

Decision of the Appeal Division

Number: 92-0634
Date: March 19, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 91(1) – Remedial Jurisdiction

The worker has appealed the July 12, 1991 Review Board finding.

By decision of April 6, 1990, the disability awards claims adjudicator advised the worker that no change to her existing pension award of 2.5% of total would be made. Based on a comparison of recent medical reports with those previously on the claim file, she concluded that there had been no significant deterioration in the worker's overall condition.

The worker appealed to the Review Board which allowed her appeal in its finding of July 12, 1991. The Review Board found that the worker's permanent partial disability award:

should be established as equivalent to 5 percent of a totally disabled person, effective February 6, 1990, the date to which the panel has jurisdiction over this issue.

The Review Board also stated:

we . . . specifically recommend that the worker be provided with sufficient skills as to reasonably enable her to obtain a light to sedentary job, at no loss of earnings.

In her Notice of Appeal, the worker expressed disagreement with the Review Board finding concerning the effective date of the increase in her pension award. She is seeking to have the increase retroactive to 1972–76, or 1983. She further submits that she is entitled to a loss-of-earnings pension award.

A preliminary issue is whether the Appeal Division has the jurisdiction to address the question of an increase in the worker's pension award retroactive to 1972–76 or 1983.

Facts

It is important to establish the factual context in which the worker's appeal arose.

The worker injured her back on October 30, 1970 when she was employed in a plywood mill. The Board authorized surgery carried out in May 1971.

On November 30, 1971, the worker underwent a disability examination, the results of which are contained in Memo #21. Dr. H, the disability awards medical officer, stated that the worker "could have a temporary P.P.D. award with review in one year of 5% of total."

In Memo No. 37 of May 3, 1972, Dr. H expressed the opinion that there was no change in the worker's condition.

By decision letter dated June 2, 1972, the Board granted the worker a tentative award of \$18.63 per month (5% P.P.D.) from April 10, 1972, with review after approximately nine months.

A medical report dated July 26, 1972 concluded that the worker was no longer physically disabled and attributed her problems to her psychological condition.

In Memo No. 47 dated December 20, 1972, Dr. G, a disability awards medical officer, stated that the worker's residual disability was barely of compensable degree and that it would perhaps amount to 2.5% of total.

In Memo No. 48 dated December 29, 1972, a claims adjudicator agreed with the P.P.D. assessment of 2.5% of total but stated that "as it has not been the Boards [sic] policy in the past to grant a 2½% P.P.D. for back disability therefore an award would not be indicated."

By decision letter dated January 4, 1973, the Board informed the worker that they would not recommend payment of an award.

Memo No. 80 dated August 11, 1975, states that the worker sustained another work injury on March 24, 1974 "which in turn was related to her work injury in 1970."

In January 1976, the worker underwent another P.P.D. examination. In Memo No. 89 dated January 14, 1976, Dr. B, claims medical advisor, recommended a P.P.D. award of 5% of total. He also recommended offering the worker rehabilitation assistance.

In Memo No. 96 dated April 28, 1976, the disability awards officer stated that he did not feel that the worker had a marked disability with her back and he recommended an award of 2.5% of total disability on a judgment basis effective February 17, 1976. No medical evidence contradicting that of Dr. B was cited.

By decision letter dated May 6, 1976, the Board informed the worker of the 2.5% P.P.D. award.

On May 13, 1976, the worker's physician reported to the Board that she was unable to resume her usual work. Her complaints at the time were persistent low backache with radiation down the left leg and intermittent difficulty walking.

By letter dated June 7, 1976, the claims adjudicator stated that there was no significant change in the medical findings. He concluded that the 2.5% P.P.D. award the worker was receiving was adequate. The claims adjudicator also concluded that wage-loss benefits were not payable to the worker since she was not totally disabled as a result of her compensable injuries of October 30, 1970.

In July 1977, the worker's physician reported that the worker was again disabled from working. Following receipt of this report, the claims adjudicator requested more information.

In August 1979, the worker's physician sent another report to the Board noting that the worker was suffering from low back pain and depression and was hospitalized. The hospital admission report on file indicates that the worker was admitted with severe low back pain and spasm and reactive depression.

By decision letter dated October 23, 1979, the Board informed the worker that her back complaints reported by her physician in August 1979 did not entitle her to compensation. The claims adjudicator also stated:

It is noted that the recent medical reports are essentially the same as those submitted in 1976 and 1977 wherein they were not accepted as Compensation Board responsibility. Therefore, I cannot accept your present back complaints as part of your entitlement under this claim.

The worker appealed this decision to the Board of Review.

In a decision rendered on October 22, 1980, the Board of Review allowed the appeal, giving the worker appropriate medical benefits and wage-loss benefits. In doing so, the Board of Review characterized the issue before it as pertaining to whether the worker's low back pain reported by her physician in August of 1979 was related to her back injury of October 30, 1970.

