No. 1-10-1210WC

Workers' Compensation
Commission Division
Filed: June 27, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

HUMANA, INC.,	) APPEAL FROM THE CIRCUIT
	) COURT OF COOK COUNTY
Appellant,	)
	)
v.	)
	) No. 09 L 50021
ILLINOIS WORKERS'	)
COMPENSATION COMMISSION,	)
ALEXI GIANNOULIAS, Illinois	)
State Treasurer and *ex*	)
officio custodian of the Rate	)
Adjustment Fund,	)
(STEPHEN K. RYJEWSKI,	) HONORABLE
	) ELMER JAMES TOLMAIRE, III,
Appellee).	) JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice McCullough and Justices Hudson, Holdridge and Stewart concurred in the judgment.

O R D E R

HELD: The Illinois Workers' Compensation Commission's finding that the claimant is permanently and totally disabled is not against the manifest weight of the evidence.

Humana, Inc. (Humana) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois

Workers' Compensation Commission (Commission), awarding the claimant, Stephen K. Ryjewski, permanent total disability (PTD) benefits pursuant to section 8(f) of the Workers' Compensation Act (Act) (820 ILCS 305/8(f) (West 2002)). For the reasons which follow, we affirm the judgment of the circuit court.

The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on June 6 and July 6, 2007.

The claimant worked in the insurance industry, selling multiple lines of insurance, for approximately 25 years. During that time period, he obtained a life insurance underwriting certification and was licensed by the Illinois Department of Insurance to sell life, health, fire and casualty insurance, and annuities. Prior to his work injury on April 30, 2001, he had a history of treatment for problems with his back, including a surgical posterior fusion, which was performed by Dr. Avi Bernstein in the early 1990s. Following that surgery, the claimant had not sought any treatment for his back, had no complaints about his back or legs, had not missed time from work because of his back, and had been able to complete his job successfully.

The claimant was employed by Humana from 1991 to 2004, eventually achieving the level of senior sales representative. He was responsible for group sales to corporate clients, and his duties included soliciting brokers and clients on behalf of

Humana, preparing quotes, making presentations, and conducting open enrollments. In performing these responsibilities, the claimant was required to carry a laptop computer and cartons of enrollment materials and proposals. According to the claimant, he might need to transport as many as 20 cartons of materials, weighing 30 to 40 pounds each. While he was employed by Humana, the claimant belonged to a health club, where he walked on the track and worked out on some of the weight machines. He also performed a home exercise regimen, which he had adopted after his prior back surgery. In addition, the claimant played golf approximately three times a week for about 20 years.

On April 30, 2001, the claimant tripped over a computer cord at work, somersaulted approximately 360 degrees into another office cubicle, and landed sideways on his back. He experienced excruciating pain in his back and down his legs, and he was unable to get up. He was taken by ambulance to Northwestern Memorial Hospital, where he was treated for the pain in his back and legs. He was discharged from the hospital on May 2, 2001, with a prescription for pain medication.

The claimant followed up with Dr. David Spencer, seeing him three times in May 2001. He underwent an MRI on May 12, 2001, which indicated that he had a herniated disk. Though the claimant continued to complain of back pain, Dr. Spencer released him to return to work without any restrictions on May 29, 2001.

The claimant returned to work on May 31, 2001, and performed

his duties as a senior sales representative until April 27, 2004. During the first two years after his return to work, the claimant did not seek any additional medical treatment for the 2001 employment injury, and he lost no time from work as a result of that accident. The claimant explained that, though he continued to experience pain and took prescribed pain medication when it was severe, he had so much work to do and was doing so well at Humana that he continued working through the pain. He stated that he could not afford to risk losing a relationship with any of his insurance brokers. Over time, however, the pain intensified, and he began having more problems with his legs and trouble sleeping.

In June 2003, the claimant consulted Dr. Avi Bernstein, the surgeon who had performed the posterior fusion on his back in the early 1990s. When he was examined by Dr. Bernstein on June 16, 2003, the claimant complained of pain in the lower back pain that radiated across his buttocks and down his legs to his toes. Dr. Bernstein ordered a myelogram and CT scan, which were performed on June 26, 2003. After these diagnostic tests were performed, Dr. Bernstein referred the claimant to Dr. Richard Noren for pain management.

