of the evidence fails to establish the employee has been incapable of substantial gainful employment as a result of the work injury on May 4, 1971 during the period September 7, 1996 to the time of hearing." (Finding No. 23.)

The employee argues that he is permanently totally disabled as a substantial result of his May 4, 1971 work injury, and relies primarily upon the opinions of three medical and vocational experts who determined that the employee is incapable of work. Dr. Karayusuf, the physician who examined the employee on November 27, 1999 for Social Security re-evaluation, concluded that the employee was unable to work as a result of his "food behavior." (Ee Ex. K.) Marilyn Bronner, the employee's therapist at the Ramsey County Mental Health Clinic, concluded that the employee is incapable of work and that his May 4, 1971 work injury and its consequences are a substantial contributing factor in the employee's incapacity. (Ee Ex. U.) In addition, Dr. Richard Ugland, the employee's vocational expert, reached the same conclusion. However, in her memorandum, the compensation judge concluded that all of those individuals relied on information which she considers to be suspect: "the employee's self-reported history." The compensation judge stated that "I consider the history as reported by the employee suspect for basically three reasons."

First, in her memorandum, the compensation judge outlines the medical and vocational reports in evidence which contain varying and inconsistent histories of the employee's

alcohol consumption and frequency of daily bingeing/purging. Upon review of those records, we concur that discrepancies do exist concerning the amount of alcohol consumed and the frequency of eating/purging binges. The compensation judge concludes that due to those discrepancies, there is no reliable proof of the extent of the employee's emotional/psychological disability. She concluded that without proof of the extent of the employee's disability or "some evidence of a reasonable, diligent job search, [the compensation judge considered] a finding of total disability extremely speculative."

It is the trier of fact's responsibility to assess the credibility of a witness. Tolzmann v. McCombs-Knutson Associates, 447 N.W.2d 196, 198, 42 W.C.D. 421, 424 (Minn. 1989) (citing Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225 (Minn. 1989) and Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988)). It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990). Rather, we must give due weight to the compensation judge's opportunity to observe the witness and judge their credibility. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Based upon the compensation judge's assessment of the employee's credibility, which was formulated in part from her review of the varying histories outlined in the medical reports, it was not unreasonable for the judge to conclude that the employee had not proven that he has been permanently totally disabled since September 6, 1996 as a substantial result of his May 4, 1971 injury.

Second, the compensation judge concluded that there is a volitional component to the employee's current unemployment. She bases that conclusion in part on her review of the medical chart notes from the Fairview University Medical Center outpatient chemical dependency program, and the employee's history provided during a psychiatric diagnostic assessment at Ramsey County Mental Health Center.

The compensation judge states in her memorandum that:

[I]t appears his current unemployment is at least as likely to be a result of an unwillingness to work as it is to be the result of restrictions/limitations associated with his May 4, 1971 work injury. He fears change. (Employee Exhibit 1: 8/24/98 note.) The evidence suggests he has settled into the roll of "victim by choice" as a means of avoiding responsibility, despite having adequate coping skills to self-intervene and positively change his behavior. (Employee Exhibit G: 12/22/98 and 1/19/99 notes.)

(Memorandum, p. 6.)

The compensation judge also concluded that secondary gain appears to be a strong motivator in the employee's self-assessment. The compensation judge did not expressly adopt Dr. Hartman's opinion that the employee "continues to exaggerate bulimia and alcoholism to promote financial goals." However, it is evident from her finding that she relied upon the

employee's treatment records and Dr. Hartman's opinion, and she is entitled to do so. See, Nord v. Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 371 (Minn. 1985) (it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony).

We conclude that, under these facts, it was reasonable for the compensation judge to find that the employee has not been permanently totally disabled since September 6, 1996 as a substantial result of his May 4, 1971 injury. That conclusion is supported by the medical opinions of Drs. Hartman and Wicklund. The employee has emphasized, with some merit, the fact that Drs. Karayusuf and Ugland and Ms. Bronner all concluded that the employee is incapable of sustaining employment as a result of his injury. However, the compensation judge considered the employee's self-reported history, as provided to those three medical and vocational witnesses, to be suspect and therefore did not rely on those opinions. The facts upon which an expert relies for his or her opinions must be supported by the evidence. McDonald v. MTS Sys. Corp., 43 W.C.D. 83 (W.C.C.A. 1990), summarily aff'd (Minn. July 13, 1990). In addition, the issue of an employee's total disability from working remains one of ultimate fact for the compensation judge. Garza v. Alamco Wood Prods., slip op. (W.C.C.A. June 9, 1993). A finding based on the credibility of a witness will not be disturbed on appeal unless such a determination is clearly and manifestly contrary to the evidence. The compensation judge's determination that the employee was not permanently totally disabled since September 7, 1996, as a substantial result of his May 4, 1971 injury, is supported by substantial evidence of record and is not clearly erroneous. We therefore affirm the decision of the compensation judge. See, Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.