WCAT Decision Number: WCAT-2004-00081-RB
WCAT Decision Date: **January 12, 2004**
Panel: Nora Jackson, Vice Chair

Introduction

In a decision letter dated October 23, 2001, a Workers' Compensation Board (Board) vocational rehabilitation consultant (VRC) advised the worker that no retroactive vocational rehabilitation benefits would be paid for the period between April 1, 1997 to December 31, 1998 inclusive. The worker appeals that decision (Appeal E).

Issue(s)

Was the worker entitled to retroactive vocational rehabilitation benefits for the period between April 1, 1997 and December 31, 1998 pursuant to law and Board policy?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). Pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the former Review Board and Appeal Division have been replaced by the Workers' Compensation Appeal Tribunal (WCAT) effective March 3, 2003. Section 38 of the legislation provides that all Review Board appeals are to be transferred to WCAT to be completed as WCAT appeals, unless a panel of the Review Board had completed an oral hearing, or unless written submissions were completed and a panel of the Review Board had commenced deliberations, before March 3, 2003.

As this appeal was not considered by a Review Board panel by March 3, 2003, it was transferred to WCAT and has been considered as a WCAT appeal except that no statutory time frame applies to the making of this decision. One effect of this change is that WCAT must apply policies set by the board of directors and the former governors of the Board.

Evidence

I have reviewed the evidence in the claim file, any submissions made by the worker and the accident employer in support of their respective positions, the *Workers Compensation Act* (Act) in effect at the time of the events here in question, and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). Interested parties have received full disclosure of the claim file, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

The worker was employed by the employer as a truck driver. In 1994, the worker was 34 years old; he began working for the employer in about April 1993. On February 2, 1994, the worker was injured when the cable on the tail gate of his truck broke, and he fell to the ground. He submitted an application for compensation to the Board, and his claim was accepted for injuries to his neck and back, specifically low back and neck strain, and aggravation of his pre-existing degenerative condition. Wage loss and health care benefits were paid; the worker participated in a graduated return to work during late September and early October 1994. Wage loss benefits were terminated in December 1994, on the basis of an at-Board examination on December 7, 1994 which revealed no objective findings. The Board therefore was of the opinion that the worker could return to his pre-injury employment.

In 1996, the worker applied to the Board to reopen his claim for his then-current low back disc herniation; reopening was denied. Memo #25, dated May 21, 1996, indicated that Dr. Wright, a Board medical advisor, thought that the worker was at undue risk for further and permanent aggravation if he performed jobs involving more than a medium level of lifting. Vocational rehabilitation benefits were paid from July 7, 1996 to March 16, 1997 on what appears to be a preventative basis. Computer training was provided, but the worker did not find work in that area. The worker attended the computer classes full-time from September 3, 1996 to January 31, 1997. He then attended courses for 12 hours per week from February 1, 1997 to April 12, 1997 to complete some course that he had missed while he was receiving treatment. In April, 1997, the worker's vocational rehabilitation benefits were terminated by the Board.

In a September 15, 1997 memo (memo #39) from a VRC to a senior rehabilitation manager, the following was outlined:

- After his compensable injury, the worker completed a graduated return to work with the accident employer, but could not continue because of the amount of lifting required.

- A functional capacity evaluation indicated that the worker was restricted from returning to truck driving due to static loading restrictions.

- The worker would be at risk of permanent aggravation of his pre-existing degenerative back condition if he returned to truck driving which involved static loading.

- From January to June 1995, the worker attended courses to upgrade his education.

- After the worker's benefits were terminated at the end of 1994, the worker received UIC and some sick leave benefits from the accident employer's insurer. However, from October 1995 to June 1996, the worker did not receive benefits from either the insurer, UIC or the Board.

- Although the claim was originally referred to Vocational Rehabilitation Services on August 24, 1994, no vocational rehabilitation intervention commenced until the initial vocational assessment was carried out in July 1996.

- During the almost two-year delay in referral to Vocational Rehabilitation Services, the worker was upgrading his education and seeking employment on his own. He was volunteering in an effort to network with the aim of obtaining employment. These activities had been confirmed by the VRC.

- As the worker had marketable transferable skills, vocational rehabilitation assistance in the form of 21 weeks of job search assistance was determined to be the extent of benefits to which the worker was entitled when he was finally referred to Vocational Rehabilitation Services.

