Spencer, Mary

VOCATIONAL REHABILITATION

Abuse of discretion

Where the record consists of information substantially different than that before the Director, the industrial appeals judge's disagreement with the determination does not establish that the Director's determination was arbitrary and capricious and thus an abuse of discretion where Director relied upon evaluations and recommendations of qualified, certified vocational rehabilitation counselor, in light of RCW51.32.095. ***….In re Mary Spencer*, BIIA Dec., 90 0264 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00629-2.]

Burden of proof

To establish that the Director's decision was arbitrary or capricious and thus an abuse of discretion, the appealing party must put forward the same or at least substantially similar factual information as was before the Director. *Citing Ritter v. Board of Commissioners*, 96 Wn.2d 503, 637 P.2d 940 (1981). ***….In re Mary Spencer*, BIIA Dec., 90 0264 (1991)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARY M. SPENCER	)	**DOCKET NOS. 90 0264 & 90 1241**
	)	
CLAIM NO. S-862103	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mary M. Spencer, by
Tom G. Cordell

Self-Insured Employer, Carnation Company, by
Rolland, O'Malley & Williams, per
Thomas O'Malley and Wayne L. Williams

Docket No. 90 0264: This is an appeal filed by the claimant on January 16, 1990 from a determination of the Director of the Department of Labor and Industries dated December 7, 1989 wherein vocational rehabilitation services were denied on the basis that they were not necessary to assist the claimant in returning to work, and that she was employable as a receptionist. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on February 27, 1991, in which the Director's determination of December 7, 1989 was reversed and the matter remanded to the Department with direction to further evaluate the claimant's entitlement to vocational rehabilitation services; and in which the Department order of February 23, 1990 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issues presented by these appeals and the evidence presented at this Board's hearings are adequately recited in the Proposed Decision and Order. We have granted review for the sole purpose of considering whether the Director's determination of December 7, 1989 regarding vocational rehabilitation services should or should not be reversed. That is the sole issue raised by the appeal under Docket No. 90 0264.

The initial determination, as to whether vocational rehabilitation services are necessary and likely to make the worker employable, is committed to the discretion of the supervisor or the supervisor's designee. RCW 51.32.095. Furthermore, any dispute from that decision must be filed with the Director. RCW 51.32.095(6); WAC 296-18A-470. Again, the Director's decision as to

whether or not the claimant is entitled to vocational services is clearly vested in the Director's sole discretion. In re Todd v. Eicher, BIIA Dec., 88 4477 (1990).

Our review is limited to determining whether the exercise of discretionary authority constituted an abuse of discretion. In re Gary J. Manley, BIIA Dec., 66,115 (1986); In re Armando Flores, BIIA Dec., 87 3913 (1989).

> . . . . discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. (Citation omitted) Where the decision or order . . . . is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted)

State Rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Action is not arbitrary and capricious when exercised honestly and upon due consideration, though it may be felt that a different conclusion might have been reached. See Buell v. Bremerton, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972).

In the case at hand, the burden is on the claimant, as the appealing party, to prove that the Director's exercise of discretion was arbitrary or capricious based on the information then before him. In that light, it would be reasonable to expect the claimant to present evidence tending to show that the Director's decision was based on information unrelated to the claimant's ability or inability to work; or that the evidence then before the Director was logically unconnected to determining the need for vocational rehabilitation; or that none of the information before the Director at the time of his decision could support the decision. No such attempt was made.

The evidentiary record here was created at hearings conducted in October 1990. Mrs. Spencer testified, and presented the testimony of Dr. Gerald Olmsted, a plastic and reconstructive surgeon who treated her for her right hand condition related to her industrial injury of May 16, 1986, from November 1987 through March 1988 (including a carpal tunnel release done on January 14, 1988), saw her again in August and December of 1989, and prescribed some further treatment in January and early February of 1990. The employer, Carnation, presented the testimony of Dr. Robert Wetzler, neurologist/psychiatrist, who examined the claimant on one occasion on November 29, 1988; and of Daniel McKinney, a certified rehabilitation counselor, who made employability assessments of the claimant in mid-1989. No records or documents were submitted into evidence at our hearings which

would show the specific information which was before the Director for his review at the time he rendered his vocational rehabilitation decision on December 7, 1989. Our industrial appeals judge recognized this crucial problem in this review-of-discretionary-action appeal, but then concluded "that the evidence testified to here is the same evidence which was considered by the Department."

