Edwin Sevene v. Don-Vac, Inc. (June 23, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Edwin Sevene	Opinion No. 16-11WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Don-Vac, Inc.	For: Anne M. Noonan Commissioner
	State File No. H-6839

<u>RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</u>

APPEARANCES:

Jennifer Pacholek, Esq., for Claimant
Stephen Ellis, Esq., for Defendant

ISSUE:

Is Claimant's claim for permanent total disability benefits barred as a matter of law on statute of limitations grounds?

FINDINGS OF FACT:

Considering the facts in the light most favorable to the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. Claimant worked for Defendant as a floor installer. On October 3, 1994 he injured his lower back in the course and scope of his employment. He was diagnosed with a lumbar disc herniation and later underwent L4-5 and L5-S1 disc surgery.

2. Defendant accepted Claimant's injury as compensable and paid workers' compensation benefits accordingly.

3. On two occasions, first in February 1995 and later in March 1997, Claimant was referred for vocational rehabilitation entitlement assessments in accordance with 21 V.S.A. §641. In both instances, medical providers had determined that Claimant had a medium duty work capacity. On each occasion, the assigned vocational rehabilitation counselor concluded that Claimant had sufficient transferable skills to obtain suitable employment at either that level or at a light duty level. On those grounds, Claimant was deemed not entitled to vocational rehabilitation services.

4. In October 1998 Claimant was determined to have reached an end medical result, and was rated with an 8.5% whole person permanent impairment. Defendant paid permanent partial disability benefits in accordance with this rating.

5. At some point thereafter, Claimant returned to work as a self-employed light carpentry, painting and landscaping contractor. During this time he also performed similar work for two other local construction contractors.

6. In October 2001 Claimant advised Dr. Weinberg, his primary care physician, that his back pain had worsened, that he was limiting his hours at work and that he was having difficulty sleeping. Dr. Weinberg determined that Claimant was no longer able to perform light carpentry and painting work, because of the repetitive bending and heavy lifting involved. He concluded that Claimant needed to "change his back-abusing job" and obtain vocational rehabilitation assistance so as to find more suitable employment. Claimant testified at his deposition that he understood the doctor's recommendation to mean that he should "get out of the construction business."

7. At Defendant's request, in April 2002 Claimant underwent an independent medical evaluation with Dr. Lefkoe. Dr. Lefkoe determined that Claimant properly had been placed at end medical result in 1998, and that his lower back condition was both chronic and permanent. Dr. Lefkoe also determined that Claimant had a light duty work capacity with a twenty-pound lifting restriction.

8. Upon reviewing Dr. Lefkoe's report, in May 2002 Dr. Weinberg reiterated his previous recommendation that Claimant be referred for vocational rehabilitation assistance so that he could "get out of the physical labor market altogether." Also in May 2002 Claimant corresponded with the Department's workers' compensation specialist, raising various issues about his workers' compensation claim. In the letter, Claimant specifically requested vocational rehabilitation assistance. He also claimed entitlement to further temporary total and medical benefits. As to the latter, Claimant requested both physical therapy and assistance with weaning himself off of narcotic pain medications.

9. Despite a recommendation from the Department's workers' compensation specialist that it do so, Defendant declined either to pay for Claimant to undergo another vocational rehabilitation entitlement assessment or to offer vocational rehabilitation services in response to Claimant's request. With reference to the 1995 and 1997 assessments, both of which had concluded that Claimant was not entitled, it stated that a third assessment was neither necessary nor warranted.

10. In July 2002 Dr. Weinberg described Claimant's situation to the Department's workers' compensation specialist as follows:

> For years now it has been amply demonstrated that returning to any kind of construction work, whether heavy or light, results in exacerbation of [Claimant's] pain and disability. My patient wants to return to work but cannot return to his current vocation and would greatly benefit from vocational rehabilitation/consultation/evaluation in order for him to obtain

long-term gainful employment that does not cause debilitating pain requiring narcotics, which themselves have debilitating side effects.

