COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003711-07**

Anna Keane	Employee
McLean Hospital	Employer
Partners HealthCare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Horan, and Levine[1])

The case was heard by Administrative Judge McDonald.

APPEARANCES

Steven P. Brendemuehl, Esq., for the employee at hearing and on appeal
Christopher A. Iannella, Jr., Esq., for the employee on appeal
Tamara Ricciardone, Esq., for the self-insurer

HARPIN, J. The self-insurer appeals from a decision awarding the employee § 34A benefits from the date of the exhaustion of her § 34 benefits. Two issues raised by the self-insurer merit discussion in our affirmance of the decision.[2]

On February 20, 2007 the employee, a licensed practical nurse since 1983, suffered an industrial accident when she injured her neck, shoulder, right hand and abdomen while attempting to restrain a patient. (Dec. 7.) She had minimal treatment after that injury, although a post-accident MRI showed evidence of multi-level cervical disc herniations and nerve root impingement. (Dec. 7.) Her treating physician recommended steroid injections and physical therapy. (Dec. 8.)

The employee has had continuous symptoms since the accident, consisting of headaches four times a week on average, pain in her biceps and in the base of her neck (after sitting or standing for fifteen minutes), spasm in her shoulder, and

[1] Judge Levine recused himself from this case.

[2] The decision is summarily affirmed as to the other issues raised by the self-insurer.

other complaints. (Dec. 9.) She takes Percocet and Gabapentin for her pain, Ativan for anxiety and Motrin for inflammation, some of which cause her to be groggy and suffer memory loss. (Dec. 9.)

The employee testified she cannot work with her pain. (Dec. 9.) The judge credited this testimony and found the employee could not return to work secondary to her pain, reduced range of motion, lack of strength in her hand, and grogginess because of her medications. (Dec. 10.)

The report of the impartial physician appointed pursuant to G. L. c. 152, §11A, Dr. William Shea, was found to be inadequate due to his failure to give an opinion on causation. (Dec. 11.) Consequently the judge allowed the admission of additional medical evidence. The employee submitted the deposition testimony of Dr. Antonio Mendes, the employee's treating physician since 2002. (Dec. 2, 11.) Among other records, on December 22, 2011, the self-insurer submitted three reports of its examining physician, Dr. Robert Levine,[3] as well as his deposition testimony. (Dec. 2, 13.) Dr. Levine's record review of December 21, 2011, while not listed as a separate exhibit, was submitted on December 23, 2011 to the judge for inclusion with the self-insurer's other medical records.

The self-insurer raises two main issues. It argues the judge failed to review and consider the medical evidence it submitted, and that he failed to make sufficient subsidiary findings on the employee's extent of disability. We address these issues in turn.

The self-insurer argues that the judge's failure to list or discuss Dr. Levine's December 21, 2011 report and his failure to discuss all the medical evidence in general requires recommittal, as it "makes it impossible to determine whether he actually considered that evidence, thereby assuring an adequate foundation for his conclusions." (Self-ins. br. 11). We disagree.

[3] Dr. Levine's reports listed by the judge in his decision were those of March 14, 2008, October 3, 2008, and June 21, 2010. (Dec. 2).

A judge must either list or discuss the medical evidence admitted at the hearing. It is legally sufficient if the judge lists the medical evidence as exhibits, as the judge is presumed to have considered all of them. Bennett's Case, 72 Mass. App. Ct. 1109 (2008)(Memorandum and Order, Rule 1:28), rev. den. 452 Mass. 1107 (2008); Clark v. Longview Assocs., 24 Mass. Worker's Comp. Rep. 253, 258 **(**2010).[4] That the judge did not list one medical record, the December 21, 2011 report of Dr. Levine, as a separate exhibit at the beginning of the decision, is not error, as the judge noted in the body of the decision the submission of that report.[5] The record review was thoroughly discussed by the doctor during his deposition.[6] (Dep. 5, *et seq*.) Bennett's Case, supra; McCarthy v. Peabody Properties, 24 Mass. Workers' Comp. Rep. 89, 95 (2010)(discussion by doctor in his deposition of medical records presupposes knowledge by judge of those records where judge refers to the doctor's testimony in the decision). The judge, therefore, did consider the December 21, 2011 report.

The self-insurer also seeks reversal and recommittal on the ground the judge mischaracterized Dr. Mendes' opinion to support his finding that she was permanently and totally disabled from all remunerative employment. While we agree that the judge mischaracterized the doctor's opinion, this error is harmless.

The judge found:

> Dr. Mendes opined that as of February 20, 2012, the employee was permanently and totally disabled (Id. at [Mendes] 22), based upon her complaints, the MRI findings, examinations and her chronic narcotic pain medications that have side effects (Id. at 23).

---

[4] The self-insurer acknowledged the judge identified medical records in the exhibit list. (Self-ins. br. 6).

