A Map of a Disability Claim:
St. John's Rehabilitation Hospital and O.N.A. (Greening), Re

A recent arbitration decision contains an impressively neat summary of the key issues in disability disputes, while highlighting the seminal decisions and providing a checklist of pitfalls to avoid. The decision makes for excellent reading to any counsel concerned with the issue of whether a continued disability exists in a first party disability claim.

In *St. John's Rehabilitation Hospital and O.N.A. (Greening)*, *Re*,[1] the arbitrator dealt with an appeal by the Ontario Nursing Association of the denial of a long term disability claim of one of its members.

The Facts

The claimant was a bedside nurse who ceased working primarily due to back pain, on July 28, 2011. She was approved for LTD benefits effective February 23, 2012, on the basis that she was disabled from her "own occupation". After she had been off work for two years, the applicable test of "total disability" changed to an "any occupation" test. The parties did not dispute that the claimant met the test for total disability within the two year period. However, the employer disagreed that she was totally disabled from any occupation within the meaning of the policy.

In support of their respective positions, the parties each called medical witnesses.

The claimant called her treating neurosurgeon who stated that she was unfit to return to work in her capacity as a registered nurse.

The employer called an orthopaedic surgeon retained to perform an independent medical examination who came to the same conclusion. However, the employer's expert stated that with proper treatment, she could improve sufficiently to return to a lighter form of work.

The employer also called a physician whom it had retained to review the claimant's file on six occasions but had not ever examined her. After reviewing the report of the claimant's expert, he came to the conclusion that she should be able to perform sedentary or light work related activity.

The Law

The employer relied upon *Sucharov* v*. Paul Revere Life Insurance Co.*; *Toronto (City)* v*. C.U.P.E., Local 416*; *Toronto (City)* v. *CUPE, Local 79*; *Plouffe* v. *Mutual Life*; *Mathers* v. *Sun Life*; and *Chaplin* v. *Sun Life*, among other decisions.

The claimant also relied upon *Sucharov* and *Toronto (City)* v*. C.U.P.E., Local* 416, in addition to *Joseph Brant Memorial Hospital and ONA, Re*; *Eddie* v. *UNUM Life*; and *Domtar Inc. and I.W.A.-Canada, Local 2693, Re*.

[1] St. John's Rehabilitation Hospital and O.N.A., Re (2016), 2016 CarswellOnt 6381 (Ont. Arb.)

The Arbitrator stated that his review of these authorities led him to the following principles applicable to the dispute:

- The onus of proof of total disability is upon the claimant.

- If the claimant presents a prima facie case that he or she is totally disabled from "any occupation", the onus then shifts to the insurer (or in this case the employer) to prove that there is a specific occupation the claimant is capable of substantially performing.

- The testimony of a doctor or other medical practitioner ought to be discounted if he or she has become an advocate and provides less than objective testimony. Similarly, a medical report which is based solely on the subjective narrative of the claimant should be given limited weight, if any.

- The material question is not whether a claimant suffers from pain or any illness, but whether he or she is disabled from performing work which is required of them pursuant to the "own occupation" or the "any occupation" test, as the case may be.

- In assessing the claimant's credibility, an adjudicator should consider his or her efforts or lack of effort to cooperate in treatment or accommodated work.

- The claimant's ability to attend a hearing ought not to influence the result. However, it is appropriate for the decision maker to observe and comment upon the claimant's behaviour at the hearing as it bears upon the restrictions and limitations alleged.

- In appropriate circumstances, the failure or refusal of a claimant to participate in a return to work process may be relevant.

The Arbitrator cited the definition of “total disability” set out in *Sucharov*:

> “…total disability does not mean absolute physical inability to transact any kind of business pertaining to one's own occupation, but rather that there is a total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation in order to effectuate a cure, hence, if the condition of the insured is such that in order to effect a cure prolongation of life, common care and prudence will require that he cease all work, he is totally disabled…".

The Arbitrator noted that these principles were not in dispute between the parties, at least insofar as they were applicable to the facts. The parties did however disagree on two legal issues: the requisite level of proof and the test of disability.

The Level of Proof

On this issue, the employer stated that proof of total disability cannot be satisfied by the testimony of a claimant alone; objective medical evidence supporting that testimony is also required. The claimant disagreed and replied that proof of total disability can be found in a claimant's testimony if it is consistent with the surrounding circumstances. Notably, the claimant argued that objective medical evidence is required only where the claimant's credibility was in issue, either because the claimant was dishonest or demonstrated physical capabilities at odds with his or her testimony.

The Test of Disability

On this issue, the employer relied upon the Supreme Court's decision in *Sucharov* and argued that total disability is established when a claimant can show that he or she is required to cease all work, as dictated by common care and prudence, in order to prolong their life. The claimant stated that the proper test is that set out in the insurance policy. The claimant further stated that it was unnecessary to establish that she would suffer harm from continued employment so long as she could establish on a balance of probabilities that her condition caused her to suffer too much pain to make it feasible for her to continue to work in any capacity for which she was "reasonably qualified".

The Decision

With respect to the required proof, the Arbitrator held that although medical opinions were useful and, in many cases, essential to a determination of total disability, there was no precise method of quantifying the degree of pain suffered by a claimant. Accordingly, any evidence tendered would necessarily be *subjective*. This being, there was no absolute requirement that *objective* medical evidence be tendered to substantiate a claim for total disability benefits. However, the Arbitrator specifically noted the caution expressed by the court in *Eddie* that an adjudicator must be "exceedingly careful" where there is little or no objective evidence of continuing injury.

