Vocational Retraining Claims

by
William R. Sachse, Jr.
Jessica M. Vianes
Peterson, Johnson & Murray, S.C.
733 North Van Buren Street
Sixth Floor
Milwaukee, WI 53202
(414) 278-8800

I. Vocational Retraining: An Overview

A. Purpose

The Wisconsin Division of Vocational Rehabilitation, a unit of the Department of Workforce Development ("DVR") is the state agency charged with implementation of the Federal Rehabilitation Act of 1973, 29 U.S.C.A. §701, et. seq. Wisconsin codified the Federal Rehabilitation Act in Chapter 47 of the Wisconsin statutes.

In its Program Policy, the DVR states under the Purpose Section of the Wisconsin Vocational Rehabilitation Program that "The purpose of the Title I of the Rehabilitation Act of 1973, as amended, is to provide, 'comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation that is designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, and capabilities, interests and informed choice, so that such individuals may prepare for and engage in gainful employment.'" June 2001 VR Program Policy at p. iii *quoting* [P.L. 105-220 s. 100 (a)(2)]. As such, the DVR adopted the purpose of the Federal Rehabilitation Act as its own guide.

B. Structure

The Division of Vocational Rehabilitation, administered by Charlene Dwyer, is a division within the Department of Workforce Development, of which Roberta Gassman is the Secretary. The Worker's Compensation Division (WCD), administered by Frances Huntley-Cooper, is also within the Department of Workforce Development. Consequently, the DVR and WCD are co-equal units of government in the same cabinet-level department.

C. Eligibility

The VR Program Policy states that to be eligible for services, a consumer must: (1) have a physical or mental impairment that results in a substantial impediment to employment and (2) require VR services to prepare for, secure, retain or regain

employment. VR Program Policy at p. 8. These requirements are the same as the federal eligibility requirements for rehabilitation services. 29 U.S.C.A. §722(a). The WCD has adopted the federal eligibility requirements in Wis. Adm. Code. §DWD 80.49(2).

The federal rehabilitation laws define "disability" as "a physical or mental impairment that constitutes or results in a substantial impediment to employment." 29 U.S.C.A. §705(9). The federal laws further define "individual with a disability" as any individual who "has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and can benefit in terms of an employment outcome from vocational rehabilitation services . . ." 29 U.S.C.A. §705(20).

The federal regulations provide that an eligibility determination for vocational benefits must be based upon, among other factors, a determination by qualified personnel that the applicant has a physical or mental impairment and that the impairment constitutes or results in a substantial impediment to employment for the applicant. 34 CFR §361.42. Thus, a qualified individual, such as a doctor, must have made the assessment of the applicant's disability and extent of that disability.

Eligibility is determined by the DVR counselor on a case by case basis. "The assessment for determination of eligibility shall be based upon a review of existing data, including VR Counselor observations, to the maximum extent possible. Information may be obtained, as necessary, from other programs and providers, such as educational institutions, Social Security Administration, physicians, hospitals and other information provided by the consumer or his/her family. The data used must describe the current functioning of the customer." VR Program Policy at p. 8. But, the manual is silent as to what rules or regulations the counselor must follow to determine whether an employee is eligible for rehabilitation under the DVR policy or federal law.

D. DVR Options

The DVR may attempt to place an individual in a job with his previous employer or a different employer before certifying the applicant for retraining benefits. The VR Program Policy does state, "While the policy dictates what must be done, there will not be detailed procedures on how these policies must be implemented. Due to the individualized nature of the program, there is no one best way to accomplish the intent of these policies. It is trusted all staff in the agency will understand and implement these policies in the manner most appropriate for the individual being served." VR Policy Program at p. iii. Thus, the DVR counsel has wide discretion in determining how an applicant will be rehabilitated.

E. IPE: Individual Plan for Employment

The VR Program Policy requires that each consumer receive an Independent Plan for Employment which outlines the consumer's options for developing a plan for future employment. VR Program Policy at pp. 10-11. DVR has adopted the federal requirements for an IPE, which are provided for in 34 CFR §361.45, and mandate that the document must be in writing and developed in such a way that the consumer had "informed choice." The program policy and federal regulations state that informed choice includes the following elements: 1) the employment setting; 2) the specific VR services needed to achieve the employment outcome; 3) the settings in which the services will be provided; 4) the entity that will provide the VR services; and 5) the methods available for procuring the services. Program Policy at pp. 10-11; 34 CFR §361.45.

