COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 012487-81

Carol Greene	**Employee**
Ethyl Products	**Employer**
Travelers Insurance Company	**Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Hernandez.

APPEARANCES

William H. Murphy, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on appeal
Donna Gully-Brown, Esq., for the insurer

COSTIGAN, J. The employee appeals from an administrative judge's decision discontinuing payment of § 34A permanent and total incapacity benefits for her 1981 industrial back injury. Because we agree with the employee that the decision contains a key factual error and a faulty incapacity analysis, we reverse the decision, reinstate the employee's § 34A benefits and § 34B cost-of-living benefits, and recommit the case for further findings.

In a prior hearing decision filed on July 1, 1986, (Ex. 6), a different administrative judge found the employee permanently and totally incapacitated as of November 1, 1984. At that time, her complaints were low back pain and numbness radiating down to her right knee. Id. The employee continued to receive § 34A benefits and annual § 34B cost-of-living adjustments for some twenty years. In November 2006, the insurer filed a complaint for modification or discontinuance of weekly compensation. Following a § 10A conference, the current administrative judge denied the complaint, and the insurer appealed.

On May 30, 2007, pursuant to the provisions of § 11A, the employee was examined by Dr. Mehrdad Motamed, who reported that the employee's complaints

were low back pain with right lower extremity radiculopathy, sometimes going to her foot. The doctor opined that the employee had reached maximum medical improvement and stated he did not believe her condition would significantly change. He further opined that the employee "should definitely work in a modified capacity, limiting her heavy lifting, forceful pushing and pulling, and straining." (Ex. 1.)

Against the backdrop of the impartial physician's opinions, the judge analyzed the employee's intervening twenty-one year medical profile and, based essentially on four factors, concluded that her condition had improved. First, he noted that the medical evidence the administrative judge relied on in 1986 to find the employee permanently and totally incapacitated addressed her condition when she was only three years post-surgery. At the time of the hearing in November 2007, the employee was twenty-six years post-surgery. Second, the judge found the employee no longer receives the injections to her back she was undergoing in 1986. Third, the employee no longer undergoes counseling for depression and, fourth, she has lost sixty-five pounds. (Dec. 8-9.)

Although the employee's work history consisted largely of physical labor in a warehouse setting, she testified that in the months prior to her injury, she supervised anywhere from five to fifteen co-employees, but continued to perform the physical aspects of her job as well. (Tr. 18-19; 48-49.) The judge found the employee did have supervisory experience, and possessed transferable skills.[1] He also found that her back symptoms did not interfere with her performance of daily life activities. (Dec. 9.) Adopting the opinion of the insurer's vocational expert, the judge concluded that the employee could engage in sedentary employment, and would be able to perform jobs in the open labor market such as customer service, cashier or light assembly work. (Dec. 10-11.) He therefore found the employee was only partially incapacitated, and allowed the insurer's discontinuance complaint as of May 30, 2007. (Dec. 12-13.)

The employee challenges several of the judge's findings. First, she submits that she was *fifty-eight* years old at the time of the hearing, (Tr. 35), not *fifty* as the judge

[1] Both parties offered expert vocational testimony. (Dec. 6-7.)

found. (Dec. 3.) It is clear that the judge's finding as to the employee's age, the first vocational factor under Frennier's Case, 318 Mass. 635 (1945), is inaccurate, and we cannot conclude it is a simple scrivener's error. We agree with the employee that an eight-year age difference -- particularly in the latter portion of an individual's working life, and especially where this employee had been out of the labor force for almost twenty-seven years at the time of the hearing -- is not insubstantial, and could have affected the judge's assessment of the employee's employability.

The main thrust of the employee's appeal, however, is that the judge's view of the four factors noted above as indicative of medical improvement, was arbitrary and capricious. We agree.

First, the mere passage of time, *ipso facto*, does not establish that the employee's condition has improved. The judge found that the 1986 decision ordering § 34A benefits was supported by medical opinions rendered only three years post-surgery, while the current impartial physician, Dr. Motamed, examined the employee twenty-one years later. However, the medical experts whose opinions were adopted in 1986 declared the employee had reached maximum medical improvement, as did Dr. Motamed in 2007, and all found the same symptomatology -- low back pain with right lower extremity radiculopathy. (Exs. 1 and 6.) Thus, the medical evidence does not support the judge's finding that the employee's condition had improved in the interim. Rather, the opposite is so. Dr. Motamed's opinion that the employee could work modified duty was based on the same medical conditions and physical restrictions found to be permanently and totally incapacitating by the prior administrative judge in 1986.

Dr. Motamed's disability opinion not only appears tainted by a misperception of the employee's pre-examination disability status,[2] but it also strays impermissibly

[2] In his § 11A impartial medical report, Dr. Motamed wrote: "In my opinion, this woman *continues to be partially disabled* for the type of work that requires repeated bending and lifting of heavy objects. . . ." (Ex. 1, p. 3; emphasis added.) Although this statement plainly called into question whether the doctor was aware of the employee's long-standing total disability, neither party elected to depose the impartial physician. On recommittal, the judge in his discretion may consider

close to a vocational determination. It is the judge's exclusive responsibility to conduct a vocational analysis, and he is charged with determining how the employee's medical limitations, in combination with her age, education, work experience, training and other relevant factors, impact her ability to work and earn wages. O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16, 22 (2004), citing Scheffler's Case, 419 Mass. 251, 256 (1994) and Frennier's Case, supra at 639.

