WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1655/19**
Appellant:	**Sela Ifopo**
Respondent:	**Secretary, Department of Communities and Justice**
Date of Decision:	**29 October 2019**
Citation:	**[2019] NSWWCCMA 154**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Julian Parmegiani**
Approved Medical Specialist:	**Dr Michael Hong**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 July 2019, Ms Sela Ifopo (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Professor Nick Glozier, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 13 June 2019.

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 MAC contains a demonstrable error.

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 WorkCover Medical 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 WorkCover Medical 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). WPI is a reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 9 May 2019, the delegate of the Registrar referred this matter for a WPI caused by psychological/psychiatric injury which occurred on 10 July 2017 (deemed).

7. Ms Ifopo had been employed by the respondent for 11 years when she suffered a psychological injury. It was caused by the bullying and harassment she encountered amongst fellow workers, involving several themes including racism, difficulties with management of a knee injury, and finally the targeted bullying behaviour of a co-worker, who sought to undermine her. Ms Ifopo's mental state deteriorated over 2017. She attended her general practitioner on 22 July 2017, suffering from anaemia, but was referred to the care of a psychologist who she first saw on 1 August 2017. She received treatment and returned to work. However over 2018 her condition deteriorated and in 2019 she was put on a performance review for her lateness, as she was struggling to get to work on time.

8. The AMS noted however that there had been a substantial change in 2019. Her medication was changed and she was referred to a new psychologist, with whom she engaged well. Her range of activities had increased and when assessed by the AMS, Ms Ifopo was living with her uncle and cousins in Padstow.

9. The AMS found a WPI of 7% to which he added a further 1% for the effects of the treatment giving her an 8% WPI total.

PRELIMINARY REVIEW

10. 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.

11. The appellant requested a review by a Panel AMS. As no demonstrable error was found, the request is denied.

EVIDENCE

Documentary evidence

12. 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

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

SUBMISSIONS

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

FINDINGS AND REASONS

15. 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.

16. 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.

17. Ms Ifopo appealed against the decision of the AMS on two principal grounds. The first related to the assessment made as to two of the six categories under the Psychiatric Impairment Rating Scale (PIRS). The second related to an alleged "discount" made in relation to a condition of obstructive sleep apnoea.

Ground One

The Psychiatric Impairment Rating Scale (PIRS)

18. The Psychiatric Impairment Rating Scale is established as the rating criteria for assessing psychiatric/psychological impairment, by virtue of Chapter 11 of the Guides. Chapter 11 sets out six categories of behaviour to be considered, each being divided into five classes, ranging in seriousness from 1 to 5. Class 1 relates to a situation where there is no psychological deficit, or a minor deficit attributable to the normal variation in the general population. Class 5 pertains to a person who is totally impaired.

19. Chapter 11.12[1] provides:

> "Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities are examples only. The assessing psychiatrist should take account of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms."

20. The assessor is required to classify each category, and to apply the resulting scores as set out in Chapter 11[2].

21. The assessment of psychiatric disorder has been considered in a number of cases. In *Ferguson v State of New South Wales*[3] Campbell J was concerned the case where the Medical Appeal Panel had revoked the MAC on the basis that the finding by the AMS had been glaringly improbable. His Honour found that the Panel had fallen into jurisdictional error. He said at [23]:

> "By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS:
>
> > '… the pre-eminence of the clinical observations cannot be underrated. 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'.
>
> 24. The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
>
> 25. The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at

[1] Guides 55
[2] See 11.15-11.21 at Guides p 65 and Table 11.7 at Guides p 66
[3] [2017] NSWSC 887 (*Ferguson*)

> [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see *Jenkins v Ambulance Service of New South Wales*[4]. The Appeal Panel said, 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

22. In *Glenn William Parker v Select Civil Pty Ltd*,[5] another case regarding assessment of psychiatric disorder, Harrison AsJ cited [23] of *Ferguson* with approval at [65]. Her Honour said at [66]:

> "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])….."

23. In *Jenkins* Garling J said at [73]:

> "It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review."

24. It is accordingly necessary for the Panel to be satisfied that the assessment by the AMS in this category was erroneous in one of the following ways (to use the reference by Campbell J in *Ferguson*):

    (a) if the categorisation was glaringly improbable;
    (b) if it could be demonstrated that the AMS was unaware of significant factual matters;
    (c) if a clear misunderstanding could be demonstrated, or
    (d) if an unsupportable reasoning process could be made out.

