

## Decision of the Appeal Division

**Number:** 2001-1285/2001-1286  
**Date:** June 28, 2001  
**Panel:** John Steeves  
**Subject:** Effective Date of Pension

**APPLICATION FOR COMPENSATION (OCCUPATIONAL DISEASE, SILICOSIS) (REFERRALS OF REVIEW BOARD FINDINGS)** – In 1997, worker applied for compensation for silicosis – Pension granted, effective the date of application – Worker appealed – Appeal allowed in part – Review Board relied on medical evidence that the worker was symptomatic in 1994 and adjusted the effective pension date – Worker appealed amount of functional pension – Matter referred by the president to the Appeal Division under s. 96(4) – Claim not filed within three years of medical disablement – When an application for compensation is not filed in time there can be a difference between the date of medical disablement and the date when compensation is effective – Review Board erred in law by not applying s. 55 of the Act and contravened policy by applying policy #29.42 for a purpose it was not intended.

**Law:** WCA (1996): s. 6(8), s. 23(1), s. 55(3.1), s. 91(1), s. 96(4)  
**Policy:** RSCM: #29.42

*Section 96(4) – Referral [s. 96(4) referral]  
Permanent Disability Award – Impairment Percentage [worker appeal (rev. brd.)]  
Appeal Division Decision No. 2001-1285/2001-1286*

17 *Workers' Compensation Reporter* [583]

- 
- (1) This is a decision with regards to two matters before the Appeal Division. The first is a referral to the Appeal Division by the president of the Board, pursuant to section 96(4) of the *Workers Compensation Act* (the "Act"), of a Review Board finding dated November 29, 2000. The second matter is an appeal by the worker pursuant to section 91 of the Act of the same Review Board finding of November 29, 2000.

### **Issue(s)**

- (2) With regards to the president's referral pursuant to section 96(4) of the Act the issue before me is whether the Review Board finding of November 29, 2000 contains an error of law or contravention of policy. With regards to the worker's appeal pursuant to section 91 of the Act he has raised the issue of the effective date of his pension.

- (3) I set out sections of the Act that are relevant to this decision as follows,

### **Section 6 – Occupational disease**

6(8) A worker in the metalliferous mining industry or coal mining industry who becomes disabled from uncomplicated silicosis or from silicosis complicated with tuberculosis is entitled to compensation for total or partial disability as provided by this Part, and where death results from the disability, the dependants of the worker are entitled to compensation as provided by this Part; but neither a worker nor a dependant is entitled to compensation for the disability or death unless the worker

- (a) has been a resident of the Province for a period of at least 3 years last preceding the disablement, or unless at least  $\frac{2}{3}$  of the worker's exposure to dust containing silica was in the Province;
- (b) was free from silicosis and tuberculosis before being first exposed to dust containing silica in the metalliferous mining or coal mining industry in this Province; and
- (c) has been a worker exposed to dust containing silica in the metalliferous mining or coal mining industry in the Province for a period or periods aggregating 3 years preceding his or her disablement, or for a lesser period if the worker was not exposed to dust containing silica anywhere except in this Province.

### **Section 55 – Application for compensation**

(1) An application for compensation must be made on the form prescribed by the board or the regulations and must be signed by the worker or dependant; but, where the board is satisfied that compensation is payable, it may be paid without an application.

(2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).

(3) If the board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the board may pay the compensation provided by this Part if the application is filed within 3 years after that date.

(3.1) The board may pay the compensation provided by this Part for the period commencing on the date the board received the application for compensation if

- 
- (a) the board is satisfied that special circumstances existed which precluded the filing of an application within one year after the date referred to in subsection (2), and
  - (b) the application is filed more than 3 years after the date referred to in subsection (2).

### **Section 91 – Appeal to appeal division**

(1) Where the review board makes a finding under section 90, the worker, the worker's dependants, the worker's employer or the representative of any of them may, not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow, appeal the finding to the appeal division.

(2) Where an appeal is commenced under subsection (1), the appeal division may direct the review board to reconsider the matter either generally or on a particular issue, and the appeal division may withhold its decision pending the finding of the review board.

(3) A decision on an appeal commenced under subsection (1) must be made as soon as practicable and in any case within

- (a) 90 days of the date on which the appeal is commenced,
- (b) 90 days of a reconsideration by the review board under subsection (2), or
- (c) a longer period the chief appeal commissioner may designate where the appellant requests a delay in the proceedings or where the chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

### **Section 96 –Jurisdiction of board**

(4) The president may, not more than 30 days after a finding of the review board is sent out, refer the finding to the appeal division for redetermination on grounds of error of law or contravention of a published policy of the governors.

