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2017 IL App (4th) 160303WC-U

Order filed

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

FILED
August 14, 2017
Carla Bender
4th District Appellate
Court, IL

WORKERS' COMPENSATION COMMISSION DIVISION

RICHARD OLMSTED,)	Appeal from the Circuit Court
)	of the Seventh Judicial Circuit,
)	Sangamon County, Illinois
)	
Appellant,)	
)	
v.)	Appeal No. 4-16-0303WC
)	Circuit No. 14-MR-1382
)	
ILLINOIS WORKERS' COMPENSATION)	Honorable
COMMISSION, <i>et al.</i> , (Freeman United)	Leslie Graves,
Coal Mining Co., Appellees).)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Harris and Moore concurred in the judgment.

ORDER

¶ 1 *Holding:* The matter is remanded to the Commission so it may determine whether the claimant has proven that he has CWP and if so, the appropriate level of compensation.

¶ 2 The claimant, Richard Olmsted, appeals from a decision of the Illinois Workers' Compensation Commission (Commission) denying his claim for benefits under the Illinois Workers' Occupational Disease Act (Act) (820 ILCS 310/1 *et seq.* (West 2010)). The

Commission found that the claimant failed to prove he suffered from an occupational disease, specifically coal workers' pneumoconiosis (CWP), chronic bronchitis, and/or obstructive ventilator defect and that he failed to prove that his current condition of ill-being was causally related to his employment with Freeman United Coal Mining Co. (employer). The Commission's decision reversed the award of the arbitrator, which found that the claimant suffered from an occupational disease (CWP) causally related to his employment and awarded permanent partial disability (PPD) to the extent of 10% of the person as a whole (\$636.15 x 50 weeks). The claimant sought judicial review of the Commission's decision in the circuit court of Sangamon County. The circuit court confirmed the Commission's ruling. The claimant then filed this timely appeal.

¶ 3 The claimant raises the following issues on appeal: (1) whether the Commission's finding that the claimant failed to prove that he suffered from an occupational disease related to his coal mining employment was against the manifest weight of the evidence; (2) whether the Commission's finding that the claimant failed to prove that his current condition of ill-being was causally related to his employment was against the manifest weight of the evidence; and (3) whether the claimant was entitled to a wage differential award.

¶ 4 **FACTS**

¶ 5 At the February 13, 2014 hearing, the claimant testified that he was 59 years old, and had worked as an underground coal miner for 31 years. He worked his last shift on August 30, 2007, and he was 53 years old at that time. While working at the mine, he worked as a repairman and performed maintenance underground. On his last day of work, the mine shut down. He placed himself on a recall panel for an above ground position only, which he believed would result in his not being called back for any work. He was on the bottom of the list for above ground work

and he was never recalled, due to his lack of seniority. He testified that if he had said he would work underground, he would have been given the worse job because of his lack of seniority and he did not want that. He testified that he would not take a coal mining job today because of the exposure to dust and physical exertion. At the time the mine shut down, the claimant had no plans to retire and he was planning on continuing to work at the mine. He received his full pension on November 7, 2007. In the first year after the mine shut down he performed some mechanical work at his home on a limited basis. He has had a business for the last 25 years called Richard's Machine Shop where he put in 8-16 hours a week. In February of 2011, the claimant began working as a full-time road commissioner. The most he made in this job was \$17,400.00. He believed that this was the best job he could get since he did not complete high school and did not obtain a G.E.D. He left the road commissioner job in May of 2013.

¶ 6 The claimant further testified he noticed he was having breathing problems approximately ten years before the mine shut down. He testified that his breathing problems got progressively worse. He experienced shortness of breath with exertion. He had a cough with phlegm production. He testified that since leaving the mine his condition gradually worsened. He estimated that he would walk two blocks on level ground or walk up two flights of stairs before he became short of breath or had to stop and rest. He testified that he cannot walk as far and he cannot do as much exertion as he could in the past. He testified that he is a life-long non-smoker.

¶ 7 The claimant submitted medical treating records going back to 1988. A summary of the records showed that: the claimant had sinusitis on February 11, 2000, April 3, 2000, September 18, 2000, October 17, 2002, November 8, 2002, November 28, 2003, December 1, 2003, March 3, 2004, October 14, 2004, March 16, 2006, March 20, 2006, October 23, 2006, November 16, 2006, April 14, 2007, April 19, 2012, and November 12, 2012. He had a viral upper respiratory

infection on October 31, 1994, February 27, 1995, December 8, 1997, October 19, 2001, April 5, 2011, April 20, 2011, and October 10, 2011. He had an upper respiratory infection with acute bronchitis on November 15, 1990, November 19, 1990, January 24, 1992, April 20, 1992, March 1, 1993, October 25, 1993, January 4, 2000, December 1, 2004, December 8, 2005, August 16, 2006, December 3, 2007, and March 8, 2013. He had a cold with a non-productive cough on December 13, 2006. He complained of experiencing shortness of breath on March 8, 2013, and April 2, 2013. On March 25, 2013, the claimant treated with an allergist, Dr. Bernard Zeffren, who noted that the claimant had an FEV1 breathing test rate of 78%, which improved to 83% after use of inhaled bronchodilator.

