

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

- [1] The worker, a professional engineer, was injured at work on March 27, 2013. The Workers' Compensation Board, operating as WorkSafeBC (Board) accepted the worker's claim for compression fractures of the spine. The Board accepted that this was a permanent condition, and the worker's claim file was referred to the Board's Disability Awards Department to determine the nature and extent of his permanent impairment.
- [2] In a decision letter dated March 24, 2015, a Board disability awards officer advised the worker that a permanent partial disability pension in the amount of 20.44% of a totally disabled person had been awarded. An age adaptability factor of 2.816% had been added, for an overall award of 23.256% of total disability. The worker's award was made effective May 13, 2013, and was calculated using the long-term wage rate previously established on the worker's claim. The worker's pension would be paid until he reached 65 years of age, and then concluded.
- [3] The worker requested a review of that decision from the Review Division. In a decision dated November 3, 2015, *Review Reference #R0190918*, a review officer found that that the evidence did not support that it was more likely than not that the worker had planned to work past age 65. He therefore found that the Board's decision to conclude payment of the worker's pension award at age 65 was in accordance with the evidence, the law, and Board policy.
- [4] The Board's March 24, 2015 decision was confirmed. The worker appeals the Review Division's November 3, 2015 decision.

Issue(s)

- [5] Pursuant to section 3.3.1 of the Workers' Compensation Appeal Tribunal (WCAT) *Manual of Rules of Practice and Procedure* (MRPP), WCAT will generally restrict its decision to the issues raised by the worker in the worker's notice of appeal and submissions. The worker did not dispute the calculation of his functional award, but took issue only with the Board's decision to conclude his pension entitlement when he reached 65 years of age. Therefore, in accordance with WCAT's practice, the only issue to be determined in this decision is whether the Board correctly determined to conclude the worker's pension entitlement when he reached 65 years of age.

Jurisdiction

- [6] This appeal of a decision made by a review officer has been brought pursuant to section 239(1) of the *Workers Compensation Act* (Act). WCAT must make its decision on the merits and justice of the case, but in doing so must apply the policy of the board of directors of the Board that is applicable in the case.

[7] WCAT has inquiry power and the discretion to seek further evidence, although it is not obligated to do so. The standard of proof in compensation matters is the balance of probabilities, subject to the provisions of section 250(4) of the Act, which provides that, if the evidence supporting different findings on an issue is evenly weighted, the WCAT panel must resolve that issue in a manner that favours the worker.

[8] The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

[9] Rule #7.50 of the MRPP provides that a request for an oral hearing will normally be granted where the appeal involves a significant issue of credibility. An oral hearing *may* be granted if there are significant factual matters to be determined, or for other compelling reasons.

[10] The worker did not request an oral hearing on this matter, and the WCAT Registry assigned it to be decided by means of a reading of the materials on the claim file. I agree with the WCAT Registry that the matters here at issue can be fairly decided without an oral hearing, as the matters are not complex in nature, there are no significant issues of credibility involved. Any significant disputed factual issues concerning this appeal can be determined through a review of the file material and the evidence and/or the submissions provided. The issue rests primarily on weighing the evidence and applying and interpreting the applicable law and policy. I am satisfied that an oral hearing is not necessary.

[11] Consequently, I have reviewed the evidence in the claim file, the submissions made by the worker in support of his position (set out in detail below), the Act, and applicable Board policy in effect at the time of the events here in question, as set out in the RSCM II. The worker and his representative have had full disclosure of the claim file available to them, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

[12] The worker was employed as a professional engineer; in 2013, he was 60 years old. On March 27, 2013, the worker was injured when he fell six feet from scaffolding, landing on the concrete below. He submitted an application for compensation to the Board on April 8, 2013, and his claim was accepted for compression fractures of the spine. That condition was accepted to be permanent, and the worker's claim file was referred to the Board's Disability Awards Department to determine the nature and extent of his permanent impairment.

