

WCAT Decision Number : WCAT-2004-03368-RB
WCAT Decision Date: June 24, 2004
Panel: Earl A. Simm, Vice Chair

Introduction

The worker appeals two decisions by officers of the Workers' Compensation Board (Board) related to a March 9, 1998 injury claim.

In the first decision under appeal dated September 16, 2002, the worker was provided with a copy of an employability assessment in accordance with Board policy item #40.14 in the *Rehabilitation Services and Claims Manual* in effect at the time of the decision (RSCM). The worker was given a 30-day period to make a submission related to the employability assessment.

As well, a vocational rehabilitation consultant said that based on a review of all the evidence on file, it was considered that the worker would not sustain a loss of earnings in the long term as a result of the injuries accepted under the claim.

In the second decision under appeal dated October 31, 2002, the worker was advised of her entitlement to a permanent partial disability award. In the decision, a Board claims adjudicator in the Disability Awards Department, said that the worker's claim had been accepted for a bilateral carpal tunnel syndrome condition and psychological problems. The claims adjudicator said that based on assessments of March 26, 2002 and April 22, 2002, it was considered that the worker was entitled to a temporary total disability award equal to 17.5% of a totally disabled person; 15% of that award was for the worker's psychological condition and 2.5% of that award was for the worker's subjective complaints of pain, related to her bilateral carpal tunnel syndrome condition.

The claims adjudicator in Disability Awards noted that the worker considered herself to be 100% disabled, but a Board consultant had identified jobs believed to be suitable for the worker. These occupations would match or exceed the worker's pre-injury earnings level. Therefore the worker would not be entitled to a loss of earnings disability award.

Issue(s)

The issues arising out of the two decision letters under appeal are:

- Whether the disability award equal to 17.5% of a totally disabled person, reflects the worker's physical and psychological disability arising out of the March 9, 1998 injury.

- Whether the worker is capable of returning to employment that would meet or exceed her pre-injury earnings, or whether she is entitled to having her pension established using the projected loss of earnings method under section 23(3) of the *Workers Compensation Act* (Act).
- Whether the effective date of the award, being February 1, 2001, is correct.
- Whether the worker's wage rate for pension purposes based on 100% of the worker's earnings of \$17,963.70 in the one-year prior to injury is correct.

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Review Board and the Appeal Division of the Workers' Compensation Board (Board) were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As these appeals had not been considered by a Review Board panel before that date, they have been decided as WCAT appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Background and Evidence

The worker's claim was initially accepted for a bilateral carpal tunnel syndrome and, following a Review Board finding of January 10, 2002, the worker's psychological problems were also accepted.

The Review Board panel in their findings of January 10, 2002, dealt with the Board decision of January 27, 2000 that determined that the worker was capable of returning to work to her pre-injury employment. The panel also decided whether she was entitled to further wage loss and medical aid benefits. In his findings, the panel chair said that the worker's condition had remained fundamentally unchanged since the January 27, 2000 decision, and it appeared that the worker had reached a state of plateau by the time the decision was made. The panel chair determined that the worker was still disabled when temporary wage loss benefits were concluded and that the worker's problem was partly physical and partly psychological and both conditions had reached a state of plateau by January 2000. The panel chair directed that the worker's file be referred to Disability Awards Department of the Board, so that the worker could be assessed for a disability award, taking the psychological factor into account.

The worker underwent a permanent functional impairment evaluation on March 26, 2002. Following examination, it was the opinion of a disability award medical advisor that functionally the worker's wrists had an active range of motion, but any movement was limited by the worker's reported pain and her voluntary guarding. The worker was provided with an award of 2.5% of total for her subjective complaints.

In a May 16, 2002 memo to file, a director of Long-term Disability/Occupational Disease Services said that a psychological disability awards committee had met on May 15, 2002 and following review of the medical reports on file, determined that:

In keeping with the guidelines outlined in the Schedule of Psychological Impairments the Committee would rate the client's functional psychological impairment at 15%.

The disability awards committee returned the file to the claims adjudicator disability awards to consider an award under section 23(3) and implement the award.

An employability assessment took place on June 12, 2002.

