

WCAT Decision Number : WCAT-2005-06162
WCAT Decision Date: November 17, 2005
Panel: Frances G. Bickerstaff, Vice Chair

Introduction

In a June 23, 2004 decision letter, a case manager Disability Awards informed the worker of her pension entitlement with respect to the permanent aggravation and worsening of pre-existing chemical sensitivities that had been accepted under her claim. Her award for permanent functional impairment was 40% of total disability, effective October 27, 1995. Although the worker could not return to work at her pre-injury occupation, the case manager concluded she could earn \$555.00 per month working part time as a medical transcriptionist, telemarketer or customer sales representative. Therefore, her pension would be paid on a loss of earnings basis at 75% of the difference between her pension wage rate of \$3,346.00 and the \$555.00 she was deemed capable of earning.

In a February 2, 2005 decision, a review officer of the Review Division confirmed the Board's decision.

Issue(s)

In accordance with policy item #14.30 of the Workers' Compensation Appeal Tribunal (WCAT) *Manual of Rules, Practices and Procedures* (MRPP), I will restrict my decision to issues expressly raised by the appellant. The appellant, through her representative, has stated that the only issue in contention is whether or not the Board appropriately deemed her capable of earning \$555.00 per month.

Does the worker have a loss of earnings greater than that recognized by the Board?

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act).

WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but, in so doing, must apply a policy of the board of directors that is applicable in the case (section 250). WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law and discretion arising, or required to be determined, in an appeal before it (section 254).

The worker's entitlement in this case is adjudicated under the provisions of the *Workers Compensation Act* (Act) that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Policy relevant to this appeal is primarily set out in the *Rehabilitation Services and Claims Manual, Volume I*, (RSCM I), relating to the former provisions of the Act.

Background and Evidence

The worker's claim history has been documented in Review Board findings dated April 3, 2000 and will not be recounted in detail here.

Briefly, the now 50-year-old worker was employed as a hospital x-ray technician. In September 1993, she developed severe multiple symptoms after exposure to x-ray processing chemicals at work. Arising from an April 3, 2000 Review Board decision, the Board accepted the worker's claim for a permanent aggravation and worsening of pre-existing chemical sensitivities.

A Board occupational physician reviewed the file and concluded the worker appeared to have been disabled from June to October 1994, after which her condition had plateaued. The occupational physician stated that returning to her pre-injury work would put the worker at undue risk of creating or enhancing a permanent functional impairment. The physician added that the worker might be fit for suitable work; however it would have to be part-time, flexible, and sedentary as the worker was limited by fatigue. Something the worker could do at home would minimize her potential exposure to irritants, possibly some computer or telephone work. The Board paid wage loss benefits from April 4, 1994 to October 26, 1994, at which point, the worker's condition was considered plateaued and her file was referred to the Disability Awards Department and to the Vocational Rehabilitation Department for consideration of further entitlement.

A vocational rehabilitation consultant (VRC) met with the worker and her daughter on July 30, 2003 to conduct an initial vocational assessment. The worker described a fairly limited range of activities, minimal excursions out of the house for groceries and a need to sleep 10 to 12 hours per day and to nap often. She had body pain from fibromyalgia (not accepted under the claim). The chemical sensitivity symptoms that limited her activity consisted of red blotches on her face and hands, swelling in her fingers, burning in the eyes, respiratory problems and asthmatic reactions, headaches, migraines, and fatigue. She kept an oxygen tank at home in addition to numerous medications. Stress affected her fatigue level, her general cognitive functioning and her coordination. She had difficulty coping with daily chores and her social functioning was also curtailed by fatigue.

After reviewing the file to determine the nature and extent of the worker's permanent functional impairment relative to her compensable chemical exposure, a Board internal medicine consultant judged the worker to have an overall Class II impairment equal to 40% of a totally disabled person (August 18, 2003 claim log entry).

An employability assessment was conducted by a third party (January 9, 2004 report). The evaluator met with the worker and her daughter at the worker's home on December 22, 2003. The evaluator noted that during the lengthy meeting, the worker demonstrated increasing fatigue that affected her level of cognitive thought process. The worker said her activities were limited by fatigue and depended on how well she had slept the previous night. She had a low level of adaptability.

