Order filed April 28, 2015

2015 IL App (4th) 140465WC-U

NO. 4-14-0465WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

ROY BURRIS,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Sagamon County.
	)	
v.	)	No. 13-MR-836
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION, et al. (Freeman United Coal Mining	)	John W. Belz,
Company, Appellee).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's finding that the claimant failed to prove that he suffered from an occupational disease is not contrary to the manifest weight of the evidence. In addition, the claimant was not prejudiced by the Commission's failure to answer five questions posed in a request for special findings.

¶ 2 The claimant, Roy Burris, worked as a coal miner for the employer, Freeman United Coal Mining Company, for 31 years. The claimant filed a claim pursuant to the Illinois Workers' Occupational Diseases Act (the Act) (820 ILCS 310/1 *et seq.* (West 2012)), seeking benefits for various respiratory conditions, including coal workers' pneumoconiosis, chronic bronchitis, sinusitis, and rhinitis. He appeals from an order of the circuit court of Sangamon County, which confirmed a decision of the Illinois Workers' Compensation Commission (the Commission) that denied him benefits pursuant to the Act. The claimant challenges the Commission's finding that he failed to prove that he suffered from an occupational disease and failed to prove that his condition of ill-being at the time of the arbitration hearing was causally related to his employment. In addition, the claimant takes issue with the Commission's failure to answer five questions he posed in a request for special findings. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Initially, we note that the claimant has appealed the Commission's decision that he failed to prove that he suffered from work-related coal workers' pneumoconiosis, chronic bronchitis, sinusitis, and rhinitis. However, at oral argument, the claimant withdrew his appeal with respect to the Commission's finding that he failed to prove coal workers' pneumoconiosis. The claimant proceeded with his argument as it related to the Commission's finding that he failed to prove that he suffered work-related chronic bronchitis, sinusitis, and/or rhinitis. Our background discussion will focus on the evidence in the record relevant to this argument.

¶ 5 During the 31 years he worked as a coal miner for the employer, the claimant worked in several capacities, including approximately 7 years underground and the last 15 or 20 years above ground in plant maintenance. At the time of the arbitration hearing, he was 64 years old. He was 57 years old on his last day of employment as a coal miner on August 29, 2007. The coal mine closed on his last day of work. He was still able to perform the duties of a coal miner on the day the mine closed.

¶ 6 During his employment, the claimant was regularly exposed to coal dust, rock dust, roof bolting glue, and welding fumes. The claimant testified that 10 years after he started working as a coal miner, he noticed difficulty breathing when he walked up a catwalk of a 150-foot silo. He testified that his breathing problems progressively worsened over the years and that his symptoms included shortness of breath, coughing, sinusitis, and sinus drainage. In the past, he had smoked one pack of cigarettes per day for 20 years but at the time of the arbitration hearing had not smoked in 20 years. One of the claimant's coworkers, Leonard Durbin, testified that he had observed the claimant coughing and having breathing problems at work. He described his observations with respect to a decline in the claimant's respiratory health over the 30-plus years they worked together. At the arbitration hearing, the claimant testified that his current breathing problems affected his activities of daily living and that his breathing problems have worsened since leaving the mine.

¶ 7 A family practitioner, Dr. Roger McFarlin, testified concerning his care and treatment of the claimant beginning July 6, 2001. The doctor testified that over the years, he found the claimant to have a cough, bronchitis, sinusitis, pharyngitis, and rhinitis at

various times. He believed that coal mine exposure could have been an aggravating factor in those conditions. In reviewing Dr. McFarlin's medical records, the Commission noted that on separate occasions in May and August 2007, March 2008, July 2009, May 2010, and August 2012, the claimant denied shortness of breath during office visits with Dr. McFarlin.

¶ 8 Dr. McFarlin diagnosed the claimant with acute bronchitis for the first time on March 4, 2009, when the claimant complained of a cough. Dr. McFarlin's notes indicate that the claimant denied any sputum production with his cough and reported that the cough had been present for only two weeks. The claimant returned to Dr. McFarlin on July 23, 2009, and at that time he denied any respiratory problems. During Dr. McFarlin's deposition, when asked whether the claimant's bronchitis had resolved at that point, he responded, "apparently." The claimant's last office visit with Dr. McFarlin occurred on August 17, 2012. At that time, he did not have any complaints about shortness of breath, and his lungs were clear on examination. Dr. McFarlin testified that he never diagnosed the claimant as having chronic bronchitis because the claimant never reported a sufficient history of cough and sputum production to make that diagnosis. He testified that he had no opinion regarding whether the claimant had any functional impairment.

