

On May 13, 2016, I conducted a hearing pursuant to the Rehabilitation Act of 1973 concerning the vocational rehabilitation of [REDACTED] [REDACTED] at the [REDACTED] ACCES-VR District Office at [REDACTED] [REDACTED] [REDACTED] [REDACTED] assistant district office manager of the [REDACTED] represented ACCESS-VR (the Agency), and the Applicant appeared pro se. A list of the witnesses who testified and the documents received into evidence is attached to this final decision.

Issues

The issues before me are:

- 1) Whether the Applicant has provided sufficient documentation to determine [REDACTED] eligibility for ACCES-VR; and
- 2) Whether the Agency should make phone calls to potential employers on behalf of the Applicant.

Position of the Agency

The Agency contends that the Applicant has not provided proper medical documentation of a disability and documentation of [REDACTED] functional limitations, both of which are necessary for a determination of eligibility for ACCES-VR services. The Agency's position is that it cannot make phone calls to potential employers on behalf of the Applicant.

Position of the Applicant

The Applicant contends that [REDACTED] has provided sufficient documentation of [REDACTED] eligibility for ACCES-VR services, and that the Agency does not have a right to further delve into [REDACTED] life. In addition, [REDACTED] contends that the Agency's policies violate the Americans with Disabilities Act (ADA). (Tr. 51)

Findings of Fact

The Applicant is [REDACTED] who is in [REDACTED] and seeks work as a part-time professor of speech in a local community college. (Tr. 53, 58) [REDACTED] completed law school at [REDACTED] in 1981. (Tr. 63) [REDACTED] did not take and pass a bar examination, and [REDACTED] is not an attorney admitted to the practice of law in any state. (Tr. 63) [REDACTED] taught speech classes in the [REDACTED] [REDACTED] in the late 1980's, but there is no testimonial or documentary evidence to establish whether [REDACTED] has worked since then. (Ex. J) [REDACTED] wants work to help [REDACTED] "mental well-being," occupy [REDACTED] time, and to "give back." (Tr. 65-6) [REDACTED] does not "need the money" although [REDACTED] does not want to "work for free." (Tr. 53)

The Applicant applied to ACCES-VR in February 2016, and [REDACTED] met with [REDACTED] [REDACTED] Ph.D. [REDACTED] assigned vocational counselor, on March 15, 2016. (Tr. 14) [REDACTED] noticed that there was no medical documentation from a health provider in [REDACTED] file, and no signed release to permit the Agency to obtain medical documentation. (Tr. 14, 17, 18-19) [REDACTED] [REDACTED] informed [REDACTED] of the need for medical documentation, but the Applicant refused to consent to the release of medical documentation. (Ex. D) [REDACTED] was willing to affirm under oath that [REDACTED] disability [REDACTED] [REDACTED] [REDACTED] "1 (Tr. 54)

Instead of medical documentation [REDACTED] presented two documents to the Agency: a Department of Veterans Affairs letter dated December 23, 2015 (Ex. C) and two observations of [REDACTED] teaching at [REDACTED] on November 10, 1987 and April 19, 1988. (Ex. J) The Applicant believes that these two documents should be sufficient to determine [REDACTED] eligibility for ACCES-VR. (Tr. 15, 48) [REDACTED] believes that Exhibit C should be sufficient to establish [REDACTED] disability and right to ACCES-VR services, and

¹ [REDACTED] made this statement under oath in this hearing so [REDACTED] has now provided it to the Agency.

that Exhibit J should be sufficient to establish [REDACTED] teaching qualifications. (Tr. 48)

Although the Veterans Administration letter indicates that the Applicant is “unemployable,” the Applicant testified that [REDACTED] is able to work part-time as an adjunct instructor. (Tr. 55-6) [REDACTED] contends that the Agency does not have the right to engage in an “invasive fishing expedition” for further information. (Tr. 49, 51) The Agency has not found [REDACTED] to be eligible for ACCES-VR and refuses to make phone calls to potential employers on [REDACTED] behalf. (Tr. 53-5)

