

WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number: M1-1300/20
Appellant: Savy Ven
Respondent: The Sydney Children's Hospitals Network
Date of Decision: 21 August 2020
Citation: [2020] NSWWCCMA 135

Appeal Panel:
Arbitrator: Ross Bell
Approved Medical Specialist: Professor Nicholas Glozier
Approved Medical Specialist: Dr Douglas Andrews

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 June 2020, Savy Ven (appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Patrick Morris, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 14 May 2020.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - the assessment was made on the basis of incorrect criteria (section 327(3)(c));
 - the MAC contains a demonstrable error (section 327(3)(d)).
3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.
4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.
5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th ed* (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the general background set out by the AMS at Part 4 of the MAC,
“Brief history of the incident/onset of symptoms and of subsequent related events,
including treatment:

Ms Ven said she commenced working at the Children's Hospital Westmead as an Administration Officer in January 2017. She said problems at work began in June 2017 when a work colleague named Jackie began shouting at her in front of other work colleagues and told her that she would be working for her which was not the case. She said that Jackie became very angry at her. She said that this had occurred after Jackie's mother, Ellie had been employed at the hospital in a managerial role in late May 2017. Ms Ven said that she became very frightened and was "in shock" and felt humiliated by Jackie's behaviour towards her. Ms Ven said Jackie continued to be angry and confronting in her attitude towards her. Ms Ven said that on one occasion Jackie threw in anger a calendar sheet at the desk where Ms Ven was sitting. Ms Ven said that Jackie was very angry in her manner towards her and Ms Ven said that she felt "scared of her" as a result. Ms Ven said she tried to respond calmly to Jackie on the occasions when Jackie was angry in her manner towards her. Ms Ven said that Jackie had accused her of doing things that she did not do. Ms Ven said that another manager named Lyn told Ms Ven to resign or be terminated. Ms Ven said that Jackie, Ellie and Lyn would try to micromanage her at work. Ms Ven said she became extremely depressed and anxious. She said that she wanted to leave her work because she felt so unsafe at work. She said she saw her GP, Dr Hugo, on the advice of her partner as she felt very depressed and had started to self-harm by cutting herself. Dr Hugo commenced her on medications and referred her to a Psychologist Betty whom she saw on one occasion. Dr Hugo then referred her to another Psychologist named Jane whom she saw for a number of sessions. About 12 months ago Dr Hugo referred her to another Psychologist named Professor Raj whom she continues to see every three to four weeks.

Ms Ven said that in early 2018 her GP referred her to a Psychiatrist, Dr Way whom she has been seeing since then. Dr Way has been trying different medications on her and has been wanting her to be admitted to hospital, but she has declined. She was taking Valdoxan and Dothiepin but these medications were ceased about two months ago and she is taking Zyprexa and increasing doses of Tofranil.

Ms Ven has not tried to return to work as she said that she feels "too scared" to attempt this."

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.
8. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination for the reasons given below.

EVIDENCE

Documentary evidence

9. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

Appellant

12. The appeal concerns the assessment of the Psychiatric Impairment Rating Scale (PIRS) Category of Social Functioning.
13. In summary, the appellant employer submits that the AMS has erred in failing to refer to the appellant's statement, which differs from the history taken by the AMS. The AMS makes no comment as to why his history is different to the worker's statement.
14. The AMS erred in failing to take a complete and proper history.
15. Specifically, the AMS incorrectly assessed Class 2 for Social Functioning in the PIRS and should have found Class 4 as the more appropriate Class, because Ms Ven's statement and Dr Suman suggest this.
16. The MAC should be revoked and Class 4 found.

Respondent

17. There is no demonstrable error by the AMS, the assessment is not based on incorrect criteria.
18. The AMS has taken the history from the worker and the present symptoms on the day of the assessment. The AMS considered the evidence of the worker's statement in each PIRS Category.
19. The AMS noted in relation to Social Functioning that the relationship with Ms Ven's partner was very strained, but they remain together, without episodes of separation or domestic violence.
20. The AMS has taken the worker's statement into account as well as the history he took before drawing conclusions. The AMS explains why he arrived at his findings. The AMS did not base the assessment on incorrect criteria; and the appellant has not made out any demonstrable error on the face of the Certificate.
21. The MAC should be confirmed.

