COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020474-08**

Peter A. Kent	Employee
Town of Scituate School Department	Employer
Town of Scituate	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Levine)

The case was heard by Administrative Judge Novick.

APPEARANCES
Thomas C. McDonough, Esq., for the employee at hearing and on appeal
Mark J. Kelly, Esq., for the self-Insurer at hearing
John J. Canniff, Esq., for the self-Insurer on appeal

HARPIN, J. The employee appeals the decision of the administrative judge awarding him § 35 partial incapacity benefits, rather than his claimed § 34 temporary total incapacity benefits. We affirm the decision.

The employee worked as a school custodian, cleaning and securing the building, painting, dusting, and emptying trash barrels, among other similar tasks. He was required to lift up to fifty-five pounds or more, and to be on his feet for the entire working day. (Dec. 5.)

On July 23, 2008, the employee injured his back at work. Due to intense pain, the employee was taken by ambulance to the South Shore Hospital, where he was treated as an outpatient. Thereafter, he underwent a regimen of physical therapy and a steroid injection. The employee returned to work, at light duty but full pay, on October 21, 2008. He went back to full duty work in February, 2009, but found that on October 26, 2009, the work became too difficult, and he again went out of work. On December 15, 2009, the employee made one more attempt to return to work, but reinjured his back emptying trash barrels; he has not worked since. (Dec. 5-6.)

In March 2010, the employee underwent a fusion performed by Dr. Lewis Jenis, followed by a second back surgery in April 2010. Despite these surgeries the employee continued to have pain in his back, left leg and right thigh. Dr. Jenis referred the employee to Dr. Lauren Elson, a physiatrist, who saw the employee from November, 2010, to August, 2011, and recommended additional physical therapy, acupuncture and medication. (Dec. 6-7.) Dr. Elson also recommended pain management and counseling. Dr. J. Randall Paulsen, a psychiatrist, treated the employee for depression and prescribed pain and sleep medications. Despite all the treatment, the employee continues to experience pain in his back and left leg. (Dec. 7.)

The self-insurer accepted liability and paid the employee §34 benefits until his return to work on October 21, 2008. The § 34 benefits were reinstated, by agreement, after the employee left work on October 26, 2009. (Dec. 5.) In November, 2010, the self-insurer filed a complaint to modify or discontinue the employee's § 34 benefits, which was denied following a § 10A conference. The self-insurer appealed the conference order. (Dec. 3.) Dr. Peter Anas performed a § 11A medical examination on September 5, 2012.[1]

Following a hearing the judge issued a decision, in which she modified the employee's benefits by assigning an earning capacity of $400.00, resulting in a weekly § 35 rate of $201.83. She also found the employee suffered from a causally related psychological condition and ordered the self-insurer to pay for the employee's related treatment. However, she did not find him disabled from this condition, as she found that Dr. Paulsen's "records do not contain an opinion as to extent of disability, if any, related to the employee's depression." (Dec. 10.)

The employee immediately filed a "Motion for Reconsideration of the Decision," in which he raised several scrivener's errors, asserted the judge erred in finding that Dr. Paulsen and Dr. Elson did not address the extent of his disability, and argued that the

[1] The medical report and deposition testimony of the §11A examiner were admitted into evidence. (Dec. 1.) Additional medical evidence was also allowed. (Dec. 2-3.)

decision overlooked or failed to consider the disability opinion of Dr. Jay Portnow. The crux of the employee's argument was that "all medical evidence submitted by the Employee concerning the extent of his disability was ignored, overlooked, misconstrued, not considered, disregarded or not understood." (Employee br. 4.) The self-insurer stipulated to the correction of the scrivener's errors, but disagreed with the employee's arguments regarding the judge's misconstruction of the medical evidence. (Self-ins. Response and Opposition.)

The judge issued an amended decision on September 27, 2012. In her cover letter to that decision she wrote:

> After reviewing the employee's motion for reconsideration and the insurer's objection to that motion regarding the September 5, 2012 Hearing decision in the above matter, I have corrected the error in No. 4 of the stipulations and the scribner's [sic] error in No. 1 of the Order. These changes are marked in bold on the enclosed amended decision.
> The rest of the decision stands and there will be no further changes.[2]