Second, the bare fact that the employee no longer receives injections for her back complaints does not support a finding she has improved. The employee testified that she had her last injection in 2004 and none thereafter simply because the doctor who administered the shots retired. (Tr. 21-22.) Dr. Motamed did not opine that the injections were stopped because the employee's back complaints improved, and the judge's inference to the contrary was not permissible.

Third, even if the judge was warranted in inferring the employee's depression had improved because she was no longer in counseling, that fact is irrelevant to the analysis of her present incapacity. Her depression was never claimed, let alone found, to be causally related to her industrial injury. It had no place in the analysis of her incapacity in 1986, and therefore no place in the judge's analysis in 2007.[3]

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whether the doctor's misapprehension of the employee's pre-examination disability status rises to the level of inadequacy, so as to warrant the allowance, *sua sponte*, of additional medical evidence. G. L. c. 152, § 11A(2).

[3] The administrative judge who, in 1986, found the employee permanently and totally incapacitated did so by crediting her complaints of low back and radiating right leg pain, and by adopting the opinion of her treating orthopedic physician, Dr. George May, that the employee had reached a medical end result with a fifty percent permanent loss of function of her low back and a twenty-five percent permanent loss of function of her right lower extremity. (Ex. 6, pp. 4-5.) The only reference the judge made to the employee's mental condition was: "The employee testified that she has become depressed since her injury . . . and sought treatment at the Valley Adult Counseling Service from Dr. Feldman who prescribed medication. . . ." (Ex. 6, p. 3.) That judge did not factor this alleged depression into

Lastly, given that the employee's sixty-five pound weight loss, (Dec. 5; Tr. 55), was not even noted by Dr. Motamed, it cannot have played any role in the doctor's opinion of partial disability. In the absence of an expert medical opinion addressing the effects of the employee's weight loss, the judge's reliance on that factor as indicative of medical improvement was unfounded.[4]

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his incapacity analysis, nor did he order the insurer to pay for the counseling. Indeed, in his report of May 30, 2007, Dr. Motamed noted: "In the past [the employee] had been on Effexor but she is not taking this medication any longer. She was asked if she has a history of depression and her response was negative." (Ex. 1, p. 3.)

[4] According to the judge, "the employee testified that the weight loss has helped her back pain." (Dec. 5.) Although the employee ultimately conceded as much when pressed by the judge, this conclusion does not accurately reflect the entirety of the employee's testimony on the subject:

> Q.: Has your back improved, or changed, or gotten worse since that period of time [1986]?
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> A.: It hasn't gotten any better. It just hasn't gotten any better.
>
> Q.: How do you characterize your back, how it feels today as how it felt then?
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> A.: Some things, there's no difference. Other things, it's different, in a way. I think, you know, when I lost 65 pounds there, and I didn't have a steady weight, I had a lot of trouble with the back. . . . Then when I got to like, 180, I think, where I'm at now, I believe, it started up. The sciatic calmed down a little bit, and the back wasn't too, too bad then. Then I quit smoking and I put on a few pounds. It changes with weight. . . .
>
> Q.: Has the back got better since '85.?
>
> A.: No.
>
> . . .

By hearing decision filed in 1986, the employee had been adjudicated permanently and totally incapacitated as of November 1, 1984. Thus, the only question before the administrative judge was whether the employee's medical or vocational circumstances had changed in such a way as to permit the [ ] insurer to place her § 34A entitlement at issue. "[W]here the insurer seeks discontinuance of § 34A benefits, the insurer must go forward with evidence of improvement in the employee's condition or a lessening of the degree of incapacity in order to meet its burden" of producing sufficient evidence to create a dispute. Slater v. G. Donaldson Const., 17 Mass. Workers' Comp. Rep. 133, 137 (2003), quoting Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406 (1994). Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007).

Because the judge's reasons for finding medical improvement were flawed, and because he may have thought the employee was eight years younger than she is, the decision terminating § 34A benefits cannot stand. We reverse the decision, reinstate § 34A and § 34B benefits retroactive to May 30, 2007, and recommit the case for further findings consistent with this opinion.

So ordered.

> Q.: Before you gained the seven or eight pounds, did the weight loss help with your back pain?
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> A.: . . . I think it gets worse when you're losing the weight. And when you stop at a level, it goes back to where it was before. I don't think it's better or worse, I think it just starts to say, okay, is this where you're going to be.
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> . . .
>
> Q. (by judge): . . . Has it helped or hasn't it helped, the weight loss?
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> A.: Yeah, you know -- yes.

(Tr. 55-57.)

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: March 27, 2009