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2019 IL App (5th) 180160WC-U

Order filed May 2, 2019

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

ALLEN ERB,)	Appeal from the Circuit Court
)	of the 20th Judicial Circuit,
Appellant,)	St. Clair County, Illinois
)	
v.)	Appeal No. 5-18-0160WC
)	Circuit No. 17-MR-3
)	
ILLINOIS WORKERS' COMPENSATION)	
COMMISSION <i>et al.</i>)	Honorable
)	Stephen McGlynn,
(Peabody Coal Company, Appellees).)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* The Commission's decision was not contrary to law or against the manifest weight of the evidence.

¶ 2 The claimant, Allen Erb, appeals from a judgment of the circuit court of St. Clair County, confirming a decision of the Illinois Workers' Compensation Commission (Commission). The

Commission denied the claimant's request for additional temporary total disability (TTD) benefits and an award of permanent total disability (PTD) benefits pursuant to section 19(h) of the Illinois Workers' Compensation Act (Act). 820 ILCS 305/19(h) (West 2010).

¶ 3 The claimant filed three separate Applications for Adjustment of Claim in 1998. These cases were consolidated for trial and heard by an arbitrator on July 16, 1998, and August 25, 1998. On October 28, 1998, the arbitrator denied benefits in two of the cases, but awarded medical benefits and TTD in the case with date of accident November 14, 1997. On appeal by the employer, the Commission affirmed the arbitrator. The employer appealed to the circuit court, which confirmed the decision of the Commission. This court subsequently affirmed the Commission. *Peabody Coal Co. v. Industrial Comm'n*, No. 5-02-0688WC (Sept. 26, 2003) (unpublished order under Supreme Court Rule 23).

¶ 4 On January 28, 2005, this case was submitted to the arbitrator for additional TTD benefits, medical benefits, and permanency, pursuant to section 19(h) of the Act. 820 ILCS 305/19(h) (West 2010). In this petition, the claimant sought an award of PTD benefits. Following a hearing, the arbitrator awarded additional TTD benefits, medical benefits, and permanent partial disability (PPD) at 50% loss of use of the body as a whole under section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2) (West 2010). The claimant appealed the arbitrator's decision to the Commission, which modified the TTD benefits, but denied TTD benefits from March 21, 2000, through December 16, 2002. The Commission affirmed the arbitrator's decision on permanency. The claimant appealed to the circuit court, which affirmed the decision in all respects. The claimant then sought review in the appellate court. On January 26, 2009, this court issued an unpublished order affirming the circuit court's judgment. *Erb v.*

Industrial Comm'n, No. 5-08-0144WC (Jan. 26, 2009) (unpublished order under Supreme Court Rule 23).

¶ 5 While the appeal was pending before this court, the claimant filed with the Commission a second petition under section 19(h) of the Act. In this petition, the claimant again claimed to be permanently and totally disabled. On June 3, 2013, the Commission awarded new additional TTD benefits as well as an additional 20% loss of use of the body as a whole for permanency. This award was paid by the employer.

¶ 6 On April 15, 2014, and October 8, 2015, the claimant filed two additional section 19(h) petitions, seeking an award of permanent total disability. These petitions were consolidated and submitted to the Commission on April 5, 2016. On December 27, 2016, the Commission denied the claimant's petitions for all additional benefits. The claimant had also filed a petition for penalties under sections 19(k), 19(l), and 16 of the Act. 820 ILCS 305/16, 19(k), 19(l) (West 2010). These petitions were also denied.

¶ 7 On February 26, 2018, the circuit court affirmed the decision of the Commission in its entirety and denied the request for penalties. The claimant then filed this appeal.

¶ 8 **BACKGROUND**

¶ 9 The following factual recitation is taken from the evidence presented at the arbitration hearing held before Arbitrator Joshua D. Luskin in Mt. Vernon, Illinois, on April 5, 2016. The claimant testified that he was 68 years old at the time of this hearing. The last hearing he attended on this matter was in November 2011 on a previous section 19(h) petition. Since then, he had right shoulder replacement in October 2014 and left shoulder repair on October 12, 2015. In February 2016, the claimant underwent a similar repair procedure on the previously replaced right shoulder.

¶ 10 The claimant further testified, after the right shoulder replacement procedure, he experienced “a lot of increased pain and lack of movement.” He also testified, after November 2011, he noticed considerably more weakness in the right shoulder attributable to the surgery. He observed that he had “no strength in [his] arms whatsoever anymore.” The claimant testified that he is right-hand dominant and it is almost impossible to even lift a gallon milk carton out of the refrigerator. It was also difficult to take a shower and he upgraded to a handicapped shower with a seat in it. He testified, at the time of the hearing, he could not reach above shoulder level with either arm and his range of motion was significantly worse on the left. He could not engage in hobbies, such as fishing, and he resumed taking pain medication because his shoulders hurt so much.