II. Vocational Rehabilitation and Worker's Compensation

Worker's compensation applicants, insurers and self-insured employers become involved in the vocational rehabilitation process through Wis. Stats. §§102.43(5) and 102.61. Wis. Stats. §102.61(1) provides in part that employees receiving both worker's compensation benefits and "instructions" pursuant to the Federal Act are entitled to receive maintenance and travel and meal reimbursement during their rehabilitation. Maintenance is defined by Wis. Stats. §102.43(5) as temporary total disability benefits.

According to Wis. Stats. §102.43(5), maintenance payments shall not exceed 80 weeks unless the Worker's Compensation Division "determines that additional training is warranted." The first 80 weeks of benefits, however, are not addressed in either of the two statutes. Review of the first 80 weeks is strictly limited under Massachusetts Bonding & Insurance Co. v. Industrial Commission, 275 Wis. 505, 82 N.W.2d 191 (1957).

The Division of Workforce Development Administrative Code states, "The primary purpose of vocational rehabilitation benefits is to provide a method to restore an injured worker as nearly as possible to the worker's preinjury earning capacity." Wis. Adm. Code. §DWD 80.49(1).

A. The Standard for Worker's Compensation Division Review of Vocational Rehabilitation Claims: Massachusetts Bonding & Insurance Co. v. Industrial Commission, 275 Wis. 505, 82 N.W.2d 191 (1957).

The question of who decides whether an applicant is entitled to the first 80 weeks of vocational rehabilitation maintenance benefits was answered in Massachusetts Bonding & Insurance Co. v. Industrial Commission, 275 Wis. 505, 82 N.W.2d 191 (1957). In Massachusetts Bonding, a part-time crop dusting pilot sustained a disabling injury when he fell while working in a hangar. The VTAE Board, predecessor to the DVR, certified the applicant as eligible for courses at the University of Wisconsin-Madison. The courses were designed to give the worker

a college degree. This was felt to be reasonable since the applicant aspired to attain a college degree prior to the accident and because the accident occurred during a summer vacation from classes at St. Norbert University in Green Bay.

The worker's compensation insurer argued that the Board abused its discretion and that the Industrial Commission erred by affirming the Board. The court affirmed the Industrial Commission, holding that absent express statutory language to the contrary the Industrial Commission's authority to review VTAE determinations was limited to situations where material facts were withheld or misrepresented, or where the Boards' interpretation of the rehabilitation laws was so unreasonable as to amount to an abuse of discretion.

Massachusetts Bonding has been analyzed in terms of an allocation of responsibility between two competing state agencies. In Massachusetts Bonding, the Wisconsin Supreme Court confronted the apparent conflict between the Worker's Compensation Division and the VTAE Board. The court held that while the VTAE Board determined whether an injured worker was eligible for vocational rehabilitation services, the eligibility decision could not be overruled by the Worker's Compensation Division at least in terms of maintenance benefits. Massachusetts Bonding requires the employer to show that "highly material facts were misrepresented to or withheld from the State Board or that the State Board has applied an interpretation of the rehabilitation laws which is entirely outside the reasonable scope of interpretation and hence a clear abuse of administrative power" to avoid paying maintenance benefits. Massachusetts Bonding & Insurance Co. v. Industrial Commission, 275 Wis. at 512. The court went on to observe that the employer does not have the right to a hearing before the VTAE Board, but may litigate the basic compensability of a work injury claim before the Worker's Compensation Division. That, according to the court, preserved the employer's due process rights.

In Dane County Hospital and Home v. Labor & Industry Review Comm., 125 Wis. 2d 308, 371 N.W.2d 815 (1985), the Court of Appeals reaffirmed the Massachusetts Bonding rule that the employer must show an abuse of administrative discretion or pay the maintenance benefits.

Another court found it appropriate to approve vocational benefits when an employee had worked in Wisconsin but was a resident of Illinois and the Illinois Department of Rehabilitation Services had certified him for retraining benefits, using Massachusetts Bonding as the standard of review. Beloit Corp. v. LIRC, 152 Wis. 2d 579, 449 N.W.2d 299 (Ct. App. 1989).

