COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 002618-11 028974-11**
Patricia Vaillancourt	Employee
Templeton Developmental Center	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Harpin and Long)

This case was heard by Administrative Judge Maher.

APPEARANCES
Charles E. Berg, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer at hearing and on appeal
Joseph Clark, Esq., for the self-insurer at hearing and on appeal

CALLIOTTE, J. The self-insurer appeals from a decision ordering it to pay § 34A permanent and total incapacity benefits for physical injuries and their psychiatric sequelae. The self-insurer argues that the judge's incapacity determination was arbitrary and capricious because it failed to take into account the minimal § 36 loss of function benefits awarded at conference, which, the self-insurer maintains, do not support a finding of permanent and total incapacity. In addition, the self-insurer argues that the judge failed to consider the § 11A physician's testimony as a whole. We disagree and affirm the decision.

The employee, sixty-three years old at the time of hearing, completed the eleventh grade and then got her GED. Prior to her industrial accidents, she had worked for approximately twenty-five years as a developmental aide for the employer. Her duties ranged from socializing and playing games with developmentally disabled clients to

assisting with transfers to the bathroom. Correspondingly, the physical requirements of her job ranged from sedentary to physically demanding. (Dec. II, 5-6.)[1]

In 2011, the employee suffered two industrial accidents. On October 15, 2011, she fell while assisting a patient, injuring her neck, shoulder, back and left knee. (Dec. II, 12.) She returned to work in a light duty capacity, but, on November 2, 2011, fell at work again, re-injuring her left knee. She has not returned to work. (Dec. II, 6.)

The self-insurer initially paid the employee § 35 benefits pursuant to a conference order and then a § 19 agreement. (Dec. I, 3.) The employee subsequently filed a new claim for §§ 34, 34A or 35 benefits, and for §§ 13 and 30 psychiatric benefits beginning on April 19, 2012. Id.

In the first hearing, the parties stipulated that the self-insurer had accepted liability for the physical injuries occurring on both claimed dates, (Dec. I, 4-5), and the judge accordingly found liability for the neck, shoulder, back and knee. (Dec. I, 9-10.) As a result of those injuries, he further found that her "inability to lift, stand for any substantial length of time as well as no bending, crouching or heavy lifting," excluded her from any of her prior employment, and that, although "she may have the ability to do some type of work," she could not work, contrary to the suggestions in the vocational expert reports. (Dec. I, 11.)

The judge also found that the psychiatric injury was the result of the "pain and limitations to her life" which arose "as a consequence of her physical injuries." (Dec. I, 11.) After finding the employee was hospitalized for five days in 2012 with suicidal thoughts, (Dec I, 7), the judge adopted the opinion of Dr. Mark O. Cutler, the psychiatric § 11A examiner, that "the ongoing pain and the substantial limitations in the activities of this employee's daily living have changed her life and brought on the emotional aspects of sadness, despair and suicidal thoughts that she now has." (Dec. I, 9-10.) The judge further adopted Dr. Cutler's opinion that, as of April 16, 2014, she is "totally disabled

[1] The first hearing decision, filed on October 30, 2015, will be referred to as "Dec. I"; the second decision, on which this appeal is based, filed on May 14, 2018, will be referred to as "Dec. II."

from major depression and is in need of psychotherapy to improve her condition." (Dec. I, 11.) The judge did not find her total disability to be permanent, as Dr. Cutler felt "psychotherapy would assist her pain management and alleviate her depressive disorder." Id. Accordingly, the judge ordered § 34 benefits from April 16, 2014, and continuing; reasonable and related medical expenses for the employee's left knee and psychiatric condition for the November 2, 2011, injury, as well as medical benefits for the employee's back and neck based on the October 15, 2011, injury.[2] (Dec. I, 13.) Neither party appealed. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(permissible to take judicial notice of Board file).

