COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035561-09**

Gail Wicklow	Employee
Fresenius Medical Care Holdings, Inc.	Employer
American Casualty of Reading, PA	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

This case was heard by Administrative Judge Vieira.

APPEARANCES
Bernard J. Mulholland, Esq., for the employee
Linda D. Oliveira, Esq., for the insurer

CALLIOTTE, J. The employee appeals from a decision denying her claim for § 34A permanent and total incapacity benefits, and ordering the insurer to pay § 35 partial incapacity benefits, beginning on May 13, 2012, and continuing. We reverse the decision and order the insurer to pay § 34A permanent and total incapacity benefits from that date forward.

This case was the subject of a prior hearing decision, in which a different administrative judge awarded the employee ongoing § 34 benefits from May 15, 2009, for a work-related emotional injury arising out of a series of encounters with management in the three-year period before she left work on May 15, 2009.[1] The judge found the employee had pre-existing post-traumatic stress disorder (PTSD), due to "an extremely chaotic and difficult childhood." (Dec. 1, 7.) She adopted the opinion of Dr. Marc Whaley, the §11A examiner, that the work events were "the major and predominant cause of the employee's injury, disability and need for treatment." (Dec. I, 44.) Although she found that some of the events at work were personnel actions, she further

[1] That decision, issued on April 30, 2013, will be referred to as "Dec. I." The current decision on appeal, issued on April 28, 2016, will be referred to as "Dec. II."

found that none of those events were "*bona fide* personnel actions."[2] (Dec. I, 34-43.) Cornetta's Case, 68 Mass. App. Ct. 107, 118-119 (2007); see Descoteaux v. Raytheon Co., 19 Mass. Workers' Comp. Rep. 211 (2005)(in emotional injury claim involving both work and non-work-related causes, employee must prove employment events not deemed to be bona fide personnel actions are the predominant contributing cause of the claimed emotional disability). Accordingly, she awarded the employee § 34 temporary total incapacity benefits from the date of injury forward. (Dec. I, 44.) That hearing decision was affirmed by the reviewing board in Wicklow v. Fresenius Medical Care Holdings, Inc., 28 Mass. Workers' Comp. Rep. 41 (2014), and by the Appeals Court in Wicklow's Case, 87 Mass. App. Ct. 1130 (Memorandum and Order Pursuant to Rule 1:28)(2015).

During the pendency of the appeal to the reviewing board, the employee filed the present claim for § 34A permanent and total incapacity benefits, beginning on the date of exhaustion of her § 34 benefits, May 13, 2012. (Dec. II, 2.) Following a § 10A conference, the original administrative judge ordered the insurer to pay § 34A benefits from May 13, 2012, to December 31, 2013, and § 35 benefits from January 1, 2014, and continuing. Id. Both parties appealed to hearing. On August 5, 2014, after completing the testimony of three lay witnesses, the original judge concluded the hearing, but for the medical deposition of the § 11A examiner. Shortly thereafter, that judge left the Department, and the case was reassigned to the present judge, who held an off-the-record status conference on September 26, 2014. At that time, the parties agreed that the new judge would use the transcript of the August 5, 2014, hearing in making her decision, but

[2] G. L. c. 152, § 1(7A), sentences three and five, state:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. . . . No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

that the employee would testify again before the new judge to enable her to assess credibility. (Dec. II, 3.) That testimony took place on November 18, 2014.[3]

On October 28, 2013, prior to the employee's testimony before either judge in her § 34A claim, Dr. Marc Whaley re-examined the employee pursuant to § 11A, and issued a report on October 30, 2013. (Dec. II, 4, 10.) The original judge found the impartial report adequate and the medical issues not sufficiently complex to warrant opening the medical record. However, she allowed medical evidence for the "gap" period between May 13, 2012 (the date from which § 34A benefits were claimed) and October 30, 2013 (the date of the § 11A report). (Tr. I, 5.) The current judge made the same findings regarding adequacy and lack of complexity, noting that she allowed "gap medicals" because "the § 11A report does not specifically address this prior period of alleged disability." (Dec. II, 4.) The judge stated that neither party filed motions on inadequacy or complexity. Id.

