

Decision of the Appeal Division

Number: 92-0930
Date: May 4, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) — Vibration White Finger

Letters dated August 21, 1991 and November 8, 1991 have been received from the Office of the Ombudsman, requesting reconsideration of the February 20, 1991 decision by the prior commissioners. The commissioners had concluded that the worker was not entitled to a permanent partial disability pension for his vibration white finger disease.

(a) Section 17(2) of Bill 27

By letter of November 8, 1991, the general counsel for the ombudsman submits:

In view of the extent of activity generated in response to our submission [of May 25, 1990], we do not consider that the Commissioners' reported decision not to reconsider the matter should be determinative on this issue, and that consideration of [this] case can therefore be continued under section 17(2) of Bill 27.

Section 17(2) of Bill 27 provides:

s. 17(2) If an appeal or a rehearing under . . . section 91 or 96 of the former *Workers Compensation Act* has been commenced but has not been completed on the date that this *Act* comes into force, that appeal or rehearing shall be continued by the appeal division under and in conformity with the new *Workers Compensation Act* . . . , so far as it may be done consistently with that new *Act*.

The background to this matter is that the ombudsman officer wrote to the prior commissioners on May 25, 1990. In a preliminary response dated October 16, 1990, the Board's general counsel and secretary advised that the commissioners had decided to obtain input from the Board's Medical Services Department. This was followed by the commissioners' decision of February 20, 1991, which enclosed copies of the additional medical reports they had obtained.

In their decision of February 20, 1991, the prior commissioners stated that they were unable to accept the ombudsman's proposal. Nothing further was heard from the Office of the Ombudsman concerning this matter until the letter of August 21, 1991. There was nothing outstanding before the prior commissioners on this claim at the time the *Workers Compensation Amendment Act, 1989* came into force on June 3, 1991.

The two final paragraphs of the commissioners' February 20, 1991 decision were as follows:

[The worker] was not considered by the board of review panel to have sustained any long-term loss of earnings as a result of his V.W.F.D. The Commissioners do not consider that there is any basis to reconsider this decision.

In the result, the Commissioners are unable to accept your proposal. [The worker] will not be awarded a permanent partial disability pension for his Vibration White Finger Disease. In the Commissioners' opinion, their decision in this respect does not constitute a new *medical* decision within the meaning of Section 58 of the *Workers Compensation Act*.

The commissioners had clearly concluded their consideration of the matter. The paragraph quoted above cannot be interpreted as showing that a rehearing by the commissioners "has been commenced but has not been completed" within the meaning of Section 17(2) of Bill 27.

General counsel for the ombudsman suggests that the prior commissioners would have had:

an expectation that we would review and assess this material and *likely* make a further submission based on such consideration, following the pattern established in previous cases.

(emphasis added)

This argument is properly qualified with the term "likely." As this implies, at each stage of the proceeding it requires a further decision by the ombudsman as to whether he will pursue the investigation, taking it to a higher level, or accept the explanation provided by the Board and close the investigation. While an expectation of a further response from the ombudsman might well have been reasonably anticipated in this case, this was nevertheless conditional on the ombudsman making a decision to pursue the inquiry further. I have difficulty equating the fact that the ombudsman would likely decide to pursue the complaint further (which was conditional on his

proceeding in this manner), with a conclusion that there was a rehearing in progress before the prior commissioners.

I conclude, therefore, that there was no rehearing under way before the prior commissioners on the date the *Workers Compensation Amendment Act, 1989* came into force which can be continued by the Appeal Division under Section 17(2).

I have one serious reservation in reaching that conclusion. This concerns the fact that the commissioners obtained new medical reports, which they relied upon in reaching their further decision without disclosing these reports to the worker, the employer, or the ombudsman, prior to their decision. I appreciate that support for the argument by the general counsel for the ombudsman that a rehearing was in process may be found in this failure by the prior commissioners to disclose these reports.

The course of action taken by the prior commissioners in failing to disclose these reports may, as argued, have been based on an expectation that the ombudsman could respond further in the future. Notwithstanding the fact that the prior commissioners' February 21, 1991 letter was couched as a final decision, it may be viewed as part of an ongoing process of review with the Office of the Ombudsman. The difficulty with this approach, however, is that it requires assumptions concerning the prior commissioners' decision-making process which go beyond what is evident from the record. It requires an assumption that such a process of review was under way, in the face of a decision letter written in a form suggesting conclusion of the commissioners' consideration of the matter. This process would seem to be more accurately characterized as involving a rehearing and redetermination by the prior commissioners, which was itself subject to the possibility of a further reopening, rehearing and redetermination if the ombudsman pursued the matter further.

Having regard to the statement in the prior commissioners' decision that they did not consider that there was any basis to reconsider the Review Board decision, an alternative interpretation of their letter is that the commissioners never reopened the matter at all. On this interpretation, their February 20, 1991 letter only amounted to a negative determination on the preliminary issue as to whether grounds had been provided which warranted a reopening under Section 96(2) of the *Act*. Viewed in this way, it may be considered that the matter was never reopened by the prior commissioners so as to initiate a rehearing of the matter.