11. In September 2002 the parties participated in an informal telephone conference with the Department's workers' compensation director. The substance of the conference concerned whether Claimant had yet reached an end medical result, as both the Department and Defendant previously had determined. Following the conference, the Director indicated that the matter would not be forwarded to the formal hearing docket until Claimant produced further evidence on the end medical result issue. There is no indication, however, that the question of Claimant's entitlement to vocational rehabilitation services was ever discussed.

12. At Dr. Weinberg's referral, on January 14, 2003 Claimant underwent an evaluation with Dr. Cody at the Spine Institute of New England. In reporting his findings back to Dr. Weinberg, Dr. Cody stated:

    > [Claimant] continues to have chronic low back pain. He is essentially totally disabled from work. He does believe that he is clinically depressed at this time, and he has a lot of concerns. He has gained a significant amount of weight, and he has not worked for over a year. His back pain is constant, with many aggravating activities, and no relieving activities.

    After making some recommendations for further treatment, Dr. Cody continued:

    > We also did recommend that [Claimant] apply for disability and also try to get his workers' compensation opened back up through a hearing, which we will think, no doubt, he will have the ability to do.

13. In June 2003 Claimant applied for social security disability benefits, alleging a date of onset of August 10, 2001. This application was denied in October 2003 on the grounds that Claimant had a "capacity for [substantial gainful activity]-other work."

14. Claimant again applied for social security disability benefits in March 2008, this time alleging that his disability began on March 1, 2000. This application also was denied, on the same grounds as previously.

15. On January 28, 2008 Claimant wrote to Defendant and again requested vocational rehabilitation services. Defendant denied this request on February 27, 2008, once again referring to the 1995 and 1997 vocational assessments as support for its position that Claimant was not entitled.

16. In March 2008 the Department's vocational rehabilitation specialist corresponded with Defendant as to Claimant's renewed request for vocational rehabilitation services. The specialist instructed Defendant to file a Memorandum of Payment (Form 25M) so that the Department could determine whether Claimant was entitled to vocational rehabilitation screening in accordance with Workers' Compensation Rule 53.0000.

17. For reasons that are not clear from the record, the screening process did not occur until more than a year later, July 28, 2009. It concluded that Defendant was obligated to refer Claimant for a vocational rehabilitation entitlement assessment. In the meantime, in December 2008 Claimant retained legal counsel. On April 30, 2009 counsel filed a Notice and Application for Hearing (Form 6), challenging Defendant's denial of vocational rehabilitation benefits.

18. On February 28, 2010 Claimant's attorney filed a second Notice and Application for Hearing, again seeking vocational rehabilitation benefits. By this time, some seven months after the screening process had determined that Defendant was obligated to pay for Claimant to undergo another entitlement assessment, no such assessment had yet occurred.

19. At the Department's referral, Claimant underwent a second screening process in November 2010. Like the first one, this screening as well determined that Claimant was an appropriate candidate for a vocational rehabilitation entitlement assessment.

20. Defendant challenged the screening determination. Following an informal conference, in February 2011 the Department's vocational rehabilitation specialist ordered that it comply with the screening determination and undertake a vocational rehabilitation entitlement assessment.

21. At his attorney's referral, in August 2010 Claimant underwent a functional capacity evaluation with Charles Alexander, an occupational therapist. Mr. Alexander determined that Claimant had no work capacity. Specifically, Mr. Alexander stated:

> To summarize, [Claimant] currently does not have a work capacity based on the Dictionary of Occupational Titles. His residual work capacity is potentially 2 hours of sedentary work that does not require lifting from the floor. In working at this level he would need to be able to change his position from sitting at least every 30 minutes to manage his pain. With this residual work capacity coupled with the fact that he does not have a driver's license and has a variety of other medical issues, employment is unlikely. Based on the chronic nature of this injury it is unlikely that his abilities are going to change.

22. With Mr. Alexander's report as support, on September 13, 2010 Claimant 's attorney filed a third Notice and Application for Hearing, this time claiming entitlement to permanent total disability benefits.

23. At Defendant's referral, in April 2011 Claimant underwent a second functional capacity evaluation with Sandy Ladd, a physical therapist. Ms. Ladd concluded that Claimant demonstrated "at least the capacity for sedentary to light work, but a definitive level above that cannot be ascertained from the data."