25. The two categories from the scale were that the AMS has fallen into error in assessing were social functioning and recreational activities and concentration, persistence and pace.

Social functioning

26. In regard to Ms Ifopo's social activities and her activities of daily living, the AMS took a history of the difficulties she encountered since 2017, noting that before then she had been devoting herself to the church and tithing a portion of her salary. Her social life had been almost entirely through the church, although she contributed back to the community by attending the local SES on Tuesdays. She was playing the piano at her church, the Mortdale temple and had been the young women's president, and a state representative for activity days for her church. She drove regularly and travelled often to New Zealand. She was computer literate, much of her work involving computer systems.

27. Since late 2017 in early 2018 however the AMS noted that she had become withdrawn, demotivated and anergic. The AMS noted that Ms Ifopo had got into arguments with her daughter and her sister which resulted in her sister finding different accommodation at the end of the lease, and Ms Ifopo's daughter electing to go and live with her aunt, notwithstanding that Ms Ifopo had rented a two-bedroom apartment.

[4] [2015] NSWSC 633 (*Jenkins*)
[5] [2018] NSWSC 140 (*Parker*)

28. The AMS then said[6]:

> " …Over the past couple of months [Ms Ifopo] has moved in with an uncle and his family in Padstow. When she was most unwell, she stopped going to the SES meetings on Tuesdays and cannot really explain why but that she had lost interest. She has changed temples since moving in with her uncle and for some time, was far less regular in her attendance. She said she has begun to reattend, as one of their leading prophets has come over from the US. She still does not attend as regularly as she did previously or contribute in the same way. As such, her social life is less than it was. ……. She has been re-engaging recently with her daughter, drives over to see her and go out for dinner every fortnight or so now. She says that she is now quite fatigued during the day, which seems to be indicative of her OSA symptoms but this has also increased recently following the change in her antidepressant medication. As a result, she prefers not to drive long distances. For instance, a sister (she has several) asked her to share the driving to Melbourne. Although she did so, her sister did most of the driving. She flew to New Zealand just recently for an aunt's funeral travelling on her own without difficulty. She continues to use public transport without problem to get to work but has moved offices as part of her work dysfunction."

29. We were referred to Ms Ifopo's statement of 29 March 2019 where she said[7]:

> "(b) I no longer attend church and permit friends to visit my home. I rarely go out socially. I estimate that I would leave my home at best once per month. Previously I would go out and enjoy myself on Friday and Saturday nights. I can no longer do this."

30. In the PIRS Rating Form[8] with regard to social and recreational activities, the AMS gave a class 2 value saying:

> "She plays piano and goes to church now, is going out to see her daughter for dinner, and has partially reintegrated into her temple community but with less frequency than pre-injury."

31. The examples given relating to this category appear at Table 11.2 of Chapter 11 of the Guides.[9] A class 2 value is described as:

> "Occasionally goes out to [social activities that are age, sex and culturally appropriate] eg without needing a support person, but does not become actively involved (eg dancing, cheering favourite team)."

32. A class 3 impairment is described as:

> "Class 3 Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn."

[6] Appeal papers 22
[7] Appeal papers 43
[8] Appeal paper 28
[9] Guides 56

Submissions

33. We were referred to the comments made by the AMS which we have reproduced above regarding Ms Ifopo's activities of daily living. The reasons given for the class 2 value, it was submitted, were not consistent or compatible with that history. Reference was made to the history taken regarding Ms Ifopo's problems over 2017 and 2018 and the appellant alluded to her condition at that time, which included withdrawing to her room, being argumentative with her sister and her daughter, and the change in living arrangements.

34. Ms Ifopo conceded that she had resumed attending church but said that she was less regular in attending and did not contribute in the same way. Ms Ifopo conceded also that she had begun to reengage with her daughter, but that nonetheless, they still lived separately.
35. We have also reproduced that part of the statement dated 29 March 2019 which was also referred to in Ms Ifopo's submission to the effect that she would not go out on Friday and Saturday nights. This, it was submitted, should have resulted in a class 3 value.

