

WCAT Decision Number : WCAT-2010-02445
WCAT Decision Date: September 10, 2010
Panel: Sherryl Yeager, Vice Chair

Introduction

- [1] The worker was employed as a truck driver when he injured his low back in a fall in June 2004. The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted his claim for an L5-S1 disc herniation and discectomy. The Board accepted the worker had permanent chronic pain and low back impairment, and provided him a permanent partial disability award (pension) of 5.5% of total disability in July 2006 to recognize the disc surgery, chronic pain, and radiculopathy. This was increased by 1% in August 2008 after a worsening of the worker's permanent L5 sensory radiculopathy. The Board also accepted the worker's depression was a compensable consequence of the low back injury, and a permanent condition. The worker received a pension of 50% of total disability to recognize the effects of his depression. A Board officer advised the worker of this decision by letter dated April 20, 2009. The worker requested a review of this decision.
- [2] A review officer varied the Board's decision, and found the worker was entitled to an award of 60%, an increase of 10%, for the effect of his depression. The review officer also referred the worker's file back to the Board to determine if he was now entitled to a loss of earnings assessment, and issue a new decision.
- [3] These decisions are set out in *Review Decision #R0107702*, dated December 15, 2009.
- [4] The worker has appealed that review to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

- [5] The worker disputes only the quantum of his functional award for depression, and requests a higher percentage be awarded. He did not dispute the remainder of the review decision. In accordance with WCAT practice, I have not considered any other issues.

Jurisdiction

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

Law and Policy

- [7] Section 23(1) of the Act provides that where a permanent partial disability results from a worker's compensable injury, the Board must estimate the impairment of the worker's earning capacity from the nature and degree of the injury and pay the worker compensation based on 90% of the estimate of the loss of average net earnings resulting from the impairment. This is commonly referred to as the functional award.
- [8] The applicable policies are found in *the Rehabilitation Services and Claims Manual, Volume II* (RSCM II), unless otherwise mentioned.

Evidence, Reasons and Findings

- [9] I find sufficient evidence to warrant altering the worker's functional award from 60%, as determined by the review officer, to 70%, an additional 10% increase.
- [10] The worker's medical history is well established on a number of prior review and WCAT decisions and will not be repeated in detail here. I will summarize the evidence I have relied on in making my decision.
- [11] The worker underwent a permanent functional impairment psychology assessment on February 6, 2009, and the report of that assessment is dated February 9, 2009. The worker reported his depression had been a problem since he had surgery in 2004 and his pain increased afterward. His depression had worsened over time. The worker was having significant difficulty coping with his pain and pain-related limitations, and perceived himself as worthless and a burden to his family. The worker had attempted suicide on two occasions and as a result, his family watched him closely.
- [12] The assessing psychologist noted the worker did not display any signs of disturbance of thought content. He was appropriately oriented. He had poor psychological insight. An air of hopelessness was evident throughout the discussion. The worker displayed marked emotional distress throughout the interviews. He broke down into tears when discussing the level of suicidal risk.
- [13] The worker reported constant pain in his low back which radiated into his legs, and numbness in his feet. He rated this as an 8 out of 10 on the severity scale. The worker was pain avoidant and fearful of exacerbating his pain, and paced his activity according to his pain.
- [14] The psychologist noted the worker's sleep disturbance resulted in daytime fatigue. This would also impact concentration and problem-solving ability. Depression was a condition that amplified pain perception and resulted in overestimated disability. Mood-related lethargy tended to undermine any commitment to active functional restoration. In addition, the worker's worry and concern about his current situation and future fuelled general anxious arousal, thereby contributing to a pain-tension cycle.

- [15] The worker's pain and pain-related consequences, including mood disturbance, had interacted in a synergistic manner to exacerbate his pain and prolong his recovery. The psychologist therefore considered the worker's diagnosis to be Pain Disorder associated with Psychological Factors and a General Medical Condition, and a Major Depressive Disorder. She believed both diagnoses were interacting in a synergistic manner, reinforcing and maintaining each other.
- [16] Despite ongoing psychiatric intervention, the worker's psychological symptoms had not improved significantly; in fact, his mood disturbance appears to have worsened. She categorized his depression as severe, and associated with significant impairment in social and occupational functioning. She considered this the most significant cause of the worker's impairment at that time. His risk for suicide was likely to increase with psychosocial stressors, and in particular a negative outcome from the appeal of his compensation claim.
- [17] The psychologist assessed the worker's global assessment of functioning (GAF) rating at 45 out of 100. She believed the worker was unlikely to return to gainful employment. His activities of daily living (ADL) had been significantly curtailed by mood-related apathy, fatigue and concentration difficulties. His social life had been curtailed in part by mood-related disinterest. Given the worker's low self-esteem, he would likely be vulnerable to supervisor criticism in a new position where he was unsure of his capabilities.
- [18] The worker had cognitive difficulty due to his pain and depression, such as impaired concentration, forgetfulness, and difficulty making decisions. Fatigue and low energy would also limit his endurance for activities, and would likely interfere with the timely completion of work tasks and perhaps even regular work hours.
- [19] The worker had become susceptible to stress, and had become increasingly nervous and easily startled. She believed the worker would be vulnerable to a worsening of his depression and anxiety in a work atmosphere of unusual tension.
- [20] The psychologist believed the worker would not be capable of working given his current depressive symptoms and pain disorder. He would become easily overwhelmed in the face of even minor stress, had fatigue and concentration difficulties, and pain-related limitations.
- [21] It was also noted in the report that financial stressors, the loss of his job, and adverse decisions by the Board and appeal body had caused deteriorations in the worker's condition.

