

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 12,813

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Appeal of )

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INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities, Division of Vocational Rehabilitation (VR), finding him ineligible for VR services. The issue is whether there is reasonable expectation that the petitioner can benefit from VR services in terms of his employability.

This case was initially considered by the Board at its meeting on July 13, 1994, after which the Board remanded the matter to the hearing officer for further consideration in light of the mistaken finding by the hearing officer, which had formed the basis of his Recommendation, that the petitioner had been found disabled for purposes of SSI.

On June 15, 1995, the petitioner submitted a Decision by the Social Security Administration Office of Hearings and Appeals that found him to have been disabled for purposes of SSI eligibility from November 23, 1993, continuing at least until the present.

In a Revised Recommendation issued July 31, 1995, the hearing officer recommended that the petitioner be considered to have a "substantial barrier to employment" within the meaning of the first part of the VR eligibility criteria (see *infra*). Following the issuance of this recommendation the parties stipulated and agreed that the petitioner met the "substantial barrier to employment" criteria and that matter would be remanded to VR to determine whether the petitioner met the second criteria, i.e., whether he could benefit from VR services.

The parties then notified the hearing officer that VR had determined that the petitioner did not meet this second eligibility test and that the petitioner was not eligible for VR services. A hearing on this issue was held on October 18, 1995.

FINDINGS OF FACT

The pertinent facts (at least insofar as the Board deems necessary to decide this matter) are not in dispute. The Social Security Administration in an appeal Decision dated June 12, 1995, determined that the petitioner met the disability criteria for SSI eligibility as of November 23, 1993, and that he has been

continuously disabled since that time.

The petitioner applied for VR services in early January, 1994. In mid-February, 1994, VR determined that the petitioner was ineligible for VR services. Following an administrative review hearing by the Agency, the petitioner was notified on April 28, 1994, that the denial of VR services had been upheld because a "substantial barrier to employment could not be verified". VR now concedes that by virtue of the petitioner's eligibility for SSI he meets the first criteria of VR eligibility as having a "substantial handicap to employment", but has now determined that the petitioner is ineligible for VR services because there is no reasonable expectation that he will benefit from VR services.

### ORDER

VR's decision is reversed.

### REASONS

VR "eligibility criteria" are set forth in the VR Regulations § 107.2 as follows:

To be eligible for services of the Vermont Vocational Rehabilitation Division, it must be demonstrated that both the following conditions exist:

1. the presence of a physical or mental disability which, for the individual, constitutes a substantial handicap to employment;
2. there is reasonable expectation that vocational rehabilitation services may benefit the individual in terms of employability.

VR now concedes that the petitioner, by virtue of his eligibility for SSI, meets the first criteria of the above definition. It argues, however, that despite the petitioner's eligibility for SSI, he does not meet the second test.

VR Regulation § 107.5 provides that a decision by the Division that an individual does not meet VR eligibility criteria must be based on "clear evidence". In this case, not only is VR's decision not supported by clear evidence, in terms of VR's own regulations it is nonsensical.

As noted above, the petitioner has been found eligible for SSI benefits based on "disability". The SSI definition of "disability" is as follows:

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience.

20 C.F.R. § 416.905(a).

VR's position appears to be that notwithstanding the petitioner's eligibility for SSI he either is or can be successfully employed at present as a graphic artist or a paralegal, and, therefore, does not require VR services. That this determination is plainly and diametrically opposed to the factual basis of the petitioner's eligibility for SSI appears to be lost on VR. Despite its pedantic arguments, all VR has really done in this matter is use the second criterion of VR eligibility (supra) to contradict the first. The "evidence" introduced by VR at the hearing included medical reports, most, if not all, of which had been considered by the Social Security Administration (SSA) in determining the petitioner's eligibility for SSI--i.e., the same evidence that SSA had concluded established that the petitioner is "unable to perform any substantial gainful activity". If, as VR maintains, however, that same evidence (or any "new" evidence) establishes that the petitioner is in fact "already employed and possesses adequate education and training to pursue another employment opportunity", he would not, in fact, be eligible for SSI.

In light of this, the only remotely arguable legal question presented by this case continues to be whether VR can ignore or disagree with the factual basis of the petitioner's eligibility for SSI and reach a separate decision of VR eligibility that is facially inconsistent with the determination that the petitioner is "disabled" for purposes of SSI. The Board concludes that such an inconsistent determination by VR is plainly contrary to VR's own regulations, due process, and fundamental fairness.

