

**Noteworthy Decision Summary**

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**Decision:** WCAT-2012-00195   **Panel:** M. Redmond   **Decision Date:** January 23, 2012

***Section 23(1) of the Workers Compensation Act – Permanent Partial Disability Award – Amount of Award – Permanent Disability Evaluation Schedule – “Severe” Depressive Disorder***

This decision is noteworthy as an example of a decision that addresses the appropriate amount for a permanent disability award for depression, especially in cases where the medical evidence describes the worker's depression as “severe”.

The worker, a painter, injured his right buttocks and right shoulder when he fell at work. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted his claim for compensation for the permanent conditions of chronic pain in his right shoulder and low back, and a major depressive disorder. The Board decided that he was entitled to a permanent disability award on a functional basis for his psychological impairment, calculated at 50% of total disability. The Board's *Permanent Disability Evaluation Schedule* (PDES) sets out four broad categories for emotional and behavioural disturbances, these being “mild”, “moderate”, “marked”, and “extreme”. “Moderate” disturbances are valued at between 30% and 70% of total disability.

The worker requested a review of the Board's decision on the grounds that his psychological impairment should have been assessed at 100%, because the medical evidence confirmed that his condition was “severe”. However, the Review Division confirmed the Board's award of 50%. The worker appealed that decision to WCAT.

In his submission to WCAT, the worker argued that even if his condition was “moderate”, it should have been assessed at the upper level of the “moderate” category (70% of total disability), because he was unable to have a reasonably normal working and personal life. He submitted that this position was supported by a large amount of medical evidence and opinion that indicated the severity of his condition.

The WCAT panel noted that the term “severe”, which was used by a Board psychology advisor and other physicians to describe the extent of the worker's psychological condition, is not used in the PDES and thus it would be a matter of examining the evidence to determine in which of the PDES categories the worker should be placed.

The panel determined, using the Guidelines developed by the Board's Psychological Disability Awards Committee (PDAC), that the worker did not fall into the “extreme” category, which allows an award of 100%, because he was not impaired to the extent that there was significant interference with daily life activities or executive functioning, nor did he require significant supervision for routine tasks, or constant monitoring. The panel went on to determine that the worker did not fall into the “marked” category, because while the evidence showed that the worker had trouble concentrating, he did not require supervision other than during specific periods of psychosis, and was overall not significantly affected to the point that he could be considered markedly impaired.

Having thus determined that the worker fell into the “moderate” category, the panel referred to the PDAC Guidelines, which breaks the “moderate” category into two sub-sections. Each sub-section of the “moderate” category has four indicators, addressing vocational capacity, ability to perform activities of daily living, and ability to perform complex tasks. While the PDAC concluded that the restrictions the worker faced in performing daily life activities were not serious enough to be considered “moderate”, they did not provide any reasons for that conclusion, and as a result the panel placed no weight on that part of the PDAC’s decision. In contrast, the panel noted that the medical documentation of the worker’s weight loss, lack of appetite, low physical energy, lack of interpersonal relationships, and limited ability to interact with others was reasonable evidence of “moderate” restrictions on his activities of daily living. This, in combination with the documentation of the worker’s lack of vocational capacity and inability to perform complex tasks lead the panel to the conclusion that the worker fell into the higher sub-section of the “moderate” category. The panel concluded that the worker was entitled to an award of 70% of total disability for his psychological condition.

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Michael Redmond, Vice Chair

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## Introduction

- [1] The worker, a painter, was injured at work on December 1, 2003 when he fell on his right buttock and right shoulder. His application for compensation was eventually accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board), for the permanent conditions of chronic pain in his right shoulder and low back and a major depressive disorder.
- [2] The worker was granted a permanent partial disability (PPD) of 5.0% of total disability for the chronic pain conditions in his low back and right shoulder.
- [3] On November 22, 2010 the Board wrote to the worker, advising him it had assessed his entitlement to a PPD award for his permanent psychological impairment. The Board advised the worker it had determined he was entitled to an award of 50% of total disability for his psychological impairment. Combined with his previous chronic pain award and an age adaptability factor of 6.50% of total disability, the Board advised the worker his PPD award was now calculated at 61.50% of total disability on a functional impairment basis, with an effective date of December 3, 2007. The Board advised that a separate decision would be made to determine if the worker was entitled to an assessment for a loss of earnings pension.
- [4] The worker requested a review of that decision by the Review Division. In a decision dated May 12, 2011 the Review Division confirmed the Board's decision. The worker appealed that decision.
- [5] The appeal was conducted by means of a review of the claim file and the written submissions of the worker. The worker did not request an oral hearing and since the issue under appeal turns on the interpretation of medical evidence and not on disputed issues of credibility I am satisfied an oral hearing is not required for the fair adjudication of this matter. The employer did not participate in the appeal although advised of its right to do so.