Dr. Noren's treatment of the claimant consisted of two lumbar epidural steroid injections, a selective nerve root block, an attempt to insert a spinal cord stimulator, and the prescription of pain medications. None of the treatments or

medications provided any lasting relief for the claimant. After the failed attempt to insert the spinal cord stimulator, the claimant developed spinal meningitis, for which he was hospitalized for several days in November 2003.

When the claimant returned to Dr. Bernstein, in January 2004, he was still complaining of lower back pain radiating down both legs. Dr. Bernstein recommended a decompressive laminectomy for spinal stenosis and symptoms of neurogenic claudication at the L1-L2 level. That surgery was performed on April 27, 2004, but the claimant's symptoms did not subside, and he began experiencing a different type of pain, as well as frequent muscle spasms in his legs. Thereafter, he continued to follow-up with Drs. Bernstein and Noren.

Dr. Bernstein ordered a myelogram and a CT scan, which were performed on July 29, 2004. In addition, Dr. Bernstein ordered an MRI, which was performed on August 11, 2005, but he did not prescribe any treatment other than recommending that the claimant follow up with Dr. Noren for pain management.

Dr. Noren gave the claimant another epidural steroid injection on August 10, 2004, which failed to provide any relief. He also provided nerve blocks at the L5-S1 level on December 17, 2004, which gave the claimant only temporary relief for about a week. Since December 2004, Dr. Noren had not given the claimant any more injections, and his sole treatment had been to prescribe, and revise prescriptions for, various medications.

When the claimant last saw Dr. Noren in December 2006, he was taking Baclofen, Topamax, Hydrocodone, Robaxin, Elavil, and Cymbalta for his sleep problems.

The claimant did not return to work after the April 2004 surgery. In October 2004, he accepted an offer to retire from Humana and received a lump sum payment as part of his severance package.

Dr. Avi Bernstein testified at his evidence deposition that he referred the claimant to Dr. Richard Noren for pain management because the claimant continued to experience pain following the April 2004 laminectomy. After a period of time, Dr. Bernstein concluded that the claimant had developed a type of chronic burning sensation in his legs, which pain specialists referred to as chronic neuropathic pain syndrome. In July and August 2005, Dr. Bernstein ordered the claimant to remain off work, and he saw no reason for changing that restriction as of the date of his deposition.

Dr. Bernstein opined that the damage at the L1-L2 level was causally related to the claimant's 2001 work injury. He stated that the claimant probably had some degenerative changes there, as well as some element of spinal stenosis, and that the injury had caused a new onset of the symptoms, which remained chronically symptomatic and progressively led to the laminectomy. Dr. Bernstein also opined that the claimant was permanently and totally disabled, concluding that his prognosis for future

medical care was simply pain management. In addition, Dr. Bernstein stated that the current work restrictions were based on the claimant's most recent injury and his subsequent treatment and current complaints.

When questioned as to whether the claimant could return to work in a position where he would be allowed to change positions frequently with no lifting over 20 pounds, Dr. Bernstein stated that, although he did not think such a position would be dangerous to the claimant, he did think it would cause increased complaints of pain. Dr. Bernstein agreed that there was no medical contraindication to the claimant attempting to return to work in such a light-duty position. Dr. Bernstein further stated that he had not been advised of any surveillance video of the claimant, and he acknowledged that it was conceivable that his opinions regarding the claimant's ability and the restrictions on his return to work could change, depending on what was depicted on any surveillance tapes.

Dr. Richard Noren testified that he first met with the claimant in July 2003 as a result of a referral by Dr. Bernstein. On that occasion, the claimant reported that he had a recent worsening of pain symptoms, primarily low back pain, and leg pain to his knees, which was greater on the left and extended to his left ankle. The claimant further reported that the pain did not change with activity and that the cramping caused him to have difficulty sleeping. Dr. Noren stated that prior to Dr.

Bernstein's performance of the 2004 laminectomy, he tried to relieve the claimant's pain with two lumbar epidural injections and then some selective nerve root blocks, but that the claimant reported no improvement from either. Dr. Noren then attempted to place a spinal cord stimulator, but that also proved unsuccessful in relieving the claimant's pain.

Dr. Noren staid that, when he saw the claimant afer the surgery, in August 2004, the claimant reported that his pain and cramping were unchanged, and that there was no difference with activity or different sitting positions. At that time, the claimant was taking Robaxin, Neurontin, Elavil, and Vicodin, and Dr. Noren gave him another epidural injection. Again, however, the injection failed to provide any relief. Since that visit, the claimant returned to Dr. Noren for follow-up visits, but received no further treatment, other than nerve blocks performed on nerve roots unrelated to the L1-L2 or L2-L3 level.