- [22] The psychologist believed the worker had psychological restrictions for the following:
- Work in situations where lapses in attention might result in serious injury to self or others
 - Work that requires extended concentration
 - Work that requires unusual time urgency and pace
 - Work that requires high sociability
 - Work that requires learning significant amounts of new information, and/or shifting of duties or decision-making.
- [23] While a job would improve the worker's mood, the psychologist believed his disability orientation would increase the stress of any vocational placement and exacerbate the worker's anxiety and depressive symptoms. She was pessimistic about the worker's success in re-entering the workforce. She suggested participation in limited volunteer opportunities. It would be important to choose such activities carefully and formulate realistic expectations and goals, as a failure would likely increase the worker's emotional distress and place him at increased risk for self harm.
- [24] The Board's Psychological Disability Awards Committee (PDAC) assessed the worker's psychological impairment on February 25, 2009, to be 50% of total disability. The PDAC provided no explanation as to how this figure was reached for this worker, other than its standard form letter describing the generic process that is used for these memos. I therefore cannot place significant weight on this document.
- [25] An oral hearing was held on July 19, 2010. The worker's wife provided evidence first, with the assistance of an interpreter.
- [26] She said the worker became easily upset about small things, could not sleep and walked around all night. He could not be left alone because of his prior suicide attempts, a family member was with him at all times, even when he paced at night due to his pain. The worker did not perform any activities during the day. He could not get into the bathtub on his own and required assistance for bathing. He had to be reminded to eat and given his medications or he would not take them in the right time period. The family hiding his medications from him to prevent an overdose would upset the worker. He was disinterested in food. He took part in no chores or activities around the house, although prior to the accident he mowed the lawn, vacuumed and did the gardening.
- [27] She described the worker as moody and focused on his pain and wanting to be left alone.
- [28] The worker gave evidence, also with the assistance of a translator, that he spent his day thinking all the time. He watched television, and laid on the bed or sofa. He had difficulty sleeping because of his extreme pain, which was not alleviated by medications. He needed help dressing himself and bathing. He could not put on his socks or tie shoes. He no longer performed household or garden chores, and very rarely left the

house. He did not attend social functions because he could not sit or stand for very long.

- [29] The worker said he asked about returning to work, but was told he could not as work would be dangerous for him because his brain is working slowly. He did not believe he could return to work, because of his extreme pain. The worker said he would get frustrated when he had to talk about things.
- [30] He was upset about the lack of treatment such as massage for his pain. He also expressed concern about his financial situation.
- [31] The worker submitted, through his legal counsel, that his level of psychological disability could be rated between 75 and 90% of total disability, under the Board's PDAC section 23(1) guidelines. (This table is available on the Board's website at www.worksafebc.com.) He relied on his prior submission of September 30, 2009 to the review officer. He argued the opinion of the psychologist who performed the permanent functional impairment assessment suggests that the worker is not capable of adapting to another occupation.
- [32] The worker argued that the review officer did not go far enough in assessing his disability under the PDAC guidelines. The medical reports were consistent in the conclusion the worker could not perform meaningful work. He was not capable of performing complex tasks. The ability to perform ADL was part of the criteria in the PDAC guidelines, as was the need for monitoring. The evidence was the worker required constant supervision to take his medication, assistance with ADL, and to take his medication. The assessing psychologist had come as close to saying the worker was unemployable as could be done without making the statement outright.
- [33] I have carefully considered the worker's argument. I note the review officer considered the worker's level of overall function as falling somewhere between the 50 to 60% and 65 to 70% ranges. The review officer gave weight to the impact on the worker's ADL and executive function, and found a rating of 60% was appropriate. The review officer expressed concern that the worker's pain was a significant component of his presentation, rather than his depression. He also noted the worker's GAF score was 45, in the middle of the scale, not at the lower end of the impairment rating.
- [34] I do not concur with the review officer's comment that a score of 45 is in the middle of the scale for function. I note the GAF codes are described in the DSM-IV (*Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*) in the following way:

GAF Code:

- 60 to 51 – Moderate symptoms OR moderate difficulty in social, occupational, or school functioning in social, occupational, or school functioning.