Dr. Whaley was deposed on February 13, 2015. He opined that, in October 2013, the employee was permanently and totally disabled as a result of her psychiatric condition, (Dep. 18), and that work-related events were the "major and predominant cause of the exacerbation of her PTSD that made her permanently and totally disabled." (Dep. 19.) Following a long and detailed hypothetical recounting the employee's testimony at hearing, Dr. Whaley testified that his opinion on disability and causation had not changed since his second examination. (Dep. 20-28).

At hearing, the employee, who lives in Georgia with her two sisters, testified that, although she has seen some "small improvement" in her medical condition, her thought processes remain impeded, and she has trouble processing, which increases with her stress level. (Dec. II, 8.) She continues to have days when she cannot function at all. Id. She still experiences nightmares when she has been exposed to a lot of stimulation, and, within the last six months, has had nightmares thirty percent of the time. She does not

[3] The transcript of the August 5, 2014, hearing will be referred to as "Tr. I." The transcript of the November 18, 2014, hearing will be referred to as "Tr. II."

watch television because it is too noisy and does not hold her interest, and she finds reading difficult. Id. She testified that she volunteers for Meals on Wheels once a month, making a 21- mile round trip delivering meals to senior citizens. (Dec. II, 6.) However, she is uncomfortable going into peoples' homes, id. at 8, and some months she is unable to do the meal deliveries. Id. at 6. She cannot deal with crowded places, and feels the need to get out because "sounds become distorted and much louder," id. at 8, and her visual perception is distorted in an overstimulating environment. Id. She shops for groceries in small markets, finding larger stores too busy and bright. However, she can handle a big, bright store such as Target or Home Depot, if she makes short trips. She often shops two or three days in a row, using shopping as a way to push herself. Id. at 6. She limits the amount of time she is out, finding about three hours tolerable. Id. at 8. She tried working in her brother-in-law's` office, but was unable to continue for more than a few weeks. Id. at 6. She has taken a number of vacations, flying to Alaska to go hiking with a group of friends in July 2014, and a few months later, flying alone to Utah to go camping with friends. In addition, she has traveled to the Caribbean and to Amelia Island with her sisters. Id. at 7. She continues to treat with Dr. Jennifer Fennell, a psychotherapist, once a week, undergoing EMDR (eye movement desensitization reprocessing[4]) treatment at some sessions. She also treats with Dr. James Bowcock once every six months, for her medications, which consist of Lorazepam, up to four times a day for anxiety; Inderal for overstimulating situations, as an adjunct therapy for PTSD; and Seroquel and Trazadone, to help her sleep. Id.

The insurer presented the testimony of two investigators and submitted into evidence videotapes of their surveillance on nine or ten occasions in September 2013,

[4] The explanation of what EMDR stands for is contained in Dr. Mark Cutler's report of June 18, 2013 (Employee Ex. 2). Dr. Fennell, who provides the treatment, does not describe it in her July 7, 2013, report.

January 2014, and April 2014.[5] (Dec. II, 8-9; Insurer Ex. 2) The judge viewed the videotapes, but they were not shown to Dr. Whaley. The judge found as follows:

> Having had the opportunity to observe the Employee's demeanor, hear her testimony at . . . [h]earing, and review the video surveillance, *I find the Employee credible and adopt her testimony*. However, *I find that her symptoms and disability do not rise to the level complained of and that she is capable of physical activity greater than what she has testified to.*

(Dec. II, 9; emphasis added).

