Tishchenko, Vladimir

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Failure to comply with vocational rehabilitation plan

Where a worker would be able to work but for his non-cooperation with a vocational plan, and the worker's medical condition is fixed and stable, the worker is not permanently totally disabled. ***….In re Vladimir Tishchenko*, BIIA Dec., 11 21603 (2013)** [*Editor's Note*: The Board's decision was appealed to Clark County Superior Court, No. 13-2-01062-7.]

VOCATIONAL REHABILITATION

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: VLADIMIR I. TISHCHENKO	)	**DOCKET NO. 11 21603**
	)	
CLAIM NO. P-461608	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Vladimir I. Tishchenko, by
Busick Hamrick, PLLC, per
Steven L. Busick

Employer, Exterior Wood, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Katy J. Dixon, Assistant

The claimant, Vladimir I. Tishchenko, filed an appeal with the Board of Industrial Insurance Appeals on November 2, 2011, from an order of the Department of Labor and Industries dated October 26, 2011. In that order, the Department affirmed the provisions of orders dated June 13, 2011, and June 20, 2011. In the June 13, 2011 order, the Department suspended Mr. Tishchenko's benefits effective June 13, 2011, for failure to comply with the accountability agreement or plan interruption due to his own actions. In its June 20, 2011 order, the Department closed Mr. Tishchenko's claim with compensation for permanent partial disability consistent with the degree of disability represented by Category 2 of WAC 296-20-280, less compensation previously paid for permanent partial disability. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department and the claimant filed timely Petitions for Review of a Proposed Decision and Order issued on November 30, 2012, in which the industrial appeals judge reversed and remanded the Department order dated October 26, 2011.

In the Proposed Decision and Order, our industrial appeals judge properly denied the motion to admit Exhibit No. 1 to the deposition of John L. Hart, D.O. The document is renumbered Exhibit No. 6 and remains rejected. The Board has reviewed the other evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

Contested issues addressed in this order include whether Mr. Tishchenko established good cause for failing to comply with his responsibilities under his vocational retraining plan and whether

as of October 26, 2011, Mr. Tishchenko was permanently totally disabled because the Department closed his claim before he completed training necessary to enable him to obtain and perform a form of gainful occupation in the competitive labor market.

On April 25, 1997, Mr. Tishchenko injured his low back during the course of his employment with Exterior Wood, Inc. The Department determined that as a result of the injury Mr. Tishchenko required vocational training services in order to obtain and perform a form of reasonably continuous gainful occupation.

Vocational services began in the fall of 2009 when Irena Razvina, VRC, and two of her assistants at Grant and Associates helped Mr. Tishchenko identify a vocational goal, a plan to accomplish the goal, and to select a training site. While it was not Mr. Tishchenko's first choice, he agreed to attend Lower Columbia College (LCC) in Longview for training as a computer help desk support worker. To that end, on April 6, 2010, he signed a worker accountability agreement. The agreement included pledges that Mr. Tishchenko would notify his vocational counselor if he missed three consecutive days of classes or had concerns about his ability to complete his training program because of medical or physical restrictions, and he would comply with LCC's attendance requirements. Mr. Tishchenko also acknowledged that he understood that failure to comply with the terms of the accountability agreement could result in suspension or termination of his industrial insurance benefits. Mr. Tishchenko started classes at LCC on September 20, 2010, the beginning of the fall quarter. At that time, Mr. Tishchenko lived 49 miles from LCC.

John L. Hart, D.O., is a physiatrist who specializes in pain management and rehabilitation. Beginning on April 4, 2007, he treated Mr. Tischenko for his low back injury. Dr. Hart approved Mr. Tishchenko's vocational training program with the caveat that Mr. Tishchenko not lift more than 15 pounds and limit bending activities. Dr. Hart was not concerned about Mr. Tishchenko's abilities to drive to and from LCC or focus on his class work because, Dr. Hart said, the claimant suffered from mechanical low back pain. Mr. Tishchenko did not have any neurological abnormality or condition that would result in radicular symptoms, and as of August 2010, he required the lowest possible dose of Vicodin for control of his pain.

Mr. Tishchenko successfully completed the fall and winter quarters of classes at LCC. He did not report any problems in completing his training to Dr. Hart or Ms. Razvina. Mr. Tishchenko registered to take the spring quarter, which was to begin on April 7, 2011, but his wife called Ms. Razvina's office that day to report that he would not attend school due to back pain and a

headache. The next day one of the vocational counselors talked with Mr. Tishchenko to advise him that absence from classes without a physician's excuse could result in suspension of his benefits. Ms. Razvina sent Mr. Tishchenko a letter the same day containing the same warning.

