

Decision of the Review Division

Number: 2069
Date: December 30, 2003
Review Officer: Guy Riecken
Subject: An Estate

The worker requested a review of the decision of the Workers' Compensation Board (the "Board") dated March 6, 2003. The worker provided a written submission in support of his request. The employer was notified of this review but is not participating. The worker died on June 6, 2003, and his surviving spouse seeks to continue the review on behalf of the worker's estate.

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

Issues

There are two issues in this review:

1. The preliminary issue of whether the worker's estate has standing to continue the review after the worker's death.
2. The review of the Board's decision to grant the worker a disability award based on a permanent functional impairment of 2.07% of total disability effective from May 27, 2002.

Background

On September 21, 2001, the worker was employed as an ironworker when he caught his hand between some rebar and sustained an injury. The Board accepted the claim for a right hand crush injury.

The claim was referred to the Board's Disability Awards Department. In the decision under review the Board granted a functional impairment award of 2.07% of total disability for the worker's right wrist impairment.

The worker filed his request for review of the Board's decision on April 15, 2003. The worker died on June 6, 2003, before the review was completed. The worker's surviving spouse, TM, on behalf of the worker's estate, requests that the review continue to completion.

Facts and Evidence

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

- The May 22, 2002 medical review memo from Dr. S, Board medical advisor, which indicates that, although the worker was not able to return to his full pre-injury heavy duties, he was capable of returning to moderate duties on a full-time basis.
- The May 23, 2002 memo from the Board case manager, which indicates that the worker's wage loss benefits would be terminated as of May 26, 2002, and that the worker would be referred to Vocational Rehabilitation Services.
- The February 10, 2002 memo from the case manager, which indicated that the worker had returned to work in a different job three weeks earlier.
- The November 12, 2002 permanent functional impairment ("PFI") evaluation conducted by Dr. K., PFI physician, which sets out the measurements of the restricted range of motion of the worker's right wrist. The PFI evaluation also indicates that the worker reported that he continued to experience intermittent pain and cracking in his right wrist when performing various activities.
- The November 14, 2002 ARCON impairment rating report, which indicates that the worker had a scheduled impairment of 2.07%, including 0.6% for abnormal right wrist flexion and extension, 1.08% for abnormal radial and ulnar deviation, and 0.39% for abnormal motion of pronation and supination.
- The March 4, 2003 PFI review (Form 24) by the disability awards officer ("DAO"), which reviewed the findings of the PFI evaluation and the ARCON calculation, and concluded that the 2.07% scheduled impairment calculation would be accepted. The DAO considered the worker's subjective complaints for pain and concluded that the scheduled percentage included the worker's subjective complaints. The DAO determined that the effective date of the pension would be May 27, 2002, the day after the worker's wage loss benefits concluded. The DAO applied an earnings rate for the one-year period before the worker's injury of \$5,913.75. This was a monthly pre-injury earnings rate of \$492.79. The worker's disability award was based on 2.07% of that amount. The DAO indicated that a loss of earnings assessment was not applicable.
- The worker's certificate of death.
- The June 28, 2003 statutory declaration of TM, which indicated that TM was the common-law spouse of the worker, that the worker died on 6 June, 2003 without a will, that with the exception of insurance policies payable to a named beneficiary and jointly registered assets, the total value of the worker's estate did not exceed \$10,000, and that no other person was entitled to share in the estate of the deceased worker.

Submission

In the submission which the worker provided with his request for review, he argued that it was unfair to base his disability award on his one-year earnings prior to the date of injury because he had an uneven work history during that period due to his young age and relative inexperience in the workforce. The worker indicated in his submission that at the time of his injury he was close to moving to a better paying position with his employer and would have had future earnings that were much higher than the wage rate used in the decision by the Board. The worker also submitted that the functional impairment percentage was too low and that it did not reflect the extent of his pain in his wrist and did not reflect the effect on his reduced physical functioning and potential future earnings.

Law and Policy

The Act

The Act was amended, effective June 30, 2002, by the *Workers Compensation Amendment Act 2002*, (the “amendment”). As the worker’s injury and permanent disability occurred before June 30, 2002, the provisions of law and policy as they read prior to the amendment (the “former” Act and policies respectively), apply to the substantive issue of the worker’s disability award.

