

NO. 354021-II

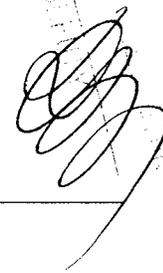
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DONALD E. HOBSON, Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
STATE OF WASHINGTON, Respondent.

FILED
BY
CLERK OF COURT
APPELLATE DIVISION
STATE OF WASHINGTON
OCT 11 1993



REPLY BRIEF OF APPELLANT

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A. Introduction

The Department of Retirement Systems (DRS) concedes Hobson was seriously and permanently injured trying to help restrain a student in the course of his employment at the Child Study and Treatment Center (CSTC) at Western State Hospital (WSH). DRS also concedes that Hobson had previously been given a disability retirement from the United States Navy.¹ It agrees that Hobson has since qualified for Social Security disability retirement. Finally, DRS admits that because of his on-the-job injury, Hobson received a State Labor and Industries' (L&I) pension. Nevertheless, DRS asserts Hobson is not eligible for a DRS disability retirement because he is not "totally incapacitated."

The retirement statutes provide that for purposes of disability retirement, "totally incapacitated for duty," as applied to Hobson, means:

(1) inability to perform the duties of his job as

¹ DRS's Statement of Facts, which purports to be based on the Department's findings, contains several errors. For example, the brief suggests that Hobson's employment with the Navy ended in 1987. In fact, Hobson's Navy employment continued until his disability retirement in 1990. As a federal employee, he received federal worker's compensation benefits, not benefits from the Department of Labor and Industries, State of Washington. CP 35, p. 27, ¶ 9.

a Psychiatric Child Care Counselor 3 at CSTC; and (2) inability to perform any other work he is qualified for by training or experience. RCW 41.40.010(28).

If granted a disability retirement, Hobson would earn retirement service credits he would have earned but for the disability.

1. Hobson is totally incapacitated because he is unable to perform his previous duties.

The trial court properly concluded that Hobson could not perform his previous duties, and that the administrative decision was in error in holding that he could. The trial court was correct. The trial court affirmed only that part of the DRS order holding that Hobson was not totally incapacitated from performing other work for which he was qualified. Nevertheless, DRS urges this Court to find that Hobson could perform his job of injury working with frequently violent patients.²

² This Court recently had occasion to address the severe, but apparently not certain risk of patient assaults to WSH employees in Brame v. Western State Hospital, ___ Wn.App ___, 150 P.3d 637 (2007).

Hobson's employer, the Department of Social and Health Services (DSHS), had concluded Hobson could not return to his job of injury.

The Examiner's decision noted that "CSTC administrators told Mr. Johnson [the vocational counselor] that there were no return to work options there for Mr. Hobson," and that "CSTC would not alter Mr. Hobson's job duties to the extent of eliminating all responsibility for student supervision and counseling," thus minimizing the risk of injury, which was the concern of his physicians.³

Hobson's physicians opined that Hobson could not return to his job because of his physical inability to withstand the risks of a patient attack because of the nature of his disabilities. Despite these opinions, the DRS hearing Examiner concluded:

Mr. Hobson was barred by examining physicians from returning to that employment for safety reasons, and not because of any perceived inability to perform the modified duties of that position based on his medically verifiable impairments.⁴

³ Id., ¶ 13.

⁴ CP 28, ¶ 14.

Thus, despite (1) Hobson's physicians' opinions that he could not safely return to his job of injury; (2) his employer's opinion that it could not modify his job to make it safe for him to return; (3) DRS's concession that Hobson could not return to his job of injury; and (4) the medical restrictions that Hobson could not perform other than part-time employment, and even that not on a regularly continuous basis, infra, the Examiner concluded Hobson's job of injury was an employment option making him ineligible for a disability retirement.

Given the nature of the employment, which was taken into account by both Hobson's physicians and his employer, who felt that he could not be reasonably protected against future contacts which could reasonably be expected to lead to further permanent injury, the Examiner's finding that Hobson could return to his job of injury was error.