The worker requested payment of retroactive vocational rehabilitation benefits, and in a memo dated November 7, 1997, a Board client services manager indicated that retroactive vocational rehabilitation benefits would be payable from May 21, 1996, the date of Dr. Wright's memo indicating that they were appropriate, to July 7, 1996, the date of the start of active vocational rehabilitation involvement. Those benefits were paid to the worker on February 3, 1998. No payments were made for the period between December 1994 and May 1996, although the Board had delayed two years in providing vocational rehabilitation benefits, and evidence was already on file (cited above), that the worker had been working at his own rehabilitation.

The worker appealed the Board's December, 1994 decision terminating his wage loss benefits, as well as three other claim and vocational rehabilitation decisions, to the Review Board. The Review Board, in its findings dated April 19, 1999, allowed the worker's appeal, finding:

- The worker was not physically capable of returning to his pre-injury employment as a truck driver.

- The worker had been left with a permanent functional impairment as a result of the injuries accepted as compensable under his claim.

- The worker was not capable of any physical activity which required lifting, bending, twisting, climbing or working in an overhead position.

- The worker was entitled to vocational rehabilitation assistance as a result of the limitations and restrictions which resulted from his compensable injury, and not on the basis of preventative rehabilitation.

- The Review Board specifically addressed the issue as to whether the worker was entitled to retroactive vocational rehabilitation benefits from November 8, 1994 to May 20, 1996. As the panel found that the worker was temporarily totally disabled until January 22, 1996, that part of the vocational rehabilitation query was decided. Subsequent to January 22, 1996, the panel found that the worker was entitled to a permanent functional impairment award in recognition of his neck and pack disability. Pending the implementation of that award, the worker was entitled to consideration of entitlement for continuity of income benefits.

From April 19 through May 2, 1999, the worker received compensation benefits under another claim.

No action was taken on the Review Board's finding for eight months. The worker requested retroactive vocational rehabilitation benefits based on the Review Board's April 19, 1999 decision, and on January 18, 2000, the Board paid retroactive vocational rehabilitation benefits for the period between May 3, 1999 and December 31, 1999, with deductions made for earnings from the worker's employment during this period. The worker was advised that from that point, he would receive regular vocational rehabilitation payments for so long as he was actively participating in a vocational rehabilitation plan. Payments would be in the amount of $913.70 bi-weekly. Vocational rehabilitation benefits were later paid through February 18, 2001.

In May of 2000, the worker was paid retroactive vocational rehabilitation benefits for the period between January 23 to May 20, 1996, as information on file indicated that the worker was looking for work during that period but had no earnings. However, aside from this payment, there was little or no vocational rehabilitation involvement with the worker between March 2000 and November 2000 (see memo dated October 24, 2001).

The worker requested further retroactive vocational rehabilitation benefits, for the period between April 1, 1997 and May 3, 1999. From April 1997, when his schooling ended and his vocational rehabilitation benefits were terminated, through 1998, the worker was employed, but, in his words, "minimally" (see telephone log dated October 2, 2000). The VRC requested that the worker submit tax returns for 1997, 1998 and 1999, as well as a detailed record of his job search activities. On January 1, 2001, the worker submitted information to the VRC indicating a significant attempt to obtain employment from April 1997 through the end of 1998.

In a decision letter dated October 23, 2001, a Board VRC advised the worker that no retroactive vocational rehabilitation benefits would be paid for the period between April 1, 1997 and December 31, 1998.

The VRC noted that the Review Board, in its April 19, 1999 decision, had addressed the issue of vocational rehabilitation benefits. In its findings, the Review Board did not direct the Board to pay benefits for the period between April 1, 1997 and December 31, 1998. The VRC was of the opinion that the Review Board's failure to direct the Board

on that matter indicated that any decision with regard to retroactive vocational rehabilitation benefits for that period would be at the Board's discretion.

That said, she cited Board policy that allowed for payment of retroactive vocational rehabilitation benefits only on evidence of the worker's active participation in the vocational rehabilitation process. She noted that the worker did not meet the Board's job search requirements during that period; specifically, the worker did not contact at least 15 employers per week, nor was he involved in any other pre-authorized vocational rehabilitation plan. The worker did not contact his vocational rehabilitation consultant, nor did he appear to be acting in a collaborative manner with the VRC to plan further rehabilitation efforts. For those reasons, it was the decision of the VRC that no retroactive vocational rehabilitation benefits were payable for the period in question.