Dr. Noren testified that, when he last saw him, the claimant was taking daily doses of Robaxin, Topamax, Baclofen, Norco, and Elavil. Dr. Noren intended to follow up with the claimant for pain management, based on his prognosis that the claimant would need pain medications indefinitely. Dr. Noren was hopeful that the claimant's condition would stay stable and not worsen, but he would be surprised if the claimant's condition improved beyond his current functioning at a sedentary level.

When questioned as to whether the claimant could return to

work, Dr. Noren testified that he would defer to and agree with Dr. Bernstein's assessment regarding the claimant's ability to return to work in a job that would allow him to shift his posture and position and would require no lifting over 20 pounds. Dr. Noren also stated that, based on his having treated the claimant as well as others with similar symptoms, there was a good probability that functioning in such a light-duty position would increase the claimant's pain. Dr. Noren testified that, after treating the claimant for more than three years, he had not observed anything that would make him think the claimant was being untruthful about his pain complaints.

The claimant testified that, as of the date of the arbitration hearing, he continued to take all of his prescribed medications on a daily basis, with little effect. The awful muscle spasms and the burning sensation in his legs persisted, and he had great difficulty sleeping. The claimant explained that, on a good night, he would be able to sleep uninterrupted for only about three and one-half hours, and, on a bad night, he would be awake all night, which was a regular occurrence. He compensated for this lack of sleep by not leaving the house and lying in bed all day. In addition, his condition affected his appetite, and he had lost 15 to 18 pounds. The claimant stated that his daily activities consisted of arising at about 4:30 a.m., taking the dog out to the backyard, having coffee, reading newspapers, doing a little shopping and trying to do things

around the house to help out his wife. He made an effort to wash the car, but had not done so for several months prior to the arbitration hearing. He watered the plants in front of the house and tried to keep the house neat so his wife did not have to do a lot, but he was no longer able to cut the grass.

The claimant further testified that he was able to drive his own vehicle, but he had to be careful when he did so because he got occasional spasms and needed to stretch out. The spasms sometimes went from his thigh down to his toes and could last from 40 seconds to 5 minutes. Sometimes his muscles would cramp closed, and he would have to lie down on the ground to straighten out. As a result, he never drove in the middle lane. In addition, although he continued to go to his health club, he usually spent 15 to 20 minutes in a steam room and between 60 and 75 minutes in the whirlpool. He had not tried to walk on the track, and, though he twice tried to use weights or weight machines, he was unable to do so. He attempted playing golf, but could not finish a whole round; he was unable to walk the course and experienced pain when he swung the club.

The claimant also stated that he had not renewed his insurance licenses after their expiration in February 2007 and that he had not taken the study course necessary for the renewals because he lacked the ability to concentrate on the course materials. The claimant explained that his pain interrupts his thought process and affects his concentration.

Humana presented the testimony of David Reynolds, Humana's vice-president of sales, who testified that he is familiar with the job duties of a sales representative since 2004 through the date of the arbitration hearing. Reynolds stated that, as of 2004, the claimant's duties as a senior sales representative required that he carry a laptop computer, any written materials that were necessary for presentations during client meetings, and, on occasion, a small projector. According to Reynolds, the claimant would be able to alter his posture and shift positions as necessary, and he was not required to lift over 20 pounds.

Humana also presented videotapes of surveillance filming of the claimant engaging in various activities on several dates over a two-year period beginning in March 2005. The individuals conducting the surveillance were positioned in a vehicle located on a side street to the west of the claimant's residence. From that vantage point, they filmed activity occurring outside the front of the claimant's house and in a portion of his attached garage, but there was no footage of any activities occurring inside the claimant's residence.

The surveillance videos reflected that, on several dates, the claimant was seen early in the morning, standing, leaning slightly over the rear of a vehicle in his garage, reading a newspaper and sipping from a thermos or smoking. On some dates, he was seen carrying bags from the garage area to the curb of his property, entering and exiting a vehicle, and walking to and from

various stores or businesses. The persons conducting the surveillance did not film the claimant while he was inside any stores or businesses. On certain dates, the claimant appears to be limping as he moves about, and, on one occasion, a woman assists him in lifting a suitcase into the back of a vehicle. On one occasion, the claimant is seen jogging from the front of his residence into his garage, and on another date, he is seen cleaning his vehicle. In August 2005, the claimant was filmed carrying a gym bag while entering a health club, and Humana introduced documentary evidence indicating that the claimant regularly attended the club.