The evaluator noted numerous factors affecting the worker's potential employment. The worker had not worked since 1994. She had a significant permanent functional impairment with significant restrictions and she was easily fatigued. The worker had difficulty coping with her restrictions and lived in an area with limited opportunities. Her restrictions precluded working outside the home. However, the evaluator noted the worker had numerous transferable skills, a well-rounded background of experience, was well educated, presentable, and had good interpersonal skills.

The evaluator concluded that despite the worker's limitations, she would be able to work on a part-time basis as a medical secretary/medical transcriptionist, a job for which she could be trained on line and for which there were "reasonably available employment opportunities". The evaluator also suggested the worker could work from home in elemental sales occupations, such as telemarketer or customer service representative which entailed doing follow up customer contact or surveys. She could earn \$8.00 to \$10.00 per hour working two or three hours per day.

On March 31, 2004, the worker's representative responded to the employability assessment stating that the suggested occupations were not realistic in the face of the worker's physical limitations. She pointed out that the worker had to rest prior to any testing or interviewing and those appointments left the worker exhausted and unable to function. Often, the worker was unable to cope with a simple conversation with her representative.

The Board concluded the worker should receive a loss of earnings award; however it would be based on the deemed ability to work 15 hours per week at \$10.00 per hour.

The case manager, Disability Awards, then issued the appealed June 23, 2004 decision letter.

In a February 2, 2005 decision, a review officer of the Review Division found that the employability assessment had taken the worker's limitations into consideration and pointed out that the jobs need not be available at the time of the employability assessment but should be reasonably available to the worker in the long run. The review officer confirmed the Board's June 23, 2004 decision.

Pre-Hearing Evidence

Dr. Hershler, specialist in physical medicine and rehabilitation, provided a medical opinion dated September 13, 2005, based on a May 9, 2005 visit with the worker. After interviewing and examining the worker, Dr. Hershler stated the worker's history and physical findings were consistent with a number of conditions, including chemical sensitivity. The condition fluctuates from day to day. He stated the worker's mental status probably changed from day to day depending on her level of fatigue.

With respect to the worker's employability, Dr. Hershler stated:

Based on this history and the physical findings, it is my opinion that [the worker] is not capable of any form of gainful employment even limited to 10 or 20% of her time. The reason for this is that although at any one time she probably can start a task, she will not be able to sustain this task in an efficient and productive manner. This will eventually lead to mistakes, frustration and an inability to perform her task with appropriate professionalism.

Oral Hearing

The worker was represented at an oral hearing and gave evidence under oath. She was accompanied by her daughter, who also gave evidence under oath, and by her mother, who observed the hearing. The employer did not attend the hearing. The worker seeks a finding that she is 100% disabled and incapable of working part time at the deemed employments of telemarketer, medical transcriptionist, or customer service representative.

The worker's evidence at the oral hearing can be summarized as follows:

- Prior to the compensable injury, she had a demanding job, was on call at the hospital, raised a child and had a busy social life. She had a university science background and could do complicated mathematics, such as calculus. She would be active for 18 hours a day. She would frequently help with preparing meals for large gatherings of 12 to 35 family and friends at her mother's home. She enjoyed working and would describe herself as a workaholic and an overachiever.
- Her compensable injury has left her with a wide range of debilitating symptoms and she now had to take so much longer to do everything. Just getting up and getting dressed in the morning takes a couple of hours. She cannot problem-solve or concentrate and has problems communicating. She often has conversations that she is later unable to recall. She speaks slowly and has a difficult time speaking on the telephone even to people she knows, such as her representative, because she forgets words, becomes confused and cannot explain herself if asked questions. When she gets flustered and frustrated, she sometimes breaks down in tears or becomes very abrupt. People who know her situation understand this, but strangers do not.

