IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 65

WCC No. 9502-7239

JERRY ELAM

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER ON APPEAL

Summary: On appeal from the Department of Labor and Industry's order on claimant's appropriate return to work option, claimant argued substantial evidence did not support the decision and, in the alternative, that essential findings of fact were not made.

Held: Substantial evidence supports the hearing officer's determination that option (2)(d) of section 39-71-1012, MCA (1987), on the job training, is the first appropriate rehabilitation option for claimant. Claimant emphasizes his testimony and that of the property manager where claimant tried to return to work about his pain and incapacity to perform the job requirements of airport parking lot attendant. But the record also contains testimony by a physical medicine specialist that claimant could perform the work despite his reported difficulties, as well as the hearing officer's credibility determination that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." Other testimony and documentation also demonstrates claimant's hostility to physical evaluation and refusal to make reasonable effort to perform physical activities. With regard to claimant's assertion that essential findings were omitted, the hearing officer's determination that claimant was capable of performing the job duties of parking lot attendant encompasses a determination that he can perform the individual tasks required by the position, so explicit findings on each individual task are not required.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-1012, MCA (1987). Substantial evidence supports DOL hearing

officer's determination that option (2)(d) of section 39-71-1012, MCA (1987), on the job training, is the first appropriate rehabilitation option for claimant. On appeal to the WCC, claimant emphasizes his testimony and that of the property manager where claimant tried to return to work about his pain and incapacity to perform the job requirements of airport parking lot attendant. But the record also contains testimony by a physical medicine specialist that claimant could perform the work despite his reported difficulties, as well as the hearing officer's credibility determination that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." Other testimony and documentation also demonstrates claimant's hostility to physical evaluation and refusal to make reasonable effort to perform physical activities.

Vocational -- Return to Work Matters: Employability. Substantial evidence supports DOL hearing officer's determination that option (2)(d) of section 39-71-1012, MCA (1987), on the job training, is the first appropriate rehabilitation option for claimant. On appeal to the WCC, claimant emphasizes his testimony and that of the property manager where claimant tried to return to work about his pain and incapacity to perform the job requirements of airport parking lot attendant. But the record also contains testimony by a physical medicine specialist that claimant could perform the work despite his reported difficulties, as well as the hearing officer's credibility determination that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." Other testimony and documentation also demonstrates claimant's hostility to physical evaluation and refusal to make reasonable effort to perform physical activities.

Benefits: Rehabilitation Benefits: Rehabilitation Options. Substantial evidence supports DOL hearing officer's determination that option (2)(d) of section 39-71-1012, MCA (1987), on the job training, is the first appropriate rehabilitation option for claimant. On appeal to the WCC, claimant emphasizes his testimony and that of the property manager where claimant tried to return to work about his pain and incapacity to perform the job requirements of airport parking lot attendant. But the record also contains testimony by a physical medicine specialist that claimant could perform the work despite his reported difficulties, as well as the hearing officer's credibility determination that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." Other testimony and documentation also demonstrates claimant's hostility to physical evaluation and refusal to make reasonable effort to perform physical activities.

Witnesses: Credibility. Substantial evidence supports DOL hearing officer's determination that option (2)(d) of section 39-71-1012, MCA (1987), on the job training, is the first appropriate rehabilitation option for claimant. On appeal to the WCC, claimant emphasizes his testimony and that of the property manager where

claimant tried to return to work about his pain and incapacity to perform the job requirements of airport parking lot attendant. But the record also contains testimony by a physical medicine specialist that claimant could perform the work despite his reported difficulties, as well as the hearing officer's credibility determination that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." Other testimony and documentation also demonstrates claimant's hostility to physical evaluation and refusal to make reasonable effort to perform physical activities.

Appeals (To Workers' Compensation Court): Generally. Substantial evidence supports DOL hearing officer's determination that option (2)(d) of section 39-71-1012, MCA (1987), on the job training, is the first appropriate rehabilitation option for claimant. On appeal to the WCC, claimant emphasizes his testimony and that of the property manager where claimant tried to return to work about his pain and incapacity to perform the job requirements of airport parking lot attendant. But the record also contains testimony by a physical medicine specialist that claimant could perform the work despite his reported difficulties, as well as the hearing officer's credibility determination that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." Other testimony and documentation also demonstrates claimant's hostility to physical evaluation and refusal to make reasonable effort to perform physical activities.

Appeals (To Workers' Compensation Court): Generally. On appeal to the WCC from DOL's determination of injured worker's first appropriate return to work option, claimant argued that hearing officer erroneously failed to make findings on each specific task of the identified job. Where the hearing officer's determination that claimant was capable of performing the job duties of parking lot attendant encompassed a determination that he can perform the individual tasks required by the position, explicit findings on each individual task are not required.