The judge adopted the opinion of Dr. Whaley, the § 11A examiner, that the "work events of May 15, 2009 continue to be the major cause of the Employee's disability and need for treatment."[6] (Dec. II, 10.) However, she rejected Dr. Whaley's opinion on disability:

> As to ongoing disability, the 11A examiner in his report . . . found the Employee to be totally disabled from any gainful employment at this time *because of the severity of her anxiety and concentration difficulties together with her very limited tolerance for stress.* At deposition Dr. Whaley testified as to the history given to him by the Employee as to her limitations. *When told that there was video surveillance* which showed the Employee shopping alone in "box stores" such as Target, Home Depot, Sherwin-Williams, Starbucks and a chocolate store

[5] Based on her viewing of the videotapes and the testimony of the investigators, the judge found that, on one occasion, the employee was observed at Home Depot for one-half hour; once she was observed delivering meals to four different locations for approximately forty-five minutes; once, she was observed leaving the house on a Saturday at 9:46 a.m. and returning home at 2:53 p.m.; once she was observed at the Pathway Center [for Psychotherapy, where she treats with Dr. Fennell] for a little over an hour; once she was observed at Home Goods for an unspecified amount of time, and again at Home Depot and Target for an unspecified amount of time. On several occasions, there was no activity at her house. (Dec. II, 9.)

[6] The judge also adopted the "gap" medical opinion of the employee's treating psychologist, Dr. Fennell, that, as of May 13, 2012, the major cause of the employee's disability and need for treatment is the work trauma. (Dec. II, 10.) However, where gap medical evidence is allowed only for disability prior to the impartial examination, those medicals may not be used to determine causal relationship during the gap period. Villiard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 5 (2013). Dr. Fennell's reports were admitted as "gap medicals" because "the § 11A report does not specifically address this prior period of alleged disability." (Dec. II, 4.) Thus, they should not have been used to determine causal relationship during the gap period. However, neither party has complained about their use for causation, and, at any rate, the insurer has not appealed.

> and her going to Panera Bread for lunch as well as going into the Pottery Barn[,] Dr. Whaley stated that that would be inconsistent with what she had portrayed to him. Dr. Whaley was also unaware of the camping trips the Employee had taken to Alaska and another to Utah. He testified that that would be reflective of some improvement, but *it did not change his opinion as to causal relationship and disability*. I adopt the opinion of Dr. Whaley as to causal relationship. *I do not adopt Dr. Whaley's opinion as to total disability from all gainful employment*. The Employee, when interviewed by Dr. Whaley did not provide a number of facts as to the extent of her daily activities. Dr. Whaley admits that her history to him was inconsistent with a number of facts to which she testified at hearing and the video surveillance.

(Dec. II, 11; emphases added.)

The judge then performed the following vocational analysis:

> Having had the opportunity to hear the Employee's testimony as to her symptomology and the limitations she feels due to them, I find that her testimony as to her daily activities, her numerous shopping trips to "big box stores" where she is surrounded by the lighting and stimulation which she states she cannot be around, the camping trips where she flew alone to Utah and Arizona [sic] as well as a Caribbean cruise; the fact that she testified that the farthest she has driven in a year was the 21 [sic] round trip route for Meals on Wheels although she also testified that her daughter lives 2 ½ miles [sic] away from her home in Georgia and they usually meet half way and on one occasion she drive the entire 2 ½ miles [sic] to visit her daughter. [sic] In addition, after reviewing the *video surveillances* and the documented time outside of her home doing various errands, I find her testimony that she has a three hour window outside of the home to be inconsistent.

(Dec. II, 12.) The judge concluded:

> I find the *Employee's testimony credible*. However, I find that her *symptomatology and disability do not rise to the level complained of and she is capable of physical activity greater than what she has testified to.* I find that the Employee is unable to return to her prior work as a dialysis nurse. I do find that she is capable of performing work eight hours a day, five days a week, in a position that would include customer service, cashier or parking lot attendant. As a result, I find the Employee capable of earning $9.00 per hour, forty hours a week, earning $360.00 per week as of May 13, 2012 and continuing. *I do not base my findings as to disability on the medical evidence, the 11A report and deposition or the gap medicals submitted by counsel for the Employee and the Insurer.*

(Dec. II, 12-13; emphases added.) The judge ordered the insurer to pay § 35 benefits from May 13, 2012, and continuing, as well as §§ 13 and 30 medical benefits. Id. at 13.

