

Decision of the Appeal Division

Number: 92-1017, 92-1018
Date: May 14, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2) — Medical Review Panel Certificate

A letter dated May 28, 1991, was received from an ombudsman officer, requesting reconsideration of the October 25, 1990 decision of the prior commissioners. A further letter dated November 8, 1991, was received from the general counsel, Office of the Ombudsman. The latter correspondence invoked the Appeal Division's jurisdiction under Section 96.1 of the *Workers Compensation Act*, requesting that this case be considered on the basis of new evidence provided by the chairman of the medical review panel.

A letter dated May 31, 1991, was also forwarded to the Board by counsel for the worker requesting reconsideration of the October 25, 1990 decision of the prior commissioners. In a further submission dated January 20, 1992, counsel for the worker addressed the Board's power to reopen, rehear and redetermine under Section 96(2). He contended that the prior commissioners' decision of October 25, 1990 is wrong in law.

In a letter dated April 27, 1992, counsel for the employer submitted that the worker has been "a victim of jurisdictional bickering" between the prior commissioners and the chairman of the medical review panel. He fully endorsed the submissions from the worker's counsel and the Office of the Ombudsman.

The prior commissioners' decision of October 25, 1990 concerned a medical review panel certificate dated January 24, 1990, (the "certificate") and the medical review panel's clarification of this certificate in a letter dated July 13, 1990 (the "panel's clarification").

In a decision dated October 25, 1990, the prior commissioners concluded that some of the statements contained in the certificate were not binding on the Board. They were of the view that these statements lay outside of the jurisdiction of the medical review panel and that they were, if not contradictory, at least ambiguous enough not to be acted upon by the Board.

Examination by the medical review panel had been initiated by the worker's family doctor, as he disputed the decision of the Board that the worker could do the job of strip piler at a sawmill on a full-time basis.

The statutory scheme under which medical review panels are established and carry out their function is found in ss. 58 to 66 of the *Act*.

Section 61 requires that a panel report within a reasonable time after examination of the worker and certify on such matters as "the condition of the worker," "the existence or non-existence of a disability," "its nature and extent," and "its cause and, if there is more than one cause, how much of the disability is related to one cause and how much to another." The panel in this case was requested by the Board to answer a range of questions relating to these general issues.

The issues posed by the Board and the answers certified by the medical review panel are as follows:

Medical issues stated by the Board

Answers "certified" by the panel

What is the condition of the worker?

The conditions the claimant now has are:

- (i) Left sided L5 spondylolysis pars interarticularis (post traumatic)
- (ii) Chronic pain syndrome.

Does he now have a disability with respect to his back? If not, could the Panel advise the Board whether historically they believe that the worker did, at any time, have a disability with respect to his back?

Yes, the claimant now has a disability with respect to his back.

If he has or had such a disability, what is its nature and extent and in what ways has it affected the body function of the worker? In particular, in what ways has it limited his capacity for work?

The disability the claimant now has is low back pain and radiating left leg pain associated with muscle spasm, stiffness and a marked decrease in range of motion of the lumbar spine, with a superimposed well established chronic pain syndrome, which credibly prevents him from performing any physical, manual or sedentary work.

If he has or had such a disability, was the compensable work injury of 28 June 1984 of causative significance and, if so, in what way?

Yes, the compensable injury of June 28th, 1984, is of causative significance in producing the claimant's disability, as the crush injury to his right mid-section by the log caused a severe sudden right lateral flexion and rotation force applied to his lumbar spine, causing a shear injury to the left pars interarticularis, which resulted in his L5 spondylolysis at the pars interarticularis. We do not know the exact cause(s) of the claimant's chronic pain syndrome, but we have concluded that the work related injury of June 28th, 1984, is of primary significance in its development.

If he has or had such a disability, was the disability, wholly or partly the result of causes other than the compensable work injury of 28 June 1984? If so, what other causes were there, and how and to what extent was each cause significant?

If there are or were two or more causes of the worker's disability with respect to his back, could the Panel please explain:

- a) Did each cause independently result in some disability and, if so, what proportion of the disability found by the Panel?
- b) If each cause did not independently result in some disability, did two or more causes act together to produce a disability and, if so, which causes acted together to produce the disability?

The Board has recognized that the worker was temporarily disabled as a result of the compensable work injury of 28 June 1984 for the period set out in non-medical fact number thirteen of this statement. Would the Panel please state whether they feel that the worker was temporarily disabled for any further period or periods as a result of the compensable work injury of 28 June 1984 and, if so, what the nature and extent of the disability was during this further period of time.

