

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
REHABILITATION UNIT

EMPLOYEE: PEDRO MORALES

CASE NUMBER: 86 P 10019

EMPLOYER: DATA PRODUCTS CORPORATION

DETERMINATION

CLAIMS ADMINISTRATOR: DATAPRODUCTS
CORPORATION/ASSOCIATED CLAIMS MGMT.

OF THE

CLAIM NUMBER: 290738

REHABILITATION UNIT

In accordance with agreements reached at the October 12, 1994 Formal Conference, the parties have submitted the following to the Rehabilitation Unit:

1. Points and Authorities with attachments by Glass and Seebode dated October 31, 1994.
2. Points and Authorities with attachments by Kegel, Tobin, and Truce dated October 31, 1994.
3. A letter from Pedro Morales dated October 25, 1994.
4. Defendants response to applicant's Points and Authorities dated November 10, 1994.
5. Applicant's response to defendant's Points and Authorities dated November 15, 1994.

The issues which the Rehabilitation Bureau has been asked to address are:

1. Is Pedro Morales eligible for vocational rehabilitation services?
2. To resolve Issue #1, is it necessary to:
 - a. obtain a new job analysis?
 - b. have the job analysis reviewed by the Agreed Medical Examiner?
 - c. have Pedro Morales re-examined by the Agreed Medical Examiner?
3. Entitlement to Retroactive VRTD Benefits.
4. Is entitlement to vocational rehabilitation benefits barred by either:
 - a. statutory time constraints
 - b. the doctrine of laches

BACKGROUND

The following background will highlight those historical events relevant to the Discussion and Determinations which follow:

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I. In the Findings and Award dated December 7, 1989, Worker's Compensation Judge Harvey Stark found that Pedro Morales:

- a. did sustain injury AOE/COE to his back
- b. did not sustain injury AOE/COE to his psyche
- c. "Defendant did not unnecessarily delay or fail to pay self-procured and medical-legal, temporary disability indemnity, vocational rehabilitation temporary disability indemnity, and permanent disability indemnity."
- d. "The issue of applicant's Appeal of the Decision and Order of the Rehabilitation Bureau is ordered off calendar."

II. In his Memorandum on Opinion dated December 6, 1989, Worker's Compensation Judge Harvey Stark stated:

...Applicant has failed to prove his claim of unreasonable failure or delay in paying self-procured treatment costs, medical-legal costs, temporary disability, vocational rehabilitation temporary disability, and permanent disability. Applicant has made inconsistent statements regarding the history of his injury. Based thereon defendant reasonably put injury in issue and that remained a viable issue even through trial.

...Applicant's appeal of the October 30, 1987 Decision and Order of the Rehabilitation Bureau cannot reasonably be determined without a supplemental report from the parties' Agreed Medical Examiner, Richard Masserman M.D. Dr. Masserman's opinion on applicant's ability to return to his former occupation is somewhat ambiguous. Further, Dr. Masserman did not have the benefit of the Job Analysis at the time that he arrived at his conclusions. Therefore, the issue of applicant's Appeal of the Decision and Order of the Rehabilitation Bureau will remain off-calendar until such time as a supplemental report from Dr. Masserman is filed with the Worker's Compensation Appeal's Board and/or a request for further proceedings on this issue is made by either party.

III. The rating instructions by Harvey Stark dated August 29, 1989 were:

...injury to the back resulting in mid and low back pain, intermittent slight to occasionally less than moderate with repeated heavy lifting, frequent bending and stooping on the basis primarily of subjective factors. The applicant would be advised to avoid repeated heavy lifting, frequent bending or twisting movements to avoid his symptoms.

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IV. Richard Masserman M.D. acting in the capacity of Agreed Medical Examiner in the field of orthopedic surgery issued a report dated February 10, 1986 which stated under recommendations on pages eight and nine:

...On the basis of primarily subjective factors, the patient would be advised to avoid repeated heavy lifting, frequent bending or twisting movements to avoid his symptoms, but apparently was capable of continuing to work at his regular job although with continuing symptoms until he was terminated from his job in January of 1983.