On or about March 3, 2017, the employee filed the present claims for § 34A permanent and total incapacity benefits, §§ 13 and 30 medical benefits, and § 36 loss of function benefits in the amount of $6,905.78 for the lumbar and thoracic spine and bilateral lower extremities.[3] Rizzo, supra. Following a § 10A conference, the judge ordered the self-insurer to pay § 36 benefits of $1,328.91 for a 3% permanent loss of use of the left lower extremity for the November 2, 2011, injury. In a separate conference order based on the October 5, 2011, date of injury, he ordered the self-insurer to pay § 34A benefits beginning April 16, 2017, as well as § 36 benefits for a 1% permanent loss of use of the cervical spine in the amount of $272.46, and $363.46 for a 1% permanent loss of use of the lumbar spine. Rizzo, supra. In addition, the judge ordered § 30 medical benefits, including payment for a TENS unit, chiropractic treatment, referral

[2] The judge found the shoulder injury had resolved. (Dec. I, 12.)

[3] The employee's claim for § 36 benefits was based on Dr. Mortimer's evaluation of October 6, 2016, in which he opined she had a 3% whole person loss of function (LOF) for the low back (which translated to a 5% loss of function of the lumbar spine); a 3% whole person LOF for the thoracic spine (which translated to a 5% loss of function of the thoracic spine); and, a 1% whole person loss of function for each lower extremity (which translated to 3% LOF for each lower extremity). (See Employee Ex. 9, Dr. Mortimer report 10/6/16; and Employee's § 36 claims dated 3/3/17.)

for pain management evaluation, and follow-up care. Both parties appealed.[4] (Dec. II, 3.)

At the beginning of the hearing, the judge stated that there was no longer a dispute regarding the § 36 claims, (Tr. II, 5), and in the decision found § 36 loss of function benefits were no longer at issue. (Dec. II, 17.) The employee joined a medical claim for medial branch blocks, and the self-insurer raised § 1(7A) for the first time.[5] (Dec. II, 4.) Dr. Cutler who saw the employee on August 8, 2017, (Dec. II, 8), and was deposed on February 13, 2018, was again the §11A examiner. Rizzo, supra. The judge adopted Dr. Cutler's opinion that "the assessment is major depressive disorder and somatic pain disorder[;] . . . there is a connection between her work-related injuries and her current psychiatric disability[;] . . .[t]he injury hurt her standard operating procedure to be working and good feelings she had as an occupational therapy assistant which has led to the depression." (Dec. II, 8.) Further, the depression affects her ability to concentrate, and this would preclude her from maintaining employment. Id. at 9.

The judge allowed additional medical evidence on the basis of complexity, and adopted the opinions, in part, of Dr. Zamir Nestlebaum and Dr. Errol Mortimer. Dr. Nestlebaum, a psychiatrist and neurologist, opined that the employee has chronic pain in her neck, back and right knee; her depression and anxiety are clearly secondary to the workplace injury; and "resolution of her pain would not result in resolution of her psychiatric disorders." (Dec. II, 9, 14.) Dr. Mortimer, an orthopedic surgeon, opined that the injuries the employee sustained in 2011 are a major component of her disability, and her treatment has been "in large part causally related to the industrial accident." (Dec. II, 10.) He believed she was at a medical end result with respect to her causally related thoracic (by which he meant cervical [Dec. II, 10]), and lumbar conditions, and would not recover further. Her ongoing back and bilateral knee pain are causally related to the work

[4] The self-insurer states in its brief that only it appealed. (Self-insurer br. 18.) This is incorrect, as the employee requested to file a late appeal, which was allowed. Rizzo, supra.

[5] The judge stated that "the self-insurer is raising § 1(7A) again," (Dec. II, 4), although that affirmative defense was never raised in the first hearing. (See Dec. I, 4.)

accidents. She cannot stand, walk or sit for long periods of time due to her chronic upper and lower back pain, which also limits her ability to turn her head, or to hold her head in a fixed position, such as looking at a computer screen. Dr. Mortimer believed "she is incapable of returning to the workforce in any capacity." He opined that the medial branch blocks are reasonable therapy and are related to the injuries. (Dec. II, 10-11.)