With respect to the test of total disability, the Arbitrator emphasized that the employer's submission suggested that no matter how much pain a claimant might suffer, total disability would depend upon whether the performance of an occupation would cause further risk to the claimant's health. In other words, a claimant who suffered immense pain could never be totally disabled so long as the performance of work would not cause further deterioration in the claimant's condition. The Arbitrator rejected this position.

Referencing *Sucharov*, the Arbitrator stated that he read the decision to mean that the test for total disability could be satisfied in those circumstances wherein the claimant can physically and mentally perform the duties of an occupation, but not without additional peril to his or her life, or to a cure. The Arbitrator did not see the decision as suggesting that total disability exists only if pain prevents the claimant from working without *further* potential health complications.

Turning to the application of the law to the facts at hand, the Arbitrator noted that all the witnesses who testified agreed that the claimant suffered constant back pain and was not malingering. The question therefore was whether the pain was so severe that she was disqualified from working in any occupation for which she was reasonably suited.

In determining that issue, the Arbitrator emphasized that the claimant's treating neurosurgeon demonstrated a far greater knowledge of the claimant and her condition, and spent more time with her, than the employer's expert. The Arbitrator also emphasized that the claimant's expert never crossed the line between providing an opinion and becoming an advocate for her.

The Arbitrator was less impressed with the evidence of the employer's orthopaedic surgeon who conducted only a short interview and appeared to ask her fewer questions. In addition, an error contained within the report as to the claimant's work history suggested to him that the opinion was based on a somewhat "hasty" examination.

The Arbitrator also commented on the employer's expert's treatment of the claimant's knitting activities. To the Arbitrator's view, the expert appeared to be suggesting that she could make a living by knitting or that her ability to knit was in and of itself an indication that she could perform sedentary work. The fact that the claimant was able to knit and sell small quantities of knitted garments (for about $25), did not strike the Arbitrator as indicating anything about her potential to return to the workforce. In addition, the Arbitrator rejected the suggestion that the manufacture of handicrafts, even if that were that within her abilities, would be an occupation for which the claimant was reasonably suited by education, training or experience.

The Arbitrator was critical of the employer's other medical witness and found that he had crossed the line from expert to advocate by making unfounded criticisms of the claimant's neurosurgeon, such as that he no longer practiced surgery, which by coincidence neither did the orthopaedic surgeon retained by the employer.

Despite these concerns about the employer's medical witnesses, the Arbitrator focused on whether there was evidence that the claimant could have returned to work in some capacity after the two-year mark. The Arbitrator noted the results of an Functional Abilities Evaluation that concluded she was capable of sedentary work; the claimant's testimony that she was able to complete much of her housework and to regularly make the four-hour drive to her cottage; and the claimant's presentation during the conduct of the arbitration where she demonstrated an ability to sit for extended periods of time. Although he recognized that "disability" did not demand that a claimant be bedridden or utterly unable to enjoy life, the Arbitrator stated that when a claimant has voluntarily engaged in activities which seem to require effort beyond those required in the course of employment, some explanation is called for. He added that in that event, it is the responsibility of a claimant to offer evidence demonstrating that participation in those activities was not evidence of the ability to return to work. To the view of the Arbitrator, failing to do so amounted to a failure to discharge the onus of proof.

Also central to the Arbitrator's decision was the claimant's refusal to apply for an available alternative position. Her failure to inquire into the terms of that job and possible accommodations was called "unwise". At the very least, she ought to have sought medical advice as to whether the position was within her capabilities. The Arbitrator found that these failures contradicted her professed eagerness to return to work, with the result that it was difficult to escape the implication that the claimant had decided not to work.

Ultimately, the Arbitrator found that the claimant was not totally disabled under the "any occupation" test prescribed by the policy, and her grievance was denied.

The conclusions to draw from this are that the keys to establishing or discrediting the claim for total disability are as follows:

- Compelling medical evidence:

Although it was not surprising that the Arbitrator focused on the experts' familiarity with the claimant and the time spent with her, and how this impacts the weight attributable to their opinions, his comments on the more trivial criticisms raised by the insurer's medical witness and the conclusions drawn from the errors contained within the report are instructive. This should be a caution to experts, insurers, and their counsel to ensure that only material criticisms are raised and the factual content of medical opinions are sound.

- The Arbitrator's opinion as to whether an expert has become an advocate:

Also worthy of emphasizing is that where minor, insignificant criticisms are made by one medical witness against another, an Arbitrator may be persuaded that such conduct gives the appearance of bias, suggesting that the expert is no longer an expert but rather an advocate, with the result that the overall opinion is impugned.

- Whether activities of daily living support or detract from an ability to return to work:

As noted by the Arbitrator, where the activities of daily living suggest that a claimant enjoys a level of functioning that would permit a successful return to work, an explanation or clarification from the claimant is a tactical necessity, even if not a legal requirement. Failing to do so will give rise to a reasonable inference that the claimant is looking for a lifestyle change, rather than suffering from a genuine disability from employment.

- The effect of a failure to attempt a return to work:

Perhaps most crucially, an attempt to return to work in a position to which the claimant is clearly suited through training, education or experience, and failing to maintain it, may be the most compelling evidence of disability.

Overall, the Arbitrator's decision was founded on first principles, evident from some of the most fundamental cases on the law of disability. In the writer's submission, the dispute was correctly resolved.

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