I have some concern with the failure by the prior commissioners to disclose the new medical reports obtained by them in advance of making their February 20, 1991 decision. It might be questioned whether this involved a breach of natural justice which would constitute an error of law. In light of my conclusions concerning the "new evidence" provided by the ombudsman, however, it is not necessary that I consider this aspect further.

(b) Section 17(5) of Bill 27

The ombudsman officer submits, as an alternative, that this case may be reconsidered by the Appeal Division because of new evidence within the meaning of Section 96.1 of the *Act*.

Section 17(5) of Bill 27 states:

A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*.

Section 96.1 of the *Workers Compensation Act* provides:

Reconsideration by appeal division

(1) Subject of this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

(2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the Appeal Division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

- (a) is substantial and material to the decision, and
- (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

he may direct that

- (c) the Appeal Division reconsider the matter, or
- (d) the applicant may make a new claim to the Board with respect to the matter.

The jurisdiction of the Appeal Division to reconsider the prior commissioners' decision under Section 96.1 is dependent upon all of the requirements of this provision being met.

The governors' policy concerning the "Assessment of Pensions for Raynaud's Phenomenon" is set out in #30.11 of the *Rehabilitation Services and Claims Manual* (the *Manual*). It contains a table, with criteria for classifying a worker's disability as being in Classes 1 through 5. The *Manual* does not identify the source of this table. It is clearly indicated in the prior commissioners' decision, however, that this table is based on the classification system developed by Dr. Gilles P. Laroche. A table, entitled "Classification of traumatic vasospastic disease" was included in Dr. Laroche's article "Traumatic vasospastic disease in chain-saw operators" published in the *C.M.A. Journal*, December 18, 1976, Volume 115, page 1217, at page 1220. The table in Dr. Laroche's article is the same as that contained in the governors' policy in all essential respects, apart from the fact that Dr. Laroche assigned specific ranges of percentage of disability to each class which are not found in the governors' policy.

The letters from the prior commissioners on this claim clearly indicate that the Board was utilizing the Laroche classification system. Their letter of October 16, 1990 stated, for example, that:

. . . it appears to the Commissioners that the dispute over the severity of [this worker's] V.W.F.D. does not result from any differences which might exist between the Laroche system and the Taylor-Pelmeur system or from Dr. G's conversion of Dr. L's findings under one system to the other.

In their subsequent letter of February 20, 1991, the commissioners noted:

Dr. L has therefore confirmed Dr. G's conversion of his 1983 findings from the Taylor-Pelmeur System to Class 1 of the Laroche system. Since Dr. L examines virtually all V.W.F.D. cases considered by the Board, [this worker] was treated in exactly the same way as any other worker with V.W.F.D.

The ombudsman submits that the commissioners have erred in their interpretation of the Laroche classification system. Significantly, the Office of the Ombudsman contacted Dr. Laroche directly to obtain clarification as to the proper interpretation of the classification system developed by him. By letter of August 1, 1991, an ombudsman officer wrote to Dr. Laroche to confirm the contents of their telephone discussions as to the proper interpretation of his classification system. Her letter was endorsed by Dr. Laroche on August 12, 1991, in confirmation of the following:

The table used by the B.C. Board appeared in your article in the *C.M.A. Journal*, December 18, 1976, Vol. 115 . . . Table II, on page 1220, states that traumatic vasospastic disease must exist “along with any two or more of the findings below” for a Class 2 classification. It was my understanding that “a finding” could include the conclusion, under the heading: “Symptoms”, that a patient’s symptoms were sufficiently severe to cause the abandonment of his or her job. Equally, a “finding” could include any of the five clinical observations or investigations listed under the heading: “Evidence of vascular damage”.

Accordingly, a patient could be classified as Class 2 even in the absence of “sclerodactyly” or “fingertip scars (healed ulcers)” if any other two or more “findings” were found to be present. For example, a patient who was forced to abandon his job because of the severity of symptoms and who also demonstrated severe changes in some fingers, demonstrated by U.V.D. or D.P., could also be classified as Class 2.

Dr. Laroche added the notation “correct” beside this last passage from the ombudsman officer’s letter.

The interpretation by the prior commissioners of this classification system was clearly at odds with Dr. Laroche’s intent and the policy stated in the *Rehabilitation Services and Claims Manual*. The prior commissioners stated in their decision as follows:

However in compensating for V.W.F.D., the Board does not pay a permanent partial disability pension to a worker who does not suffer a loss of earnings, unless that worker has sustained observable physical impairment as a result of V.W.F.D. This “observable physical impairment” consists at a minimum of “sclerodactyly” (tight and shiny skin) and “fingertip scars (healed ulcers)”. Without this physical impairment, no permanent partial disability pension would be paid (if no loss of earnings) whatever system of medical assessment was adopted.