## Issue(s)

- [6] The issue to be determined in this appeal is whether the worker is entitled to a PPD award greater than 50% of total disability for his compensable major depressive disorder.

## Jurisdiction

- [7] This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). The worker appeals a May 12, 2011 decision of the Review Division.
- [8] The relevant policies of the Board are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

## Background and Evidence

- [9] The background to this claim has been set out extensively in previous Review Division and WCAT decisions and, except to the extent necessary, I will not repeat that evidence here.
- [10] In a decision dated April 6, 2009, a WCAT panel found the worker's major depressive disorder was a permanent condition effective December 3, 2007 and referred the issue to the Board's Disability Awards Department for an assessment.
- [11] Following that decision the worker was referred for a psychological permanent functional impairment evaluation (PPFIE). That evaluation was conducted on July 17, 2009 by Dr. L. Lightfoot, a registered psychologist.
- [12] In her report of the PPFIE, dated August 26, 2008, but presumably made on August 28, 2009, Dr. Lightfoot reviewed the worker's psychological treatment history and described the evaluation process, including the information provided by the worker in an interview. She reviewed the results of the psychological tests conducted on the worker in the PPFIE and concluded those results were valid, although they might overestimate the degree of psychopathology because of the worker's tendency to over-report his psychological symptoms.
- [13] Dr. Lightfoot concluded the worker met the *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (DSM-IV) criteria for major depressive disorder dysthymia, severe with psychotic features, panic disorder with agoraphobia, and pain disorder associated with both psychological factors and a general medical condition. She said the worker's psychiatric symptoms were so severe and profound that they precluded a return to employment at that time. From a cognitive point of view he was experiencing difficulties in concentration, judgment and memory. Those symptoms were likely a result of his depression. He was also experiencing some paranoid symptoms which would likely significantly impair his ability to participate in interpersonal relationships in the workplace. His prognosis for returning to work was very guarded, given his age and the duration and severity of his symptoms, his limited response to all pharmacologic or psychotherapeutic interventions and his resistance to psychological interpretations of his difficulties.

- [14] On November 17, 2009 Dr. V. Colotla, a registered psychologist and Board psychology advisor, provided a clinical opinion, set out in the claim file. Dr. Colotla said he had reviewed Dr. Lightfoot's opinion and had concluded her conclusions were not in keeping with the information contained in the report.
- [15] Following a review of that opinion the Board's Psychological Disability Awards Committee (PDAC) met on November 19, 2009 and agreed to request further information from Dr. Lightfoot.
- [16] Following receipt of the requested information Dr. Colotla provided a further clinical opinion on May 31, 2010, in which he again concluded Dr. Lightfoot's conclusions were not reliable, given the balance of the test results reported.
- [17] The Board referred the worker to Dr. Colotla for a further evaluation. That evaluation was conducted on August 9, 2010 and a report of the evaluation is set out in the claim file on August 18, 2010.
- [18] Dr. Colotla reported the details of his interview of the worker, and stated he did not administer psychological tests, as he was concerned about the worker's English language proficiency and his cultural background which was different than the cultural norms used to establish the tests. Dr. Colotla said the worker's response pattern would likely be similar to that obtained in previous reports. He believed the worker was also too tired after an extensive interview to allow for proper psychometric examination.
- [19] Dr. Colotla concluded the worker met the criteria for a major depressive disorder, single episode, severe, without psychotic features. He also fulfilled the criteria for pain disorder associated with both psychological factors and a general medical condition. His cognitive difficulties restricted the worker from any position involving high speed or dangerous machinery and he was limited from complex tasks, high level decision making or multi-tasking. He also tired easily. His activities of daily living were affected mostly in sleeping and eating. He had psychotic symptoms in the past and given his persistent pain and severe depression he was likely to decompensate and become psychotic again in a work-related setting should he be forced to return to work-related activities. Dr. Colotla recommended ongoing psychological maintenance.
- [20] I note that while Dr. Colotla had expressed concerns with Dr. Lightfoot's opinion, his conclusions do not appear to differ from hers in any material way on the issues of the worker's limitations or restrictions related to his major depressive disorder.
- [21] In a clinical opinion dated November 5, 2010 Dr. Colotla noted the worker had suicidal ideation. Dr. Colotla noted there had been a three-month delay in PDAC's review of the claim and expressed his concern that further delay might be fatal.
- [22] On November 18, 2010 the PDAC again met to consider the worker's claim. After stating its general language on how it interprets and applies evidence, the PDAC noted

