

Workers' Compensation
Commission Division
Order Filed: November 9, 2015

No. 5-14-0297WC

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
FIFTH DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

CONSOLIDATION COAL COMPANY,)	Appeal from the
)	Circuit Court of
Appellant,)	Franklin County.
)	
v.)	No. 13-MR-54
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION, <i>et al.</i> ,)	Honorable
)	Thomas J. Foster,
(Cyril Smothers, Appellee).)	Judge, presiding.

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

ORDER

¶ 1 *Held:* The Commission's determination that the claimant's disability has increased is neither contrary to law nor against the manifest weight of the evidence.

¶ 2 Consolidation Coal Company (Consolidation) appeals from an order of the circuit court of Franklin County which confirmed a decision of the Illinois Workers' Compensation Commission which granted the petition of the claimant, Cyril Smothers, brought pursuant to

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section 19(h) of the Workers' Compensation Act (Act) (820 ILCS 305/19(h) (West 2012)), and awarded the claimant permanent and total disability benefits pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2012)). For the reasons which follow, we affirm.

¶ 3 The following facts were taken from the evidence adduced at the arbitration hearing conducted on June 21, 2005, which formed the basis of the Commission's decision of April 2, 2007, and the evidence submitted in support of and in opposition to the claimant's section 19(h) petition at the hearing held on November 30, 2010.

¶ 4 The claimant worked as a coal miner for 32 years. He was employed by Consolidation as a miner on August 29, 2000, when he quit mining due to breathing problems. It is undisputed that the claimant suffered from chronic obstructive pulmonary disease (COPD), emphysema, and chronic bronchitis. The claimant filed an application for adjustment of claim pursuant to the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2002)), seeking benefits from Consolidation. Following a hearing, the arbitrator issued a decision finding that the claimant was exposed to coal mine dust for 32 years, including his last day of employment with Consolidation. The arbitrator found that the COPD, emphysema, and chronic bronchitis from which the claimant suffered was caused in part by his mine dust exposure, rendering him permanently and partially disabled to the extent of 30% of a man as a whole. In arriving at the extent of the claimant's disability, the arbitrator relied upon the opinions of various doctors that, although the claimant could no longer perform heavy or light manual labor, he could perform sedentary work. The arbitrator awarded the claimant permanent partial disability (PPD) benefits for 30% loss of a man as a whole pursuant to section 8(d)(2) of the Workers' Compensation Act (820 ILCS 305/8(d)(2) (West 2002)), made applicable to occupational diseases by section 7 of the Act (820 ILCS 310/7 (West 2002)).

¶ 5 Both parties sought a review of the arbitrator's decision before the Commission. On April 2, 2007, the Commission issued a unanimous decision awarding the claimant PPD benefits for 75% loss of a man as a whole, and affirming and adopting the arbitrator's decision in all other respects. The Commission specifically noted that, although the claimant was totally disabled from working as a coal miner, he was capable of performing sedentary work.

¶ 6 Consolidation sought judicial review of the Commission's decision in the circuit court of Franklin County. On May 15, 2008, the circuit court entered an order confirming the Commission's decision.

¶ 7 Thereafter, Consolidation filed an appeal from the judgment of the circuit court, arguing, *inter alia*, that the Commission's determination that the claimant was permanently and partially disabled to the extent of 75% of a man as a whole is against the manifest weight of the evidence. On March 9, 2009, we affirmed the May 15, 2008 judgment of the circuit court. *Consolidation Coal Co. v. Illinois Workers' Compensation Comm'n*, No. 5-08-0294WC (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 On August 20, 2009, the claimant was examined by Dr. William Houser, a board certified pulmonologist. According to Dr. Houser, the claimant's pulmonary function testing on that date showed severe airway obstruction. As of that examination, Dr. Houser diagnosed the claimant as suffering from severe COPD with signs of progression, CWP category one, and chronic bronchitis. When deposed, Dr. Houser opined that the claimant was totally disabled from working as a result of his occupational lung disease. Dr. Houser compared the results of the claimant's pulmonary function testing which he performed on November 30, 2001, with his testing results on August 20, 2009, and concluded that the comparison showed significant deterioration in the claimant's pulmonary function. By extrapolating data from the claimant's

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November 30, 2001 testing and from his August 20, 2009 testing, Dr. Houser opined that the claimant would have been precluded from performing even sedentary work by November of 2003.

¶ 9 On September 25, 2009, the claimant filed a petition pursuant to section 19(h) of the Act (820 ILCS 305/19(h) (West 2008)), alleging that his condition of ill-being has materially increased.