Thus, the only way in which the Worker's Compensation Division can find that retraining benefits are inappropriate is 1) if there was a misrepresentation of highly material facts, or 2) if the DVR counselor unreasonably interpreted the federal rehabilitation laws.

The Worker's Compensation Division will generally approve retraining beyond 80 weeks if it is reasonable and if the primary purpose is to restore, rather than improve the worker's pre-injury earning capacity. Wis. Adm. Code §DWD 80.49.

B. DVR's Policy Change and Vocational Retraining Law: A Trend Towards "Consumerism"

On October 1, 1998, the DVR rewrote its policy manual for handling vocational rehabilitation cases. It eliminated the rule that required a worker's compensation claimant to show there was no work available with the time-of-injury employer or in a general labor market before starting a school program.

In reaction to the Massachusetts Bonding decision, representatives of the Worker's Compensation Division and the DVR negotiated a special policy for handling vocational rehabilitation claims involving work-injured applicants. The DVR agreed not to approve schooling for injured workers unless the DVR counselor established that the time-of-injury employer did not have work for the applicant and that the applicant could not find suitable work in the general labor market. This so-called three-step protocol has been in effect since late 1970s. DVR Program Policy Manual Sec. 2400(2)(b) (April 1990 ed.).

DVR staff announced in June 1998 that changes in federal rehabilitation statutes prohibited the three-step protocol. According to the DVR, federal law required the DVR counselor to let the injured worker make an "informed choice" as to appropriate vocational rehabilitation. The three-step protocol did not allow workers to obtain employment commensurate with his or her abilities and capabilities" or otherwise enhance employment opportunities. Thus, the DVR's new policy did not require injured workers to contact their employers and determine whether alternate work was available, nor did it require injured workers to go through job placement before being sent to school.

Another area of change involves the type of school program selected by the DVR counselor. Under the new rules, the DVR counselor was not to consider the cost of the school program in determining whether it was appropriate. If the worker made an informed choice that a six-year graduate degree program was appropriate, the DVR counselor was likely to approve it. Two-year associate technical school degrees remained the program of choice, but there are more cases involving longer programs than under the old rules. The 80 week limitation in Wis. Stats. §102.43(5) remains and the applicant still must to prove that the longer program was necessary to restore earning capacity in order to receive benefits.

The DVR's policy reflected a change in the way rehabilitation professionals view the most effective approach to rehabilitation. Consumerism sought to "empower" the disabled person, requiring him or her to devise a rehabilitation plan and implement it. In practice, the DVR counselor exercises little control over the IPE,

perhaps explaining why the DVR is perennially bankrupt before the conclusion of the state's fiscal year.

III. Defenses to Vocational Retraining Claims

A. No Injury

Wis. Stats. §102.61(1) states that an employee who is entitled to receive and has received Worker's Compensation benefits and is receiving instruction under the Federal Rehabilitation Act is entitled to maintenance. In order to be eligible for Worker's Compensation benefits under Wis. Stats. §102.03(1), an employee must have sustained an injury arising out of and incidental to his employment. As such, a work-related injury is a necessary component to receive vocational rehabilitation benefits under Wis. Stats. §§102.43(5) and 102.61. Absent such an injury, there cannot be payments under Wis. Stats. §§102.43(5) and 102.61.

B. No Permanency

The law does not require that permanent restrictions or a minimum permanency rating be assessed in order for an individual to be eligible for vocational benefits. Furthermore, Wis. Adm. Code §IIND 80.49, which had provided a presumption that an employee rated at less than 10% PPD did not warrant vocational benefits, was subsequently repealed after the court decided Dane County Hospital and Home v. Labor & Industry Review Comm., 125 Wis. 2d 308, 371 N.W.2d 815 (1985). Thus, any such presumption based upon a minimum rating would likely be void under Massachusetts Bonding.

While there may not be a minimum permanent disability rating which triggers vocational benefits, the federal law states the employee must have an impairment which impacts the employee's ability to work in order to qualify for vocational benefits. 29 U.S.C.A. §722(a). Furthermore, the federal regulations require that qualified personnel make the determination that the employee has an impairment which is a substantial impediment to employment. 34 CFR § 361.42. That requirement could be interpreted as requiring that a doctor make a permanency determination before a person is eligible for VR services under the Federal Act. A temporary disability would not result in an impairment which would adversely affect an employee's ability to work.

