

Palodichuk, Christine

STANDARD OF REVIEW

Vocational rehabilitation vs. time-loss compensation

VOCATIONAL REHABILITATION

Eligibility for time-loss compensation distinguished (RCW 51.32.090)

Review of Director's decision that a worker is "employable," and therefore not eligible for vocational rehabilitation services, is limited to whether or not the discretionary authority of RCW 51.32.095 has been abused. However, review of a determination that a worker is "employable," and therefore not eligible for time-loss compensation under RCW 51.32.090, is de novo, subject only to a "preponderance of the evidence" standard of review.*In re Christine Palodichuk, BIIA Dec., 90 0252 (1990)*

Scroll down for order.

1 the claimant that her "dispute" had been accepted for review. Thereafter, Ms. Markham's letter of
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3 October 23, 1989 was entered in response to this "dispute".

4 On November 13, 1989, the Department received a letter from the claimant's attorney. The
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6 attorney expresses disagreement with the "Dispute Summary" which accompanied Ms. Markham's
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8 letter of October 23, 1989, and asks the Department to "institute retroactive time loss benefits
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10 immediately." The attorney asks that if the Department does not intend to do so then to please enter a
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12 determinative order so that an appeal can be taken to the Board. It was apparently in response to this
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14 letter that the Department entered the order of December 1, 1989 which affirmed the letter dated
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16 October 23, 1989.

17 On December 8, 1989 the Board received the claimant's notice of appeal of the order dated
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19 December 1, 1989 (Docket No. 89 5561). After the Department entered the order of December 27,
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21 1989 holding the order of December 1, 1989 in abeyance, we entered our December 29, 1989 order
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23 Returning Case to Department for Further Action, denying the appeal without prejudice to the right of
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25 any party to appeal from any further order of the Department.

26 On January 10, 1990 the Department entered an order declaring the order of December 1,
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28 1989 null and void. This order apparently reflects the position of the Department that a Claims
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30 Manager has no authority to review a vocational rehabilitation services determination of the Director.
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32 However, it does not appear that any further order has been entered by the Department concerning
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34 the termination of time-loss compensation on September 1, 1989.

35 It seems to us that the Department, through its various letters to the claimant, has confused the
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37 issue of "employability," as it relates to eligibility for vocational rehabilitation services, with the issue of
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39 "employability" as it relates to eligibility for time-loss compensation. Understandably so, this confusion
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41 is perpetuated in the letters filed by the claimant and her attorney.

42 Pursuant to RCW 51.32.095, determinations concerning a worker's eligibility for vocational
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44 rehabilitation are vested in the discretion of the supervisor of industrial insurance, or his or her
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46 designee. The further review of vocational rehabilitation determinations by the Director of the
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Department, through the dispute process of WAC 296-18A-470, is also discretionary. RCW
51.32.095(6). Thus, if the supervisor or the Director determines that a worker is not eligible for
vocational rehabilitation because he or she is "employable," our scope of review of such a
determination is limited to whether or not the exercise of the discretionary authority of RCW 51.32.095
has been abused. See In re Armando Flores, Dckt. No. 87 3913 (July 6, 1989). As a practical matter,

1 a worker would find it difficult to establish such abuse since a finding of abuse of discretion essentially
2 requires a showing that "no reasonable person would take the position adopted by" the decision
3 maker. Flores, at 5, quoting from Griggs v. Averbek Realty, 92 Wn.2d 576, 584 (1979).
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6 As we pointed out in Flores, however, the provision of time-loss compensation is not a matter
7 within the discretion of the supervisor or the Director, and our scope of review of a determination
8 concerning a worker's eligibility for time-loss compensation is de novo, subject only to a
9 "preponderance of the evidence" standard of review. As a result, we may well defer to the Director's
10 determination that a worker is "employable" (and therefore not eligible for vocational rehabilitation
11 services) but yet find that a worker is "not employable" and therefore entitled to temporary total
12 disability benefits. That is precisely the action we took in Flores.
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16 The mistaken impression amongst certain Department personnel seems to be that a
17 determination of "employability" in connection with an assessment for vocational rehabilitation services
18 constitutes a determination which applies to the worker's eligibility for time-loss compensation as well.
19 While we do not intend to prevent Department personnel from simply "lumping" the two separate
20 issues together, they would be well advised to recognize that the deference given to Department
21 determinations involving the provision of vocational rehabilitation services under RCW 51.32.095 does
22 not and will not extend to our evaluation of a worker's eligibility for time-loss compensation under RCW
23 51.32.090. Perhaps more importantly, Claims Managers and Disability Adjudicators need to
24 understand that a finding of "employability" necessarily involves two separate and legally distinct
25 determinations -- a denial of vocational services under RCW 51.32.095 and a denial of further time-
26 loss compensation under RCW 51.32.090.
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30 The confusion of Department personnel with respect to these two separate issues is evident in
31 this case. For, while the Department has responded to the letters of the claimant and her attorney, it
32 did so only with respect to the vocational rehabilitation services "employability" determination.
33 Although it must be said that the claimant has timely protested the September 5, 1989 order
34 terminating time-loss compensation, there is no indication that the Department has reconsidered that
35 decision and entered a further order with respect to the propriety of terminating time-loss
36 compensation on September 1, 1989. The time for entering such further order has expired. See
37 RCW 51.52.060 (fifth proviso).
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41 The order dated December 27, 1989, is not a final order of the Department. Further, the
42 claimant has not indicated in her notice of appeal that she is aggrieved by the decision of the Director
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1 not to provide her with vocational rehabilitation services. Eligibility for vocational rehabilitation
2 services, to our minds, is the only issue addressed by the letter of October 23, 1989 and the orders of
3 December 1 and December 27, 1989. Her appeal is therefore denied. However, the Department is
4 hereby directed to reconsider its September 5, 1989 order terminating time-loss compensation and to
5 forthwith enter a further appealable order addressing the claimant's continued eligibility for time loss
6 compensation subsequent to September 1, 1989. The denial of this appeal is without prejudice to the
7 right of any party to appeal from such further order, or any other order of the Department.
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12 It is so ORDERED.

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14 Dated this 1st day of February, 1990.

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16 BOARD OF INDUSTRIAL INSURANCE APPEALS

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18
19 /s/ _____
20 SARA T. HARMON CHAIRPERSON

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23 /s/ _____
24 FRANK E. FENNERTY, JR. Member

25
26
27 /s/ _____
28 PHILLIP T. BORK Member