FINDINGS AND REASONS

22. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment, but the review is limited to the grounds of appeal on which the appeal is made.
23. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

Discussion

24. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 (*Mahenthirarasa*) the Court said: “A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion.”
25. In *Marina Pitsonis v Registrar Workers Compensation Commission & Anor* [2008] NSW CA 88 the Court said,

“Those dependent on the applicant showing that the doctor failed to record or to record correctly things she had told him face a double difficulty. They are not demonstrable on the face of the Certificate. And they seek, in effect to cavil at matters of clinical judgment in that matters unrecorded are likely to be matters on which the specialist placed no weight. The same can be said about factual matters recorded in one part of the Certificate that did not translate into the decision favourable to the applicant now contended for.”
26. It must be observed that “examples” are given in the SIRA Guidelines at Chapter 11, Tables 11.1 - 11.6 for the PIRS Categories, not inflexible measurement tools to be used literally. They are to assist the AMS in bringing clinical expertise to bear for each PIRS Category in the individual circumstances of the case.
27. The appellant submits that the AMS has erred in failing to take proper account of Ms Ven’s statement. The Panel notes that the appellant does not identify precisely where any purported failure to take account of the statement has resulted in a demonstrable error in the assessment, except to refer to the Category of Social Functioning, which is discussed below.
28. The Panel notes that the AMS records in the MAC the fact that he took the materials before him into account, and these included the appellant’s statement. Apart from the Category of Social Functioning the appellant does not point to anything in Ms Ven’s statement that might have led to a different outcome and therefore required further explanation. No material differences are identified by the appellant that might have given rise to error. These general assertions of the appellant are not accepted by the Panel and are insufficient to comprise a ground of appeal.

Ground of appeal – Assessment of PIRS Category - Social Functioning

29. The appellant submits that the AMS has erred in finding Class 2 for this Category when “a more appropriate PIRS category is 4”, given Ms Ven’s statement and the report of Dr Suman.
30. Table 11.4 of the SIRA Guides sets out the examples regarding social functioning for Class 2, 3 and 4 as follows,

“Class 2 Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.

Class 3 Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.

Class 4 Severe impairment: unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent).”

31. The AMS says at Part 10.c. in relation to this Category when considering Dr Suman's report of 30 July 2019,

"I note a report on Ms Ven by Dr Aman Suman, Psychiatrist dated 30 July 2019. Dr Suman noted that Ms Ven was taking the medications Dothiepin 300mg at night and Zyprexa 10mg at night. He made a diagnosis of Major Depressive Disorder and Social Anxiety Disorder in Ms Ven whereas I have made the one diagnosis of Major Depressive Disorder with Anxious Distress. Dr Suman gave Ms Ven a whole person impairment rating of 47%. Where he differed from me was in his ratings for Social Functioning where Dr Suman rated Ms Ven a Class 4 whereas I have rated her a Class 2. I rated Ms Ven a Class 2 as she is still in a relationship with her long-term partner despite significant strain in their relationship. There have been no episodes of separation or domestic violence."

32. The AMS explains in the above extract why he differs from Dr Suman, and why he found Class 2. As the authorities tell us, a difference of opinion with another practitioner does not constitute a demonstrable error.

33. At Table 11.8 the AMS summarises his reasoning for the conclusion of Class 2,

"Mild impairment. Ms Ven reports her relationship with her partner is very strained and there has been reduced intimacy, but they remain together with no episodes of separation or of domestic violence. She has lost contact with all her other family and friends."

34. The appellant submits that the AMS should have found Class 4, because it is "more appropriate". The Panel does not accept this submission. The AMS was obliged to consider the criteria using his own clinical judgement. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140,

"In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWCCMA 36 ("*Wark*"), where it is stated at [33]:

"...the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. ...

In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24])."

35. The Court said, finding the Panel in that matter erred in equating a difference of opinion with a demonstrable error at [70],

"To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence."

36. The Panel notes the appellant's submission that a higher Class is "more appropriate", but it is clear from the above authority that such a difference of opinion falls short of establishing error.

37. *Parker* involved a different PIRS Category to that appealed here, but the principle is the same. The AMS in *Parker* took a similar approach to AMS Dr Morris in this matter. The Court described the process as,

"The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene."

38. The Panel notes that the reasons given by the AMS for his rating are not contrary to the evidence. The situation as to the functioning of Ms Ven's relationship with her partner as expressed by the AMS is consistent with the history taken at examination and with Ms Ven's statement. The appellant submits that Ms Ven's statement is "much more detailed" than the history reported by the AMS but does not point to any conflicts that might require further reasons.

39. The AMS has not applied incorrect criteria but has considered carefully the examples in the relevant Classes together with his findings on examination and the other evidence and set out the reasoning as to why he has assessed the worker as Class 2. This finding was open to the AMS when considering the Classes at Table 11.4 of the SIRA Guidelines.

Findings

40. There is no demonstrable error on the face of the Certificate discerned by the Panel regarding Social Functioning. The assessment is not based on incorrect criteria.

41. For these reasons, the Appeal Panel has determined that the MAC issued on 14 May 2020 is confirmed.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

