

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 050282-96

Christine Kennedy
City of Chicopee School Dept.
City of Chicopee

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Fabricant and McCarthy)¹

The case was heard by Administrative Judge Chivers.

APPEARANCES

Charles R. Casartello, Jr., Esq., for the employee
Douglas F. Boyd, Esq., for the self-insurer

FABRICANT, J. The employee appeals from a decision in which an administrative judge denied and dismissed her claim for medical and specific loss of function benefits. We affirm the decision.

The employee alleges respiratory problems beginning in 1996, attributed to working as a teacher in a moldy environment. The self-insurer accepted her claim, and paid workers' compensation benefits until she retired in 2000. The employee's present claim is for continuing respiratory problems, allegedly attributable to her prior workplace exposure to mold. The judge denied her claim at conference, and the employee appealed to a full evidentiary hearing. (Dec. 2.)

The §11A impartial medical examiner diagnosed the employee with asthma, deeming her current regimen of medication to be reasonable. (Dec. 2, Dep. 13.) The impartial examiner also acknowledged the employee's history of symptoms originating with air quality issues while working prior to 2000. However,

¹ Judge Koziol recused herself from this case and did not participate in panel discussions.

concluding that the impartial physician's opinion fell short in supporting a causal relationship, the judge ultimately denied the employee's claim. (Dec. 2-3.)

The employee argues that the judge erred by not addressing its post-deposition motion for inadequacy of the § 11A opinion. However, the judge's lack of action on the employee's post-deposition motion may, in fact, be deemed a denial of that motion. See Rusconi, Petitioner, 341 Mass. 167 (1960)(failure to act on motion deemed to be implied denial). The judge clearly considered the deposition, and cites to it in his decision. Thus, the question remains as to whether the judge abused his discretion in finding that opinion adequate.

The employee's inadequacy argument is centered on the theory that a self-contradictory opinion under § 11A cannot be adequate, as the nature of prima facie evidence is inherently compromised in such a situation. See Brooks v. Labor Management Services, 11 Mass. Workers' Comp. Rep. 575 (1997). The employee proffers as contradictory the doctor's opinion that work is no longer a factor in any symptomatology, and his final deposition answer that the use of medications to treat the asthmatic symptoms "is part of the continuing process." (Dep. 39.) The doctor first testified regarding causal relationship:

Q: . . . [D]o you have an opinion as to whether these [work] conditions aggravated her condition, made her symptomatic *even to this day*?

. . .

A: I do believe that that [work] exposure aggravated her condition. I cannot say -- *I don't think that that [work] exposure is causing her current symptoms*.

Q: [D]o you have an opinion as to what is causing her current symptoms?

A: I think she does have upper respiratory inflammation, postnasal drip and perhaps some asthma, but the exacerbating environmental triggers that she reported to me are not related to her work in the school system over seven years ago.

Q: . . . [I]s it possible that the persistence of her symptoms result[s] from the original exposure to mold and a current reaction to other contaminants that wouldn't otherwise exist?

A: Anything is possible.

Q: Do you have an opinion whether or not that is likely?

A: *I think it is unlikely.*

(Dep. 27-28; emphasis added.) The doctor also testified, while ruling out the diagnosis of reactive airways disease found by the employee's treating physician, that "[h]er reactions were more typical of a patient with extrinsic asthma and allergies who was reacting, as anyone with allergies to molds, when exposed to molds." (Dep. 25.)

In contrast to this cogent opinion on causal relationship, the employee interposes a rather confused examination leading to the doctor's "continuing process" testimony which concluded his deposition:

Q: So there is a continuing connection between her original diagnosis and what symptoms she has to the present, is that right?

A: She says she can't breathe when she is exposed to molds.

I have no reason to disbelieve her. Certainly I think that is reasonable. I can't prove it or disprove it. I have to take that at face value and say I think it is reasonable to say based on the opinions of the people taking care of her at the time and her own history that there appears to be a relationship and I would think prudence would say we should avoid all such situations.

Q: And the use of medicines similarly to help her to avoid episodes would likewise be prudent?

A: In the proper -- with the proper supervision and in the proper context, determining which medicines [] would be the most appropriate[,] would be in her best interest.

I am not sure that has been done.

Q: But medicines of some sort to continue to deal with her symptoms?

A: Yes.

Q: Asthmatic symptoms is appropriate?

A: Yes.

Q: And in the same way continues to be related to her original development of these symptoms?

A: It is part of the continuing process.

(Dep. 38-39.)

As the doctor was never asked what he meant by the "continuing process," his answer stands as ambiguous. We do not think the answer requires a finding that the original work exposure continues to have a causal connection to the present asthmatic sensitivity, which the doctor clearly testified was "unlikely." (Dep. 28.) Thus, there was no inherent contradiction as contemplated in Brooks. We see no abuse of discretion in the judge's *de facto* denial of the employee's motion for a declaration of inadequacy of the § 11A opinion.

Given our disposition of the inadequacy issue, the judge's failure to address the employee's § 36 claim is, at most, harmless error. Absent causal relationship, no claim for specific loss of function benefits may logically stand. The employee's reliance on Florea v. County of Bristol Sheriff's Dept., 22 Mass. Workers' Comp. Rep. ____ (2008) is inapposite. Unlike the present case, the impartial opinion on causal relationship was utterly equivocal in Florea. Under such circumstances, the judge's action in Florea, allowing additional medical evidence in order to address the employee's § 36 claim was within the reasonable exercise of his discretion.

The decision is affirmed.

So ordered.

William A. McCarthy
Administrative Law Judge

Christine Kennedy
Board No.: 050282-96

Bernard W. Fabricant
Administrative Law Judge

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