- The day can start out normally, but can deteriorate rapidly. She gets exhausted very easily and when she is tired, she cannot focus on anything. She has to have 10 to 12 hours of sleep a night and is in bed by 8:00 p.m. She follows a regimen of vitamins and minerals that she worked out for herself. She has to be careful of household cleaning products and food products. She cannot tolerate any additives. Vegetables and fruits have to be organic and she cannot eat red meat or pork. Her daughter used to help her with the housekeeping until she left home to attend university. Since then, a home service has been coming for four hours per week to do basic dusting and tidying. Friends have also been helpful.
- She keeps a notebook and writes reminders so she does not forget things, but then she forgets to check the notebook. She cannot keep a journal or diary. Driving is minimal and done only as necessary. Her mother drove her to the hearing because it was too far for her to drive alone. Once a week, her mother takes her grocery shopping. Grocery shopping is like “Russian roulette”. She might inhale something and have a pulmonary reaction. In order to attend the hearing, she had to stay in a hotel and she had a reaction to something in the room. Her symptoms in general have left her clumsier than she used to be and she has often tripped and dropped things.
- She used to be able to read complicated scientific or technical manuals but now she is not able to absorb the information. Her reading consists of light detective fiction and short inspirational quotes and any information that might help her cope with her condition. At one point, she thought she could join a local writer’s group because she used to be able to write well, but she found she could not even write a couple of pages. She watches a lot of movies. She bought a computer but has had a lot of problems learning to operate it as she cannot follow the written instructions and she telephones her daughter daily for assistance with basic operating procedures.
- With respect to the telemarketing job, she often cannot speak clearly and certainly cannot speak rapidly. She could not cope with trying to sell people things over the telephone, especially if they asked any questions. She would either break down crying or be rude. As for medical transcription, her typing is very slow and she has to look at the keys, then at the screen and still gets confused about basic functions and has to call her daughter for assistance. She cannot focus on written material. On a good day, she might be able to handle one or the other for 20 minutes, but she could not do either one well enough or long enough to be of any real use.
- When she is tired, it is not like normal tiredness. She has fibromyalgia and is often in a lot of pain. When she gets tired, her senses blur out and she feels as though she is in a fog. It is like hearing a lot of static and she loses her sensations.

The worker’s daughter’s evidence can be summarized as follows:

- For the past few years, since leaving for university, she has gone back as often as possible to assist her mother. During visits home, she would prepare and freeze individual meals so that her mother would be able to eat nutritiously because her mother reacts to processed foods. There would frequently be a month's worth of laundry to do. She would pay any bills and attend to anything legal and do all the grocery shopping. Since her mother received a settlement on her compensation claim and has been able to afford some basic housecleaning help it has helped with some of the work.
- Because her mother cannot communicate or remember important information, she has had to act as liaison with respect to her mother's compensation appeal or any other important business. When her mother moved, she took care of everything related to the buying, selling and moving. Her mother has to live out of town where the air is cleaner. She previously lived closer to town, but there was too much smoke and pollution.
- When her mother is tired, upset, or exposed to chemicals, she gets upset and loses tact. Her mother's concentration and cognitive skills are lacking and on a bad day, her mother cannot cope. She said her mother types slowly and has to keep looking at the keys and at the screen, so it is not a smooth process. Her mother cannot even read one of her essays beyond a paragraph before losing her train of thought. Her mother does not retain information and asks the same questions over and over again.
- She grew up in an educated household and used to be able to talk to her mother about anything. Now she cannot use her mother as a resource or "bounce ideas off her" as she used to be able to do. All the knowledge her mother possessed is no longer accessible.

The worker's representative submitted that, although rare, the worker's "darkroom disease" has left her with a hypersensitivity to everything. There is no suggestion of the worker magnifying her symptoms in any of the medical reports. The worker is stoic and tries to put up a good front, but she has a lot of trouble looking after herself and has to rely on her mother and daughter a great deal.

The worker's representative argued that accuracy is paramount in medical transcription. The worker cannot concentrate or focus and her computer skills are poor. As for telemarketing, the worker cannot even cope with discussing her claim with her representative. She lacks the communication skills, focus or recall to be able to sell things over the telephone.

The worker's representative stated that the worker's evidence is supported by Dr. Hershler's opinion. She submitted that the worker is essentially unemployable.