We believe the claimant's disability is wholly the result of his work related injury of June 28th, 1984.

- a) Non-applicable
- b) Non-applicable

The Panel has concluded that the claimant was temporarily totally disabled for the period June 29th, 1984, until June 29th, 1986, inclusive, except for two days, the 26th and 27th of July, 1984. The Panel further believes that by June 29th, 1986, the claimant's condition had stabilized, and from that time to the present the claimant has had a total permanent disability, which strictly on a medical basis has credibly prevented him from performing any manual, physical or sedentary work. The nature of his disability is chronic low back pain and radiating left leg pain associated with muscle spasm, stiffness, and marked diminished range of motion in association with a well established chronic pain syndrome.

We believe that the claimant would benefit from a more comprehensive orthopaedic workup and consequently would recommend:

- (i) A bone scan to ascertain if there is an inflammatory response present and active at the site of the L5 spondylolysis.
- (ii) Local anaesthetic blocks at the site to see if his pain is relieved.
- (iii) On the basis of these tests he may be amenable to an orthopaedic procedure to stabilize this site. We believe he may have a treatable condition.

Notwithstanding the orthopaedic workup, the Panel strongly believes the claimant would greatly benefit from a rehabilitation program for his chronic pain syndrome and support from the Board for completion of the Accounting and Finance Diploma program which he started in September of 1986. Alternatively,

Did the worker suffer from any pre-existing condition or disability and, if so, was it activated, accelerated, or aggravated by the compensable work injury of 28 June 1984?

we would urge that he be given the benefit of vocational counselling and/or training to find non-physical or manual work which he can better tolerate.

No, the claimant did not suffer any pre-existing condition or disability prior to his work related injury of June 28th, 1984.

If the worker now has a disability related to his back, has it changed to any significant extent since its commencement and, if so, what has been the nature and progress of that change? Is any significant change in the disability reasonably expected in the next 12 months.

The Panel believes that without appropriate treatment the claimant now has a disability which is permanent. It became stabilized on June 26th, 1986.

If not already stated, would the Panel please state whether the worker was able to return to full time work on 29 June 1986, which did not require heavy lifting, bending, rotational movements and static positions.

The Panel has concluded that even though the claimant's disability became stabilized on June 26th, 1986, as a consequence of his chronic low back and left leg pain, and superimposed chronic pain syndrome, strictly on a medical basis, he has been unable to work in any capacity, i.e., physical, manual, or sedentary work.

In requesting clarification of the certificate dated July 11, 1990, the prior commissioners asked the medical review panel to answer the following medical questions:

to what extent has the work-related 1984 injury medically affected the worker's ability to function? Specifically, what are the areas of impairment and the extent of the impairment? Is the existing level of impairment temporary or permanent?

The prior commissioners also conveyed the opinion that:

. . . there was a contradiction or at least an ambiguity in the Panel's statement that the worker has a total permanent disability, which strictly on a medical basis has credibly prevented him from performing any manual, physical or sedentary work and its statement that he would benefit from further medical treatment and from rehabilitation assistance to find non-physical or manual work which he can better tolerate.

The panel's clarification stated in part:

With regard to your first question, the Panel has concluded that the claimant's work related injury of June 28th, 1984, *strictly on a medical basis*, has rendered him unable to perform physical, manual or sedentary work. In addition, he is similarly able to participate

only in a limited fashion in recreational activity and activities of daily living, e.g. household chores, etc. . . .

With regard to your second question, the Panel has concluded that together these two conditions have produced his impairment and total disability. This disability involves constant chronic moderate to severe low back pain and radiating left leg pain, associated with muscle spasm, stiffness and a marked decrease in range of motion of the lumbar spine. . . . The claimant's disability is so marked that while he attended a one year accounting course, which started in the fall of 1988, he could only register for part of the course, which allowed him to limit most of his lectures to one hour at a time. It was then necessary for him to return to his apartment across the street from the college and soak in a hot bath to ease his pain in between lectures. He did much of his studying while in the bath, as he had too much pain to sit up and study. . . .

In answer to your last question, the Panel has concluded that the claimant's total disability became stabilized on or about June 26th, 1986. . . .

As regards the L5 spondylolysis, the Panel feels the claimant may yet have a treatable condition in Item #7 of the Certificate. Without treatment, most certainly the claimant's disability in this regard will become permanent.

