

## Decision of the Review Division

**Number:** 14738  
**Date:** May 14, 2004  
**Review Officer:** Zen Kozak  
**Subject:** Health Care Decisions — Reconsideration or Decision on New Matter?

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The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated February 20, 2004. In support of this request for review, the worker has provided a written submission. The employer was given notice of the review and is not participating.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

### Issue

The issue on this review is the Board's decision to terminate the worker's intramuscular stimulation treatments effective February 24, 2004.

### Background

On March 9, 1995, the worker, a then 56-year-old tractor operator, was involved in a motor vehicle accident. The Board has accepted this claim for a lumbar musculo-ligamentous strain and chronic pain disorder. The worker was awarded a permanent functional impairment equal to 2.5% of total disability in recognition of his pain disorder and subjective complaints.

The Board originally terminated payment for the worker's intramuscular stimulation treatments effective February 28, 2002. This decision was reviewed in a Review Division decision dated October 15, 2003. The review officer determined that the Board had no basis to limit these treatments to February 28, 2002, and the worker should be reimbursed for his ongoing treatments.

A Board officer subsequently sought a medical opinion and, based on this opinion, once again terminated payment for further treatments. The letter of February 20, 2004, informed the worker that further treatments beyond February 24, 2004 would not be paid. The worker has requested a review of this decision, and believes that the Board should continue to pay for this treatment.

## **Facts and Evidence**

The following are the relevant facts and evidence that I have considered in conducting this review:

- A Board officer, upon receipt of the Review Division decision, noted the review officer's discussion on the matter of appropriateness of treatment being a matter for decision by a Board medical advisor, and how a Board medical advisor's opinion had not previously been obtained. The Board officer proceeded to request an opinion from a Board medical advisor as to "whether you feel this worker's condition has plateaued and therefore the ongoing treatment of the intramuscular stimulation would not be considered medically indicated at this time."
- A Board medical advisor, Dr. F., responded in a log entry dated February 16, 2004. Dr. F. indicated that the determination of plateau or clinical recovery with regards to chronic pain syndrome was not typically asked of medical advisors. Following Medline searches of Western medical journals, Dr. F. opined that the body of evidence-based medical literature on the use of intramuscular stimulation was not sufficient to develop evidence-based conclusions as to its efficacy in the treatment of chronic regional pain.
- The Board officer, as outlined in the letter of February 20, 2004, determined that the Board would no longer fund this treatment based on Dr. F.'s opinion. The Board officer relied on policy items #74.00 and #78.10 of the *Rehabilitation Services and Claims Manual ("RSCM")*, in determining that this treatment was unconventional and lacked evidence-based conclusions as to its efficacy in conventional medical literature.

## **Law and Policy**

### **The Act**

The Act was amended on June 30, 2002, by the *Workers' Compensation Amendment Act, 2002*, under Bill 63 which came into effect on March 3, 2003.

The law that applies to this review is found in subsections 21(1), 96(1), 96(4), 96(5) and 96.4(9).

Section 21(1) discusses the provision of health care benefits.

Section 96(1) discusses the jurisdiction of the Board.

Section 96(4) directs that the Board may, on its own initiative, reconsider a decision that the Board or officer of the Board has made.

Section 96(5) discusses the circumstances under which the Board is able to reconsider a decision under section 96(4).

Section 96(6) gives a review officer the authority to review a decision of the Board.

Section 96.4(9) discusses the circumstances under which a decision by a review officer "is final and the Board must comply with that decision."

## Policy

The policies relating to this review are found in the *RSCM*, Vol. I.

- Policy item #2.20, *Application of the Act and Policies*, provides, in part, that references to business processes are only applicable in decision-making to the extent that they are necessary to comply with the rules of natural justice and procedural fairness. These business processes are not intrinsic to the substantive decisions required by the Act and the policies.
- Policy item #74.00, *Physicians and Qualified Practitioners*, discusses, in part, the Board's right to determine if any particular form of treatment, or provider of treatment, is one that should be recognized for the care of a worker.
- Policy item #78.10, *Direction, Supervision, and Control of Treatment*, directs that all questions as to the necessity, character, and sufficiency of health care to be furnished shall be determined by the Board, and that the appropriateness of a particular treatment is a matter for decision by a Board medical advisor. Coverage for "non-standard" treatment is discussed.
- Policy item #96.20, *Board Officers*, directs that a Board officer determines whether compensation is payable. The term "compensation" includes a worker's entitlement to health care benefits.
- Policy item #C14-103.01, *Changing Previous Decisions – Reconsiderations*, discusses the Board's ability to reconsider a previous decision as provided under sections 96(4) and 96(5). This policy discusses how the Board's reconsideration authority is intended to provide a quality assurance mechanism for the Board by allowing the Board a time-limited opportunity to correct, on its own initiative, any errors it may have made.

