

Noteworthy Decision Summary

Decision: WCAT-2004-04921 **Panel:** Randy Lane **Decision Date:** September 22, 2004***Reopening – Characterization of Request – New Matter for Adjudication – Section 96(2) of the Workers Compensation Act***

The language in section 96(2) of the *Workers Compensation Act* is clear that a reopening involves a matter that has been previously decided. Where there is no earlier decision relating to treatment of an injury, a request for payment for treatment is not a request for reopening. Rather, it is a new matter for adjudication.

The worker suffered a lower limb injury in 1970. In 2000 he was awarded a pension for the aggravation of his non-compensable back condition resulting from the altered gait caused by the compensable leg injury. In 2003 the worker brought forward medical evidence that chiropractic treatments relieved his back symptoms. Both the case manager and the review officer characterized the request for payment of chiropractic treatments as a request for reopening, and denied it on the basis that there had been no significant change in his condition.

The panel considered that the request for payment for chiropractic care raised a new matter for adjudication, and went on to consider the merits, since both the case manager and the review officer had done so. The panel found that the worker was not entitled to chiropractic treatments because the evidence did not establish that the worker was experiencing a significant deterioration in his back disability.

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Panel: Randy Lane, Vice Chair

Introduction

The worker suffered a 1970 lower limb injury for which he was awarded a pension by the Workers' Compensation Board (Board). In 1999 he was examined by a Medical Review Panel which determined that the worker's back symptoms had been aggravated over time by the altered gait caused by the disability associated with his 1970 injury.

By decision of February 1, 2000 the worker was awarded a pension of 1% of total disability for the aggravation of his non-compensable back disease. The pension was effective November 16, 1994, and it was paid in a lump sum amount.

By letter of September 17, 2003 the worker's representative asked that the Board authorize chiropractic care for the worker. By decision of September 25, 2003 a Board case manager denied reopening of the claim. In his March 4, 2004 decision a review officer of the Board's Review Division confirmed the September 25, 2003 decision.

The worker appealed the March 4, 2004 decision to the Workers' Compensation Appeal Tribunal (WCAT). A March 8, 2004 notice of appeal and an April 17, 2004 submission were received by WCAT. There is no active employer to notify.

I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

Issue

At issue is whether the worker's request for payment of chiropractic care for his back was properly characterized as a reopening and whether the Board should pay for chiropractic care for his back.

Jurisdiction

The *Workers Compensation Act* (Act) was amended effective March 3, 2003 by the *Workers Compensation Amendment Act, (No. 2), 2002* (Amendment Act).

Under section 96(2) of the Act as amended by the Amendment Act, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board, if one of two conditions exists. The reopening may be on application or at the Board's own initiative.

In cases where a decision to reopen or not to reopen has been made under subsection 96(2) on the Board's initiative, that decision may be appealed to the Review Division. The Review Division's decision may then be appealed to the appeal tribunal which is defined as WCAT and which was established on March 3, 2003 by the Amendment Act.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, it must apply a policy of the Board's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

Background and Evidence

It is not necessary to provide a detailed review of the first 30 years of this claim. It is sufficient to focus on the last few years.

In his April 29, 2003 report Dr. Pritchett, the worker's attending physician, commented that the worker's back pain was aggravated by his gait, and the worker requested a review of the level of his disability.

In her July 22, 2003 decision the disability awards officer indicated that no increased permanent condition had been accepted under the claim, and the Disability Awards Department would not be conducting an assessment.

In his September 9, 2003 letter Dr. Kinakin, a chiropractor, indicated that the worker had been consulting Dr. Kinakin's office since July 1997, and the examination findings and subjective symptoms were consistent with the type of injury suffered by the worker.

In his September 25, 2003 decision the case manager cited subsection 96(2) of the Act dealing with reopenings and items #102.01, #34.12, and #74.21 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). He advised that only if there was a "permanent deterioration" in the worker's condition could the Board consider payment of wage loss and health care benefits. He noted that the purpose of section 21 the Act was to provide health care benefits for the treatment of injuries or diseases, and long-term chiropractic care would not be acceptable as it was probably more in the nature of a preventative measure. He commented that there were no new reports since Dr. Pritchett's report of April 29, 2003. He noted Dr. Kinakin's September 9, 2003 report. He determined that there had been no significant change in the worker's condition.

In his October 1, 2003 report Dr. Kinakin indicated that chiropractic treatment was needed to assist the worker in recovering from his injury. In his October 14, 2003 letter Dr. Kinakin indicated that it was necessary that the worker receive chiropractic care. He observed that the worker's examination findings and subjective symptoms showed that chiropractic treatments would relieve the symptoms of the compensable injury.

In his October 17, 2003 report Dr. Pritchett commented that the worker was using chiropractic care for relief of his symptoms due to his altered gait arising out of his injury. In his October 21, 2003 report Dr. Pritchett indicated that the worker was advised to continue with chiropractic treatment if it was beneficial.

In confirming the September 25, 2003 decision, the review officer offered the following "Reasons and Decision" in his March 4, 2004 decision:

The question before me is whether the worker's ongoing low back pain warrants a reopening of his January 30, 1970 claim for chiropractic treatment. I find that it does not. In reaching my conclusion, I note the following.

- While I recognize that policy item # 34.12 does not specifically address the worker's specific circumstances, I find that the Board correctly relied on the underlying principles of this policy to determine the worker's entitlement to further health care benefits.
- Policy item #34.12 states that a worker who is in receipt of a permanent disability award will only be entitled to further benefits if the worker undergoes a significant and temporary change in his medical condition. The change must be more than the type of fluctuation that would normally be expected as part of the condition in relation to which the permanent functional impairment award was assessed. The policy also states that, where there is a normal fluctuation in the worker's condition, the pension is designed to cover any additional expenses, including medical treatment cost
- Dr. K.'s medical evidence of September 9 and October 14, 2003 stated that on examination that the worker presented with subjective symptoms of pain associated to his low back condition. Dr. K. further stated that he had been treating the worker for low back pain since July 28, 1997. This represents seven years of ongoing chiropractic treatment for low back symptoms. I believe this evidence to mean that the worker had ongoing subjective low back complaints and continued to obtain chiropractic treatment on a preventative basis.

- Dr. P. and Dr. K.'s medical evidence does not support that the worker had a significant deterioration or a temporary change in his condition. I interpret this evidence to mean that the worker had a normal fluctuation in his low back condition.
- There was no medical evidence that the worker experienced a significant deterioration of his condition in September 2003. In this worker's case, he had been receiving chiropractic treatment for at least the last seven years for his low back pain. I find that the chiropractic treatment was not medically necessary to cure and relieve from the effects of the injury or alleviate those effects, as the worker had a lengthy history of chiropractic treatment.
- Therefore, I find that the worker's request for further chiropractic treatment is not medically necessary to treat his compensable injury within the meaning of policy items # 34.12, #74.21 and section 21 of the Act.

I conclude that the worker is not entitled to any further chiropractic benefits.

[reproduced as written]

The worker's representative's submission is to the effect that a pension examination of the worker in 2000 indicates that there was no evidence of magnified pain behaviour, the worker's evidence is that his symptoms are alleviated and he is better able to mobilize following chiropractic treatments, and section 21 of the Act allows for ongoing medical treatment for an ongoing disability. The representative submits that the Board should provide chiropractic treatments, as needed, to alleviate the worker's compensable back symptoms.

Reasons and Findings

Both the case manager and the review officer characterized the request for payment of chiropractic care as a reopening. Yet, I consider that the request did not involve a reopening. As can be seen from the language of subsection 96(2), a reopening involves a matter that has been previously decided:

Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,

- (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
- (b) there has been a recurrence of a worker's injury.

There is no earlier decision on this file denying chiropractic care for the worker's compensable back disability. There was a June 22, 1995 decision which concluded that the worker's hip, back and knee complaints were not related to his 1970 injury, and therefore the Board would not pay for treatment by Dr. Raabe, a chiropractor. However, that decision dealt with causation; it did not concern the issue of treatment for a compensable back disability. I do not consider that the September 25, 2003 decision of the case manager was a reopening of a matter previously decided in the June 22, 1995 decision, and I note that neither the case manager nor the review officer assert that it was.

I find that the request in 2003 for payment of chiropractic care raised a new matter for adjudication. It was not necessary for the reopening grounds in subsection 96(2) the Act to be satisfied. While the case manager and the review officer considered the matter in the context of a reopening, they also addressed the merits of whether the worker was entitled to health care. My review of the matter will not be confined to the issue of reopening, but will also address the merits of the worker's request for health care. The earlier decisions provide me with jurisdiction to address the merits.

The worker's entitlement to payment for chiropractic care is properly considered using the law and policy set out in section 21 the Act and item #74.21 of the RSCM II.

I question the applicability of item #34.12 to the case before me. The review officer's comments concerning that policy item, in the second bulleted point found in his "Reasons and Decision", are not accurate. Item #34.12 does not address entitlement to "further benefits"; it only deals with temporary disability wage loss benefits. The following comment by the review officer finds no support in the actual text of item #34.12:

The policy also states that, where there is a normal fluctuation in the worker's condition, the pension is designed to cover any additional expenses, including medical treatment cost.

Item #34.12 provides that the pension is intended to cover fluctuations. It makes no reference to the pension being intended to cover additional expenses.

The Board's authority concerning the provision of health care is found in section 21 the Act. Subsection 21(1) provides, in part, as follows:

In addition to the other compensation provided by this Part, the Board may furnish or provide for the injured worker any medical, surgical, hospital, nursing and other care or treatment... that it may consider reasonably necessary at the time of the injury, and thereafter during the disability to cure and relieve from the effects of the injury or alleviate those effects, and the Board may adopt rules and regulations with respect to furnishing health care to injured workers entitled to it and for the payment of it. ...

Subsection 21(6) of the Act provides, in part, as follows:

Health care furnished or provided under any of the preceding subsections of this section must at all times be subject to the direction, supervision and control of the Board ... and all questions as to the necessity, character and sufficiency of health care to be furnished must be determined by the Board....

With respect to chiropractic care, the Board has provided policy guidance at RSCM II items #74.20 to #74.24. Item #74.21 provides that after eight weeks of treatment by a chiropractor, or earlier in some cases, the claim must be referred to a Board medical advisor who will consider whether an extension should be authorized. Any extension should be limited to a maximum of four weeks, and it is expected that extensions beyond 12 weeks would only occur in "rare and unusual circumstances." The policy concludes, as follows, with respect to long-term chiropractic treatment:

Situations are occasionally met where workers receive chiropractic treatments on a long-term basis (for example, one treatment per month for six to twelve months). Such treatments are probably more in the nature of preventative measures or as a means of forestalling future problems. The purpose of section 21 of the *Act* is to provide health care benefits for the treatment of injuries or occupational disease. As such, long-term chiropractic manipulation of this type will not be considered acceptable.

While it is not necessary for the worker to satisfy the terms of subsection 96(2) the Act before entitlement to payment for chiropractic care may be considered, it is appropriate to determine whether the worker has experienced a significant change in his back condition. By that, I mean that payment of health care benefits would be appropriate if the worker was experiencing a significant fluctuation in his permanent back disability such that he was experiencing a temporary disability. In such circumstances, the worker would be experiencing a disability similar to a disability occurring immediately after an injury. Such a case would involve health care at the time of injury, as referred to in subsection 21(1) the Act.

I find that the evidence does not establish that the worker was experiencing a significant deterioration in his back disability. The reports of Drs. Kinakin and Pritchett make no

reference to the worker experiencing an acute temporary disability, and they do not contain evidence to support a finding that the worker had such a disability in 2003.

I find that the worker is not entitled to payment for chiropractic care. The Board's policy indicates that the intention is that chiropractic care covered by the Board involve periods of time up to 12 weeks. Rare and unusual circumstances can justify extensions beyond 12 weeks. That chiropractic care may alleviate the worker's symptoms does not provide sufficient justification for payment for that care.

As of 2003, the worker had been receiving chiropractic care for six years. The Board recognizes that the worker has been suffering a compensable back disability since 1994. While the worker may not have been seeking reimbursement for six years of treatment, I consider that it is appropriate to take into account the duration of treatment. I do not consider that the case before me involves rare and unusual circumstances that would justify payment for chiropractic care that had gone well beyond 12 weeks in duration. Like the review officer, I consider that the fact the worker has been receiving chiropractic care since 1997 indicates that the worker is receiving such treatment as a preventative measure or as a means of forestalling future problems.

Conclusion

I deny the worker's appeal. I confirm the review officer's March 4, 2004 decision. While I find that the worker's request for payment of chiropractic care was not properly characterized as a reopening, I find that the worker is not entitled to payment for chiropractic care.

Randy Lane
Vice Chair

RL/jy