At Humana's request, the claimant was examined by Dr. Gunnar Andersson on three occasions between April 2004 and June 2005. Dr. Andersson's findings were memorialized in four written reports. At his evidence deposition, Dr. Andersson testified that he examined the claimant on April 6, 2004. At that time, the claimant reported a history of a back problem, which had been treated with surgery 10 years earlier. The claimant reported that he had done well after that surgery until he tripped over a computer cord in 2001. The claimant further reported that, though he returned to work after that accident, he continued to experience pain and ultimately consulted Dr. Bernstein in June 2003. After several diagnostic tests and steroid injections, Dr. Bernstein recommended surgery at the L1-L2 level. Upon examining the claimant, Dr. Andersson diagnosed spinal stenosis and a

possible disc herniation at L1-L2, and he agreed that a surgical procedure such as a laminectomy was appropriate.

Dr. Andersson next saw the claimant on October 19, 2004, approximately six months after the April 27, 2004, surgery. In his report of that visit, Dr. Andersson indicated that the claimant was experiencing pain in the lower back that radiated down both legs, mostly on the sides and down toward the toes. The claimant said his feet constantly felt as if there were on fire, and he complained of severe cramping in both legs, which was new and different from before the surgical procedure. The claimant said that the cramping occasionally was so severe that he could hardly endure it. The claimant was taking Neurontin, Methocarbamol, Topamax, Norco, and Elavil. During the physical examination, Dr. Andersson noted that the claimant walked normally but slowly. Dr. Andersson's report also indicated that the claimant's condition was worse than it had been prior to the laminectomy and that the claimant obviously was in need of pain management. Dr. Andersson also expressed a concern about the claimant's inability to focus during the exam and questioned whether this circumstance was induced by the claimant's medication.

The claimant next saw Dr. Andersson on June 7, 2005, and reported that there had not been much change in his condition. The claimant stated that his primary complaint was pain in both legs, which he described as severe cramping, as well as numbness

and tingling in both legs. The claimant was taking several prescribed pain medications and a sleeping pill, but he had not experienced any appreciable improvement. The claimant reported that he was able to drive, but was fearful that a muscle spasm could make it difficult to stop and result in an accident.

Dr. Andersson stated that he had seen surveillance tapes of the claimant and determined that the activities performed in March 2005 were not consistent with the complaints articulated by the claimant during the June 2005 examination. Dr. Andersson opined that, as of June 7, 2005, the claimant was at maximum medical improvement (MMI) and could return to work in a light-duty position that required no lifting of more than 20 pounds and that permitted the claimant to shift his posture or change position as necessary. Yet, Dr. Andersson acknowledged that stenosis at the L2 level will affect all the nerves below that level and could cause the variety of symptoms described by the claimant, including the lower-leg pains or cramps. Dr. Andersson also stated that it was possible that the compression of an L1 or L2 nerve root can cause the nerves to become irritated and that the irritation could persist.

Humana's vocational expert, Joseph Belmonte, met with the claimant in December 2006 for vocational evaluation and possible placement services. In his report, Belmonte indicated that he interviewed the claimant and reviewed his educational, vocational, and socioeconomic status. He also reviewed the

reports of Dr. Andersson's examinations in April and October 2004, as well as certain correspondence with Humana's attorney, which indicated that Dr. Bernstein testified there was no medical contraindication to the claimant's returning to work in a light-duty capacity.

Though Belmonte noted that the claimant occasionally exhibited pain behavior and appeared to be uncomfortable when seated, he concluded that the claimant's physical restrictions did not result in any significant disability. Belmonte further concluded that, given the claimant's background, education, training, skills, and medical restrictions, he was capable of returning to work in his former employment position at Humana as a sales representative. In addition, Belmonte reported that the claimant was employable in numerous other sales positions and that the claimant was capable of returning to work in a light-duty position.

Following the arbitration hearing, the arbitrator found that the claimant sustained a work-related accident on April 30, 2001, and that the condition of ill-being in the claimant's low back is causally connected to his employment with Humana. The arbitrator awarded the claimant temporary total disability (TTD) benefits for a period of 62 3/7 weeks, plus medical expenses.