This is an appeal by Jerry Elam, claimant, from a Department of Labor and Industry hearing examiner's Findings of Fact, Conclusions of Law, and Order which found that Option (2)(d) — on-the-job training — of section 39-71-1012, MCA (1987), was the first appropriate rehabilitation option. Claimant argues that the decision of the hearing examiner should be reversed because it is not supported by substantial evidence. In the alternative he asks that the decision be modified because findings of fact upon issues essential to the decision were not made. (Claimant's Brief on Appeal at 9.)

Factual background

Claimant was born April 14, 1945. He did not complete high school, nor has he obtained a GED. From 1961 to 1986 he worked as a brakeman/lineman for Burlington

Northern Railroad. Due to a disabling knee injury he left that employment. In February 1990, he went to work for Territorial Restaurant, Inc., the employer in this case. He worked as a security guard and then as a janitor. Claimant's work history can be classified as unskilled and semi-skilled work with medium to heavy physical demands.

Claimant was injured on July 27, 1990, when he fell down a flight of stairs while carrying two 35 pound containers of cooking oil. On the day of the injury claimant was examined at North Valley Hospital by Dr. Jerrold Johnson. His condition was diagnosed as lumbosacral sprain. (Ex. 4 at 6.) X-rays revealed moderate degenerative narrowing of the L4-5 interspace with spurring, sclerosis and moderate facet degenerative changes at L4-5 and L5-S1. (*Id. at* 3.) Spinal surgery was performed by Dr. James Mahnke on December 7, 1990.

In August 1991, Dr. Mahnke referred the claimant to Dr. John Stephens, a physical medicine and rehabilitation specialist, for further evaluation and follow-up. Dr. Stephens examined the claimant on August 15, 1991 (Ex. 2 at 22-25), October 1, 1991 (Ex. 2 at 26), and December 19, 1991 (Ex. 2 at 12-13). In December of 1991, Dr. Stephens noted that the claimant "doesn't really seem to be improved with anything that I have done at this point." (*Id.*) Dr. Stephens referred claimant to Dr. Seabaugh for management of urinary complaints and sexual dysfunction and to Dr. Ceverha for an additional neurosurgical opinion.

On January 21, 1992, Dr. Ceverha provided the following assessment:

> Assessment: 1. Status post diskectomy L4-5, L5-S1 with persistent low back pain. He has a very degenerative disc at L4-5. From a neurological point of view no post surgical intervention would [be] helpful, in my opinion. **If the patient were to try surgical [sic] for pain relief in the lumbar spine perhaps fusion of the L4-5 vertebra anteriorly may provide him with a 50% chance of relief**. 2. Impotence status post above mentioned surgery. From my prospective [sic] it is difficult to place the location neurological that would give his above mentioned sensory findings. There may be a functional component to his sexual dysfunction. [Emphasis added.]

(Ex. 5.)

In a May 11, 1992 letter to the State Fund, Dr. Stephens concluded that the claimant had reached maximum medical improvement and assigned a 24% whole body impairment rating. The rating was based upon surgery, loss of motion and loss of sexual function. He noted that the claimant's physical restrictions were in the "light-manual sedentary range," and that the claimant needed to "get going vocationally." (Ex. 2 at 8, 9.)

Claimant was then referred to Crawford & Co. Health and Rehabilitation for vocational evaluation. Michael Helms, a vocational consultant, contacted the claimant on October 5, 1992. Helms administered a wide-range achievement test which showed that claimant ranked at the fifth grade level for reading and below the third grade level in arithmetic. Helms testified that claimant did not take the spelling portion of the test "because of pain he, he terminated the test because he was unable to continue sitting." (Tr. at 5.) Claimant completed the COPS Interest Inventory, scoring highest in the area of skilled service occupations. He expressed an interest in security and law enforcement occupations. (Ex. 9 at 18-19.)

A Functional Capacity Evaluation was performed by Jay Shaver, RPT, on October 22 and 23, 1992. Claimant did not cooperate in the testing. Shaver reported:

> Cooperation:
>
> Client demonstrated repeated uncooperative behavior. Although maximal safe lifting clearly had not been met, client would not continue with lifting activities on either day **making maximum lifting capacities invalid.**
>
> Consistency of Performance:
>
> Inconsistent behavior was noted throughout the testing period. Client was able to sit 15 minutes without any weight shift while doing dexterity drills, however started extreme weight shift within two minutes of timed sitting activities. He was also able to maintain forward static positioning for five minutes with only minimal and normal weight shifts, but was **inconsistent with** specific sitting activities. **Consistency between day one and day two lifts is invalid due to self-limiting behavior.**
>
> Pain Behavior:
>
> **Client demonstrated behavior inappropriate to maximal effort throughout the testing period**. There were multiple uses of profanity throughout testing. Client also refused to continue to full maximal potential with lifts on both days, although lifting was observed to be done in a safe and controlled manner. . . .
>
> Safety:
>
> Demonstrated poor safety awareness. Constant verbal cueing was necessary to correct poor body mechanics with all lifts and carries. Pacing was poor with **excessive time taken between lifts and between tasks.**