The Act was further amended, effective March 3, 2003 by the *Workers Compensation Amendment Act (No. 2), 2002*, (the “2003 amendment”). The current provisions of the Act as amended by the 2003 amendment, apply to the conduct of reviews by review officers.

Section 15 of the Act, which has not been changed by either of the aforementioned amendments, provides that a sum payable as compensation is not capable of being assigned, charged or attached, nor can it pass by operation of the law except to a personal representative.

Section 23(1) of the former Act provides that a worker with a permanent disability is eligible for a benefit that estimates the impairment of earning capacity based on the nature and degree of the injury.

Section 23(2) of the former Act allows the Board to compile a rating schedule of percentages of impairment of earning capacity for specified injuries, to be used as a guide in determining the compensation payable.

Policy

The following policies relating to the issues in this review are found in the *Rehabilitation Services and Claims Manual* (the “RSCM”), Volume I, Chapter 6, *Permanent Disability Awards*, Chapter 9, *Average Earnings*, and Chapter 12, *Claims Procedures*:

- Policy item #38.00, *Permanent Partial Disability*, identifies two methods for assessing permanent partial disabilities: the loss of function method and the projected loss of earnings method. These two methods are “considered in every case where applicable.” The amount of the award is to be the higher of the two methods.

- Policy item #39.00, *Loss of Function/Physical Impairment Assessment*, identifies the physical impairment, or loss of function method, provided for under section 23(1) of the Act, as the primary one used for measuring permanent functional disabilities. The policy also specifies the calculation model to be used for determining a loss of function award.
- Policy item #39.01, *Chronic Pain*, which applies to Board decisions made on or after January 1, 2003, provides guidelines for the assessment of section 23(1) awards for workers who experience disproportionate disabling chronic pain as a compensable consequence of a work injury.
- Policy item #39.10, *Scheduled Awards Permanent Disability Evaluation Schedule*, refers to the permanent disability evaluation schedule as a rating schedule for percentages of impairment for specific injuries, as well as other variables, that may be considered by the Board officer in Disability Awards.
- Policy item #68.00, *Permanent Disability Pensions*, provides that the long-term earnings rate resulting from the eight-week review is normally the rate used for pension purposes. However, if there are valid reasons for doing so, a different rate may be used for pension purposes.
- Policy item #97.40, *Disability Awards*, identifies that the report of a disability awards medical advisor (“DAMA”) or an external service provider takes the form of expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded.

Reasons and Decision

Issue #1 – Preliminary Matter – Standing of Worker’s Estate to Continue Review

This review was requested by the worker, under subsections 96(6) and 96.3(1) of the Act, prior to his death. These circumstances raise the issue of whether the deceased worker’s estate has standing, through the estate’s representative, to continue the review after the worker’s death.

As explained in a reported decision of the former Appeal Division of the Board (Appeal #95-0991), 11 *Workers’ Compensation Reporter* 507, at common law the estate of a deceased person did not automatically inherit all the rights of the deceased. Generally, with some exceptions, the rights of the deceased were extinguished upon death. For example, at common law the estate of the deceased person could not maintain an action for damages for a personal injury suffered by the person during his life. Statutory law has given rights and obligations to the estates of deceased persons that did not exist at common law. The extent to which the rights of the deceased vest in the estate, and the standing of the estate to commence or continue an action or an appeal with respect to those rights, is a matter of statutory law. The extent to which the rights of deceased workers to compensation, for employment-related personal injuries, may vest in their estates is governed, in the circumstances of this case, by the Act and by the *Estate Administration Act* (the EAA).

In their decision in Appeal #95-0991, the panel of the Appeal Division reviewed the provisions of the former Act and the EAA and concluded that the estate of a deceased worker had standing to continue an appeal that had been initiated by the worker, where the worker was seeking

to have his entitlement to compensation benefits recognized or given full effect. The Appeal Division panel also held that the estate of a deceased worker had standing to initiate an appeal of a decision concerning a claim for arrears of compensation.

The Appeal Division panel commented, however, that an estate may not be able to maintain a worker's claim for discretionary benefits, such as vocational rehabilitation benefits, because section 15 of the Act refers to "a sum payable as compensation" passing to a worker's personal representative. The panel found that the words "a sum payable as compensation" suggest some entitlement to compensation, as that term is defined in the Act, rather than discretionary benefits.