[13] The Board advised the worker in a January 30, 2015 letter that permanent partial disability benefits were normally payable to age 65. The letter asked the worker to provide information and/or evidence regarding his intention, at the time of the injury, regarding whether he planned to retire later than age 65. The worker did not respond to the Board's invitation for evidence on this matter.

[14] In a decision letter dated March 24, 2015, a Board disability awards officer advised the worker that a permanent partial disability pension in the amount of 20.44% of a totally disabled person had been awarded. An age adaptability factor of 2.816% had been added, for an overall award of 23.256% of total disability. The worker's award was made effective May 13, 2013, and was calculated using the long-term wage rate previously established on the worker's claim. The worker's pension would be paid until he reached 65 years of age, and then concluded.

- [15] The worker requested a review of the Board's decision from the Review Division. The worker's representative provided submissions to the Review Division. He argued that the worker had planned to work beyond age 65, to at least 75 years of age. The representative advised that the worker had completed his schooling, married, and purchased a family home later than normal. The worker was in good health, and his pre-injury employment was not overly strenuous. Finally, he did not have a pension plan or retirement benefits, and had a financial motive to continue working past age 65. The worker also submitted a number of exhibits, including a letter from a co-worker, who had heard the worker state that he would be working well past the normal retirement age.
- [16] In its submissions to the Review Division, the employer advised that its employees could elect to postpone their retirement date providing they were able to perform their core job responsibilities. Six of its 209 employees were over the age of 65.
- [17] In a November 3, 2015 decision, a review officer noted that motive alone is not sufficient evidence for the exception to the standard retirement date to apply. The review officer did not interpret the evidence from a co-worker confirmed that the worker had developed a plan to continue working beyond age 65. The review officer found that the evidence did not support that it was more likely than not that the worker had planned to work past age 65. He therefore found that the Board's decision to conclude payment of the worker's pension award at age 65 was in accordance with the evidence, the law, and Board policy.
- [18] The worker's request for review was denied; the Board's March 24, 2015 decision was confirmed.
- [19] The worker has appealed the Review Division's decision. In support of his appeal of the November 3, 2015 decision, the worker has provided a submission from his representative dated March 17, 2016. The worker's representative reiterated his submissions to the Review Division regarding the worker's ongoing financial obligations, and resulting motivation to continue working. The representative referred the panel to the employer's submissions to the Review Division supporting that the employer continued to employ people beyond the normal retirement age. The representative noted that the nature of the worker's career and the demand for his expertise would support his working past 65 years of age and to 75 years of age.
- [20] The worker's representative noted the worker's demonstrated abilities and good health. He submitted that the worker met the test for the exception to the standard retirement age. But for the compensable injury, the worker would have worked until age 75, as confirmed by the worker in his own statement. The representative asked the panel to vary the Review Division's decision, and to find that the worker's pension should continue to be paid until he reached 75 years of age.
- [21] Included with the submission were a number of letters from current and former colleagues of the worker, referencing conversations with the worker prior to the compensable injury. They confirm the writer's impression that the worker would have worked past the age of 65.

[22] Also included were the following:

- an excerpt from the employer's website, indicating the nature of work being undertaken by the company;
- mortgage documents and amortization cost calculations;
- an asset and liability statement; and
- a summary of family expenses.

[23] Also included in the materials submitted are two letters from the worker to the employer, dated May 29, 2013 and June 17, 2013. Both letters confirm his intention to retire after 14 years with the company. The retirement date noted was July 5, 2013.

[24] The employer did not participate in the worker's appeal, although provided the opportunity to do so.

Reasons and Findings

[25] Section 23.1(a) of the Act provides that a pension may be paid to a worker (who is less than 63 years of age at the date of injury) only until the worker reaches the age of 65, unless the Board is satisfied that the worker would retire after that date, in which case the worker's pension would be paid until the date determined by the Board that the worker would have retired.

