As of September 20, 2010, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2006-02051
WCAT Decision Date: May 11, 2006
Panel: Gail Starr, Vice Chair

Introduction

This is the worker's appeal from *Review Decision #29482*. In that July 25, 2005 decision, the Review Division of the Workers' Compensation Board (Board) confirmed all aspects of the January 6, 2005 pension award made to the worker under his 2002 left shoulder claim.

The worker brings this further appeal to the Workers' Compensation Appeal Tribunal (WCAT), and the matter has been assigned to me to be dealt with under the authority conferred on WCAT panels by section 239(1) of the *Workers Compensation Act* (Act). Among other provisions of the Act relevant to my authority and jurisdiction, the following should be noted. Under section 254, I am authorized to inquire into, hear and determine all questions of fact and law which may arise or need to be determined in the appeal. Thus, WCAT appeals from the Review Division are appeals by way of rehearing, rather than a hearing *de novo* or an appeal on the record. I have jurisdiction to consider new evidence, and to substitute my own decision for the decision under appeal. My decision is required to be made on the merits and justice of the case. While not bound by legal precedent, I must apply such policy of the Board's board of directors as is applicable to the case, except in circumstances described in section 251.

No oral hearing was requested in this appeal. I have considered whether an oral hearing might be necessary or helpful in reaching a conclusion on the issues presented. Under WCAT's *Manual of Rules of Practice and Procedure* (MRPP) item #8.90, I have satisfied myself that an oral hearing is not necessary in order to fully canvass and fairly decide the appeal. Both the worker and the employer are represented. The worker's representative has provided February 6 and March 17, 2006 written submissions. To the former was appended a letter from the worker himself describing his disagreement with the original Board decision in detail. The employer's representative provided a February 28, 2006 written submission. No other new material has been tendered in the appeal.

Issue(s)

Item #14.30 of the MRPP provides that a WCAT decision will generally be limited to the issues raised by the appellant in the notice of appeal and submissions. Accordingly, I will confine my findings to the following issues:

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- Did the functional award made to the worker properly omit recognition of disability from chronic pain and/or "additional factors"?

- Should the worker's pension be payable beyond age 65?

Background and Evidence

A machine operator, this worker fell/jumped from equipment on October 31, 2002, catching himself with his left arm. He sustained a hyperextension injury which was accepted as compensable and, following advice from a Board medical advisor, it was accepted that this injury had caused a left rotator cuff tear.

The worker has been looked after by family physicians Dr. Mah and Dr. Burns. On January 8, 2003, he came under the care of Dr. Olmstead (orthopaedic surgeon). Treatment was conservative at first. However, as the worker's complaints continued, Dr. Olmstead saw him several times during 2003, acromioplasty, excision of the distal clavicle and repair of a small rotator cuff tear being carried out May 7, 2003. This was the first of two surgeries.

By August 28, 2003 the worker's recovery was described as "quite protracted" at a team meeting. Physiotherapy had been ordered and a decrease in narcotic use was recommended; the worker by this time was considered to have a long-standing and prominent pain history which might make return to pre-injury work an optimistic expectation.

When the worker was assessed for intake to an occupational rehabilitation program on October 2, 2003, he was still complaining of constant pain. Among other goals of the program then planned, it was anticipated he would benefit from pain management techniques. When Dr. Olmstead saw him on October 22, 2003, his report suggests he rather frankly doubted the worker's opinion that he still had something significantly wrong, but he did undertake to order an MRI. He then confessed surprise at the positive results in his November 12, 2003 report, and he undertook to perform an arthroscopic subacromial bursectomy, although he thought it might not help very much. This second surgery, undertaken on January 14, 2004, interrupted the occupational rehabilitation program and saw the return to work postponed.