- (4) The jurisdiction of the Appeal Division in an appeal pursuant to section 91 of the Act is described in section 96(3) as the authority to, "re-open, re-hear and redetermine any matter that has been dealt with by the Review Board." Decision 75 of the governors (10 *Workers' Compensation Reporter* 753) provides more detail about my jurisdiction on the worker's appeal in this case by stating that the Appeal Division can, "initiate" and "conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it."

---

## **Background**

- (5) The worker was employed in the mining industry for a number of years and he stopped work in 1981.
- (6) On August 20, 1997 the worker made an application for compensation for silicosis and he listed his first exposure in British Columbia as occurring in 1962. After reviewing a C.T. scan dated January 11, 1994 Dr. M, an expert in radiology, provided a report dated July 7, 1998 in which he identified bilateral calcified plaques. There were also bilateral upper lobe nodules in a pattern and distribution most suggestive of silicosis. In memo #8 Dr. F, a Board internal medicine consultant, accepted that there was a pulmonary impairment and his opinion was that the worker fulfilled the requirements for Class 2 of the American Medical Association classes of respiratory impairment. The range in this class is 10% to 25% and Dr. F thought that the worker had a maximum of 15% overall respiratory impairment.
- (7) In a decision dated November 18, 1998 the Board advised the worker that his diagnosed silicosis had been accepted by the Board and his impairment had been judged to be 15% of total. He was granted a pension of \$352.35 per month effective August 20, 1997. This date was chosen as the date of the worker's application for benefits because there was no clear indication that the worker had a medical disability prior to that time (memo #9). There was no consideration of a loss of earnings' pension because it was believed that the worker had been retired for approximately 15 years. Memo 10 indicates that the earnings used for calculating the worker's pension were those from his last year worked in 1981.

## **Review Board Finding of November 29, 2000**

- (8) The worker appealed the decision of November 18, 1998 to the Review Board.
- (9) In a finding dated November 29, 2000 the majority of a Review Board panel allowed the worker's appeal in part. The majority's decision can be summarized as follows:
  - (a) The panel found that the Board correctly assessed the worker's impairment at 15% of total.
  - (b) The majority found that the worker's average earnings for the purpose of computing his wage rate should be calculated with reference to his 1981 and 1982 earnings up to the date of his retirement. It was an error for the Board to use the worker's earnings in 1981, the last full year in which he was employed, according to the majority.
  - (c) The majority found that the Board erred in determining the effective date of the worker's pension at August 20, 1997. The majority accepted that the date of application for benefits was one option allowed by policy. However, they preferred the medical opinion of Dr. M who had found in July 1998 that the worker had findings consistent with silicosis based on a 1994 C.T. scan. On this basis the majority found that the effective date for the worker's pension should be January 12, 1994.

---

(d) The majority accepted that the worker was not entitled to a loss of earnings pension because he had retired.

- (10) The dissenting vice-chair would have denied the worker's appeal for two reasons. First, the worker had not been disabled from earning wages as a result of his compensable disease. This is because he retired in 1981 and the disease was not diagnosed until 1994. Also, the dissenting vice-chair applied section 55 and 6(2) of the Act and found that 1994 would be the date of injury after applying section 6(2) of the Act. When an application is received more than three years after the date of injury this provision of the Act permits payment of benefits but only from the date of the application.

### **President's Referral**

- (11) In memo #11, December 6, 2000, a claims adjudicator in the Board's Occupational Disease Unit submitted to his manager that the Review Board finding of November 29, 2000 contained an error of law;

If this worker was in fact disabled as of January, 1994 he has failed to file an Application for Compensation within one year of the date of disablement from his disease. Implicit in the Review Board findings is that special circumstances existed which precluded the filing of an application in a timely fashion. However, Section 55(3.1) provides that where such special circumstances existed and where the application is filed more than three years after the date of disablement by the occupational disease, benefits under the *Act* can only be paid "for the period commencing on the date the Board received the Application for Compensation" (sic). Clearly the timeframe from January 12, 1994 to August 20, 1997 exceeds three years. This is why the pension was made effective from the time of his application, namely August 20, 1997. To initiate a disability award with an effective date of January 12, 1994 would be in breach of Section 55(3.1) of the *Act*.

- (12) In a memorandum dated December 11, 2000 the president referred the Review Board finding to the Appeal Division pursuant to section 96(4) of the Act.

### **Worker's Appeal**

- (13) The worker has also appealed the Review Board finding of November 29, 2000. In a submission dated December 28, 2000 the worker stated the following:

(1) If the Board considers the findings of [Dr. M] that the conditions described as parenchymal disease (silicosis & bilateral calcified plural plaques relating to exposure from 1/12/94 I don't see why my pension can't be considered from that date.