The judge also adopted the employee's testimony that her condition has not changed over the last two years. She can turn her head only 30-40 degrees left or right, can barely look up, and cannot hold her head in one position without experiencing stiffness and pain. She can sit for about twenty-five minutes, walk for about ten minutes, and drive for fifteen minutes. She can bend only a little, and cannot reach overhead or lift a gallon of milk without pain. (Dec. II, 6-7.) Her lifestyle is primarily sedentary. She does go with her husband to a summer camp that's about a four-minute drive away from her home, "where she may ride in a boat or sit in a tube in the water. Generally, she sits at the camp and just watches the lake and the activities around the lake." (Dec. II, 7.) Otherwise, she sits around her house and watches television. Since her 2012 psychiatric hospitalization, she has had ongoing visits with a counselor and takes medication, including Risperdal and Lorazepam, as well as Trazadone to help her sleep and Gabapentin for pain. (Dec. II, 7, 13.)

Based on the employee's credited testimony, and the adopted medical evidence, the judge concluded the employee was permanently and totally incapacitated beginning on April 17, 2017.[6] With respect to § 1(7A), he found she had a pre-existing degenerative lumbar condition and pre-existing knee pain, with which the work injuries combined, and that the work injuries were a major cause of her disability, based on Dr. Mortimer's opinion. Because she had no history of anxiety or depression prior to the work injuries, those syndromes were clearly a sequela of the physical injuries. Also,

[6] Despite finding the employee permanently and totally incapacitated beginning on April 17, 2017, the judge ordered § 34A benefits beginning on June 16, 2017. (Dec. 17.) This appears to be an error, since, at hearing, the employee amended her claim to seek § 34A benefits beginning April 16, 2017, rather than June 16, 2017, as had been ordered at conference. (Tr. II, 6.). Nonetheless, the employee has not appealed, nor does she argue this point.

based on Dr. Mortimer's opinion, the judge found the employee's right knee is related to overuse due to the November 2, 2011, left knee injury. (Dec. II, 16.) In sum, he found the right knee overuse, neck pain, ongoing back pain and bilateral knee pain, and psychiatric condition are all causally related to one or both accidents. Id. at 15-16. Accordingly, the judge ordered treatment for both knees, the employee's psychiatric condition, and the lumbar, thoracic and neck injuries, including the requested medial branch blocks. (Dec. II, 16.)

Only the self-insurer appeals, arguing first, that because § 36 loss of function benefits were not at issue in the hearing, the § 36 conference findings were the "law of the case," and the judge erred by failing to consider them in determining disability and incapacity. The self-insurer further argues that the minimal loss of function findings made at conference preclude a finding of permanent and total incapacity. We disagree.

As the employee points out, the self-insurer has overlooked the fact that impairment and disability are separate and distinct concepts. " 'Impairment is the loss of a particular body function. The disability is the inability of that patient to do things as a result of that loss. There can be individuals who are severely impaired who are very able and vice versa.' " Tran v. Continental Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 318 (2003). See also Blanchette v. Town of Marblehead, 25 Mass. Workers' Comp. Rep. 347, 348-349 (2011) ("A medical opinion that the employee is no longer disabled due to his work injury simply does not address whether the employee might have sustained an *impairment—loss of function*—as a result of his work injury")(emphasis added).

In Okraska v. Universal Plastics, 23 Mass. Workers' Comp. Rep. 193 (2009), we addressed a similar argument to that presented here. There, the employee maintained that, because an unappealed conference order established an employee's loss of function, the § 11A physician was obligated to base his disability assessment upon that § 36 conference award, and erred by basing his disability opinion on his own finding that the employee had no loss of function. We held that the judge's adoption of the § 11A

physician's opinion was proper, because the impartial doctor had not based his disability opinion on his finding of no permanent loss of function, but had merely formed the two separate opinions regarding disability and loss of function at the time he examined the employee. We continued,

> Had employee's counsel informed the doctor about the prior § 36(j) adjudication, and asked him to assume it as the law of the case, i.e., that the insurer had accepted the degree of the employee's functional loss, a different medical opinion, and a different result, may have resulted. Cf. Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(and cases cited). However, no such question was ever posed.