¶ 11 On cross-examination, the claimant acknowledged that he last worked in 1999 and that he applied for and began receiving social security disability benefits in October 2000. He acknowledged that the prior section 19(h) hearing was after he had the surgical procedure on his left shoulder. The claimant further acknowledged, that at the original arbitration hearing in 2005, he claimed to be entitled to PTD benefits. He again claimed PTD benefits at the 2011 hearing. The claimant further acknowledged that he had not looked for work since 2000. He did not remember whether he testified that he had no strength in his left or right arm in 2011. He did not remember whether he had treated with Dr. Ken Yamaguchi between November 2011 and May 7, 2014. He further testified that he had had eight surgeries on his shoulders since 1999. The claimant acknowledged, that when he sought treatment from Dr. Yamaguchi in May 2014, he did not tell him that he was on disability since 2000 nor did he inform Dr. Yamaguchi that he had not worked since 1999. The record established, that on January 18, 2011, Dr. Yamaguchi opined that

the claimant was at maximum medical improvement (MMI) and the claimant had not treated with Dr. Yamaguchi between February 2011 and May 2015.

¶ 12 On redirect examination, the claimant testified he is not able to perform as many household chores as he did in 2011. He further testified he had difficulty with everyday activities and sleeping. He also testified that he had not decided whether to have the recommended right-sided surgery because of complications after the left shoulder surgery.

¶ 13 On June 3, 2013, the Commission issued a decision on the claimant's previous 19(h) petition, awarding him an additional award of 30 2/7 weeks of TTD benefits and an additional 100 weeks of PPD benefits. The increased PPD award represented an increase of 20% loss of the person as a whole for a total loss of 70% of the person as a whole.

¶ 14 The medical records reveal, that on May 7, 2014, Dr. Yamaguchi examined the claimant as a follow-up regarding his right shoulder pain, which the claimant rated as 10/10 pain. The claimant asked if it was possible to have the same procedure on the right shoulder that he had on the left, noting that he thought the left shoulder was doing reasonably well. After the examination and review of x-rays, Dr. Yamaguchi noted that the claimant's left shoulder was "doing very well" while the right shoulder was "extremely painful with a massive irreparable cuff tear in context of cuff tear arthropathy." Dr. Yamaguchi planned a "right reverse total shoulder replacement." He administered an injection and gave the claimant an "off-work" report, not knowing that the claimant had not worked since 1999.

¶ 15 On October 30, 2014, Dr. Yamaguchi performed reverse total right shoulder replacement for failed rotator cuff repair syndrome and cuff tear arthroplasty. The claimant returned to Dr. Yamaguchi on November 12, 2014, who indicated that the claimant was doing very well after right shoulder replacement and he already had active assisted elevation to 130 degrees. He

observed that the prosthesis was in good position and opined that the shoulder would improve with continued stretching. Dr. Yamaguchi continued to indicate that the claimant would be “unable to work.”

¶ 16 On January 7, 2015, Dr. Yamaguchi reported that the claimant was still doing well and was happy overall, though he still had some soreness in the arm and felt weak. Dr. Yamaguchi ordered more physical therapy. The record contains a work note indicating that the claimant may be able to work with restrictions, but no specific restrictions were included in the notation.

¶ 17 On April 8, 2015, the claimant reported he was still having pain in the right shoulder. He indicated that it was similar to what happened with the other shoulder when he received an intra-articular injection. Dr. Yamaguchi ordered an intra-articular steroidal injection and indicated that the claimant should remain “off work.”

¶ 18 On July 16, 2015, Dr. Yamaguchi noted that the claimant reported mild pain in both shoulders, the etiology of which was unknown. The bilateral injections provided temporary relief. Dr. Yamaguchi was “going to get bilateral aspirations.” Dr. Yamaguchi continued to keep the claimant “off work.”

¶ 19 On October 12, 2015, Dr. Yamaguchi performed left shoulder open release surgery.

¶ 20 On February 11, 2016, Dr. Yamaguchi noted that the claimant was doing much better after the latest left shoulder surgery and observed that the same repair procedure might be helpful on the right shoulder, which remained very painful. Dr. Yamaguchi thought the surgery was reasonable because of the success on the left, even though the results were unpredictable.