Findings and Reasons

The worker's pensionable condition plateaued prior to June 30, 2002. Her entitlement is therefore adjudicated under the former provisions of the Act. The relevant policy is set out in the RSCM I. This policy must be used where applicable and is binding on the WCAT pursuant to section 42 of the *Workers Compensation Amendment Act, (No. 2), 2002*.

The former provisions of section 23(1) required the Board to estimate the physical impairment of earning capacity from the nature and degree of the worker's injury.

Under section 23(3) of the former Act, where it was more equitable to do so, the Board would award a pension with regard to the difference between the worker's pre-injury average earnings and the amount the worker was earning or was able to earn in some suitable occupation after the injury.

Under item #38.10 of the RSCM I, both physical impairment and projected loss of earnings were to be considered at the same time, and investigations were to be undertaken into projected loss of earnings, including employability assessments and functional capacity evaluations, to determine what suitable occupations were available to the worker within his or her determined physical abilities.

Item #40.12 of the RSCM I set out guidelines for determining suitable and reasonably available jobs for the worker.

Item #40.13 required the Board to determine the earnings figure that would maximize the worker's long-term earnings potential. The occupations need not be immediately available, but should be reasonably available to the worker over the long run.

The issue to be decided is whether the worker is sustaining a loss of earnings greater than that recognized by the Board.

The worker has not worked for over 10 years. Her evidence is that her condition fluctuates from day to day but is never good. I acknowledge that fibromyalgia has not been accepted under the claim and thus, the fibromyalgia symptoms would not be taken into consideration in determining the worker's compensable disability. However, the medical reports on file note that the fatigue, cognitive difficulties and communications problems that fluctuate daily are functions of her accepted condition of multiple chemical sensitivity.

The worker's symptoms have been well-documented on file and she reiterated a description of her symptoms at the oral hearing. I accept the worker's evidence, corroborated by her daughter's evidence. With respect to the occupation of medical transcriptionist, in addition to accuracy, such work normally involves deadlines. Because of the worker's fatigue and limited ability to focus, it is highly unlikely she would be able to work to any deadline. Further, assuming the worker could secure such

employment, her described computer skills are poor and barely suitable for personal use. Whatever improvements she might make in those skills over time, given her limitations, would not likely be sufficient to meet the fairly stringent requirements of medical transcribing. I find the occupation of medical transcriptionist unsuitable for the worker's limitations.

With respect to telemarketing or customer service representation, the worker's communication problems render her unfit for telephone work. She speaks slowly and carefully, but loses focus and becomes easily confused. This was apparent at the oral hearing when the worker became frustrated and tearful over being unable to recall a particular word. As her daughter pointed out, the worker's friends and family understand her cognitive and conversational limitations, but strangers would not. The worker's evidence and her daughter's corroborative evidence, which I accept, is that the worker's inability to focus for any meaningful length of time and her cognitive and communication problems, would preclude any telephone work that would require her to sell a product or answer questions, much less possibly receive complaints. I find the occupations of telemarketer or customer service representative unsuitable for the worker.

The review officer has stated that the identified jobs need not be available at the time of the employability assessment but should be reasonably available to the worker in the long run. I agree with that statement; however, in this case, it is not a matter of whether or not the jobs might be available to the worker but whether the worker would be capable of the jobs. I find the evidence indicates she would not.

I rely on Dr. Hershler's opinion. I find the evidence supports a conclusion that the worker is not capable of working as a medical transcriptionist or as a telemarketer/customer service representative, even on a very limited part-time basis. I find that she is competitively unemployable and is, therefore, entitled to a full loss of earnings pension pursuant to section 23(3) of the Act.

Conclusion

I allow the worker's appeal and thereby vary the Review Division's decision of February 2, 2005. I find the worker is unemployable and entitled to a full loss of earnings pension.

Pursuant to section 7 *Workers' Compensation Act Appeal Regulation*, I direct reimbursement for the expense of Dr. Hershler's medical opinion to the limit of the Board's tariff for such reports.

Frances G. Bickerstaff
Vice Chair

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