

SENIOR DIRECTOR

AUG 18 1995

LABOR RELATIONS

Appeal of Engineer L. M. Chiaramonte, for return to service after 10 years of rehabilitation from an automobile accident in 1979. Claim for lost wages and benefits on account of a delay in return to service pursuant to Article G-m-13.

FINDINGS: The significant events leading to this claim began when the Claimant was involved in an automobile accident in December 1979 which caused a cervical spine injury. In 1981, he underwent back surgery. After about three months recovery, he returned to work. However, he had three more operations and subsequently was granted a disability retirement by the Railroad Retirement Board in August 1984.

On January 10, 1993, the Claimant telephoned the Carrier's Labor Relations Office in New Jersey to inquire about the steps he needed to take to return to work. The next day, the Carrier responded by letter and advised the Claimant that it would be necessary for him to obtain a medical release from his attending physician and that the release must be handled in accordance with the Carrier's Medical Policy. The letter also provided instructions as to how the Claimant's physician could contact the Carrier's Medical Director.

Subsequently, on January 19, 1994, the Claimant's physician provided his findings about his evaluation of the Claimant's condition to the Carrier's Medical Department. The physician, among many observations about the Claimant's physical well-being, stated that he thought "a work trial is indicated." In a letter dated March 4, 1994, the Claimant was told to report for a "Functional Capacity Evaluation" on March 22, 1994 at 2:30 p.m. at Latham, New York. The Claimant lived in Port Saint Lucie, Florida.

Chronologically, the next piece of evidence in the record is a one page "Medical Status Report" form signed by the Carrier's Medical Director and dated March 25, 1994 ("Form 40A"). The box on Form 40A

that reads "Not qualified for any Conrail Job." was checked.

On March 31, 1995, the Carrier's Labor Relations Office sent a copy of the Claimant's "Functional Capacity Examination of March 22, 1994" to the Organization.

On May 2, 1994, the Organization wrote to the Carrier and, relying on Article G-m-13 of the Parties Agreement, requested that the Claimant be examined by a neutral physician. The Organization's request was rejected on June 9, 1994. The Carrier's reason was stated as follows:

There is no disagreement between Mr. Chiarmonte's physician and Conrail's Medical Director as to the diagnosis of his condition. Therefore, there is no basis under the current set of circumstances which would warrant appointment of a neutral doctor and your request is denied.

On June 15, 1994, the Claimant's physician sent another medical evaluation, except this time it was sent to the Carrier's Labor Relations office, rather than the Medical Director. This medical evaluation updated the previous one. It did not contain the proviso that the Claimant be returned to work on a trial basis and it specifically stated that the Claimant "could return to work without restrictions." It also suggest the options of an independent medical evaluation by a neutral physician.

On June 27, 1994, the Carrier's Medical Director wrote to the Claimant and advised him that he was not qualified for the position of locomotive engineer as a result of tests performed on March 22 and 24, 1994.

On July 5, 1995, the Organization appealed the Carrier's denial of its request for a neutral physician. It further claimed that the Claimant had not been examined by the Carrier's medical department and that he had not been provided documentation that would explain the reasons for his disqualification pursuant to Article G-m-13(a).

On August 3, 1994, the Carrier again denied the Organization's request. It pointed out that the Carrier's fee-for-service physician determined that the Claimant did "not possess the functional capacity to render service as an Engineer." Moreover, the Carrier, paraphrasing the Claimant's physician, noted that he merely "recommended" granting

a trial run to confirm that his opinion is correct." The Carrier further noted that this amounted to a condition for return to employment that the Carrier's Medical Department would not permit.

The applicable scheduled rule reads:

Article G-m-13 - PHYSICAL DISQUALIFICATION

(a) When an engineer has been physically disqualified, he shall be furnished a copy of the medical report containing the reason for disqualification.

(b) When an engineer has been physically disqualified and a physician of his choice disputes the medical diagnosis of the Corporation which resulted in the engineer's disqualification, such disqualification may be appealed and a request made for an examination by a neutral physician. The request for a neutral physician must be made by the General Chairman to the highest appeals officer of the Corporation. A copy of the findings of the engineer's personal physician must accompany such request. The neutral physician shall be a specialist in the field involved in the disqualification, and shall be selected by a physician designated by the General Chairman and a physician designated by the Corporation. To the extent practical the neutral physician and the examination shall be at a location convenient to the engineer.

(c) The engineer shall be examined by the neutral physician who shall report his findings in writing to the physician designated by the General Chairman and to the Regional Medical Officer of the Corporation. The findings of the neutral physician shall be final and binding. If the neutral physician finds that the diagnosis of the Corporation physician is not correct, the engineer shall be returned to service promptly after the report is received by the Corporation.

(d) A physically disqualified engineer who is returned to service on the basis of the decision of the neutral physician shall be paid for time lost due to his disqualification computed from the date of receipt of written medical report from the engineer's physician by the highest appeals officer of the Corporation. The General Chairman and the highest appeals officer of the Corporation shall determine the payment to be made for time lost if the physically disqualified engineer performed compensated service on an irregular basis during the 6 month period before his disqualification.

(e) An engineer who has accepted physical disqualification or who was found to be properly disqualified by a neutral physician may, if there has been a change in his physical condition as evidenced by a report of his personal physician, request a reexamination. There shall be no claim for time lost in such case unless the Corporation refuses to grant the reexamination or there is unreasonable delay in applying the terms of this article.

(f) The Corporation shall pay its physician, and the engineer shall pay the physician designated by the General Chairman. The expense of the neutral physician, including such X-ray and laboratory examinations as he may require, shall be divided equally between the Corporation and the engineer involved.


To put this case in proper context, several observations should be made here. The Claimant was physically disqualified in 1984 and, as noted earlier, was found disabled within the meaning of the applicable regulations and has received railroad retirement pay. Accordingly given the particular circumstances of this case, Article G-m-13(e), not G-m-13(a), is applicable, because the Claimant had accepted physical disqualification in 1984 and there has been a change in his physical condition in 1994 as shown by the medical evaluation.


Clearly, it is well-established (and the Board will not belabor the point) that the Carrier has the responsibility to ensure the safe and efficient operation of its facilities, including the protection of its employees and the public. In meeting this obligation, it has become well-settled that the Carrier may set and enforce its medical standards. And, when this function is performed properly, it cannot be overturned by neutral parties. The Board in this case accepts and will not differ from the well-established practice and precedents.

In summary, the Carrier is directed to have a neutral physician examine the Claimant within thirty (30) days after receipt of this Award at a location close to the Claimant's home, if that is possible.

AWARD

As specified in the Findings.


William C. Kepner, Jr.
Organization Member


Eckehard Muessig
Neutral Member


~~AWARD~~
Carrier Member

Dated: AUGUST 23, 1995

DISSENT ATTACHED

**Carrier Dissent to
Award No.1595 of
Special Board of Adjustment No.894**

Article G-m-13 does not entitle this Claimant to an examination by a neutral physician. The report by his personal physician does not provide evidence of a change in his physical condition. Even if there were a change, the Claimant was re-examined by the Carrier and found to remain unqualified for any Conrail job. There never has been any dispute with respect to the diagnosis of the Claimant's physical condition; only with respect to whether he could work in that condition. Thus, the Award is based on the false premise that the Claimant's condition had changed. As a result of that false premise, the board has reached an erroneous conclusion that the provision for a neutral physician applies here. The Carrier dissents and will not consider this Award as precedent in any future case.

 5/23/95

Peter C. Poirier,
Carrier Member