¶ 21 On May 12, 2016, Dr. Yamaguchi reported that the claimant was actually doing quite well after right cortical brachialis release with significantly reduced pain although there was no diagnostic report in the record. He appeared “to be on track to do as well as he did on the left

side.” Dr. Yamaguchi opined that the claimant was at MMI regarding the right shoulder, released him from treatment, and recommended a functional capability evaluation (FCE). There is no FCE report in the record.

¶ 22 In the current 19(h) application, the claimant sought additional TTD benefits of 104 6/7 weeks, from May 7, 2014, when he first returned to Dr. Yamaguchi, through May 12, 2016, when he opined that the claimant was at MMI. The employer maintained that the claimant was not entitled to additional TTD benefits because he voluntarily took himself out of the work force in 1999, citing the claimant’s application for social security disability benefits.

¶ 23 The Commission determined that the claimant had voluntarily removed himself from the work force, not only because he had applied for social security disability benefits, but also because the claimant had testified that he had not worked since 1999 and had not even looked for work at any time since 2000. The Commission noted that the claimant’s application for, and acceptance of, social security disability benefits “confirm[ed] his intention not to work or seek employment.” The Commission further noted that the claimant had offered no evidence that his earning capacity had been adversely impacted by the most recent medical treatment. Therefore, the Commission determined that the claimant had failed to establish his entitlement to additional TTD benefits.

¶ 24 Regarding the claimant’s request for an increased permanency award, the Commission noted that his testimony about his disabilities at the current hearing was substantially the same as his testimony at the prior hearings. The Commission concluded, therefore, that the claimant had failed to prove any increased level of disability after the most recent surgeries. The Commission further noted that because the claimant had voluntarily removed himself from the labor force, he could not show an increase in impairment since the last award. The Commission further noted

that the evidence of disability in the record supported a conclusion that the extent of the claimant's permanent disability had not materially changed throughout the proceedings.

¶ 25 The Commission further noted that there was no medical evidence establishing that the claimant incurred an increased physical impairment since the prior permanency award. The Commission noted that neither Dr. Yamaguchi nor any other physician had opined that the claimant suffered any increased disability relative to the prior permanency award, nor did the record contain a functional capability evaluation to document the claimant's current disability. Accordingly, the Commission determined that the claimant failed to sustain his burden of proving that he has experienced any additional disability from his latest medical treatment or that he was entitled to any additional permanent disability benefits.

¶ 26 On the issue of penalties and attorney fees, the Commission determined that the employer denial of the claimant's request for additional TTD benefits was neither vexatious nor for the purpose of unreasonable delay.

¶ 27 The claimant then sought judicial review of the Commission's decision in the circuit court of St. Clair County, which confirmed the ruling of the Commission. The claimant then filed this timely appeal.

¶ 28 ANALYSIS

¶ 29 I. TTD Benefits

¶ 30 The claimant first maintains that the Commission erred when it denied his claim for additional TTD benefits for the period May 8, 2014, through May 12, 2016. The time during which a worker is temporarily totally disabled is a question of fact. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118-19 (1990). The Commission's decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id.* at 119.

¶ 31 In the instant matter, the claimant argues that the record established that Dr. Yamaguchi's medical records show that the claimant was unable to perform work beginning May 8, 2014, and continuing until he determined that the claimant was at MMI on May 12, 2016. The claimant further points out that Dr. Yamaguchi made treatment notes indicating that the claimant needed to be "off work" on November 12, 2014, and October 30, 2014. The claimant further maintains that the Commission based its finding that the claimant was not entitled to TTD solely on an erroneous conclusion that his receipt of social security benefits precluded an award of TTD benefits. The claimant maintains that this finding is erroneous as a matter of law. See *Schmidgall v. Industrial Comm'n*, 268 Ill. App. 3d 845, 849 (1994).

¶ 32 A claimant is entitled to TTD benefits from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injuries will permit. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). A claimant must not only show that he did not work, but also that he was unable to work as a result of his industrial accident. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2005). Once the claimant's condition has stabilized, his condition has become permanent and he is no longer entitled to TTD benefits. *Westin*, 372 Ill. App. 3d at 542. The duration of TTD is controlled by a claimant's ability to work and his continuation in the healing process. *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (1996). Therefore, when determining whether a claimant is entitled to TTD benefits, the test is whether the claimant remains temporarily totally disabled as a result of a work related injury and whether the claimant is capable of returning to the work force. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146 (2010).