¶ 8 The record indicated that the claimant participated in a coal worker' monitoring program that included x-rays taken on May 29, 1998, and May 7, 2007. Both films were read by qualified B-reader/radiologists, and all readers reported the films negative for CWP.

¶ 9 The record also contained an x-ray taken on February 14, 2000, which showed the claimant's lungs to be normal in all parameters. Another x-ray, taken on October 9, 2002, was also deemed to be within normal parameters. Additional x-rays were taken on September 9, 2004, October 12, 2005, April 24, 2008, and February 23, 2010. These four x-rays were interpreted by five experts whose reports and/or depositions comprised the medical evidence related to the claimant's claim of occupational disease and impairment.

¶ 10 The claimant presented the report of Dr. Henry Smith, a B-reader/radiologist, who reported the presence of mild CWP at a profusion of 1/0. Dr. Michael Alexander, also a B-reader/radiologist, reported CWP category 1/0, with opacities in all but the lower left lung. Dr. Robert Cohen, a B-reader/pulmonologist opined that the February 23, 2010, x-ray was positive for CWP category 1/0. In addition to reading the x-rays, Dr. Cohen examined the claimant. The

claimant gave a history of 30 years of employment in coal mining with exposure to coal dust. He reported shortness of breath beginning approximately 13 years prior to the examination. The claimant further reported that the shortness of breath was exacerbated by heavy lifting or brisk walking. Dr. Cohen ordered pulmonary function tests that he interpreted to indicate mild irreversible obstructive defect. A functional exercise test indicated normal work capacity. Dr. Cohen opined that the claimant had CWP and chronic bronchitis, both related to his 30-year history of coal dust exposure.

¶ 11 By way of evidence deposition, Dr. Cohen noted that the claimant's x-rays showed opacities in the mid and lower lungs, but no opacities in the upper lungs. He acknowledged that the predominant medical diagnostic protocol for CWP called for opacities to present first in the upper lung field and to progress to the mid and lower lung field. Dr. Cohen opined, however, that the lack of opacities in the upper lung field did not preclude a diagnosis of CWP, relying upon a recent research paper indicating that CWP could begin in the middle or lower lungs.

¶ 12 At the request of the employer, Dr. Jerome Wiot, a B-reader/radiologist reviewed the claimant's x-rays. Dr. Wiot opined that the x-rays were either not readable due to overexposure, or showed no evidence of CWP. In an evidence deposition, Dr. Wiot opined that the claimant did not have CWP. He observed that the readable films were negative for CWP. He also testified in an evidence deposition that the consensus of medical opinion was that CWP begins in the upper lung field and then progresses into the mid and lower zones.

¶ 13 Also at the request of the employer, Dr. David Rosenberg, a B-reader/pulmonologist, reviewed the x-rays as well as the claimant's medical records, including the report of Dr. Cohen. He did not personally exam the claimant. Dr. Rosenberg opined that none of the films revealed the presence of CWP. In his evidence deposition, Dr. Rosenberg also noted the current medical

consensus that CWP begins in with opacities in the upper lung zones, and then, as the condition progresses, spreads to the middle and lower lungs. Dr. Rosenberg was of the opinion that the article referred to by Dr. Cohen had not been subjected to peer review. Dr. Rosenberg further noted that claimant exhibited a long history of sinusitis and bronchitis, which he opined were not related to coal dust exposure since these symptoms would not have persisted after the claimant left the mine.

¶ 14 Following Dr. Rosenberg's deposition, the claimant sought additional testimony from Dr. Cohen, who issued a written report stating his disagreement with Dr. Rosenberg's opinions regarding the state of published peer-reviewed literature concerning diagnosis CWP and whether chronic bronchitis would resolve after the claimant no longer mined coal. Dr. Cohen was subsequently re-deposed and stated his opinions in disagreement with Dr. Rosenberg.

¶ 15 The arbitrator found that the claimant sustained CWP related to his exposure to coal dust and other substances while working as a coal miner for approximately 30 years. The arbitrator's determination was based on his finding that the opinions of Drs. Cohen, Smith and Alexander as to occupational disease and causation were more persuasive than those of Drs. Wiot and Rosenberg. The arbitrator further noted that "[i]n spite of the fact that [the claimant] had a long history of sinusitis and bronchitis, [the claimant] was a non-smoker, and the medical evidence does support the diagnosis of mild case [CWP]." The arbitrator then rejected the claimant's argument in favor of a wage differential award and instead awarded a PPD benefit equal to 10% of the person as whole.