As regards the claimant's chronic pain syndrome, we have concluded that it will become permanent if not appropriately treated. By appropriate treatment, the Panel would strongly urge that the claimant be assessed and treated in an intensive rehabilitation program at a multidisciplinary chronic pain centre. Such treatment to be effective, should be in a facility totally unrelated to the Board, given the nature of the claimant's relationship with the Board and the contribution this has made to the maintenance of his chronic pain syndrome.

Turning to the other recommendations made by the Panel in its Certificate which have raised the ambiguity in the minds of the Commissioners, the Panel made these only as alternative recommendations. According to the relevant sections of the *Workers' Compensation Board Act*, a Medical Review Panel is directed to make recommendations arising out of its deliberations. According

to the Commissioners' interpretation of other sections of the W.C.B. Act, the Board is not bound to follow such recommendations made by the Panel, as they pertain to medical treatment of a claimant. Consequently, although a Panel may make strong recommendations, urging the Board to pursue a specific course of medical assessment and treatment for a specific claimant, the Board, in its wisdom, is not bound to comply. Realizing this fact, this Panel made alternate recommendations, *which are not satisfactory* for the claimant's condition, but as alternatives might have assisted him in his own efforts to help himself, improve his self-esteem, and combat a deteriorating mental state.

Despite the panel's clarification, the prior commissioners informed the worker in their decision letter of October 25, 1990 that:

After having carefully reviewed the matter, the Commissioners do not consider that the wording used by the Panel in its most recent letter means that you will be awarded a functional impairment pension of 100% of total. Regardless of the Panel's assertion that its conclusion is "strictly on a medical basis", the Panel still is describing your disability in terms of what work you can or cannot do. *This is a question of employability* which, as outlined in the Commissioners' June 1990 letter, is a matter beyond the jurisdiction of a Medical Review Panel. The Commissioners do not consider that the Panel's assertions regarding your employability are binding on the Board.

(emphasis added)

The Board subsequently assessed the worker's impairment at 10.5% of total disability.

Analysis

General counsel for the ombudsman suggested that the opinion of the chairman of the medical review panel, as reported in the senior ombudsman officer's letter to the Board, constitutes new evidence that satisfies the requirements of Section 96.1 of the Act. The ombudsman officer had met with the chairman in order to obtain further clarification of the certificate.

Section 96.1 reads as follows:

- (1) Subject to 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.

First, I note that because the opinion of the chairman of the medical review panel is reported by the ombudsman officer, it amounts to hearsay evidence. Nothing in the file indicates that the chairman of the medical review panel has certified the statements reported. Hearsay evidence is frequently considered in relation to Workers' Compensation cases. In this instance, however, because of the statutory requirements surrounding medical review panel certificates, I find that I cannot attach significant weight to this evidence.

Second, the evidence is more in the nature of a restatement of the substance of the certificate and the panel's clarification than new evidence that would satisfy the requirements of Section 96.1(3).

In light of the above considerations, I find that reconsideration of the prior commissioners' decision under Section 96.1 is inappropriate.

Counsel for the worker submitted that the failure to respect the findings of the medical review panel constitutes an error of law on the part of the prior commissioners. The governors' Decision No. 8, *Workers' Compensation Reporter*, 1991, Vol. 7(4): p. 171 gives the Appeal Division the authority to reconsider the prior commissioners' decision on this basis. The governors delegated to the Appeal Division, in certain circumstances, the Board's statutory discretion to reopen, rehear and redetermine decisions of the former commissioners. This additional authority was assigned to the Appeal Division in the following terms:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; and that the appropriate amendments be made to the *Rehabilitation Services and Claims Manual, Assessment Policy Manual and Occupational Safety & Health Division Policy and Procedure Manual*.

The resolution was effective as of January 6, 1992.

In an earlier decision (*Workers' Compensation Reporter*, Vol. 8(3): p. 211, Appeal Division Decision Number 92-0818), I discussed the standard of review where decisions of the prior commissioners are concerned. Because the former commissioners' decisions were protected by a privative clause, I found that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, I also noted that this test must be qualified in the case of decisions involving jurisdictional questions.

There is substantial judicial authority for the proposition that jurisdictional questions must be answered correctly and that the test of patent unreasonableness applies only to errors committed within the statutory delegate's jurisdiction (see Rene Dussault and Louis Borgeat, *Administrative Law* Toronto: Carswell, 1990, p. 221).