[5] The judge wrote: "Dr. Levine submitted a medical record review on December 21, 2011." (Dec. 13.)

[6] The record review was attached to Dr. Levine's deposition transcript as Exhibit 4, and the parties had ample opportunity to examine and cross-examine the doctor about his opinions contained therein.

(Dec. 12.)

The judge later concluded:

> I have adopted the opinion of Dr. Mendes that the employee's disability is permanent and total, and that the injury of February 20, 2007, is the major cause of her present disability and need for medical treatment. Further, I credit the employee's testimony that her need for narcotic pain medication affects her concentration and attention, which would reasonably be an impediment to employment as a nurse.

(Dec. 17.)

A review of Dr. Mendes' deposition testimony taken as a whole, Fahey's Case, 77 Mass. App. Ct. 1113 (2010)(Memorandum and Order, Rule 1:28), demonstrates he considered the employee to be permanently and totally disabled from her work as a nurse, but not from all work, for which he imposed specific restrictions. Dr. Mendes testified the employee was permanently and totally disabled "and unable to perform any duties." (Dep. 22). It is apparent from his answers to follow-up questions, however, that he was referring to the employee's work as a nurse.

> Q. Doctor, upon what is that opinion based?
>
> A. It's based on her symptoms, her complaints, the MRI report, the examination which occurs with the MRI findings. Also, the fact that she's on chronic narcotic pain killers, multiple medications which … obviously, all these medications have side effects with … especially working as a nurse, I wouldn't … advise her to … anybody to take those medications and take care of patients in the hospital. So those are pretty much my opinion why she shouldn't be able to do any of it.
>
> Q. Would there be any specific physical limits that you would place on Miss Keane?
>
> A. I think also the fact that … a specific job, she wouldn't be able to, for example, do reparative (sic) pushing, pulling, lifting. I think that she wouldn't be able to lift more than 10 pounds comparatively. But also, working as a nurse and duties required to lift patients, perform CPR, multiple things that she wouldn't be able to perform in her condition.

(Dep. 22-23).

However, the judge did not rest his award of § 34A benefits solely on Dr. Mendes' opinions. He also specifically "credited the employee's testimony . . . that she cannot return to work secondary to her pain, reduced range of motion, and because medications make her groggy, and she has no strength in her hand."[7] (Dec. 10).

The key, of course, is that the employee was asked at the hearing to consider whether she could work *in any capacity* because of her pain, not just whether she could work as a nurse. The judge was well within his authority to credit the employee's complaints of pain. Killam's Case, 83 Mass. App. Ct. 1102 (2012)(Memorandum and Order, Rule 1:28). Combining this credited pain with her inability to perform her prior work as a nurse, the judge did not err in finding that the employee was totally and permanently incapacitated from all remunerative employment. Sweet v. Eagleton School, 25 Mass. Workers' Comp. Rep. 25, 28 (2011); Cugini v. Town of Braintree School Department, 17 Mass. Workers' Comp. Rep. 363, 366-367 (2003); Capozzi v. Allen Davis d/b/a Brockton Auto Repair, 17 Mass. Workers' Comp. Rep. 119, 123 (2003)(total disability stems from a finding that the credited pain added to the restrictions applicable to the employee's return to work); See Delaney v. Laidlaw Waste Systems, 13 Mass. Workers' Comp. Rep. 72, 74 (1999); Anderson v. Anderson Motor Lines, 4 Mass.

---

[7] The judge was referring to the employee's testimony on the first day of the hearing.

> Q. And Miss Keane, do you believe that you could return to work in any capacity at this time?
> A. No.
> Q. Why not?
> A. Because of the severe pain I'm in, because of my functions are limited as to range of motion and what I could do. The medicine I take renders me groggy. I get confused, I can't remember anything. I can't use my hands like I used to. I don't have the strength that I used to have. No I can't.

(Tr. 8/24/11, 24).

Workers' Comp. Rep. 65, 67 (1990)(employee's creditable complaint of lower leg pain proscribed sedentary work, even though the medical opinion found a loss of function that would have allowed such work).

While the judge did not specifically refer to the employee's pain in concluding that she was permanently and totally incapacitated from all work, (Dec. 17.), his prior crediting of her testimony that she could not work in any capacity because of her pain, together with his adoption of Dr. Mendes' opinion that she could not return to work as a nurse, has the same effect, and fully supports the award of § 34A benefits. Patterson v. Liberty Mutual Insurance Co., 48 Mass. App. Ct. 586, 587 n.5 (2000)(decision will be upheld if it contains conclusions adequately supported by subsidiary findings which are not lacking in evidential support or tainted by error of law); See also Dalbec's Case, 69 Mass. App. Ct. 306, 313 (2007).

Accordingly, we affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is directed to pay the employee's counsel a fee of $1,563.91.

So ordered.

_____
William C. Harpin
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

Filed: January 25, 2013