COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 056481-91

Kathleen M. Sheehan	Employee
Town of Randolph	Employer
Mass. Education & Government Association SIG	Self-insurer

REVIEWING BOARD DECISION

(Judges Carroll, Costigan and Fabricant)

APPEARANCES

Stephen Kessman, Esq., for the employee
Donald M. Culgin, Esq., for the self-insurer at hearing
Robert J. Ricco, Esq., for the self-insurer at hearing and on appeal

CARROLL, J. The employee and self-insurer appeal from a decision in which an administrative judge discontinued the employee's § 34A permanent and total incapacity benefits as of the date of the impartial examiner's deposition. After a review of the evidentiary record, we reverse the decision.

Kathleen M. Sheehan was a fifty-five year old, single woman at the time of the administrative judge's decision. She has an A.B. degree in teaching and worked as a special education teacher for twenty-one years. During that time, Ms. Sheehan also worked part-time for three years, at T.J. Maxx, as a customer service representative. (Dec. 3-4.) In September of 1970, Ms. Sheehan began her employment with the Town of Randolph as a special education teacher. On September 24, 1991, the employee was in the course of her work "when, while attempting to break up a fight between two students, she was pushed by a [ ] female student into a wall," causing physical injuries and a long lasting and disabling psychiatric injury diagnosed as post-traumatic stress disorder. (Dec. 4.)

"Liability was accepted by the [self-]insurer and § 34 benefits paid. Thereafter, another [a]dministrative [j]udge awarded § 34A benefits by a decision . . . which was not appealed." (Dec. 3; see also Dec. 4.) The self-insurer ultimately filed a complaint seeking

to discontinue § 34A benefits. (Dec. 3.) An administrative judge denied the complaint at a § 10A conference, and the case was appealed to a de novo hearing. (Id.)

On four occasions, the employee was examined by Dr. Michael Braverman, the § 11A psychiatric impartial medical examiner. (Dec. 5.) His reports, as well as deposition testimony, were before the judge. The judge allowed the employee's motion to submit additional medical evidence, and the parties submitted several reports.

In her decision, the administrative judge adopted the opinion of Dr. Braverman exclusively. Doctor Braverman diagnosed Post Traumatic Stress Disorder (PTSD) with depression and anxiety causally related to the 1991 work incident. (Dec. 5.) At each exam, March 1, 1993, April 19, 1995, January 6, 1997 and November 5, 2001, he concluded that the employee was totally psychiatrically disabled. (See i nfra for deposition cites to total disability opinions for all periods.) The medical expert opined, and the judge found, that the employee "has been and remains totally psychiatrically disabled due to the severity and persistence of the PTSD, depression, and anxiety. In his opinion the employee would be disabled from even working at home as a full-time job. . . ." (Dec. 5-6.)

The administrative judge determined that the employee possessed the ability to earn part time wages. Accordingly, the administrative judge allowed the self-insurer to discontinue paying § 34A incapacity benefits as of the last deposition of the § 11A examiner, April 29, 2003. (Dec. 9.)

We have the case on appeal by the employee and self-insurer. We summarily affirm all issues on appeal but one. Both parties argue that discontinuing § 34A incapacity benefits on April 29, 2003 was arbitrary and capricious. The employee argues that the medical evidence does not allow for a change of medical condition and thus there should be no change in benefits. (Employee br., 21, 29-33.) The self-insurer contends that the judge erred in using the § 11A deposition date to terminate benefits, as that date has no evidentiary significance. The general proposition is that "[f]actual findings as to when incapacity, be it total or partial, begins or ends must be grounded in the evidence." Montero v. Raytheon Corp., 11 Mass. Workers' Comp. Rep. 596, 597 (1997)(purely procedural date of when judge received deposition transcript irrelevant to when employee's incapacity began). Here, contrary to the judge's decision and the self-insurer's argument, the impartial physician's opinion does not support discontinuing § 34A benefits. The doctor's opinion is unequivocal.