According to Section 65 of the *Act*, a certificate of a medical review panel is conclusive as to the matters certified and is binding on the Board. This assumes that the statements made in the certificate are within the jurisdiction of the medical review panel, that is, are the kind of statements authorized by the *Act* under s. 61(1). Statements pertaining to matters outside of the scope of s. 61(1) are not binding on the Board. Thus, in determining whether the medical review panel had the jurisdiction to make the statements appearing in the certificate, the prior commissioners were setting the limits of their own residual jurisdiction. Under the *Act*, the medical review panels and the Board have, in effect, competing areas of jurisdiction, even though the Board (in this instance, the prior commissioners) has the authority to determine the jurisdiction of the medical review panels through their interpretation of Section 61 and the panel certificate.

I conclude that an error concerning the jurisdiction of the medical review panel would put the prior commissioners' decision outside of the protective ambit of the privative clause that is found in Section 96 of the *Act*. On a question of jurisdiction,

Section 96 does not protect the prior commissioners' decisions from review, nor does Section 65 protect the medical review panels' decisions from review.

The Certificate's Reference to "Capacity to Work"

As indicated earlier, the prior commissioners rejected the medical review panel's repeated statements that the worker's total permanent disability has prevented him from performing any manual, physical or sedentary work.

The prior commissioners contended that the medical review panel's statements pertained to the worker's employability and thus lay outside the jurisdiction of the medical review panel. This was an error.

The medical review panel clearly and expressly stated that its conclusions about the extent of the worker's disability were rendered "strictly on a medical basis." The medical review panel said so in paragraphs 7 and 10 of the certificate and on page 2 of the panel's clarification. I note that the wording "strictly on a medical basis" is underlined in the panel's clarification. In turning a deaf ear to these repeated assertions, the prior commissioners were implicitly challenging the medical review panel's medical expertise.

S. 61(1)(c) makes it mandatory for medical review panels to certify the extent of a worker's disability. That the medical review panel did not describe the worker's medical condition solely in anatomic or physiologic terms does not mean that its assessment of this condition was not based on medical grounds. The medical review panel concluded that, to a large extent, the worker's disability was due to a chronic pain syndrome. In the case of chronic pain, a description solely in terms of limitation of movement or the effect of physical damage to the anatomy may not be suitable.

There is nothing in the language of Section 61 or elsewhere in the *Act* to suggest that the medical review panel cannot describe the nature and extent of a disability in terms of its effect on the worker's capability to perform certain tasks and thus, logically, certain generic types of work. The *Concise Oxford Dictionary* defines "work" as follows:

work --n. 1 the application of mental or physical effort to a purpose; the use of energy. 2a a task to be undertaken. b the material for this. c (prec. by the; foll. by of) a task occupying (no more than) a specified time (the work of a moment). 3 a thing done or made by work; the result of an action; an achievement; a thing made. 4 a person's employment or occupation etc., esp. as a means of earning income.

Statements about a person's capacity to do some generic types of work need not be viewed as statements about that person's employability. The medical review panel's reference to "manual, physical or sedentary work" could be regarded as simply intending to emphasize the medical finding that the worker was incapable of performing the tasks usually encountered in daily living.

Another medical review panel had certified, in an earlier case, that a worker's disability rendered him "incapable of performing his duties as carrier driver or performing *manual labour* or *sedentary labour* (emphasis added)." This case was the subject of a Court of Appeal decision in February 1991, *Kooner v. Workers' Compensation Board* 54 B.C.L.R. (2d) (B.C.C.A.). The Board never contended that the medical review panel had exceeded its jurisdiction by referring to the worker's incapacity to perform "manual labour or sedentary labour." It is hardly arguable that the wording in the *Kooner* case made a difference, and that a reference to "manual or sedentary labour" is acceptable while a reference to "physical, manual or sedentary work" is not. Decisions cannot logically be based on such a slight difference in wording.

In light of the above considerations, I hold that the prior commissioners erred in law when they characterized the medical review panel's statements concerning the worker's disability as pertaining to his employability and, hence, as not binding on the Board. I find that the impugned statements were within the jurisdiction of the medical review panel.

I should like to add, however, that I understand the basis for the prior commissioners' concerns. The legislative evolution of s. 61 together with the Sloan and the Tysoe Royal Commission Reports suggest that the legislative intent was to make the assessment of the worker's earning capacity a matter outside the jurisdiction of the medical review panels.

