COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 023944-04

Keith Howe	Employee
Ken Weld Company, Inc.	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Hernández.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Robert J. Riccio, Esq., for the insurer at hearing and on appeal
Holly B. Anderson, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing his §§ 13, 30 and 34 claims for a psychiatric condition alleged to be a sequela of his work related physical injury.[1] See Cornetta's Case, 68 Mass. App. Ct. 107 (2007). We affirm.

The employee received § 34 benefits for an accepted back injury of July 21, 2004. In a prior hearing decision, a different administrative judge awarded the employee § 35 benefits from March 29, 2007, to date and continuing. One of the § 11A[2] impartial medical examiners in that proceeding was Dr. Marc A. Linson,

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[1] All references herein are to the judge's amended decision filed on April 30, 2010.

[2] General Laws c. 152, § 11A, provides, in pertinent part:

> (1) With the assistance of the medical consultant to the commissioner and the administrative judges, the senior judge shall periodically review and update a roster of impartial medical examiners who are certified specialists in various medical fields and who are willing to make prompt reports and be deposed as hereinafter provided. The department shall establish criteria for being named to and remaining on said roster.

an orthopedist.[3]

Thereafter, the employee filed the instant claim alleging that he suffers from a psychiatric condition owing to his compensable back injury. At the § 10A conference, he requested to be examined by a psychiatrist pursuant to § 11A. The judge denied the employee's psychiatric claim and referred him back to Dr. Linson for a second § 11A examination. The employee appealed the conference denial.

On July 1, 2009, prior to the hearing, Dr. Linson examined the employee. (Dec. 1; Ex. 1.) Dr. Linson again concluded the employee was capable of

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> (2) When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order . . . the parties shall agree upon an impartial medical examiner from the roster to examine the employee . . . or said administrative judge shall appoint such examiner from the roster.
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> . . .
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> The report of the impartial medical examiner shall be admitted into evidence at the hearing. Either party shall have the right to engage the impartial medical examiner to be deposed for purposes of cross examination. Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

[3] See the November 5, 2007 decision of Administrative Judge Rose. We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). There were two § 11A impartial examinations in the case before Judge Rose because the employee had claimed § 36 benefits for work related chemical exposures suffered in 1999 and 2002. These injury dates were joined at the hearing before Judge Rose on the cross appeals from his conference order awarding the employee § 35 benefits for his July 21, 2004 work related back injury. Judge Rose found the employee's § 36 claim premature because the employee had not reached a medical end result. This board summarily affirmed that decision in Howe's Case, 22 Mass. Workers' Comp. Rep. 364 (2008).

performing full-time sedentary or light work. (Dec. 6; Ex. 1). He did not render an opinion addressing the employee's psychiatric condition. (Ex. 1.)

At hearing, the employee filed a motion requesting that a second impartial examination of the employee be performed – this time by a psychiatrist. (Tr. I,[4] 5.) The judge denied the motion but allowed both parties to submit medical evidence respecting the employee's psychiatric injury claim.[5] (Dec. 3; Tr. I, 7, 40-42.) The employee submitted the March 25, 2010 deposition testimony of Dr. Steven Hoffman. (Dec. 3, 6.) The insurer submitted the April 25, 2009 report of Dr. Michael Rater.[6] (Dec. 1, 7; Tr. I, 4-5.) The judge adopted the opinion of Dr. Rater and concluded "that the Employee's mental health conditions are non-impairing and are not causally related to his work injury of July 2004." (Dec. 9.) The judge denied the employee's psychiatric claim but ordered the insurer to continue to pay the employee ongoing § 35 benefits.[7]

On appeal, the employee argues the judge erred as a matter of law by failing to have him examined by a § 11A psychiatrist. He also contends his due process rights were violated because he was denied the opportunity to introduce a § 11A psychiatric report. We disagree.[8]

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[4] The hearing was held on two days; we refer to the January 11, 2010 transcript as "Tr. I," and the February 22, 2010 transcript as "Tr. II."