the worker's accepted permanent conditions were major depressive disorder and chronic pain. It said the psychological conditions diagnosed in the PPFI assessment were major depressive disorder, single episode, severe, and pain disorder associated with both psychological factors and a general medical condition.

- [23] The PDAC noted the worker was seven years post-injury and it described his current symptoms. It said the worker was described as having moderate symptoms that precluded his ability to function in a work setting, although he may be capable of sheltered work. There was no indication of executive dysfunction. The PDAC concluded that in keeping with the Board's Psychological Permanent Disability Evaluation Schedule, as further detailed in the Guidelines developed by the PDAC, the worker's compensable PFI should be rated at 50% of total disability.
- [24] On November 18, 2010 a Board disability awards officer (DAO) prepared a form 24 PFI Review Memorandum, noting the PDAC recommendation of a 50% functional impairment for the worker's psychological impairment and accepting that recommendation. The DAO calculated the worker's total PFI entitlement to be 55% of total disability, including the worker's chronic pain awards.
- [25] On November 22, 2010, the Board wrote to the worker, advising him of the new calculation of his functional impairment award which, with an age adaptability factor, would now be 61.50% of total disability on a functional impairment basis. The Board advised that a separate decision would be made on his entitlement to a loss of earnings assessment.
- [26] The worker requested a review of that decision by the Review Division.
- [27] In submissions to the Review Division the worker said he should be entitled to a PPD award of 100% of total disability. He stated that all the health care professionals with whom he had dealt indicated his psychological problems were severe. He said he was as disabled as a person could be and his chances of making a living were nil. The worker said he could not go outside or be with anyone.
- [28] On May 12, 2011, the Review Division issued a decision confirming the Board's decision. The Review Division said the issue of whether the worker could earn a living was one that would be addressed when the Board made a determination on his entitlement to a loss of earnings assessment.
- [29] On the issue of the worker's functional impairment award, the Review Division said the Board's decision was in conformance with Dr. Cololla's expert opinion and that of the PDAC. It said the PDAC had appropriately described the worker's condition as moderate and applied the appropriate criteria in the Permanent Disability Evaluation Schedule (PDES) for determining his entitlement to an award.
- [30] The worker appealed that decision.

## **Submissions**

- [31] In submissions provided with his notice of appeal the worker stated that he was unable to have a reasonably normal working and personal life. He also stated his position was supported by a voluminous amount of medical evidence and opinion, all of which indicated the severity of his condition. The worker said that even if his condition was “moderate”, it should have been assessed at the upper level of the “moderate” category, 70%, rather than the 50% assigned by the Board.