This conclusion is an erroneous assumption. The Director's decision of December 7, 1989 plainly stated that it was based on "the enclosed summary of facts and findings." That Summary recited the information supporting his decision to deny vocational rehabilitation services, and further stated that the November 20, 1989 microfilm of the claim was reviewed, including documents consisting of a report of July 10, 1985 from a Dr. McCabe; a report of July 14, 1986 from Dr. McCabe; a report of February 17, 1989 from Dr. Olmsted; a report of June 16, 1989 from Mr. McKinney, vocational rehabilitation counselor; a letter of August 18, 1989 from Ms. Stewart, supervisor's designee; a report of September 1, 1989 from Mr. McKinney; and a letter of November 2, 1989 from Ms. Stewart.

None of the foregoing documentary reports are before us, so we are unaware of the findings or opinions of Dr. McCabe. Dr. Olmsted did of course testify, but close perusal of his testimony reveals no reference to any report or opinions by him under date of February 17, 1989.

Thus it can be seen that several items of documentary information that clearly were considered by the Director in making his discretionary decision on December 7, 1989, are not included in this Board's record in any fashion. Conversely, the record before us contains considerable evidence which obviously could not have been before the Director when he made his decision, i.e., the testimony of both Mrs. Spencer and Dr. Olmsted concerning certain treatment she received in January and February of 1990; the status of her right extremity condition following conclusion of that treatment; and a subsequent consultation examination by a vascular surgeon. Furthermore, we simply do not know whether the rest of claimant's testimony concerning her condition over the course of time prior to late 1989, or the rest of Dr. Olmsted's testimony concerning his findings and opinions based on his periods of treatment prior to December 1989, or, for that matter, Dr. Wetzler's testimony regarding his findings and opinions based on his November 29, 1988 examination, were contained, in substantially similar content, in reports and documents in the November 20, 1989 claim microfilm which was reviewed in connection with the Director's determination.

In other words, there is no showing that the evidence in the Board's record is the same as, or even closely similar to, the evidence which was considered by the Director in making his December 7,

1989 discretionary decision. Our Supreme Court stated in Ritter v. Board of Commissioners, 96 Wn.2d 503, 515, 637 P.2d 940 (1981) that:

> Administrative action is not arbitrary or capricious if there are grounds for two or more reasonable opinions and the agency reached its decision honestly and with due consideration of the relevant circumstances. Such action is not arbitrary or capricious merely because an appellate court believes it would have reached a different decision on the same facts. (Emphasis added)

It is thus implicit that, in reviewing a discretionary administrative decision to determine whether or not it was arbitrary or capricious and thus an abuse of discretion, the appellate body must review the same, or at least substantially similar, factual information as was before the administrative decision-maker. Clearly, that is an essential prerequisite for applying the arbitrary or capricious test, i.e., whether or not the Director was arbitrary or capricious in making his decision on the need for vocational rehabilitation services in light of the factual information on that issue which was before him at that time. The burden of proof is on the appealing party -- in this case the claimant -- to put before us such factual information, since that is the only way we, as the reviewing body, may review the discretionary decision for the alleged abuse of discretion. That burden of proof was not met here.

There was a limited amount of factual information which we do know was before the Director at the time of his decision, and which was also put into our record in adequate testimony form, namely, the testimony of certified rehabilitation counselor Daniel McKinney summarizing the findings from his reports of June 16 and September 1, 1989, leading to his recommendations that Mrs. Spencer was qualified and able to perform the duties of a receptionist/appointment clerk, and that such employment did exist in her labor market area. In cross-examination of Mr. McKinney, claimant's counsel attempted to focus on alleged unreasonableness or arbitrariness in his conclusions regarding claimant's employability.