¶ 9 At the request of his attorney, the claimant submitted to an independent medical examination conducted by Dr. Robert Cohen. Dr. Cohen conducted a physical examination of the claimant and concluded that the claimant met the criteria for a diagnosis of chronic bronchitis. He opined that the bronchitis was caused by the

claimant's 31 years of exposure to coal dust with a very small component from four-pack years of exposure to tobacco smoke. Dr. Cohen did not examine any of the claimant's medical records in making his diagnosis. He based this diagnosis on the claimant's report of coughing with black sputum since 1982, which became colorless after he left the coal mine. He admitted that a cough was not an objective determinant of pulmonary impairment, but was a nonspecific symptom that could have many causes.

¶ 10 Dr. Cohen testified that the claimant reported that he did not have to stop and catch his breath with any activity. The claimant was not taking medication for his breathing, and his work capacity during exercise testing was at a level that Dr. Cohen expected for a normal, healthy 61-year-old male. In addition, Dr. Cohen noted that the claimant's spirometry was normal, which revealed neither evidence of obstruction nor restriction. The claimant's lung volumes, diffusion capacity, and exercise testing were also normal. Exercise testing revealed that the claimant was capable of heavy manual labor.

¶ 11 At the request of the employer, a pulmonologist, Dr. David Rosenberg, reviewed the claimant's medical records. Dr. Rosenberg disagreed with Dr. Cohen's diagnosis of chronic bronchitis. According to Dr. Rosenberg, Dr. Cohen relied on the claimant's self-reported medical history, but there was nothing in the claimant's medical records that supported the claimant's history that he gave to Dr. Cohen. According to Dr. Rosenberg, the claimant's treating physician, Dr. McFarlin, did not note any significant reports of shortness of breath, and the medical records did not outline chronic coughing and congestion consistent with bronchitis. Dr. Rosenberg believed that if someone truly had

chronic bronchitis, his medical records would outline the symptom of increasing cough and increasing sputum production. He also testified that he would not expect exposures in the mine to cause an aggravation of rhinitis and that if there was any exacerbation while the claimant was working in the mine, it would not result in any problem for him presently.

¶ 12 Dr. Rosenberg noted that the claimant did not desaturate with exercise and that his lung volumes and diffusing capacity measurements were normal. The normal lung volumes indicated to the doctor that the claimant did not have any restrictions, and the claimant's normal diffusing capacity led the doctor to conclude that the alveolar capillary bed within the claimant's lungs were intact. Dr. Rosenberg opined that the claimant did not have any pulmonary disease or impairment resulting from occupational exposure to coal mine dust.

¶ 13 At the conclusion of the arbitration hearing, the arbitrator found that the claimant failed to prove that he had sustained an occupational disease arising out of and in the course of his employment. The arbitrator specifically found that the testimony of Dr. Rosenberg was more credible. The arbitrator found that the claimant failed to prove that his current condition of ill-being was causally connected to his employment.

¶ 14 The claimant appealed to the Commission, and the Commission unanimously affirmed and adopted the arbitrator's decision. Prior to oral arguments before the Commission, the claimant filed a request for special findings pursuant to Rule 7040.40(c) of the Rules Governing Practice Before the Workers' Compensation Commission (50 Ill. Adm. Code 7040.40(c) (2012)). According to the Commission, the claimant submitted

more than five questions for special findings. The Commission denied the claimant's request for special findings based on the claimant's failure to comply with the requirements set forth in Rule 7040.40(c).

¶ 15 The claimant appealed the Commission's decision to the circuit court. The circuit court confirmed the Commission's decision, holding that the Commission's finding that the claimant failed to prove that he suffered from an occupational disease was supported by the evidence. The court noted that the Commission was clearly persuaded by the employer's expert. In addition, the circuit court held that the Commission properly exercised its discretion in denying the request for special findings. In the present appeal, the claimant challenges the Commission's findings with respect to disease and causation and its denial of his request for special findings.

¶ 16 ANALYSIS

¶ 17 I

¶ 18 Occupational Disease/Causation

¶ 19 In order to recover the claimant has the burden of proving that he suffers from a disabling disease and that a causal connection exists between the disease and his employment. *Payne v. Industrial Comm'n*, 61 Ill. 2d 66, 69, 329 N.E.2d 206, 208 (1975). In the present case, the Commission found against the claimant with respect to both of these elements. The Commission found that the claimant failed to prove that he suffered from an occupational disease and that he failed to prove that his current condition of ill-being was causally related to his employment as a coal miner.

