

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Judith Peabody)	State File No. G-6060
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Comprehensive Rehabilitation and)	
Home Insurance Company)	For: R. Tasha Wallis
)	Commissioner
)	
)	Opinion No. 36-00WC

On remand from the Vermont Supreme Court, case submitted on the record.
Record closed on August 8, 2000.

APPEARANCES:

Patrick L. Biggam, Esq. for the claimant
John W. Valente, Esq. for the defendant

In this Department's Opinion No. 69-98WC on December 23, 1998, Ms. Peabody's claim for rehabilitation benefits was denied on the basis that she could perform work for which she had previous training and experience. That decision did not reach the second issue of whether a master's degree was reasonably necessary to restore her to suitable employment. The claimant filed a timely appeal to the Vermont Supreme Court which reversed and remanded the case because the claimant had been "denied benefits without a determination of whether she was able to return to suitable work." *Peabody v. Home Insurance Company*, No. 99-057 (Vt. Supreme Court, April 6, 2000).

At a pretrial conference on June 12, 2000, the attorneys agreed that the record created at the original hearing obviated the need for additional testimony. However, claimant's counsel represented that he would obtain information about the claimant's current employment and salary, which he later produced in the form of his affidavit. The defense provided no additional evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At the time of her July 1993 injury, the claimant was earning \$37,500.00 a year as a Senior Rehabilitation Specialist for Comprehensive Rehabilitations Associates (CRA). She had a Bachelor of Science degree in education from the State University of New York, which she received in 1971, but had no teaching certificate.
2. Before working for CRA, the claimant worked for about two years as an assistant for a counselor, William Roberts. Before that she stayed at home raising her family and doing part-time jobs. From 1972-1978 she worked as Director of Therapeutic Activities at the

Wyoming State Training School. And before that she was a counselor at NOLS (National Outdoor Leadership School).

3. The claimant testified that after her work-related injury, she was unable to return to her job at CRA for both physical and psychological reasons. The parties agree that a return to CRA was not an option. However, she had been offered a job to return there.
4. The claimant sought vocational rehabilitation services and worked with Richard Phillips, a vocational rehabilitation counselor hired by the insurance carrier, although no formal vocational rehabilitation plan was in place. According to the carrier, this initial work was purely voluntary.
5. Although working for CRA did not seem to be a viable option for this employee, Phillips did not rule out the vocational rehabilitation business entirely, if the driving component of the job could be managed. He opined that the claimant would have been qualified as an in-house vocational counselor. Phillips testified that although the claimant looked for jobs, she refused to consider any that paid less than \$30,000.00 to \$32,000.00 per year.
6. Phillips and the claimant both expressed the belief that the claimant could work toward a Master's Degree in Counseling in order for her to find employment.
7. In his initial vocational evaluation of November 15, 1993, Phillips concluded, "Judith's pre-injury wage corresponded to an annual equivalent of \$37,500.00 per year. Without her advanced education, this will [be] impossible to duplicate." On January 17, 1994, he reported that the claimant and he "had candid discussions about the fact that, without advanced education, it is unlikely she will even closely approximate her pre-injury earning capacity. I have attached some figures for the carrier's review which Ms. Peabody put together herself in preparation for our most recent meeting. Despite the extent and magnitude of training involved, this may represent the most expedient resolution of this claim."
8. However, Phillips terminated vocational rehabilitation services for the claimant after determining that this Department's policy was that a claimant would not qualify for vocational rehabilitation services if she had sufficient transferable skills to enable her to find employment.
9. Phillips used a computer program to identify potential job matches. That program identified 346 jobs, of which Phillips determined four were related to the claimant's past jobs: 1) counselor, 2) vocational rehabilitation counselor, 3) recreational therapist, and 4) vocational training teacher. Those jobs were considered available to the claimant based on her work history and physical ability.
10. Phillips estimated that the salary for a counselor would be between \$22,000.00 to \$26,000.00. However, he explained that to obtain a Vermont license for counseling, in most settings one would need a master's degree. An occupational therapist job would pay between \$22,000.00 and \$26,000.00. A recreational therapist would earn a salary between \$22,000.00 and \$26,000.00.