24. Claimant's deposition testimony is somewhat conflicting as to when he first came to understand that he was unlikely ever to return to gainful employment. He acknowledged that his disability had not changed at least since October 2001, when he ceased doing the light carpentry and painting work he had been doing before. It is unclear, however, at what point he understood that he was precluded from performing any work at all.

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The nonmoving party is entitled to all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 242 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. Here, Defendant argues that Claimant's claim for permanent total disability benefits is time-barred under 21 V.S.A. §660(a) because it was not asserted within six years of becoming reasonably discoverable and apparent. Defendant points to Dr. Cody's January 14, 2003 statement that Claimant was "essentially totally disabled from work" as the moment at which his permanent total disability claim accrued. As a matter of law, therefore, Defendant asserts that the limitations period already had run by the time Claimant filed his September 13, 2010 Notice and Application for Hearing.

3. A cause of action for permanent total disability benefits cannot accrue until it becomes reasonably apparent, both medically and vocationally, that as a result of his or her work injury a claimant most likely will never be able to return to regular gainful employment. *Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009); *K.T. v. Specialty Paperboard*, Opinion No. 33-05WC (June 24, 2005). Until that point occurs, it would be premature to make a claim for permanent total disability benefits. By the same token, because a claim period can only begin to run when there is in fact something to claim, *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 446 (1985), the same point in time also governs consideration of a statute of limitations defense. *Hoisington, supra; K.T. v. Specialty Paperboard, supra.*

4. Taking the evidence in the light most favorable to Claimant, *Toys Inc., supra*, I cannot conclude as a matter of law that his claim for permanent total disability accrued at the moment that Dr. Cody described him as "essentially totally disabled from work." Even assuming that this constituted credible evidence of Claimant's inability to return to work from a medical perspective, it does not begin to approach a credible statement of Claimant's vocational outlook at the time. A viable claim for permanent total disability requires due consideration of both medical and vocational factors, however. 21 V.S.A. §644(b); Workers' Compensation Rule 11.3100.

5. Nor can I conclude from the undisputed evidence that Claimant's permanent total disability claim was reasonably discoverable and apparent at any time before Dr. Cody's pronouncement. To the contrary, up until that time Dr. Weinberg had been advocating strongly for vocational rehabilitation services aimed at assisting Claimant to find a more suitable, less "back-abusing" job.

6. Last, I cannot conclude from the undisputed evidence that Claimant's claim became reasonably discoverable and apparent at any time after Dr. Cody's pronouncement but before September 13, 2004, the date on which a six-year statute of limitations would preclude his most recent filing.

7. I agree with Defendant that the correct standard for determining when a claim for particular benefits arises is when it becomes reasonably discoverable and apparent, not necessarily when the claimant becomes aware of it. *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 219-220 (2000). However, Defendant's position in this claim has long been that Claimant was not entitled to vocational rehabilitation services because he had both the work capacity and the transferable skills necessary to be employable. It is curious, therefore, for it now to argue that Claimant should have known all along that he was permanently precluded from working when its own view of the evidence, as expressed on numerous occasions to Claimant, was directly contrary.

8. In fact, there is ample evidence in the record indicating that Claimant may have had at least a light duty work capacity both before and after Dr. Cody's pronouncement that he was totally disabled. The 1995 and 1997 vocational rehabilitation entitlement assessments, the 2003 and 2008 social security disability denials, Dr. Weinberg's persistent recommendations for vocational rehabilitation assistance, and most recently, Ms. Ladd's April 2011 functional capacity evaluation all point in this direction. At a minimum, this evidence gives rise to genuine factual issues as to when Claimant's permanent total disability claim first became reasonably discoverable and apparent. Such issues are not amenable to determination on summary judgment.

9. I conclude that the undisputed evidence fails to establish that Claimant's claim for permanent total disability benefits is time-barred as a matter of law. Summary judgment in Defendant's favor is inappropriate.

ORDER:

Defendant's Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 23rd day of June 2011.

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Anne M. Noonan
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.