Okraska, supra at 196. Thus, a physician may reach his disability determination without reference to the prior unappealed § 36 findings at conference, but the doctor may be questioned about whether his opinion on disability would change if he was presented with the § 36 ratings from that unappealed conference order. Id.

Similarly, here, even if the § 36 loss of function, i.e., impairment, determinations made at conference, are the "law of the case,"[7] an issue we need not decide, the doctor is not bound by them in forming his disability opinion because they are not directly correlated with disability. Dr. Mortimer, whose opinion the judge adopted, was specifically questioned about the relationship between impairment and disability, and stated, "there is some correlation, but it's not a direct equivalent correlation." (Dr. Mortimer dep. 40.) Although he maintained that he thought the employee's permanent impairment in her neck was greater than the 1% the judge awarded in the conference order, id. at 37-41, he testified consistently that loss of function or impairment ratings affect different people differently, and a low impairment rating did not necessarily mean an employee had little disability. Id. at 41-48.

[7] See Doonan v. Pointe Group Health Care, 28 Mass. Workers' Comp. Rep. 249, 256-257 (2014)(law of the case doctrine applies "probably exclusively to interlocutory decisions," and " 'is weaker than res judicata, for it is without force beyond the particular case and does not limit the power of the court' ").

> Q: Okay. Let's talk about the hypothetical individual. So if this hypothetical individual has a 1 percent cervical impairment, in your mind what does that translate into limitations?
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> A: A relatively mild disability, but I can't tell you specifically what that would impact because the impairment rating is, if you will, in a vacuum. It just gives you a number that correlates to symptoms, but it doesn't correlate necessarily to real life and an individual's functions. You can ask me a number of questions.
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> Somebody who has a 1 percent impairment, I wouldn't expect them to be able to drive, but maybe they could drive. I wouldn't expect they could work on an assembly line, but maybe somebody with a 1 percent impairment could. I would expect somebody to be able to operate a computer, but another person might not be able to, even with a 1 percent. *So I think the disability is very personal, whereas, the impairment is very general.*
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> Q: Again, you would agree that a 1 percent impairment cannot coexist with a person with a significant disability?
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> A: *I would not agree with that.*

(Dr. Mortimer Dep. 42-43.)(Emphasis added.) Dr. Mortimer continued:

> Q: In your opinion, is 3 percent impairment of neck pain, is that somebody who is still working or is that somebody who can't work at all?
>
> A: It depends on the individual.

(Dr. Mortimer Dep. 45.) With respect to the employee specifically, Dr. Mortimer's opinion was that she was unable to return to the workforce in any capacity. (Dec. II; Ex. 9, Dr. Mortimer's report, 1/11/18.) Thus, the judge did not err in determining the employee's disability without reference to the prior § 36 determination, nor did that determination preclude a finding of permanent and total incapacity. Okraska, supra.

The self-insurer next argues that the judge erred by failing to consider the testimony of Dr. Cutler, the impartial physician, as a whole. See Stawiecki v. DPW Highway Dep't, 26 Mass. Workers' Comp. Rep. 31, 33 (2012)(testimony of medical expert should be considered as a whole). The self-insurer alleges that the judge adopted

isolated parts of Dr. Cutler's opinion, while ignoring parts indicating the employee's psychiatric condition was much better than the doctor suggested. We disagree.

In support of its argument, the self-insurer cites the notation in Dr. Cutler's August 8, 2017, report that the employee "denied homicidal or suicidal ideation." (Ex. 1, p. 2.) However, in that same report, Dr. Cutler testified that she continues to suffer from a major depressive disorder and somatic pain disorder, and that he would not expect her psychiatric symptoms to improve sufficiently for her to be able to return to work. Id. Later, in his deposition, Dr. Cutler testified that her depression interferes with her ability to focus and concentrate, which precludes her from maintaining employment. (Dr. Cutler Dep. 7-8; Ex. 1.) Thus, there is no merit to the self-insurer's argument that the employee's lack of suicidal ideation changed Dr. Cutler's opinion on disability.