In support of his appeal of the October 23, 2001 decision, the worker has provided a submission by his representative dated August 9, 2002. In his submission, the worker's representative argued that the Board failed to correctly implement the Review Board's April 19, 1999 decision, and, in fact, reversed the intent of the Review Board's finding by refusing to pay vocational rehabilitation benefits from April 1, 1997 to May 2, 1999. In the alternative, the worker's representative argued that if the Review Board did not, in fact, decide that the worker was entitled to vocational rehabilitation benefits for the period in question, then the Board has strictly applied its policy with regard to retroactive vocational rehabilitation benefits in circumstances in which that policy was not appropriate.

The employer has not participated in the worker's appeal, although given the opportunity to do so.

Subsequent to the October 23, 2001 decision here being appealed, the worker requested a manager's review of the October 23, 2001 decision. In a decision letter dated January 31, 2002, a Board manager advised the worker that there would be no change in the October 23, 2001 decision. Although the manager acknowledged that the worker had submitted job search information, he agreed with the VRC that the documentation submitted did not demonstrate a sufficiently sustained job search effort. He also noted that the worker had neither sustained a significant permanent functional impairment nor had he been awarded a loss of earnings pension. Therefore, he did not meet the Board's requirements for payment of continuity of income benefits.

The Board implemented a permanent partial disability pension award in the amount of 3.2 percent of a totally disabled person on January 7, 2002. The pension was effective as of January 23, 1996, and was based on a wage rate of $2,413.00 per month. Further vocational rehabilitation benefits were provided for tutoring, and sponsorship of a property management course. He received job search allowance, and a training-on-the-job opportunity was authorized by the Board.

Reasons and Findings

Section 16(1) of the Act provides that the Board may make suitable provision for vocational rehabilitation. Its decision to do so is discretionary, and, according to Board policy (RSCM, item #85.30), is based on the worker's motivation and active involvement. The worker must show a commitment and determination to re-establish himself in order to receive rehabilitation assistance from the Board.

Factors which would mitigate in favour of providing vocational rehabilitation (RSCM, item #86.12) include situations in which the worker would experience difficulty in returning to his pre-injury employment, or where he would be at a long-term disadvantage compared with others in that occupation.

The Board's objectives with regard to vocational rehabilitation are twofold. The first is to assist workers in their efforts to return to their pre-injury employment or to an occupation comparable in earning capacity to the worker's pre-injury occupation. The second is to provide the assistance considered by the Board to be reasonably necessary to overcome the immediate and long-term vocational impact of the compensable injury.

Item #89.11 of the RSCM provides that the Board may pay a rehabilitation allowance to assist workers who are not actively engaged in the rehabilitation process but who are awaiting assessment of their disability pension. Such benefits will be considered for workers whose disability has stabilized, who (effective July 16, 1998) are employed at a reduced level due to their compensable disability, who are likely to receive a significant permanent partial disability award, and who are not otherwise eligible for temporary disability benefits. Prior to implementing an income continuity payment, the VRC must have considered and offered to the worker all rehabilitation measures which are reasonable and might be of assistance to the worker.

With regard to the amount of payment to be made under income continuity, item #89.12 of the RSCM provides that if the worker has retired, or if the worker is experiencing non-compensable medical, psychosocial or financial problems or is otherwise refusing to actively participate in the rehabilitation process, the VRC will readjust the income continuity rate to the rate which best reflects the conclusions contained in the employability assessment regarding the worker's projected long-term earning capacity.

The following chronology can be drawn from the file:

- The worker's wage loss benefits were terminated in December 1994 on the basis that he could return to his pre injury employment.

- The worker attempted a graduated return to work with his accident employer but was unable to complete that return to work because of the lifting required.

- From January to June 1995, the worker attended courses to upgrade his education.

- In 1996, he requested a reopening of his claim file; that request was denied.

- Although Dr. Wright, a Board medical advisor, thought on May 21, 1996 that the worker was at undue risk for further and permanent aggravation if he returned to his pre-injury employment, no vocational rehabilitation benefits were paid until July 7, 1996.