Under s. 55(9)(b) and s. 55(9)(c) of the *Workers Compensation Act* R.S.B.C. 1960 c. 413, the medical review panels were explicitly authorized to certify as to the worker's fitness for employment and, if unfit, the cause of such unfitness. These provisions were deleted in 1968. In his 1966 report, Mr. Justice Tysoe had expressed the view that the exclusive jurisdiction of the Board to determine "the degree of diminution of earning capacity by reason of an injury" ought not to be encroached. Thus, the history of the present s. 61 suggests that the medical review panels must not address directly the question of a worker's employability.

On the other hand, s. 61 directs medical review panels to certify a worker's disability. The concept of "disability" is much broader than that of "functional impairment" or "physical impairment." It is a multi-faceted concept which partakes of legal, economic and medical aspects. As defined in *Black's Law Dictionary*, disability is a

composite of (1) actual incapacity to perform the tasks usually encountered in daily living and one's employment, and (2) physical impairment of the body that may or may not be incapacitating.

Because it explicitly uses the concept of "disability," the *Act* gives the medical review panels a somewhat broader jurisdiction than if it had used instead the concepts of "functional impairment" or "physical impairment." Proper consideration of whether statements made by medical review panels are within their jurisdiction cannot ignore this.

The very wording of the *Act* gives the medical review panels a certain amount of leeway. Statements that might incidentally bear on a person's employability do not transgress the limits set by this wording.

The Governors' Policy on s. 61(1) and "Total" Disability

I note that item #103.53 of the *Rehabilitation Services and Claims Manual* discusses Section 61(1)(c) of the *Act* and states, in part:

There are two distinct elements in a determination that a person is or is not fit to perform a particular job or occupation. There are, first, the physical requirements of the job and, second, the worker's capability of performing those requirements. The first of these is non-medical in nature and therefore outside the jurisdiction of the Medical Review Panel. The second is a medical matter within the jurisdiction of the panel, but only if there are sufficient facts before the panel which the Board has found regarding the physical requirements of the job. Even then, the panel's certification would not be binding with regard to any job where the Board concluded that the physical requirements were different from those before the panel.

I interpret this policy to mean that a medical review panel cannot certify that a worker is disabled from performing a specific job (for example, carpentry or pipe fitting) unless the Board has described the physical requirement of this job. It is my view that this does not imply that a medical review panel's more general statements as to the worker's ability to perform a broad type of activity (be it characterized as "labour" or "work") or a range of tasks are not binding on the Board.

Section 103.53 also states at the outset:

Section 61(1)(c) provides that, if there is a disability, the Medical Review Panel is required to certify as to its nature and extent, but not stated in terms of percentage of disability of the whole body.

The latter restriction means that the panel should not certify that a worker has a permanent “total” disability as this suggests an award at 100% of total.

This wording first appeared in the May 1988 *Manual*.

Underlying this policy is a series of decisions by the prior commissioners which found its fullest expression in a decision dated April 13, 1988. In this decision, the prior commissioners stated:

. . . the Commissioners consider that the finding by the Medical Review Panel that you are permanently totally disabled may be outside its jurisdiction as involving non-medical factors. *The Commissioners accept, however, that it is possible for a Medical Review Panel to determine on a strictly medical basis that a worker is permanently totally disabled (i.e. in the sense that the worker is suffering from such a degree of impairment that he is medically incapable of functioning in any capacity).*

(emphasis added)

This explains why, in the case before me, the prior commissioners did not object to the certificate on the grounds that the *Act* altogether bars medical review panels from certifying “total” disability.

It is my view that item #103.53 of the *Manual* must be read with the prior commissioners’ qualification in mind. In some circumstances and on a medical basis it must be possible for medical review panels to certify “total” disability. It would be helpful if this qualification was expressed in the policy manual. Read literally and without qualification, item #103.53 is not consistent with the terms of the statute.

As pointed out by worker’s counsel, to state that a medical review panel cannot certify that a worker is totally disabled, because this would be equivalent to certifying a “100% disability” implies logically that a medical review panel would similarly be unable to certify that a worker is not disabled since this would be equivalent to a 0% disability. This cannot be the intent of the *Act*.

A likely reason for the Legislature directing medical review panels not to certify the specific percentage of disability is to ensure consistency. S. 23(3) of the *Act* authorizes the Board to prepare a rating schedule of permanent partial disabilities. Practice has also developed within the Board as to the compensation of non-scheduled disabilities. Medical review panel members usually are not familiar with the Board’s schedule or practice in assessing permanent partial disability awards. To have medical

review panels specify percentages of disability would risk substantially overcompensating or undercompensating some workers. It, therefore, is logical that medical review panels not engage in the process of fixing the degree of disability. However, particularly where a worker suffers from chronic pain syndrome or psychological problems, certifying the extent of their disability may require reference to the extent of their ability to perform the substantial and material tasks connected with daily living — be it at home or at work.

