



New South Wales

Personal Injury
Commission

DETERMINATION OF APPEAL PANEL

CITATION:	Beatty v State of New South Wales- Nepean Blue Mountains Local Health District [2021] NSWPICMP 93
APPELLANT:	Brian Beatty
RESPONDENT:	State of New South Wales – Nepean Blue Mountains Local Health District
APPEAL PANEL:	Member R J Perrignon Dr Douglas Andrews Dr Julian Parmegiani
DATE OF DECISION:	18 June 2021
CATCHWORDS:	WORKERS COMPENSATION- Appeal from assessment of whole person impairment (psychiatric and psychological); whether assessor erred in assessing psychiatric impairment rating scales of <i>Self-care and personal hygiene, Social and recreational activities, Social functioning, and Employability and adaptation</i> ; Held- MAC confirmed.

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

BACKGROUND TO THE APPLICATION TO APPEAL

1. The appellant worker, Mr Beatty appeals from the Medical Assessment Certificate of Approved Medical Specialist Dr Hong, dated 8 December 2020.
2. Dr Hong assessed a 7% whole person impairment (psychological) as a result of injury on 13 February 2018 (deemed date). In doing so, he assessed impairments as follows in respect of the relevant Psychiatric Impairment Rating Scales (PIRS):
 - (a) Self-care and personal hygiene: Class 2
 - (b) Social and recreational activities: Class 2
 - (c) Social functioning: Class 2
 - (d) Employability and Adaptation: Class 3.
3. The appellant says that the assessment in respect of each of these PIRS categories demonstrates error and the application of incorrect criteria. In respect of scales (a) to (c) above, he submits that the evidence supported a Class 3 impairment, and in respect of scale (d), a Class 5 impairment.
4. On 27 January 2021, the Registrar of the Workers Compensation Commission by his delegate was satisfied that the ground of demonstrable error was capable of being made out in respect of *Social and recreational activities*, and referred the appeal to this Panel for determination.
5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed (AMA 5).

PRELIMINARY REVIEW

6. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *WorkCover Medical Assessment Guidelines 2006*.
7. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because neither error nor the application of incorrect criteria was demonstrated.

EVIDENCE

Documentary evidence

8. The Appeal Panel has before it all the documents that were sent to the Approved Medical Specialist for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

9. The parts of the medical certificate given by the Approved Medical Specialist that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

10. Both parties made written submissions. They are not here repeated in full, but have been considered by the Appeal Panel.
11. In summary, the appellant submits as follows.
 - (a) In respect of *Self-care and personal hygiene*, the Approved Medical Specialist failed to take into account evidence of weight gain, failure to eat regularly, failure to shower or shave regularly, failure to take pride in dress, wearing loose comfortable clothing, set out in the appellant's further statement in the Application to Resolve a Dispute. This indicates that he is not capable of living independently without support, and is inconsistent with a Class 2 impairment and consistent with Class 3.
 - (b) In respect of *Social and recreational activities*, the Approved Medical Specialist failed to take into account:
 - (i) evidence in the appellant's further statement that his partner and friends push him to go out, which proves that he does not voluntarily go out on his own;
 - (ii) clinical notes of the appellant's treating psychologist recording a panic attack while away for two weeks,
 - (iii) the appellant's evidence in his statement that his ability to socialise is limited by anxiety attacks,
 - (iv) the clinical notes of his treating psychiatrist on 24 March 2020 recording panic attacks at the shops, and
 - (v) evidence recorded by the respondent's psychiatrist, Dr Wotton, to the effect that the appellant avoided his former workplace, scanned the shopping centre before getting out, and experiences anxiety while about shopping and avoids people he knows there.
 - (c) The appellant submits this is consistent with a Class 3 impairment, and not with Class 2.
 - (d) His solicitor also submits that the appellant told the Approved Medical Specialist that he will not go out without a support person, such as his father, brother or partner.
 - (e) In respect of *Social functioning*, he submits that the Approved Medical Specialist has made contradictory findings of fact: on the one hand, that the appellant stays with his partner regularly, and on the other, that 'sometimes she stays with her or she would stay with him'. He failed to ask whether the appellant was living with his partner, or to confirm the history that he was not, as recorded by Dr Wotton. He did not elicit from the appellant that he stays with his partner only once a fortnight, and that they have experienced temporary separation twice. This is consistent with Class 3 impairment, not Class 2.
 - (f) In respect of *Employability and Adaptation*, the appellant submits that the Approved Medical Specialist failed to take into account that the farm activities of looking after animals and fencing were solitary activities, and that the appellant would be unable to work with people he does not know or trust, because he is prone to panic attacks. The reports of psychologist Dr O'Neill and Dr Wotton support the conclusion that he is incapable of employment outside his home or farm. He failed also to take into account Dr Wotton's opinion that the appellant

was unemployable because of cognitive difficulties and unstable moods. The evidence is inconsistent with Class 3 as assessed, and consistent with Class 5.

