

D. A. v. Central Vermont Hospital

(April 21, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. A.

Opinion No. 20-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Central Vermont Hospital

For: Patricia A. McDonald
Commissioner

State File No. R-24647

Hearing held on September 13 and 14, 2005 and March 27, 2006
Record Closed on April 3, 2006

APPEARANCES:

Patrician K. Turley, Esq., for the Claimant
Jason R. Ferreira, Esq., for the Defendant

ISSUE:

Is Claimant permanently and totally disabled from all gainful employment?

EXHIBITS:

Joint I: Medical records

Claimant 1: Curriculum Vitae of Dr. Kenneth Borie

Claimant 2: Curriculum Vitae of Dr. Joseph Phillips

Defendant 1: Curriculum Vitae of Dr. William Boucher

Defendant 2: Curriculum Vitae of William O'Neil

Defendant 3: Job Offer and Description from CVH September 6, 2005

CLAIM:

Permanent total disability benefits

FINDINGS OF FACT:

1. Claimant was an employee and Central Vermont Hospital (CVH) her employer within the meaning of the Workers' Compensation Act in August 2000.
2. In August 2000, Liberty Mutual Insurance Company provided workers' compensation insurance to CVH.
3. Claimant is a 60-year-old registered nurse (RN). Her nursing education began in 1981 when she became a licensed practical nurse (LPN). Later she took more course work and earned an associate degree. In 1986 she earned her RN license and has worked in the field, often 60 hours a week, until the injury at issue here.
4. Claimant has lived in Randolph, Vermont since 1996.
5. In May of 1996 Claimant began working at CVH. She also worked as an RN at Dartmouth Hitchcock Medical Center (DHMC).
6. On August 15, 2000, Claimant injured her neck while pulling a patient up in bed at CVH. She sought medical treatment the next day for what was diagnosed as a neck strain. The injury was not disabling at that time; she continued to work without restrictions.
7. In May of 2001, Claimant saw Dr. Stuart Williams, for left neck and shoulder pain. He ordered an MRI and prescribed physical therapy. The MRI revealed a disc herniation in the neck.
8. Claimant then saw a neurosurgeon, Dr. Joseph Phillips, who performed a C-5 foraminotomy in October 2001.
9. In the initial postoperative period, Claimant's condition was improving. Soon afterwards, new pain appeared, suggesting a problem lower in the neck. Dr. Phillips kept Claimant out of work. He prescribed conservative treatment and, on January 11, 2002 released Claimant to light duty work effective January 14, 2002.
10. By June of 2002, Dr. Phillips recommended further surgery, a C-6 foraminotomy. As of June 3, 2002, he placed Claimant out of work for an estimated four to twelve weeks.
11. In July 2002, Dr. Phillips noted that Claimant no longer had headaches and had greater movement in her neck. However, she had pain in her shoulder and in her left thumb.
12. A September 23, 2002 CT scan revealed disc herniations at C5-C6 and C6-C7.
13. According to a November 2002 note of Dr. Kenneth Borie of Gifford Medical Center, Claimant was working full time at DHMC and part time at CVH.

