WCAT Decision Number: WCAT-2004-00090-RB
WCAT Decision Date: **January 12, 2004**
Panel: Gail Starr, Vice Chair

Introduction

This is the worker's appeal from a decision under her 1992 claim which was communicated to her in a September 20, 2001 letter from a disability awards claims adjudicator at the Workers' Compensation Board (Board). The letter was itself a clarification of or amendment to a June 20, 2001 letter which had set out the details of the worker's pension under the claim.

This appeal was initially filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been transferred to WCAT by operation of law. (See the *Workers Compensation Amendment Act (No. 2), 2002,* section 38.)

Under sections 250(1) and (2) of the *Workers Compensation Act* (Act) (effective March 3, 2003), WCAT may consider all questions of fact and law arising in an appeal, but it is not bound by legal precedent. It must make its decision on the merits and justice of the case. It must apply policies of the Board's board of directors which apply to the case, except in circumstances outlined in section 251 of the Act.

Under section 254 of the Act (effective March 3, 2003), WCAT has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in an appeal before it. Thus, this appeal is a rehearing.

Both the worker and the employer are represented in the appeal. Both representatives, as well as the worker, appeared at an oral hearing held before me on October 28, 2003. No formal written submissions as such have been provided by either representative, although I have reviewed brief arguments presented in their notices of appeal and of participation. I have also considered their respective oral representations at the hearing. Further, the worker's representative provided two sheets of information in the nature of job descriptions for work it has sometimes been considered the worker could perform; these "benchmark" descriptions for "R1, Clerk I, Messenger" and for an "R5, Clerk III, Postal" were made available at the oral hearing and have been marked, respectively, exhibits #1 and #2. The "benchmark" documents are both dated January 9, 1987.

In a post-hearing communication requested by me at the end of the oral hearing, the employer's representative has confirmed in an October 30, 2003 note that the

benchmark job descriptions just described are indeed the current versions of those jobs, despite their dating from January 9, 1987.

Other than as described above, no further arguments, submissions or evidence have been provided since the appeal was launched. Apart from the worker's own evidence given orally at the hearing, the evidence is substantially as it was when the Board's decision was described in the September 20, 2001 letter here appealed.

Issue(s)

1. Is the worker eligible for a greater loss of earnings pension?

2. Should the overpayment declared in the September 20, 2001 letter be recovered from the worker?

Background and Evidence

Under her 1992 claim for compensation, it was accepted that the worker had developed bilateral wrist tendonitis as a result of her work as a cook. Improvement was slow. She was examined by Board medical advisor Dr. Didcott on July 22, 1992 and Dr. Didcott pronounced her ready for a gradual return to work. Further investigation ensued, however, including an August 24, 1992 consultation with Dr. Yorke (rheumatology). Dr. York was unable to find any clinical evidence of tendonitis, although he was aware of the history suggesting over-use of the upper extremities. His report is otherwise lacking in conclusions.

Dr. Didcott examined the worker again February 20, 1995 and found her about the same as before, although she continued to complain of discomfort. Dr. Didcott could find no objective signs but thought she should obtain other work on a preventative basis.

Two years later, the worker was examined for permanent functional impairment by Board disability awards medical advisor Dr. Tamboline. The worker was then on long-term disability, but Dr. Tamboline found good range of motion, no wasting or weakness and no sensory or reflex deficit. The right upper extremity was a little puffy, but no impairment could be reported, and the worker was soon advised she would not be awarded a pension.

In an appeal to the Review Board, the worker was successful when, in October 8, 1998 findings, a Review Board panel awarded her 1 percent of total disability for subjective complaints and found her entitled to a loss of earnings assessment by the Board. While the findings recorded that the worker's tendonitis condition did not show

obvious signs of physical impairment when she was not doing anything with her hands, the slightest activity was accepted as causing swelling and pain. Thus the Board was directed to identify suitable alternate employment and to undertake a loss of earnings assessment.

An employability assessment was undertaken in implementation of the 1998 Review Board findings. An outside consultant provided a report stating that the injury employer had no alternative jobs. The consultant was of the opinion that, apart from any physical disability issues, the worker's employability was limited by both her age (then 62) and her lack of transferable skills, and that she was not competitively employable. This was not accepted by the Board.

