

Decision of the Review Division

Number: 8856
Date: February 25, 2004
Review Officer: Sidney G. Dennison
Subject: Provision of Vocational Rehabilitation Past Age 65

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated July 25, 2003. In support of this request for review, the worker has provided written submissions. The employer was given notice of the review and is participating. The employer has filed a submission with respect to this review, which has been cross-disclosed to the worker.

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

Issue

This is a review of the Board's decision to deny the worker vocational rehabilitation services after May 25, 2003.

Background

The worker, an appliance repairperson who is now 66 years old, injured his lower back and both knees on May 30, 2002, while repairing a stacked washer/drier unit for a home appliance repair service. The worker received short-term disability benefits from May 31, 2002 to December 1, 2002, and vocational rehabilitation benefits from December 2, 2002 to May 25, 2003. The worker fractured his left wrist on May 7, 2003. The wrist fracture was accepted under this claim, as the fall that caused the injury was due to the worker's compensable knee condition. Further short-term disability benefits were paid from May 26, 2003 to September 22, 2003. On October 28, 2003, a Board officer wrote to the worker advising that he had been assessed as having a permanent functional impairment equivalent to 12.48% of total disability. The worker began receiving a functional pension in the amount of \$345.48 at the end of November 2003.

The worker's vocational rehabilitation benefits were concluded because the worker was unable to convince the Board officer that he had intended to work past the normal retirement age of 65. The worker asserts that it was his intention to work until he was 70 years old, and so continues to seek vocational rehabilitation services.

Facts and Evidence

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

- On November 26, 2002, a Board officer wrote to the worker to arrange an interview on December 5, 2002, to begin the process of developing a vocational rehabilitation plan.
- The Initial Vocational Assessment (“IVA”) was completed during the interview of December 5, 2002. The IVA notes that the worker held a \$93,000.00 mortgage, and had just purchased a new car and a motor home. In documenting the worker’s financial situation, the IVA noted that it was the worker’s intention to continue working until age 70. The IVA indicates that if a return to the pre-injury employer is not possible, the vocational rehabilitation plan would focus on Phase III.
- On January 13, 2003, the Board officer telephoned the worker to ask if he could have his employer provide a letter verifying the worker’s intention to work until he was 70 years old, as the worker said that he and his manager had specifically discussed this issue.
- On January 24, 2003, the worker reported that his manager had declined to provide the requested letter. The worker reported that the manager said such a letter would need to be issued “by personnel.” The Board officer then telephoned the manager to explain what the Board required. The manager advised the Board officer that she remembered a casual conversation with the worker about working after age 65, but that the worker had referred to the fact that he had not yet reached the age of 65 and “you never know.” The manager interpreted this to mean, “maybe I will and maybe I won’t.” The manager explained that she was not prepared to write a letter verifying the worker’s intention to work to age 70 based on such a casual conversation.
- The Board officer met with the worker on February 4, 2003. The Board officer reviewed the manager’s comments, and advised of the need to provide the Board with evidence of his intention to work to age 70.
- On February 17, 2003, Dr. M. wrote to the Board, stating that the worker had consistently and enthusiastically discussed his strong desire to return to work throughout his disability. Dr. M. said he had no doubt regarding the worker’s ongoing and current wish to return to some form of employment.
- On February 20, 2003, the worker wrote to the Board officer, asserting that he had told the manager that he wanted to “stay with (his) job after 65” during the course of an employee evaluation. The worker submitted financial documentation regarding his mortgage and car loan, as well as statements from four individuals stating that the worker had told them of his intention to work beyond age 65.
- The documentation submitted by the worker was then considered by three Board officers on March 3, 2003. The Board officers concluded that the evidence offered by the worker was not convincing, noting that the worker had applied for Canada Pension Plan (“CPP”) and Old Age Security (“OAS”) benefits, had relocated, and had purchased a motor home. The Board officers considered that these actions suggested that the worker had been preparing for retirement. It was agreed that the Board officer would contact Dr. M., and request a

medical opinion as to whether the worker's medical condition would have allowed him to work until 70 years of age, had he not sustained his compensable injuries.

- Also on March 3, 2003, the Board officer contacted the worker who advised that he had applied for his CPP benefits at age 60 because he had been told that if he did not apply "there would likely be no money left in the fund." The worker said his OAS commenced on November 1, 2002, after he turned 65 in October 2002. The worker reiterated that he had never intended to quit working at age 65.
- In a letter dated March 5, 2003, Dr. M. advised the Board that it was his opinion that the worker would have been capable of working past the age of 65.
- A claims log entry for March 6, 2003, documents a telephone conversation between the Board officer and Dr. M., which apparently took place prior to Dr. M.'s drafting of the letter dated March 5, 2003. The Board officer explained the Board's need for evidence of the worker's pre-injury intention to work to age 70. Dr. M. agreed to write a letter confirming that the worker's general medical condition prior to the compensable injury was good, and that the worker would have been able to continue working at his pre-injury employment beyond age 65.
- On May 12, 2003, the Board officer met with the worker. The Board officer advised that the evidence the worker had submitted had been reviewed by the Disability Awards Department, and they too had concluded that the evidence was not sufficient to document the worker's pre-injury intention to work to age 70. The Board officer advised that vocational rehabilitation benefits would be concluded as of May 25, 2003. This decision was then confirmed by way of a letter dated July 25, 2003.