2. Hobson is totally incapacitated because he is unable to perform other employment.

It is undisputed that Hobson has significant physical impairments which limit his ability to

work.⁵ His previous disability retirements, and the medical and vocational evidence in the record, make this abundantly clear. If Hobson were able to work six hours a day on a reasonably continuous basis, he might very well have other gainful employment options making him ineligible for a disability retirement. The evidence is uncontroverted that he cannot work, even part-time, on a reasonably continuous basis.

The physical capacities' examination and the opinions of Casady (an Occupational Therapist retained by L&I to evaluate Hobson) and Kabacy (a Certified Disability Management Specialist), and concurred in by Dr. Stump (Hobson's principal treating physician), concluded that Hobson could not perform even sedentary part-time employment "on a reasonably continuous basis."

The problems of trying to find employment that does not require a reliable schedule are obvious. Hobson could not count on being able to work a regular schedule. He could not count on going to work any given day, or for how long (up

⁵ Hobson also takes medication significantly impairing his abilities to drive and to work.

to six hours) on any given day he would be able to remain at work. These limitations made it impossible for Hobson to find any meaningful employment for which he was qualified by training or experience.

An individual may be able to work up to six hours a day, but if they cannot work on any kind of a schedule because they cannot work on a reasonably continuous basis, employment options are virtually impossible.

The parties disagree with regard to the application of the term "totally disabled" to the facts of this case. DRS argues for a strict literal interpretation that an individual who can perform any kind of work for any amount of time is not totally disabled. DRS is unwilling to identify any kind of threshold that an individual would have to be able to meet, whether it be five minutes or five hours a day.

The real issue in this case is not that Hobson could perform part-time sedentary work for up to as much as six hours some days, it is that he could not perform it on a reasonably continuous basis. Neither party has been able to identify

any job available to Hobson with such a limitation.

DRS attempts to distinguish Dillard v. Washington Public Employees Retirement System, 23 Wn.App 461, 597 P.2d 428 (1979); and Marler v. DRS, 100 Wn.App. 494, 997 P.2d 966 (2000), both of which dealt with DRS disability retirements. In Dillard the Court upheld a DRS disability retirement for a WSH employee anxious she might be injured working with potentially violent patients. This psychological condition made her "totally disabled." Marler was found totally disabled based simply on **his** claim that he could not find a job because of back spasms. Hobson's medical condition is much more compelling than that in either Dillard or Marler.

While the State argues that Hobson would only have to work 70 hours a month to work the equivalent of the qualifying time for the monthly retirement credits,⁶ there is no evidence that Hobson could count on being able to work even 70 hours a month on a reasonably continuous basis.

⁶ Of course, he would earn such credits only if employed by a public employer in the Public Employees' Retirement System.

Hobson urges the court to adopt a meaningful interpretation of the term "totally disabled," and one which reflects the individual's preclusion from gainful employment, which would require that the individual be able to work on a reasonably continuous basis, even on a part-time basis, to not be totally disabled.

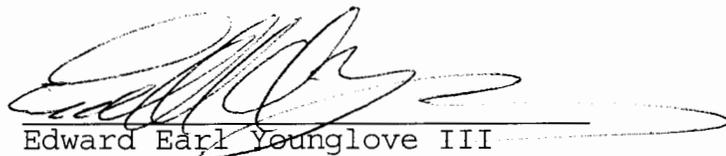
B. Conclusion

Hobson's appeal should be granted and the decision of the Department of Retirement Systems reversed, and the Department directed to grant Hobson disability retirement status.

RESPECTFULLY SUBMITTED this 2nd day of March, 2007.

Respectfully submitted,

YOUNGLOVE LYMAN & COKER, P.L.L.C.



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CERTIFICATE OF DELIVERY

I, Carla C. Flynn, being first duly sworn upon oath, deposes and says: That I am employed by the law firm of Younglove Lyman & Coker, P.L.L.C. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

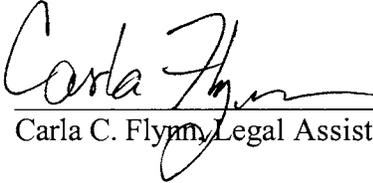
On the 2nd day of March, 2007, I did file and serve the Reply Brief Of Appellant by sending the same by ABC Legal Service to:

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DATED this 2 day of March, 2007

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