...He is probably capable of returning to work at the same job though would require some bending and lifting precautions.

V. Job Analysis dated March 18, 1987 by Oswaldo Reinoso for the usual and customary occupation of computer assembler. Which states:

a. that there is frequent bending/stooping (Page 3) and occasional lifting of large power supplies weighing a maximum of 34 pounds.

The job analysis was signed by Mr. Morales and his legal representative indicating that they were in agreement with its contents with the exception of some corrections. One was that approximately two to three times per week, an assembled computer device had to be returned to the assembly area to correct an error. These devices could weigh 100 - 150 lbs. and would be lifted by two or three co-workers.

VI. The Decision and Order of the Rehabilitation Bureau by Sandra Lee dated October 30, 1987 which found Pedro Morales was not precluded from returning to his occupation at the time of injury based on a review of the job analysis and the report of Dr. Masserman dated February 10, 1986. This Decision and Order did not address the issue of entitlement to retroactive VRTD benefits.

VII. Applicant's legal representative filed a timely appeal of the Decision and Order of the Rehabilitation Bureau dated November 16, 1987. In that appeal, applicant's legal representative requested that:

1. the Decision and Order dated October 30, 1987 be vacated and annulled.
2. that VRTD be ordered to begin from the date of request and continuing.
3. that the issue of penalties and interest for failure to provide timely rehabilitation benefits be set for hearing.

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VIII. On February 27, 1990, an Opinion and Order Dismissing the Petition For Reconsideration was issued. The Rehabilitation Unit is not aware that applicant's legal representative ever filed a Petition for Writ of Review.

IX. Memorandum from Harvey Stark dated August 18, 1993 which states: "I believe jurisdiction over rehabilitation is still with the Rehabilitation Bureau. Until they issue a final Decision and Order, jurisdiction remains with them. Your Declaration of Readiness to set for conference is therefore denied."

DISCUSSION

The parties returned to the Rehabilitation Unit for resolution of the aforementioned issues after Worker's Compensation Appeal's Board Judge Harvey Stark refused to schedule a hearing. A Formal Conference was held at the Rehabilitation Bureau. Since the Rehabilitation Bureau file could not be located, the parties were asked to submit Points and Authorities as well as the necessary documentation so that the Rehabilitation Unit could reconstruct its file. All of the aforementioned documents that were received have been reviewed.

Judge Stark believed that Dr. Masserman's report was ambiguous and felt that having Dr. Masserman review the job analysis would resolve the issue of medical eligibility for vocational rehabilitation services. In the Findings and Award, Judge Stark took the Rehabilitation appeal off calendar to allow the parties the opportunity to send the job analysis to Dr. Masserman. The copies of letters submitted to the Rehabilitation Unit show that applicant's legal representative blocked this from occurring. Later, applicant's legal representative demanded a re-examination by Dr. Masserman and still later the preparation of new job analysis to be reviewed by a different Agreed Medical Examiner.

This consultant agrees with Judge Stark that having the agreed upon job analysis reviewed by Dr. Masserman in 1989 would have been the most expeditious manner in which to resolve the issue. However, this was not done and five years have since elapsed with no progress. Now the matter has been remanded back to the Rehabilitation Unit. In view of the length of time which has elapsed, This Consultant will make a Determination on all issues posed by the parties based on the available record.

The Rehabilitation Unit will find that there is no need for a new job analysis since both Pedro Morales and his legal representative agreed to the existing job analysis as evidenced by their

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signatures. Judge Stark has made a finding as to permanent disability, temporary disability, and the need for future medical treatment based on the report of the Agreed Medical Examiner in the field of orthopedic surgery, Dr. Masserman. Therefore, the Rehabilitation Unit will also base the Determination as to medical eligibility for vocational rehabilitation services on this report as well. The Rehabilitation Unit will find it is not necessary for Dr. Masserman to review the job analysis in order to make the medical eligibility determination. Additionally, there is no need for a re-examination or the selection of a new agreed medical examiner to resolve the rehabilitation issues.