The Board of Review did not, in this decision, discuss the fact that, in granting the worker a 2.5% P.P.D. in May 6, 1976, the disability awards officer had departed from Dr. B's recommendations of a P.P.D. award of 5% of total.

On November 27, 1980, the worker underwent an L5-S1 spinal fusion authorized by the Board on November 13, 1980. In a letter to the Board dated June 3, 1980, Dr. C, an orthopaedic surgeon, had recommended this surgery.

In May 1983, the worker's physician sent medical reports to the Board indicating that the worker was still experiencing back problems.

By decision letter dated May 20, 1983, the Board informed the worker that they would reopen her claim for medical aid and wage-loss benefits effective May 9, 1983.

On August 17, 1983, the same Dr. G, who in 1972 had concluded that the worker's residual disability was barely compensable, examined the worker. He concluded that her residual impairment was the same as when the L5-S1 fusion was carried out. He would not recommend any changes to the P.P.D. award.

By decision letter dated October 18, 1983, the Board informed the worker that they would not change her P.P.D. award of 2.5% of total since there was no significant change in her medical condition.

By decision letter dated October 24, 1983, the Board denied the worker wage-loss benefits. The reason given was that the worker was in receipt of a pension that should compensate her for any lost wages resulting from occasional time off work.

In two separate letters appended to a Notice of Appeal dated November 9, 1983, the worker appealed both the October 18, 1983 and the October 24, 1983 decisions to the Board of Review.

Referring only to the decision letter dated October 24, 1983 and addressing, therefore, only the issue of wage loss, the Board of Review rendered its decision of April 30, 1984. It denied the worker's appeal on the basis that her inability to work was caused by other medical or employment problems.

In March of 1989, the worker contacted the Board and stated that she was suffering from back problems.

By letter of June 30, 1989, the worker's physician confirmed this. He also expressed concerns about the worker's employment in a home for elderly people. He felt that this employment was too hard on her back and that she should be doing something less demanding.

The worker eventually asked for a re-evaluation of her permanent partial disability award. Accordingly, Dr. D, disability medical advisor, examined her.

In Memo No. 146 dated February 6, 1990, Dr. D stated: "Taking into account the one level fusion, I would assess the impairment of function in this case at 5% of total, as previously assessed in 1972 and 1976."

In Memo No. 147, a claims adjudicator reviewed Dr. D's assessment and recommendations and concluded: "[i]n the absence of any evidence to suggest that there has been a change in this worker's condition, the worker will be advised that her disability entitlement will be continue (sic) to be paid at the same rate."

By decision letter dated April 6, 1990, the Board advised the worker that they would not increase her permanent partial disability award. As indicated earlier, the worker appealed this decision to the Review Board whose finding is presently before the Appeal Division.

Findings and Reasons

Having examined the factual context in which the worker's appeal arose, I have concluded that the Appeal Division has the jurisdiction to address this worker's concerns.

Subsection 91(1) of the *Workers Compensation Act* (the *Act*) sets out the limits to the Appeal Division's jurisdiction. It provides that:

Where the Review Board makes a finding under Section 90, the worker . . . may . . . appeal the finding to the Appeal Division.

The requirement under the *Act* that the Appeal Division decide each appeal with reference to the merits and justice of the case calls for a broad interpretation of the word "finding" in the context of subsection 91(1).

There is ample judicial authority for the proposition that workers' compensation legislation is to be regarded as remedial legislation and interpreted liberally and non-technically to facilitate the expeditious and fair handling of injured workers' claims.

Moreover, as attested by this worker's situation, a claim cannot always be easily categorized into separate components. The issues of present and ongoing disability necessarily overlap, as may other matters such as worker's impairment and earning capacity. Workers' compensation, functioning as a system of personal income security, tends to generate claims that raise inter-related issues. Moreover, decisions may be emanating from various levels of the adjudication or appeal system contemporaneously. If we are to prevent the Workers' Compensation appellate structure from becoming a legal maze of technical complexities, it is imperative that the Appeal Division conceive of its role in the broadest possible terms compatible with the statute.

The Board of Governors' published policy is consistent with an expansive interpretation of the Appeal Division's jurisdiction in dealing with claims matters. The governors' Decision No. 1 in the *Workers' Compensation Reporter*, Vol. 7(1): p. 8, states:

The Appeal Division has the discretion to initiate and conduct a full enquiry into *all of the issues arising out of an appeal* once the matter is before it . . . (emphasis added).

The discretion to inquire into "all of the issues arising out of an appeal" entails a broad jurisdiction to fashion appropriate remedies. The Appeal Division has the power to consider the set of issues that were explicitly or implicitly "present" at the root of the claims adjudicator's decision. In selecting the issues on which it will focus, the Appeal Division's ultimate concern must be a determination of the issues essential to findings consistent with the merits and justice of the case. Obviously there must be proper regard to all competing interests and to ensuring that the parties are fully aware of the matters under consideration.