In his brief the employee restates, although in greater detail, the argument raised in his motion, that the judge made a "flawed and erroneous analysis that misstates, misconstrues or failed [sic] to consider medical evidence submitted for review by the employee." (Employee br. 14.) He specifically argues that Dr. Elson, contrary to the judge's finding that "[s]he does not provide an opinion as to the extent of disability referable to this diagnosis," (Dec. 9), did in fact render an opinion on disability. He points out the doctor, in her note of August 8, 2011, wrote, "It is likely that there is a significant supratentorial component; however, this is causing him to be incapacitated and unable to work causing him more stress." (Employee br. 16-17; Employee Ex. 6.) The employee also asserts the judge erred by misstating the opinion of Dr. Jay Portnow as "the employee would not be able to return to his work as a custodian as it was heavy, manual work." (Dec. 9.) The employee argues the November 4, 2011 "full disability

[2] The employee's motion, the self-insurer's response, the various medical opinions and reports, and the judge's ruling on the motion, are contained in the board file. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file).

opinion" of the doctor was that the employee was "unable to work at this time secondary to his chronic pain." (Employee br. 17-18) .[3]

While Dr. Elson did find the employee "incapacitated" in her August 8, 2011, report, she relates that to his "significant supratentorial component," not his back condition, as she stated "this is causing him to be incapacitated and unable to work. . ." (Employee Ex. 6, emphasis added.) (Dec. 9.) The judge found that Dr. Elson's diagnosis, as of August 22, 2011,[4] was of "intermittent low back and chronic left foot pain status post surgery with radicular pain." (Dec. 9.) The finding that there was no "opinion as to the extent of disability referable to this diagnosis," (Dec. 9, emphasis added), was therefore correct. Any ambiguity in the doctor's opinion on the cause and extent of the employee's disability was resolved by the judge's finding that there was no disability opinion on the employee's low back, leg, and foot pain. This she was allowed to do. Boucher v. Edward Buick, Inc., 22 Mass. Workers' Comp. Rep. 301, 303 (2008)(judge may resolve ambiguity in doctor's opinion). The judge thus did not err when she found the medical opinion of Dr. Elson failed to address the extent of the employee's disability.

In regard to Dr. Portnow, the judge did not "misstate" his opinion, as the employee contends. (Employee br. 17.) The judge merely summarized the doctor's opinion, in part, that the employee would not be able to return to work as a custodian. (Employee Ex. 5, report of November 4, 2011; Dec. 9.) The fact the judge did not recite another part of the opinion on the extent of the employee's disability -- "He is unable to work at this time secondary to his chronic pain," (Employee Ex. 5) -- is of no moment, as the judge did not adopt any of the doctor's opinions. Bemis v. Raytheon Corp., 15 Mass.

[3] The employee referred to the same opinions of Dr. Elson and Dr. Portnow in his Motion for Reconsideration. (Employee Motion, 4-5.)

[4] The doctor signed her report of the August 15, 2011, visit on August 22, 2011.

Workers' Comp. Rep. 408, 412 (2001)(recitation of a doctor's opinions is not equivalent to a finding on them).

The judge adopted the opinions of the impartial physician, Dr. Anas, that the employee had a permanent partial disability which allowed him to work full time, as long as he had the opportunity to sit, have breaks and rest, and not be on his feet more than six hours out of an eight hour day. (Dec. 13.) She also adopted the opinions, in part, of Dr. Jenis, as to the diagnosis, causation, and future treatment (a spinal cord stimulator), but noted that he did not give an opinion as to the employee's disability.[5]

The employee acknowledges, (Employee br. 20-21), that a judge is free to adopt all, part or none of an expert's medical opinion, as long as she makes sufficient findings to allow the Reviewing Board to determine on what medical evidence she relies, Schaeffer v. Philadelphia Sign Co., 25 Mass. Workers' Comp. Rep. 215, 220 (2011); Ingalls' Case, 63 Mass. App. Ct. 901, 902 (2005); Amon's Case, 315 Mass. 210, 214-215 (1943), and does not mischaracterize that medical opinion. Mays v. Alpha Indus., 24 Mass. Workers' Comp. Rep. 175 (2010).

This is what occurred in this case. In the decision the judge found Dr. Elson did not render an opinion on the employee's diagnosed work-related injury, and recited in part the opinion of Dr. Portnow. In addition, in her ruling on the employee's Motion for Reconsideration, the judge did consider the medical opinions of Dr. Elson and Dr. Portnow, including the total disability opinions referenced by the employee. There she rejected the employee's arguments, identical to those raised now on appeal, regarding the doctors' opinions, as she made no substantive changes to the original decision. The unmistakable inference is that she considered the actual opinions and chose not to adopt them. The judge simply adopted other medical evidence over the medical evidence urged for adoption by the employee. Ingalls' Case, supra.[6]

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[5] The employee does not raise an issue as to this finding.