> Quality of Movement:
>
> Client's movements were slow and guarded throughout testing procedure. Constant verbal cueing was necessary to maintain pace and use correct mechanics with activities. . . .
>
> Significant Abilities:
>
> Client demonstrated good bilateral coordination as well as good overhead activities.
>
> Significant Deficits:
>
> Client's overall performance was limited primarily by self-limiting behavior. Client also demonstrated poor body mechanics throughout testing activities as well as decreased lower extremity and trunk stability and strength. Decreased (R) knee flexion also limited kneeling and bending activities. [Emphasis added.]

(Shaver Dep., Ex. 1.) Because claimant did not fully participate in the FCE, the results of the FCE are of limited value in determining the claimant's limitations. Claimant concedes that he refused to follow directions during the FCE because "[I] wasn't about to screw my back up just to satisfy him." (Tr. at 46.)

Dr. Stephens disapproved claimant's return to work in the position of janitor/security guard and limited claimant to part-time light-duty employment. (Stephens Dep. at 18-19; Ex 9, p. 19.) The doctor did not rely on the FCE in his determination. (*Id.* at 17-20.)

On January 14, 1993, Dr. Stephens approved a job analysis for the position of Parking Lot Attendant. At the time of his deposition in September 1994, Dr. Stephens indicated he had some concerns about the snowblowing and the garbage emptying aspects of the job. However, he went on to say that they appeared to fall within the restrictions placed on the claimant. (*Id.* at 21.)

Claimant and Helms attended a job orientation session at Glacier International Airport with Bob Spoerl, Property Manager for APCOA. APCOA runs the airport parking lot. Claimant participated in two orientation sessions, the first lasting one hour, the second one-half hour. (Ex. 1; Tr. 7-9.) The sessions were terminated after claimant exhibited pain behavior and indicated he could not continue. (*Id.*)

Helms discussed the claimant's physical limitations with Dr. Stephens, who prescribed a work-hardening program with occupational therapist Tim Tracy. The claimant attended six work- hardening sessions between June 10, 1993 and June 29, 1993,

at which time Tracy concluded "this pt. does not currently possess the ability to complete and/or participate in a work-hardening program at this time." (*Id.*, Ex. 2.) Tracy noted that the claimant displayed constant pain behavior and demonstrated a very low endurance for any activity on any physical level. In a report of his meeting with Tracy regarding the work-hardening program, Dr. Stephens noted, "He [Tracy] stated that basically Mr. Elam did not participate particularly well and had `self-limiting behaviors.'"

On July 27, 1993, Dr. Stephens approved the job analysis for the position of Security Guard. (*Id.*, Ex. 2.)

On November 15, 1993, the State Fund requested a Rehabilitation Panel. The Panel issued its report on January 12, 1994. It unanimously identified option (d), on-the-job training, as the first appropriate option available to the claimant. Specifically, it approved on-the-job training as a parking lot attendant.

The job duties of parking lot attendant include running a cash register; making change; cleaning up the booth; inventorying vehicles in the lot, which may require the employee to walk or drive one-third mile; removal of debris from the lot; changing damaged gates, which weigh a few pounds; and clearing walkways of snow with a self-propelled power snowblower or snow shovel. The attendant may sit or stand at will. Lifting and carrying requirements are no more than 15 pounds. Work shifts are four to seven hours, twenty to thirty hours per week. The attendant has access to a telephone.

In March 1994, the claimant and Helms attended the third job orientation session with Spoerl at APCOA. The session was terminated when the claimant indicated he could not continue and exhibited pain. The claimant was able to perform the tasks of running the cash register, taking money and making change. He did not attempt to run the snowblower.

Helms testified at the hearing. He had the following information available from which to form his opinion: a job analysis of the position of parking lot attendant; observation of the physical demands of the job duties; observation of the claimant while being instructed in the particulars of the job duties; the medical restrictions placed on the claimant by Dr. Stephens and conversations with Dr. Stephens; and the results of the work-hardening program and the FCE. At the hearing, Helms testified that the claimant demonstrates the aptitude to perform the job of parking lot attendant, both physically and mentally. (Tr. at 9-26.)

The claimant testified that his current complaints include terrible headaches three or four times a week, sharp pain in the middle to right area of his back, difficulty sleeping at night and a short temper. His daily activities revolve primarily around the care of his two grandchildren. The children are in grade school and his responsibilities include watching

them and driving them to school. He states that the rest of the day is spent making himself comfortable, sitting or lying down. (Tr. at 38-43.)

