COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031999-08**

Shelly Chapin	Employee
Gil Montague Regional School District	Employer
Mass. Education and Government SIG	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
James F. Dolan, Esq., for the employee
Shelley M. Harvey, Esq., for the insurer at hearing
John J. Canniff, Esq. for the insurer on appeal

FABRICANT, J. The employee appeals from a hearing decision ordering the insurer to pay for certain claimed medications, setting limitations on other medications, and denying payment for those remaining. On appeal, the employee asserts that the judge was arbitrary and capricious in reducing the employee's Oxycodone use, as well as in finding that the evidence relative to Atenolol use was equivocal. We affirm the judge's decision, with directives to insure adherence to his orders relative to tapering the employee's dosage of Oxycodone.

The employee was fifty-seven years old at the time of hearing. (Dec. 3.) She worked for the Turner Falls school system as a cook until she sustained a lifting injury on December 13, 1996. (Tr. 16.) As a result of that injury, the employee sustained a tear of her rotator cuff, and a supraspinatus tendon/cervical injury. (Dec. 2, 3.) She underwent a cervical spine fusion in 2003, and right shoulder surgeries in 1997 and 2008. (Tr. 5.)

On August 6, 1999, the employee settled her workers' compensation claim, with the insurer retaining liability for the payment of future medical benefits.[1] She has been treated with narcotic medications since 2003 for neck and shoulder area pain. Although her pain is never completely gone, the narcotics lessen the pain and increase her ability to function. (Dec. 3.) In 2010, the reasonableness and adequacy of certain medications, including some opiates, was litigated through conference, and an agreement for payment of further medications was approved on January 20, 2011. (DIA Form 113 dated January 18, 2011.) Rizzo, supra.

In September 2015, the insurer stopped paying for any of the employee's prescription medications, without prior notice to her or the filing of a claim with the Department. (Tr. 21-22; see Dec. 6.) The employee filed a claim, and a conference pursuant to § 10A was held on March 8, 2016, with an order for payment of certain prescriptions filed shortly thereafter. Cross-appeals were filed and a hearing de novo was held on August 30, 2017. (Dec. 1.)[2]

The employee was examined by Dr. Roberto Feliz, the § 11A impartial medical examiner, on June 6, 2016. (Dec. 4.) The judge found the § 11A report to be adequate and allowed the parties to take the deposition of Dr. Feliz on November 6, 2017. (Dec. 2-3.) Accordingly, the § 11A opinion was the only medical opinion in evidence. (Dec. 3.) In his findings regarding the employee's medical condition, the judge adopted the § 11A opinions on the following diagnoses:

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[1] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] The employee's claim was for the following ongoing medications as prescribed by the primary care physician "from on or about September 1, 2015 to date and continuing": Trazadone 100mg. x 2, Atenolol 50mg. x 2, Omeprazole 20mg., Tizanidine 25mg. x 3, Cyclobenzaprine substituted 10mg. x 3, Flector Patch 1.3%, Tens Unit supplies, Oxycodone 15mg. x 4. The employee also sought payment of the following medications "from on or about 9/1/15 until the date the employee ended usage or weaned from" them: Lorazepam 1mg., OxyContin and Lidocaine 5% patch. (Dec. 2.)

> 1) Cervicalgia (status post-cervical fusion C5-C6; with residual chronic pain), 2) Adhesive capsulitis of right shoulder, 3) Pain in the right shoulder (progress degenerative tendinopathy/osteoarthritic), 4) Anxiety disorder, unspecified, associated with depressive features. I further accept and adopt his opinion that the injury of December 13, 1996 is a major, but not necessarily the predominate cause of the employee's ongoing pain, disability, and need for chronic pain management.