¶ 10 The claimant was examined at the request of Consolidation on December 31, 2009, by Dr. Peter Tuteur, a board certified pulmonologist. An x-ray of the claimant's chest was taken, revealing a 2.5-centimeter density in the left suprahilar area which Dr. Tuteur noted was suggestive of carcinoma, and he suggested that further testing was in order. According to Dr. Tuteur, the claimant's pulmonary function testing on that date indicated that he had significant worsening of pulmonary function as compared to his examination on November 27, 2002. In his report, Dr. Tuteur wrote that his examination of the claimant revealed the presence of advanced COPD, emphysema, and chronic bronchitis with anatomical change typical of cylindrical bronchitis in the left lower lung. According to Dr. Tuteur, this condition can be caused by coal mine dust or tobacco smoke. He opined that, in the claimant's case, the inhalation of tobacco smoke produced the COPD, which is the same opinion that Dr. Tuteur rendered following his November 2002 examination, and which was rejected by the arbitrator and Commission in its decision of April 2, 2007.

¶ 11 On January 19, 2010, the claimant underwent a CT scan which revealed a mass in the left upper lobe of his lung, but no evidence of metastasis was found. Additionally, the scan showed enlarged lymph nodes. On January 20, 2010, the claimant was seen by Dr. Bradley at Barnes-Jewish Hospital. A needle biopsy taken at Barnes-Jewish Hospital on January 27, 2010,

confirmed the presence of lung cancer, and the claimant was treated with radiation therapy in February of 2010.

¶ 12 Based upon the data obtained from the pulmonary tests performed by Drs. Houser and Tuteur, along with the claimant's chest x-ray taken in December 2009 and the records of his cancer treatment at Barnes-Jewish Hospital, Dr. Byron T. Westerfield, a board certified pulmonologist and B-reader, performed a records review on February 19, 2010. Dr. Westerfield had conducted an earlier review of the claimant's medical records in July of 2002. In his report of that review dated July 18, 2002, Dr. Westerfield found that the claimant was totally disabled due to pulmonary impairment caused by smoking. When deposed following his 2010 records review, Dr. Westerfield testified that the claimant's pulmonary function had decreased since 2005. He stated that the difference in the claimant's condition in 2010 and his condition in 2005 was due to the development of lung cancer. Dr. Westerfield admitted that he could not opine that the claimant's lung cancer was the only cause of his worsening pulmonary function. According to Dr. Westerfield, the claimant's emphysema contributed to his loss of lung function, but the primary difference was his lung cancer. However, he did opine that, given the claimant's loss of respiratory function, he was permanently and totally disabled.

¶ 13 On July 1, 2013, the Commission issued a unanimous decision granting the claimant's section 19(h) petition. The Commission found that the claimant's "condition has materially increased as a result of exposure to an occupational disease arising out of and in the course of his employment on August 29, 2000, rendering the [claimant] *** permanently and totally disabled." The Commission awarded the claimant permanent total disability (PTD) benefits for life pursuant to section 8(f) of the Act (820 ILCS 305/8(f) (West 2008)).

¶ 14 Consolidation sought judicial review of the Commission's decision in the circuit court of Franklin County. On June 17, 2014, the circuit court entered an order confirming the Commission's decision, and this appeal followed.

¶ 15 As a preliminary matter, the parties seem to disagree as to the appropriate standard of review. Consolidation, relying upon our opinion in *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 544-45 (2010), argues that this case involves a mixed question of fact and law and, as such, the clearly erroneous standard of review is applicable. The claimant argues that this case involves a question of fact, and therefore, it should be reviewed under a manifest weight standard. *Board of Trustees of University of Illinois v. Industrial Comm'n*, 71 Ill. 2d 287, 295 (1978). We agree with the claimant.

¶ 16 In the case of *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998), our supreme court held that, on appeal from a decision of an administrative agency, the manifest weight standard is appropriate when reviewing the agency's factual determinations, and the *de novo* standard applies to the review of holdings on questions of law. The supreme court went on to hold that, when reviewing the propriety of the agency's application of the law to the facts, a clearly erroneous standard is to be applied as the inquiry involves a mixed question of law and fact. *Id.* However, after the issuance of its decision in *City of Belvidere*, the supreme court continued to apply the manifest weight standard when reviewing decisions of the Commission. See *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 150 (2010); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 188 Ill. 2d 243, 245 (1999).