Since Judge Stark did not find injury AOE/COE to the psyche, the only possible basis for entitlement to vocational rehabilitation services can be the injury to the back. Unfortunately, Dr. Masserman, in his February 10, 1986 report did not specify work restrictions. Dr. Masserman found Mr. Morales to be permanent and stationary with subjective factors of disability including "mid and low back pain, intermittent slight to occasionally less than moderate with repeated heavy lifting, frequent bending or twisting. It is the opinion of This Consultant that pain which is occasionally less than moderate with "repeated heavy lifting frequent bending or twisting" would not preclude those activities. It is noted that Dr. Masserman does not indicate that these activities should be avoided in order to prevent further injury but rather states "the patient would be advised to avoid repeated heavy lifting, frequent bending or twisting movements to avoid his symptoms." Dr. Masserman goes on to state: "He is probably capable of returning to work at the same job though would require some bending and lifting precautions." Once again, this consultant believes that bending and lifting precautions are not a work restriction but rather a suggestion to minimize Mr. Morales' physical discomfort. Therefore, This Consultant finds that Dr. Masserman's report does not contain any work restrictions and so Mr. Morales is able to perform his position at the time of injury. Since he is able to perform his position at the time of injury, he is not entitled to vocational rehabilitation services.

The next issue is entitlement to retroactive VRTD benefits. The case law cited by the parties, particularly Elizondo and Blunt specify that there must be prima facie evidence of the need for rehabilitation services in order for the injured worker to be entitled to benefits while the issue of his medical eligibility is in dispute. Applicant's legal representative, in his points and authorities, relies on Dr. Sigmond and Dr. Firman for this evidence. In reviewing the reports, Dr. Firman in his January 21, 1988 report defers vocational rehabilitation needs to the

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orthopedic and neurological specialists. Dr. Sigmond in his May 28, 1983 permanent and stationary report imposes a light work restriction but makes no comment as to the need for vocational rehabilitation services. Nor does he include in this report a description by the employee as to his job duties. This Consultant is not persuaded that either of these reports constitutes the prima facie evidence necessary to trigger entitlement to VRTD benefits during the pendency of a dispute. Therefore, the Rehabilitation Unit will find that Pedro Morales is not entitled to any retroactive VRTD benefits. As noted earlier in this determination, Judge Stark appears to have reached the same conclusion in his November 6, 1989 Memorandum on Opinion (page 2, paragraph 3) when he states: "Applicant has failed to prove his claim of unreasonable failure or delay in paying self-procured treatment costs, medical/legal costs, temporary disability, vocational rehabilitation temporary disability and permanent disability." (emphasis added)

The final issue is that of penalties which the Rehabilitation Unit lacks jurisdiction to determine. This issue must be determined by the Worker's Compensation Appeal's Board. The aforementioned sentence taken from Judge Stark's Memorandum on Opinion appears to indicate that he already believed penalties would not be warranted.

DETERMINATION

1. The request for a new job analysis is hereby denied.
2. The request for a new Agreed Medical Examiner is hereby denied.
3. The request for a re-examination of Pedro Morales by Dr. Masserman is hereby denied.
4. Pedro Morales is not precluded from performing his work at the time of injury and so he is not medically eligible for vocational rehabilitation services.
5. There has never been prima facie evidence of a need for vocational rehabilitation services. Therefore, Pedro Morales is not entitled to retroactive VRTD benefits.
6. The Rehabilitation Unit lacks jurisdiction to make a determination on the issue of penalty.

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This Determination is final. Any aggrieved party must file an appeal with the Workers' Compensation Appeals Board within twenty (20) days from the date of service of this Determination. A copy of any appeal shall be served on the Rehabilitation Unit by the appealing party.

James Gainey

JAMES GAINEY
REHABILITATION CONSULTANT

CC: Pedro Morales
Glass and Seabode
Associated Claims Mgmt Inc.
Kegel, Tobin & Truce

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