The Board agrees that not all individuals who meet the VR definition of "disability" under § 107.2(1), supra, will meet the second criterion of eligibility set forth in § 107.2(2). An individual with a generic "disability" may well be able to work without help from VR. This does not apply to an SSI recipient, however, who by definition has a "disability" that renders him "unable to perform any substantial gainful activity". Thus, unless an individual on SSI is so severely disabled that no amount of VR services can benefit him, it is clear that all SSI recipients must automatically qualify for VR under both the first and second criteria of § 107.2.

VR argues that it continues to have discretion under its regulations to determine whether in its view of the "evidence" the petitioner can benefit from VR services.<sup>(1)</sup> While this may be true generally, other sections of the VR regulations themselves indicate that when a VR applicant is a recipient of disability-based Social Security or SSI benefits, the applicant is not only eligible for "regular" VR services, he or she must be considered as having a "severe disability", making him or her eligible for "multiple services over an extended period of time". VR Regulation § 109.2 provides, in pertinent part:

#### General Policy

At the time of certification of eligibility for regular services the client will be identified as having either a severe or non-severe disability. A client with a severe disability is one who can be classified in any one of the following four categories at any time while in the vocational rehabilitation process and whose vocational rehabilitation is expected to require multiple services over an extended period of time:

1. a recipient of a Social Security Disability Insurance (SSDI); or
2. a recipient of Supplemental Security Income (SSI) by reason of blindness or disability; or
3. having a specified major disabling condition as listed and described in 109.3; or
4. having a substantial loss of functional capacity and restriction of activity as described in 109.4.

Given the obvious conclusion under the above provision that individuals who meet the SSI definition of "disability" require even more VR services than "regular" VR clients, VR's machinations in this matter strike the Board as Kafkaesque.

VR's own regulations notwithstanding, other compelling factors dictate that VR must be bound by all aspects of a determination of "disability" under SSI. VR, like DDS, is a division of a department under the Agency of Human Services. Individuals who have been found eligible for SSI are automatically eligible for medicaid--a program, like VR, administered by a department (DSW) in the Human Services Agency. Both VR eligibility decisions and DSW medicaid decisions are directly appealable to the Human Services Board. See 3 V.S.A. § 3091(a). Given the fact that under the definitions in the VR regulations, discussed above, an individual who is ineligible for VR because he is already employable cannot possibly be considered "disabled" for medicaid purposes, if the Board were to affirm VR's decision in this case it would be tantamount to a negative ruling on the factual basis of the petitioner's eligibility for SSI and medicaid. The Board would in effect be deciding that the petitioner is no longer eligible for medicaid and SSI--despite the Social Security Administration and DSW never having considered such an action. Due process, as well as fundamental notions of administrative consistency, efficiency, and fairness, dictate that as long as the petitioner is eligible for disability-based SSI, VR (as well as the Board) is required to find the petitioner disabled and unable to work for purposes of VR eligibility.

Much of VR's "evidence" in this case consists of past claims and statements purportedly made to VR by the petitioner himself regarding his employment status and income prospects. As noted above, however, the petitioner would not be eligible for SSI if he were either working or presently able to work. Therefore, the only conclusion possible is that VR either has been grossly selective, if not biased, in evaluating the "evidence" or believes that the petitioner is fraudulently obtaining SSI. If VR believes the latter, however, it produced no evidence that the petitioner has withheld or misrepresented any information regarding his circumstances to SSA.<sup>(2)</sup> Rather, it appears that the petitioner may have an unfortunate (but certainly not uncommon) propensity to exaggerate his professional qualifications--which VR has inexplicably taken at face value. In the face of the petitioner's eligibility for SSI, for VR to rely so heavily on the petitioner's own statements--in effect, trying to hang him with his own rope --without investigating his situation further, appears cynical and disingenuous.

Based on the foregoing it must be concluded that as long as the petitioner is eligible for SSI based on his "disability" as it is defined by that program he must be found eligible for VR services not only as having a "disability (that) constitutes a substantial handicap to employment", but also under the criterion that "there is a reasonable expectation that vocational rehabilitation services may benefit (him) in terms of employability".<sup>(3)</sup> VR's decision to the contrary is, therefore, reversed.

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1. VR continued to argue that it had the same discretion to make determinations regarding "disability" under the first criteria of § 107.2 until, after the last Revised Recommendation in this matter, it was shown a federal statute requiring a presumptive finding of "disability" under VR for all SSI recipients. See 29 U.S.C. § 722(a)(2).

2. To the hearing officer's knowledge VR has not confronted SSA regarding the petitioner's SSI. VR's position throughout this matter has been to ignore the petitioner's eligibility for SSI rather than argue that the petitioner is not really eligible for it.
3. This decision has not considered what VR "services" the petitioner might be eligible for, or when they would have to be provided. These determinations must be made by the Division once the petitioner is found eligible.