

## **CLAIM HISTORY AND APPEAL PROCEEDINGS:**

The Worker injured his right shoulder in a workplace accident on February 18, 1986. He has not worked since that time.

In September 1988, the Worker was awarded a three percent permanent impairment rating. That award was increased to 10.5 percent following a decision of the Workers' Compensation Appeal Board on February 15, 1989. The Worker's impairment rating was further increased to 18 percent as a result of a Permanent Medical Impairment ["PMI"] assessment conducted on May 30, 2006.

In 2005, the Board reviewed the Worker's file and assessed his eligibility for benefits in relation to chronic pain. The Board determined that the Worker suffered from chronic pain, as that condition is defined in the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"] and awarded him a three percent pain related impairment ["PRI"] rating.

The Worker applied for a supplementary benefit in 2006. In decisions dated October 13 and November 6, 2006, a Board Extended Benefits Adjudicator concluded that the Worker was not entitled to a supplementary benefit. The Worker appealed to a Hearing Officer who, in a decision dated December 13, 2006, confirmed the earlier decisions. The Worker appealed to this Tribunal.

This appeal proceeded by way of oral hearing in Stellarton on February 7, 2007. The Worker and his wife testified at the hearing, and the Worker's representative presented submissions on his behalf. Neither the Board or the Employer actively participated in the appeal.

## **ISSUE AND OUTCOME:**

Is the Worker entitled to a supplementary benefit?

Yes, the Worker is entitled to a supplementary benefit for the period October 1, 2006 to September 30, 2007.

## **ANALYSIS:**

The legislation applicable to this appeal is the *Act*. In weighing the evidence, I have considered s. 187 of the *Act* which provides that where there is doubt on an issue and the possibilities are evenly balanced, the issue shall be resolved in favour of the worker.

Provision for the payment of a supplementary benefit is contained in ss. 227(4) of the *Act*. The relevant portion of that section provides that where a worker is injured prior to March 23, 1990, and is receiving or entitled to receive periodic compensation of either a permanent partial disability or a permanent total disability award and meets the conditions prescribed by Board regulation, the Board shall pay a supplementary benefit to the worker.

When ss. 227 (4) of the *Act* is read together with sections 28 to 33 of the Board's General Regulations, it is apparent that the Worker must satisfy the following criteria to establish entitlement to a supplementary benefit:

- 1) The Worker's compensable injury occurred prior to March 23, 1990;
- 2) The Worker is receiving or is entitled to receive periodic compensation for a permanent disability;
- 3) The Worker is receiving a Canada Pension Plan/Quebec Pension Plan ["CPP/QPP"] disability pension for his compensable injury, or would be entitled to receive a CPP/QPP disability pension but for insufficient contributions to CPP/QPP; and
- 4) The Worker has a personal income below one-half of the average industrial wage for Nova Scotia.

Board Policy 3.8.1 R4 also addresses the issue of supplementary benefits. It essentially reiterates the above requirements.

A supplementary benefit is payable to workers who were injured prior to March 23, 1990. These workers do not qualify for earnings-replacement benefits. A supplementary benefit is intended to assist workers injured prior to March 23, 1990, whose income is below one-half of the average industrial wage for Nova Scotia. The Worker falls into this category.

The Worker was provided with a lump sum payment for his permanent partial disability award in 1989. He received no further benefits from the Board until his file was reviewed for chronic pain benefits in 2005. At that time, he received another lump sum payment of approximately \$6,900.00 dollars.

The Worker and his wife testified that when he received this payment, he voluntarily stopped receiving social assistance until the lump sum payment for chronic pain was gone. Currently, the Worker receives monthly social assistance in the amount of \$351.00, along with his PRI pension of \$225.00, for a total monthly income of \$576.00.

The critical issue in this appeal is whether the Worker meets the criteria with respect to CPP disability pension benefits. The other criteria are not in dispute - the Worker's injury occurred prior to March 23, 1990, his income is well-below the necessary threshold to

qualify for a supplementary benefit, and he is in receipt of a monthly disability pension.

In the present case, the Worker applied for CPP disability benefits in 1988 and 1989. His requests were denied on the basis that, although his condition may have prevented him from returning to his pre-accident employment, a determination could not be made that the Worker was completely disabled from resuming any type of work.