## Reasons and Decision

There is no dispute that the Review Division decision of October 15, 2003 directed the Board to pay for the worker's intramuscular stimulation treatments beyond February 28, 2002. The review officer also concluded that the worker should be reimbursed for ongoing treatments. The review officer, in reaching his decision, weighed the medical evidence as guided by policy items #74.00 and #78.10.

The worker, through his representative, submitted that the Review Division decision of October 15, 2003, is final and binding on the Board and that the Board's decision of February 20, 2004, should be cancelled. Pursuant to section 96.4(9), the Board has no authority to once again revisit the issue of entitlement to this treatment and is bound by the Review Division decision. The Board therefore lacked the authority to alter the worker's entitlement for this treatment. The medical advisor was asked for an opinion as to whether the ongoing treatment was medically indicated, and Dr. R's response instead discussed whether a review of the literature supported evidence-based conclusions as to its efficacy. There is no requirement in policy that there need be evidence-based literature to support ongoing treatment of a worker. The medical advisor did not find the ongoing treatment to be inappropriate or no longer supportable.

I find that there is merit in the worker's submission. In deciding this issue, I must consider the circumstances under which the Board can render a new decision on a matter that has been previously decided by a review officer.

The Board's exclusive jurisdiction to issue decisions pursuant to the Act is discussed in section 96(1), and a Board officer's ability to reconsider a prior decision of the Board is discussed in sections 96(4) and 96(5), and in policy item #C14-103.01. Based on this law and policy, one cannot reasonably conclude that a Board officer has the authority to reconsider a decision of the Review Division under sections 96(4) and 96(5), given that section 96.4(9) directs that the Board must comply with a decision by a review officer. Conversely, it is equally unreasonable to conclude that every review officer decision can never be disturbed. The Act directs that, under certain circumstances, a review officer's decision can be reconsidered if the chief review officer so directs, and most decisions of the Review Division are subject to appeal to the Workers' Compensation Appeal Tribunal.

The Board's wide discretion to provide health care benefits under section 21(1) allows for individualized treatment to reflect the individual circumstances of a worker and his or her personal injury or disease. Variability in the nature and severity of a worker's compensable injury or occupational disease occurs over time. This variability allows a Board officer to make ongoing determinations on the entitlement to a health care benefit as a new matter arising as opposed to reconsiderations of prior decision under sections 96(4) and 96(5). However, the facts of the case which formed the basis of a prior determination must be so different that, by a later date, the subsequent decision is not merely a reconsideration of the prior decision but truly a decision on a new matter. New facts could include changes in a worker's circumstances or changes in medical knowledge.

In the facts of this case, I note that the only change that occurred between the Review Division decision of October 15, 2003, and the Board's letter of February 20, 2004, is the opinion of Dr. F. and the passage of time. There is no evidence that the worker's condition had significantly changed, and there is no evidence that the worker's treatment was any more or less beneficial. The Board officer relied on the same policies as were considered by the review officer. The review officer decided the issue in the absence of a Board medical advisor's opinion as discussed in policy item #78.10. The review officer held that this treatment was compensable regardless of the lack of evidence-based literature. I accept that the need for a medical opinion under policy item #78.10 constituted a business process, and, pursuant to policy item #2.20, was applicable to the extent that it was necessary to comply with the rules of natural justice and procedural fairness. The medical evidence before the review officer was sufficient for him to render a decision in the absence of a medical opinion and remain in compliance with the rules of natural justice and procedural fairness.

It is clear that the facts of this case had changed so minimally by February 20, 2004, that the Board officer did not have the authority to alter the binding nature of the review officer's decision on this issue.

I find that the Board officer lacked the authority to render a decision on the issue under review on February 20, 2004. As a result, I allow the worker's request.

**Conclusion**

As a result of this review, I cancel the Board's decision of February 20, 2004.