In post-operative follow-up on January 23 and February 25, 2004, Dr. Olmstead reported the worker's condition was better. He was making progress which suggested he could anticipate a gradual return to work. On March 29, 2004, he returned to the occupational rehabilitation program. They assessed him as not, at that time, meeting all job demands, although he was slowly progressing. He still reported sharp pain occasionally. His participation in work-hardening led the program team to expect that a gradual return to work could commence April 5, 2004, and that he would eventually proceed to full-time pre-injury work without limitations. On March 30, 2004,

Dr. Olmstead saw the worker again. He still reported some discomfort. Dr. Olmstead suggested he avoid heavy, repetitive lifting and prolonged or repetitive overhead positioning with his left arm. Otherwise, he should be able to perform essentially all duties having to do with his previous work driving trucks. Dr. Olmstead discharged him on this occasion, although he indicated he would be willing to see him again in future if needed.

Several claim log entries in late April 2004, as the worker was coming to the end of his occupational rehabilitation program, show that caregivers and Board officers were well aware of the worker's complaints of ongoing pain. Notably, the case manager recorded notes of a telephone conversation with the worker on April 21, 2004. The case manager offered information and counselling to the worker concerning how his pain impacted his ability to perform. In particular, the case manager stated "I explained to [the worker] that pain itself does not equate with disability in the absence of some objective pathology supporting such a disability. Such is the reason why the Board only grants a 2.5% pension for such pain." It was regularly communicated to the worker that he would likely be considered capable of returning to full duties. On April 30, 2004, the worker was discharged from the occupational rehabilitation program as meeting the critical job demands (although a few were marked "uncertain"). The discharge report showed he could return to work full time with modified duties. Some reports from the family physician continued to be sent to the Board.

After he was working full time, the worker reported to a Board nurse advisor on May 14, 2004 that he was experiencing pain at the end of a shift. On May 20, 2004, the worker and case manager met, the case manager emphasizing to the worker that he was considered fit to perform pre-injury duties and that his compensable condition had plateaued. Wage loss benefits would end. The May 20, 2004 claim log entry indicates the worker understood this and expected his return to work to succeed, although he evidently had some apprehension about it. Wage loss benefits did end May 28, 2004.

When the case manager referred the worker's file to Disability Awards for assessment of his permanent partial disability under the claim, chronic pain was not listed among the conditions which had been accepted under the claim. When the disability awards officer referred the worker for permanent functional impairment evaluation, there was no request to assess any conditions other than the left shoulder rotator cuff tear, with two surgical interventions. It was pointed out to the evaluator that no issues regarding depression or high blood pressure had been accepted, as these had been the specific subjects of earlier decisions. The evaluator was simply requested to perform regular range of motion testing on the worker's left shoulder.

The requested evaluation was carried out by permanent functional impairment physician Dr. Dahlstrom on August 12, 2004. Dr. Dahlstrom's report takes the usual form and includes a history taken from the worker and a record of the worker's complaints (including complaints of a dull ache, pins and needles and a "sharp pinch"

felt sporadically in the left shoulder, together with shooting pain after working long hours). Despite the fact that the worker did not complete all tests and there were some inconsistencies in his performance, Dr. Dahlstrom recorded his belief that the range of motion values were likely reliable and consistent with the diagnosis. The results of the examination produced a calculated impairment of 7.25% of total, all related to the left upper extremity.

In the final review of the worker's pensionable condition (in her December 31, 2004 form 24 CP, the disability awards officer reviewed Dr. Dahlstrom's report, summarized the main findings, and accepted the calculation of 7.25% of total. She further recorded considering the worker's subjective reports under *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) item #39.10. While the worker's complaints were recognized, she found they were consistent with the objective findings and were not disabling to any degree greater than reflected in the functional award. Noting specifically that chronic pain had not been accepted under the claim, no additional award was made under that heading.

With no indication of any particular factors considered, the disability awards officer also recorded in her form 24 CP that the worker's pension would terminate at age 65.