The 2003 amendment repealed sections 90 and 91 of the former provisions of the Act, which gave the former Workers' Compensation Review Board (the "Review Board") and the former Appeal Division, respectively, their jurisdiction.

The relevant provisions in the current Act with respect to the initiation of reviews, and the jurisdiction of review officers, are subsections 96(6), 96.3(1) and 96.4(2).

I find that the repeal of the former sections 90 and 91 has not diminished the standing of deceased workers' estates. I adopt the general approach of the Appeal Division in Appeal #95-0991. I also note that, as outlined in the passage quoted below, the Workers' Compensation Appeal Tribunal ("WCAT") has recognized the standing of estates of deceased workers to initiate and continue appeals. I conclude that the estate of the worker has standing, through the estate's personal representative, to continue this review.

This leads to the question of whether adequate documentation has been provided by TM to establish that she can act as the personal representative of the estate for the purpose of continuing this review. The issue of the documentation that is required for this purpose is not addressed in the legislation or the Review Division Practices and Procedures.

The Manual of Rules, Practices and Procedures of WCAT addresses the estates issue in the section 3.20 as follows:

The estate of a deceased worker has the right both to initiate an appeal to the WCAT, and to continue an appeal on behalf of a deceased worker, concerning a claim for arrears of compensation up to the date of the worker's death. Documentation is required to establish the identity of the estate's representative. This may include the Letters of Administration or Letters Probate, or a copy of the will if the estate is small and probate is not required, or a statutory declaration or other form of evidence where there is no will and the estate is small or substantially held in joint tenancy.

I adopt the same approach with respect to documentation.

In this case TM, the worker's surviving spouse, has provided a statutory declaration which confirms that the worker died intestate, that the estate is small, and that no one else is entitled to claim as beneficiary of the estate. I accept this as sufficient documentation to establish the standing of TM to continue the review as the personal representative of the worker's estate.

Issue #2 – Substantive Issue

In his submission, the worker contended that the percentage of the PFI assessment did not adequately reflect his degree of impairment and did not properly take into account his pain and the effect of his disability on his potential earnings. The worker also contended that the Board should not have used his earnings from the one-year period prior to the date of injury to calculate his award. The worker did not dispute the effective date of the award.

Under policy item #97.40, the DAO was required to treat the PFI findings of Dr. K, an external service provider, as expert evidence. The worker has not provided any other expert evidence to the contrary, and the PFI evaluation cannot be disregarded. I have reviewed Dr. K's PFI evaluation and the calculations in the ARCON impairment rating report. I find that the measurements from the PFI evaluation were correctly entered into the Board's ARCON rating system. I concur with the DAO's determination that the resulting 2.07% scheduled award accurately reflects the worker's functional impairment.

Under policy item #39.01, in considering the worker's chronic pain as part of a section 23(1) assessment, the DAO is required to enquire carefully into all the circumstances of the worker's chronic pain, including the findings of any multidisciplinary assessments, information provided by the worker, the worker's conduct and activities, medical evidence, and in the case of specific chronic pain, whether the pain is in keeping with the particular permanent impairment.

I find from my review of the evidence, including the PFI evaluation, the medical evidence on the claim file, the information provided by the worker, and the Form 24 PFI review, that the DAO considered the relevant factors under policy item #39.01. I find that the DAO's determination, that the worker's continuing pain was adequately included in the scheduled PFI award, was consistent with the evidence and with the provisions of policy item #39.01.

In calculating the disability award, the DAO used the earnings rate established at the eight-week point of the claim, in accordance with policy item #68.00. I have reviewed the information submitted to the Board by the worker with respect to his earnings from 1995 through 2000. While the worker did have higher earnings in 1995 through 1998, his annual earnings in 1999 and 2000 were lower than during the one-year prior to his date of injury. Considering all of the available information about the worker's earnings, I concur with the determination of the DAO that using the worker's earnings in the one-year period prior to his injury best reflects the worker's long-term loss due to the injury.

In light of the worker's low pre-injury earnings of \$492.79 per month, and the evidence that he had returned to work in a different job before the disability award was calculated, I concur with the determination of the DAO that a loss of earnings assessment is not applicable in this case.

As a result of this review the worker's request is denied.

Conclusion

As a result of this review, I confirm the Board's decision of March 6, 2003.