Although Mr. Tishchenko had not contacted Ms. Razvina, his mathematics instructor at LCC subsequently notified the vocational counselor that the claimant attended classes only on April 11, 2011. Ms. Razvina then sent a letter to Mr. Tishchenko asking him to explain his absences or risk the termination of vocational services. Mr. Tishchenko did not respond to the letter.

Mr. Tishchenko saw Dr. Hart on May 4, 2011. He asked Dr. Hart to write a letter excusing him from attending LCC because of back pain. Mr. Tishchenko testified that he suffered from extreme low back pain that his commute to LCC aggravated; that he had to take double the prescribed amount of Vicodin in order to make the drive; and that the medication adversely affected his ability to focus and learn at school. By that time, Mr. Tishchenko had moved to Washougal, Washington, which is 55 miles from Longview. Dr. Hart declined to excuse Mr. Tishchenko from his training program. Mr. Tishchenko then stopped seeing Dr. Hart. Mark C. Weed, D.O., and other physicians also refused Mr. Tishchenko's request for an excuse from participating in his vocational plan.

Mr. Tishchenko posits that his clear failure to abide by the terms of his worker accountability agreement was the result of constant severe low back pain caused by his industrial injury. In *In re John Galen,* BIIA Dec., 03 18491 (2004), the only proper and necessary treatment available to Mr. Galen for the effects of his industrial injury was surgery to fuse his cervical spine. His surgeon refused to perform the operation until Mr. Galen ended his 30 year habit of smoking cigarettes. The uncontested evidence demonstrated that although he was willing and had tried a number of modalities to do so, Mr. Galen was too addicted to stop smoking. The Department suspended his benefits for noncooperation.

The Board declared: "Noncooperation is, by definition, behavior that obstructs or delays the administration of the claim. The behavior is deliberate and calculated to obstruct. Behavior that is not designed or intended to obstruct or delay is not noncooperation." *Galen,* at 4. The Board determined that Mr. Galen's failure to end his addiction did not constitute noncooperation because he did not refuse treatment or deliberately fail to comply with the step he needed to take before he could undergo the proper surgery.

Mr. Tishchenko contends that because of his back pain it was impossible for him to accomplish the commute required to attend classes at LCC without taking well more than the Vicodin dosage that his pain specialist physician prescribed. Mr. Tishchenko contended that the increased dosage rendered him unable to focus and learn during class. Thus, Mr. Tishchenko asserts his noncooperation was not a deliberate and calculated effort to obstruct the administration of his claim.

Dr. Hart charted the amount of pain medication Mr. Tishchenko took. Dr. Hart did not make any note that Mr. Tishchenko took more Vicodin than what was prescribed. In August 2010, one month before Mr. Tishchenko began classes at LCC, Mr. Tishchenko was taking "the lowest dose that Vicodin is made in" (Hart Dep. at 23) three times per day. On May 4, 2011, a month after Mr. Tishchenko stopped attending LLC, the dosage Dr. Hart prescribed was the same. Dr. Hart made clear that Mr. Tishchenko did not have any objective finding that would buttress his assertion that he suffered from radicular symptoms or severe low back pain.

Mr. Tishchenko never explained why he did not notify Ms. Razvina that his medical condition interfered with his ability to attend classes at LCC or that he had, in fact, stopped attending school. When offered the opportunity, Mr. Tishchenko did not attempt to explain why he could not comply with his responsibilities under his training program. WAC 296-14-410 authorizes the Department to deny, reduce or suspend payment of industrial insurance benefits to a worker who demonstrates noncooperation with management of the claim, including participation in a vocational training plan. As a prerequisite to such action, the worker must be advised in writing of the possible repercussions of noncooperation and be given 30 days in which to explain his or her failure to cooperate. Mr. Tishchenko did not respond to the opportunity Ms. Razvina gave him to do so after she learned he was not attending classes at LLC. We conclude that his behavior was deliberate and intentionally meant to obstruct or interfere with the vocational plan. The Department properly suspended Mr. Tishchenko's receipt of benefits.

Mr. Tishchenko also argues that the Department lacked authority to close his claim while his benefits were suspended. Our industrial appeals judge correctly determined the Department had the authority to do so. But the industrial appeals judge concluded in the Proposed Decision and Order that closure of the claim at a time when Mr. Tishchenko had not completed training that was proper and necessary for him to obtain and perform a form of gainful occupation meant he had to be found permanently totally disabled. We disagree.