These details were compiled and expressed in the January 6, 2005 pension letter to the worker which underlies the present appeal. In its consideration of that letter, the review officer noted, in response to the worker's request, that chronic pain had not been accepted under the claim and was therefore not fit subject matter for an award under RSCM II item #39.02. She cited RSCM II item #96.30 as authority for this conclusion. The review officer also found that the Board disability awards officer who issued the pension decision had correctly considered the "other variables" as contemplated by RSCM II item #39.10. She recorded her agreement that the worker's ongoing complaints were consistent with the objective findings and were not disabling to any degree greater than was represented by the award of 7.25% of total.

In written submissions to WCAT, the worker's representative takes the position that there should be an award for chronic pain and that WCAT can either allow an appeal on that basis or refer the worker for a multidisciplinary assessment to determine whether a chronic pain award is appropriate. It is further contended that the worker's pension should continue beyond age 65, and that this matter should be referred back to the Board for determination. The submission refers to RSCM II item #41.00 which provides that a pension may continue beyond age 65 if the Board is satisfied the worker would retire later; it is argued the Board did not make sufficient inquiries on this question. The submission also suggests "other factors" should have been considered in development of the worker's pension; the nature of the two surgeries and their effects should have been taken into account as a variable. Evidence of osteoarthritis in the worker's shoulder is highlighted.

In her written submission, the employer's representative submits that the worker's pension was correctly calculated and awarded. It is further argued that the worker was medically fit to return to work without limitations and that his permanent functional impairment has been correctly evaluated. With respect to chronic pain, it is contended that, although the case manager did not specifically adjudicate the issue of chronic pain, there was allowance in the functional award for subjective complaints corresponding to the worker's compensable condition, and Disability Awards must accept that the Board had not accepted chronic pain under the claim. With respect to retirement at age 65, the employer submits this is mandatory under both the company's policy and the worker's union pension plan. Although some workers do return to employment on an auxiliary basis after retirement, there is no guarantee such a position will be available. (There is some discussion of evidence concerning the worker's sick leave and its relationship to his compensable condition. This has been the subject of a subsequent Board decision and is not at issue in this appeal.)

In rebuttal, the worker's representative points out that the employer admits to having workers over the age of 65 and that nothing would preclude this worker from applying his transferable skills to another employer at and after age 65.

Decision and Reasons

After preparing and writing the above summary of the background and evidence of this appeal, I again reviewed the evidence, particularly the medical evidence, with the issue of chronic pain uppermost in mind. In the course of that second review, which included also a review of the written submissions in the appeal, I have come to the conclusion the worker's appeal seeking recognition in his pension of chronic pain cannot be allowed.

While there are occasional reports in the post-surgical medical record of the worker's pain experience, I am unable to find that, for pension purposes, he suffers either from a diagnosed chronic pain syndrome or from any other permanent pain condition the effects of which exceed what is already recognized by his functional award.

Picking up the thread of the worker's recorded pain experience as he was progressing toward a return to work in March 2004, I note that he was approved to commence a graduated return to work, "as tolerated." This was facilitated by the employer and, by the time the worker came to be discharged from the second occupational rehabilitation program at the end of April 2004, he was performing several jobs (including some modified work and some regular pre-injury work); while he reported pain in connection with some of the work tasks (such as turning the steering wheel), he did progress ultimately to a full return to work. Although he reported ongoing pain, and continued to take pain medication for occasional shoulder pain, he said he would "do what he can" and he obviously did. Progress reports from his family physician were received by the Board in May, July and September 2004, all showing progress at work and minimal

indication of pain complaints. In the autumn of 2004 (as shown by two September progress reports and one in October), he was sometimes off work; he underwent an arthrogram which showed normal results. By the next progress report (February 14, 2005) he was back working, although he reported shoulder pain worse in the evening.

When the worker came to be examined for permanent functional impairment on August 12, 2004, he was back at work and progress reports from his family physician were infrequent and did not highlight pain. To the evaluator, he reported a dull ache, pins and needles and an occasional sharp pinch in his shoulder. In the evaluation itself, he exhibited some pain behaviour but not enough to cloud the results of the examination. The evaluator concluded, as already described, that the range of motion values were likely reliable and consistent with the compensable condition.

