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2017 IL App (5th) 160127WC-U

Order filed: August 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RONALD SUMMERS,	)	Appeal from the Circuit Court
	)	of the First Judicial Circuit,
	)	Saline County, Illinois
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 5-16-0127WC
	)	Circuit No. 15-MR-41
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (The American Coal Co., Appellees).	)	Honorable Todd D. Lambert, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Commission's decision was not against the manifest weight of the evidence where the Commission's decision was supported by the opinions of three qualified physicians and the conflicting evidence did not lead to a clearly apparent opposite conclusion. The arbitrator's erroneous reference to section 19(d) of the Illinois Occupational Diseases Act did not warrant reversal of the Commission's decision. The claimant's argument that he should have received a wage differential award is moot.

¶ 2 The claimant, Ronald Summers, appeals a decision of the Illinois Workers'

Compensation Commission (Commission) denying his claim for benefits under the Illinois

Workers' Occupational Diseases 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. The Commission's decision affirmed and adopted the decision of the arbitrator, who found that the preponderance of the medical evidence and opinion testimony failed to establish that the claimant suffered from an occupational disease. The claimant sought judicial review of the Commission's decision in the circuit court of Saline County. The circuit court confirmed the Commission's decision, finding that it was not against the manifest weight of the evidence. Additionally, the court noted that the arbitrator erred in applying section 19(d) of the Act (820 ILCS 310/19(d) (West 2010)), when he found that the claimant's smoking habits were relevant to the determination that the claimant suffered from an occupational disease. The court noted that, while erroneous as a matter of law, the reference to section 19(d) had no impact on the issue of the presence of occupational diseases. The claimant then filed this timely appeal.

¶ 3 ISSUES

¶ 4 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 arbitrator's reference to the claimant's smoking practices under section 19(d) of the Act requires reversal of the Commission's decision; and (3) if the Commission erred regarding whether the claimant proved that he suffered from an occupational disease, was the claimant entitled to a wage differential award.

¶ 5 FACTS

¶ 6 The following factual recitation is taken from the evidence presented at the arbitration hearing held before Arbitrator Edward Lee in Herrin, Illinois, on August 6, 2014. The claimant

was 67 years old at the time of arbitration. He graduated from West Frankfort High School. He worked for 38 years in underground coal mining. During his coal mining career in addition to coal dust he was exposed to silica, roof bolting fumes, diesel fumes and Trowel-on.

¶ 7 The claimant's last day of exposure in the coal mine was February 21, 2010, at the Galatia mine owned and operated by The American Coal Company (employer). The claimant testified that he was 63 years old on that date and his work classification was "face boss." He further testified that he quit working on that day because he was told that the employer was going to send him to the less desirable location. He testified that his health "was getting bad and he could not breathe and he could not walk that much."

¶ 8 On January 6, 2011, the claimant was examined by Dr. William Houser at the suggestion of his counsel. Dr. Houser had been the medical director of the Deaconess Hospital Black Lung Clinic since it started in 1979. Dr. Houser has conducted 3,000 or 4,000 exams in the Black Lung Clinic. He is board certified in internal medicine, pulmonary disease and critical care medicine. Dr. Houser testified that he has seen hundreds of patients at the request of the claimant's counsel. The claimant was not a patient of Dr. Houser's and he saw him on only one occasion. The arbitrator noted that Dr. Houser was not a certified B-reader. Dr. Houser acknowledged that the claimant informed him that he was a heavy smoker.

¶ 9 Dr. Houser opined that the claimant had coal workers' pneumoconiosis (CWP) and chronic obstructive pulmonary disease (COPD) which were related to the claimant's 35-year history of coal mine employment. Based on his diagnosis of CWP and COPD, Dr. Houser opined that the claimant could have no further exposure to the environment of a coal mine without endangering his health. Dr. Houser testified that independent of causation, exposure to coal and/or rock dust is likely to aggravate COPD and therefore would be a factor that would cause

more rapid progression of the disease process. Dr. Houser testified that in terms of symptoms, shortness of breath and cough with mucus could be some of the symptoms commonly seen with COPD. He testified that at the cellular level, there is no difference between COPD caused by milling versus smoking. Dr. Houser testified that the official position of the National Institute of Occupational Safety and Health (NIOSH) and the Department of Labor was that the relative risk of smoking and coal mining for obstructive lung disease is similar. He testified that the American Thoracic Society's position is that coal mining in a heavily exposed miner can be worse than smoking. Dr. Houser opined that the claimant had clinically significant pulmonary impairment caused by exposure to coal and rock dust as well as cigarette smoking. He also testified that the claimant had radiographically apparent abnormalities that were consistent with pulmonary impairment. Dr. Houser further opined that the claimant would be able to do heavy manual labor if he could go where the labor was to be done safely.

¶ 10 With regard to the claimant's smoking, Dr. Houser opined that the claimant would be in danger for developing chronic bronchitis with continued tobacco use. According to Dr. Houser, the damage caused by tobacco use shows up on spirometry as an obstruction. As for an individual who had an obstruction and continued to smoke, Dr. Houser testified that he would anticipate an accelerated decline in pulmonary function over time. He testified that the claimant's continued use of tobacco was injurious to his health and he told him to stop.