The Worker reapplied for CPP disability benefits in August 1995. Human Resources Development Canada [“HRDC “] reviewed his claim and again determined that his medical condition did not warrant a finding that he would be entitled to a CPP disability benefit. When HRDC reviewed the Worker’s claim in 1995, it did so under its late applicant provisions, as it was clear that the Worker would not qualify for benefits due to the fact that he had not made CPP contributions since he last worked in 1986.

In 2005, the Worker once again applied for CPP disability benefits. In correspondence dated March 9, 2006, HRDC indicated that CPP legislation required that a payment be made in four of the last six years in order to qualify for benefits; unfortunately, the Worker did not meet this requirement. HRDC then reviewed the Worker’s claim under the late applicant provision. The operative year for CPP purposes was 1989, based on the Worker’s history of payments into the CPP. HRDC concluded that the medical evidence did not support a finding that the Worker was completely disabled from working back in December 1989. On that basis, the Worker was again denied CPP disability benefits.

The Worker is seeking a supplementary benefit from the Board for the period October 1, 2006 to September 30, 2007. In denying the benefit, the Board has followed CPP’s lead and concluded that the medical evidence did not support a finding that the Worker’s condition was severe enough in 1989 to limit all or any type of work.

In reaching this determination, the Board considered both the Worker’s shoulder injury and his chronic pain diagnosis. The Board also relied upon an August 3, 2006 opinion from one of its Medical Advisors which stated that, although the Worker’s shoulder injury, alone, would not qualify him for CPP disability benefits, the Worker would qualify for CPP disability benefits based on chronic pain or mental health issues.

In a subsequent opinion dated October 23, 2006, the Board Medical Advisor indicated that the medical evidence did not suggest that the Worker’s chronic pain was severe enough back in 1989 to limit any or all type of work. On that basis, the Board concluded that the evidence did not establish that the Worker would have been disabled from any type of employment as a result of his shoulder injury and his chronic pain.

The Worker’s representative argues that, for the purposes of a supplementary benefit application, the relevant date for assessing eligibility for a CPP pension is the date that the supplementary benefit is being requested. The Board, on the other hand, used December 1989. HRDC used that date, as it was the last possible date on which the Worker could

qualify for benefits, based on his previous CPP contributions.

I find that the relevant date in this case is the date that the Worker applied for a supplementary benefit in 2006. In my view, the December 1989 date used by both the Board and HRDC is not a relevant consideration in the Worker's application to the Board for a supplementary benefit.

The Regulations provide that, when assessing a worker's request for a supplementary benefit, the Worker be eligible for a CPP disability pension for his compensable injury, but for insufficient contributions. It is reasonable to interpret that provision as referring to the present time, not a date in the past. There is nothing contained in the Regulations or Board Policy to suggest that the operative time would be anything but the present time of the application.

In my view, it would go against the intent of a supplementary benefit to require the Worker to prove today, that his medical condition back in 1989 prevented him from returning to any type of work. It was only in 2005 that the Board determined that the Worker suffered from chronic pain relating to his compensable injury. It is far too speculative for a medical specialist today to try and determine whether a condition that has only recently been identified could have prevented him from returning to the work force many years ago.

The Worker is not looking for a supplementary benefit dating back from 1989; rather, he is seeking a supplementary benefit in 2006. In my view, that should be the relevant date to assess his eligibility for a supplementary benefit. To conclude otherwise would unduly ignore the real merits and justice of this claim.

If December 1989 were the operative date in this case, the Worker would never be able to qualify for a supplementary benefit. When his CPP disability benefits were denied in 1989, it was not on the basis of insufficient contributions; rather, it was because a determination was made that his medical condition did not render him completely unable to work. To use 1989 as the relevant date would effectively ignore the deterioration in the Worker's condition over the years. There is clear evidence on file that the Worker's condition in 2005 was, in fact, much worse than in 1989. A Board Medical Advisor has recently expressed the opinion that the Worker's chronic pain would render him unable to work and therefore qualify him for CPP disability benefits. Unfortunately for the Worker, he has insufficient contributions to qualify for benefits at this time, as he has not worked since 1986.

I accept the Board Medical Advisor's opinion that the Worker's current medical condition would qualify him for CPP disability benefits, as he has a severe and prolonged disability. I therefore conclude that the Worker meets the necessary requirements for a supplementary benefit. Supplementary benefits are intended to assist individuals like the Worker who were unable to return to work following their injury, but received no earnings-replacement benefits and whose income falls below a certain threshold.

**CONCLUSION:**

The appeal is allowed. The Worker is entitled to a supplementary benefit for the period October 1, 2006 to September 30, 2007.