In addition, the arbitrator found that the claimant suffered a permanent total disability and was entitled to PTD benefits as of June 8, 2005. In making this determination, the arbitrator

specifically found that the testimony of the claimant was especially credible and that the opinion of Dr. Bernstein was more persuasive than that of Dr. Andersson. The arbitrator also observed that the evidence established the claimant was "clearly suffering from chronic pain that has not been relieved by injection, surgical intervention, or medications." The arbitrator further observed that the pain interrupted the claimant's thought processes and that he was daily taking large amounts of narcotic medications to find some relief. Noting that both Dr. Andersson and Belmonte expressed the opinion that the claimant was employable in a light-duty position, the arbitrator stated that neither of those opinions had addressed the claimant's inability to concentrate due to chronic pain or the large amount of narcotic pain medication that had been prescribed for him. With regard to the surveillance tapes of the claimant's activities, the arbitrator stated that he saw nothing that was inconsistent with the claimant's permanent disability. In particular, the arbitrator stated that none of the activities reflected on the videotapes were inconsistent with the claimant's claim of permanent total disability and that the recorded activities did not demonstrate an ability to concentrate.

Humana sought review of the arbitrator's decision before the Commission. In a decision with one commissioner dissenting, the Commission affirmed and adopted the decision of the arbitrator.

Humana filed a petition for judicial review of the

Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision in all respects, and this appeal followed.

On appeal, Humana does not dispute that the condition of ill-being in the claimant's low back arose out of and in the course of his employment. Rather, Humana argues that the Commission's finding, that the claimant is permanently and totally disabled, is against the manifest weight of the evidence.

The question of whether a claimant is permanently and totally disabled is one of fact to be determined by the Commission and will not be set aside on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005 (1987); *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 1117, 1127, 864 N.E.2d 838 (2007). For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72 (2006). On review of a factual finding by the Commission, the test is not whether the reviewing court would reach the same conclusion, but whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90 (1982).

An employee is totally and permanently disabled when he is

unable to make some contribution to industry sufficient to justify payment of wages to him. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842 (1983). There are three ways that a claimant can establish permanent and total disability: (1) by a preponderance of medical evidence; (2) by showing a diligent but unsuccessful job search; or (3) by demonstrating that, because of his age, training, education, experience, and condition, there are no jobs available for a person in his circumstances. *Federal Marine Terminals, Inc.*, 371 Ill. App. 3d at 1129; *ABB C-E Services v. Industrial Comm'n*, 316 Ill. App. 3d 745, 750, 737 N.E.2d 682 (2000). In deciding the nature and extent of the claimant's disabilities, it is the function of the Commission to assess the credibility of the witnesses, resolve conflicting medical evidence, decide the weight to be given to the evidence, and draw reasonable inferences therefrom. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980).

In this case, the claimant testified that he continues to experience pain virtually every day and that the several narcotic pain medications and sleeping pill prescribed by Dr. Noren offer minimal relief. The severe pain interferes with his thought process, affects his concentration, and results in extreme sleep deprivation. Dr. Bernstein testified that, in his opinion, the claimant is permanently and totally disabled from future employment and that his prognosis for future medical care is

simply pain management. Though Dr. Bernstein found there was no medical contraindication to the claimant returning to work in a light-duty position, he did believe that such employment would cause increased complaints of pain by the claimant. Dr. Noren concurred in Dr. Bernstein's opinion, stating that the claimant would need pain medications indefinitely and that there was a good probability that functioning in a light-duty capacity would likely increase the claimant's pain.

In finding that the claimant suffers from a permanent and total disability, the Commission affirmed and adopted the decision of the arbitrator, which found that the claimant's testimony was particularly credible and that the opinion of Dr. Bernstein was more persuasive than that of Dr. Andersson. As noted above, it was the obligation and prerogative of the Commission to judge the credibility of the witnesses, resolve any conflicts in the medical evidence, determine the weight that should be accorded to the evidence, and draw reasonable inferences from the evidence. *O'Dette*, 79 Ill. 2d at 253. Here, the factual determination that the claimant is permanently and totally disabled is supported by competent medical evidence, and an opposite conclusion is not clearly apparent. Consequently, we cannot say that the Commission's decision awarding the claimant PTD benefits is against the manifest weight of the evidence. See *Federal Marine Terminals, Inc.*, 371 Ill. App. 3d at 1129-30. Finally, we note that, because there is sufficient medical

evidence to support the Commission's finding that the claimant is permanently and totally disabled, we need not address Humana's argument that the claimant is not entitled to PTD benefits under the odd lot category.

Based upon the foregoing analysis, we affirm the judgment of the circuit court which confirmed the Commission's decision.

Affirmed.