

L. S. v. Charles River Lab

(August 2, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

L. S.

Opinion No. 21-07WC

v.

By: Jane Dimotsis, Hearing Officer
Codee McDaniel, Law Clerk

Charles River Lab

For: Patricia Moulton Powden
Commissioner

State File No. U-11848

Pretrial Conference held on November 11, 2006

Record Closed on July 16, 2007

APPEARANCES:

Joseph Paul O'Hara Esq., and Frederick F. Bethel, Esq., for the Claimant
John Valente, Esq., for the Defendant

ISSUES:

1. Whether the Amendment to the Claimant's Individual Written Vocational Rehabilitation Plan is appropriate.
2. Is the employer/carrier allowed to challenge the Individual Written Rehabilitation Plan by appointing a second rehabilitation counselor? If not, then the Claimant's Motion for In Limine should be granted which bars the admission of the second Independent Vocational Evaluation (record review) performed by Maurice Demers of CRC Solutions.

EXHIBITS:

Joint: Vocational Rehabilitation records from Wagner Rehabilitation

FINDINGS OF FACT:

1. Claimant is a refugee of the Democratic Republic of the Congo. He immigrated to the United States in 2001 with very limited English skills.
2. Claimant's educational background from the Congo is undisputed. He completed a Bachelor's Degree in Financial Accounting and Business Administration in 1975 from Lwanaururu Institute of Beni and a Master's Degree in Agronomy and Zoology from the Institute of Mondongo. These degrees were in French.

3. Claimant does not possess any record of his higher education. He has been unable to obtain these records due to the civil strife surrounding the Congo, and the communication barriers created by limited telephone access. One of the colleges he attended has burned down; which has further frustrated these efforts.
4. Claimant has twenty-plus years of work experience in organizing and managing small business cooperatives, primarily agricultural, in several countries in Africa and Haiti. He has also served as a financial expert for the United Nations.
5. Claimant is fluent in French, Lingala, Kiswahili, Creole, and Kirundi languages.
6. The Claimant's work authorization permit was approved in January 2001 by the Immigration Department. Subsequently, he began looking for jobs in the accounting field.
7. In February 2002, Claimant was hired by the University of Vermont as a lab technician. His job duties included monitoring the health and safety of the animals, feeding the animals, and changing their bedding. These duties were laborious and required heavy lifting and moving.
8. Claimant was employed by University of Vermont from February 2002 to May 2002. He received a wage of \$13 dollars per hour.
9. Charles River was awarded the contract from the University of Vermont in June 2002 to manage the College of Medicine's animal facilities.
10. Charles River hired Claimant in June 2002 as a lab technician at a pay rate of \$13.00 per hour. During all relevant times pertaining to this action Claimant was employed by Charles River and Chubb Insurance has been the insurer of the employer.
11. On January 7, 2004 Claimant was injured while loading a 50 lb. bag of bedding into a cart; when he turned, and heard something "crack" in his shoulder or clavicle. Claimant immediately contacted his supervisor who sent him to the Occupational Health Center where he was treated by Dr. Smith-Horne for a right shoulder strain and SLAP lesion.
12. Medical treatment was conservative initially.
13. On March 28, 2005, Dr. Macy performed arthroscopic SLAP lesion and rotator cuff repair surgery.
14. On September 8, 2005, Claimant was released for light duty work per Dr. Macy with the following restrictions: limit of six hours of sitting and standing; lift no more than 20 lbs. from floor to waist; lift no more than 5 lbs. above chest; no repetitive use of the right upper extremity; and no use of right upper extremity above waist level or further than 12 inches away from body.