12. In reply, the respondent submits as follows.

- (a) In respect of *Self-care and personal hygiene*, it was open to the Approved Medical Specialist to conclude, as he did, that the appellant was capable of living without independent support. He carefully considered the appellant's history. On that basis, the only available assessment was a Class 2 impairment. This was consistent with the assessment of Dr Teoh.
- (b) In respect of *Social and recreational activities*, the Approved Medical Specialist did not fail to take into account evidence of panic attacks. That evidence was before him. He took an adequate history. Assessment of a Class 2 impairment was reasonably open to him.
- (c) In respect of *Social functioning*, it is impermissible for the appellant to introduce new evidence as to the state of his relationship with his partner. In any event, the Approved Medical Specialist described the relationship with the appellant's partner as 'reasonably good' and 'overall stable', which at the date of assessment was not inconsistent with the problems described in the appellant's submissions. The evidence before the Approved Medical Specialist was entirely consistent with a Class 2 impairment.
- (d) In respect of *Employability and Adaptation*, the Approved Medical Specialist's assessment of a Class 3 impairment was the same as that of Dr Teoh. Dr Hong was not bound to accept Dr Wotton's opinion that the appellant was unemployable. It was open to the Approved Medical Specialist, having regard to the activities of the appellant on the farm, to conclude that he was capable of some form of employment.

FINDINGS AND REASONS

Self-care and personal hygiene

13. In the PIRS table, Dr Hong gave the following reasons for assessing a Class 2 impairment in respect of this scale:

'Mr Beatty described having neglected his self-care. He reported skipping meals and having gain[ed] weight. He said he does not shower regularly. Mr Beatty is capable of independent living without regular support.'

14. The descriptors for Class 2 and 3 impairments are set out in the Guidelines as follows:

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| Class 2 | Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food. |
| Class 3 | Moderate impairment: Can't live independently without regular support.
Needs prompting to shower daily and wear clean clothes. Does not prepare own meals, frequently misses meals. Family member or community nurse visits (or should visit) 2–3 times per week to ensure minimum level of hygiene and nutrition. |

15. The task of the Approved Medical Specialist was to compare the descriptors with his findings on examination and history, and to determine which class those findings and history best fit. Neglect of self care generally may fall into either category, but a Class 3 impairment requires

that a person be incapable of living separately without regular support. The Approved Medical Specialist found that the appellant was capable of independent living without regular support. That is inconsistent with a Class 3 impairment.

16. Contrary to the respondent's submissions, the Approved Medical Specialist specifically took into account weight gain and failure to eat regularly. The fact that he did not also mention some other matters in the appellant's supplementary statement, such as failure to shower or shave regularly, failure to take pride in dress, or wearing loose comfortable clothing, is not evidence that he did not read the statement, or that he had no regard to it. He does not have to refer to all the evidence.
17. In our view, taking into account all those matters, the selection of a Class 2 impairment was reasonably open to the Approved Medical Specialist on the evidence. We can identify no error.

Social and recreational activities

18. In the PIRS table, Dr Hong gave the following reasons for assessing a Class 2 impairment:

'Mr Beatty self-initiates activities and makes plan and does not need prompting. He interacts with 6-7 people he knows at the Bowling club and enjoys being actively engaged, and has competed twice during 2020. Mr Beatty has regular social and recreational contact with his friends, he visits them to chat and sometimes eats out at a pub.

He had a holiday with his partner and brother early in 2020 before COVID-19 restrictions, and enjoyed time on the beach and fishing.'

19. The descriptors for Class 2 and 3 impairments are set out in the *Guidelines* as follows:

Class 2 Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg dancing, cheering favourite team).

Class 3 Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn.

