COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054609-93**

Robert Souza	Employee
Harvard University	Employer
Harvard University	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Levine)

APPEARANCES
Robert F. Gabriele, Esq., for the employee
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

WILSON, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee benefits for permanent and total incapacity under G. L. c. 152, § 34A, upon finding that his work-related medical disability had worsened. The self-insurer contends that the impartial medical evidence does not support the judge's finding of medical worsening, and that the judge's vocational findings were inadequate. Although the evidence is somewhat equivocal, we agree with the judge that the impartial physician's opinion sufficiently establishes medical worsening. We also see no need to recommit the case for further vocational findings under the circumstances presented here. We therefore affirm the decision.

The parties stipulated that the employee had suffered a low back injury while lifting furniture as a maintenance man for the employer on July 30, 1993, and that benefits for temporary, total incapacity were paid to exhaustion. The parties also stipulated that the employee had received partial incapacity benefits under § 35 for the full four years allowable after exhaustion of § 34 benefits, pursuant to a decision by a different administrative judge, dated July 29, 1998. The judge took judicial notice of that decision. The employee then claimed § 34A incapacity benefits, which were denied at the § 10A conference. (Dec. 2-3.)

On January 24, 2001, the employee underwent an impartial physical examination by the same doctor who had examined him on July 25, 1997. (Dec. 2.) At the time of the earlier, 1997 examination, the doctor had diagnosed multiple lumbar disc herniations, left leg sciatica, and chronic pain syndrome, all causally related to the employee's 1993 work injury. The impartial doctor found the employee capable of working a sedentary job at that time, with limitations including lifting fifty pounds rarely, no repetitive lifting over fifty pounds, the ability to stand and sit at will, and walking moderate distances. (Dec. 4-5.)

Based on his January 24, 2001 examination, the impartial physician diagnosed the same causally related medical conditions of lumbar disc herniations, sciatica and chronic back pain. The doctor noted that the employee complained of new episodes of numbness and paresthesia and weakness of the left leg, and he observed a diminution of reflexes of the knees and ankles. (Dec. 5; Dep. 25, 26, 30.) The doctor opined that the three, diagnosed, causally related, medical conditions suffered by the employee had, more likely than not, worsened between the two examinations, although there was no further objective testing to document such deterioration. (Dec. 5-6; Dep. 28-29, 32.) Finally, the doctor opined that the employee's medical disability was permanent and total. (Dec. 6; Statutory Exhibit.) The judge adopted the impartial physician's opinions as enumerated above, and awarded the employee § 34A benefits. (Dec. 6-7.)

The self-insurer argues that the impartial physician's opinion does not establish the medical worsening that the employee needs to show in order to prove entitlement to permanent and total incapacity benefits after a determination of only partial incapacity. See Foley's Case, 358 Mass. 230 (1970). We acknowledge that the doctor's deposition testimony is rather ambiguous at points. However, the judge specifically quoted and adopted the doctor's opinion that the employee's medical condition – as per his causally related diagnoses of disc herniation, chronic pain and sciatica – had worsened between the examinations of 1997 and 2001. We consider that the judge's findings specifically adopting this medical testimony were within his authority to adopt all, none, or *part* of a medical expert's opinions. See Amon's Case, 315 Mass. 210 (1943). Insofar as the

doctor opined that the employee's increased symptomatology might have other explanations, (Dep. 21), he clearly indicated – in the nature of a differential diagnosis – that the employee did not present a history of those other possible causative conditions. (Dep. 33.) Finally, the doctor's testimony that there was no objective documentation of why the employee was experiencing increased symptomatology, (Dep. 31-32), was just that. The lack of findings on objective diagnostic testing is not a bar to a doctor's opinion that the employee's complaints are causally related to his work related medical conditions. It was for the judge to assess the probative value of that opinion, which duty the judge performed.[1]

In the alternative, the self-insurer argues that the judge did not perform an adequate analysis of how the employee's worsened medical condition combined with his vocational profile to yield total incapacity. The self-insurer's argument has some merit, but it is form over substance in the present circumstances. The judge noted the employee's age, education, training and work experience in his decision. (Dec. 3.) See Frennier's Case, 318 Mass. 635 (1945). But for advancing age, which cannot be viewed as a factor in "worsening,"[2] these factors did not change in the three years between the 1998 decision awarding partial incapacity benefits and the present judge's 2001 decision awarding § 34A benefits. Cf. Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. ___ (March 12, 2003)(historical factors of education, training and work experience cannot worsen).[3] That prior decision featured extensive vocational findings, including the employee's performance of a vocational rehabilitation program approved by the Office of Vocational Education and Rehabilitation, which had not been successful in returning the employee to limited duty work. (July 29, 1998 Dec. 4-6.) Although the

[1] Of course, where a judge rejects uncontroverted medical evidence, there must be a basis for such rejection on the record and the determination must be supported by clear and sufficient findings. See Robinson v. Contributory Retirement Appeals Bd., 20 Mass. App. Ct. 634, 639-640 (1985).

[2] Foley's Case, supra at 232.

[3] This is not to say that an administrative judge may not view these historical factors in a different light, given a change in external job and economic factors.

tenor of that decision was that the employee had not made his best efforts in trying to obtain a job within his medical limitations, the foundational facts of his vocational profile were established by that decision, and the present judge's judicial notice of that decision brought that profile within his purview. We do not think that the judge's implicit reliance on those findings was unwarranted. The combination of those vocational considerations with the medical worsening as found adequately supports the judge's § 34A award. Contrast Buonanno, supra (judge's finding of vocational worsening unsupported by the evidence and violative of res judicata principles). Finally, there is no evidence in the record that the *external* vocational factors enunciated in Scheffler's Case, 419 Mass. 251, 256 (1994) had changed in any way. See id. (other factors relevant to employee's ability to earn include business prospects of employer and strength or weakness of economy). Admittedly, the judge could have done more to enunciate the vocational profile presented by the employee. However, under the circumstances of this case (namely, his judicial notice of the prior decision), we do not think a recommittal is necessary.

We summarily affirm the decision as to the self-insurer's argument that the employee was obligated to show attempts at finding work as a prerequisite to receiving § 34A benefits. The judge clearly credited the employee's testimony, which included his unsuccessful attempts to find work during his years on partial incapacity benefits. (Tr. 26-27.)

Accordingly, we affirm the decision. We award the employee's attorney a 50% reduced fee of $636.77 under G. L. c. 152, § 13A(6), because he did not file a brief.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 23, 2003**

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge