

WCAT Decision Number : WCAT-2007-01476
WCAT Decision Date: May 10, 2007
Panel: Lisa Hirose-Cameron, Vice Chair

Introduction

On July 14, 2003, the worker, in the course of his employment as a police officer, was accosted by three teens with machetes. This resulted in one of the youths being fatally shot by the worker. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for post-traumatic stress disorder (PTSD) and major depressive disorder. The Board determined that the worker's conditions were permanent and his file was referred to the Disability Awards Department for assessment of his permanent psychological impairment.

In a letter dated April 7, 2006, the worker was advised by the Board that his permanent psychological impairment was equal to 33.6% of total disability (30% for impairment plus 3.6% for age adaptability). The worker requested a review of this decision by the Review Division. In a decision dated August 24, 2006, the review officer confirmed the Board's decision.

The worker is represented in this appeal. His representative has provided submissions in support of the appeal. The employer is not participating in the appeal although provided the opportunity to do so.

Issue(s)

Whether the Board properly determined the worker's permanent psychological impairment.

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under subsection 239(1) of the *Workers Compensation Act* (Act).

Under section 250(1) of the Act, WCAT may consider all questions of fact and law 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's board of directors that is applicable in the case. Section 254 of the Act gives WCAT 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.

The worker has requested that this appeal be dealt with based on a review of the information contained in the worker's Board claim file and on written submissions. Item #8.90 of the *Manual of Rules of Practice and Procedure* states that this tribunal may conduct an appeal in the manner it considers necessary. The appeal will normally be conducted on a read and review basis where the issues are largely medical, legal or policy based and credibility is not an issue. I am satisfied that credibility is not an issue in this appeal and that the matter may be fairly and fully decided without an oral hearing.

Background and Evidence

On March 2, 2006 the worker underwent a psychological permanent functional impairment (PFI) assessment conducted by Dr. Du, a registered psychologist. The assessment involved a review of medical reports, an interview with the worker, and personality and mood testing.

The findings from the assessment are noted below:

- The worker participated fully in the interview.
- The worker continues to meet the criteria for PTSD. The worker experienced a life threatening event and felt a sense of helplessness and horror. The worker experiences flashbacks, nightmares, intrusive recollections, and psychological distress when exposed to cues. The worker avoids places and people that evoke memories of the incident. The worker has a diminished interest in participating in activities, has a sense of foreshortened future, and avoids conversations about the incident. The worker has difficulty sleeping, is irritable, and has difficulty concentrating.
- The worker also continues to meet the criteria for major depression. He has a depressed mood, diminished interest in activities, fatigue, feelings of worthlessness, difficulty concentrating, and suicidal thoughts.
- Although the worker acknowledges multiple serious stressors prior to the work incident, the worker was functioning fully in his pre-injury work. The current symptoms represent a significant change from the worker's premorbid functioning.
- The worker's present condition is a result of the work incident.

Dr. Du assessed the worker's current functioning as follows:

The worker is mildly impaired with respect to activities of daily living.

- The worker is able to independently manage self-care activities, prepare his own meals, and is involved in ongoing renovations around his home. Factors which impact on his ability to complete tasks and impact on his speed of work include difficulty concentrating, forgetfulness, and fatigue.

The worker is severely impaired with respect to emotional and social functioning.

- The worker described avoidant behavior, depressed mood, anxiety, nightmares, flashbacks, irritability, emotional lability, and suicidal ideation. The worker expressed a strong desire to remain at home away from others.

The worker is mildly to moderately impaired with respect to concentration, persistence and pace.

The worker is severely impaired with respect to work functioning.

Dr. Du made the following conclusions with respect to the worker's limitations and restrictions with regard to work:

- the worker's fatigue, depressed mood, irritability, difficulty concentrating, memory problems, anxiety and avoidance of trauma cues post restrictions to him returning to his pre-injury work;
- the worker's symptoms would negatively impact his capacity to work full days, attend to details, multi-task, remain calm in crises, interact with peers, operate dangerous weapons, and assume responsibilities for critical decisions; and,
- the symptoms would also pose serious limitations to retraining for alternative employment.

Without any improvement in his psychological functioning, Dr. Du felt that the worker was not suitable for retraining.

In a memorandum dated March 31, 2006 to the Disability Awards Department, the director of Disability Awards stated that the Psychological Disability Award Committee (PDAC) met to review the worker's functional psychological impairment. They reviewed the worker's medical, psychological and neurological examinations, and assessments that were contained in the worker's claim file. The impact of the compensable injury and conditions on the worker's overall vocational functioning was also considered. The memorandum indicated that the rating determined was based primarily on the most

recent psychological examination carried out for PFI purposes with particular regard to the narrative portion of the report dealing with impact on work performance. PDAC recommended a psychological impairment award equal to 30% of total disability in keeping with the Board's Schedule of Psychological Impairments which is further detailed in the Psychological Disability Awards Guidelines.

In the form 24-CP PFI review dated April 4, 2006, the disability awards officer (DAO) accepted the recommendation of PDAC. The DAO also considered policy item #39.10 and determined that there were no other variables which warranted consideration. The worker requested a review of this decision by the Review Division.

The worker's representative argued that worker should be entitled to an award equal to 50% to 60% of total disability. She argued that this rating was more in keeping with the evidence of Dr. Du from the PFI assessment and from an October 13, 2005 report of Dr. McIntosh, the worker's treating psychiatrist.

The worker's representative argued that Dr. Du found "occupational problems and economic problems following the incident" and evaluated the worker's global assessment of functioning at 48 compared to 85 prior to the injury. She noted that psychological functioning of 41 to 50 in accordance with the DSM-IV-TR (*Diagnostic and Statistical Manual of Mental Disorders*, fourth edition, text-revision) represented:

Serious symptoms (e.g. suicidal ideation, severe obsessional rituals, frequent shoplifting) **OR any serious impairment in social, occupational, or school functioning** (e.g. no friends, unable to keep a job).

(reproduced as written, emphasis in original)

The worker's representative further pointed out that Dr. Du found the worker to demonstrate severe impairment as it related to work functioning. The representative also noted various limitations and restrictions of the worker as set out by Dr Du.

The worker's representative submitted that Dr. McIntosh's opinion was in keeping with Dr. Du. Dr. McIntosh stated:

I believe that it is fair to say that [the worker] will not be able to return to his duties as a police officer, and in fact the chronicity of his symptoms suggests that he will not be able to work in any capacity for the foreseeable future.

The worker's representative also submitted that PDAC provided a general discussion of how they determine psychological impairment ratings but did not refer to what in the body of Dr. Du's report they relied on in coming to their conclusion.

In a decision dated August 24, 2006, the review officer confirmed the Board's decision. The worker now appeals the review officer's decision.

Submissions

The worker's representative relied on her submissions to the Review Division. Additional arguments have been summarized below.

- That the review officer incorrectly stated that the PDAC's report should be considered expert evidence under policy item #97.40. While Dr. Du's report is expert evidence under this policy, PDAC is not. PDAC assesses the percentage of disability on the basis of the evaluations for PFI. They are in the role of decision-making and not in the role of providing expert evidence.
- It was not appropriate for the review officer to refer to the section 23(3) process if the evidence suggests that the worker's vocational capacity is severely impaired by the effects of his psychological injury. While the worker's employability is considered in a separate analysis, the PDES provides a percentage of functional impairment that takes into consideration the average impairment of earning capacity on the average worker due to the compensable psychological disability. Residual "vocational capacity" as opposed to "employability" plays a significant role in determining how a worker is rated for psychological impairment.
- The review officer was incorrect in interpreting Dr. Du's report. The review officer stated that "without further improvement in his condition, this worker would not be suitable to be retrained to a position with similar responsibilities as a police officer."
- The review officer was incorrect in stating that the evidence does not mean that the worker has no vocational capacity only that he will not be able to work again in a level of such responsibility and pressure. This is inconsistent with the reports of Dr. Du and Dr. McIntosh.

In support of the worker's appeal, a report of Dr. Passey, a psychiatrist, dated December 7, 2006, was provided. Dr. Passey noted that her opinion was based on an interview with the worker, review of the medical reports, Board reports, hospital chart notes, and various books and articles on post-traumatic stress disorder. I have summarized Dr. Passey's findings:

- The worker continues to fulfill criteria for chronic PTSD and Major Depressive Disorder. The worker's PTSD remains severe despite his compliance with his pharmacotherapy and psychotherapy.

- The worker has a significant level of dysfunction and has plateaued in his recovery. The worker will most likely have significant symptoms for the rest of his life.
- The worker has significant deficits in his ability to control his anger outbursts and spontaneous tearfulness. He has clearly demonstrated difficulty with his concentration and memory (by history and simple testing in the mental status section), is easily distracted, has poor or variable energy, diminished motivation, high anxiety if triggered by reminders of his traumatic event, difficulty being around people, and is easily startled.
- With the level of dysfunction, the worker would not be able to work in police work or to be otherwise gainfully employed. The worker would not be able to attend work on a regular basis since on those days that his symptoms worsen, the worker would be precluded from leaving his house. It would be unlikely that the worker could handle any type of work because of perceived stress in even simple tasks. The worker was unable to do simple serial 7 subtractions from 100. The worker was noted to become anxious and his mind went blank.