20. The appellant submits that the evidence in his supplementary statement of anxiety and panic attacks while out, and the fact that he is prompted by family members to go out, is consistent with a Class 3 impairment. The history taken by the Approved Medical Specialist was that he speaks with close friends in Sydney and Molong every two weeks, visits them on his own maybe every four weeks, eats with them at their homes, or sometimes at a restaurant or pub.
21. This is inconsistent with a Class 3 impairment, which requires that the worker will not go out without a support person. In all the circumstances, we consider the findings taken as a whole, including the evidence in the supplementary statement, to be more consistent with a Class 2 impairment.
22. We note the submission of the appellant's solicitor that the appellant told the Approved Medical Specialist that he would not go out without a support person. No evidence has been adduced to support that submission, and we are not satisfied that it is correct. Nor is leave sought to adduce any such evidence. In any event, demonstrable error requires proof of an error which appears on the face of the Medical Assessment Certificate. Even if evidence were produced in support of such a submission, it is not capable of proving an error on the face of the certificate.
23. The assessment of a Class 2 impairment was reasonably open to the Approved Medical Specialist. We identify no error.

Social functioning

24. In the PIRS table, Dr Hong gave the following reasons for assessing a Class 2 impairment:

‘Mr Beatty’s relationship with his partner is intact and he stays with her regularly.

He has lost friendships.

The relationship with his family is good and they are close.’

25. The descriptors for Class 2 and 3 impairments are set out in the *Guidelines* as follows:

Class 2 Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.

Class 3 Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.

26. Contrary to the appellant’s submissions, we identify no inconsistency between the finding of the Approved Medical Specialist that the appellant sometimes stays with his partner and she sometimes stays with him, and the finding that he stays with his partner regularly. The latter appears as a summary of reasons in the PIRS Table. We interpret it as a summary of the former.

27. It is similarly incorrect to allege that the Approved Medical Specialist failed to inquire whether he was living with his partner, or to confirm Dr Wotton’s history that he was not. The Approved Medical Specialist must have asked about the living arrangements between the two in order to elicit the response he did - namely, that sometimes he stays with her, and sometimes she with him.

28. The appellant’s solicitor submits that the two stay together once a fortnight and that they have experienced separation twice, but points to no evidence to support it, and does not seek leave to adduce any such evidence. Even if it were true, it would not cause us to doubt that a Class 2 impairment was reasonably open to the Approved Medical Specialist on the evidence before him. We can identify no error.

Employability and adaptation

29. In the PIRS table, Dr Hong gave the following reasons for assessing a Class 3 impairment:

‘Mr Beatty undertake various activities at home and on the farm, which is equivalent to 20 hours per week of lower stress employment.’

30. The descriptors for class 3, 4 and 5 impairments are set out in the *Guidelines* as follows:

Class 3 Moderate impairment: cannot work at all in same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful).

Class 4 Severe impairment: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.

Class 5 Totally impaired: Cannot work at all.

31. The task of the Approved Medical Specialist was to compare these descriptors with the evidence before him, and to determine into which class the impairment best fit. The fact that

Dr Wotton or Dr O'Neill support a view that the appellant was incapable of working outside the farm did not compel the Approved Medical Specialist to accept that view, or to assess any particular class of impairment.

32. The fact that he did not adopt Dr Wotton's assessment of employability does not establish that he failed to have regard to that report, or any part of it, such as Dr Wotton's observations with respect to cognitive difficulties or unstable mood. On the contrary, the Approved Medical Specialist specifically discussed Dr Wotton's report, and we are satisfied that he had regard to its contents.
33. The appellant submits that the evidence was inconsistent with a Class 3 impairment, and consistent with Class 5. In our view, the ability to work on a farm for up to 20 hours per week is inconsistent with a Class 5 impairment, which requires that the worker 'cannot work at all'.
34. The descriptors for Class 3 impairment require that the worker not be able to work at all in the same position as previously, and that he or she is capable of less than 20 hours per week work in (relevantly) a less stressful position. That is entirely consistent with the findings of the Approved Medical Specialist. We consider that the selection of a Class 3 impairment was reasonably open to him, and identify no error.
35. For these reasons, we can identify neither demonstrable error nor the application of incorrect criteria in respect of any of the psychiatric impairment rating scales the subject of appeal.
36. The Medical Assessment Certificate of Approved Medical Specialist Dr Hong dated 8 December 2020 is confirmed.