[6] Our recent decision in Gurey v. Tables of Content, Inc., 27 Mass. Workers' Comp. Rep. __ (October 4, 2013), is not in conflict with our finding here. In that case this same judge found there was no medical evidence for disability after a certain date. We reversed, on the basis that

The employee's assertion regarding Dr. Paulsen is a bit more intricate. The employee argues that when the judge found Dr. Paulsen's "records do not contain an opinion as to the extent of disability, if any, related to the employee's depression," (Dec. 10), she misconstrued the doctor's rating of the employee's diagnosis. The employee contends that the doctor, by giving the employee a Global Assessment of Function (GAF) rating of "50," meant he "believes the employee has a serious mental impairment in social and occupational functioning." (Employee br. 15.) The employee asserts that such a score was at the top end of "Range 41-50" of the GAF, and that the Range, according to the DSM–IV-TR, pg. 34, was for "serious symptoms (e.g. suicidal ideation, severe obsessive rituals, frequent shoplifting) OR serious impairment in social, occupational, or school functioning." (Employee br. 15.)

There was no error. Dr. Paulsen incorporated the GAF chart into his medical notes and assigned the employee a value of 50. (Employee Ex. 4.) However, there is no meaningful opinion as to the extent of disability associated with that rating. It is simply too vague. Were we to hold, as the employee urges, that the judge erred in not finding "Dr. Paulsen's' GAF score of 50 is his opinion as to the degree of impairment the employee's medical related depression causes him in interaction with people, family, work or everyday life," (Employee br. 16), we would be requiring the judge to have expert knowledge of a medical issue. The purpose of requiring expert medical testimony on disability is to provide an understanding of medical issues that are beyond the common knowledge and experience of a lay person. Cruz v. Pet Edge Admin. Serv. Co., 27 Mass. Worker's Comp. Rep. ___ n. 8 (September 16, 2013); Colon- Torres v. Joseph's Pasta, 27 Mass. Workers' Comp. Rep. 61, 65-66 (2013)(judge cannot determine causation from his own review of the DSM-IV without expert testimony); Josi's Case,

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the record did contain such evidence and the judge's termination of benefits on that date was therefore not supported by the record. See also Jaho v. Sunrise Partition Sys., 23 Mass. Workers' Comp. Rep. 185, 191 (2009) (mischaracterization of adopted medical opinion was error). In the present case, taking as a whole the judge's findings in the decision and her ruling on the employee's Motion for Reconsideration, all the evidence was considered, with her adoption of Dr. Anas' opinion on the extent of disability.

324 Mass. 415, 418 (1949). Where an unfamiliar and complex rating system is used, the employee's failure to produce expert testimony as to its meaning constitutes a problem with his burden of proof, not an error on the judge's part to understand it. Lawton v. Hartford Roofing Co., Inc., 26 Mass. Workers' Comp. Rep. 77, 83 (2012); Sponatski's Case, 220 Mass. 526, 527-28 (1915) (employee has burden to prove every aspect of his claim). As such, the judge correctly determined the employee failed to meet his burden to prove he was disabled as a result of his work-related depression. (Dec. 15-16.)

Finally, the employee asserts the vocational findings were flawed, as the judge adopted the vocational opinion of Susan Chase, which did not take into account the medical evidence from Dr. Paulsen, Dr. Elson and Dr. Portnow, nor did she consider the employee's depression "and its psychological impact in [sic] his ability to work." (Employee br. 26.) Because the judge did not adopt the opinions of either Dr. Elson or Dr. Portnow, she was within her discretion to adopt a vocational opinion which did not consider them. Regarding the employee's depression, the judge, while adopting Dr. Paulsen's diagnosis of depression, did not find any disability related to that condition, for the reasons we have previously given.[7] There being no adopted evidence on the effect the employee's depression had on his ability to work, the lack of consideration by the vocational expert of the condition would have no bearing on the judge's adoption of her opinion.

We find the employee's other arguments to be without merit. The decision is affirmed.

So ordered.

[7] The employee did not avail himself of the opportunity in Susan Chase's deposition to cross-examine her on whether she had considered the employee's psychological state in coming to her conclusion on his vocational status.

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William C. Harpin
Administrative Law Judge

Filed: **December 10, 2013**

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Bernard W. Fabricant
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge