

## Noteworthy Decision Summary

**Decision:** WCAT-2011-01582    **Panel:** Teresa White    **Decision Date:** June 27, 2011  
Janice A. Leroy  
Andrew Pendray

***Former policy items #22.33, 22.35 of the Rehabilitation Services and Claims Manual, Volume II – Current policy item #C14-101.01 of the Rehabilitation Services and Claims Manual, Volume II – Rehabilitation and Compensation Services Practice Directive #C3-1 – Compensable consequences – Permanent disability awards – Specific permanent disabilities – Psychological impairment – Chronic pain – Review Division refusal to review***

Policy items #22.33 and #22.35 of the *Rehabilitation Services and Claims Manual, Volume II* do not preclude the Workers' Compensation Board, operating as WorkSafeBC (Board), from adjudicating a worker's diagnosed pain disorder, where it has previously accepted a permanent chronic pain condition. A refusal by the Board to adjudicate a worker's claim for a pain disorder in these circumstances constitutes an implicit denial of the claim for pain disorder. Such a decision is reviewable by the Review Division.

The worker injured his back in a work incident. The Board accepted chronic pain as the only permanent condition on the worker's claim. Subsequently, the worker was diagnosed with Pain Disorder Associated with Psychological Factors and a General Medical Condition, under the *DSM-IV-TR*.

The worker requested the Board to adjudicate his pain disorder as a compensable consequence of his work injury. In its letter of May 19, 2010, the Board stated that, given that policy item #22.35 indicates that pain is not assessed as a psychological impairment, and given that the Board had already accepted permanent chronic pain, it would not adjudicate the worker's claim for a pain disorder. The Review Division agreed that the matter of the worker's pain had already been adjudicated. Therefore, the Board was not able to issue a new decision, and there was no new reviewable decision before the Review Division.

The issue before the WCAT was limited to whether the Board's May 19, 2010 letter rendered a decision reviewable by the Review Division.

The panel considered the reconsideration limitation in section 96(5) of the *Workers Compensation Act*, and the exceptions, provided in policy item #C14-101.01, to decisions that constitute reconsiderations or reopening of previous decisions. The worker's pain disorder qualified as an additional medical condition identified as being a consequence of the work injury, and therefore fell within the reconsideration exceptions in policy.

The Board's May 19, 2010 letter contained a decision reviewable by the Review Division. The Board had implicitly denied the acceptance of pain disorder as a new matter under the worker's claim, by informing the worker that his pain disorder had been adjudicated as chronic pain.

While Practice Directive #C3-1 states that a *DSM-IV* Pain Disorder is considered by the Board to be synonymous with chronic pain, practice directives are not binding policy. Policy item #22.35 does not preclude the Board's adjudication of a pain disorder as a psychological

condition. Policy states that pain is not assessed as a psychological impairment, but it does not state that a diagnosed psychological condition with some relationship to the pain is not compensable otherwise than through a chronic pain award.

It was open to the Board to adjudicate a *DSM-IV* Pain Disorder as a psychological condition under policy item #22.33. That policy provided, in part, that psychological problems arising from a physical or psychological injury are acceptable as compensable consequences of the injury. However, there must be evidence that the worker is psychologically disabled.

WCAT allowed the appeal. Given that the Board's May 19, 2010 letter contained a reviewable decision, WCAT returned the matter to the Review Division to decide whether the Board had appropriately denied acceptance of the worker's pain disorder.

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## Introduction

- [1] This is the worker's appeal to the Workers' Compensation Appeal Tribunal (WCAT) of a decision of the Review Division refusing to review a decision of a case manager of the Workers' Compensation Board, doing business as WorkSafeBC (Board).
- [2] We are deciding this appeal as a three-person non-precedent panel of WCAT under section 238(5) of the *Workers Compensation Act* (Act).
- [3] In a September 20, 2010 decision, (*Review Reference #R0118926*), a review officer declined to conduct a review of a May 19, 2010 letter from a case manager of the Board.
- [4] The case manager's letter was in response to the worker's request for adjudication of the compensability of a recently-diagnosed pain disorder condition. The case manager informed the worker that policy item #22.35 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) states that "pain is not assessed as a psychological impairment" and accordingly she would not be adjudicating the worker's claim for acceptance of a pain disorder as the claim had already been accepted for permanent chronic pain.
- [5] The review officer found that as the worker's claim had already been accepted for chronic pain, and a DSM-IV (American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition) Pain Disorder is "adjudicated as 'chronic pain' under policy item #22.35," the matter had already been dealt with and the case manager was not able to issue a new decision. Thus, she said, there was no new reviewable decision and the review would not proceed.
- [6] The worker is represented by legal counsel. The employer is not participating in the worker's appeal, despite being invited to do so.

- [7] The worker did not request an oral hearing. The worker's representative has provided written submissions. We considered whether an oral hearing was necessary and determined that the matter could be fairly and fully adjudicated based on the current file material as the issue is primarily one of jurisdiction.