¶ 33 Here, the Commission determined that the claimant was not entitled to TTD benefits for

the period May 8, 2014, through May 12, 2016, based on a factual finding that the claimant was not available to return to work since he had voluntarily removed himself from the possibility of returning to the work force. While the claimant maintains that the Commission's determination was based solely on his having begun receiving social security disability benefits in 1999, the record shows, to the contrary, that receipt of benefits was only one factor considered by the Commission. In finding that the claimant was voluntarily unavailable for work, the Commission noted that the claimant: (1) had not actively sought employment since 2000; (2) had consistently claimed that he was permanently totally disabled since the date of his application for benefits in 1999; (3) had received permanent partial disability benefits since 2000 with no attempt to seek employment within his permanent restrictions; and (4) evidenced his intent not to seek employment by his application for social security disability benefits. In other words, the Commission did not consider the claimant's application for social security disability benefits as dispositive, but merely as one factor indicating that the claimant was not entitled to TTD benefits during the time in question.

¶ 34 In addition, the record established that Dr. Yamaguchi's observations and opinions were based upon the mistaken assumption that the claimant was still working or at least seeking work within existing restrictions.

¶ 35 Moreover, the instant matter is distinguishable from *Schmidgall*, where the claimant applied for social security retirement benefits, not social security *disability* benefits. In *Schmidgall*, the court held that a social security retiree is not precluded from receiving retirement benefits while still seeking employment. *Schmidgall*, 268 Ill. App. 3d at 848. Here, the record established that the claimant applied for and received social security *disability* benefits, which required the claimant to prove that he was "unable to engage in any substantial gainful activity."

42 USCA § 423(d)(1)(A) (West 1991). Thus, the Commission could reasonably consider that the claimant's application for social security disability benefits was some proof that he was no longer seeking gainful employment.

¶ 36 Given the totality of the record, it cannot be said that the Commission's determination that the claimant was not entitled to additional TTD benefits for the period May 8, 2014, through May 12, 2016, was against the manifest weight of the evidence.

¶ 37 II. Permanency

¶ 38 The claimant next maintains that the Commission erred in not increasing his permanency award. On this issue, we note that neither party had cited to case authority to support their respective positions on this issue, nor provided a statement of the appropriate standard of review on this issue. Illinois Supreme Court Rule 341 (eff. July 1, 2008). The rules of procedure concerning appellate briefs are rules and not mere suggestions, and failure to comply with the rules can have consequences. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7.

¶ 39 The purpose of a section 19(h) proceeding is to determine whether the extent of a claimant's disability has changed since the time of the original decision by the Commission. *City of Alton v. Industrial Comm'n*, 231 Ill. App. 3d 334, 338 (1992). The change in the claimant's condition must be a material one. *Id.* As with any permanency claim, the claimant has the burden to establish a material change in the extent of his disability by a preponderance of the evidence. *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 31. This is a factual question to be determined by the Commission. *Id.* Accordingly, the Commission's decision on the nature and extent of a claimant's permanent injuries will not be overturned on appeal unless it is against the manifest weight of the evidence. *Id.*

¶ 40 In the instant matter, the claimant sought an increase in his prior permanency award. In its 2013 decision, the Commission increased the claimant's permanency award from 50% to 70% of the person as a whole. In order to establish his claim to an increased permanency award in the claim at issue herein, the claimant needed to establish a material increase in his degree of disability over the prior award. Here, the record supported the Commission's factual finding that the claimant's degree of impairment had not materially increased since the prior permanency award. While Dr. Yamaguchi reported the need for additional surgeries subsequent to the 2013 permanency award, there was nothing in the record to establish that those surgeries had left the claimant with an increased degree of physical impairment greater than 70% of the person as a whole. As the Commission noted, there was no medical opinion testimony from Dr. Yamaguchi, or any other medical professional, that established an increase in the claimant's degree of disability subsequent to the prior permanency award. In addition, there was no FCE report to establish a greater degree of functional impairment after the prior award. There was only Dr. Yamaguchi's opinion as to the claimant's current condition, which was based upon the mistaken assumption that the claimant was currently in need of an "off work" determination. Given the record before the Commission, we cannot find that its decision regarding the degree of the claimant's permanency was against the manifest weight of the evidence.

¶ 41 III. Penalties and Attorney Fees

¶ 42 The claimant's petition for penalties and attorney fees for unreasonable and vexatious denial of additional TTD benefits was denied by the Commission based on its finding that the claimant was not entitled to additional TTD benefits. As we have affirmed the Commission's finding regarding TTD benefits, we need not address the issue of penalties and fees. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 43

CONCLUSION

¶ 44 The judgment of the circuit court of St. Clair County confirming the decision of the Commission is affirmed.

¶ 45 Affirmed.