(Dec. 4.) The judge also adopted the § 11A opinion that the employee's Oxycodone medication should be weaned and tapered down to 5-l0 milligrams, three times a day. (Dec. 4.) Based on the § 11A opinion, the judge made the following findings:

> To her good credit the employee has reduced her level of narcotics from, in Dr. Feliz's opinion, a "great and substantial risk of an accidental overdose" with levels "not needed or medically necessary", to a somewhat safer regimen with lower doses. Specifically, she stopped taking OxyContin, and is down to 60 milligrams oxycodone; 15 milligrams four times a day. (Tr. Dr. Feliz, pg. 15).
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> However, it is Dr. Feliz's opinion, which I accept and adopt, that the employee should be further weaned and tapered down to 5 to 10 milligrams three times a day. (Id. p. 19). I am persuaded by the scientific rationale thoroughly explained by Dr. Feliz that individuals can be gradually weaned to a safer level of minimal opioids. (Id. pp. 18-23). The patient eventually receives the same pain relief at the lower level. (Id. p. 25). With high level narcotics, "the narcotics themselves cause pain" (Id.). The weaning itself should take place over a period of 16 months (Id.).

(Dec. 4.) The judge then ordered that Oxycodone be weaned and tapered with the ultimate dosage goal being 5 milligrams, three times a day. (Dec. 6.) As for the medication Atenolol, the judge characterized the opinion of the § 11A as equivocal and held that the employee had failed to meet her burden of proof. He ordered the insurer to pay for her Atenolol prescription from 9/1/15 to 11/6/17, but not thereafter. (Dec. 4-5; Dep. 39.)[3]

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[3] In his decision, the judge included a chart reflecting his order of § 30 prescription medications:

Oxycontin ordered from September 1, 2015 to cessation.
Oxycodone (previous levels) from September 1, 2015 to June 6, 2016.
Oxycodone (15mg 4x daily) June 7, 2016 to date & cont. per weaning/tapering schedule -Goal 5mg. 3x per day.

On appeal, the employee first takes issue with the judge's order requiring the employee to reduce her Oxycodone usage to 5 milligrams, three times daily within sixteen months of the hearing decision. (Employee br. 1.) In a postscript at the end of the employee's brief, she posits that if we interpret the order as a "goal" she would have no objection to it. Id. at 10.

The parties do not seem to dispute that a tapering of the Oxycodone dose would be beneficial to the employee. The employee herself testified that after the §11A examination, and with the approval of her primary care physician, she tried to discontinue Oxycodone completely. (Tr. 40-41.)

The § 11A physician provided medical guidance in the tapering of the employee's Oxycodone use. The judge adopted and relied on the § 11A examiner in finding that "a fair reading of the report and deposition shows that the goal of tapering requires months and months of constant give and take." (Dec. 5.) The judge further found:

> In the words of Dr. Feliz, "Also, when you're weaning a patient, it's dynamic. Sometimes you can accelerate it. Sometimes you have to slow it down." ([Dep.] p. 70.) The employee will "fight you," and the treating physician must be flexible to explore what combination of alternative medications will be most effective. (Id. pp. 61, 65, 71.) In Dr. Feliz's opinion, the carrier should be willing to consider alternative therapies such as a therapeutic exercise program, nerve blocks, cognitive behavior treatment.

(Dec. 5.) The insurer argues that the judge created an "unassailable construct" in accepting and adopting the opinion of the § 11A examiner that "the weaning itself should

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Trazadone September 1, 2015 to date and cont.
Lorazapam September 1, 2015 to June 6, 2016.
Tizanidine September 1, 2015 to date and cont.
Atenolol September 1, 2015 to November 6, 2017.
Omeprazole September 1, 2015 to November 6, 2017.
Lidocaine September 1, 2015 to date & cont.
Flector September 1, 2015 to date & cont.
TENS Unit supplies September 1, 2015 to date and cont.

(Dec. 6.)

take 16 months." (Insurer br. 6.) We disagree.