## **Law and Policy**

- [32] As the worker’s injury occurred before July 1, 2010, the version of Chapter 3 of the RSCM II that existed immediately prior to that date applies.
- [33] Section 23(1)(a) of the Act states that if a PPD results from a worker’s injury the Board must estimate the impairment of earning capacity from the nature and degree of the injury.
- [34] Section 23(2) of the Act states that the Board may compile a rating schedule of impairments of earning capacity that may be used as a guide when determining the compensation payable in permanent disability cases.
- [35] Section 23(1)(a) of the Act states that if a PPD results from a worker’s injury the Board must estimate the impairment of earning capacity from the nature and degree of the injury.
- [36] Section 250(4) of the Act states that if the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.
- [37] Policy item #39.00 of the RSCM II, states that the percentage of disability determined for the worker’s condition under section 23(1)(a) of the Act reflects the extent to which a particular injury is likely to impair a worker’s ability to earn in the future.
- [38] Policy item #39.10 of the RSCM II refers to the Scheduled Awards PDES and states that the PDES is a set of guide lines for percentages of impairment for specific injuries. The DAO or claims adjudicator disability awards may apply other variables as well in arriving at a final pension. Those “other variables” must relate to the degree of physical impairment.
- [39] Policy item #97.00 of the RSCM II deals with the issue of the evidence and the burden of proof in Board claims. The correct approach is to examine the evidence to see if it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If, on

weighing the evidence there is a preponderance in favour of one view over another, that is the conclusion that must be reached.

- [40] Policy item #97.10 of the RSCM II deals with the weighing of evidence. If evidence is evenly weighted, a decision must be made in favour of the worker. This only applies, however, if there is evidence of roughly equal weight, and does not apply if the evidence indicates one possibility is more likely than the other.
  
- [41] Policy item #97.32 of the RSCM II states that a statement of a claimant about his or her own condition is evidence insofar as it relates to matters that would be within the worker's knowledge. There is no requirement that a statement of a worker about his or her condition must be corroborated. A conclusion against a statement by a worker may be reached if it is based on a substantial foundation, such as clinical findings or other medical or non-medical evidence.
  
- [42] Policy item #97.34 of the RSCM II sets out the guidelines for dealing with a conflict of medical opinion. A Board officer must not automatically prefer the opinions of one category of doctors to another category. The Board officer must analyze the opinions and conflicts as best as possible on each issue and arrive at her or his own conclusions about where the preponderance of the evidence lies. If it is concluded that there is doubt on any issue, and that the evidence supporting different findings on an issue is evenly weighted in that case, the Board officer must follow the mandate of section 99 of the Act and resolve that issue in a manner that favours the worker.

## Findings and Reasons

- [43] The appeal is allowed and the decision of the Review Division is varied.
  
- [44] While Dr. Colotla and other physicians who have examined the worker have diagnosed his depression as "Severe", the use of that term by itself is not determinative of the category of the PDES which should be used to assess the worker's functional impairment. As PDAC noted in its memorandum, the terms used by medical practitioners in, for example, the DSM-IV, are not the same as those used by the Board in setting PPD awards and assessing the impact of a disability on a worker's earning capacity.
  
- [45] There is no question but that the worker's psychological impairment has had a significant effect on his life and has reduced his earning capacity. I note, however, as did the Review Division, that the Board decision that is the basis of this appeal did not address the question of whether the worker was entitled to an assessment for a loss of earnings pension. That issue is the subject of a separate Board decision and is not a matter over which I have jurisdiction in this appeal.
  
- [46] The Board has established a schedule for assessing a worker's entitlement to a PPD award for psychological disability, set out in the PDES. That schedule sets four broad



categories for emotional and behavioural disturbances, “mild”, “moderate”, “marked” and “extreme”. The term “severe” is not used by the Board in this context and it is necessary, in determining a worker’s entitlement to a psychological PPD award, to examine the evidence of his or her disability to determine into which of the Board’s categories he or she should be placed.