The self-insurer also alleges that Dr. Cutler testified that it was a sign of good health if the employee was able to participate in boating, swimming and camping activities. (Self-insurer br. 25.) When asked about these activities at deposition, Dr. Cutler testified, "Well, *if* she's able to participate *fully* in all those things and, you know, we believe that she is, then that's a sign of good health. If she's socially withdrawn and not able to participate then that's a sign of bad mental health." (Dr. Cutler Dep. 16-17.) Thus, while Dr. Cutler's opinion was contingent on her ability to participate "fully" in those activities, the judge's opinion was that her activities were "sedentary." (Dec. 13.)("Generally she sits at the camp and just watches the lake and the activities around the lake," sometimes riding in a boat or sitting in a tube in the water. [Dec. 7.]) It is the judge's role, not that of the impartial physician, to find facts. Maldonado v. Tubed Products, Inc., 19 Mass. Workers' Comp. Rep. 221, 224 (2005). To be entitled to any weight, the doctor's opinion must be based on those facts. There was no error.

The self-insurer also points to Dr. Cutler's opinion regarding the employee's GAF[8] score as being inconsistent with his earlier opinion of total disability. However,

[8] Dr. Cutler explained that the GAF scale, which was part of the Diagnostics Statistics Manual Fifth Edition,

the self-insurer has mischaracterized Dr. Cutler's testimony on that issue. Dr. Cutler did not testify that she had a GAF score of 70 and could therefore work, as the self-insurer alleges. (Self-insurer br. 26.) Rather, regarding the employee's activity at the "camp," even as characterized by the self-insurer, he testified, "It suggests greater than 45. I don't know about 70." (Dr. Cutler Dep. 25-26.) Finally, when asked to comment on medical records from August 16, 2016, in which the employee said she had been "doing good," and had been busy gardening, canning, spending time with family and going to their camp, Dr. Cutler opined that it was a report of somebody that's functioning better. (Dr. Cutler Dep. 26-27.) However, when confronted with the employee's testimony that, "As long as I'm on the medication, I seem to be doing pretty good," (Tr. 18-19), he testified he "would wonder about her level of denial, her level of insight." (Dr. Cutler Dep. 28-29.) He acknowledged that some of the documents he had been presented with might "raise questions as to her level of functioning," id. at 29, but never testified that this would change his opinion that she could not work due to her psychological disability. (Dec. II, 14; Dr. Cutler Dep. 7-8.) "Where . . . the impartial physician's misgivings . . . were based on a history not adopted by the judge, the judge appropriately ignored those misgivings." See Faieta v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 10 (2004), citing Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342 (2003). Here, Dr. Cutler's statements, on which the self-insurer relies for its argument that the judge failed to properly consider the § 11A physician's opinion, are either inconsistent with the facts found by the judge, or have been mischaracterized

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> [I]t's supposed to, given the symptoms and their level of functioning, you put a number from 0 to 100 with 0 being totally maybe being in a room no functioning at all and 100 being as well as anyone can function, you know, but certainly if it's – I mean, her I probably would have put at like 45 or something like that. I mean, she's not hospitalized, the medication is maintaining her, you know, she has family support from what she portrayed to me, and she, you know, is not even an active mother because her children are all much older, so that's why I would have given her like a 45 probably.

(Dr. Cutler Dep. 21-22.) He said he would have given her a little lower GAF rating at the time of his first examination, two and one-half years earlier, on April 16, 2014. Id. at 22.

by the self-insurer. Thus, the judge did not fail to consider Dr. Cutler's opinion as a whole in concluding the employee was totally disabled. [9]

Accordingly we affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the self-insurer shall pay employee's counsel a fee in the amount of $1,680.52.

So ordered.

Carol Calliotte
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***May 31, 2019***

[9] We summarily affirm the decision as to the self-insurer's remaining argument.