[5] As neither party filed a motion requesting permission to submit additional medical evidence, we deduce that the judge acted sua sponte, as provided by § 11A(2). See footnote 2, supra. At hearing, insurer's counsel stated: "You [the judge] had indicated that you wanted a handle on the physical and allowed the parties to submit additional medical evidence on the psychiatric." (Tr. I, 6.)

[6] The judge referred to Dr. Hoffman's deposition under the heading "Employee's Gap Medical Evidence," (Dec. 6), but there is no indication that he admitted or considered it for gap purposes only.

[7] The insurer did not challenge the employee's entitlement to receive weekly benefits owing to his physical injury.

[8] The employee offered testimony from a vocational expert, (Tr. II, 3-37), and also contends the judge erred by failing to conduct an adequate vocational analysis.

Although the judge had the discretion to authorize a second impartial examination, the employee had no statutory right to two § 11A examinations in the same disability adjudication. Raymann v. Mass. Turnpike Auth., 21 Mass. Workers' Comp. Rep. 255, 257 (2007); see also Oliveira v. Scrub-a-Dub Wash Center, 10 Mass. Workers' Comp. Rep. 61, 64 (1996)(no provision in § 11A to allow employee to have more than one impartial examination "even in cases involving medical issues that are appropriately addressed by different specialties"). More specifically, the employee had no statutory right to a § 11A examination by an impartial physician in a particular medical specialty. Breslin v. American Airlines, 22 Mass. Workers' Comp. Rep. 215, 219-220 n.4 (2008); Moskovis v. Polaroid Corp., 13 Mass. Workers' Comp. Rep. 273, 277 (1999); Hebert v. Brockway Smith Co., 10 Mass. Workers' Comp. Rep. 679, 682 (1996); Dupras v. Water Divisions of Millipore, 10 Mass. Workers' Comp. Rep. 1, 4 (1996). Accordingly, "[t]he fact that the impartial physician was an orthopedic specialist rather than a psychologist or psychiatrist does not render his report inadequate." Dupras, supra; see also Mattison's Case, 305 Mass. 91, 93 (1940)(fact that impartial physician [under G.L. ç. 152, § 9, the prior impartial provision] was orthopedist rather than neurologist did not disqualify him where employee claimed a post-traumatic anxiety neurosis due to physical injury).

In fact, an orthopedist may opine regarding an employee's "psychogenic overlay of his physical problems." See Breslin, supra. Had Dr. Linson offered an opinion regarding the employee's psychiatric condition, the judge could have adopted it. See Hebert, supra (specialty of impartial examiner goes to weight of testimony, not its admissibility); see also Ambrose's Case, 335 Mass. 121, 125

(Employee br. 23-26.) We reject this argument. Because the judge found no causally related psychiatric disability, and his decision did not alter the employee's ongoing entitlement to § 35 benefits due to his work-related physical injury, no additional vocational analysis was required. In any event, it is clear the judge considered the vocational expert's testimony. (Dec. 8-9.) The judge was under no obligation to credit his testimony. See Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999).

(1956). There was no error. Cf. Atkinson's Case, 78 Mass. App. Ct. 1117 (2011)(Memorandum and Order Pursuant to Rule 1:28)(where employee did not produce psychiatric records requested by insurer, and judge allowed the parties to introduce psychiatric medical evidence, no abuse of discretion to deny access to psychiatric impartial examiner).

We also reject the employee's argument that the judge's decision to deny him a psychiatric examination pursuant to § 11A violated his due process rights. A due process violation may occur when a judge "foreclose[s] further medical testimony where such testimony is necessary to present fairly the medical issues. . . ." O'Brien's Case, 424 Mass. 16, 22 (1996). Here, the judge did not foreclose further medical testimony. He did the opposite. When Dr. Linson failed to opine regarding the psychiatric issues,[9] the judge permitted the parties to submit additional medical evidence bearing on the employee's psychiatric claim.

The decision is affirmed.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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[9] Of course, neither the judge, nor the parties, had any way of knowing prior to the issuance of Dr. Linson's report that he would offer no opinion concerning the employee's psychiatric claim.