[REDACTED] filed a Due Process Request dated March 15, 2016 seeking to have the Agency “make inquiry with local community colleges to see if they have an opening for me to teach a section of a speech course, P/T, no later than the Fall 2016 term.” (Ex. A at 2). [REDACTED] does not want an “individualized plan for employment” (IPE) or any vocational training or any vocational counseling. (Tr. 59) [REDACTED] just wants the Agency to make phone calls to local community colleges as prospective employers for [REDACTED] (Tr. 59-60) [REDACTED] has made phone calls [REDACTED] without getting interviews so [REDACTED] wants the Agency to make these phone calls on [REDACTED] behalf because [REDACTED] believes that the Agency has “clout.” (Tr. 60-1)

The applicant began receiving Veteran Benefits on September 22, 1964 when [REDACTED] was injured during basic training. (Tr. 68) [REDACTED] alleges that [REDACTED] also received Social Security Disability benefits sometime in [REDACTED] 50’s approximately twenty years ago. (Tr. 65-67) [REDACTED] testified that [REDACTED] Social Security Disability benefits were converted into Social Security Retirement benefits when [REDACTED] turned age [REDACTED] (Tr. 67-8)

Conclusions of Law

Vocational Rehabilitation is a Federal and State funded program that provides services to help individuals with disabilities enter, or return to, employment. It is designed to help individuals with disabilities compete successfully with others in earning a livelihood. The entire focus of the program is employment. In New York, Vocational Rehabilitation is called ACCES – VR. But ACCES - VR is not an entitlement. The individual applicant must be eligible.

Eligibility for ACCES - VR

Eligibility for ACCES- VR is based upon federal and New York State statutes and regulations:

2. Basic conditions. Eligibility for vocational rehabilitation services shall be based only upon:

A. the presence of a physical or mental impairment which for the individual constitutes or results in a substantial impediment to employment;

B. the ability to benefit in terms of an employment outcome from vocational rehabilitation services; and

C. a determination that the applicant requires vocational rehabilitation services to prepare for, secure, retain or regain employment consistent with the applicant's strengths, resources, priorities, concerns, abilities, capabilities, and informed choice.

8 NYCRR Section 247.6(2)

- In the matter before me, the Applicant wants ACCES-VR to accept a Veterans Administration letter that reports that ■ has an unspecified disability in lieu of medical documentation that permits ACCES-VR to make its own determination of disability and eligibility. But the Veterans Administration is an entitlement program with its own criteria for determining disability and the extent of disability, and those criteria are different from the criteria used to determine eligibility under ACCES-VR.

The Veterans Administration assessment is based on an evaluative rating scale limited to disabilities resulting from diseases and injuries that are a result of or incident to military service. The percentage ratings represent “the average impairment in earning

capacity resulting from such diseases and injuries” rather than an assessment of the individual’s actual earning capacity. 38 C.F.R. §4.1 Even so, the VA needs:

“ . . . accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition. Over a period of many years, a veteran’s disability claim may require reratings in accordance with changes in laws, medical knowledge and [REDACTED] or [REDACTED] physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history. 38 C.F.R. §4.1 See also 38 U.S.C. §1155

A Veterans Administration “rating specialist” reviews this information because:

“Different examiners, at different times, will not describe the same disability in the same language. Features of the disability which must have persisted unchanged may be overlooked or a change for the better or worse may not be accurately appreciated or described. It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history . . . ”
38 C.F.R. §4.1

The VA may assign a total disability rating where the “schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.” 38 C.F.R. §4.16(a)

In this case, I find that the Veterans Administration letter, exhibit C, does not establish the Applicant’s disability, [REDACTED] functional limitations, or [REDACTED] eligibility for ACCES-VR. ACCES-VR may conduct a comprehensive assessment when it needs additional data to develop an IPE. But that would require the Applicant to consent to an assessment and participate in it. In this case, [REDACTED] is not willing to do so.

