

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal from a June 18, 2007 Hearing Officer decision. The Hearing Officer found that the Board had properly exercised its discretion, in deciding not to provide the Worker with vocational rehabilitation ["VR"] services in the form of an additional two-year university program to acquire the Addiction Counsellor designation. In reaching this conclusion, the Hearing Officer found (1) that the Board had not led the Worker to believe it would provide such VR assistance if he successfully completed his undergraduate program, and (2) that the Board had clearly identified to the Worker the VR support it was willing to provide, prior to his commencement of the undergraduate program.

I will set out only those portions of the claim history and appeal proceedings most relevant to this decision.

The Worker was employed as a construction labourer. He suffered a compensable left knee injury on March 6, 1997. In 2002, while working in Alberta, he suffered what was later determined to be a recurrence of the 1997 injury. The Worker was eventually awarded a permanent medical impairment ["PMI"] rating of five percent with respect to the left knee injury.

It was determined that the Worker could not return to employment as a construction labourer. The file materials indicate that Board employees and the Worker discussed various VR retraining options. The Board agreed to provide the Worker with VR assistance in the form of a three-year Bachelor of Arts program in Community Studies at the University College of Cape Breton. The Board states it clearly advised the Worker that it would not provide VR assistance for any studies beyond the undergraduate degree. The Worker asserts the Board employee assisting him with VR indicated that the Board would provide additional VR assistance for a two-year graduate program to become an Addiction Counsellor, provided he successfully completed the undergraduate program.

The Worker requested additional VR assistance in the form of the two-year Addiction Counsellor program (evidently a form of the Master of Social Work degree). The requested program is available in St. John's, Newfoundland, one of the two Canadian locations offering such a program.

An April 4, 2007 Case Manager decision denied the Worker's request for the additional VR assistance. The Worker appealed the Case Manager decision by means of an April 19, 2007 Notice of Appeal to Hearing Officer, to which the Worker appended a two-page typewritten submission. That appeal led to the June 18, 2007 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the Workers' Representative's filing of a Notice of Appeal dated July 18, 2007 with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of oral hearing, held at Sydney, Nova Scotia, on September 11, 2007. The Worker attended at the hearing and provided testimony. The Workers' Representative questioned the Worker, and provided submissions to the Tribunal. No other participant attended at the oral hearing, or actively participated in this appeal.

ISSUES AND OUTCOMES:

At issue is whether the Worker is entitled to additional VR assistance in the form of the two-year university program leading to the Addiction Counsellor designation.

The Worker's appeal is denied, for the reasons below. The Worker is not entitled to the additional VR assistance in the form of the two-year graduate program.

ANALYSIS:

I have reviewed the materials in the Board and Tribunal files. In addition, I reviewed the recording of the oral hearing. I will set out only those portions of the testimony, evidence and submissions most relevant to this decision.

Oral Hearing

The Worker is 53 years old. He testified that he always received good marks in school, but he was forced to leave in Grade 10 owing to the death of his father and the resulting need for him to earn income.

The Worker had advised the Board from the beginning that his ultimate objective was to become an Addiction Counsellor. The two choices at which the Worker and the Board employees looked were (1) a two-year program with the Nova Scotia Community College, and (2) the three-year program with the University College of Cape Breton. The Worker indicated that the program with the Nova Scotia Community College was a certificate program, and would qualify him to engage in generally lower level counselling - for example, counselling men in a shelter. The two-year program is not highly regarded, and graduates of the program are paid only a small salary. The Worker testified he initially believed that the three-year program would equip him to be employed as an Addiction Counsellor, but soon after starting the program he was advised by a professor that a graduate degree would be necessary.

The Worker believes that the Board employees initially did not think he would be successful in his studies, because he had been out of school for so long and because most of the other workers who pursued university studies had experienced difficulties. His VR

worker stated that the Board would certainly consider the two-year graduate program, but that the Worker should focus on being successful in the undergraduate program. The Worker later testified that, at one point, his VR worker indicated the Board would pay for the two-year program, provided that he successfully completed the undergraduate degree. The Worker was successful in his studies, making the Dean's List in all three years. The Worker testified the Board employees began to backtrack concerning the two-year graduate program when it was apparent he was succeeding in his studies. In the end, the Board workers who had been previously involved with his case were removed, and new employees were assigned to him who were not familiar with his file.

The Worker testified he has not been able to secure any type of employment with the Bachelor of Arts in Community Studies degree. The Worker attributes this primarily to his age, but also partly to his injury. He related that a 23-year-old foreign student with essentially no English language skills was hired, but he cannot secure employment. I asked the Worker whether he could secure employment in a call centre. He replied that he was too slow a typist, and there were concerns whether he could sit for lengthy periods of time with his injured knee.

The Worker's professors advised him that he would have no trouble securing employment if he successfully completed the two-year program and acquired the Addiction Counsellor designation. In fact, the Worker opined that he could then probably secure immediate employment with a local hospital. The Worker complained that he would have already completed the first year of the program, if the Board had approved it. The Worker indicated he would accept a loan from the Board, which he would repay, if such an arrangement could be pursued.

In response to questions from the Tribunal, the Worker acknowledged there was no binding or written agreement with the Board concerning funding the two-year graduate program. However, he believes the Board should honour its undertakings.

The Workers' Representative pointed to section 112 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "Act"] and various Board Policies. She argued that the Board should provide VR services to mitigate the Worker's loss of earnings. She argued that the Worker would be successful in securing employment if he were able to complete the two-year program, and he should be free to pursue his career choice.

Summary Reports and Decisions

In reviewing the file materials, I have paid particular attention to the December 8, 2005 correspondence from the VR Counsellor to the Worker, and the Summary Reports and Decisions dated 10 June 2003, 1 August 2003, 5 August 2003, and 12 August 2003.