¶ 16 The employer appealed the arbitrator's decision to the Commission, which unanimously rejected the arbitrator's award. The Commission noted that the arbitrator's finding that the claimant was entitled to benefits was based entirely upon the medical evidence and the

arbitrator's finding that "the opinions of Drs. Cohen, Smith and Alexander were more persuasive than Drs. Wiot and Rosenberg." The Commission further noted, however, that "the [a]rbitrator did not provide a basis for accepting one set of opinions over another." The Commission then noted in great detail the observations from of the various x-rays that each medical expert relied upon in reaching an opinion that the claimant either had or did not have CWP. The Commission noted that the experts "depart company *** on the issue of whether or not the opacities must first develop in the upper zones prior to developing in the lower zones, and which particular zones, if any, the opacities are found in." The Commission noted that the question hinged on the legitimacy of the article relied upon be the claimant's experts and whether it had been peer reviewed. The Commission further noted that a second issue of dispute was "whether B-readers results need to parallel one another or not or whether it is sufficient to find the x-rays to be positive or negative."

¶ 17 After framing the issues in terms of the weight to be accorded the medical evidence and conflicting medical expert opinion as the crux of the issue, and devoting 10 of the total 12 pages of its decision to an analysis and discussion of the medical records and expert medical opinion, the Commission inexplicably stated that "[g]iven what had been presented to the Commission, the Commission will not base its determination on which expert should be given more weight than another." The Commission continued, "[w]ith that said, the Commission turns to the issue of whether there is disablement per the [o]ccupational definition as set forth in Section 1(d) and 1(e) of the Act."

¶ 18 The Commission then found that the claimant: 1) failed to prove that he sustained an occupational disease arising out of and in the course of his employment or which had become aggravated and rendered disabling as a result of the exposure of his employment; and 2) failed to

prove there is a causal connection between his current condition of ill-being and the exposure on August 30, 2007 [the claimant's last day of exposure]." In support of these findings, the Commission noted: 1) the claimant did not leave the mine because he was disabled, but left because the mine was shut down; 2) the claimant's testimony that he experienced shortness of breath on exertion for 10 years is contradicted by the lack of any history of such contained in the medical records; 3) the first documented report of a treating physician of shortness of breath were on March 13, 2013, and April 2, 2013, *i.e.*, approximately six years after the date of last exposure; 4) the claimant took steps to avoid any recall to underground work, not due to breathing issues, but only to avoid undesirable work; 5) the claimant took retirement within three months of leaving the mine, continuing his small engine repair business and serving as road commissioner; 6) the claimant did not seek any medical treatment for breathing issues for over six years after leaving the mine; 7) the claimant reported instances of shortness of breath prior to the hearing, which were treated by an allergist who reported pulmonary functions within normal range that were improved by the use of a bronchodilator. The Commission concluded, "[g]iven these facts the Commission finds that [the claimant] was not disabled as defined by Section 1(e) of the Act and did not sustain an occupational disease resulting in disablement as defined by Section 1(d) of the Act."

¶ 19 The claimant then sought judicial review of the Commission's decision in the circuit court of Sangamon, which confirmed the Commission's ruling. The claimant then filed this timely appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, the claimant argues that the Commission's findings that he failed to establish that he suffered from an occupational disease arising out of and in the course of his employment

and failed to establish that he suffered a disablement as a result of his condition were both against the manifest weight of the evidence and erroneous as a matter of law. He maintains that the evidence clearly established that he was diagnosed with CWP and that once a diagnosis of CWP is established, both causation and disablement are proven by the diagnosis. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120564WC. The claimant further maintains that the Commission erred in considering the facts regarding his shortness of breath and his motivation for leaving mining and seeking retirement in rendering its causation and disablement decisions.

¶ 22 The employer maintains, to the contrary, that the Commission rejected the diagnosis of CWP and was therefore correct in relying upon the facts regarding the claimant's shortness of breath and motivation for leaving mining and seeking retirement in reaching the conclusion that the claimant failed to establish that his condition of ill-being was causally related to his employment and that he was currently disabled. *Hicks v. Industrial Comm'n*, 251 Ill. App. 3d 320, 326 (1993).

¶ 23 The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact for the Commission to determine, and its determination will not be overturned unless it is against the manifest weight of the evidence. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469 (1994); *Plasters v. Industrial Comm'n*,

246 Ill. App. 3d 1, 8 (1993). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *Hosteny v. Illinois Worker's Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). The Commission's determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 856-57 (2004). For a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 539 (2007).