¶ 17 This case involves the propriety of the Commission's determination that the claimant's disability has increased since the entry of its initial award. The question is one of fact, not law,

and the Commission's determination should not be disturbed on review unless it is against the manifest weight of the evidence. *Board of Trustees of University of Illinois*, 71 Ill. 2d at 295.

¶ 18 In urging reversal, Consolidation argues that the Commission's determination that the claimant's condition materially changed since the original award is against the manifest weight of the evidence. According to Consolidation, the objective pulmonary function testing of the claimant fails to support a finding that his disability has increased. Based upon Dr. Houser's testimony, Consolidation contends that the claimant was permanently and totally disabled in 2005, and he remains permanently and totally disabled. Accordingly, Consolidation concludes that the claimant's disability has not increased.

¶ 19 Section 19(h) of the Act provides, in relevant part, that:

"An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.

On such review, compensation payments may be re-established, increased, diminished or ended." 820 ILCS 305/19(h) (West 2008).

¶ 20 The purpose of a section 19(h) proceeding is to determine whether a disability has changed subsequent to an award or agreed settlement. *Zimmerly Construction Co. v. Industrial Comm'n*, 50 Ill. 2d 342, 344 (1972). In determining whether an increase in disability has occurred, the entire record must be examined. *Board of Trustees of University of Illinois*, 71 Ill. 2d at 295. The evidence introduced at the original hearing must be considered, but only to

determine whether the disability existing at the time of the original award has changed. *Zimmerly Construction Co.*, 50 Ill. 2d at 344.

¶ 21 Consolidation argues that the Commission erred in comparing the results of the claimant's pulmonary function testing at the time of the section 19(h) hearing with the results of his pulmonary function testing in 2001 and 2002. It asserts that the appropriate comparison requires a consideration of the results of the claimant's pulmonary function testing at the time of the section 19(h) hearing, versus his test results at the time of the arbitration hearing in 2005 that gave rise to the Commission's original award. We agree that the Commission erred in this regard. However, we do not believe that the error warrants reversal under the circumstances of this case, as we can affirm the Commission's decision on any basis substantiated by the record, regardless of the Commission's reasoning. *Beaudette v. Industrial Comm'n*, 308 Ill. App. 3d 188, 191 (1999).

¶ 22 In support of its argument that the Commission erred in finding a material increase in the claimant's disability, Consolidation relies upon the results of the claimant's pulmonary function tests taken on November 11, 2004, the last tests performed prior to the original arbitration hearing on June 21, 2005, and the results of his pulmonary function tests performed subsequent to the filing of the claimant's section 19(h) petition. According to Consolidation, the objective pulmonary function testing fails to support an increase in the claimant's disability. Relying upon Dr. Houser's testimony, Consolidation contends that the claimant's test results establish that he was totally disabled at the time of the original award in 2005. Specifically, Consolidation argues that "it is impossible to show a material or substantial increase in pulmonary disability to support an award for permanent and total disability benefits because Dr.

Houser's testimony and objective medical evidence revealed that Claimant was permanently and totally disabled no later than March 9, 2004, over a year before the initial arbitration hearing."

¶ 23 The flaw in Consolidation's reasoning is that it attempts to relitigate the extent of the claimant's disability at the time of the original award. In its original decision, the Commission found that the evidence established that the claimant was capable of performing sedentary work and that he was permanently and partially disabled to the extent of a 75% loss of use of a person as a whole. Those findings cannot be relitigated or called into question in a section 19(h) proceeding; they are considered final, and relitigation is barred under the doctrine of *res judicata*. *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979); *Zimmerly Construction Co.*, 50 Ill. 2d at 344-45.

¶ 24 It is undisputed that, as of the filing of his section 19(h) petition, the claimant was totally and permanently disabled. Drs. Houser and Westerfield both rendered opinions to that effect, and stated that the claimant is incapable of performing even sedentary work.

¶ 25 As noted earlier, the extent of the claimant's disability at the time of the arbitration hearing underlying the Commission's original award of April 2, 2007, is not subject to review in the context of this section 19(h) proceeding. In its original decision, the Commission found that the claimant was capable of sedentary work and was permanently and partially disabled to the extent of 75% of a man as a whole. It is undisputed that, at the time of the filing of his section 19(h) petition, the claimant was not capable of performing even sedentary work and was permanently and totally disabled. We conclude, therefore, that the Commission's determination that the claimant's condition of ill-being has materially increased and that he is entitled to PTD benefits is not against the manifest weight of the evidence.

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¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court which confirmed the Commission's decision granting the claimant's section 19(h) petition and awarding him PTD benefits.

¶ 27 Affirmed.