My inquiry does not end there. There are two presumptions in 8 NYCRR Section 247.6(3) that I must also consider in this case.

Presumptions.

A. An applicant will be presumed to be able to benefit in terms of an employment outcome from vocational rehabilitation services unless it is demonstrated otherwise on the basis of clear and convincing evidence.

B. An applicant with a disability as determined under title II or title XVI of the Social Security Act will be considered to be an individual with a significant disability, and will be presumed to be eligible for vocational rehabilitation services provided the individual intends to achieve an employment outcome consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests and informed choice.

8 NYCRR Section 247.6(3)

The first presumption is that ACCES-VR presumes that an applicant is able to benefit from vocational rehabilitation services unless there is clear and convincing evidence otherwise. In this case, the Applicant has provided a Veterans Administration letter that gives clear and convincing evidence that ■■■ is not employable. While the VA regulations establish that a veteran may be deemed totally disabled and unemployable even though ■■■ is not, the lack of medical documentation in this case precludes such a finding. Therefore, I find that the presumption in 8 NYCRR Section 247.6(3)(A) does not apply in this case and the Agency cannot presume that Mr. Lipsman is able to benefit from vocational rehabilitation services.

While ACCES-VR does not accept the Veterans Administration disability determination, it does accept the disability determination of the Social Security Administration. The second presumption is that recipients of Supplemental Security Income (SSI) or Social Security Disability Insurance Benefits (SSDI) are presumed to be eligible for ACCES-VR. In the instant case, the Applicant testified that the Social Security Administration found ■■■ to be “disabled” under the Social Security Act, but that was many years ago. Furthermore, it is the responsibility of the applicant to provide evidence of ■■■ status relating to the Social Security Administration.

“The individual should provide appropriate evidence to verify that the individual is a recipient of SSI or SSDI benefits. If the applicant is unable to provide appropriate evidence to support that they are receiving Social Security benefits, then ACCES-VR must obtain appropriate releases from the individual and verify the applicant’s eligibility by contacting the Social Security Administration. This verification must be made within a reasonable period of time so that eligibility for vocational rehabilitation services may be made within 60 days of the application

for services.”

202.00 Eligibility for Services Policy (April 2009) See also Presumptive Eligibility for Persons Receiving SSI/SSDI - May 28, 2004

In this matter, the Applicant supplied no such evidence to the Agency.

I find that neither presumption in New York State regulation 8 NYCRR Section 247.6(3) applies in the case before me. The Applicant is not eligible for ACCES-VR despite ■■■ affirmed statement of the nature of ■■■ disability in this hearing.

ACCES-VR Services

The entire focus of the ACCES-VR program is employment based upon an individual “employment outcome.” The Rehabilitation Act of 1973 defines an “employment outcome” with respect to an individual at 29 U.S.C. Sec. 2(11). See also 34 C.F.R. § 361.5(b)(16), and 8 NYCRR § 247.1(5) The “employment outcome” is a conclusion reached by a professional vocational counselor and a Consumer based upon history, evaluations, **current** level of functioning, work skills, employment readiness, and other factors.

“While individuals are encouraged to actively participate and make meaningful choices, Applicant choice does not mean that they have complete control over their programs. Vocation rehabilitation counselors must also apply their professional judgment; applicable laws, regulations, and policies, sound planning considerations; and responsible use of public funds. Services must lead directly to employment objectives that are realistic, timely and attainable within the fiscal constraints of the program.”

ACCESS-VR Policy Section 100.00.

See also *In the Matter of Sharon Barbee*, 234 A.D.2d 646; 650 N.Y.S.2d 488; 1996 N.Y.

