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2011 IL App (4th) 100752WC-U

Workers' Compensation
Commission Division
Filed: September 22, 2011

No. 4-10-0752WC

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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

MONTEREY COAL COMPANY,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Appellee,)	MACOUPIN COUNTY
)	
v.)	No. 09 MR 45
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	
(SCOTT BIGGS,)	HONORABLE
)	KENNETH R. DEIHL,
Appellant).)	JUDGE PRESIDING.

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

ORDER

HELD: The circuit court erred in reversing a decision of the Workers' Compensation Commission that was not against the manifest weight of the evidence.

¶ 1 The claimant, Scott Briggs, appeals from an order of the Circuit Court of Macoupin County that reversed a decision of the Illinois Workers' Compensation Commission

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(Commission) awarding him benefits pursuant to the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 *et seq.* (West 2004)), for Coal Workers' Pneumoconiosis (CWP) and Chronic Obstructive Pulmonary Disease (COPD) that he is alleged to have developed while in the employ of Monterey Coal Company (Monterey). For the reasons which follow, we reverse the judgment of the circuit court and reinstate the Commission's decision.

¶ 2 The following factual recitation is taken from the record on appeal and the evidence presented at the arbitration hearing conducted on May 13, 2008.

¶ 3 The claimant worked underground in coal mines for Monterey for all but four months from April 1978 through November 1996, and again from February 2001 until December 2002, when he left work due to a shoulder injury unrelated to his current claim. The claimant testified that he began noticing breathing problems in "the early '80's," while he was working for Monterey and that his breathing had become worse since. The claimant said that he complained to his superiors at Monterey about the dusty conditions in the mine.

¶ 4 On February 8, 2002, the claimant underwent a chest x-ray that was administered by the National Institute for Occupational Safety and Health. In May 2002, the Department of Health and Human Services sent the claimant a letter stating that his x-ray "show[ed] DEFINITE EVIDENCE of CATEGORY 1 PNEUMOCONIOSIS." Later, in 2006, Dr. Michael Alexander, a B-reader/Radiologist, interpreted the same chest film to indicate that the claimant suffered from CWP.

¶ 5 In a June 4, 2002, treatment note, Dr. David Mooth, the claimant's family physician, states that he and the claimant discussed the finding that the claimant suffered from pneumoconiosis and that the claimant intended to attend a clinic for further evaluation.

¶ 6 On December 6, 2002, the claimant sought treatment for a "2 day history of cough, feeling short of breath at times." The treatment note of that visit contains the physician's impression that the claimant suffered from bronchitis.

¶ 7 On December 17, 2002, the claimant visited Dr. Timothy Beaty complaining of elevated blood pressure following shoulder surgery. Dr. Beaty noted that the claimant's "lungs [were] clear" on that date. Dr. Beaty made a similar note regarding the claimant's lungs after a May 2003 examination just before the claimant underwent another shoulder surgery.

¶ 8 On March 2, 2004, Dr. Renato Rivera, who examined the claimant as part of a surgical consultation for colon problems, noted a past medical history of "black lung miner." However, Dr. Rivera's notes reflect that his examination of the claimant's lungs revealed "[g]ood breath sounds, no rales, no wheezing, no respiratory distress, no retraction."

¶ 9 In a January 5, 2004, treatment note after the claimant complained of general or epigastric pain, Dr. Beaty wrote that his physical examination revealed that the claimant's lungs were "clear." Dr. Beaty made the same notation on February 18, 2004, following his examination of the claimant, who was complaining of insomnia.

¶ 10 The claimant was examined by Dr. Robert Cohen on February 10, 2005. In his note of that visit, Dr. Cohen recorded that the claimant gave a history of having experienced shortness of breath with exertion for the previous five years, as well as a daily dry cough and occasional wheezing. The note further states that the claimant described having experienced "wheezing and a cough productive of black sputum almost daily" when he worked in the mines. The claimant also reported that, when he worked as a miner, he was required to take one week off per year due to shortness of breath. The claimant told Dr. Cohen that his last time feeling symptom free was "in the mid 1980's." Although Dr. Cohen's physical examination of the claimant revealed clear lungs, Dr. Cohen recorded an impression that the claimant suffered from CWP based on a chest x-ray, the claimant's symptoms, and the claimant's work history.