## **Issue(s)**

- [8] The issue is whether the Board's May 19, 2010 letter rendered any decisions which are reviewable by the Review Division.
- [9] The worker seeks acceptance of his pain disorder before us. This appeal is limited to the issue of the Review Division's refusal to review. The Review Division has not made a decision on the merits of the worker's claim.

## **Jurisdiction**

- [10] Section 239(1) of the Act provides that a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review, may be appealed to WCAT.

## **Background and Evidence**

- [11] The worker injured his back on April 16, 2008 while driving a loader. He hit a pothole and felt an immediate sharp pain in his left leg. The claim was accepted for a low back strain and chronic pain. A disc herniation later discovered on MRI was not accepted. The only permanent condition accepted is chronic pain.
- [12] The worker's claim was referred to the Disability Awards Department of the Board. The worker was granted a permanent disability award for chronic pain equal to 2.5%, without having undergone a permanent functional impairment evaluation.
- [13] In a May 5, 2010 report, a registered psychologist diagnosed Pain Disorder Associated with Psychological Factors and a General Medical Condition, under the DSM-IV-TR (the most recent version of the DSM-IV, the "text revision"). The psychological factors affecting the worker's pain disorder include depressive symptoms such as feelings of worthlessness, helplessness, irritability, loss of pleasure, sadness, a tendency to ruminate, and feelings of anger. The worker also has a strong conviction that surgical intervention is necessary to repair his back, and an enduring fear of re-injury.

[14] In a May 10, 2010 letter, the worker's representative asked the Board to adjudicate the worker's psychological diagnosis as a compensable consequence of his work injury under policy item #22.00 of the RSCM II. The response was the May 19, 2010 decision letter which states, in part:

With respect to your request, Policy Item 22.35 of the Rehabilitation and Claims Manual, Vol II states pain is not assessed as a psychological impairment and accordingly I will not be adjudicating the claim for a pain disorder as the claim has already been accepted for a permanent chronic pain condition.

[15] The worker requested reconsideration of the May 19, 2010 decision, citing a number of previous WCAT decisions in which panels have found that policy item #22.35 does not apply when a worker has been diagnosed with Pain Disorder Associated with both Psychological Factors and a General Medical Condition. The decisions cited by the workers' adviser were:

- *WCAT-2003-03993-RB* (a noteworthy decision)
- *WCAT-2004-04097*
- *WCAT-2004-03099*
- *WCAT-2005-00355*
- *WCAT-2005-02625*
- *WCAT-2006-00391-RB*
- *WCAT-2007-02445*
- *WCAT-2009-01198*

[16] In all of these WCAT decisions, the panel found that the statement from policy item #22.35 that "[c]hronic pain is not assessed as a psychological impairment" does not preclude the Board from assessing a Pain Disorder Associated with both Psychological Factors and a General Medical Condition.

[17] The case manager responded in a May 31, 2010 letter stating she would not reconsider her May 26, 2010 letter (this must have been an error in dates as the original letter was dated May 19, 2010).

[18] The worker sought a review. In the August 6, 2010 submission on the review, the worker submitted that the acceptance of chronic pain alone does not provide for any recognition of the psychological factors, which are significant enough to merit a diagnosis of a Pain Disorder Associated with both Psychological Factors and a General Medical Condition.

[19] In her September 20, 2010 decision rejecting the worker's request for review, the review officer pointed to Practice Directive #C3-1, which states that a DSM-IV Pain Disorder is included in a list of various medical conditions considered by the Board to be

synonymous with chronic pain. Only where the degree of emotional distress is sufficient to meet the DSM IV diagnostic criteria of a psychological disorder that is not primarily characterized by pain (such as major depression) is the disorder adjudicated separately.

- [20] The worker made a January 11, 2011 submission to WCAT. He referred to the decision of the British Columbia Supreme Court in *Bagri v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 300, and *WCAT-2006-00391-RB*, noting the conclusion that there is no legislative or policy basis for treating a Pain Disorder differently than other DSM-IV conditions. He submitted that contrary to the Board's practice, psychological conditions, of which Pain Disorder Associated with both Psychological Factors and a General Medical condition is one, must be assessed as psychological conditions, pursuant to the Permanent Disability Evaluation Schedule (PDES).

## Reasons and Findings

- [21] This appeal is limited to the narrow question of whether the Board's May 19, 2010 letter contains any reviewable decisions. If we find the letter contains any reviewable decision(s), the outcome of this appeal will be to refer the worker's file to the Review Division to review any such decision(s).

- [22] Sections 96.2(1)(a) and 96.3(1)(a) of the Act allow parties to request reviews of Board decisions respecting compensation or rehabilitation matters under Part 1 of the Act.

- [23] The Review Division - *Practices and Procedures* defines "decision" as follows:

A letter or other communication to the person affected that records the determination of a Board officer as to a person's entitlement to a benefit or benefits or a person's liability to perform an obligation or obligations under any section of the Act.