The employee appeals, making several related arguments, all of which concern the judge's rulings on the extent of the employee's disability.[7] Essentially, the employee argues the judge erred by disregarding all the expert medical evidence of the employee's psychological disability and substituting her own lay opinion for the prima facie opinion of the impartial examiner. The employee further maintains that the judge impermissibly inferred the employee was not mentally or emotionally disabled based on the employee's testimony regarding her physical capabilities and on surveillance videotapes which were not shown to the impartial examiner. We agree.

The judge explicitly stated that she did not base her disability determination on *any* of the medical evidence, including the § 11A report and deposition testimony. (Dec. II, 12, 13.) However, "[i]t is fundamental that when medical issues of causation and disability are beyond the common knowledge and experience of a lay person, expert medical opinion is a necessity." Castillo v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 351, 355 (2010), citing Josi's Case, 324 Mass. 415, 417-418 (1949). In mental and emotional injury cases, "[a]n expert opinion is generally required . . . because the etiology, nature and extent of the mental disability is rarely a matter of general human knowledge and experience." Daly v. City of Boston School Dep't, 10 Mass. Workers' Comp. Rep. 252, 257 (1996), citing Lavoie v. Westfield Pub. School Sys., 7 Mass. Workers' Comp. Rep. 77, 81 (1993); Waltz v. Aetna Casualty & Surety, 2 Mass. Workers' Comp. Rep. 151, 153 (1988); cf. Lovely's Case, 336 Mass. 512, 515 (1957)(medical testimony may not be essential in simple cases).

[7] The insurer has not appealed, and thus, there is no challenge to the judge's finding the employee's disability is causally related to her work injury, or to her finding the employee is unable to return to work as a dialysis nurse.

Here, the only medical evidence for the period after October 13, 2013, was Dr. Whaley's § 11A report and deposition testimony.[8] Because there was no contradictory medical evidence for this period, Dr. Whaley's opinion was prima facie evidence as to the medical issues of causation and ongoing disability. Brommage's Case, 75 Mass. App. Ct. 825, 827-828 (2009). As such, the judge was required to accept Dr. Whaley's opinion regarding disability as true, id., citing Young's Case, 64 Mass. App. Ct. 903, 904 (2005), unless "it goes beyond the medical evidence in the record," or the judge does not believe the facts on which it is based, or for "any other proper basis." Brommage, supra at 827-828. If a judge rejects prima facie medical evidence, she must give clear and sufficient reasons, based on the evidence, for doing so. Castillo, supra at 358; Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 303 (2007).

The judge did not adopt Dr. Whaley's disability opinion, nor did she give legally sufficient reasons for rejecting it. She rejected Dr. Whaley's opinion not because it went beyond the medical evidence in the record, or because she disbelieved the facts on which that opinion was based, but because, "[t]he employee when interviewed by Dr. Whaley did not provide a number of facts as to the extent of her daily activities. Dr. Whaley admits that her history to him was inconsistent with a number of facts to which she testified at hearing and the video surveillance." (Dec. 11.) The judge credited and adopted the employee's testimony, but concluded that her "symptomatology and disability do not rise to the level complained of and she is capable of *physical* activity

[8] Although the employee and insurer submitted gap medical evidence which could appropriately be used only for disability during the gap period, see supra note 6, the judge did not adopt any of this evidence regarding disability. However, we need not recommit the case for the judge to make further findings, because the only "gap" medical evidence on which the judge could have relied was the employee's evidence from Dr. Fennell, Dr. Cutler, and Dr. Beszterczey, all of whom opined that the employee was totally psychologically disabled. (Employee Ex. 2; Dec. II, 10.) The insurer submitted a medical report from Dr. Michael Rater in which he opined the employee's disability was not causally related to the employee's work events, and that she was not disabled. (Insurer Ex. 3; Dec. 10.) However, the judge could not adopt Dr. Rater's opinion, as it was in conflict with the adopted causation opinion of Dr. Whaley. See Sourdiffe v. U. of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(decision arbitrary and capricious which adopts medical opinions based on inconsistent foundations).

greater than what she has testified to." (Dec. 12 [emphasis added]; see also Dec. 9.) She emphasized her reliance on the employee's physical abilities in determining extent of incapacity by quoting that portion of Scheffler's Case, 419 Mass. 251, 256 (1994), where the court stated, "[p]hysical handicaps have a different impact on different individuals." (Dec. 12.)