14. Claimant then saw Dr. Tramner at University of Vermont College of Medicine for persistent pain. He performed more tests that confirmed a disc herniation. Then, on February 10, 2003 he performed a cervical discectomy and fusion at C5-C6.
15. A month after the surgery Claimant seemed to have been improving well. By April of 2003, however, she was reporting neck pain with radiation to left arm.
16. In June 2003, Dr. Borie prescribed morphine for her pain.
17. In August 2003, Claimant returned to Dr. Phillips who noted that she continued to have pain despite the fusion. Early x-rays suggested that the bone and graft had failed to fuse, leading Dr. Phillips to diagnosis pseudoarthrosis. Later studies, however, confirmed a firm fusion with normal alignment of the vertebrae.
18. In December 2003, Claimant had carpal tunnel surgical release for the upper extremity pain.
19. In February of 2004, Dr. William Boucher examined the Claimant for the defense in this case. He noted that she was a good historian, was attentive and had a normal affect. At that time, Dr. Boucher determined that Claimant had not reached medical end result for her neck injury. He also determined that she has a sedentary work capacity.
20. Dr. Borie increased Claimant's morphine dose in March 2004, a change that Claimant reported a month later as a big help.
21. CVH offered Claimant a medical secretary position, a job that does not require lifting.
22. Dr. Phillips opined that Claimant has no work capacity because no one could rely on her, given her need to stop and rest every 15 to 20 minutes. Dr. Borie also opined that Claimant has no work capacity.
23. Claimant babysits three grandchildren 25 hours a week. The youngest child is three years old. Dr. Phillips and Dr. Borie were unaware of this fact when they rendered their opinions regarding work capacity.
24. Claimant insists that she spends most of the time in bed or on the couch while caring for the youngest child. The only time she has all three children is after the older two (7 and 9 years old) return from school, and then only for an hour or hour and a half until the a parents picks them up. During the summer and school vacations, Claimant watches all three children all day. The parents work near Claimant's home and are available to help should Claimant have a bad day.
25. Dr. Boucher saw Claimant a second time on November 18, 2004. She did not tell him of her childcare responsibilities. Dr. Boucher noted that Claimant was attentive, with normal affect and good eye contact, although she has a high level or perceived disability and perception that she is crippled. He also noted that Claimant reported difficulties with concentration and memory.

26. Dr. Boucher determined that Claimant had reached medical end result with a 27 percent whole person impairment rating. Because of Claimant's reported problems with mentation and concentration, Dr. Boucher determined that she did not have a work capacity at the time of the second visit with him.
27. Claimant continued to treat for pain at the Dartmouth Pain Clinic.
28. At a third visit to Dr. Boucher in August 2005, Claimant described an inactive typical day, never mentioning childcare responsibilities. He determined that she had at least a sedentary work capacity and could work at least four hours a day with restrictions. Despite the morphine pain medication, he noted that Claimant was fully alert and might benefit from a mild increase in dose.
29. On September 6, 2005, almost on the eve of hearing, CVH offered Claimant a job as a phlebotomist at that hospital, a job that involves taking blood from patients, which necessitates bending. I agree with Dr. Phillips's later determination that such a job is not appropriate for this Claimant given the location of her pain.
30. After the first two days of hearing, Dr. Mark Bucksbaum evaluated this Claimant at her request for a permanency determination. He rated her permanent partial impairment rating at 26% for her cervical spine and 3% for left sided carpal tunnel syndrome. Dr. Bucksbaum opined that Claimant could not return to fulltime work, but recommended a functional capacity evaluation (FCE).
31. The FCE concluded that Claimant has light duty work capacity for 20 hours per week. The examiner noted that Claimant could do more than what she reported or perceived.
32. Vocational rehabilitation services are still open for Claimant.
33. Dr. Phillips recently testified that Claimant could work in a light duty job at least 20 hours per week. He also opined that her babysitting activities are relevant to her physical work capacity and her ability to concentrate. He placed no restrictions on Claimant ability to use the phone, type, use a computer, read or drive.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962).
2. Claimant alleges she is permanently totally disabled pursuant to 21 V.S.A. § 644 (b), the odd lot doctrine, defined as following in WC Rule 11.3100:

A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

3. Claimant must have "no reasonable prospect for finding regular employment." § 645. Regular and gainful work means work that is not casual or sporadic, work that is not charitable, where one earns wages. See *Rider v. Orange East Supervisory Union*, et. al. Op No. 14-03 (2003)
4. Claimant is a 60-year-old intelligent, educated woman. She has disproved her own claim with the childcare work she provides 25 hours a week, meaningful significant activity that could be translated to gainful employment if she chose to pursue that path. She is reliable, has set hours and possesses the judgment to care for children. Furthermore, the FCE and medical evidence support the defense position that she is capable of doing at minimum 20 hours a week of light duty work. Section 644 does not require that one have a full time work capacity to be capable of regular gainful employment.

5. In sum, Claimant has not proven permanent total disability.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 21st day of April 2006.

Patricia A. McDonald
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.