

## REVIEW DECISION

**Re:** Review Reference #: R0236326  
Board Decision under Review: March 27, 2014

**Date:** December 6, 2018

**Review Officer:** Allan Wotherspoon

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In February 1983 the worker, then age 41, sustained an injury to his right foot. The Workers Compensation Board ("Board"), which operates as WorkSafeBC, allowed the worker's claim and accepted a number of permanent conditions.

The worker was initially granted a permanent functional impairment award on a loss of function basis of 2.5% of total disability. Subsequently, his disability was reassessed and his functional award was replaced by a partial loss of earnings award effective November 15, 1993. The worker's functional impairment was reassessed by the Board in 2003, 2010 and 2012. While the loss of function component was increased, no change was made to the loss of earnings award as it continued to be higher than the loss of function award.

As a result of the 2012 reassessment, the Board determined that the worker was competitively unemployable and that he was entitled to a 100% loss of earnings award.

The decision to grant the worker a 100% loss of earnings award was communicated in a decision dated March 27, 2014. In that decision, the Board determined the loss of earnings award would terminate on the worker's 70<sup>th</sup> birthday. After that date, the worker would receive a permanent disability award for loss of function of 8.62% effective October 15, 2012.

The worker has requested a review of the Board's March 27, 2014 decision. He is represented by a solicitor who provided written submissions in support of the request. I note that the worker was granted an extension of time to request a review of this decision.

In his Request for Review, the worker's solicitor indicated that the only issue in dispute was the termination date of the worker's loss of earnings award and his submissions dealt solely with that issue.

The employer is no longer registered with the Board and there is no successor or deemed employer. As a result, there is no respondent to this review.

My authority to conduct this review is found in section 96(6) of the *Act*. Since the worker was injured and the first indication of a permanent disability was before June 30, 2002, the law that applies to the worker's disability award entitlement is the *Act* as it read prior to the June 30, 2002 amendments ("former *Act*"). The

policy that applies is found in Volume I of the Board's *Rehabilitation Services & Claims Manual*.

The standard of proof that applies to this review is the balance of probabilities as modified by section 99(3) of the *Act*. Section 99(3) provides that where the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker.

## **Issue**

The issue in this review is the termination date of the worker's loss of earnings award

## **Analysis, Decision and Reasons**

Policy item #40.20, *Duration of Projected Loss of Earnings Pension*, states that while a loss of function award is granted for life that is not necessarily the case for a loss of earnings award. The policy explains that when a worker is assessed for a loss of earnings award following a recurrence of disability, the worker's age at the date of recurrence is used to determine the duration of the loss of earnings award. The date of recurrence was determined to be October 15, 2012, at which time the worker was age 65. Policy item #40.20 states that were a permanent disability award is assessed and the worker is at or above age 65, normally the pension is granted on a loss of function basis. However, the policy goes on to state that a loss of earnings award may continue past age 65 in cases where the worker presents clear and objective evidence that he or she would have worked past age 65. In that case, the Board may set a different retirement date.

Here, the Board determined that the worker's retirement date was his 70<sup>th</sup> birthday, noting that the worker was still working at age 65 for an employer that had no mandatory retirement, that he had no pension or retirement savings, and that the worker had expressed that he would have to work for "many years yet".

In his submissions, the worker's solicitor argued that the worker would not have retired at age 70 and would likely have worked until age 75. The worker's solicitor submitted that, aside from his compensable right foot injury, the worker was generally healthy and that he could continue working. The worker's solicitor noted that the worker was working in 2012 when his condition was reassessed. The worker's employer at that time confirmed that it did not have a mandatory retirement age and that it did not have a pension plan.

The worker's solicitor also notes that the worker has limited retirement savings to fund a retirement at age 70. The worker does not have a pension or RRSP. He

noted that the worker has financial obligations, including a mortgage and two vehicle loans which would require him to work until at least age 75.

In support of these submissions, the worker's solicitor also submitted a number of documents. These included a statement from the worker setting out his financial situation and stating that he intended to work to age 75, financial statements in respect of his mortgage and vehicle loans, and detailed monthly budgets. In his statement, the worker noted that both his father and grandfather had worked past age 75 and he had always intended to do the same.

I have decided to allow the worker's request. When the evidence is viewed as a whole, I find that it is sufficiently clear and objective to establish that the worker would have worked past age 65 and likely not retired until age 75. Accordingly I vary the decision dated March 27, 2014. As a result, the worker's loss of earnings award will terminate on his 75<sup>th</sup> birthday and thereafter he will receive his loss of function award.

## **Conclusion**

As a result of my review, I vary the decision of the Board dated March 27, 2014.

Allan Wotherspoon  
Review Officer  
Review Division