In this context, the disability awards officer, faced with the fact the case manager had not accepted any pain condition as a permanent feature of the worker's compensable condition, made no award for that. I have reviewed the worker's representative's submission on this point and am unable to agree that there was sufficient evidence of any compensable chronic pain condition to mandate further investigation at that time. In particular, I find that the requested referral for a multidisciplinary assessment (as contemplated by RSCM II item #39.02 paragraphs two and three) is not mandated. I note that paragraph two of that policy guideline contemplates (as the employer's representative argues item #96.30 requires) that a worker must first be referred (by a case manager) for permanent partial disability assessment for chronic pain. That was not the case here. I do not find there is either sufficient evidence of a cognizable chronic pain condition or the required acceptance and referral to trigger such an investigation.

So far as the worker's complaints of pain are concerned, I consider that the evidence shows his major complaints of pain were temporary. Indeed, further medical investigation and the second surgery were pursued specifically because his pain experience seemed to call for a further medical solution. I find the evidence shows that the second surgery largely accomplished that purpose. The worker's complaints of pain dropped off at that time and, although they have plainly sometimes been exacerbated by work since then, I believe the evidence shows his ongoing pain complaints are consistent with and represented by the functional award which has already been made to him.

I would specifically observe that it cannot be inferred, as the worker's representative seeks to do, from the case manager's comments on April 21, 2004 that the prospect of a pension recognizing chronic pain was held out to the worker. The explanation the case manager offered included reference to the fact that the Board only grants 2.5% of total in recognition of any pain complaints; it would not be reasonable to take this as assurance, or even encouragement to believe, either that chronic pain was accepted

under the claim or that an award would be forthcoming. Therefore, I deny the request for an increase in the pension in relation to pain.

It is also contended by the worker's representative that insufficient recognition has been given, in the worker's pension, to his two surgical interventions and their results. I am unable to give effect to this argument, either. Surgery itself does not necessarily trigger a pension award. The results of the surgery, together with other aspects of the worker's medical condition, contribute to a reduced range of motion and a corresponding increase in impairment. That is what typically attracts a functional award, as it has done. I am unable to see that the worker has suffered surgical consequences not already recognized by the functional pension awarded. Although there is scope for the recognition of "other variables" under RSCM II item #39.10, I find there is insufficient evidence of any other aspects of the worker's condition not already recognized by the functional award provided. It is argued by the worker's representative that the excisions carried out during surgery "may greatly increase the possibility of osteoarthritis in the future, and which show a serious shoulder condition capable of producing significant pain." I have already dealt with the pain issue. The osteoarthritis which the representative contends may arise in the future must, if it does arise, be assessed in the future, not in the present. Awards for potential worsening of a compensable condition would be speculative and are not authorized under the law and policy.

Finally, so far as the quantum of the worker's award is concerned, I also deny the worker's request for a higher award based on his understanding of what it means, in impairment evaluation, to compare an injured limb with the uninjured one. The physical examination he underwent was a standard one, carried out by a physician whose report is recognized as expert evidence under RSCM II item #97.40. His report clearly shows the objective measurements of the upper limbs were conducted and compared according to the recognized standards. The worker is simply mistaken to think improper comparisons were made.

On the first issue, the appeal is denied.

I turn to the second issue in the appeal, the duration of the award. Although I see no evidence of it in the claim file prior to this appeal to WCAT, it is now contended on behalf of the worker that he did not intend to retire at age 65. It is therefore argued that certain provisions in RSCM II item #41.00 should now be invoked to extend the worker's pension to some later date. Policy item #41.00 relates, on this point, to section 23.1 of the Act, where age 65 is recognized as the standard retirement age, coupled with permission to the Board to continue to pay pension benefits "where the Board is satisfied that the worker would retire after the age of 65." Section 23.1 of the Act provides that, among other things, a section 23(1) pension (a functional award) is payable, where the worker is less than 63 years of age on the date of the injury (in which category this worker falls), only until the later of the worker's 65th birthday or, "if

the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board."