(2) Why I did not apply for compensation till 1997.

I was hoping my breathing of the lungs would improve like the health of rest of me did after the lung surgery and no need to apply for compensation (this did not happen).

Was at a loss how to apply for compensation (never heard of workers advisers) contacted a labour lawyer in [city] he asked for \$500 before he would look at my case. After lung surgery had two cancer cases and a heart problem, so was not thinking of W.C.B.

(3) Do think that [Dr. F's] impairment of 15% is on the low side, my pension of 367.05 per month does not amount to much as Revenue Canada took away pension supplement when it was payed.

(4) Throuout the correspondence there is a referance to my employer [name] retiring me, this is not the case, was on a salary and they dismissed me without any notice, or monatary allowance, other than severance pay. Was told I could now get old age security, which I did 3 years later as I was only 62 years of age at that time.

[reproduced as written]

### **Submission From Employers' Advisers**

- (14) In a submission dated March 20, 2000 the Employers' Adviser advised that they would not be responding specifically to the worker's appeal. They did however provide a detailed submission with regards to the president's referral.
- (15) The Employers' Adviser supports the president's referral. It is submitted that the Review Board majority erred in determining the effective date of the pension to be January 12, 1994. Pursuant to section 55 of the Act the worker must first satisfy the Board that there were special circumstances which precluded his filing the application if he was in fact disabled in January 1994. If the worker meets this requirement then the Board may exercise its discretion to pay the pension award, but only from the date of application. The Employers' Adviser submits that the Appeal Division must first consider and determine the date of disablement and this decision will then direct the course of action to be followed under the Act and policy.

### **Decision and Reasons**

- (16) On March 27, 2001 I held a hearing into the matters before me. At that hearing the worker attended on his own. Initially the Workers' Adviser and Employers' Adviser indicated that they were going to attend the hearing but they subsequently advised that they would not attend.

- 
- (17) During the hearing before me the worker referred to surgery he had in 1991 or 1994. He was not sure of the date but he recalled it was surgery on his lungs, he recalled the name of the surgeon and the hospital. On the basis of this evidence the Appeal Division obtained further medical records which describe a carcinoma in the right lung plus diffuse pleural plaques and non specific fibrosis. This information was disclosed to the worker and he was given an opportunity to provide a submission on this information but no submission was received. A lobectomy was done on January 19, 1994. Much of this is summarized in a report from Dr. K, the surgeon, dated March 1, 1994, which was on file prior to the hearing.
- (18) At the hearing before me the worker also made submissions on two issues which were of concern to him. The first was that he believes that his disability was more than 15% of total and this is the focus of his appeal. On the second issue he submits, as a party to the president's referral, that the majority of the Review Board was correct because he believes that the effective date of his pension should be 1994.
- (19) The worker objects to the Board describing his leaving work in 1981 as retirement. In his evidence before me he says that he was "dismissed" from the employer at the time. He was a supervisor of maintenance with the employer in an excluded position and he was having difficulties with management of the mine over issues such as safety. I accept that description of the worker's history with his last employer but the worker also explained that there was "lots of other work" and he did not take advantage of that other work. He described the situation as his age being in the early 60s and he "had had enough." In these circumstances I find that it can be fairly stated that the worker retired in 1981.
- (20) With regards to whether the worker has an impairment of 15% of total the worker states that, "I can't do 15% of the work I used to do." While he can walk up stairs he cannot perform that activity in a hurry. He can go for extended walks but he has to rest during those walks. As well, he does not have the breath to mow his lawn except when he uses a self-propelled mower.
- (21) I have reviewed the issue of the percentage of disability awarded to the worker in the context of his appeal. While I appreciate the worker's comments about his reduced activity the determination of impairment in these matters is determined by classifying the worker within the guidelines of the American Medical Association. They are a reflection of medical tests rather than a person's perceptions of his disability. In this case memo #8 sets out a medical opinion that the worker fulfills the requirements for Class 2 of the guidelines with a range of 10% to 25% of the whole person and his individual situation is that he has a 15% overall respiratory impairment. The medical tests used to determine the opinion have not been challenged and, in the absence of a contrary medical opinion, I cannot make a different finding than the one in memo #8.
- (22) For these reasons I deny the worker's appeal on the issue of the amount of his functional pension pursuant to section 23(1) of the Act. On the basis of the evidence available to me his permanent impairment was correctly assessed at 15% of total. I also find that the Board correctly determined the average earnings of the worker and it was correct to conclude that he was not entitled to a loss of earnings' pension.