It could be argued by respondents that a DVR counselor who found eligible an employee without a permanent disability rating or permanent restrictions misapplied federal law such that worker's compensation benefits were improper under Massachusetts Bonding. However, the applicant could reply that there is no express statutory provision, state or federal, which requires that the employee have a permanent disability or permanent work restrictions to qualify for vocational retraining.

C. Job Offer

In response to the new DVR policy not requiring a job search, the legislature enacted §102.61(1g), effective as of January 1, 2002, which states that an employee seeking worker's compensation benefits must inquire about re-employment with his previous employer. Where the employer offers "suitable employment," which is defined as work within the employee's restrictions that pays greater than 90% of the worker's average weekly wage, the respondents are not liable for vocational rehabilitation benefits. Wis. Stats. §102.61(1g).

There are two exceptions to the "suitable employment" offer: (1) the employee's education, training, or employment experience demonstrates that an employee was on a career or vocational path which was not reflected in the employee's average weekly wage on the day of injury and that permanent work restrictions caused by the injury impeded the employee's ability to pursue that path; or (2) the employee was working part-time at the time of the injury and the employee's wage calculated under the special rules for part-time employment in Wis. Stat. §102.11(1) exceeds the gross weekly wage for part-time employment.

Thus, after receiving permanent work restrictions and learning that he is eligible for vocational retraining, the employee must provide those restrictions to the employer. Wis. Stat. §102.61(1g)(c). The employer has 60 days to respond with an offer of suitable employment. Id. The statutes further provide that either party can request a hearing before the WCD to determine the employee's work restrictions if a resolution cannot be made within 30 days. Id.

The applicant should inform his employer as soon as possible of his permanent work restrictions and that he is eligible for DVR benefits. In response, the employer must put its response in writing as to whether suitable employment is available. If there is a dispute about the applicant's work restrictions, a hearing should be requested.

The Labor and Industry Review Commission addressed job offers in cases where the injury occurred prior to January 1, 2002, in Manske v. Rasch Construction & Engineering W.C. Claim No. 1998-016330 (LIRC, June 24, 2002). In Manske, the employee was offered work by his previous employer within his work restrictions and within 85% of his pre-injury wage. Id. The employee refused the position, noting that he had safety concerns, but the employer testified that the employee thought the position was beneath him. Id. The DVR counselor certified the employee for benefits. Id.

The LIRC noted, "At most, DVR's current policy simply notes the possibility that an insurer might protest if retraining is undertaken without an attempt to return to work." Id. The LIRC also held that since Wis. Stats. §102.61(1g) did not apply to Mr. Manske's date of injury, "Consequently, the commission has no choice,

under DVR's new policy and the limits on the commission's authority under Massachusetts Bonding, but to order payment of benefits under Wis. Stat. §§102.43(5) and 102.61(1) for at least the first 80 weeks of retraining." Id. For injuries before January 1, 2002, the DVR counselor does not have to consider a job offer before certifying the applicant for retraining.

D. Job Placement

Under the current VR Program Policy mandating "informed choice" by the worker, the DVR counselor does not have to conduct a job search for the applicant prior to approving retraining because federal law does not require such a search. While there is not an express requirement that the counselor attempt to place the applicant prior to certification, it could be argued by a respondent that a job search would provide both the counselor and the applicant with a more informed choice regarding the applicant's opportunities. As the VR Program Policy and federal laws require informed choice, an argument could be made that the applicant did not research all and the DVR counselor misinterpreted the federal "informed choice" requirements. This is a huge burden for the respondent to sustain because of the broad discretion allowed under the informed choice rules.

E. The Applicant Fails to Follow the IPE

IPEs regularly state that the employee must take 12 credits per semester and maintain a certain grade average, usually 2.0 on a four-point scale. What happens when the worker fails to follow the IPE? Wis. Stats. §102.61(1r)(b) states that the employee must continue with rehabilitation training with such regularity as health and situation will permit, but it contains no enforcement language.