36. The respondent referred to *Marina Pitsonis v Registrar Workers Compensation Commission*[10] and to *Ferguson* in submitting that to establish a demonstrable error an appellant must show more than a mere difference of opinion, and that matters which an AMS either did not record or did not comment on in his reasons were matters that the AMS accorded no weight to. The respondent submitted that the AMS justified his reasons in any event. It submitted that Ms Ifopo in making her submissions in this category had ignored the finding by the AMS that things had changed substantially in 2019.

Discussion

37. The appellant's submissions must be rejected. We concur with the respondent that her submissions do not take into account the reasons given by the AMS for the assessment, which was that there had been an improvement in 2019. Ms Ifopo conceded that there had been an improvement, but she failed to explain why the AMS had erred in taking that improvement into account. Moreover, the AMS engaged with the opinion of Associate Professor Robertson, Ms Ifopo's medico-legal referee and explained clearly why he differed. We have extracted the AMS's comments when dealing with the challenge to his assessment for concentration, persistence and pace.

Concentration, persistence and pace

38. With regard to this category in the Rating Form the AMS said in assessing class 2 value:

> "She was not objectively impaired today and her concentration, persistence and pace are intermittently impaired at work."

39. A class 2 assessment in the relevant table, Table 11.5[11] provides:

> "Mild impairment: can undertake a basic retraining course, or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods up to 30 minutes, then feels fatigued or develops headache".

[10] (2008) NSWCA 88 (*Pitsonis*)
[11] Guides 57

40. A class 3 impairment is described as:

> "Moderate impairment; unable to read more than newspaper articles. Finds it difficult to follow complex instructions, (eg operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting".

41. Whilst discussing Mr Ifopo's present symptoms, the AMS said: [12]

> "….She has an onset insomnia but also great difficulty waking in the morning with her alarm going off several times. Though she goes to bed around 11:30, she may not fall asleep until 12:30 to 1am, getting up at 7 and thus achieves a borderline low sleep duration. When she is not at work, she may nap excessively during the day and continues to be fatigued and demotivated. She snores and has excessive daytime sleepiness. She prompts herself for a range of tasks and it appears that her issues with cognitively demanding tasks relate more to motivation rather than actual concentration or focus difficulties. She says she is often tired and headachey."

42. The AMS also said, in considering Mr Ifopo's general health:[13]

> "She described most symptoms of Obstructive Sleep Apnoea and is due for a sleep study soon, having seen a sleep specialist."

43. In describing Ms Ifopo's activities of daily living, the AMS observed:[14]

> "…She says that she is now quite fatigued during the day, which seems to be indicative of her OSA symptoms but this has also increased recently following the change in her antidepressant medication."

44. In his summary the AMS said:[15]

> "However, she has all the symptoms of Obstructive Sleep Apnoea and a habitus characteristic of this disorder which is likely to be contributing to her overall impairment through fatigue and daytime sleepiness. I have discounted this from the whole person impairment rating provided later."

45. Ms Ifopo referred to the findings by the AMS as to her symptoms, noting that Ms Ifopo said when she was not at work she may nap excessively during the day, and that she continued to experience fatigue and demotivation. The AMS also noted that she had to prompt herself for a number of tasks . As we understood the submission, these symptoms were clear indications of impaired concentration persistence and pace, which the AMS had failed to consider.

46. We were also referred to comments by the AMS that "[Ms Ifopo] had been having problems with performance at work in terms of her concentration, focus and energy".

47. We were also referred to the opinion of Associate Professor Michael Robertson, the medico-legal psychiatrist retained on Ms Ifopo's behalf, dated 28 September 2018, and Ms Ifopo's statement of 29 March 2019. Reference was made to Associate Professor Robertson's report that Ms Ifopo was unable to read beyond a paragraph before losing focus, and of her frequently misplacing belongings. We were also referred to page 3 of Ms Ifopo's statement where she said[16]:

[12] Appeal papers 21
[13] Appeal papers 22
[14] Appeal papers 23
[15] Appeal papers 25
[16] Appeal papers 43

"(e) I have impaired memory and concentration. I am unable to read beyond a couple of paragraphs before I lose concentration and I frequently misplace my belongings which I did not do previously."

48. Ms Ifopo submitted that the evidence demonstrated that she did not have these problems prior to the consent of this condition.