¶ 11 The claimant did not tell Dr. Houser that he left coal mining at the time he did due to respiratory disease or relate an inability to perform the duties of his last job in the coal mine. The only disabling symptom that the claimant related to Dr. Houser was exertion.

¶ 12 Dr. Houser testified that he based his diagnosis of COPD on a FEV1/FVC test result of 68, where a low normal limit would be between 69.5 and 69.3. He observed that the claimant

was “right on the cusp, but he was below the lower limit of normal.” Dr. Houser also testified that the results of bronchodilator testing that was performed on the claimant were within the range of results seen with COPD from many causes, including smoking.

¶ 13 Dr. Henry K. Smith, board certified radiologist and NIOSH B-reader, interpreted the claimant’s chest x-rays of February 17, 2005, and March 2, 2010, as positive for CWP, category 1/1 with opacities in all lung zones. Dr. Smith also interpreted chest x-ray of November 9, 2011, as positive for CWP category 1/1 with opacities in the middle and lower lung zones. Dr. Smith also interpreted a CT scan performed on November 9, 2011. He noted that the findings on the CT scan were consistent with CWP. Dr. Smith testified at the behest of the claimant.

¶ 14 Dr. Robert Cohen, board certified in internal medicine and pulmonology, and certified B-reader, interpreted the February 17, 2005, x-ray as positive for pneumoconiosis, category 1/0 with opacities in all lung zones. Dr. Cohen made an identical interpretation of the chest x-ray dated November 9, 2011. Dr. Cohen also reviewed the CT scan of November 9, 2011, and concurred that the scan was consistent with CWP. Dr. Cohen also examined the x-rays at the request of the claimant.

¶ 15 The record also indicated that Dr. Michael Alexander, a board certified radiologist and B-reader, interpreted the chest x-ray of March 2, 2010, as positive for CWP category 1/1 with P/S opacities in all lung zones. Dr. Alexander was a claimant’s expert.

¶ 16 At the request of the employer, Dr. Jerome F. Wiot, a board certified radiologist and B-reader, interpreted the March 2, 2010, x-ray as completely negative for CWP. Dr. Wiot testified that he had been a B-reader since NIOSH instituted the B-reader program and also served on the American College of Radiology Task Force on Pneumoconiosis beginning in 1969. Dr. Wiot was on the original committee that designed the training for the B-reader program.

¶ 17 Dr. James Castle, board certified in internal medicine and pulmonary disease and a certified B-reader since 1985, also interpreted the March 2, 2010, chest x-ray as negative for CWP. Dr. Castle testified as an expert for the employer.

¶ 18 At the request of the employer, Dr. Christopher A. Meyer interpreted the claimant's chest x-ray films dated February 17, 2005, March 2, 2010, and November 9, 2011. He also reviewed the chest CT scan dated November 9, 2011. Dr. Meyer found the February 17, 2005, film to be inadequate quality, the March 2, 2010, film to be of good quality, and the November 9, 2011, film to be overexposed to the point of limited usefulness. Regarding the 2005 film, Dr. Meyer found no evidence of CWP. He made essentially the same interpretation of the 2010 film, noting only one vague nodule at the left base, for which he recommended repeat examination. He also interpreted the CT scan of November 9, 2011, as showing no indications of CWP.

¶ 19 On November 9, 2011, at the request of the employer, Dr. Lawrence Repsher conducted a review of all relevant medical records and examined the claimant. The claimant reported symptoms indicative of progressive dyspnea on exertion for the preceding several years, as well as cough productive of scant yellow/green phlegm. The claimant denied having asthma, COPD, emphysema, or GERD. Dr. Repsher recorded a smoking history of two packs per day since 1966, although he noted that the claimant's smoking was somewhat less than a pack a day while actually working in the mine. The claimant told Dr. Repsher that estimated he had approximately 90-pack-year cigarette smoking history. Dr. Repsher described such smoking history as significant. Dr. Repsher testified that a significant smoking history is associated with the development of chronic obstructive pulmonary disease. Dr. Repsher opined that the claimant's continued smoking habit was injurious to his health. Dr. Repsher opined that the claimant would see a progression of symptoms and the potential for a decline in his pulmonary function over

time if he continued to smoke. On physical examination of the claimant's chest, Dr. Repsher noted breath sounds diminished bilaterally, but he noted no rales, rhonchi or wheezes, even with forced expiration. Dr. Repsher opined that the claimant's diminished breath sounds were consistent with his smoking history and more consistent with emphysema. Dr. Repsher reviewed the chest x-rays and reported no evidence of CWP on these films. Dr. Repsher also reviewed a high resolution CT scan of the chest that showed calcified mediastinal and hilar adenopathy, but no evidence of CWP. Dr. Repsher testified that CT scans are generally accepted diagnostic techniques capable of showing the presence or absence of CWP.