- 50 to 41 – Serious symptoms OR any serious impairment in social, occupational, or school functioning.
- 40 to 31 – Some impairment in reality testing or communication OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood.
- 30 to 21 – Behaviour is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment OR inability to function in almost all areas.

[35] The review officer observed that a significant component of the worker's limitations around his ADL were due largely to pain.

[36] I note that the assessing psychologist commented that the worker's pain condition and depression were synergistic, in that they potentiated and worsened each other. It is clear from her report that she viewed the worker's pain condition and major depressive disorder to be intertwined. It was also evident from the evidence at the oral hearing, and the evidence on the claim file, that the worker is strongly focused on his pain, and that his pain condition is the cause of much of his disability conviction. This makes the adjudication of this matter complicated, as the Board has recognized the worker's chronic pain by an award of 2.5% under policy #39.02, in addition to his award for the discectomy and sensory loss in his legs.

[37] The presence and impact of the worker's depressive symptoms cannot be discounted, however. For example, the assessing psychologist attributed the worker's impaired ADL to mood-related apathy, fatigue and concentration difficulties. She also considered the worker capable of only limited volunteer opportunities, within strict limits or controls to prevent a decompensation of his condition.

[38] The PDAC disability guidelines set out the criteria to consider when assessing the range of permanent functional impairment. To qualify for an award, the psychological diagnosis must be related to the work incident. If a worker has a pre-existing condition, at least a portion of the current psychological impairment must arise from the work incident. The psychological impairment must be affecting or have the potential to affect earning capacity.

[39] In the current matter, it is accepted the worker's psychological condition arises from the compensable injury, and is affecting his earning capacity. Of relevance to this appeal, the PDAC guidelines set out the following criteria for moderate and marked-extreme levels of impairment.

[40] The rating of "moderate" impairment levels, compatible with some but not all useful functioning, sets the criteria for a 30 to 35% range of impairment as:

- Moderate residual symptoms
- Capable of competitive work

- Inadequate adaptation to impairment with or without accommodation
- Moderate increased risk of decompensation under normal stress.

[41] Moderate impairment in the 40 to 45% range has the following criteria:

- Moderate residual symptoms
- Capable of competitive work if provided significant support
- Inadequate adaptation to impairment
- Significant accommodation required
- High increased risk of decompensation under normal stress.

[42] Moderate impairment in the 50 to 60% range is appropriate if the worker meets the following criteria:

- No significant competitive vocational capacity
- Competitive vocational capacity only in exceptional circumstances
- May be capable of sheltered work
- None to mild ADL problems or executive dysfunction.

[43] The worker's representative requested an award of 70% or higher.

[44] The criteria for an award in the 65 to 70% range are:

- No significant vocational capacity
- May be capable of sheltered work if provided significant support
- Moderate ADL or executive dysfunction
- Supervision/monitoring required for complex tasks.

[45] An award over 75% is considered "marked-extreme" impairment levels that preclude most useful functioning. An award of 75 to 90% is provided when workers have:

- Significant ADL problems or executive dysfunction
- Supervision/monitoring required for moderately complex tasks
- Can be left unsupervised some of the time.

[46] A 100% of disability award is provided when a worker exhibits:

- Significant interference with ADLs or executive functioning
- Can be left alone for only brief periods
- Requires significant supervision for routine tasks
- Requires constant supervision/monitoring.

[47] I accept the opinion of the psychologist who performed the permanent functional impairment evaluation, that the worker is not capable of significant vocational activity,

although he may be capable of limited volunteer opportunities, in supported situations. The reason for the worker's inability to return to work was in part his pain; however the psychologist relied on the likelihood the worker would not tolerate critical supervisors, stress, extended concentration, work requiring time urgency and pace, or high sociability. The worker has moderate dysfunction of his ADL and executive dysfunction, as he has to be prompted to eat and to take his medications. These impairments are due to his psychological condition, rather than avoidance of pain.

- [48] I find there is insufficient evidence to conclude that the worker has significant interference in his ADLs or executive functioning due to his major depressive disorder, or that he requires supervision/monitoring for moderately complex tasks. I understand the requirement in the guidelines that a worker must be monitored to be in relation to performance of work duties, as opposed to the current situation where the family are fearful the worker will attempt suicide if left alone.
- [49] I therefore find that the worker's level of psychological impairment falls in the 65 to 70% category, and award the worker 70% of total disability for his psychological impairment arising from the compensable depression.
- [50] I allow the worker's appeal.

Conclusion

- [51] I vary *Review Decision #R0107702*, dated December 15, 2009. I find the worker's pension award for psychological impairment should be established at 70% of total disability. The file is returned to the Board to determine the quantum of the worker's benefits as a result of this decision. I note that the Board has not as of this writing taken action on the review officer's referral back to revisit the worker's entitlement to a loss of earnings assessment under section 23(3.1) of the Act.
- [52] No expenses were incurred related to the worker's participation in the appeal, and none are identified. Therefore, I make no order regarding expenses.

Sherryl Yeager
Vice Chair

SY/ml