The LIRC has not expressly addressed the issue of whether retraining benefits should continue when the employee fails to attend school on a regular basis, carry 12 credits per semester, maintain a 2.0 GPA, or otherwise comply with the IPE. In Gasper v. Wismarq, W.C. Claim No. 94067858 (LIRC, February 24, 1998), the respondent argued that it should not have to pay for benefits when the employee failed to maintain a 2.0 GPA. The LIRC responded, "This argument lacks any support in the law. The applicant's grade point average was initially lower than satisfactory because he entered into a program which involved math requirements which he found difficult. The applicant and the DVR responded reasonably by switching the applicant's program to marketing, which does not involve the difficult math curriculum. As of the hearing date, the applicant was making good progress in his studies. There was no abuse of discretion by the DVR, or unreasonable behavior by the applicant, which could justify withholding rehabilitation benefits for the periods in question." Id. This case is not helpful for those where the employee does not change the IPE, but fails to follow it.

There is no statutory provision to enforce that the employee actually attend school with regularity or that he maintain a certain GPA or carry the requisite number of credits. Furthermore, Massachusetts Bonding would suggest that such review would be reserved for the DVR. However, if an employee fails to fulfill the requirements of the IPE, a respondent should argue that the Worker's Compensation Act requires reasonable regularity and that the terms of the IPE define what is "regularity" in any given case. That the requirement is in the WC Act means the WCD may deny its benefits to those who do not follow their rehabilitation plan. A "reasonable" failure could be due to limitations resulting from the work injury or other factors outside the worker's control.

F. The Applicant Fails to Seek DVR Benefits within 60 Days from When He Has Sufficiently Recovered

Wis. Stats. §102.61(1r)(a) provides that an employee must undertake the course of instruction within 60 days from the date when the employee has sufficiently recovered from the injury to permit doing so or as soon thereafter as the officer or agency having charge of the instruction shall provide the opportunity for rehabilitation.

The LIRC has found that benefits need not be paid under Wis. Stats. §§102.43(5) and 102.61 if the applicant waited longer than 60 days from when he had recovered to seek vocational rehabilitation. In Hubatch v. Miller Brewing Company, W.C. Claim No. 1981064308 (LIRC, March 5, 1999), the applicant had sustained a work-related injury while he worked for Miller Brewing Company in 1981. He met with the DVR at that time, but did not pursue vocational rehabilitation and returned to work for Miller. Id. In 1996, the applicant accepted a severance package in lieu of lay-off and attempted to seek DVR benefits, pursuing degrees in marketing and microcomputing. Id. The ALJ awarded vocational benefits, but LIRC reversed, noting that the applicant should have sought benefits 60 days after he had recovered from his 1981 injury. The LIRC came to a similar conclusion in Rainer v. Thomas P. Zellmer, W.C. Claim No. 90038142 (LIRC, October 7, 1997).

The applicant can respond to arguments that he did not seek benefits within 60 days of recovery by citing the statutory language of "as soon thereafter as possible." Wis. Stats. §102.61(1r)(a). The respondent can cite to the 60 days after recovery language.

G. Challenging the Massachusetts Bonding Decision.

The Supreme Court's 1957 holding is arguably outdated. The VTAE Board no longer implements the Federal Rehabilitation Act. The DVR, which now implements the Federal Act, is in the same governmental agency as the WCD. Thus, the underlying premise of Massachusetts Bonding – that one separate state agency cannot dictate to another – is no longer valid. Moreover, such premise

was faulty from the beginning. The WCD never tried to deny the Massachusetts Bonding applicant his federal rehabilitation benefits. Rather, it denied worker's compensation benefits that were separate from those available under the Federal Act. It might also be argued that "informed choice," which in practice allows the worker to select a retraining program with little or no involvement by the DVR counselor, is not the same process as existed in 1957 when the VTAE Board devised rehabilitation plans. Letting the worker determine how much compensation is due for vocational rehabilitation is no more appropriate than allowing an insurance claims handler to suspend temporary disability without support from a medical practitioner. *See* Brakebush Bros. Inc. v. LIRC, 210 Wis. 2d 623, 563 N.W.2d 512 (1997).

::ODMA\WORLDOX\F:\DOCS\099\WRS\00170090.WPD