The employee contends that the administrative judge erred by either misrepresenting or misunderstanding the § 11A medical opinion. We agree that the administrative judge misconstrued the impartial medical expert's opinion. The judge found in pertinent part:

> The impartial medical examiner opined that the employee "has been and remains totally psychiatrically disabled due to the severity and persistence of the PTSD, depression, and anxiety." In his opinion the employee would be disabled from even working at home as a full-time job, but she could try to gradually work intosuch a job.

(Dec. 5-6.) The judge further stated that Dr. Braverman thought the employee could gradually work her way into a full-time job that she performed at home. (Dec. 8.) The judge went on to reject the medical evidence submitted by the parties and rely exclusively on the impartial medical expert, "concluding that the employee has a limited earning capacity for part time work at home." (Dec. 9.) It is in this use of the impartial psychiatrist's opinion to find a change in the employee's incapacity from total to partial that the judge was in error. Dr. Braverman, on whom the administrative judge relied exclusively for a medical opinion, consistently and continually opined that the employee was totally psychiatrically medically disabled. (Dep. 22, 35-36, 49, 54, 57, 82). The judge's interpretation that the employee could presently work is a misinterpretation of Dr. Braverman's testimony, which follows:

> Q. Vocationally speaking, do you feel Miss Sheehan capable of performing work activities out of the safety and comfort of her own home?
>
> . . .
>
> A. I don't know enough about the vocational aspects of how easy it is for someone to get a job working on a computer out of the home. My sense of Miss Sheehan was that emotionally she wouldn't be ready to do a job. Let's say there was such a job that involved 9 to 5 on a computer, never having to leave the home, never having to interact with bosses and co-workers and unhappy customers and angry people. If there were such a job, right, maybe she could handle that. But my sense is that ordering cigarettes on the Internet and sending e-mails and playing computer games might be something she's capable of doing but I don't know if she's playing computer games. She didn't say that. I don't know anything about her use of the computer. It doesn't mean you can work out of a computer because work

> involves you to negotiate with other people, deal with the stress, deal with deadlines.
>
> When I said in my report I felt she was still disabled from employment, if you asked me does that include a job that involved full-time job working from the home on a computer, I would say she was disabled from that too. But it's an interesting avenue to pursue and if such jobs existed could she try to gradually work toward such a thing, *that would be an interesting vocational area to explore if she ever did some vocational rehabilitation.*

(Dep. 138-139)(emphasis added.)

> All those things add up to just what you said, that she's able to do all those things but, in my opinion, they could not add up yet or they don't add up enough to the equal ability to work. So I think those are all steps towards her further improvement but not sufficient improvement to be able to work.

(Dep. 159.)

> She might try but might find it difficult and ultimately that's subjective if she's finding it difficult, its different.

(Dep. 162.)

> I think her inability to make the attempt is because of her symptoms. In other words, I don't think she's ready to do that yet.

(Dep. 162.)

> She doesn't know because she is still depressed and anxious and still doesn't know how to answer that because she's not emotionally ready for that. What you are saying is, and I would hold out to hope she could still get better. And that's what I said last week too.

(Dep. 164.)

Any reference to part-time work, (Dep. 161), was not an opinion that the employee could do part-time work. See, *inter alia*, deposition testimony quoted and cited above. Although Dr. Braverman holds out hope that the employee can still get better even twelve years

after the assault, he never opined that she had gotten better and always opined she was totally, psychiatrically disabled. See Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939) ("permanent" does not mean eternal, endless or lifelong.)

The judge's finding that permanent and total incapacity had ended was error. Accordingly, the decision is reversed and the employee's § 34A benefits reinstated as of April 29, 2003. The self-insurer is to pay the employee applicable interest under § 50, and employee's counsel a fee of $1,312.21 pursuant to § 13A(6).

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: July 28, 2005