- [47] To assist in obtaining consistency in such decisions the PDAC has adopted Guidelines, which elaborate on, but do not replace, the PDES descriptions of psychological disability.
- [48] While the worker has argued that he should be granted a 100% PPD award for his disability, the PDES only allows such an award for “extreme” impairment levels, which it describes as an impairment level that precludes most useful functioning. The Guidelines state that such an award should be granted where there is significant interference with activities of daily living or executive functioning, the worker can be left alone only for brief periods, the worker requires significant supervision for routine tasks and the worker requires constant supervision and monitoring.
- [49] While the worker is impaired by his depression I do not find the evidence supports a finding he is impaired to the extreme extent that would warrant a 100% PPD award.
- [50] The “marked to extreme” category of the Guidelines, which recommends an award of between 75% to 90% and which corresponds to the “marked” category of the PDES, requires the worker have significant problems in activities of daily living or executive dysfunction, requires supervision, monitoring for moderately complex tasks and can be left unsupervised some of the time. In the worker’s case the medical evidence does not indicate he requires supervision at any time, other than the periods in which he had decompensated and suffered from psychosis. While the medical evidence does indicate the worker has difficulty concentrating I do not find the worker’s overall condition is significantly affected to the degree that he could be considered in the “marked” category.
- [51] The issue, then, is in which category of the “moderate” category of psychological impairment the worker should have been placed. The PDES itself provides a broad range of awards for the category, from 30% to 70% of total disability. The PDES itself only states that an award will be granted if the worker’s impairment levels are compatible with some but not all useful functioning.
- [52] Having determined that the worker’s condition met the “moderate” category as defined in the PDES, the PDAC assigned an amount of 50% of total impairment to the worker. The PDAC did not specifically address the assessment Guidelines as they might apply to the evidence. It did state that the worker’s symptoms precluded his ability to function in a work setting, stating that he may be capable of sheltered work. It also said there was no indication of any executive dysfunction. It did not explain, however, how it arrived at an award figure of 50% of total disability, given the Guidelines.

The Guidelines state that an award of between 50% and 60% of total disability can be granted if a worker has:

- a) No significant competitive vocational capacity;
- b) Has competitive vocational capacity only in exceptional circumstances;
- c) May be capable of sheltered work;
- d) Has “none to mild” problems with activities of daily living or executive dysfunction.

[53] The next category of award, between 65% and 75%, requires:

- a) No significant competitive vocational capacity;
- b) The worker may be capable of sheltered work if provided significant support;
- c) The worker has moderate problems with activities of daily living or executive dysfunction;
- d) Supervision or monitoring is required for some complex tasks.

[54] In the worker’s case, the psychological evaluations agree he has no significant vocational capacity, and he is unsuited for any complex tasks. That would appear to meet two of the criteria for an award at the higher end of the “moderate” category.

[55] On the question of whether the worker has any “executive dysfunction”, there would appear to be no objective evidence that he has, as that term is generally understood to mean, that is, an diminution of the planning capacity of the worker. There is, however, evidence that the worker had some difficulties with his activities of daily living.

[56] The Guidelines indicate a difference between “none to mild” difficulties in activities of daily living and “moderate” difficulties. The Guidelines do not provide a definition of those terms and each individual case must, in any event, be judged on its own merits and evidence. In this case the significant effects of the worker’s depression have been described in detail by both Dr. Lightfoot and Dr. Colotla.

[57] I note the medical evidence provides consistent observations regarding the effect the worker’s depression has on his activities of daily living. In addition to the sleep dysfunction and weight loss caused by his lack of appetite, the worker’s depression has also left him with very low physical energy, few if any interpersonal relationships, and limited ability to interact with others. I find it is reasonable to describe the worker’s restrictions on his activities of daily living as “moderate”. While the PDAC apparently decided otherwise, they have not provided any explanation for their decision and, accordingly, I can place no weight on that part of their opinion.

[58] As for the requirement that the worker needs supervision or monitoring for some complex tasks, the evidence appears to be that the worker is not capable of complex tasks.

- [59] Accordingly, I find the medical evidence does support a conclusion that the worker's psychological disability should be considered at the upper level of "moderate" impairment. I find the worker is entitled to a PPD award for his psychological disability of 70% of total disability.

## **Conclusion**

- [60] The appeal is allowed and the decision of the Review Division is varied. I find the worker's compensable psychological disability entitles him to a PPD award of 70% of total disability on a functional impairment basis. The worker is also entitled to his existing award of 10% of total disability for his chronic pain conditions. The Board will have to make a new calculation of any age adaptability factor to which the worker may be entitled as a result of this decision.
- [61] The worker did not request any expenses of this appeal, none appear warranted and no expenses are awarded.

Michael Redmond  
Vice Chair

MR/ec