

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 170

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of Mark Waluzak requesting that he be paid for all lost time, including overtime, since March 27, 2006 when he was released by his doctor to return to work, but the Carrier continued to consider him medically disqualified from any position that required a commercial drivers license (CDL).

(Carrier File MW-DEAR-06-43-LM-226)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The record reflects that Claimant, a Track Foreman and a Sergeant in the Michigan Army National Guard, has suffered from coronary artery disease for several years. In August 2004, Claimant was treated with cardiac catheterization, angioplasty, and stenting. On March 23, 2005, Claimant's cardiologist wrote to the Michigan Army National Guard advising that Claimant had made remarkable improvement, was exercising greater than 12 METS per day with no cardiac symptoms such as chest pain or shortness of breath, and recommended that Claimant be retained in the National Guard and found fit for duty without restrictions.

On December 23, 2005, although he had exercised for an hour the night before with no symptoms, Claimant suffered a heart attack and was hospitalized for two days. On March 27, 2006, Claimant's cardiologist wrote a note clearing Claimant to return to work with no restrictions. No medical records were included with the note. Two days later, Carrier's Medical Department wrote Claimant requesting copies of all medical records related to his heart condition. On April 6, 2006, in response to a Carrier inquiry, Claimant's cardiologist indicated that a nuclear stress test showed mild ischemia but opined that with his exercise capacity, Claimant was able to return to work without restrictions. On April 20, 2006, Carrier found Claimant medically disqualified from the position of Track Foreman.

On April 24, 2006, Claimant's cardiologist found him fit for military service. On May 7, 2006, Carrier was notified that Claimant would be deployed to Iraq on May 29, 2006. Claimant's primary care doctor wrote a note clearing him to return to work without restrictions. On May 23, 2006, the Organization filed the instant claim. On May 29, 2006, Claimant deployed to Iraq.

Claimant returned from military service on August 20, 2007, and requested reinstatement to his position as Track Foreman. On August 24, 2007, Carrier requested updated medical records related to Claimant's medical condition. On October 19, 2007, Claimant provided a report from a doctor other than his primary care physician or his cardiologist which stated that his stress test was unremarkable. The report did not indicate which stress test the doctor was referring to and did not include any records of such a stress test. On November 8, 2007, Claimant's cardiologist administered a nuclear stress test to Claimant and found his condition unchanged relative to January 2006, including the continued presence of minor ischemia and an ejection function (EF) of 37%. On November 15, 2007, Claimant's cardiologist wrote that Claimant was "capable of performing an exertional job without any major cardiovascular risk," despite the presence of ischemia and an EF of 37%, citing his completion of duty in Iraq without cardiac symptoms and his ability to exercise at 12 METS without symptoms. On December 12, 2007, Carrier notified Claimant that the presence of ischemia and the EF of 37% disqualified him from holding any position requiring a Commercial Driver's License (CDL). The letter advised Claimant that the Medical Department would reconsider its finding upon submission of evidence documenting the absence of ischemia and an EF of at least 40%. On January 8, 2008, Claimant returned to service in the position of Track Laborer, a position that did not require a CDL.

The Organization's claim seeks compensation for Claimant beginning March 27, 2007, the date Claimant's cardiologist wrote the original note releasing him to return to work without restrictions. We cannot agree. Claimant had been off work following a serious heart attack. Carrier would be remiss in its duty to ensure the safety of its employees and the public if it returned Claimant to service based on a brief note from his doctor that was not accompanied by any records or even any detailed narrative explanation as to why Claimant was fit to resume service. Carrier's response, requesting detailed medical records, was the only reasonable response available under the circumstances.

The critical question in this case centers on Carrier's evaluation of Claimant's ability to return to service as a Track Foreman following its receipt of the detailed records it requested. In particular, Carrier's Medical Department refused to clear Claimant for service as a Track Foreman or in any other position requiring a CDL, as long as he had ischemia and an EF of less than 40%.

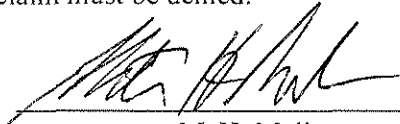
We understand fully Claimant's belief that he can serve as a Track Foreman. He served a tour of duty in Iraq without any further cardiac symptoms. His cardiologist has cleared him to perform job requiring high levels of exertion without restrictions. The State of Michigan has issued him a CDL.

However, we are unable to say on this record that Carrier's finding that Claimant is medically disqualified from holding any position requiring a CDL is arbitrary and unreasonable. Despite Claimant's possession of a Michigan CDL, Carrier is bound by the regulations of the Federal Motor Carrier Safety Administration, which disqualify from holding a CDL anyone who "has a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse or congestive cardiac failure."49 C.F.R. § 391.41(b)(4). Carrier interprets this regulation as disqualifying Claimant as long as he has ischemia and an EF below 40%. On the record developed, we cannot say that Carrier's interpretation of the FMCSA regulation is unreasonable. Furthermore, on the record developed, we are unable to say that Carrier's disqualification of Claimant from the position of Track Foreman despite his cardiologist's release was unreasonable. Claimant's cardiologist based his conclusion that Claimant was qualified despite his ischemia and low EF on Claimant's military service and his ability to exercise at 12 METS without cardiac symptoms. Yet we note that Claimant was exercising at 12 METS without cardiac symptoms and had worked out for an hour at his gym without symptoms the night before he suffered his second heart attack. We simply refuse to second guess Carrier's medical judgments in this case.

Nevertheless, we recognize Claimant's good faith desire to return to his Track Foreman's position. Carrier should advise Claimant specifically as to why his ischemia and EF of 37% disqualify him under the FMCSA regulation, whether it be reflective of "coronary insufficiency," or otherwise. Carrier has already advised Claimant that it will reconsider his qualification if his EF improves to 40%. Carrier should also advise Claimant what type of medical information, if any, would establish his qualifications despite his ischemia. If the Claimant does not believe that he had been presented sufficient information in this regard, he may subsequently petition the Carrier to provide him with the appropriate details.

Furthermore, for Claimant to successfully challenge Carrier's determination of his fitness for a position that requires a CDL, Claimant must obtain and submit sufficient medical evidence to establish an interpretation of the FMCSA regulation that would qualify him for a CDL despite his ischemia and EF of 37%. Such medical evidence should include the Claimant submitting a detailed explanation, accompanied by additional medical records if pertinent, from his cardiologist as to why, in his current condition, Claimant meets the qualifications for a CDL specified in the FMCSA regulation. Until and unless such medical evidence regarding the proper interpretation of the FMCSA regulation with respect to the Claimant's actual condition at the time is presented, and would support that the Claimant can at that point qualify for a CDL, there is no basis to overturn the propriety of Carrier's medical determination.

On the basis of the record, the claim must be denied.



M. H. Malin
Chairman and Neutral Member



T. W. Kreke 12-17-08
Organization Member



D. L. Kerby 12-17-08
Carrier Member

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