11. Phillips provided personal "ballpark" estimates of salaries, but did not generate official salary information. Nor was he able to say that the jobs listed were actually available.
12. Although she did not have the assistance of vocational rehabilitation, the claimant enrolled at Johnson State College and received a Master's Degree in 1996. The tuition cost for the program was \$13,755.10.
13. The claimant's vocational rehabilitation expert, Myron A. Smith, opined that the claimant was entitled to vocational rehabilitation services and that obtaining a master's degree was reasonably necessary for her to find suitable employment.
14. After getting her degree, the claimant obtained employment as a guidance counselor at the People's Academy. She was paid for the school year from two separate sources, \$17,000.00 for 70% of her job plus \$11.40 per hour for 12 hours each week, for a total of \$22,335.00 for the school year. If this income were annualized, it would be \$29, 780.00, approximately 80% of her pre-injury wage. According to the affidavit filed by claimant's counsel, the claimant said she was under contract for the 2000 to 2001 school year for a salary of \$34,105.00 plus health benefits.
15. Under the Department's rules, an injured worker is entitled to vocational rehabilitation services whenever she is unable to return to suitable employment, which is employment that is:

1. Reasonably comparable to the claimant's pre-injury job after consideration of wages, potential for advancement, commuting distance, shift and/or relevant factors, and

2. Reasonably attainable given current regional labor market conditions in light of the claimant's age, temperament, education, training, work experience, physical capacities and vocational aptitudes.

Rule 26 (e), *Vermont Workers' Compensation and Occupational Disease Rules*

16. The claimant's expert, Myron Smith, produced a detailed Vermont Labor Market Report that identified positions for which the claimant had transferable skills. In his opinion, those that did not require a masters' degree and were available, failed to meet the reasonably comparable wage criterion. The claimant testified that she actively searched for jobs, but found none that came close to her former income. Although the defense expert, Phillips, listed jobs for which the claimant had skills, he was not able to state that those jobs were available to her. Without that evidence, it cannot be shown that the jobs were reasonably attainable.
17. This record as a whole proves that after her work-related injury, the claimant was unable to return to work that was both comparable to her former job in terms of salary and the other factors listed in Rule 26(e)(1) and reasonably attainable. As such, she was entitled to vocational rehabilitation benefits.

18. The next issue is whether a master's degree was reasonably necessary to restore her to suitable employment. Considering the hierarchy of rehabilitation services in Rule 29(b) was the claimant eligible for Step 5, where education and, therefore, her Master's degree, would be covered, or could she have obtained "suitable employment" at a lower level? That hierarchy, in descending order of preference and in abbreviated form, is: 1) return to work for the same employer; 2) return to work for a different employer; 3) on-the-job training; 4) New Skill Training; 5) Educational/Academic Program; 6) Self-Employment.
19. In this claimant's case, return to work for the same employer was not an option. In the time that Phillips worked with the claimant, her job search demonstrated that she could not return to a different employer. Because the claimant is in the field of human resources where education and credentials are the key criteria, Smith opined that on-the-job training and new skill training were not viable options. Therefore, the step appropriate for this claimant was number 5, Educational/Academic Program.
20. This case is limited by its unique facts and procedural posture. The claimant's convincing objective evidence supporting her theory that a master's degree was necessary for a job that was both reasonably comparable to her pre-injury job and reasonably attainable found support in the defense expert's early reports. Without persuasive, objective evidence to the contrary, her claim for reimbursement for her master's degree is granted.
21. The claimant submitted evidence of her contingency fee agreement and of the hours worked on the appeal in this case. She requests an award associated with the hearing at the Department and for the appeal to the Supreme Court. Pursuant to 21 V.S.A. § 678, necessary costs as a matter of law and reasonable attorney fees as a matter of discretion are awarded when a claimant prevails in this Department. Accordingly, given the complexity of this case, the claimant is awarded 20% of the value of the vocational rehabilitation plan. Rule 10 (a)(2). However, this Department lacks the authority to award fees for work done on the appeal. In "appeals to the superior or supreme courts, the claimant, if he or she prevails, shall be entitled to reasonable attorney's fees *as approved by the court...*" § 678 (b).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the claimant's request for reimbursement for her master's degree and for attorney's fees for work done in this Department, is GRANTED.

Dated at Montpelier, Vermont this 9th day of November 2000.

R. Tasha Wallis
Commissioner