App. Div. LEXIS 12347 and *In the Matter of Arthur Goldstein*, 199 A.D.2d 766, 605

N.Y.S.2d 425, 1993 N.Y. App. Div. LEXIS 12020

An eligible individual receives an “individualized plan for employment” (IPE) that sets out the Applicant’s vocational goal and the supports and services the Agency will provide to help the Applicant achieve that vocational outcome. The New York State regulations establish the process for developing the IPE. 8 NYCRR Section § 247.11(2)

In this case, the Applicant testified, “it is not the job of agency personnel to determine whether or not I am qualified for the job. That is the determination to be made by the perspective employer.” (Tr. 52) Actually, that is precisely the job of ACCES-VR. While the consumer participates in this important decision, the Agency vocational counselor determines an appropriate vocational goal, and then works with the consumer to develop an IPE to support the vocational outcome.

In this matter, the Applicant does not want an IPE or vocational training, or vocational counseling. (Tr. 59) Essentially, ■ just wants the Agency to serve as a reference for ■ so far unsuccessful applications to local community colleges. This is a misunderstanding of the mission and functioning of ACCES-VR.

Americans with Disabilities Act

The Applicant cites the Americans with Disabilities Act (ADA), and claims that the ACCES-VR policies violate it. (Tr. 51) Enacted in 1990, the ADA is wide-ranging civil rights legislation that prohibits disability discrimination. The ADA and Section 504 of the Rehabilitation Act of 1973 use the same definition of a qualified individual.

“Both Section 504 and Title II define a “disabled individual” as one who “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(2). A three-part test exists for determining whether a person is disabled under these statutes, see *Bragdon v. Abbott*, 524 U.S. 624 (1998) and *Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 641 (2d Cir. 1998). Under *Colwell*, plaintiff must (i) show that D.G. suffers from a physical or mental impairment, (ii) identify the activity claimed to be impaired and establish that it constitutes a “major life activity” (in this case, learning); and (iii) show that D.G.’s impairment “substantially limits” the major life activity identified. See *Weixel*, 287 F.3d at 147.”

K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 44 IDELR 37 (S.D.N.Y. 2005).

In the instant case, the Applicant claims a physical impairment, namely orthopedic injuries, but ■ does not identify an activity that is impaired or establishes that it constitutes a major life activity, and ■ does not show that ■ physical impairment

substantially limits the major life activity identified. I find that the Applicant in this matter has not established that [REDACTED] is a qualified individual with a disability under the ADA although [REDACTED] claims that [REDACTED] is protected by it.

The ADA Amendments of 2008, Pub. Law 110-325 became effective on January 1, 2009. The Amendments mandate that the definition of disability in the Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act. But even considering the Amendments, the Applicant in this case has not established that [REDACTED] is a qualified individual with a disability pursuant to the ADA who may claim protection under it.

Conclusions

I find that [REDACTED] is not eligible for ACCES-VR at this time, and the Agency is not required to make any phone calls or other contact with potential employers on [REDACTED] behalf.

Order

There is no order in this case.

Dated: June 2, 2016

[REDACTED]

Impartial Hearing Officer

WITNESSES

ACCES-VR

[REDACTED]

[REDACTED]

Applicant



EXHIBITS

ACCES-VR

- Ex. A Due Process Request, dated March 16, 2016, 2 pages
- Ex. B Part of the Impartial Hearing Request, dated April 16, 2016 and received April 18, 2016, 1 page.
- Ex. C Letter from the Department of Veterans Affairs, dated December 23, 2015, 1 page
- Ex. D Agency Case Notes, dated March 15, 2016 and March 16, 2015, 2 pages.
- Ex. E Eligibility for Services Policy 202.00, dated April 2009, 9 pages.
- Ex. F Referral and Applying for Services Policy, dated March 1998, 3 pages.
- Ex. G Consumer Involvement Policy 100.00 dated February 2007, 3 pages
- Ex. H Confidentiality Procedure 102.00P dated April 2016, 5 pages.
- Ex. I Confidentiality Policy 102.00, dated December 1997, 3 pages.
- Ex. J State University of New York Observations, from November 5, 1986 and March 17, 1988, 3 pages.

Applicant

None