[26] The Board amended policy item #41.00 of the RSCM II, which deals with the duration of permanent partial disability payments, effective June 1, 2014. Because the Board decision underlying this appeal was made after June 1, 2014, the changes apply to this appeal. The policy provides that if the Board is satisfied that a worker would retire after reaching 65 years of age, the Act permits the Board to continue to pay benefits to the age the worker would have retired if the worker had not been injured. When determining whether a worker would retire after age 65, the Board considers the circumstances of the individual worker at the time of the injury.

[27] The standard of proof under the Act is on a balance of probabilities, as described in policy item #97.00 of the RSCM II. However, as age 65 is the established retirement age under the Act, the Board requires evidence that is verified by an independent source to confirm the worker would work past age 65. Evidence is also required so that the Board can establish the worker's new retirement date for the purpose of concluding permanent disability award payments

[28] Examples of the type of independent verifiable evidence include: the names of employers the worker intended to work for after age 65, and information from the employer to confirm that it intended to employ the worker after that age, and that employment was available; a financial plan indicating a post age 65 retirement date, established prior to the date of the injury; and an accountant's statement, for self employed workers, verifying a long-term business plan, established prior to the date of injury, indicating the continuation of working beyond age 65.

[29] Other kinds of independent verifiable information, such as information from a union regarding the normal retirement age for such workers, financial obligations of the worker, and family commitments of the worker, would be considered by the Board. The Board would consider any

other relevant information as well, in determining whether it was more likely than not that a worker would have worked past age 65, and at what date the worker would have retired

- [30] The Board has also issued a practice directive (Practice Directive #C5-1) regarding the duration of permanent partial disability benefits. Practice directives are not binding on WCAT panels, but do provide useful guidance in the adjudication of the duration of permanent partial disability awards. The practice directive provides that, to ensure fair and equitable treatment for all workers, Board officers should carefully consider whether the evidence actually supports a worker's contention that he would have been working after age 65. Furthermore, even if there is evidence that a worker intended to work after age 65, regard must be had to the ability and/or likelihood that he would actually succeed in finding or continuing employment after the age of 65.
- [31] I have also noted *WCAT-2015-03494*, which, while not binding on me, does provide guidance. In that appeal, a prior WCAT panel found that it is possible to determine that a worker would have worked past age 65 "if there is sufficient positive evidence other than the kinds of independently verifiable evidence listed in the policy." I am in agreement with this interpretation, and find that is consistent with the practice directive noted above.
- [32] In this case, I find that there is sufficient evidence to support that the worker would have worked past age 65. His profession is such that he would be able, and likely, to do so. The employer has confirmed that the worker could have continued to work so long as he was physically able to do his job. I accept that the worker's health, prior to his compensable injury, would have enabled him to continue working past 65 years of age.
- [33] The worker had financial motivation to continue working. With regard to the worker's financial obligations, the Board's practice directive, cited above, provides that motive alone is insufficient evidence for the exception to the standard retirement date to apply. Here, however, it is only one of several factors being applied.
- [34] The worker submitted letters from current and former co-workers indicating that the worker had discussed his plans to continue working beyond age 65.
- [35] I acknowledge and accept the worker's statements regarding the nature of his employment and his intention to work past age 65, and accept that the evidence submitted, while not a formal, written plan, is sufficient evidence of the worker's plan to do so. I find that there is sufficient evidence to deviate from the Board's standard retirement age of 65 years. The worker's appeal on this matter is allowed, and the Board is directed to extend the worker's pension entitlement until he reaches 75 years of age.

Conclusion

- [36] With regard to the issue of whether the Board correctly determined that the worker's pension entitlement should conclude when the worker reached 65 years of age, I allow the worker's appeal, for the reasons set out above. The Review Division's November 3, 2015 decision is varied.

- [37] Section 7 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002, provides for the reimbursement of expenses associated with an appeal. It does not appear from a review of the file that any expenses were incurred in mounting this appeal, none were requested by the worker or his representative, and none are ordered by this panel.

Nora Jackson
Vice Chair