The employability assessment noted the psychological permanent functional impairment assessment regarding the worker's psychological condition as:

Consistent with prior psychological and psychiatric impressions, the worker appears to continue to meet the DSM-IV criteria for a diagnosis of Major Depressive Disorder, Single Episode, Chronic, related to her pain problems, with symptoms of dysphoria, diminished interest and pleasure, weight gain, insomnia, fatigability, feelings of worthlessness, diminished concentration, and ongoing ruminative, though passive suicidal ideation.

The psychological permanent functional impairment assessment was also noted to record that the worker also appeared to meet the criteria for a DSM-IV diagnosis of pain disorder associated with both psychological factors and a general medical condition, secondary to the worker's claim and sequelae.

In the report, a vocational rehabilitation consultant noted that the worker was unwilling to participate in a vocational rehabilitation plan, as she considered herself 100% disabled and was "unable to do anything". The vocational rehabilitation consultant outlined a number of jobs which were considered as suitable for the worker. These included retail sales clerk and telemarketer which would equal or exceed the wage rate set on the worker's claim. The vocational rehabilitation consultant made no mention of the worker's psychological condition which had been accepted by the Board.

Submissions

The panel acknowledges and has reviewed the worker's representative's letters of February 12, 2003 and June 12, 2002 and the attached medical-legal report of a consultant psychiatrist dated October 10, 2003. Also attached are the consultant's

psychiatrist reports of March 2, 2001, October 17, 2000 and a report from a second consulting psychiatrist of March 29, 2001.

In his submission of February 12, 2003, the worker's representative said that the employability assessment failed to deal with Review Board finding which stated that the worker was unable to return to work. The representative requested that the worker receive rehabilitation allowances retroactive to the original termination of temporary wage loss benefits in January 2000, up to 30 days past the date of the employability assessment. The representative also saw as an issue, whether the pension the worker received was appropriate.

The representative referenced the consulting psychiatrist's report and said that the worker was entitled to receive a 100% loss of earnings pension. In the alternative, the representative said that the worker should be entitled to continuity of income benefits and a pension assessed at least at 80% disability.

In his report of October 10, 2003, the consultant psychiatrist disagreed with the Board's determination that the worker was capable of returning to selected employment. It was the consultant psychiatrist's opinion that the worker was permanently disabled from any occupation due to her clinical condition that arose due to her injury at work. The consulting psychiatrist also stated that the worker could not be trained for any other occupation.

Reasons and Findings

Section 23(3) of the Act states:

Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

The worker's employability was not assessed based on the psychological condition which the Board determined was equal to 15% of a totally disabled person. The only assessment related to whether the worker, because of her psychological condition, was capable of returning to any form of employment, is from the consultant psychiatrist in his report of October 10, 2003. It is clear from the medical assessments of the worker's wrist condition that there is no objective evidence of impairment. The psychological component is clearly restricting the worker from returning to any form of employment.

Based on the psychological examinations of the worker, which includes the assessment by the consultant psychiatrist in his October 10, 2003 medical-legal report, I find that the worker is unemployable due to her psychological condition and is entitled to a 100% loss of earnings pension under section 23(3) of the Act effective February 1, 2000, the date temporary wage loss benefits were concluded on the worker's claim.

With relationship to the functional award on the claim, though the consultant psychiatrist considers that the worker has been 100% disabled, he has not provided an assessment which would support 100% functional disability. I can find no error in the functional component of the worker's award.

With relationship to the wage rate set for pension purposes, the worker's representative has made no submission addressing that matter. As the wage rate was established based on the long-term wage rate set on the claim, I can find no error in the wage rate set for pension purposes. As the implementation of the pension was the date following the termination of temporary wage loss benefits, the date of implementation is correct.

Conclusion

The panel allows the appeal. The worker was disabled from returning to any form of employment due to her compensable psychological condition. The worker was entitled to a 100% loss of earnings pension under section 23(3) of the Act. The date of implementation of the award, the wage rate for pension purposes and the functional component of the disability award are correct.

In accordance with section 253(1) of the Act, the panel varies the decisions of September 16, 2002 and October 31, 2002 and finds that the worker is 100% unemployable due to her compensable psychological condition and is entitled to a 100% loss of earnings award under section 23(3) of the Act.

The worker is entitled to costs for the October 10, 2003 medical-legal opinion of the consultant psychiatrist, in accordance with Board tariffs.

Earl A. Simm
Vice Chair

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