15. Claimant reached Medical End Result on September 20, 2005 and was assigned a 15 % whole person impairment rating by Dr. Macy. Dr. Macy concluded that typing and computer work was within the scope of Claimant's work restrictions. However, testimony from Tammy Parker, Claimant's Vocational Rehabilitation Counselor, indicates that Claimant cannot perform this type of clerical work because it elevates the level of pain in his shoulder.
16. Charles River was unable to accommodate the Claimant's work restrictions and terminated him in April 2005.
17. Claimant has been unemployed since January 7, 2004.
18. The Department approved Claimant's Form 21 for temporary total disability on May 5, 2005 at a compensation rate of \$563.81 per week. The Claimant received temporary total disability benefits from February 20, 2005 until September 1, 2005.
19. On October 11, 2005, the Department approved Form 24 for temporary partial disability at a compensation rate of \$533.34. These benefits were paid to the Claimant until September 20, 2006.
20. On February 27, 2007 the Department approved the Claimant's Form 22 for permanent partial disability compensation at a rate of \$546.67.
21. Claimant's wife works part-time and he continues to receive \$546.67 per week in permanent partial disability compensation.
22. On September 20, 2005, Claimant met with Tammy Parker, from Wagner Rehabilitation Services, who performed an initial report at the request of the insurer. Ms. Parker's report explained that even though Dr. Macy approved typing and computer work, Claimant was unable to perform more than one to two hours of this work because it causes him increased pain in his right shoulder.
23. Shaun O'Connor performed a Functional Capacity Examination of the Claimant on October 11, 2005. He placed Claimant at the medium level, with a lifting capacity of 34 lbs., and the ability to perform eight hours of work per day.
24. On November 2, 2005, Ms. Parker determined that Claimant was eligible for Vocational Rehabilitation pursuant 21 V.S.A. § 641. In this assessment, she noted the difficulty Claimant would face in finding a sedentary or light duty occupation that would pay 80 % of his \$770.68 average weekly wage. She added that Claimant's employability was also hindered by the following factors: a language barrier (limited English skills), and physical limitations.

25. Ms. Parker submitted Claimant's Individual Written Rehabilitation Plan (IWRP) to the Department of Labor on July 30, 2006. The first objective (Part I) of IWRP was for the Claimant to successfully complete the Intensive English Program at St. Michael's College by May 12, 2006. The second objective (Part II) involved making a determination of what additional coursework was necessary for the Claimant to obtain employment as an accountant. Ms. Parker expressly provided in Part I of the IWRP, that an amendment would be made following successful completion of the Program. The total cost of the Program was \$6,617.55 which included the 15 % discount by the College for the first eight weeks.
26. On January 9, 2006, Trudy Smith, of the Department of Labor, Vocational Rehabilitation, approved the initial IWRP.
27. An amendment to the IWRP was drafted on July 13, 2006 by Ms. Parker and submitted to the Department of Labor on August 2, 2006. The Claimant, according to the revised Plan, is to complete an Associate's Degree in Accounting at the Community College of Vermont (CCV) in Part I; with the option of completing a Bachelor's Degree if necessary in Part II. The total cost of the Amended IWRP for Part I is \$12,421.00 at the high end which excludes grants and other sources of financial aid. The estimated cost of the Bachelor's Degree from Champlain College in Part II is \$30,000.
28. The insurer stated that it supported the Claimant's pursuit of an Associate's Degree on July 20, 2006. However, the insurer rejected financial responsibility for the Bachelor's Degree in belief that it was excessive because Claimant already possesses such a degree from the Congo.
29. Trudy Smith, of the Department of Labor, held an informal telephone conference with the parties on August 24, 2006. She ordered the carrier to continue paying for the vocational rehabilitation services and training until the matter was resolved at the formal hearing level. Additionally, Ms. Smith reached an impairment rating of 15.5 % which was agreed to by the parties.
30. Claimant received a federal Pell Grant in the amount of \$1,519.00, reducing the carrier's required payment to \$1,400.06 for the fall semester at CCV which it has paid.
31. Claimant satisfactorily completed his first semester at CCV earning the following grades: A+ in College Algebra; B- in Dimensions of Learning; C- in Microeconomics; and an A+ in Financial Accounting.