In its December 1, 1999 memo #29, the Disability Awards Committee rejected that view. The Committee recorded the conclusion that, while the worker's competitiveness was "certainly compromised at this time, the significance of these barriers would have been less four years ago." They directed the vocational rehabilitation consultant to return to the employability assessment stage and to consider what would have been suitable and available for the worker in 1995, at which time the Board had offered the worker assistance to return to employment, which she had declined. The Committee noted that much was made of the worker's low literacy skills, while information on file suggested she had little difficulty communicating verbally and could read a newspaper; the Committee observed that no testing had been done to confirm her level of reading and writing abilities.

A second employability assessment was undertaken and reported upon on February 20, 2001. This report documented that the worker had been an institutional cook for approximately 18 years. She had no formal training. Achievement testing showed abilities in the range of grades two to six. Although the worker had had heart surgery, she was capable of sedentary to light work. Within the opportunities historically available with the injury employer, two positions seemed within the worker's 1995 capabilities when the 2001 report was prepared.

At the oral hearing before me, the worker was unable to provide meaningful answers to questions concerning her refusal of vocational assistance in 1995. She claimed to have no memory of a messenger job being considered, and she did not know what the work might have entailed. She said she would have been prepared to try jobs, but she had her doubts that she could do much. She described herself as retired since August 2001. She said she had planned to work until age 60 or more, but I note she was 64 in August 2001.

I note further that it was recorded by the vocational rehabilitation consultant in the August 21, 1995 memo #19 that the worker had been offered eight weeks of job search allowances, but she had called the consultant on August 18, 1995 to confirm she was

not interested in doing a job search and would pursue retirement. The employer had also reported to the consultant that the worker was pursuing early retirement.

On being further questioned concerning the messenger job and what there was about it she could not perform, the worker indicated that reading was her principal difficulty. She confirmed she was able to read recipes as a cook, but she did not know how she would read delivery instructions. She stated she has been 40 years in Canada and can read her mail when it arrives.

The work identified as suitable and available for the worker in the February 20, 2001 employability assessment (considering, it will be recalled, matters as they stood in 1995) was work as a medication delivery messenger. (This was the "R1" job referred to above. It will be recalled that both the "R1" and the "R5" jobs involved sorting and delivery within the hospital. "R1" involved medications and related items, while "R5" involved items more like mail, and it was accepted the latter included heavier duties than the worker could regularly perform.) The rate of pay for the "R1" job at the time of the assessment was reported to be $2,815.00 per month, and it was estimated the worker had sufficient endurance and capability to perform this work for a 30 hour work week. The employability assessment was sent to the worker as required under *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) item #40.14, but the file contains no evidence of a response.

As the appeal developed, there was some confusion as to which of the messenger positions, for which the "benchmark" descriptions have been provided, was the one identified in the employability assessment. It has been concluded, evidently to the satisfaction of both the worker's and the employer's representatives, that the "R1, Clerk I, Messenger" description is the appropriate one. This was used in the June 20, 2001 pension letter to the worker, and the application of a 30 hour week to the reported pay scale indicated the worker could be earning $1,649.00 monthly post-injury in the occupation.

As it developed, the monthly earnings which had been reported by the employer to the Board at the time these figures were being developed proved incorrect. The Board was later notified of the difference in the earnings rate, and this information resulted in a post-injury wage rate of $1,857.00 per month. Accordingly, the monthly pension payments to the worker were reduced. Because of payments that had already been provided to her at the incorrect rate, an overpayment was declared and this was in the amount of $10,233.45, representing payments of pension benefits to the worker over the period June 12, 1995 through August 31, 2001. Calculations supporting this difference are on the claim file and had been disclosed to the worker and the employer. Details are summarized in the disability awards claims adjudicator's memo of July 17, 2001. Unlike the matter of the liability to repay, the accuracy of the calculations is not disputed.

Decision and Reasons

It is contended on behalf of the worker that she is 100 percent competitively unemployable and so should be paid a 100 percent loss of earnings award. While, following the 1998 success before the Review Board, the Board in its processes concluded the worker could return to some work at the hospital, it is argued that that subject matter had been investigated with negative consequences in August of 1995. In that earlier time period, the injury employer seemed unwilling to make any work available to the worker. Other investigations of the worker's ability were referred to as tending to show the worker was willing to attempt other work but was so in need of academic upgrading that even alternative work was not realistic. (It will be recalled the Disability Awards Committee did not accept this, putting in motion the developments which are germane to this appeal.)

