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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987.

SUMMARY:

a. The application for procedural review is dismissed.

Introduction and background

1. The applicant injured her back in the course of her employment as a Pathology Technical Officer on 26 July 2008. After one week off work, she returned to work on suitable duties, but in March 2012 her employment was terminated due to the closure of the pathology centre. She currently works for 15 hours per week in different employment. The Insurer accepted liability and made weekly payments for all relevant periods. It follows that the applicant was an "existing recipient" of weekly payments immediately prior to 1 October 2012.

2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 30 June 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 7 October 2016 because she does not meet all the requirements of section 38(3). This decision was maintained following internal review.

3. The applicant sought Merit Review from the Authority by way of application received 19 August 2016. The Authority delivered its Findings and Recommendations dated 15 September 2016. The Authority made findings that the applicant: (i) has current work capacity, and can work for more than 15 hours per week and (c) does not satisfy the special requirements in section 38(3)(c) because she does not work up to her current capacity. Despite making these findings, the merit

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reviewer saw no reason to make a recommendation of any kind, thus rendering the status of the document issued "non-binding."[1]

4. An application was made to this Office for procedural review received via email on 5 October 2016. I am satisfied that the application was made within time and in the correct form.

Submissions by the applicant

5. Section 44BB (1) (c) of the 1987 Act states that this review is *"only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer."*

6. The applicant makes the submission that the Merit Review Service was not given the "full picture." This is thought to be because the Insurer relied on a report from a doctor who had an inaccurate or misleading history. The problem with this submission is that the Insurer relied on a number of other reports as well, all of which agreed with the conclusions reached by the doctor said to have the flawed history. It was clearly open to the Insurer to rely on some or all of those reports and in doing so it has properly performed the function required under the legislation. Any decision by an insurer to prefer certain pieces of evidence over others is not a decision reviewable by this office, since it involves the exercise of discretion or judgment by the Insurer.

7. The remainder of the submissions go to the merits of the decision. Procedural review does not exist for the purpose of re-running merit review. I can only conduct a procedural review of the work capacity decision made by the Insurer.

Submissions by the Insurer

8. The Insurer noted that the submissions do not relate to the procedures adopted by the Insurer in the course of making its decision. It also noted that the remainder of the submissions were addressed fully by the merit reviewer.

[1] Section 44BB(3)(g) says that recommendations are binding on the Insurer, whereas there is no similar statement in section 44BB(3)(e) and (f) concerning the findings on which recommendations are based.

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Decision

9. The Insurer advised the applicant by email dated 9 May 2016 that a work capacity assessment had commenced and that it may lead to a decision resulting in a consequent reduction in payments. This was confirmed by a letter dated 9 June 2016. The applicant was advised to forward any "additional information" she would like to have considered within 21 days of the date of the letter of 9 June 2016. This fully complies with the "fair notice" requirement in Guideline 5.2.

10. In the notice of the work capacity decision issued on 30 June 2016 the applicant was advised that she had been found fit to work for 30 hours per week.

11. The applicant was advised that she had received 162 weeks of payments [as at 21 June 2016]. This clearly places the applicant in the period following the second entitlement period, which ends after 130 weeks. The entitlement periods were explained and the effect of section 38 was also set out and explained.

12. The applicant was advised that the due to having less than 10% whole person impairment[2] she would continue to be able to receive medical treatment for a further two years after the cessation of weekly payments. Section 59A(2) and (3) were clearly explained.

13. The medical evidence relied upon in the decision-making process was current and included work capacity certificates from the NTD.

14. The relevant notice period in section 54(2)(a) was given.

15. Relying on reports from external providers the Insurer found that the applicant could work as a Medical/Laboratory Technician or as a Pathology Collector/Phlebotomist or as a General Clerk for 30 hours per week.

16. Without being so specific, the merit reviewer found that the applicant could work "in suitable employment for more than 15 hours per week."

[2] There is no current assessment of WPI.

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This finding was open to the merit reviewer and it is perhaps odd that the merit reviewer chose to not make a recommendation based upon it.

17. Given that the applicant does not currently work to the hours assessed by the Insurer and she is in the post-130 weeks period, it is clear that she does not meet the criteria set out in section 38(3)(c) to qualify for ongoing weekly payments.

18. There appear to be no procedural errors committed by the Insurer in this case.

Finding

19. The Insurer has complied fully with the legislative requirements and with the guidelines and accordingly the application should be dismissed.

RECOMMENDATION

20. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
9 November 2016