¶ 11 On March 23, 2005, the claimant sought treatment from Dr. Jay Brieler. The doctor's notes of that visit reflect that the claimant complained of chest pain of one week's duration and reported a history of "black lung." Dr. Brieler recorded that he found the claimant's lungs

"harsh." Dr. Brieler ordered a chest x-ray which was taken that same day. The radiologist's report of that x-ray notes that the claimant's lungs were "possibly slightly hyperinflated," that there was a mild prominence of the central pulmonary vascularity, and that the claimant's lungs otherwise appeared "clear." Dr. Brieler diagnosed the claimant as suffering from bronchitis and prescribed medication.

¶ 12 The claimant returned to see Dr. Brieler on April 12, 2005, complaining of headaches. The doctor's notes of that visit contain no reference to any respiratory difficulty.

¶ 13 The claimant was referred to Dr. Thomas Tse for treatment for osteoporosis and low testosterone. Dr. Tse's notes of the claimant's visits on August 5, 2005, August 25, 2005, and September 28, 2005, each state that, on examination, the claimant's chest was "clear."

¶ 14 A September 30, 2005, chest x-ray of the claimant's chest revealed "a small nodular density in an upper retrosternal location." A follow-up CT scan taken on October 7, 2005, revealed the existence of a benign healed granuloma and several "tiny to small noncalcified middle mediastinal lymph nodes." The scan was otherwise negative.

¶ 15 On December 16, 2005, the claimant was examined at Monterey's request by Dr. Peter Tuteur, who is board certified in both internal medicine and pulmonary disease. Dr. Tuteur testified that in addition to his examination of the claimant, he reviewed Dr. Cohen's report; the claimant's medical records, including a chest x-ray taken on September 3, 2005, and a CT scan taken on October 7, 2005; and the claimant's work records. Dr. Tuteur found the claimant's chest x-ray, CT scan, and pulmonary function test that was administered that day all to be normal. He opined that the claimant had no occupational lung disease or primary pulmonary process whatever.

¶ 16 After a January 20, 2006, visit with the claimant, Dr. Barbara Sudholt, in a letter to Dr. Tse dated January 23, 2006, noted the claimant's history CWP but reported that she observed only mild dry cough symptoms and no progressive symptoms. She also noted that the claimant

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appeared to feel better since he had stopped coal mining, and that she saw no significant abnormalities on the CT scan of his chest.

¶ 17 Following a visit on July 21, 2006, Dr. Sudholt wrote to Dr. Tse stating that the claimant was clinically stable with no respiratory symptoms, and that a chest x-ray taken at the time of the claimant's visit was unremarkable.

¶ 18 In a note following a February 13, 2007, treatment for the claimant's back pain, Dr. Jacob Buchowski noted the claimant's history of lung disease and also observed that the claimant complained of shortness of breath with walking.

¶ 19 On March 28, 2007, Dr. Jerome F. Wiot, a B-reader/Radiologist, reviewed the claimant's chest x-rays which were taken on December 16, 2005. In a letter addressed to Monterey's attorneys dated that same date, Dr. Wiot wrote that he found no evidence of CWP.

¶ 20 In a January 22, 2008, treatment note for a follow-up visit, Dr. Sudholt stated that the claimant reported mild, occasional shortness of breath on exertion but demonstrated a clear chest upon examination. In another note regarding that same visit, Dr. Sudholt wrote that the claimant's condition had not changed clinically since his visit one year prior. A report of a pulmonary function test undertaken that same day indicated that the claimant had normal pulmonary function.

¶ 21 In a treatment note following the claimant's March 18, 2008, examination for headache problems, Dr. Keith Jenkins wrote that a physical examination revealed that the claimant suffered from "[m]ild end-expiratory wheezes" in his lungs. In a March 24, 2008, treatment note, however, Dr. Jenkins stated that the claimant's lungs were clear.

¶ 22 In an April 28, 2008, treatment note relating to an examination following the claimant's hospitalization for shortness of breath, Dr. Sudholt wrote that the claimant had suffered from an episode of bronchitis or sinusitis. Reports of pulmonary function tests performed on the claimant in May 2008 indicate that his lung capacity was within the normal range.

¶ 23 Dr. Cohen, whose deposition testimony was presented as evidence during the arbitration hearing, opined that the claimant suffers from CWP and early COPD, both caused by years of exposure to coal mine dust. He described the claimant's chest x-rays as "significantly positive" for coal workers' pneumoconiosis, and dismissed the notion that the claimant suffered from chronic bronchitis, because the claimant's cough did not produce sputum. According to Dr. Cohen, the claimant's conditions decreased his lung capacity, even though his impaired lung capacity might nonetheless have fallen within the normal range for the general population. Dr. Cohen stated that the claimant suffered from shortness of breath and a dry cough and would be unable to return to work in a coal mine, but would be able to obtain other gainful employment. He testified that he believed, based on the history the claimant provided him, that the claimant's symptoms began in 2000. On cross-examination, Dr. Cohen agreed that a CT scan would be a better tool for evaluating lung disease than an x-ray. Dr. Cohen also stated on cross-examination that, although the claimant may have had some exposure to lung irritants during the work he performed between his stints with the respondent, those exposures would have been "really minimal." Dr. Cohen also acknowledged that the claimant's obesity and former smoking habit might have affected his lung condition.

