

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Richard Marsha

Opinion No. 06-10WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

New England Construction

For: Patricia Moulton Powden  
Commissioner

State File No. W-07098

**RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION OF  
DISCONTINUANCE**

**APPEARANCES:**

Frank Talbott, Esq, for Claimant  
David Berman, Esq., for Defendant

**ISSUE PRESENTED:**

Is Claimant's failure to attend a scheduled functional capacities evaluation an appropriate basis for discontinuing his medical and vocational rehabilitation benefits?

**FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.
3. Claimant suffered a work-related injury on April 6, 2005. He was treated for his injury, eventually reached an end medical result and was assessed a permanency rating in 2007.
4. As part of Claimant's 2009 vocational rehabilitation efforts, Defendant scheduled a functional capacities evaluation. Claimant failed to attend. Another was scheduled and again Claimant failed to appear. In each case Claimant's failure to attend was due to a breakdown in communication rather than any purposeful refusal.
5. Due to Claimant's failure to attend the scheduled evaluations, Defendant filed a Form 27, successfully discontinuing Claimant's medical and vocational rehabilitation benefits effective May 19, 2009.

6. On June 16, 2009 Claimant attended a rescheduled functional capacities evaluation. Defendant immediately reinstated his medical and vocational rehabilitation benefits. In the interim, the Department had ordered Defendant to continue paying for Claimant's medications, pending a safe taper plan. Defendant also agreed to pay for a previously scheduled meeting between Claimant and his vocational rehabilitation counselor. Claimant did, however, have to forego various medical and physical therapy appointments during the suspension period.

**DISCUSSION:**

1. As support for its discontinuance of benefits Defendant relies on 21 V.S.A. §655. That statute allows for a claimant's workers' compensation benefits to be suspended during any period in which he or she "refuses to submit . . . to or in any way obstructs" an employer-scheduled medical examination.
2. Claimant argues that a functional capacities evaluation is not a medical examination and therefore is not covered by §655. Claimant contends there is no statutory authority for Defendant to have suspended benefits in this case.
3. I do not read the statute so narrowly. Particularly in the context of vocational rehabilitation, a functional capacities evaluation provides both parties with critical information so that the return-to-work process can move forward as expeditiously as possible. A claimant who refuses to submit to such an evaluation can sabotage the system just as effectively as one who obstructs an independent medical examination.
4. I recognize that in this case Claimant's refusal to attend was inadvertent, not intentional. Other claims might present circumstances in which it would be inappropriate to suspend benefits for such inadvertent behavior. Given the respective rights and responsibilities that our workers' compensation law accords to both workers and employers, however, the fact that the missed appointment is a functional capacities evaluation rather than a medical examination probably will not be dispositive.

**ORDER:**

For the foregoing reasons, Claimant's Motion for Reconsideration of Discontinuance is hereby **DENIED**.

Dated at Montpelier, Vermont this 10<sup>th</sup> day of February 2010.

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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.