Subsequent investigation of the worker's potential employability sought, as directed by the Disability Awards Committee, to assess the worker's abilities as they stood in 1995. It was through this analysis that the Board reached the conclusion the worker could not perform all the duties of the R5 job but that she could perform, on a defined part-time basis, all the duties of the R1 job. The employer's representative supports the analysis offered by the Disability Awards Committee in the December 1, 1999 memo #29, highlighting that the worker has historically had no difficulty communicating verbally and has sufficient reading ability that she concedes she can read the newspaper. While the employer's representative does not oppose some recognition of a loss of earnings in the worker's pension, it is contended it is not a 100 percent loss of earnings situation and she would be "at a loss" as to who could not perform the work identified in the position description for the R1 job.

The employer's representative also refers to and relies upon the January 12, 2001 e-mail on the file confirming that the employer would have been willing to accommodate the worker in the R1 position, although they did understand that the worker was medically restricted from undertaking the R5 position. Salary information in relation to the worker's pre-injury earnings was provided in this e-mail as well. It is argued the worker had decided to retire and there is no objection to recognition of loss of earnings up to the time of retirement. Again, a 100 percent loss of earnings award is opposed.

In rebuttal, the worker's representative pointed out that, although the functional award is only 1.0 percent, it is in recognition of a bilateral upper limb tendonitis and that this may explain why the worker feels she cannot do either of the jobs under consideration. It is argued that, in fact, the worker did not begin to talk of retirement until the year 2001. The worker should not be penalized now, it is submitted, because a job is considered to have been available in 1995 even though it has since been eliminated.

I am unable to find that the evidence supports the arguments offered on behalf of the worker. Specifically, I do not find that the employer was unwilling to make suitable

alternate employment available to the worker in 1995. While, on the one hand, I do not see evidence in the file that the employer actively offered much of anything to the worker, on the other hand, I find the worker had made it clear to the employer, if not also to the Board, that she was not interested in further employment, choosing rather to retire. I accept the employer's 2001 statement that the R1 position would have been available to the worker in 1995.

In view of what she has accomplished in her working life, I am unable to accept the worker's current evidence that her language limitations would have prevented her from undertaking the R1 job for the number of hours identified in the Board decision. Considering all the evidence, I cannot avoid the conclusion that she declined to consider employment in 1995. It is my conclusion that she effectively retired at the time she went on long-term disability, a date evidently in August 1995 but not specifically recorded in memos #18 and #19 which indicate these facts. (I note in passing that memo #18 indicates the worker's family physician was of the opinion that "the client will not return to any kind of work and therefore, the client has filled out long-term disability forms pending her finalization of rehabilitation assistance." This memo also indicates the client had already applied to the employer for early retirement, and I therefore conclude the employer saw no reason, as I would see no reason, for them then to make available alternative employment.)

In view of my conclusions on this evidence, I find, on the first issue in the appeal, that the worker is not eligible for a greater loss of earnings pension than that described in the June 20 and September 20, 2001 letters. It will remain for the Board to determine, under the policy described in RSCM item #40.20, when that loss of earnings pension terminates.

As to the second issue--the overpayment declared in the September 20, 2001 letter--no substantial argument has been presented as to why that Board decision should not be upheld. No argument was made that the error was not an "administrative error," as contemplated in RSCM item #48.41. That policy statement draws a distinction between administrative and decisional errors. Decisional errors, in brief, have to do with entitlement; where such a decision is modified or reversed by a later decision, no overpayment is, as a matter of policy, declared, and no repayment is demanded. The policy states that these decisions "include situations where new information is later received which initiates a **judgement** [emphasis added] change in the original decision." It might be argued on the present facts that this is what has occurred here; it might be considered that the Board has received new evidence concerning the worker's entitlement and has, on that new evidence, reached a different decision. However, that is not the way I interpret the facts here. In this case, the entitlement decision made concerning the worker is that she could perform the "R1" position on a part-time basis. That was the entitlement decision based on an assessment of her abilities post-injury. It flowed from that that, given the salary paid for such work, her loss of earnings award would be of a certain value. It was subsequently discovered that there was a mistake in

stating the likely earnings from performing such work. This is, in the language of RSCM item #48.41, an error in the nature of "computer, mechanical, mathematical, or an error in implementing a decision on a claim." Under the published policy, I find it clear that such an error results in an overpayment which is recoverable. On this issue, the appeal must fail.

Conclusion

For the reasons indicated, the worker's appeal is denied and the decisions of the Board as communicated in the September 20, 2001 letter are confirmed. No costs or expenses were requested and none are awarded.

Gail Starr
Vice Chair

GS/gl