¶ 24 In his evidence deposition, Dr. Tuteur testified that the claimant did not suffer from CWP and, in fact, suffered from no coal mine-related lung disease. Dr. Tuteur also opined that CT scans were more reliable than x-rays for detecting the type of lung problems from which the claimant claimed to suffer.

¶ 25 Following the hearing, the arbitrator found that the claimant suffers from CWP and early COPD caused in whole, or in part, by mining and exposure to coal dust. In so doing, the arbitrator relied upon Dr. Cohen's opinions which he found most persuasive and supported by a positive x-ray that was interpreted by Dr. Alexander. The arbitrator also found that the claimant's condition was diagnosed prior to his leaving Monterey's employ, that his disability

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manifested itself within the two year period required by section 1(f) of the Act (820 ILCS 310/1(f)(West 2004)), and that adequate notice had been provided to Monterey. As a consequence, the arbitrator awarded the claimant permanent partial disability (PPD) benefits under the Act for a 20 percent loss of the man as a whole.

¶ 26 Monterey sought review of the arbitrator's decision before the Commission, which unanimously affirmed and adopted the arbitrator's decision. Thereafter, Monterey sought judicial review of the Commission's decision in the Circuit Court of Macoupin County. The circuit court entered an order reversing the Commission's decision, finding it to be against the manifest weight of the evidence. This appeal followed.

¶ 27 In urging reversal of the circuit court's order, the claimant argues that the Commission's decision is not against the manifest weight of the evidence and should be reinstated. In support of the circuit court's order reversing the Commission's decision, Monterey asserts that the following findings of the Commission are against the manifest weight of the evidence: 1) that the claimant suffers from CWP and early COPD; 2) that the claimant proved disablement within two years of his last exposure as required by section 1(f) of the Act; and 3) that it received adequate notice of the claimant's alleged occupational disease. Monterey also contends that the Commission's award of benefits for the claimant's loss of 20% of a man as a whole is against the manifest weight of the evidence.

¶ 28 The parties appear to be in agreement that each of the Commission's findings which are at issue in this appeal are questions of fact and subject to a manifest weight standard of review. In that regard, we note that it "is the province of the *** Commission to weigh the evidence and draw reasonable inferences therefrom in the first instance, and we will not overturn its findings simply because a different inference could be drawn." *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Industrial Comm'n*, 51

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Ill. 2d 533, 536-37, 283 N.E.2d 875 (1972). Before a reviewing court may overturn a decision of the Commission, it must find that the award was contrary to law or that the Commission's factual determinations were against the manifest weight of the evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 188 Ill.2d 243, 245, 720 N.E.2d 1063 (1999). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894 (1992). Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120, 675 N.E.2d 175 (1996).

¶ 29 In this case, Monterey argues that Dr. Cohen's opinions were entitled to less weight for a number of reasons, including his reliance on x-rays instead of CT scans and the fact that the claimant's pulmonary testing revealed him to function near or within normal range. These, however, are all points the Commission was able to consider before it decided to credit Dr. Cohen's opinions over Dr. Teuter's. We will not now disturb that credibility determination. The claimant's testimony as to his respiratory condition, Dr. Cohen's testimony and records, Dr. Alexander's interpretation of the claimant's chest x-ray of February 8, 2002, and the May 2002 letter from the Department of Health and Human Services sent the claimant stating that his chest x-ray of February 8, 2002, showed definite evidence of pneumoconiosis collectively provide a sufficient basis for the Commission's finding that the claimant did, in fact, suffer from CWP and early COPD which was caused in whole, or in part, by mining and exposure to coal dust. We conclude, therefore, that the Commission's finding in this regard is not against the manifest weight of the evidence.

¶ 30 We next consider whether the Commission's finding that the claimant's disablement arose within the two-year period specified in section 1(f) of the Act is against the manifest weight of the evidence. Section 1(f) of the Act provides, in relevant part, that:

"No compensation shall be payable for or on account of any occupational disease unless disablement *** occurs within two years after the last day of the last exposure to the hazards of the disease ***." 820 ILCS 310/1(f) (West 2004).

