

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 035400-91

Helen Parsons
Addison Gilbert Hospital
Mass Healthcare SIG

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

This case was heard by Administrative Judge Bean.

APPEARANCES

Kevin Donius, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from a decision denying her claim for payment of chiropractic treatments, massage therapy and travel expenses to and from Florida. The employee claims that the judge erred by failing to list as exhibits, or make any findings regarding, three medical reports from her treating physician. She alleges these documents were submitted for the judge's consideration pursuant to his allowance of additional medical evidence. Because the record does not support the employee's contention, we affirm the decision.

The employee has received §34A permanent and total incapacity benefits for her July 9, 1991 work injury since 1999. The subject claim sought medical benefits for massage therapy, chiropractic treatment and psychiatric medication, along with mileage costs to and from Florida each year. The judge denied the claim at conference, and the matter went to an evidentiary hearing. (Dec. 707-708.)

The impartial physician, Dr. Victor A. Conforti, examined the employee on August 16, 2006 and opined that she suffered from failed back syndrome superimposed on spondylolisthesis, as well as post-surgical bilateral carpal tunnel syndrome, all causally related to her work injury. The doctor also found that the employee

suffered from hyperthyroidism, hypertension, diabetes and depression, which diagnoses he could not assess. The doctor opined that the employee's winter trips to Florida were not medically indicated. The doctor also opined that the employee's massage therapy and chiropractic treatments provided only temporary relief and would not reduce the need for pain medication. The doctor did not consider massage therapy to be an appropriate treatment modality for chronic pain.

The judge allowed the employee's motion for additional medical evidence on the basis of the inadequacy of the impartial physician's opinions and the complexity of the medical issues. (Dec. 710-711.) The employee introduced the October 7, 2006 medical report of her treating physician, Dr. Thomas S. Pearce, causally relating all of the employee's medical problems, physical and psychological, to the work injury. Dr. Pearce considered that the employee would require life long medications to control her pain and depression. (Dec. 711-712.) The employee also introduced evidence from an orthopedic expert, Dr. James Hewson, and her treating psychiatrist, Dr. William R. Newman. (Dec. 712.) Additional reports from Dr. Pearce, dated October 8, 2003, January 9, 2004, and September 23, 2005, were not listed as exhibits or otherwise mentioned in the decision. (Dec. 711-712.)

While the judge found the employee's prescribed medications were reasonable, necessary, and causally related to her work injury, he also concluded the massage and chiropractic therapies were not reasonable and necessary treatment modalities. Further, the employee's trips to Florida were not determined to come within a compensable mileage allowance. The judge noted the impartial physician's opinion denying reasonableness and necessity was the only one that addressed the massage and chiropractic treatment with clarity, although the impartial physician did state that he would defer to the employee's treating doctors. The judge also adopted the impartial physician's opinion that the Florida trips were not reasonable "medical treatment." (Dec. 713-714.)

After the judge issued his decision, the employee filed a "Motion to Reconsider Evidence Regarding Chiropractic Care and Massage Therapy or, Alternatively, Open the Record for Additional Evidence and for Further Findings." (Employee br. 8, Ex. C.) The motion contended that the judge failed to consider Dr. Pearce's earlier reports, which included his opinions on the employee's massage and chiropractic treatments. Alternatively, the motion requested a reopening of the

record for the introduction of Dr. Pearce's earlier reports, if it was determined that they were not, in fact, already in the record. The motion was denied.

On appeal, the employee renews her arguments regarding the judge's "failure" to consider the earlier reports of Dr. Pearce. There is nothing in the board file to indicate that the employee sent these reports to the judge as additional medical evidence for his consideration upon the allowance of the employee's motion for a finding of inadequacy and complexity. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of board file). The employee's assertion of an omission on the part of the judge is therefore without a factual foundation.

The employee's alternative argument, that the administrative judge abused his discretion in failing to reopen the record to admit the disputed reports into evidence, fails to make a showing of the arbitrary, capricious or whimsical decision-making necessary for our intervention. See Davis v. Boston Elevated Railway, 235 Mass. 482 (1920). Although the employee had her opportunity to bring the reports to the judge's attention, on this record we must conclude that she failed to do so. The judge specifically cited those medical reports that were admitted, and determined that the employee had not provided supporting opinions from her treating doctors regarding the disputed treatment modalities. (Dec. 714.) We see no error.

Finally, we agree with the insurer that the judge's determination regarding the non-compensability of the employee's travel to Florida was a factual finding based upon the adopted medical opinion of the impartial physician, and was not tainted by error of law.

The decision is affirmed.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Helen Parsons
Board No. 35400-91

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **April 27, 2009**