

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 17,968  
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Appeal of )  
 )

INTRODUCTION

The petitioner appeals a decision by the Department of Aging and Disabilities, Division of Vocational Rehabilitation (VR) finding him ineligible for VR services on the basis of being too severely disabled to benefit from such services.

Following a decision by the Board dated July 25, 2003 that the petitioner was not entitled to judgement as a matter of law on the basis of a Motion for Summary Judgement, a hearing was held on November 4, 2003. Following the partial examination of the Department's first witness (which, with cross-examination, took several hours), the hearing officer directed the Department to file the remainder of its case in written form, including affidavits and written reports. The hearing officer advised the parties that he would review the Department's proffer of evidence in its most favorable light to determine whether the Department could survive a directed verdict in the matter. In the meantime, the parties agreed to attempt to settle the matter.

The Department submitted its written submissions under cover letter dated December 1, 2003. By memorandum dated December 24, 2003, the hearing officer advised the parties that he did not believe that the Department could meet its burden of proof in the matter, and inquired whether the parties wished to attempt to settle the matter in light of this preliminary ruling. By letters dated December 30 and 31, 2003, the petitioner and the Department respectively advised the hearing officer they wanted him to issue a formal recommendation to the Board.

The following findings of fact are based on a viewing of the Department's proffered evidence in its most favorable light.

FINDINGS OF FACT

1. The petitioner is a fifty-three-year-old man with significant physical and mental disabilities. He has a history of receiving services from VR going back to at least 1990. Following a period of several years in which he did not receive VR services the petitioner, on December 10, 2000, filed another application with the Department to receive VR services.

2. In a decision dated February 2, 2001, VR certified the petitioner as categorically eligible for VR services on the basis of his receipt of Social Security/SSI disability benefits.

3. In a letter dated March 25, 2002, a representative of the petitioner informed VR that the petitioner was interested in pursuing VR services. In a letter dated April 8, 2002 VR informed the petitioner that it had found him ineligible for VR services because he was "too severely disabled to benefit" from those services. The Department affirmed its position in a letter dated August 5, 2002. The petitioner appealed this decision to the Board by letter dated August 26, 2002.

4. In the early 1990s the petitioner spent several years as a client of VR that were ultimately unsuccessful in the petitioner obtaining and keeping gainful employment. The Department maintains that the petitioner's case was closed as unsuccessful at that time despite "extensive diagnostic and psychotherapeutic services, intensive vocational counseling and guidance, limited compensatory equipment, eyeglasses, clothing, linguistic training, extensive job development, and trial work experience support, among other services"<sup>1</sup>.

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<sup>1</sup> See Department's Exhibit 1.

5. In February 1998 the petitioner began receiving Social Security disability benefits. These benefits have continued through the time he reapplied for VR services in December 2000 and to the present. The Department has not offered the petitioner any trial work in connection with his most recent application for services.

6. According to the Social Security Administration, the primary bases of the petitioner's disability are "severe personality disorder" and "morbid obesity". These diagnoses are based on several examinations of the petitioner that were part of his Social Security records as of 1999.<sup>2</sup>

7. Based on his examination of the petitioner in December 2001, Phillip Massad, a consulting psychologist hired by the Department, concluded, inter alia, that the petitioner's "present assessment...does not support the diagnosis of a personality disorder".<sup>3</sup>

8. The Department's present position regarding the petitioner is largely based on a "neuropsychological consultation and recommendation" dated November 12, 2003 by Dorrie Rapp, Ph.D. In this assessment Dr. Rapp states that she reviewed all the petitioner's medical records in the

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<sup>2</sup> See Department's Exhibit 2.

<sup>3</sup> See Department's Exhibit 4.

possession of VR (including Dr. Massad's evaluation, see supra, which appears to have been conducted pursuant to an earlier recommendation by Dr. Rapp) and that she met with the "VR team".<sup>4</sup>

9. Although Dr. Rapp disagrees with Dr. Massad in that she still holds to the diagnosis of personality disorder, there appears little or no disagreement in the medical records as a whole (including Dr. Massad) regarding the petitioner's symptoms and personality traits, and how these affect his employability.

10. The following excerpt from Dr. Rapp's November 2003 report is supported *prima facie* by the record in this matter:

In my professional opinion as a Board Certified Rehabilitation Psychologist, Clinical Neuropsychologist, Licensed School Psychologist and Licensed Psychologist, [petitioner's] primary disabilities preventing him from working are his severe chronic personality disorder, including obsessive-compulsive disorder (OCD), and persistent dysthymia. The severe negative impact of [petitioner's] personality disorder and OCD were very clear during the prior supported job trial at Lilydale. [Petitioner] also has a mild learning disability (LD) within the context of average to above average cognitive abilities. [Petitioner's] LD is not a significant factor preventing him from working. However, [petitioner] does not agree that it is his psychiatric disabilities, rather than learning disability, which is preventing him from benefiting from the extensive educational and vocational support services which he has already received. As a result of his psychiatric conditions, [petitioner] persistently demands services and equipment and projects

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<sup>4</sup> See Department's Exhibit 6.

blame onto others for his persistent lack of success. It appears impossible to satisfy [petitioner] through provision of reasonable supports, services, and accommodations.