Dr. Passey concluded as follows:

Utilizing the psychology disability awards committee section 23(1) guidelines it would appear that he best fits the criteria for 50-60% disability award. He does not have the capacity for competitive employment and is unlikely to gain this capacity in the foreseeable future. At most he probably only has the capacity for volunteer type work where he could leave if his symptoms became too bothersome or he could cancel if he had been up all night because of a nightmare.

Reasons and Decision

Section 23(1) provides that where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury.

Policy item #39.01 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM I), provides that the determination of whether there is a permanent psychological impairment and the severity of the impairment is made by either a Board psychologist or a Board authorized external service provider. Once this evaluation is completed, the claim is referred to the PDAC to assess the percentage of disability resulting from the permanent psychological impairment.

The Board has made public the PDAC Section 23(1) Guidelines (Guidelines) which they use in determining a worker's psychological PFI. Within the Guidelines, impairment is

categorized into three levels of impairment: 5% to 25% of total disability reflects mild impairment, 30% to 70% of total disability reflects moderate impairment, and 75% to 90% of total disability reflects marked-extreme impairment. Criteria are listed for the varying levels of impairment.

The worker is presently assessed at 30% of total disability which is considered moderate impairment.

The criteria for psychological impairment between 30% and 35% of total disability is listed as follows:

- moderate residual symptoms;
- capable of competitive work;
- inadequate adaptation to impairment with or without accommodation; and
- moderate increased risk of decompensation under normal stress.

The criteria for psychological impairment between 40% and 45% of total disability is listed as follows:

- moderate residual symptoms;
- capable of competitive work if provided significant support;
- inadequate adaptation to impairment;
- significant accommodation required; and
- high increased risk of decompensation under normal stress.

The criteria outlined for psychological impairment between 50% and 60% of total disability is listed as follows:

- no significant competitive vocational capacity;
- competitive vocational capacity only in exceptional circumstances;
- may be capable of sheltered work; and
- none to mild ADL (activities of daily living) problems or executive dysfunction.

The criteria outlined for psychological impairment between 65% and 70% of total disability is listed as follows:

- no significant competitive vocational capacity;
- may be capable of sheltered work if provided significant support;
- moderate ADL or executive dysfunction; and
- supervision/monitoring required for some complex tasks.

The Board's PDAC determined that the worker's psychological impairment was equal to 30% of total disability. Although PDAC noted they rely more heavily on the details in the

body of the most recent psychological exam carried out for PFI purposes rather than on single work descriptors typically used in the summary sections, they have not referred to specific portions of the report which they relied on to support their reason for concluding the worker's psychological impairment was equal to 30% of total disability.

The worker's representative argues that the worker's psychological impairment should be between 50% and 60% of total disability.

In confirming the Board's decision the review officer stated that in order to fall within 50% to 60% psychological impairment the worker should have no significant competitive vocational capacity and competitive vocational capacity only in exceptional circumstances. He further noted that such workers may be capable of only sheltered work. Based on Dr. Du's report, the review officer determined that the worker did not fall into this category of impairment as Dr. Du's conclusions did not support that the worker had no vocational capacity, only that he would not be able to work again in a level of such responsibility and pressure.

I am unable to agree with the review officer's determination based upon all the medical evidence including the new evidence provided by the worker's representative in support of the worker's appeal.

In assessing the worker's psychological impairment rating, the criteria which fall under each category of impairment within the Guidelines must be reviewed having regard to the medical evidence. Dr. Du is a registered psychologist and assessed the worker for the purposes of a PFI evaluation. Dr. Passey is a psychiatrist and acted as the primary therapist for the group therapy treatment program which the worker attended for 18 weeks from October 10, 2005 to February 16, 2006. Both are medical experts who have either assessed the worker directly or treated the worker directly. I place significant weight on Dr. Du's report, as well as the report of Dr. Passey provided in support of the worker's appeal. I place less weight on Dr. McIntosh's opinion as he is not a medical expert in psychology or psychiatry.

I also disagree with the review officer that the memorandum of PDAC is analogous to a report of the disability awards medical advisor and should be considered expert evidence. Policy item #97.40 states that a permanent functional impairment report of a disability awards medical advisor or external service provider takes the form of expert evidence. While Dr. Du's report assessing the worker's psychological impairment would be considered analogous to a permanent functional impairment report of a disability awards medical advisor or external service provider, the memorandum of PDAC is not. I agree with the worker's representative that PDAC's memorandum is an adjudicative decision based upon the expert evidence regarding the impairment.

In the present case, I am unable to conclude, as the Board did, that the medical evidence regarding the worker's psychological impairment is best reflected in the criteria outlined in the 30% to 35% psychological impairment rating.