¶ 20 The Act defines the term "occupational disease" as a disease "arising out of and in

the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment." 820 ILCS 310/1(d) (West 2012). The Commission's finding on the issue of whether a claimant suffered an occupational disease is a factual finding that is reviewed under the manifest-weight standard. See *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 782–83, 901 N.E.2d 906, 910 (2008). In addition, the question of whether a causal relationship exists is one of fact for the Commission to decide. *Payne*, 61 Ill. 2d at 69, 329 N.E.2d at 208. A reviewing court cannot overturn the Commission's factual findings unless the findings were against the manifest weight of the evidence. *Freeman United Coal Mining Co.*, 386 Ill. App. 3d at 783, 901 N.E.2d at 910. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 312-13, 901 N.E.2d 1066, 1079 (2009).

¶ 21 "It is the province of the Commission to judge the credibility of witnesses, draw reasonable inferences from the testimony, and determine what weight to give the testimony." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 286 Ill. App. 3d 1098, 1103, 677 N.E.2d 1005, 1008 (1997). "When conflicting medical testimony is presented, it is for the Commission to determine which testimony is to be accepted." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 263 Ill. App. 3d 478, 485, 636 N.E.2d 77, 82 (1994). The interpretation of medical testimony is particularly the function of the Commission. *Freeman United Coal Co.*, 286 Ill. App. 3d at 1103, 677 N.E.2d at 1008. "[A] court will not disregard permissible inferences by the Commission merely

because it may have drawn other inferences from the evidence." *Id*.

¶ 22 With respect to chronic bronchitis, the opinion of Dr. Rosenberg supports the Commission's finding that the claimant did not have this occupational disease. Dr. Rosenberg opined that the claimant's medical records do not contain enough reports of shortness of breath or chronic coughing with sputum, which would be present if the claimant had been suffering from chronic bronchitis.

¶ 23 The claimant argues that the Commission's reliance on Dr. Rosenberg's opinion was against the manifest weight of the evidence because it was based on a false conclusion that he did not have a chronic cough. He emphasizes his testimony and the testimony of his coworker, Leonard Durbin, concerning his coughing symptoms. The claimant also argues that Dr. Rosenberg's review of Dr. McFarlin's medical records was biased and inaccurate.

¶ 24 Dr. Rosenberg reviewed Dr. McFarlin's medical records and found them inconsistent with the history that the claimant gave to Dr. Cohen, who diagnosed the claimant as having chronic bronchitis based on the claimant's self-reported history. Dr. Cohen did not review any of the claimant's medical records. Dr. McFarlin's medical records were admitted into evidence along with additional medical records that dated back to 1980. The Commission reviewed the medical records in light of the two doctors' testimony and agreed with Dr. Rosenberg's opinion instead of Dr. Cohen's. The Commission agreed that the records were inconsistent with the claimant's testimony and the history he gave to Dr. Cohen.

¶ 25 On appeal, the claimant cites several notations within Dr. McFarlin's records that

he maintains support the opposite conclusion. The claimant cites a number of entries in Dr. McFarlin's records in which the doctor noted that he complained of a cough. In addition, he notes that he complained of slight shortness of breath on March 16, 2006. However, with the exception of one entry on May 7, 2010, none of the noted records presented a history of reported coughing with sputum that Dr. Rosenberg said should be present if the claimant had been suffering from chronic bronchitis. In one entry dated May 4, 2009, Dr. McFarlin noted that the claimant reported a cough that had been present for only two weeks, not since 1982 as he told Dr. Cohen. When the claimant followed up with Dr. McFarlin on July 23, 2009, the claimant denied any respiratory problems, and Dr. McFarlin testified that the claimant's bronchitis had apparently resolved at that point.

¶ 26 The Commission was entitled to agree with Dr. Rosenberg that these records were inconsistent with the claimant's report to Dr. Cohen of cough with black sputum since 1982. Dr. McFarlin actually testified that he had not diagnosed the claimant with chronic bronchitis because the claimant had not given him a sufficient history of cough and sputum production to make that diagnosis. The Commission was entitled to consider the conflicting medical opinions in light of these medical records and testimony and conclude that Dr. Rosenberg was more credible with respect to the issue of whether the claimant suffered from chronic bronchitis as a result of his work as a coal miner. As noted above, when the parties present conflicting medical evidence, it is for the Commission to determine which testimony is to be accepted. *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 856, 806 N.E.2d 230, 234-35 (2004).

¶ 27 The claimant also argues that the Commission erred in failing to find that he

suffered from an occupational disease as a result of coal dust aggravating his sinusitis and rhinitis. We disagree.