Reading this passage in the context of the prior commissioners’ decision as a whole, it is apparent that the prior commissioners meant that a worker would not be classified higher than Class 1 unless at least two findings from the right-hand column of the Laroche table were present. In stating that there had to be “a minimum of ‘sclerodactyly’ (tight and shiny skin) and ‘fingertip scars (healed ulcers)’,” the commissioners were stating that two of the requirements from the right-hand column had to be met

before a Class 2 disability would be recognized. The effect of this is that the prior commissioners misinterpreted the Laroche classification system to impose three, rather than two requirements for a Class 2 classification.

It should be acknowledged that there was an ambiguity in the table which would appear to have led to this misinterpretation. Class 2 of the Laroche classification reads as follows:

Traumatic Vasospastic Disease	Symptoms	Evidence of Vascular Damage
Exists along with any <i>two or more</i> of the findings.	Severe, forbidding outside work or causing abandon- ment of job	<ul style="list-style-type: none"> – Sclerodactyly – Fingertip scars (healed ulcers) – Bone changes and vacuoles – Arterial occlusions visualized arteriographically – Severe changes in some fingers demonstrated by U.V.D. or D.P.

(emphasis added)

The prior commissioners interpreted the phrase “two or more of the findings” as meaning two or more findings from the column at the right. The proper interpretation of the governors’ policy, however, is that the symptoms set out in the middle column may constitute one finding. Thus, if the worker is suffering from the symptoms set out in the middle column, and one of the signs of evidence of vascular damage set out in the column at the right is present, the worker’s disability is properly classified as being in Class 2.

I note with concern the statement by the prior commissioners that this worker was treated in exactly the same way as any other worker with vibration white finger disease. This would seem to indicate that the misinterpretation of the Laroche classification system evident in the prior commissioners’ decision on this claim is indicative of a generalized error. It suggests that many workers may have been improperly classified as being in Class 1 of the Laroche system, when in fact they would more properly have been classified as being in Class 2. It is of interest to note that

Dr. Laroche indicated in his original table that Class 1 would not warrant a percentage disability award, but that the appropriate range for Class 2 would be from 5 to 15% of total disability.

The error of interpretation is not contained in the governors' policy set out in #30.11 of the *Rehabilitation Services and Claims Manual*. Rather, the error arose in the application of the phrase from this passage of the *Manual* in respect of Class 2: "Exists along with any two or more of the findings." The Board's *practice* was to interpret this as requiring that the criterion in the middle column (Symptoms) be satisfied together with *two* or more findings from the right-hand column, before a worker's disability would be recognized as being in Class 2. As noted above, the proper interpretation of the table is that the prerequisites for a Class 2 classification are that the criterion in the middle column and *one* or more of the findings in the right-hand column be met. Based on the information provided concerning the proper interpretation of the classification system, it is incorrect to state that both the physical findings of "sclerodactyly" and "fingertip scars (healed ulcers)" are essential to a Class 2 classification as is implicit in the prior commissioners' decision.

The ombudsman officer submits that this worker would be properly classified as being in Class 2, on the basis that the symptoms from the middle column exist and that one of the findings from the column at the right are present, namely, that there are *severe changes in some fingers demonstrated by U.V.D. (ultrasonic velocity detection) or D.P. (digital plethysmography)*. Under the Laroche classification system, a worker is placed in Class 1 if there are "*Normal findings or moderate changes demonstrated by U.V.D. or D.P.*"

A report dated November 27, 1986 from the Department of Health Care and Epidemiology, University of British Columbia, stated:

We can, however, based on our limited examination classify [this worker] as Laroche Class 2 based on symptoms and abnormal digital plethymography.

The new evidence provided by the ombudsman was disclosed to the worker's employer. By letter of December 19, 1991, the employer's health and safety coordinator noted:

. . . the information provided in [the Ombudsman Officer's] letter, dated August 21, 1991, referring to a possible misinterpretation of the Laroche System could, as new evidence, warrant further consideration by your division.

Having carefully considered the foregoing, I have concluded that the evidence provided by the Office of the Ombudsman from Dr. Laroche (with respect to the proper interpretation to be given to the classification system developed by him and incorporated into the policy stated in the *Rehabilitation Services and Claims Manual*), constitutes new evidence which meets the requirements of Section 96.1 of the *Act*. It is substantial and material to the decision, and either did not exist at the time of the commissioners' hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered. I would rely, in this regard, on the reasoning expressed in the *Workers' Compensation Reporter*, Vol. 7(3): p. 145, Appeal Division Decision No. 91-0724.

I find that the requirements of Section 96.1(3)(a) and (b) are met. I have, therefore, the discretion to:

direct that

- (c) the appeal division may reconsider the matter, or
- (d) the applicant may make a new claim to the board with respect to the matter.

The Appeal Division will, pursuant to Section 96.1(3)(c), reconsider the question as to whether the worker is entitled to a permanent partial disability pension.

In my notice letter to the employer, I advised that if they were participating in this process they would be granted a further opportunity to make submissions prior to any decision being made on the merits of the claim. The employer has stated that they would welcome the opportunity to participate in any forthcoming process. The worker and employer will, therefore, be given the opportunity to provide submissions as to whether the worker is entitled to a permanent partial disability pension, prior to a decision being rendered.

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