But the narrow question before us is not whether the counselor was arbitrary or capricious in making his employability assessment. To the extent the Director relied on Mr. McKinney's reports--and he obviously did -- the question is whether such reliance on evaluations and recommendations of a qualified and certified vocational rehabilitation counselor constituted arbitrary or capricious action by the Director at the time of his decision. The answer to this question is clear: No, such reliance was not arbitrary or capricious. Acting on such recommendations was reasonable. Indeed, administrative decisions based on recommendations of qualified vocational experts is exactly

what is mandated by RCW 51.32.095, to aid the Department in making its discretionary decision as to whether "vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment." Acting in accord with the statutory mandate is certainly not an abuse of this discretion.

The fact that a trier of fact at this Board's level, based on an evidentiary record developed long after the Director's administrative decision and based on factual evidence not shown to be the same as the factual information which had been before the Director, may disagree with the vocational counselor's recommendation on claimant's employability because "a sufficient factual basis did not exist" for such recommendation in our evidentiary record--and even assuming the correctness of such finding in light of our evidentiary record, including presumably the admissions adduced from Mr. McKinney on cross-examination -- still does not prove that the Director was arbitrary and capricious in his discretionary decision of ten months earlier, based on the substantially different factual information then before him.

Finally, we observe that, viewed in its entirety, the claimant's case appears to more resemble an appeal seeking temporary total disability compensation rather than an appeal trying to overcome a discretionary administrative decision regarding vocational rehabilitation services. Everyone is in agreement that there is no temporary total disability issue before us in this appeal.

Proposed Finding of Fact No. 1 and proposed Conclusion of Law No. 1 are hereby adopted as this Board's final finding and conclusion. Proposed Finding of Fact No. 6 is renumbered to Finding of Fact No. 2 and is hereby adopted by the Board. In addition we make the following findings and conclusions.

FINDINGS OF FACT

3. In a letter of December 7, 1989, the Director of the Department of Labor and Industries determined that the claimant did not require vocational services to enable her to return to work inasmuch as she was qualified to work as a receptionist and such employment exists in her labor market area. The Director's decision was based on a summary of facts and findings and on review of the microfilm claim record as of November 20, 1989, including documents consisting of a report of July 10, 1985 from Dr. McCabe; a report of July 14, 1986 from Dr. McCabe; a report of February 17, 1989 from Dr. Olmsted; a report of June 16, 1989 from Mr. Daniel McKinney, vocational rehabilitation counselor; a letter of August 18, 1989 from Ms. Stewart, supervisor's designee; a report of September 1, 1989 from Mr. McKinney; and a letter of November 2, 1989 from Ms. Stewart.

CONCLUSIONS OF LAW

2. The evidentiary record herein does not show that the Director of the Department of Labor and Industries abused his discretion when he denied the claimant, Mary Spencer, vocational rehabilitation services by his discretionary decision issued on December 7, 1989 based on the factual information then before him.

3. Docket No. 90 0264; the letter decision of the Director of the Department of Labor and Industries dated December 7, 1989 in which the Director stated:

> I have reviewed the facts of your case and have decided that vocational services are not necessary to assist you in returning to work. You are qualified to work as a receptionist and this type of work exists in your labor market area. My decision is based on the enclosed summary of facts and findings.

is correct and hereby affirmed.

4. Docket No. 90 1241; the order of the Department of Labor and Industries dated February 23, 1990 which stated that;

> Whereas, claimant is contending payment of travel expenses to Moses Lake for physical therapy and to Dr. Olmsted's office in Spokane, and whereas, adequate medical treatment is available within 10 miles of Ms. Spencer's home in Soap Lake; it is hereby ordered that the self-insured employer, Carnation Company, deny the request for reimbursement of travel expenses to Moses Lake and to Spokane, pursuant to WAC 296-20-1103.

is correct and hereby affirmed.

It is so ORDERED.

Dated this 16th day of September, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
PHILLIP T. BORK Member