Again, the issue is one of fact to be resolved by the Commission. See *Peabody Coal Co. v. Industrial Comm'n*, 349 Ill. App. 3d 493, 498-99, 812 N.E.2d 59 (2004).

¶ 31 Monterey's argument that the claimant's disablement could not have occurred within two years of his work for Monterey rests largely on the premise that he was not disabled at all. However, there was adequate evidence, described above, to support the Commission's contrary conclusion. Further, as noted by the claimant, he last worked for Monterey on December 4, 2002. His chest x-ray of February 8, 2002, was interpreted by Dr. Alexander as positive for CWP, and the letter from the Department of Health and Human Services sent to the claimant in May 2002, states that his chest x-ray of February 8, 2002, showed definite evidence of pneumoconiosis. This evidence is sufficient to establish that the claimant suffered from the condition when he last worked for Monterey.

¶ 32 An employee is considered disabled for purposes of the Act when he can no longer work at the job at which he was engaged when last exposed to the hazards of the occupational disease without endangering his health. *Owens-Corning Fiberglas Industrial Comm'n*, 66 Ill. 2d 247, 252, 362 N.E.2d 335 (1977). Both Dr. Cohen and Dr. Tuteur acknowledged that a diagnosis of CWP warrants a cessation of mine dust exposure. Our analysis of this issue leads us to conclude that the Commission's finding that the claimant suffered from a disability within two years from the date of his last exposure as required by section 1(f) of the Act is not against the manifest weight of the evidence.

¶ 33 The third issue we consider is whether the Commission's finding that Monterey was given adequate notice of the claimant's disablement is against the manifest weight of the evidence. The Act's notice requirement is contained in section 6(c), which provides that:

"There shall be given notice to the employer of disablement arising from an occupational disease as soon as practicable after the date of the disablement. If the Commission shall find that the failure to give such notice substantially prejudices the rights of the employer the Commission in its discretion may order that the right of the employee to proceed under [the] Act shall be barred." 820 ILCS 310/6(c) (West 2006).

The claimant filed his application for adjustment of claim on November 29, 2004, thereby fulfilling his obligation to give notice of his alleged disablement to Monterey. *Crane Company v. Industrial Comm'n*, 32 Ill. 2d 348, 351, 205 N.E.2d 425 (1965). The next question is whether Monterey was in any way prejudiced by the two-year time period which elapsed between the date that the claimant left Monterey's employ and the filing of the claimant's application for adjustment of claim which gave notice of his alleged disablement.

¶ 34 The claimant asserts that, even if he failed to give timely notice, Monterey has submitted nothing to show that it was prejudiced by the delay. In response, Monterey offers only that it was prejudiced because the delay caused it to be "unable to obtain evidence as the claimant was able to do." With nothing more specific to support a finding of prejudice, we cannot say that the Commission's finding that Monterey received adequate notice is against the manifest weight of the evidence. See *Crane Company*, 32 Ill. 2d at 351-52.

¶ 35 Finally, we address the issue of whether the Commission erred in awarding the claimant PPD benefits for the loss of 20% of a man as a whole. The nature and extent of a claimant's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256, 402 N.E.2d 607 (1980). And as noted earlier, 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. *Orsini*, 117 Ill. 2d at 44.

¶ 36 Monterey argues in a single paragraph that the Commission's PPD award is "ridiculous"

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in light of medical evidence that the claimant has normal pulmonary function. However, the record contains the claimant's testimony that he experiences shortness of breath. Dr. Cohen verified the claimant suffers from shortness of breath and a dry cough, and he opined that the claimant has lost lung capacity. We believe that this evidence is sufficient to support the Commission's determination that the claimant was entitled PPD benefits under the Act for the loss of 20% to of the man as a whole.

¶ 37 Whether a reviewing court might have reached the same conclusion on the questions of fact at issue is not the test of whether the Commission's determination on those issues is supported by the manifest weight of the evidence. Rather, the appropriate test is 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). The foregoing analysis leads us to conclude that the Commission's decision in this case is supported by sufficient evidence and is not against the manifest weight of the evidence. We find, therefore, that the circuit court erred in substituting its judgment for that of the Commission, and consequently, we reverse the judgment of the circuit and reinstate the Commission's decision awarding the claimant PPD benefits under the Act for the loss of 20% to of the man as a whole.

¶ 38 Circuit court reversed and Commission decision reinstated.