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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can a refusal to participate in vocational rehabilitation preclude a finding that a claimant is permanently and totally disabled?

When presented with a motion seeking permanent total disability (PTD) compensation, there are a number of factors that must be considered. These include whether the claimant has reached maximum medical improvement (MMI) with regard to the allowed conditions, whether the claimant is capable of sedentary or other non-traditional employment, the claimant's age and prior work experience, and whether the claimant has applied for and completed vocational rehabilitation services. These "voc rehab" programs are critical to the determination of a PTD claim, because the Supreme Court of Ohio has held that when considering an application for PTD, the Industrial Commission may consider not only past employment skills, but also those which may be reasonably developed. *State ex rel. Cunningham v. Indus. Comm.*, (2001) 91 Ohio St. 3d 261. Recently, Tenth Appellate District considered a claim involving a claimant with severe back injuries who failed to participate in vocational rehabilitation, and whether this failure precluded a PTD award.

State ex rel. Bergen v. Northgate Masonry, Inc., 2016-Ohio-7705, involved a claimant who suffered severe injuries to his back in 2000 and last worked in 2004. The claimant attempted vocational rehabilitation one time after 2006, but his file was "closed" in 2010 because the claimant did "not feel he was able to participate." There was no medical evidence presented to indicate he was not physically capable. In June, 2011, the claimant applied for PTD compensation, but an SHO determined that he retained the functional capacity to perform sedentary employment, and that his age (41) and high school education were positive vocational factors. The SHO also noted the claimant's failure to complete the vocational rehabilitation assignment. The claimant received a second vocational rehabilitation referral in 2012, but was determined to not be eligible for vocational rehabilitation services because he was not receiving TTD, non-working wage loss, PTD, loss of use, or other disability compensation, and there were no documented medical restrictions in the file that were less than 180 days old. *OAC 4123-18-03(C)*. The claimant later filed a second PTD application in 2014, which was denied by a SHO based upon a finding that the claimant had "voluntarily removed himself from the workplace." This finding was based upon claimant's continued failure to participate in vocational rehabilitation services without medical justification, and his failure to seek new employment or produce new medical evidence to justify his disability. Thereafter, the claimant filed a *mandamus* action in the Tenth District Court of Appeals.

The Tenth District affirmed, finding that the claimant had failed in his burden to demonstrate a "clear legal right to relief." Adopting the findings of fact and conclusions of law of the magistrate, the Court noted that on both occasions that he was referred, the claimant failed to produce medical evidence to justify his refusal to participate in vocational rehabilitation. When combined with his relatively advanced education and young age, there was no information in the file which would justify this refusal. In addition, the claimant had failed to demonstrate he was even eligible for such services in his second referral, as he never produced evidence of

restrictions from a physician that were less than 180 days old. The Court rejected references to various administrative forms, all of which were not timely. His refusal to participate in vocational rehabilitation in 2010, and his failure to demonstrate eligibility in 2012, constituted “some evidence” that he had abandoned his job, and therefore could not be said to be permanently and totally disabled. *OAC 4121-3-34(D)(1)(d)*.

When presented with a PTD application, perhaps the first determination that must be made by the employer is whether the claimant is eligible for and/or has completed a vocational rehabilitation referral. If one has been made and completed, this evidence is critical to a determination of PTD. More important is whether the claimant’s vocational rehabilitation file was terminated for any reason other than medical non-feasibility, as this is clear evidence of abandonment of the work force.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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