¶ 24 The claimant maintains that he proved by a preponderance of the evidence that he suffered from three distinct occupational diseases: CWP, chronic bronchitis, and obstructive ventilator defect, each of which were causally related to his employment. The employer maintains, to the contrary, that the Commission found that the claimant failed to establish that he suffered from any compensable occupational disease. A careful reading of the Commission's decision is that both parties are incorrect. It appears that the Commission assumed *arguendo* that the claimant suffered from one or all of these three conditions and then focused on whether the claimant had established that whatever condition he may have suffered was causally related to his employment and resulted in a compensable disablement. This approach was erroneous.

¶ 25 CWP is a slowly progressing lung condition caused by long-term exposure to coal dust and must be proven by medical documentation and opinion testimony. See *Zeigler Coal Co. v. Industrial Comm'n*, 237 Ill. App. 213, 219 (1992); *Monterey Coal Co. v. Industrial Comm'n*, 241 Ill. App. 3d 386, 392-93 (1992). The question of whether a claimant has CWP is a question of fact to be established by competent medical evidence. *Id.* Once it has been determined that a claimant has CWP, the presence of CWP is outcome determinative both as to causation and

disablement. See *Freeman United Coal*, at ¶ 35. Here the Commission left the question of whether claimant had CWP unanswered. Until the Commission determines that the claimant has or does not have CWP, it cannot be determined whether he is entitled to compensation. Therefore, we must remand the matter for the Commission to determine whether or not the claimant has CWP.

¶ 26 Likewise, with regard to whether the claimant suffered from chronic bronchitis or obstructive ventilator defect *causally* related to his employment, the record contained no more than a brief, passing reference to each. It appears from the record that the claimant did suffer from chronic bronchitis, which may or may not have been caused or aggravated by his employment. However, the record established that the symptoms of bronchitis continued for years after the claimant was last exposed to coal dust, leading Dr. Rosenberg to opine that the claimant's chronic bronchitis was not related to coal dust exposure. It should be noted, however, that Dr. Cohen disagreed with Dr. Rosenberg's opinion. Regarding the ventilator defect, the record contains a single reference to a mildly reduced FEV-1 lung function test and only Dr. Cohen's opinion that it may have been related to coal dust exposure. Again, the Commission made no factual determination regarding whether the claimant proved, or failed to prove, that he suffered from a compensable occupational disease. Without a factual determination by the Commission weighing the competing medical evidence regarding the presence or absence of any occupational disease, we cannot determine if the Commission correctly rejected the claimant's claim for compensation.

¶ 27 As the Commission herein correctly observed, the medical evidence regarding the claimant's condition of ill-being and the causal relationship to his employment was closely balanced. As it is the exclusive purview of the Commission to weigh competing medical

testimony (*Steak 'N Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3rd) 150500WC ¶ 43; *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 505 (2004)), we must remand this matter to the Commission with the instruction that it perform its unique function in that regard.

¶ 28 We note that neither party has asked this court to remand the matter to the Commission for a proper weighing of the medical evidence. Rather, each has argued that the Commission correctly, or incorrectly, determined the claimant's eligibility for benefits based upon its weighing of factors such as the presence of absence of a persistent cough and the claimant's motivation for leaving mining and shortly thereafter seeking retirement benefits. We cannot agree with either party. If, as the claimant suggests, he has CWP, he is correct in arguing that the etiology of his persistent cough and whether or not he chose to forego employment for reasons other than his health have no relevance in determining whether he is disabled. *Feeman United Coal*, at ¶ 26. Similarly, if the Commission determined that the claimant failed to prove by a preponderance of the evidence that he suffered from CWP, as the employer suggests (Appellee's brief at p. 28), then the discussion of the etiology of his persistent cough and his reasons for retiring from mining likewise have no relevance. Thus, the appropriate action for this court is to remand that matter to the Commission to weigh the competing medical evidence to determine whether the claimant has established by a preponderance of the evidence that he is afflicted with CWP.

¶ 29 Regarding the claimant's argument that the Commission erred in not awarding him a wage differential benefit pursuant to section 8(d)(1) of the Act (820 ILCS 310/8(d)(1)(West 2010)), since the Commission did not rule on whether the claimant would be entitled to a wage differential award as opposed to percentage of the person-as-a-whole award, it would not be

appropriate for this court to rule on that issue. Rather, it should be addressed by the Commission on remand, if it finds the claimant has established entitlement to PPD benefits. See *Poo-Bah Enterprises v. County of Cook*, 232 Ill. 2d 463, 503 (2009) (on remand, issues not addressed below should not be addressed by reviewing court).

¶ 30

CONCLUSION

¶ 31 The judgment of the circuit court of Sangamon County is vacated; the decision of the Commission is vacated and remanded to the Commission with instruction to determine whether the claimant has established that he suffers from an occupational disease, and to make any further determinations related to that finding.

¶ 32 Vacated and remanded with instructions.