¶ 28 The plaintiff's expert, Dr. Cohen, testified concerning "seasonal rhinitis and sinusitis." He opined that the claimant's chronic bronchitis (which the Commission found the claimant failed to prove) could become worse at times because of "seasonal rhinitis and sinusitis." During direct examination, he agreed that exposure to coal mine dust and the coal mine environment could "aggravate" rhinitis and sinusitis. However, he did not opine whether the claimant's condition of ill-being was a result of coal dust aggravation of seasonal sinusitis and rhinitis.

¶ 29 Likewise, the claimant's treating physician, Dr. McFarlin, testified that the claimant's coal mine exposure "could have been an aggravating factor" with respect to his sinusitis and rhinitis. However, although Dr. McFarlin opined that chronic bronchitis caused by coal mining dust would continue after leaving the coal mine, he offered no similar opinion with respect to the claimant's sinusitis or rhinitis after leaving the coal mine. In addition, Dr. McFarlin did not have any opinion concerning whether the claimant suffered from any "functional impairment."

¶ 30 The employer's expert, Dr. Rosenberg, testified that if the claimant had any exacerbation of his rhinitis when he was working as a coal miner, it would not have resulted in any problem for him presently. He described any exacerbation of the claimant's rhinitis at work as a "temporary exacerbation." During cross-examination, the claimant's attorney asked, "[O]n rhinitis, can repeated exacerbations make the rhinitis worse?" Dr. Rosenberg answered, "At the point in time when the exposures are taking

place. There's no evidence that it would cause chronic rhinitis outside of the workplace." Dr. Rosenberg concluded that the claimant did "not have any pulmonary disease or impairment resulting from occupational exposure to coal mine dust." The Commission was entitled to find this testimony to be credible.

¶ 31 After reviewing the record on appeal, we cannot conclude that the Commission's factual findings were against the manifest weight of the evidence. The Commission engaged in an extensive review of the evidence and concluded that the claimant failed to carry his burden of proving an occupational disease stemming from chronic bronchitis, sinusitis, or rhinitis or that his conditions of ill-being were causally related to employment related diseases. A finding opposite that of the Commission's on this issue is not "clearly apparent." Accordingly, we must affirm the Commission's finding.

¶ 32 II

¶ 33 Request for Special Findings

¶ 34 The claimant also raises an issue with respect to the Commission's denial of his request for special findings.

¶ 35 With respect to requests for special findings, section 19(e) of the Act states:

"In any case the Commission in its decision may in its discretion find specially upon any question or questions of law or fact which shall be submitted in writing by either party whether ultimate or otherwise; provided that on issues other than nature and extent of the disablement, if any, the Commission in its decision shall find specially upon any question or questions of law or fact, whether ultimate or otherwise, which are

submitted in writing by either party; provided further that not more than 5 such questions may be submitted by either party." 820 ILCS 310/19(e) (West 2012).

¶ 36 Section 7040.40 of the Rules Governing Practice Before the Workers' Compensation Commission provides, in pertinent part:

"(c) Special Findings

(1) Either party may request in writing that the Commission make special findings upon any written question or questions of law or fact (not to exceed five (5) in number) submitted to it concerning issues raised by the review. Said interrogatories shall be filed at least five (5) days prior to the Oral Argument or five (5) days after completion of the review hearing, whichever is later." 50 Ill. Adm. Code 7040.40(c) (2012).

¶ 37 In the present case, prior to oral arguments before the Commission, the claimant filed a request for special findings. The Commission, however, determined that the claimant "submitted more than five questions for special findings." The Commission denied "the Request for Special Findings based upon [the claimant's] failure to comply with the requirements set [out] in Rule 7040.40(c)."

¶ 38 We disagree with the Commission's conclusion that the claimant submitted more than five questions for special findings. The record does not support this conclusion. Nonetheless, we find that the Commission's failure to answer the five questions posed by the claimant does not require a reversal of its decision. The claimant cannot establish that he was prejudiced by the Commission's denial of his request for special findings.

¶ 39 The first question posed by the claimant was: "Is an expert's opinion which is based solely on review of records accorded reduced weight when it fails to include entries

that would have been favorable to the [claimant]?" The most appropriate answer to this question would have been "maybe." The weight the Commission gives to any expert's opinion can be influenced by many factors that are not mentioned within the question. These additional factors include, but are not limited to, the expert's qualifications, his answers to questions on cross-examination pertaining to the excluded entries, the substance of the excluded entries in relation to the contested issues, the testimony and opinions of other witnesses and experts, the qualifications of the doctors making the excluded entries, other medical records admitted into evidence at the hearing, and the substance of the entries that the expert did mention in his opinion. It was impossible for the Commission to provide a definitive answer to the question. The claimant suffered no prejudice because of the Commission's refusal to answer this imprecise, theoretical question.