- [24] Section 96(4) of the Act authorizes the Board to reconsider decisions on its own initiative.

- [25] We are not obliged to accept the Review Division's definition of decision, as in assessing whether a Board letter is a reviewable decision, we must consider the matter that the Board's letter purported to address. Nonetheless, we note that RSCM II policy item #99.20 provides a similar definition to that of the Review Division of what constitutes a decision:

A "decision" is a determination of the Board to award, deny, reconsider or limit entitlement to benefits and services, or impose or relieve an obligation, pertaining to compensation or rehabilitation matters under Part 1 of the Act or policy.

[26] Section 96(5) of the Act provides:

(5) Despite subsection (4), the Board may not reconsider a decision or order if

- (a) more than 75 days have elapsed since that decision or order was made,
- (b) a review has been requested in respect of that decision or order under section 96.2, or
- (c) an appeal has been filed in respect of that decision or order under section 240.

[27] Section 1 of the Act defines “reconsider” as follows:

“reconsider” means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order;

[28] RSCM II item #C14-101.01 states that certain types of decisions do not constitute a reconsideration or a reopening of a previous decision. This type of decision includes new matters not previously decided. Examples of a new matter include the acceptability of additional medical conditions identified during the adjudication of a claim or the acceptability of further injury or disease that arises as a consequence of a work injury.

[29] We find the worker’s pain disorder qualifies as an additional medical condition identified as being a consequence of the work injury.

[30] Policy item #22.33 in the RSCM II states that psychological problems arising from a physical or psychological injury are acceptable as compensable consequences of the injury. However, there must be evidence that the worker is psychologically disabled. It cannot be assumed that such a disability exists simply because the worker has unexplained subjective complaints or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from the injury. When a psychological impairment becomes permanent, it will be necessary to determine whether there is entitlement to a permanent disability pension.

[31] RSCM II policy item #39.01 states a Board psychologist or a Board authorized external service provider makes the determination of whether there is a permanent psychological impairment, and the severity of the impairment. Once this evaluation is completed, the claim is referred to the Psychological Disability Committee to assess the percentage of disability resulting from the permanent psychological impairment.

- [32] Policy item #22.35 in the RSCM II, entitled "Pain and Chronic Pain" states that a worker's pain symptoms may be accepted as compensable where medical evidence indicates that the pain results as a compensable consequence of a work injury or occupational disease. It states that pain is not assessed as a psychological impairment.
- [33] RSCM II policy item #39.02 states that this policy sets out the guidelines for the assessment of section 23(1) awards for workers who experience a disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury.
- [34] Practice Directive #C3-1 currently states that DSM IV Pain Disorder is included in the medical conditions considered by the Board to be synonymous with chronic pain.
- [35] Practice Directives are not binding policy. While recognizing the #C3-1 Practice Directive is clear in stating that a DSM-IV Pain Disorder is synonymous with chronic pain as defined by RSCM II policy item #22.35, we find Board policy does not contain such a conclusion. Policy states that pain is not assessed as a psychological impairment, but it does not state that a diagnosed psychological condition with some relationship to the pain is not compensable otherwise than through a chronic pain award of 2.5%.
- [36] With reference to RSCM II policy item #22.33, we find it remained open to the case manager to adjudicate a DSM-IV Pain Disorder as a psychological condition under item #22.33 when the worker requested she do so in the May 10, 2010 letter. We do not find the statement in policy item #22.35 that "[p]ain is not assessed as a psychological impairment" precludes the Board's adjudication of a pain disorder as a psychological condition. In reaching our conclusion, we are persuaded by the reasoning found in the WCAT noteworthy decision, *WCAT-2003-03993-RB*, dated December 4, 2003, (see pages 10 to 15), which sets out why chronic pain and a pain disorder should be adjudicated separately. We are also persuaded by the reasoning in *WCAT-2006-00391-RB*.
- [37] We find the Board's May 19, 2010 letter contains a decision that is reviewable by the Review Division. We find the case manager's response to the worker's request for adjudication of his pain disorder was an implicit denial of the pain disorder that is reviewable by the Review Division. Through informing the worker that his pain disorder was previously adjudicated as chronic pain, we find the case manager implicitly communicated a decision denying the acceptance of pain disorder as a new matter under his claim. To conclude otherwise would deny the worker his right to request a review of the Board's determination that his pain disorder is the same as chronic pain.



## Conclusion

- [38] We allow the appeal and vary the September 20, 2010 Review Division decision, which rejected the worker's request for a review of the Board's May 19, 2010 letter. We return the matter to the Review Division for a decision about whether the Board appropriately denied acceptance of a Pain Disorder Associated with both Psychological Factors and a General Medical Condition.
- [39] No expenses are claimed and none are awarded.

Teresa White  
Vice Chair

Janice A. Leroy  
Vice Chair

Andrew Pendray  
Vice Chair

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