CONCLUSIONS OF LAW:

1. The burden of proof ultimately rests upon the Claimant. Hence, the Department has consistently upheld the Claimant's burden to prove all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morese Co.*, 123 Vt. 161 (Vt. 1963). The Claimant must also establish the character and extent of his injury in addition to the casual connection between the injury and the employment through a demonstration of sufficient credible evidence. *Egbert v. The Book Press*, 144 Vt. 367 (Vt. 1984).
2. Moreover, "it is the [C]laimant's burden to demonstrate the entitlement to vocational rehabilitation services due to his inability to perform work for which the employee has previous training and experience, and which provides suitable employment." *Steven Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999) (quoting *Peabody v. Homes Insurance Co. and Comprehensive Rehabilitation Associates*, Opinion No. 60-98WC (Dec. 23, 1998)). The Claimant, consequently, has not satisfied this burden because he has not proven that he is unable to find suitable employment in the accounting field without a Bachelor's Degree.
3. While the "[C]laimant's goal of furthering his education is laudable, it is simply not compensable" because the Claimant has not demonstrated that his lack of supporting documentation of his education has directly prevented him from obtaining employment. *Kathleen Main v. Nastech*, Opinion No. 88-95WC (Nov. 21, 1995).
4. Furthermore, pursuant to 21 V.S.A. § 641(a) "[w]hen as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including re-training and job placement as may be reasonably necessary to restore the employee to suitable employment." The Department defines "suitable employment" as that which is "reasonably comparable to the [C]laimant's pre-injury job after consideration of wages, potential for advancement, commuting distance, shift and/or other relevant factors; and reasonably attainable given the current regional labor market conditions in light of the [C]laimant's age, temperament, education, training, work experience, physical capabilities and vocational aptitudes." *Steven Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999).
5. The Claimant is entitled to the provisions outlined in Part I of the Amended IWRP because it is a reasonable and appropriate vocational goal. On the other hand, Part II of the IWRP is not a reasonable or necessary vocational goal. And more, even though Part II "is a worthy goal, it is not one mandated by the statute or by regulations." *Eric Beauregard v. Grand Union*, Opinion No.: 71-95WC (Oct. 11, 1995).

6. The rules governing Workers' Compensation constrain the Department from awarding the Claimant the provisions set forth in Part II of the Amended IWRP. However, the Department does not seek to deter the Claimant from pursuing a Bachelor's Degree, but only to preclude the Defendant's financial responsibility for this educational endeavor.
7. Similarly, there is nothing in the record to suggest that the Claimant cannot obtain a job "reasonably comparable" to the occupation he held prior to the injury at issue or an occupation for which he has adequate training. *Kathleen Main v. Nastech*, Opinion No. 88-95WC (Nov. 21, 1995) (denying Claimant's entitlement to tuition reimbursement and attorney fees). Considering the Claimant's twenty-plus years of professional work experience; the combination of his education from the Congo, and anticipating his completion of an Associate's Degree, the Claimant should be able to find suitable employment. The Claimant should not restrict his job search to the accounting field. Rather, by considering other fields of employment, the Claimant has an even stronger likelihood of finding employment at a suitable wage, which is as close as possible to 100 % of the average weekly wage under Rule 15.0000. In the alternative, if 100 % of the average weekly wage is not reasonably attainable, then the new wage is considered suitable if it is 80 % of the average weekly wage under Rule 2.1360.
8. The Vocational Rehabilitation Counselor's opinions reflect a sincere concern about the Claimant's need for a Bachelor's Degree to ensure his return to gainful employment. This concern is not persuasive because "a belief is not enough to meet the requirements of reasonable and necessary." *Steven Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999).
9. Since the Claimant's Motion for In Limine was granted by Hearing Officer Jane Dimotsis, the second issue is resolved. The Defendant's actions were not proper under Rule 30.800 because the opposing party did not request the second Independent Vocational Evaluation. Thus, the content of the second Independent Vocational Evaluation performed by Ms. Demers has not been considered by the Department in this ruling.

ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Chubb Insurance accept financial responsibility for Part I of the Independent Written Rehabilitation Plan which is hereby limited to the costs associated with the Claimant's completion of an Associate's Degree at Community College of Vermont.

Dated at Montpelier, Vermont this 2nd day of August 2007.

Patricia Moulton Powden
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.