- 
- (23) Given the two matters before me – the president’s referral and the worker’s appeal – it is sensible to consider the issue of the effective date in the context of both matters. Again the president submits that the effective date should be August 20, 1997, the date of the worker’s application for compensation, and the worker submits the Review Board majority was correct when they concluded it should be 1994.
- (24) The worker gave evidence to me that he does not recall lung symptoms until the surgery he had in 1994. He describes the surgery as taking two-weeks hospital time and then some recovery time afterwards. In fact, the worker describes himself as “still recovering” because he attributes the beginning of his symptoms to the surgery. That is, he describes no symptoms prior to the surgery and the surgery was done as a result of the finding of a spot on his lung through a routine x-ray.
- (25) It seems to me a fair reading of the evidence that the worker was symptomatic as of the date of surgery in 1994 and, furthermore, it seems clear that he was disabled in 1994 as a result of being hospitalized and the subsequent recovery. Put another way, if the worker had been employed at the time he would have missed work as a result of his surgery.
- (26) With regards to the Review Board finding of November 29, 2000 I note the majority’s conclusion that the evidence of Dr. M supported a conclusion that the worker had symptoms in 1994 and this was used as the basis for concluding that the date of disablement of the worker should be in 1994. To the extent that this is a medical finding I agree with this conclusion. But it is only part of the inquiry of what is the effective date of the worker’s compensation in the form of a pension.
- (27) The Review Board majority used 1994 as the effective date of the worker’s pension. They accepted that using the date on which the worker applied for benefits was “certainly one option allowed by policy” but they identified another option in governors’ policy at #29.42 of the *Rehabilitation Services and Claims Manual* (the “Manual”). I have set out that policy in its entirety and emphasized the portions highlighted by the majority of the Review Board panel;

#### **#29.42 Meaning of Disabled from Silicosis**

The restrictions in section 6(1) do not apply to silicosis. It is, therefore, not a requirement of a claim for silicosis that there should be a lessened capacity for work, or that the worker should be disabled from earning full wages at the work at which he or she was employed.

It is a requirement in a claim for silicosis that the worker be “disabled” from the silicosis, or from silicosis complicated with tuberculosis. There is no definition of “disability” in the Act, and the Board has not attempted any comprehensive definition. If a worker has a condition of an internal organ which is so slight as to be unnoticeable to that person, and which causes no significant discomfort or other ill effects, that is not a “disability”.

It can be difficult to fix the date for commencing the pension when there is no change of jobs or reduction in earnings to mark the inception of the disability. **No general rules can be laid down for this purpose.** The Adjudicator must decide the question according to the available evidence. However, **if the evidence does not clearly establish when the disability commenced, and there is no evidence of the existence of a disability prior to the receipt of a particular medical report, the Adjudicator may properly decide that, according to the available evidence, the disability commenced on the date of the medical examination which was the subject of that report.**

There may also be a difficulty in fixing the worker's average earnings when such worker is not employed at the time when the disability commenced. The Adjudicator should generally refer back to the employment or employments in which the worker was most recently engaged and base any pension on the previous earnings thus discovered.

- (28) The majority disagreed with the Board's conclusion in memo #9 that there was no clear indication of a medical disability related to the worker's condition prior to his application in August 1997. They considered that Dr. M's opinion of July 7, 1998 was evidence of a silicosis in 1994 and, applying Policy in #29.42, they concluded that January 12, 1994 should be the effective date of the pension.
- (29) In contrast the president submits that the Review Board majority decision contains an error of law. This is because, when an application is received more than three years after the date of disablement, section 55 of the Act states that compensation can only be paid for the period commencing on the date the application was received and not for any time before the date of the application. The date of the worker's application for compensation in the case before me was August 20, 1997 and his date of disablement was January 1994 and, according to the president, the Act only permits compensation to be paid after August 20, 1997.
- (30) What appears to be at issue as between the president and the Review Board majority is whether section 55 of the Act or #29.42 of policy decides the facts of this case.
- (31) I note that the Board's decision of November 18, 1998, which was the subject of the Review Board finding before me, decided two issues (among others). The first was to accept the worker's application for compensation and the other was to grant the worker a pension. I think separating these two issues is important for this case.
- (32) Whether a worker's application for compensation will be accepted is governed, in part, by section 55 of the Act because that section creates time limits for an application. This section is set out above. In summary, an application is normally expected to be made within one year of the date of injury, applications made after one year require special circumstances explaining the delay in order to be accepted and applications made after three years also require special circumstances but compensation can only be paid after the date of application. In cases of occupational diseases, such as this case, section 6(2) of the Act states that, "the date of disablement must be treated as the occurrence of the injury." Again, in this case the date of medical

---

disability was January 1994 and the statutory time limits began then. More than three years passed before the worker's application for compensation was made in August 1997 and, therefore, if special circumstances exist, compensation can only be paid from the date of application. I take it from the acceptance of the worker's claim in November 1998 that the Board has accepted there are special circumstances in this case.