11. The above notwithstanding, the strength and weakness of the Department's case as a matter of law is summarized in the **Conclusion** of Dr. Rapp's report:

[Petitioner] possesses average to above average cognitive abilities and indications of a mild learning disability which did not prevent him from obtaining three college degrees. The preponderance of the information available from a wide range of evaluators and vocational records, indicates that [petitioner] is severely disabled due to life-long psychiatric conditions, primarily dysthymia and personality disorders. [Petitioner] has not accepted this, therefore, he has not benefited from the intensive vocational services and supports provided over many years. In my professional opinion, [petitioner] is too severely psychiatrically disabled to benefit from VR services, and he is not competitively employable.

If additional job trials were to be attempted, I would recommend that reasonable attempts be made to locate a job site with the following characteristics. The employer would need to be sympathetic towards, and experienced working with, individuals with mental health issues and difficult interpersonal behaviors. I recommend that [petitioner] work directly under the close supervision of one designated supervisor. Jobs involving routine computer data entry would be appropriate for [petitioner's] physical and social limitations, and related to his fields of stated interest. [Petitioner] should not be asked to exercise independent judgement or problem solving. The job tasks should involve following set routine procedures. The job trial would be aimed primarily at determining whether [petitioner] has acceptable basic "worker characteristics" which he can maintain over time (e.g. reliable, punctual, sufficient stamina to sit and work for a full shift, ability to focus and sustain his attention to the task at hand,

ability to accept directions and feedback from his supervisor, ability to produce an acceptable amount of work within the allotted time, willingness to do the assigned tasks, and acceptable interactions with his supervisor and any co-workers). [Petitioner] would likely need to work in a relatively quiet area with few distractions (e.g., use wax ear plugs, have dividers around his desk area, etc.), [petitioner] should not need computer or other equipment modifications for the job trial.

12. Although Dr. Rapp's conclusions are *prima facie* supported by the medical evidence and the petitioner's history with VR, they do not adequately consider the petitioner's present attitude and frame of mind, which, at this point, are largely unknown. If (and, admittedly, this may well be a very large "if") the petitioner were to agree with Dr. Rapp's recommendations as to the nature and course of any future trial work, it would be premature to conclude at this time that he is too severely disabled to benefit from vocational rehabilitation.

13. The Department has not offered clear and convincing evidence that the petitioner at this time either overtly refuses to abide by Dr. Rapp's seemingly reasonable recommendations or is too mentally handicapped to recognize the reasonableness of such recommendations and to cooperate in following them. Based on past history, the Department may well have a reasonable basis to expect that this will be the

outcome of this case, but it cannot be concluded as a matter of law at this time that it has demonstrated by clear and convincing evidence that this will happen.

ORDER

The Department's decision closing the petitioner's VR case is reversed.

REASONS

As noted in the Board's prior Order in this matter, the parties agree that under the pertinent federal and state regulations the petitioner, by virtue of his eligibility for Social Security/SSI disability benefits, is "presumed" to be eligible for VR benefits unless the Department "can demonstrate by clear and convincing evidence that (he) is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the disability. . ." 29 U.S.C. § 722(a)(3)(A)(ii). The parties further agree that before disqualifying an individual from VR services on the basis of the severity of the disability federal and state regulations require that the Department "must conduct an exploration of the individual's abilities, capabilities, and capacity to perform in realistic work situations" (34 C.F.R. § 361.42[e]); and that "trial work

experiences must be of sufficient variety and over a sufficient period of time" (34 C.F.R. 361.42[e][2][ii][B]). The parties also agree that "clear and convincing" evidence means "unequivocal" and with "a high degree of certainty" (Note to 34 C.F.R. § 361.42).

Under the above statutes and regulations, the factual question to be resolved in any case in which services are denied on the basis of unemployability is whether the Department has adequately "explored" the individual's "abilities, capabilities, and capacity to perform in work situations" through trial work that has been "sufficient" in terms of duration and scope. (See supra.) As noted by the Board in its earlier Order, this places a high burden of proof on the Department. Although it cannot be concluded that "sufficiency" requires the Department to automatically conduct a new period of trial work each and every time a presumptively eligible individual applies for VR services, it must be concluded that the Department has not clearly shown that another attempt at trial work would be futile in the petitioner's case at this time.

As noted above, the Department has made a convincing *prima facie* showing that the petitioner primarily has significant psychological and personality problems, rather

than learning disabilities, that severely limit his ability to work. It has also clearly demonstrated the petitioner's unfortunate history of resistance, denial, and propensity for misdirected litigation. What the Department has not shown, at least by clear and convincing evidence, is that the petitioner at present is unwilling or incapable of recognizing this and being able to meaningfully participate in vocational rehabilitation.

However, this puts the proverbial "ball" squarely in the petitioner's "court". The record shows that in the past he has taken the increasingly untenable position that his failure to obtain employment is largely due to various agencies' failures to provide him with special adaptive equipment to accommodate his learning disabilities. He is of course, free to continue to litigate this position and insist, as he has in the past, that VR provide him with this equipment as a precondition of his participation in any trial work. The Board recognizes that it may not have seen all the evidence and heard all the legal arguments that the petitioner might yet offer bearing on this issue. But the petitioner is hereby advised that the Board regards precious little in the record as it presently exists as giving much, if any, support to this position. This is not to prejudge whether the petitioner

might eventually need adaptive equipment tailored to a particular job to accommodate certain learning disabilities. But, having held that the Department is required to explore trial work for the petitioner, on the basis of the record as it now stands the Board views the present recommendations of Dr. Rapp (see *supra*) as eminently well-supported and reasonable.

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