Submissions

The worker submits that he did, in fact, discuss the issue of working past age 65 with his manager, and that this conversation was not "casual." The worker submits that the manager had refused to confirm this conversation in writing, as she was not going to "sign her name to anything that might hold her or (the employer) liable." The worker submits that he has provided all the evidence requested by the Board, but that "nothing was good enough." The worker explained that he applied for early CPP at age 60 because he had been advised to. The worker also explained that when he turned 65 "the OAS was automatic," but that he did not intend to retire. The worker also states that he and his wife relocated because his wife was given an opportunity to become the office business manager for a moving company in the new community. The worker states that, in 2001, he and his wife extended their home mortgage by \$30,000.00 in order to cover the cost of a motor home. This, the worker states, substantially increased his mortgage payment. The worker states that, in January 2002, he and his wife purchased a new car, financed over 48 months at \$576.00 per month. The worker states that the purchase of the car and the motor home were made on the assumption that he and his wife would continue to enjoy two incomes. The worker states that it was necessary to sell both the motor home and the new car, due to the decrease in his income following his injury.

The employer submits that the Board's decision is correct, and asks the Review Division to uphold the decision.

Law and Policy

The Act

There were changes to the Act as a result of Bill 49 coming into force on June 30, 2002. Since the worker's injury occurred prior to that date, the Act, as it read immediately prior to June 30, 2002 (the "former Act"), applies to any entitlement to vocational rehabilitation services that the worker might have.

Section 16(1) of the former Act gives the Board the authority to provide vocational rehabilitation benefits.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* ("RSCM"), Vol. I:

- Policy item #40.20, *Projected Loss of Earnings Pension*, states that Board considers age 65 years to be the standard retirement age. If the worker was at or above the age of 65 years at the time of injury, the worker's pension will usually be established by the physical impairment method, and that pension is payable for life. A projected loss of earnings pension is not awarded unless clear and objective evidence suggests that the worker would have continued to work past the age of 65 if the injury did not occur.
- Policy item #85.30, *Principles of Vocational Rehabilitation*, establish that the intent of vocational rehabilitation is to return the worker to gainful employment.
- Policy item #85.40, *Service Objectives*, sets out the objectives of vocational rehabilitation. These include assisting in returning workers to their pre-injury employment, or to an occupational category comparable in terms of earning capacity, and providing assistance to overcome the vocational impact of the compensable injury.
- Policy item #87.20, *Operational Process*, sets out the five phases of vocational rehabilitation. Phase II involves a return to a modified job, or other in-service placement, with the same employer. Phase III applies in cases where the employer is unable to accommodate the worker in any capacity. Vocational exploration then progresses to suitable occupational options in the same or in a related industrial sector, capitalizing on the worker's directly transferable skills.

Reasons and Decision

Vocational rehabilitation services are a discretionary benefit provided under the authority of s.16(1), to aid in returning injured workers back to work, and assisting in lessening or removing a resulting handicap. The exercise of this discretion is guided by the published policy of the Board of Directors, the RSCM. Policy items #85.30 and #85.40 reiterate the goal of returning injured workers to employment, while minimizing any loss of income arising from a compensable disability.

The issue of retirement is not expressly addressed in s.16(1). However, the RSCM does provide some guidance in this area. The issue of pension entitlement is not before me. However, in practice, a similar principle to that found in policy item #40.20 applies in that the Board generally considers 65 to be the standard retirement age, not only for pension entitlement, but also in relation to vocational rehabilitation. Thus, the Board does not normally offer vocational rehabilitation services to workers over the age of 65. Nevertheless, vocational rehabilitation services may be offered if there is evidence of the worker's intent to work beyond the standard retirement age. Thus, this review turns on whether there is sufficient evidence to support the worker's assertion that he intended to work past the age of 65.

During their first meeting, on December 5, 2002, the worker advised the Board officer that it was his intention to work until he was 70 years old. I consider this early statement of intent to add weight to the worker's assertion. Both CPP and OAS are benefits for which the worker qualified by virtue of his age, and are not related to the worker's employment status. While forgoing such income may be an indication of intent to continue working, I do not believe that acceptance of such income clearly demonstrates intent to retire. Consequently, I have not afforded great weight to the fact that the worker applied for CPP and OAS benefits. I consider that the fact that the worker financed the purchase of a motor home, and a new car, and then had to sell these vehicles as a result of the reduction in the worker's post-injury income, further indicates an intent to work beyond age 65. Finally, there is the evidence of the worker's physician, who has reported that the worker would have been medically able to work past the age of 65, had it not been for his compensable injury. The physician also reported that the worker had consistently expressed a desire to return to employment, and not to retire. I have concluded that the evidence supports the worker's assertion that he intended to work beyond the age of 65.

The IVA indicated that the intent of the worker's vocational rehabilitation plan was to move to Phase III if the pre-injury employer was unable to accommodate the worker in Phase II. The employer has been unable to accommodate the worker. Thus, any vocational rehabilitation services offered to the worker would now be in accordance with Phase III, as set out in policy item #87.20. In addition to the worker's transferable skills and physical limitations, the worker's vocational rehabilitation plan should give consideration to the fact that the worker is now in receipt of a pension award intended to compensate him for lost income arising from his compensable disability.

I find that the worker is entitled to vocational rehabilitation services in the form of eight weeks of job search allowances, with individualized assistance provided by an external job placement specialist. As a result, I allow the worker's request.

Conclusion

As a result of this review, I vary the Board's decision of July 25, 2003.