- Although the worker's claim file had originally been referred to the Board's Vocational Rehabilitation Services in August 1995, **no vocational rehabilitation intervention commenced until the initial vocational rehabilitation assessment in July 1996.**

- Therefore, the worker was without benefits and unable to work at his pre-injury employment between December 1994 and July 1996.

- The worker received vocational rehabilitation benefits from July 1996 until April 1997.

- In a September 15, 1997 memo by a VRC, it was acknowledged that in the two-year delay in referral to Vocational Rehabilitation Services, the worker was upgrading his education and seeking employment on his own. He was volunteering in an effort to network, with the aim of obtaining employment. These activities were confirmed by the VRC.

- After numerous requests by the worker, retroactive vocational rehabilitation benefits were paid for the period between May 21, 1996 and July 7, 1996. **These benefits were not paid until February 3, 1998.**

- The Review Board, in its April 19, 1999 decision, specifically addressed the matter of vocational rehabilitation benefits for the worker. **The panel found that the worker was entitled to such benefits on the basis of the injuries incurred in his 1994 injury,** and not on a preventative basis only. They directed the Board to pay vocational rehabilitation benefits, and to consider paying continuity of income benefits until the worker's permanent partial disability pension was awarded.

- After the Review Board's decision, **the Board did not take any action to implement the Review Board's findings for eight months**. Only after the worker requested retroactive vocational rehabilitation benefits on the basis of the Review Board's decision did the Board take any action; on January 18, 2000, they paid benefits for the period between May 3, 1999 and December 31, 1999.

- In May of 2000, the worker was paid retroactive vocational rehabilitation benefits for the period of January 23 to May 20, 1996, as the VRC acknowledged that there was information on file that the worker was looking for work during that period. **These benefits were paid four years after the time period in question.**

- The worker's pension was not implemented until January 7, 2002, **some three years after it was mandated by the Review Board's decision.**

It was the clear intent of the Review Board in its April 1999 findings that the worker be paid vocational rehabilitation benefits as required to allow him to return to gainful employment. Although that panel was dealing directly only with a specific time period, i.e., November 1994 to May of 1996, the panel could not have predicted the delay, and subsequent fits and starts with which the worker's vocational rehabilitation assistance was handled.

I allow the worker's appeal. It is evident to me that from the beginning, the worker has done everything in his ability to return to gainful employment. The worker tried a graduated return to work; he was unable to return to his pre-injury employment because of the lifting requirements of that job. After he determined that he could not return to truck driving – and before the Board acknowledged any responsibility – the worker attempted to upgrade his educational skills and tried to find other employment.

He has attempted to find jobs in every way possible, including volunteering in order to network with job providers. His cooperation has been acknowledged by the VRC and since November 2000 every effort has been made to assist the worker in returning to work. Although he did not maintain contact with the Board in the time period here in question, he was hardly likely to do so after his vocational rehabilitation benefits had been terminated.

I find that, in the period in question, the worker has provided adequate evidence that he continued to look for work. He gave out resumes, made telephone calls, and visited potential employers, some of whom he had seen on several occasions before. His records, while not satisfying the VRC's standards, were certainly more than required, given that he was not receiving benefits at the time. I find that the worker was participating in his own vocational rehabilitation, and was entitled to retroactive vocational rehabilitation benefits from April 1997 to April 18, 1999 (during the remainder of the time for which retroactive vocational rehabilitation benefits were requested, from April 19 through May 2, 1999, the worker was receiving wage loss benefits on another claim). I note that the worker's permanent partial disability award was made effective in January 1996. I leave it to the Board to determine the worker's entitlement in light of that fact.

Conclusion

With regard to the issue of whether the worker is entitled to retroactive vocational rehabilitation benefits for the period between April 1, 1997 and April 18, 1999, I allow the worker's appeal, for the reasons set out above. The Board's October 23, 2001 decision is varied. The worker's claim file is returned to the Board for payment of vocational rehabilitation benefits at the appropriate wage rate for the period noted, together with interest on that amount. The worker requested no expenses for the mounting of this appeal, and none are awarded.

Nora Jackson
Vice Chair

NJ/jkw

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