The 1 August 2003 Summary Report and Decision contains a detailed cost benefit analysis comparing plan "A" (the three-year program at the University College of Cape Breton) and plan "B" (the two-year program at the Nova Scotia Community College). It was determined

that plan "A" would cost \$81,136.59, and would save \$169,658.84 in extended earnings replacement benefits ["EERB"] by mitigating the Worker's loss of earnings. Plan "B" would cost \$66,019.24, and would save \$184,776.19 by eliminating the Worker's loss of earnings. The Board elected to proceed with plan "A" even though it cost more, because it would spare the Worker the need to relocate and it would enable him to continue caring for his animals and property. Further, the Board believed that the three-year program would enhance the Worker's employability to a greater degree than the two-year program.

The 12 August 2003 Summary Report and Decision describes in detail a purported discussion between the Worker and two VR Counsellors. The document indicates that the Board made it clear it would finance only the three-year program, and that the Worker would be responsible for funding any further studies. The document makes clear the distinction between NOC 4153 (Addiction Counsellor) and NOC 4212 (Addiction Worker). The document states that the Board only agreed to educate the Worker to a level enabling him to become an Addiction Worker; Addiction Counsellor required a two-year graduate degree in addition to the three-year undergraduate degree. The Summary Report and Decision emphasizes that the three-year program would qualify the Worker for employment as a Community and Social Worker (also classified under NOC 4212), and would also equip him to seek other forms of alternate employment. The expectation was that the Worker would be responsible for earning income once he completed the three-year degree.

Board Policies

I reviewed the Board Policies concerning VR assistance, particularly Policies 4.1.2, 4.1.3, 4.2.3 and 4.2.4R3.

Section 1 of Policy 4.1.2 states:

1. The extent of Vocational Rehabilitation (VR) services to be offered will be determined by:
 - a) the Hierarchy of Objectives (opportunities for re-employment) - see Policy 4.1.3;
 - b) the client's transferable skills;
 - c) the client's capacity for employment;
 - d) the client's wishes; and
 - e) the estimated cost of the VR program.

Sections 1 and 2 of Policy 4.1.3 state:

1. The goal of each individual Vocational Rehabilitation (VR) plan is to assist the injured worker, through various job-specific interventions, to return to work.

2. The following Hierarchy of Objectives will be followed when developing a Vocational Rehabilitation (re-employment) plan:

Hierarchy of Objectives (in descending order)

- 2.1 Return to the same job with the same employer.
- 2.2 Return to a similar or comparable job with the same employer.
- 2.3 Return to a different but suitable job with the same employer.
- 2.4 Return to work in a similar or comparable job with a different employer.
- 2.5 Return to work in a different but suitable job with a different employer.
- 2.6 Retraining for jobs that are suitable and reasonably available.
- 2.7 Self-employment.

Policy 4.2.3 concerns relocation assistance and Policy 4.2.4R3 concerns travel expenses.

Reasoning

On reviewing the governing Board Policies concerning VR, and the history of this matter, I confirm the Hearing Officer's decision. The Worker is not entitled to additional VR assistance in the form of the two-year Addiction Counsellor program in St. John's, Newfoundland, given the facts before me.

I agree with the Hearing Officer that the Board clearly advised the Worker it would pay only for the three-year undergraduate degree. I find it would be highly unusual for the Board to agree to pay for both an undergraduate and a graduate degree, particularly for a mature worker, given the goals of VR assistance. Further, I decline to find that Board employees fabricated evidence, or prepared detailed notes concerning a conversation which never took place. In fact, I note that the August 2003 Summary Reports and Decisions are stamped "Copied for CPP May 30 2005", which would suggest they were in existence prior to the request for additional VR assistance which gave rise to the decisions below. Perhaps the Worker did have discussions with Board employees after he commenced the three-year program which caused him subjectively to believe that the Board would pay for an additional two-year, out-of-province graduate program. However, I find that no communication took place which, from the perspective of any reasonable third-party observer, would have involved the Board undertaking to pay for the graduate studies under consideration in this appeal. It is highly improbable that any Board employee would have made such an undertaking or representation, given the goals of VR assistance and the Board's approach to VR. (I note the Worker testified Board employees told him that the Board no longer sends workers to university as part of its VR programs).

For the sake of completeness, and without elaborating on this point, I doubt that the Board would have been bound, even if one Board employee had made the representations as asserted by the Worker (which I have explicitly found not to have occurred).

Further, on assessing the Board Policies and the facts of this appeal, this is not an instance where I would reverse the Hearing Officer decision. A worker's wishes are only

one criterion to be considered in determining the extent of VR services. In the present fact situation, the Board already considered the Worker's wishes when it financed the three-year degree as opposed to the two-year certificate program, even though the Board appeared to initially favour the two-year program. The Board accommodated the Worker's desire not to relocate at that time. Further, cost considerations would militate against granting the Worker's request, particularly given that the Board has apparently already expended more than \$80,000 on the Worker's education. The Board would presumably be obligated to incur travel and relocation costs to St. John's, in addition to the usual costs of the two-year program. Moreover, it would be inappropriate to grant the Worker's appeal unless the Board had an opportunity to conduct a new cost benefit analysis, in the light of all the current circumstances.

I emphasize that this decision focuses solely on the narrow issue on appeal. Nothing in this decision impacts on the analysis whether there is indeed suitable and reasonably available employment available to the Worker.

In addition, I wish to emphasize that the Worker's keen commitment to his studies, which enabled him to be placed on the Dean's List for three years, is to be highly commended.

CONCLUSION:

The Worker's appeal is denied, for the reasons above. The Worker is not entitled to the additional VR assistance he requested, in the form of the two-year graduate program leading to the Addiction Counsellor designation.