¶ 20 Dr. Repsher performed several pulmonary function tests and reported normal results, with a possible suggestion of "very mild underlying COPD of no clinical significance." Dr. Repsher's review of outside medical records revealed nothing relevant to the issue of CWP, although he found the claimant's "long and heavy cigarette smoking habit varying from one and a half to two packs per day and a persistent refusal to consider stopping smoking" to be significant. Dr. Repsher's final impression was no evidence of CWP and no clinically significant COPD. He opined that the claimant was fully fit to perform his usual coal work or work of a similarly arduous nature in a different industry. Dr. Repsher noted his agreement with Dr. Houser that the claimant was currently capable of heavy manual labor.

¶ 21 The arbitrator weighed that competing medical testimony and determined that the claimant had failed to prove by a preponderance of the evidence that he had an occupational disease arising out of and in the course of his employment. The arbitrator found that the x-ray interpretations by Drs. Meyer, Wiot, and Castle to be more credible than the interpretations by Drs. Smith, Alexander and Cohen. The arbitrator noted that, although the claimant testified that he had breathing problems while working in the mine, the claimant had failed to prove by a

preponderance of the evidence that his breathing complaints are causally related to his coal mine dust exposure.

¶ 22 The arbitrator further noted that the claimant had smoked one to two packs of cigarettes per day for almost 50 years and that all of the claimant's treating and examining physicians had counseled him on smoking cessation, yet he continued to engage in heavy smoking. The arbitrator also noted that Dr. Repsher opined that continued smoking would be injurious to the claimant's health and that Drs. Graham, Houser and Respher all opined that they would anticipate a continued decline in the claimant's pulmonary function if he continued smoking. The arbitrator then found that, in light of his continued smoking habit, the claimant "is persisting in an injurious practice which is contributing to any decline in pulmonary health which he would be suffering." The arbitrator held that the claimant's smoking was a section 19(d) factor in denying the claimant's application for benefits.

¶ 23 The claimant appealed the arbitrator's decision to the Commission, which unanimously affirmed and adopted the arbitrator's award.

¶ 24 The claimant then sought judicial review of the Commission's decision in the circuit court of Saline County, which confirmed the Commission's ruling. The circuit court took exception to the section 19(d) finding, noting that the arbitrator had found that the claimant failed to prove by a preponderance of the evidence that he suffered from an occupational disease related to his employment. The court noted that section 19(d) applies only where a claimant has established entitlement to benefits, but engaged in conduct warranting the reduction or suspension of compensation. The court noted that the arbitrator's 19(d) analysis was therefore unwarranted. The claimant then filed this timely appeal.

¶ 25 ANALYSIS

¶ 26 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. 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.

¶ 27 The employer maintains, to the contrary, that the Commission merely weighed competing medical evidence and opinion testimony, rejected the diagnosis of occupational disease, and found one set of experts more credible than the others. *Hicks v. Industrial Comm'n*, 251 Ill. App. 3d 320, 326 (1993). We agree with the employer.

¶ 28 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).

¶ 29 Here the Commission's finding rests firmly upon the opinions of three experts, Drs. Wiot, Castle and Meyer regarding CWP, as well as the opinion of Dr. Repsher regarding the lack of COPD related to the claimant's employment. That evidence was far from unchallenged. The claimant's experts, Drs. Houser, Smith, Cohen, and Alexander opined to a reasonable degree of medical certainty that the claimant suffered from CWP or COPD related to his employment. The weight to be accorded medical opinion testimony is not simply a matter of tallying up the number of experts or weighing their credentials. These experts have given opinions regarding CWP or COPD on numerous occasions, and all are recognized as qualified to give such opinions. The differences of opinions over the degree of significance of locations of opacities and NIOSH standards have been addressed on many occasions. In the final analysis, unless the evidence on one side is so compelling as to render the opposite conclusion clearly apparent, we must defer to the Commission, which is uniquely situated to weigh competing medical evidence and to resolve any evidentiary conflicts. *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC, ¶ 43; *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 505 (2004). Here, it simply cannot be said that the conclusion opposite that reached by the Commission is clearly apparent. Rather, the evidence was, in many ways, evenly balanced, making the Commission the ultimate decision maker.

¶ 30 Regarding the issue of the arbitrator's reference to section 19(d) of the Act, we agree with the circuit court's analysis. Our reading of the arbitrator's award, as affirmed and adopted by the Commission, is that the Commission determined that the claimant failed to establish the medical opinion evidence necessary to establish that he suffered from an occupational disease arising out of and in the course of his employment. Other than Dr. Houser, who was a claimant's witness, and Dr. Repsher, who opined in great detail about the claimant's smoking history, there is no evidence in the record that the other medical professionals considered the claimant's smoking habits when opining as to whether he had CWP or COPD. The claimant has not established, therefore, that the Commission erred in adopting the arbitrator's award including the spurious reference to section 19(d) of the Act.

¶ 31 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 Workers' Compensation Act (820 ILCS 305/8(d)(1) (West 2010)), since we are affirming the Commission's finding that the claimant failed to establish his entitlement to compensation under the Act, there could be no error in the method of calculating the amount of the benefit. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 32 CONCLUSION

¶ 33 The judgment of the circuit court of Saline County, which confirmed the decision of the Commission, is affirmed.

¶ 34 Affirmed.