There are a number of problems with the judge's rationale for rejecting Dr. Whaley's opinion. We begin with the judge's focus on the employee's physical capacity as reflective of her emotional disability. As the employee argues, the employee's *physical* capabilities are not at issue in this claim for a pure mental or emotional disability. Although an employee's physical capabilities *may* reflect the extent of her mental incapacity, a lay person, including the judge, is not qualified to draw an inference contrary to the prima facie medical evidence regarding the employee's psychological disability, based on her ability to engage in certain physical activities (for instance, shop in a brightly lit store, or take a camping vacation). Cf. Jaho v. Sunrise Partition Systems, Inc., 23 Mass. Workers' Comp. Rep. 185, 190 (2009)(no explanation as to how videotape of employee's physical activities spoke to his psychological disability). Because an expert medical opinion is necessary to support a disability finding in emotional injury cases, only a psychiatrist or other medical expert may draw such an inference. See Castillo, supra, 355-359; (expert medical testimony needed to determine causation and disability in psychological claims); Daly, supra; Waltz, supra.

Dr. Whaley did not draw the inference that the employee's "daily activities" reflected a change in her emotional disability status. When presented with a lengthy hypothetical question detailing the employee's testimony regarding her activities, Dr. Whaley acknowledged that, even if the employee had experienced some small improvement since 2012, his opinion she was permanently and totally disabled had not changed. (Dep. 20-28.) Thus, the judge's finding that the employee's "symptomatology and disability do not rise to the level complained of and she is capable of greater physical activity than she testified to," (Dec. 12), usurps the psychiatric impartial examiner's

opinion that, even assuming she can perform a number of "physical" activities, she is nonetheless totally and permanently disabled from working. (Dep. 20-28; 45.) The judge has impermissibly substituted her own lay opinion for that of the impartial doctor's expert opinion that the employee remains totally emotionally disabled. See Payton, supra at 307-308 (2007), citing Young's Case, supra at 904)(judge may not substitute his view on medical questions for that of impartial examiner); Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999)(judge may not rely "upon his own knowledge of medical matters in order to form his judgment "); Castillo v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 351, 356-358 (2010)(judge erroneously disregarded medical opinion on psychiatric disability, relying on mischaracterization of lay testimony). [9]

Next, we agree with the employee that the judge erred by rejecting Dr. Whaley's opinion on disability on the ground that the employee's testimony was inconsistent with what she told him about her activities, resulting in the § 11A physician having an incomplete history.

> [W]hile a doctor's reliance upon an inaccurate or less than complete history can be grounds to reject the doctor's opinion, once the opinion has been rehabilitated through questions probing whether the doctor's "opinion would change or be affected after consideration of different facts," the uncontradicted opinion cannot be rejected for that reason.

Patrinos v. Kindred Nursing Center, 24 Mass. Workers' Comp. Rep. 59, 65 (2010), quoting Daly, supra, at 257-258. The only omissions in the impartial physician's

[9] The insurer's citation to Corbitt v. Modern Continental Constr. Co., 17 Mass. Workers' Comp. Rep. 557, 561 (2003), is inapposite. (Insurer br. 6.) There we held that " 'a judge's *disbelief* of an employee's testimony about . . . his complaints of pain and *physical* restrictions, can trump an expert medical opinion of . . . disability . . . .' " Id. at 561 (emphasis added), quoting Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 319 (2003). Here, however, the judge actually credited and adopted the employee's testimony. Moreover, the employee's complaints of pain, if any, are irrelevant, since she claims only an emotional injury.