Taking into account that the *Act* requires medical review panels to certify the extent of a disability, I conclude that a medical review panel which certifies a worker to be totally disabled does not offend the *Act*.

The Certificate's Logical Consistency

The second ground for the commissioners' decision of October 25, 1990 is the alleged contradiction in the certificate between the conclusion that the worker had a permanent total disability and recommendations regarding treatment and vocational assistance that the medical review panel thought might benefit him. Here, the prior commissioners were not challenging the medical review panel's jurisdiction. Rather, they were questioning the logic behind the medical review panel's conclusion that the worker was totally permanently disabled at the time of the examination.

The prior commissioners considered that the certificate was contradictory or at least ambiguous. According to them, the medical review panel's recommendation regarding treatment and vocational assistance raised doubts as to whether the worker's disability was permanent and total. I disagree.

As noted by worker's counsel, in order to be "permanent" for the purposes of s. 23 of the *Act*, a disability need not be immutable or unchangeable. The concept of permanence does not mean that the disability must continue throughout the life of the worker. It simply connotes the idea that the disability must have stabilized, that it must be something more than temporary, and at least presumably permanent. Where a person's welfare is at stake, to act on a presumption and disregard all possible treatment would be clearly irresponsible, however strong this presumption may be. Should treatment be successful, it would obviously be open to the Board to redetermine the worker's benefits.

I see no contradiction in characterizing a disability as "permanent" while simultaneously suggesting treatment for the disabled worker. In fact, it is the Board's general practice to advise workers, at the time a pension award is made, that it is subject to being reviewed if there is a change in the level of their permanent disability.

The prior commissioners were of the opinion that the certificate indirectly — albeit unwittingly — suggested that the worker was capable of sedentary work and, therefore, less than totally disabled. The prior commissioners based this opinion on the medical review panel’s comment that the worker would benefit from support from the Board for completion of his Accounting and Financial Diploma. The prior commissioners reasoned that, if the worker is capable of studying, he must be capable of sedentary work.

In my opinion, the prior commissioners misjudged the medical review panel’s comment. The panel’s clarification removes any doubts as to the meaning of this comment.

The panels’ clarification made it clear that its recommendations were “in the alternative.” In other words, were the Board not to agree with the panel’s recommendations regarding treatment for the worker’s orthopaedic problems and his chronic pain, the medical review panel was recommending that the Board at least offer the worker vocational assistance with a view to its effect on his self-esteem.

Moreover, the medical review panel described how:

The claimant’s disability is so marked that while he attended a one year accounting course, which started in the fall of 1988, he could only register for part of the course, which allowed him to limit most of his lectures to one hour at a time. It was then necessary for him to return to his apartment across the street from the college and soak in a hot bath to ease his pain in between lectures. He did much of his studying while in the bath, as he had too much pain to sit up and study.

This observation clearly conveys the notion that the worker was unfit for any type of work. To be capable of attending one-hour lectures intermittently is an entirely different proposition from being fit for work.

The medical review panel described the worker’s chronic pain condition at length, strongly recommending an intensive rehabilitation program at a multidisciplinary chronic pain centre. Putting the medical review panel’s recommendations regarding the worker’s Accounting Diploma in the context of what it also said about his chronic pain condition, it logically follows that the worker was not fit mentally or physically to be an accountant or do any other work, regardless of whether he received training. The panel’s clarification suggests quite strongly that the necessary precondition for the worker to be in a position to do any type of work is *successful* treatment for his chronic pain syndrome.

I conclude that the medical review panel's recommendations do not invalidate their finding that the worker is permanently totally disabled.

In light of the finding that the worker is permanently totally disabled, I suggest that the Board take a fresh look at these recommendations.

In his submission, counsel for the employer requested that every possible consideration be given to finalizing this claim as soon as possible and offering the worker every possible opportunity to rehabilitate himself. However, in the case before me, it is not appropriate for the Appeal Division to usurp the specialized functions of the rehabilitation consultant.

I should like to thank counsel for the worker and the Ombudsman Office for their thoughtful and very capable submissions as well as counsel for the employer, for his detailed account of the worker's unfortunate dealings with the Board.

The worker is entitled to a pension on the basis of the medical review panel finding of permanent total disability.

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