- (33) On the other hand a pension decision is based on section 23 of the Act and related policy of the governors. Policy for a pension in the case of silicosis is contained in #29.42 of the Manual, as identified by the Review Board majority. The policy discusses situations where "the evidence does not clearly establish when the disability commenced and there is no evidence of the existence of a disability prior to the receipt of a particular medical report." The Review Board majority relied on this language for their finding that the worker's pension should be effective on the date of his medical disablement in 1994.
- (34) What is contemplated in #29.42 is a situation where there [is] a lack of medical evidence to reach a conclusion on the *medical* date of disablement and the policy provides guidance about how to adjudicate a claim in those circumstances. However, the issue before the Review Board related to *medical* disability only for the purposes of determining the start of the time for filing an application for compensation. The Review Board majority did this. The second step was to determine the date of *legal* disablement or effective date of the pension in the context of the legislation. When an application for compensation is not filed within the time limits established by the legislation there can be a difference between the date of medical disablement and the date when compensation is effective. The Review Board majority did not complete this second step.
- (35) Section 55 of the Act is specific about how these situations are to be adjudicated. It is not that there is a conflict between section 55 and #29.42 or that one is a provision of the Act and another is policy. And this is not a situation where it is a choice between "one option" over another as described by the majority. As a result of the worker not filing his application for compensation within the time limits set out in the Act the effective date of his pension occurs after the date of his medical disablement.
- (36) In my view the majority of the Review Board panel committed an error of law by not applying section 55 of the Act to the facts before them. In this case section 55 of the Act specifically applies and #29.42 cannot be used to replace that provision or otherwise serve a purpose for which it was not intended. Policy in #29.42 is limited to determining the date of medical disability and it is an error to apply it as if there are no time limits in the Act for making an application for compensation. I note that the majority of the Review Board did not mention or analyze section 55 and, therefore, we do not have the benefit of their analysis of why they did not apply that provision of the Act.
- (37) As a final matter I wish to address the decision and reasons of the dissenting vice-chair of the Review Board. In her view sections 6(2) and 55 of the Act apply in essentially the same way as I have discussed above.
- (38) The dissenting vice-chair also concluded that the worker had not been disabled from earning wages as a result of his compensable disease and the worker's "earning capacity at the date of

---

disablement was nil.” This is because he retired in 1981 and the disease was not diagnosed until 1994. This is a tracking of the language in section 6(1) of the Act which creates a technical and perhaps arbitrary obstacle to entitlement to compensation when a worker becomes disabled from an occupational disease after he has left his employment because, for example, he retired. Because of the wording of section 6(1) a worker in these circumstances would be entitled to medical aid only and would not receive compensation even though it is undisputed that his disability is related to his work.

- (39) However, it is important to recognize that the language which creates this problem is part of section 6(1) and the adjudication of this claim is properly under section 6(8) of the Act. As Policy #29.42 states,

The restrictions in section 6(1) do not apply to silicosis. It is, therefore, not a requirement of a claim for silicosis that there be a lessened capacity for work, or that the worker should be disabled from earning full wages at the work at which he or she was employed.

- (40) Accordingly, the dissenting vice-chair’s concern about whether the worker was disabled from earning full wages is not a concern which is raised by section 6(8).

### **Summary**

- (41) In summary my decision is as follows;

- (a) I deny the worker’s appeal on the issue of whether he is entitled to a functional pension greater than 15% of total.
- (b) I find that the Board and the Review Board correctly determined the issue of the average earnings used to calculate the worker’s pension as well as the issue of whether the worker is entitled to a loss of earnings’ pension.
- (c) I find that the majority Review Board finding dated November 29, 2000 contains an error of law by not applying section 55 of the Act and it also contains a contravention of policy by interpreting and applying #29.42 of governors’ policy for a purpose it was not intended.
- (d) I have redetermined the majority Review Board finding and concluded that section 55 of the Act applies to the circumstances of the worker in this case and policy in #29.42 has no application to the issue of the effective date of compensation in this case.
- (e) The worker’s date of medical disablement was in 1994. Section 55 of the Act requires that the effective date of the worker’s compensation is August 20, 1997. Since the primary compensation issue is permanent disability this is also the effective date of his pension.

*Editors’ Note: The names of the parties have been removed for privacy considerations. This decision has been edited for publication.*