The governors' *Decision No. 1* at p. 10 provides that ". . . [t]he Appeal Division shall not exercise the Board's *plenary* independent power to reopen, rehear and redetermine matters under Section 96(2) of the *Act*. . . ." However, this provision does not limit the authority of the Appeal Division to fully enquire into and resolve all matters pertinent to the appeal.

In its internal practice directives, the Appeal Division specifies (the *Reporter*, Vol. 7(1): p. 37, Decision No. 1) that "[t]here is no right of appeal to the Appeal Division under Section 91(1) against a decision of a Board officer." This does not, however, preclude the Appeal Division from considering the different facets of a decision of a

Board officer that underlie a Review Board finding. In fact, in *Decision No. 1, Practice and Procedure*, the Appeal Division states, at p. 42, that “All matters raised in the decision letter which was appealed to the Review Board, and in the Review Board finding, may be considered issues in the appeal. . . .” The Appeal Division’s position presumes, therefore, that the appeal may involve consideration of any matters arising out of “the decision letter which was appealed to the Review Board.”

With respect to the effective date of the increase in this worker’s pension award, it is apparent that the July 12, 1991 Review Board finding was intertwined with the 1972, 1976 and 1983 decisions of the Board’s disability awards officers. In its finding, the Review Board stated that the date to which it had jurisdiction over the issue was February 6, 1990. This is the date on which Dr. D assessed the impairment function of the worker at 5% of total, “as previously assessed in 1972 and 1976.” In 1983, the worker specifically appealed the P.P.D. award of 2.5% of total, but the Board of Review, for no apparent reason, failed to deal with this part of the worker’s appeal.

To view the Review Board finding of July 12, 1991 as dealing only with the *current* level of the worker’s disability would, therefore, be inappropriate. The Review Board finding addressed the decision contained in the claims adjudicator’s letter of April 6, 1990. This letter gave the worker a 2.5% P.P.D. award on the basis that the worker’s condition had not changed — hence, on the basis of an *ongoing* disability level which, over the years, the Board’s medical advisors had generally assessed at 5% of total.

In my view, the previous decisions of the disability awards officers concerning the assessment of the worker’s pension at 2.5% of total are the foundation for and are implicitly part of the matter currently before the Appeal Division.

On the basis of the evidence on file and in light of the substance of the decision letter dated October 18, 1983, I have concluded that the worker is entitled to an increase in her pension award retroactive to June 3, 1980, the date on which Dr. C recommended the spinal fusion.

I have considered whether the pension increase ought to be increased retroactively to 1976 but have declined to do so. There was a decision made on May 6, 1976, assessing the pension at 2.5% which was not appealed. Although I have serious reservations about the correctness of that decision, it was a lawful conclusion. I will not now substitute my judgment for the unappealed decision of the disability awards officer. The worker was entitled, however, to a reassessment of her permanent disability following the surgical fusion. That was not done until 1983 and, when the worker appealed that decision, no determination either for or against her complaint was rendered.

With respect to the worker's request for a loss-of-earnings pension award, it is unclear whether, in its July 12, 1991 finding, the Review Board has actually rendered a decision on this issue. The Review Board finding is somewhat ambiguous.

The Review Board stated:

The Panel has considered [the worker's] suggestion that she is now medically disabled from performing her former job, or any other job which requires significant physical activity. The Panel notes, however, that a lawful and binding decision was made in 1983 to the effect that the worker was not disabled from carrying out these jobs. Since [the worker's] medical condition has not changed significantly since 1983, the Panel has no basis upon which to find that she is now disabled from carrying out the jobs for which she was found fit in 1983.

I am assuming that the Review Board is referring here to the claims adjudicator's decision of October 24, 1983 regarding wage loss.

The Review Board also stated:

There is, however, clear medical opinion from Dr. W and Dr. D to the effect that on a preventative basis [the worker] should not return to such work. The Panel agrees with these medical recommendations.

The Review Board concluded:

. . . we therefore specifically recommend that [the worker] be provided with sufficient skills to reasonably enable her to obtain a light to sedentary job, at no loss of earnings.

I would interpret this as constituting a recommendation that the Board provide the worker with rehabilitation services with the goal of ensuring that the worker suffers no loss in earning capacity over the long term. I would not, however, interpret it as constituting a clear-cut prediction or decision with respect to the worker's future earning capacity.

The question as to whether the worker is entitled to a loss-of-earnings pension award is one which would properly be addressed by the disability awards claims adjudicator, having regard to the report of the vocational rehabilitation consultant with respect to the retraining provided to the worker. I note that the worker has submitted

an appeal to the Review Board concerning the October 9, 1991 letter of the former rehabilitation consultant on this claim. I also note the November 27, 1991 letter of the vocational rehabilitation consultant, offering to review the file once it was available.

The claim file will now be forwarded to the Claims Division to implement the foregoing.

Editors' note: This decision has been edited for publication.