¶ 40 The second question posed by the claimant was also imprecise: "Does disease-related disablement require that there be impairment measurable by testing and outside the 'range of normal' to be compensable under the Illinois Occupational Diseases Act?" Again, the only proper answer to this question is "maybe." The weight the Commission might give to any particular disablement test result can vary from case to case and can depend on numerous factors not mentioned within the question. These additional factors can include, among other things, additional evidence relevant to the claimant's disablement other than the test results, the reliability of the testing methods used, the theories underlying the tests, medical opinions and other expert testimony concerning the interpretation of the test results, the extent of the "range of normal" and where the

claimant falls within this range, and other medical opinions concerning the diagnosis of the diseases to which the tests are related. The Commission cannot offer a specific "special finding" of law or fact in response to a question that encompasses innumerable variables.

¶ 41 Furthermore, in the present case, with respect to chronic bronchitis, sinusitis, and rhinitis, the Commission did not base any findings on any tests measuring the claimant's disablement level. Instead, the Commission explained that it relied on the opinion of Dr. Rosenberg. Under these circumstances, the Commission did not prejudice the claimant's claim by failing to answer this hypothetical question concerning unnamed tests measuring impairment and an undefined "range of normal."

¶ 42 For his third question posed to the Commission, the claimant asked: "Is it valid for the Commission to give weight to an expert's opinion that CWP must begin in the upper lung zones (a) when there are certified B-readers in the record who make a diagnosis of CWP based on opacities in the mid and lower zones only; and (b) when of the most recent study on the issue by Laney and Petsonk, whose careers were with NIOSH and the B-reading program, found no zonal predominance in those with CWP?"

¶ 43 This question pertains to the claimant's claim for coal workers' pneumoconiosis. As noted above, at oral argument, the claimant withdrew his challenge to the Commission's finding with respect to this condition. Accordingly, the claimant's argument concerning the Commission's failure to answer this third question is moot.

¶ 44 The claimant's fourth question was: "Is it proper for the Commission to allow treatment records to control a disease issue when the Commission also has sworn

testimony of the records' author that they specifically cannot serve as a basis for excluding a disease's existence?" Again, this question attempts to guide the Commission in weighing the medical evidence by asking the Commission to make a special finding based on an inference drawn from a favorable witness's testimony. The record, however, does not require the Commission to make the inference upon which the fourth question is premised. The Commission was not required to conclude that sworn testimony definitively excluded certain medical records from the determination of whether the claimant had an occupational disease.

¶ 45 At the hearing, Dr. Rosenberg offered opinions based on Dr. McFarlin's medical records. During his testimony, Dr. McFarlin was asked whether a pulmonologist could rule out whether a person had chronic bronchitis based on his medical records. He answered, "I don't think so." Dr. Rosenberg is a pulmonologist, and Dr. McFarlin is not. The Commission considered the doctors' testimony and their credentials and found Dr. Rosenberg to be credible. It can be inferred from this finding that the Commission believed that Dr. Rosenberg was competent to decide what medical records he could rely on in making a pulmonary-related diagnosis or opinion. Nothing within Dr. McFarlin's "sworn testimony" required the Commission to disregard those portions of Dr. Rosenberg's opinions that were based on Dr. McFarlin's medical records.

¶ 46 This question concerns the weight the Commission might give to certain evidence, which can depend on many factors that are not encompassed within the question. Under these circumstances, we fail to see how the claimant was prejudiced by the Commission's failure to answer "maybe" to the fourth question he posed.

¶ 47 The fifth and final question that the claimant posed to the Commission was: "If the Commission relies on treatment records over the sworn testimony of the physician who authored and maintained those records, does such a finding mean that the treating physician lied under oath on the matter material to the outcome of the case?" Again, the Commission explained the basis of its decision, which included not only the records of Dr. McFarlin, but also the testimony of Dr. Rosenberg. The Commission found that Dr. Rosenberg was "more credible," and explained the basis for its conclusion concerning his credibility. Perhaps the Commission could have made a special finding concerning whether Dr. McFarlin "lied under oath," but its refusal to make this special finding does not prejudice the claimant. Such a special finding would not further any aspect of the claimant's burden of proof or his challenge to the Commission's findings on appeal.

¶ 48 We believe that the Commission's denial of the claimant's request for special findings does not require a reversal of its decision. All of the claimant's requested "special findings" relevant to chronic bronchitis, sinusitis, and rhinitis, addressed contested facts that can be discerned from the Commission's discussion of the evidence within its decision.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, we affirm the judgment of the circuit court which confirmed the decision of the Commission.

¶ 51 Affirmed.