In *In re Ernest E. Elliott*, Dckt. No. 91 1702 (May 26, 1992), we said a worker who could become employable with retraining could not seek permanent total disability benefits by waiving vocational services We noted a worker's total disability status was susceptible to change if retraining was accomplished. In *In re Gary E. Day*, Dckt. No. 01 14861 (February 26, 2003), we acknowledged "our reluctance to determine that a worker is permanently totally disabled when the worker has unreasonably thwarted attempts to return the worker to a productive work life through vocational services and retraining, an important goal of our workers' compensation system." *Day* at 7.

Mr. Tishchenko would essentially force the Department to either keep his claim open at his pleasure or award him pension benefits. We adhere to our philosophy that a worker who demonstrates noncooperation in completing a vocational training plan cannot be given unfettered control over the administration of his or her claim to force the Department into such a position.

We conclude the Department correctly suspended Mr. Tishchenko's benefits and closed his claim with compensation for permanent partial disability most accurately described in Category 2 of WAC 296-20-280. The Department order dated October 26, 2011, is affirmed.

FINDINGS OF FACT

1. On March 6, 2011, an industrial appeals judge certified that the parties agreed to include the Amended Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Mr. Tishchenko was born in Russia on July 26, 1966. He moved to the United States in 1990.
3. Mr. Tishchenko's only relevant work experience in the United States was as a laborer at Exterior Wood, Inc., work which was heavy in nature.
4. On April 25, 1997, Mr. Tishchenko was injured during the course of his employment with Exterior Wood when he lifted a heavy stack of wet plywood.
5. Mr. Tishchenko's April 25, 1997 industrial injury proximately caused a herniation at the L5-S1 level of his spine for which he underwent right L5-S1 decompressive laminectomy and foraminotomy surgery on December 8, 2006.
6. As of July 2009, the condition proximately caused by Mr. Tishchenko's industrial injury resulted in permanent restrictions that included not lifting more than 15 pounds and not performing repetitive bending activities.

7. In view of his age, education, work experience, and the limitations caused by his industrial injury, Mr. Tishchenko required vocational services in order to gain the ability to obtain and perform a form of gainful occupation on a reasonably continuous basis.

8. Mr. Tishchenko agreed to notify his vocational counselor if he missed three consecutive days of classes at Lower Columbia College, comply with the college's participation requirements, and notify the Department's claim manager and his vocational counselor immediately if he had any concerns about his ability to complete the training program.

9. Mr. Tishchenko understood that failure to comply with the accountability agreement could result in suspension or termination of his industrial insurance benefits.

10 Mr. Tishchenko deliberately obstructed successful completion of his vocational training program in that he did not notify his vocational counselor after he missed three consecutive days of classes at Lower Columbia College, he did not immediately notify the vocational counselor that he had concerns about his ability to complete the training program and he stopped attending training classes without good cause or explanation, and without notifying his assigned vocational counselor.

11. Mr. Tishchenko would have been capable of obtaining and performing work as a computer help desk support employee had he not deliberately failed to cooperate with his vocational training program by behavior that was calculated to obstruct successful completion of the plan.

12. The condition proximately caused by Mr. Tishchenko's industrial injury was fixed and stable and was not in need of further proper and necessary treatment as of October 26, 2011, and it had proximately caused permanent partial impairment that Category 2 of WAC 296-20-280 most accurately described.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. Victor Tishchenko did not have good cause within the meaning of RCW 51.32.110 and WAC 296-14-410 for failing to comply with his vocational training program.

3. As of October 26, 2011, Mr. Tishchenko's conditions were fixed and stable and did not require further proper and necessary treatment as that term is used in RCW 51.36.010, for any condition proximately caused by his April 25, 1997 industrial injury.

4. From June 20, 2011, through October 25, 2011, Mr. Tishchenko was not temporarily totally disabled as that term is used in RCW 51.32.090 because of any condition proximately caused by his April 25, 1997 industrial injury.

5. As of October 26, 2011, Mr. Tishchenko was not permanently totally disabled within the meaning of RCW 51.08.160 because of any condition proximately caused by his April 25, 1997 industrial injury.

6. The October 26, 2011 order of the Department of Labor and Industries is correct and is affirmed.

Dated: March 18, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY Chairperson

/s/
JACK S. ENG Member