Even in physical disability cases, we have held that, where the employee has had some physical improvement, a medical opinion stating that improvement translates into a change in the extent of disability is necessary to support a judge's conclusion that the extent of the employee's disability has somehow improved. Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. 261, 265 (2012), citing Greene v. Ethyl Prods., 23 Mass. Workers' Comp. Rep. 95, 99 (2009)("expert medical opinion addressing effects of change required").

knowledge regarding the employee's activities, mentioned by the judge, were with respect to the employee's shopping in big box stores, vacationing, and driving to see her daughter. (Dec. 12.) In the extensive hypothetical question posed by employee's counsel to Dr. Whaley at his deposition, these inconsistencies were, in large part, resolved. There, Dr. Whaley admitted that, when he wrote his report approximately a year and a quarter earlier, he was unaware that the employee was able to shop in "big box" stores at times, and that he did not know about the employee's camping and hiking vacations (which occurred after his October 28, 2013 examination). However, in the hypothetical, Dr. Whaley was asked to assume, inter alia, that the employee testified that "on weekdays, she will go shopping by herself to grocer[y] stores, to Target, or to Home Depot," (Dep. 23); and that "she feels improved from the early days when she had to wait to do her grocery shopping at ten to ten-thirty at night when it was – the store was most empty." (Dep. 27). In addition, he was informed about her camping trip to Alaska in July 2014, and her hiking trip to Utah in September 2014. He was told that she testified that she flew commercially, increased her medications for the flights, that she either traveled with or met friends there, and that she finds camping and hiking and the outdoors healing and therapeutic. (Dep. 25-27.) Assuming these facts, Dr. Whaley testified that his opinion that she was permanently and totally disabled as a result of the work events did not change.[10] (Dep. 27-28; Dep. 18.)[11]

The only remaining gaps in Dr. Whaley's knowledge of the employee's history, found by the judge, were that, after the impartial examination in October 2013, she drove for 2 ½ hours to her daughter's home on one occasion, drove halfway to see her daughter

[10] Although Dr. Whaley later agreed that what the employee told him about her ability to shop in big box stores was "somewhat" inconsistent with what she told him, (Dep. 36), he never stated that his opinion on permanent and total disability would change.

[11] The judge even acknowledged Dr. Whaley testified that, although her camping trips would be reflective of some improvement, they did not change his opinion as to causal relationship *and disability*. (Dec. 11; Dep. 27-28.) However, she ignored the fact that Dr. Whaley's permanent and total disability opinion was also based on the assumption she could shop in large, bright stores.

on a few other occasions, and took a vacation with her sisters. (Dec. 12). However, these activities are of the same nature as many of the other activities Dr. Whaley considered. We think his knowledge of the employee's history and activities, including her "big box" shopping trips, camping and hiking vacations, and ability to volunteer with Meals on Wheels, was sufficient to enable him to give an informed opinion on extent of her psychological disability.[12] In Payton, supra, another emotional disability case, we held that the impartial examiner's opinion,

> was not vitiated by the fact that he had not been informed about every reprimand, transfer or delay in promotion. He knew enough about the employee's work and personal life to give an informed causation opinion. See Young's Case, supra at 905 (impartial physician's opinion "was not incompetent for lack of more detailed, particularized knowledge of the employee's workplace and duties"); see also Nason, Koziol and Wall, Workers' Compensation (3d ed. 2003) § 17.18, and cases cited ("[S]light factual errors in a hypothetical question will not undermine an expert opinion").

Payton, supra at 310. The foundation for Dr. Whaley's opinion was the employee's credited and adopted testimony. See Patrinos, supra, at 66. Accordingly, the judge's rejection of Dr. Whaley's opinion on the grounds his knowledge of her activities was inconsistent with her testimony was arbitrary and capricious.