49. Ms Ifopo also criticised the AMS for his statement when describing her symptoms (the full passage of which we have reproduced above) [17]:

> "She prompts herself for a range of tasks and it appears that her issues with cognitively demanding tasks relate more to motivation than to actual concentration or focus difficulties."

50. This comment, it was submitted, was "gratuitous and not in keeping with [the AMS's role] to be objective, fair and independent".

Discussion

51. These submissions must also be rejected. The reference made by the AMS to Ms Ifopo's problems with concentration, focus and energy were in the context of the record of her earlier symptoms prior to her improvement in 2019. The appellant turned a blind eye to the words "at that stage," which preceded the impugned comments by the AMS. The "stage" being discussed was the period in 2018 to 2019 before the improvement noted in the month or so prior to the assessment with the AMS on 5 June 2019.

52. Similarly, the reference to Ms Ifopo's condition as recorded by Associate Professor Robertson in September 2018 is also of little weight, as the AMS has based his opinion on the improvement that he noted in 2019. It has not been suggested in any of the submissions by Ms Ifopo that her improvement did not occur, indeed, as noted above, it was conceded.

53. The AMS engaged with the findings by Associate Professor Robertson with regard to both cognition and social functioning.[18] He said:

> "..There have been some symptomatic and functional improvements since that time..... At the time [A/P Robertson] noted objective cognitive problems, which are no longer present. I concur with three of his classes on the PIRS. Her social functioning has improved. She goes to church now and is going out to see her daughter for dinner and made some reintegration into her temple, although all less frequently than before…… As above, she was not [as] objectively impaired today as he notes in his assessment, and her concentration, persistence and pace is only mildly impaired."

54. So far as Ms Ifopo's own assessment of her condition in her statement of 29 March 2019 is concerned, again the AMS saw her on 5 June 2019. In any event, a self-assessment is but one of the matters that an AMS is required to consider.

55. As to the comments by the AMS that Ms Ifopo has an issue with motivation, those comments have to be seen in the context of the finding by the AMS that she probably suffers from Obstructive Sleep Disorder. They were made whilst the AMS was describing the symptoms of that condition and have been taken out of context by an eye too keenly focused on the perception of error[19].

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[17] MAC 3 (Appeal papers 21)
[18] Appeal papers 8 [10c].
[19] See *Bojko v ICM Property Service Ltd* [2009] NSW CA 175 at [36]

56. We have some difficulty in comprehending the criticism of the AMS that his opinion was gratuitous and failed to be objective, fair and independent. Such comments are regrettable and of no assistance, especially where, as in the present case, the report by the AMS has been thorough, considered and clearly expressed. It is within his expertise to make an assessment of the reasons for a psychiatric symptom such as concentration, persistence and pace.

Ground two

Sleep Apnoea

57. We have already reproduced the findings and reasons given by the AMS regarding Obstructive Sleep Apnoea above whilst dealing with Ms Ifopo's submissions regarding concentration persistence and pace.

58. Having said that he would discount the Obstructive Sleep Apnoea from the WPI assessment, he later said, when considering the provisions of s 323 of the 1998 Act[20]:

> "A deduction is not applicable. Although I have incorporated the impact of what appear to be Obstructive Sleep Apnoea symptoms, in reality, these have had no actual effect on the classes in any of the six PIRS categories."

59. Ms Ifopo submitted that the opinion by the AMS that she suffered from obstructive sleep apnoea was incorrect, because there was no corroborative evidence that this condition was independent of her psychiatric condition - or indeed not a consequence of it. Accordingly, the AMS had no basis for discounting that condition in his assessment.

Discussion

60. Ms Ifopo did not refer to the comments by the AMS in paragraph 11 of the MAC, that no deduction should be made for her condition.

61. The AMS has determined that Ms Ifopo's Obstructive Sleep Apnoea was not linked to her work-related injury. However, the existence of that co-morbid feature did not affect the quantum of the WPI. As there has been no impact on the assessment made by the AMS, no demonstrable error has been shown.

62. For these reasons, the Appeal Panel has determined that the MAC issued on 13 June 2019 should be confirmed.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

H Mistry

Heena Mistry
Dispute Services Officer
As delegate of the Registrar

[20] Appeal papers 24