The judge's "Dates Ordered" pertaining to the Oxycodone medication indicates payment for "15mg, 4x per day" from June 7, 2016, to date and continuing, with a "Future Order" of "weaning/tapering schedule-Goal 5mg, 3x per day." (Dec. 6.) The judge adopts the § 11A examiner's opinion that the weaning itself "*should* take place over a period of 16 months," and the judge's chart references that opinion by ordering payment for Oxycodone "per weaning/tapering schedule" setting the "goal" for Oxycodone at "5mg., 3x per day." (Dec. 4, 6; emphasis added.) The judge's chart is consistent with his findings that there must be flexibility in the weaning/tapering plan, with the ultimate goal being the achievement of the dosage of "5mg, 3x per day."

Furthermore, given the judge's finding that weaning is a "dynamic" process requiring flexibility, we agree with the judge's cautionary statement to the insurer against unilateral discontinuance should the employee's Oxycodone levels require upward adjustment at any time.[4] (Dec. 5.) We see no reason for the employee to be punished if she were unable to either achieve or maintain the ultimate goal.

The second issue presented is whether the judge's finding relative to the employee's use of the prescription drug Atenolol was correct as a matter of law. The judge found Dr. Feliz's opinion regarding Atenolol to be equivocal. (Dec. 4.) The insurer argues it was within the judge's province to deny further reimbursement of Atenolol based on the equivocal opinion of the § 11A physician. (Insurer br. 6.) We agree.

"The employee's burden of proof encompasses two subsidiary burdens: first, a burden of production – [s]he must produce enough probative evidence on which a judge may base an award; and second, a burden of persuasion – [s]he must persuade the administrative judge, as fact finder, to enter an award in his[her] favor." Snyder v. Globe Newspaper Company, 26 Mass. Workers' Comp. Rep. 125, 128 (2012). The employee' s

[4] However, the dose may be adjusted to no more than that of the maximum prescription (15 mg. 4x per day) ordered by the administrative judge for the period from June 7, 2016 and continuing. (See Dec. 6.)

contention that the § 11A physician's opinion was not equivocal relative to Atenolol speaks to the employee's burden of production. However, there was ample evidence in the § 11A deposition to support the judge's order denying reimbursement for Atenolol:

> I must admit, I've never heard of atenolol, 50 milligrams, just giving [sic] for anxiety or tachycardia in this scenario. There's nothing against it, because in a sense, it works the same. Usually, whenever I think of a betablocker to block palpitations of your heart for anxiety, I always go more for the propranolol. Her doctor has to explain that. It's not contraindicated, if he decides that that's the one he wants to use for safety reasons. I don't know why he chose that, but you know, again, it's not that he's doing something wrong by choosing this one. It's just not kind of the standard of care.

(Dep. 39.) It is well settled that the opinion of an expert which must be taken as evidence is his final conclusion at the moment of testifying. See Perangelo's Case, 277 Mass. 59 (1931). Moreover, if the equivocal expert opinion is the only evidence on a particular issue, it will not be sufficient to carry the burden of proof. Hachadourian's Case, 340 Mass. 81, 86 (1959).

The employee had to prove, more likely than not, that the Atenolol was reasonable and adequate treatment for a particular condition that is causally related to the industrial injury. While Dr. Feliz testified that Atenolol might not be contraindicated, he further stated that this particular medication is not what he would prescribe in this instance because it is not the standard of care and that "[h]er doctor has to explain that." (Dep. 39.) Dr. Feliz did not testify that Atenolol was reasonable and adequate treatment for the condition. As long as the judge's findings are grounded in the evidence and reasonable inferences are drawn therefrom, as they are here, we will not disturb them. Blais v. Gallo Constr., 25 Mass. Workers' Comp. Rep. 351 (2011); Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 153 (2010). Accordingly, we find no error in the judge's characterization of Dr. Feliz's opinion as being equivocal, and no error in his finding that the employee failed to meet her burden of proof.

We therefore affirm the decision.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **January 21, 2020**