Claimant enjoys staying home during the day with the apparent goal of trying to do more around the house, such as yard work. (*Id*. at 43, 76.) He has not looked for work because he states he doesn't have the qualifications and/or education. (*Id.* at 43-44.) He does not feel capable of performing any job due to his qualifications and physical condition. (*Id.* at 66.) With regard to the parking lot attendant job, he is concerned about the physical aspects of the job, and about dealing with the public and handling money. (*Id.* at 47, 72.)

Dr. Stephens testified by deposition. He reiterated his approval of the parking lot attendant position. (Stephens Dep. at 21-22, 26-27.) He was not overly concerned about claimant's reported difficulties with the APCOA orientation sessions. He noted that "a lot of folks are deconditioned or have limited their own activities" and may need reconditioning. (*Id.* at 31.)

The hearing examiner observed and listened to the claimant testify at the time of the hearing. He concluded:

> The claimant has demonstrated a certain tenacity to his perception of his degree of disability--a degree which it is **believed by the hearing officer, based on the evidence, is to a great extent self-limiting and rather incredible.**

(Conclusion of Law 4 at 14.)

Standard of Review

Section 39-71-1018, MCA, (1987) provides for an appeal to the Workers' Compensation Court from the DLI's final order. Review of that order is governed by section 2-4-704(2), MCA, which provides:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;
(ii) in excess of the statutory authority of the agency;
(iii) made upon unlawful procedure;
(iv) affected by other error of law;
(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (b) findings of fact, upon issues essential to the decision, were not made although requested.

Under the clearly erroneous standard of subparagraph (e), the hearing examiner's findings of fact must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging,* 252 Mont. 97, 827 P.2d 85, (1992). The Court will not reweigh the evidence; the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. EBI Orion Group,* 252 Mont. 286, 289, 829 P.2d 1 (1992). Conclusions of Law must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue,* 245 Mont. 470, 803 P.2d 601 (1990).

Discussion

Claimant asserts that the hearing examiner's decision is not supported by substantial evidence and, in the alternative, that essential findings of fact were not made. Specifically, the claimant contends that the OJT was incomplete because several components of the job requiring physical exertion were not performed by the claimant or observed by the vocational counselor.

The Legislature has clearly set the goals and options for rehabilitation under the Workers' Compensation Act. The procedures are governed by section 39-71-1012, MCA which states:

39-71-1012. Rehabilitation goal and options.(1) The goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs.
(2) The first appropriate option among the following must be chosen for the worker:
(a) return to the same position;
(b) return to a modified position;

(c) return to a related occupation suited to the claimant's education and marketable skills;

(d) on-the-job training;

(e) short-term retraining program (less than 24 months);

(f) long-term retraining program (48 months maximum); or

(g) self-employment.

(3) Whenever possible, employment in a worker's local job pool must be considered and selected prior to consideration of employment in a worker's statewide job pool.

The claimant essentially argues that his testimony and the testimony of Spoerl, who observed the claimant during two orientations, prove that he is not capable of performing the job of parking lot attendant. The Court disagrees and affirms the findings of the hearing examiner.

The "**goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs.**" § 39-71-1012(1), MCA (emphasis added). Contrary to claimant's argument, the Court finds that there is substantial credible evidence which supports the conclusion that option (d) is the first appropriate option. Dr. Stephens continued to approve option (d) despite claimant's reported difficulties. The hearing examiner, who observed claimant during the hearing, concluded that claimant's perception of his disability was "to a great extent self-limiting and rather incredible." The hearing examiner was in the best position to assess claimant's credibility. Moreover, his assessment is supported by other testimony and documentation demonstrating claimant's hostility to physical evaluation and his refusal to make reasonable efforts to perform physical activities.

Claimant's request that the findings of fact be modified to include specific findings regarding his ability to perform <u>each</u> duty included in the job analysis is **denied.** The hearing examiner in footnote 1, at page 2 of the Findings of Fact, Conclusions of Law, and Order states:

> All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. <u>Certain proposed findings and conclusions may have</u>

been omitted as not relevant or as **not necessary** to a proper determination of the material issues presented. [Emphasis added.]

His determination that claimant is capable of performing the job duties of parking lot attendant encompasses a determination that he can perform the individual tasks required by the position. In making that determination, he relied on opinions of Dr. Stephens and discounted claimant's assertions concerning his abilities.

The decision in this case is not clearly erroneous. It is supported by reliable and substantial credible evidence. The failure to make specific findings regarding each job duty was not in error.

ORDER

The January 30, 1995 Findings of Fact, Conclusions of Law, and Order of the hearing examiner are **affirmed**.

Dated in Helena, Montana, this 25th day of August, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. David A. Hawkins
Mr. Laurence A. Hubbard
Date Submitted: May 15, 1995