The main statement of published Board policy which applies to this aspect of the duration of pensions is RSCM II item #41.00. The policy goes on to state that the standard of proof as to whether a worker would retire at age 65 or later is the balance of possibilities described in RSCM II item #97.00. It is further provided that the Board requires evidence (verified by an independent source) confirming that the worker who makes such a claim actually intended to work past age 65. Even then, the matter is not left open-ended, as a Board officer must also assess evidence to determine what actual retirement date will determine conclusion of the payment of the functional award. Where the worker's subjective statement of intent is not independently verifiable, the Board officer will make a determination based on available evidence, including the information provided by the worker.

On this point, I find the lack of investigation by the Board leads to allowing the appeal in part; the decision that the functional award will terminate when the worker reaches age 65 (the "default" position under the Act and policy) was premature in that it was taken without any inquiry as to whether other results allowed by the statute were appropriate.

It is not necessary for me to decide the point, but I am prepared to assume, from the facts available, that the worker had no actual knowledge, prior to receiving his pension letter, that his pension would terminate at age 65. As his representative points out, there is no indication on file that the disability awards officer contacted him or considered any inquiry about his retirement intentions. In view of the extent and complexity of recent changes to the law and policy relating to pensions, it is difficult to know how a worker would be alerted to the fact that the duration of the pension being developed for him could be dependent on evidence he alone could gather and provide unless the Board took the initiative to investigate.

In this appeal, I note that the worker was 57 years of age on the date of injury, 60 at the time his pension was awarded. Such evidence as there is in the present appeal comes from him alone and has been raised only here, at the final level of appeal. While I consider that I have jurisdiction to act on that evidence and to gather more evidence, including evidence which might or might not satisfy the stated policy requirements of verification, it seems more appropriate that this be done, as the terms of the policy require it to be done, at the level of the original decision, that is, by a Board officer engaged in the development of the worker's pension. I find there is sufficient evidence to warrant further investigation by the Board so that a fresh decision can be made regarding the termination of this worker's pension.

The applicable law and policy contemplate that evidence in a particular case may support a result different from the "normal" termination of a functional award at age 65.

The text of those provisions, however, does not spell out how relevant evidence should be gathered; indeed, it is an open question as to when such evidence should be received or sought. There is, so far as I have been able to determine, no further guidance to be found in the Board's "Best Practices" guidelines. There is a "Practice Directive" which touches on the issue. (See Practice Directive #41 on the Board's web site.) This Practice Directive, like the policy guidelines in RSCM II item #41.00, deals with how evidence will be assessed once it is available. Again, no guidance is offered as to the gathering of relevant evidence. Indeed, what is spelled out in Practice Directive #41 seems to assume that the worker whose pension is being developed will have already informed the Board (although there is no notice to him that he should do so), even before it is determined that he has a permanent disability, whether he plans or planned to work beyond age 65. One doubts that this is realistic, and it seems clear the lacuna in policy could lead to unfairness of several varieties.

I have noticed that other appeals like this one have been sent back to the Board for investigation and a fresh decision, and it occurs to me to suggest that a protocol for such investigation might usefully be put in place by the Board as a guide to future makers of the original decision. But that is for the Board to determine, as is the decision which will flow from the investigation now to be undertaken with respect to this worker's retirement intentions.

Conclusion

For the reasons indicated, the worker's appeal is allowed in part. *Review Decision #29482* is varied to the extent described, and the Board is directed to gather and weigh any relevant evidence of the worker's retirement intentions so as to properly decide the duration of his award. No expenses have been requested. None are apparent. None are awarded.

Gail Starr
Vice Chair

GS/gl