Finally, we agree with the employee that the judge erred by relying, in part, on surveillance videotapes to determine the employee was only partially disabled. The judge found, "after reviewing the video surveillances and the documented time outside of her home doing various errands, . . . her testimony that she has a three hour window outside of the home [was] inconsistent." (Dec. II, 12.) It is permissible to present videotapes to a medical expert for consideration in reaching an opinion on disability and causal relationship. "However, where the videos are not presented to the physician, it is error for the judge to substitute his opinion on the effect of the activities for the required

[12] The judge overruled the insurer's objection to the hypothetical question, thus allowing its admission for all purposes on which it may be probative. Nancy P. v. D'Amato, 401 Mass. 516, 525 (1988).

medical evidence." Perez v. Aguila Constr. Co., 30 Mass. Workers' Comp. Rep. 15, 21 (2016), citing Jaho, supra at 190; see also Araujo v. United Walls Systems, LLC, 28 Mass. Workers' Comp. Rep. 229, 232 (2014). Here, although Dr. Whaley was asked, in cursory fashion, to assume that there was surveillance performed of the employee, showing various shopping activity over the past year,[13] he was never shown the videotapes and given the opportunity to comment on them. Accordingly, the judge erred by relying on those tapes to support her own disability determination, which was contrary to that of the impartial examiner who had not seen the tapes. Moreover, as in Jaho, supra, evidence of the employee's physical abilities not commented on by a medical expert, would not be probative of a vocational or psychiatric improvement, in any event. Id. at 191.

In sum, we agree that the judge erred by disregarding all the expert medical evidence in determining the extent of the employee's psychiatric disability and in substituting her own lay opinion for the prima facie opinion of the impartial examiner. In addition, we hold that Dr. Whaley had sufficient knowledge of the employee's activities to make an informed decision on disability. Further, we hold the judge impermissibly inferred the employee was not mentally and emotionally disabled based on the employee's testimony regarding her physical capabilities, and on surveillance videotapes which were not shown to the impartial examiner.

[13] The only question asked of Dr. Whaley regarding the surveillance videotapes was as follows:

> Q: [I]f you assume that it showed that Ms. Wicklow, contrary to her statement to you about not being able to shop in large, bright stores, showed that on multiple occasions over the last year, she was observed shopping alone at Target, Home Depot, Sherwin-William Paint Stores, Starbucks, and a chocolate store, going into Panera Bread for lunch, going into the Pottery Barn, would this be inconsistent with what she had told you?
>
> A: It would be different, yes, inconsistent of what she portrayed to me.

(Dep. 42-43.) There were no follow-up questions.

Because the employee had received § 34 benefits pursuant to the prior hearing decision until the date of her claim for § 34A benefits, she does not need to prove a worsening of her disabling condition, but only "that the same level of impairment continues following the exhaustion of § 34 benefits." Andrews v. Southern Berkshire Janitorial Service, 16 Mass. Workers' Comp. Rep. 439, 441 (2002). Since the judge credited the employee's testimony that formed the foundation for the uncontradicted prima facie medical opinion that the employee continues to be permanently and totally disabled, and stated legally insufficient reasons for rejecting that opinion, the record supports only one conclusion: that the employee's industrial injury permanently and totally disables her. See Patrinos, supra at 66 (where judge credited employee's complaints that formed foundation for uncontradicted medical opinions of psychiatric experts, the record supports only the conclusion that employee's industrial injury is a major cause of her depression and need for treatment; decision denying § 30 benefits reversed). See also Payton, supra (denial of § 34A claim reversed and case recommitted for determination of when permanent and total incapacity began where judge substituted his own causation opinion for that of the prima facie opinion of the impartial examiner); Castillo, supra at 358 (decision terminating § 34 benefits reversed, and § 34 benefits awarded where judge's reason for rejecting uncontradicted expert psychiatric opinion on causation and disability was tainted by mischaracterization of employee's testimony).

Accordingly, we reverse the judge's decision and award § 34A benefits from the date of exhaustion of § 34 benefits, May 13, 2012, and continuing. Because the employee has prevailed on her appeal, an attorney's fee may be appropriate under § 13A(7). Employee's counsel may submit to this board for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***October 13, 2017***