I find the worker's residual symptoms to be more than "moderate." Dr. Du concluded that the worker has severe impairment with respect to emotional and social functioning. The worker has avoidant behavior, depressed mood, anxiety, nightmares, flashbacks, irritability, emotional lability, and suicidal ideation. Dr. Du has also found severe impairment relating to work function. His symptoms affecting work function include fatigue, difficulty concentrating, memory problems, anxiety, and avoidance of trauma. While it is acknowledged that other residual symptoms were described by Dr. Du as mild to moderate, overall, the worker's residual symptoms are better described as above moderate.

This is consistent with the report of Dr. Passey provided by the worker's representative. Dr. Passey stated that the worker continues to have significant deficits in his ability to control his anger outbursts and spontaneous tearfulness and demonstrated difficulty with his concentration and memory. Dr. Passey also noted that the worker has problems with being easily distracted, has poor or variable energy, diminished motivation, high anxiety if triggered by reminders of his traumatic event, difficulty being around people, and is easily startled.

I also find that the worker is not "capable of competitive work," a criterion outlined under the 30% to 35% impairment rating category, but rather, has "no significant competitive vocational capacity" and is capable of "competitive vocational capacity only in exceptional circumstances." It is outlined by Dr. Du that the worker's symptoms of fatigue, difficulty concentrating, memory problems, anxiety, and avoidance of trauma pose restrictions to returning to his pre-injury employment. He noted that these symptoms would also impact the worker's capacity to work full days, attend to details, multi-task, remain calm in crises, interact with peers, operate dangerous weapons, and assume responsibility for critical decisions. Dr. Du stated that these symptoms would also "pose serious limitations on his capacity to be retrained for alternate employment."

This is consistent with the evidence of Dr. Passey. She opined as follows:

...it is inconceivable that he could ever return to police type duty and it would not be possible to be otherwise gainfully employed with this level of dysfunction. Furthermore, he would not be able to attend work on a regular basis since on those days that his symptoms worsen it precludes him from leaving his house. It is unlikely that he could handle any employment because of perceived stress in even simple tasks.... At most he probably only has the capacity for volunteer type work where he could leave if his symptoms became too bothersome or he could cancel if he had been up all night because of a nightmare.

Another criterion under the 30% to 35% impairment rating which I find the worker does not meet is "moderate increased risk of decompensation under normal stress." Dr. Du noted that the worker has anxiety, is irritable, has memory difficulties, and poor concentration. As outlined above, Dr. Passey noted that it was unlikely the worker

could handle employment because of perceived stress in performing even simple tasks. She explained that during the interview the worker was not able to complete simple serial 7 subtractions from 100. The worker became quite anxious and his mind went blank.

The review officer has referred to an assessment provided by the Vocational Rehabilitation Department and noted that it identified the worker's transferable skills and other skills including computer literacy, driving, and carpentry. The review officer relied on this to support that a 30% psychological impairment rating was appropriate. While the worker may have other skills useful for other occupations, this assessment conducted by the Vocational Rehabilitation Department does not take into account the worker's psychological residual symptoms which may impact on the worker's ability to utilize these skills in a work environment. In addition, it would appear from the information contained on file that the author of those findings does not possess any expertise in the area of psychology or psychiatry. As a result, I place little weight on those findings in determining the issue on appeal.

I have also reviewed the findings of Dr. Du with respect to the worker's activities of daily living. Dr. Du concluded that the worker had mild impairment in relation to activities of daily living. Dr. Du found that while the worker was able to independently manage self-care activities, prepare his own meals and is involved in renovations around his home, he is expected to have difficulty concentrating, forgetfulness and fatigue as factors which impact task completion and the speed of work. Based on these findings, I find that the worker does have some mild activities of daily living problems or executive dysfunction, a criterion outlined under the 50% to 60% impairment rating category.

On all the evidence, I find that the criteria listed for impairment between 50% and 60% more closely fits the worker's vocational situation in relation to his psychological impairment. I find that the worker's psychological impairment to be in the middle of this range.

I find the worker's psychological impairment to be equal to 55% of total disability.

I allow the worker's appeal.

Conclusion

I vary the review officer's decision.

The worker's representative has not requested reimbursement for any expenses, including expenses related to the report of Dr. Passey which was provided in support of the worker's appeal.

I am satisfied that it was reasonable in the circumstances of this appeal for the worker/employer to have obtained Dr. Passey's report of December 7, 2006 related to this appeal.

Therefore, under section 7 of the *Workers Compensation Act Appeal Regulation*, I direct the Board to reimburse the worker for expenses, if any, related to Dr. Passey's report, according to the Board's schedule of fees.

Lisa Hirose-Cameron
Vice Chair

LH/gw/mm