

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 87

WCC No. 9709-7827

MICHAEL DURHAM

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

VRENDENBURG ENTERPRISES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: During 1992, 40-year old ranch foreman was crushed by cattle moving through a gate. He suffered injury to his heart and to cervical and thoracic vertebrae. He alleges permanent total disability, not due to heart or spine problems, but because of fatigue and inability to concentrate. In 1995, claimant earned an associate of applied science degree in electronics engineering technology, which claimant testified was training for computer and copier repair. In 1996, claimant received a bachelor of science degree in applied science, earning a perfect 4.0 grade point average from a school in Utah. Although he was offered a job from a computer company paying \$30,000 annually, he turned it down on the belief he could not work full time.

Held: But for claimant's alleged fatigue and inability to concentrate, he is qualified to perform a number of computer-related jobs, some of which are sedentary. The Court was not persuaded by the testimony of claimant or his treating physician, a family practitioner, that he is unable to concentrate on job tasks on a full-time basis. The treating physician's testimony was based largely on claimant's subjective reports. The Court found claimant's testimony regarding inability to concentrate exaggerated, citing evidence that claimant performed well in school, has done some work, and was believed able to perform at least sedentary work by some physicians, one of whom attributed claimant's complaints to deconditioning.

Topics:

Benefits: Permanent Total Benefits: Generally. 40-year old former ranch hand sought PTD benefits following accident with cattle. Although accident caused spine and heart problems, PTD claim was based on alleged fatigue and inability to concentrate. As the result of post-injury schooling, claimant was clearly qualified to perform a number of computer-related jobs, some of which were sedentary. The Court was not persuaded by the testimony of claimant or his treating physician, a family practitioner, that he is unable to concentrate on a full-time basis. The treating physician's testimony was based largely on claimant's subjective reports, which the Court found exaggerated, citing evidence that claimant performed well in school, had done some work post-injury, and was considered able to perform at least sedentary work by some physicians, one of whom attributed claimant's complaints to deconditioning.

Physicians: Conflicting Evidence. Court was not persuaded by evidence of treating physician, a family practitioner, that claimant could not work due to fatigue and difficulty concentrating, where opinion was based largely on claimant's subjective reports, which Court found were exaggerated.

Proof: Conflicting Evidence: Medical. Court was not persuaded by evidence of treating physician, a family practitioner, that claimant could not work due to fatigue and difficulty concentrating, where opinion was based largely on claimant's subjective reports, which Court found were exaggerated. More credence was given to evidence from other medical practitioners, who believed claimant capable of at least sedentary work, one of whom attributed his complaints to deconditioning.

¶1 The trial in this matter was held on May 27, 1998, in Kalispell, Montana. Petitioner, Michael Durham (claimant), was present and represented by Mr. Garry D. Seaman. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Todd A. Hammer. A transcript of the trial has not been made.

¶2 Exhibits: Exhibits 1 through 36 and 38 through 46 were admitted. Exhibit 37 was refused.

¶3 Witnesses and Depositions: Michael Durham, Mark Schwager, and Terri Roach were sworn and testified. The parties agreed that the Court shall consider the depositions of Michael Durham, Mark Schwager, Dr. Brent Muhlestein, Dr. Stephen H. Nichols, Dr. Donald Hamner, and Terri Roach.

¶4 Issues Presented: Claimant contends that he is permanently totally disabled as a result of his October 2, 1992 accident, and that he is entitled to permanent total disability benefits. He also seeks attorney fees and costs.

¶15 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the proposed findings of fact and conclusions of law filed by the parties post-trial, the Court makes the following:

FINDINGS OF FACT

¶16 Claimant is presently 40 years of age. At the time of trial he was living with his parents in the state of Kentucky and was unemployed.

¶17 Prior to his injury, the claimant had only obtained a high school education.

¶18 Claimant self-reports that he has an I.Q. of 140. (Trial Test.) Based on his academic success following his industrial injury, the Court has no reason to doubt his report.

¶19 Despite claimant's high intelligence, he has worked only in labor-type positions. He worked at a sawmill and built houses from 1975 to 1981. He thereafter worked as a ranch hand from 1981 to 1985. In 1985 he was hired as a ranch foreman for Vrendenburg Enterprises (Vrendenburg) in Lincoln County, Montana. He continued in that position until 1993.

Industrial Injury

¶10 On October 2, 1992, claimant was injured in the course of his employment with Vrendenburg. He was moving cattle when the cattle pushed a gate against him. He was caught between the gate and a wall and was crushed.

¶11 Vrendenburg was insured by the State Fund. The State Fund accepted liability for the claim and has paid various benefits. (Pretrial Order at 2.)

Initial Medical Treatment

¶12 The parties do not dispute that claimant suffered a severe injury of the cervical and thoracic spine and his heart.

¶13 Although claimant continued working in the belief that he had suffered only cracked ribs (Ex. 27 at 2), within two weeks he developed extreme pain in his left arm. On October 21, 1992, he was admitted to Kalispell Hospital and seen by Dr. Jack L. Davis, an internist. At the time of admission, Dr. Davis recorded that he was suffering "chest discomfort characteristic of pericarditis or sternal injury . . . , increasing shortness of breath and weakness with left arm discomfort" (Ex. 11 at 8.) Dr. Davis determined that claimant suffered "a crush[ing] injury." (*Id.* at 17.) He treated claimant until December of 1993, and his final diagnoses of claimant's injuries were "[p]ost-traumatic cervical disc disease and cardiomyopathy." (Ex. 7 at 18.)

¶14 "Cardiomyopathy is a general term utilized to describe a situation where the heart function is not completely normal." (Muhlestein Dep. at 15; see *also* Nichols Dep. at 11.)

Physicians treating claimant since his injury have used the term to describe claimant's heart condition.

¶15 In the claimant's case, the condition was initially evidenced by an abnormal "ejection fraction," which is "the percentage of blood that a heart is able to pump out with each beat from the total amount of blood that is in the heart at the time just before it contracts." (Muhlestein Dep. at 15, 16.) Dr. Davis reported on October 21, 1992, that claimant's ejection fraction was 26% (Ex. 11 at 10), which is significantly impaired (Nichols Dep. at 9). Further testing on November 23, 1992, showed an improved ejection fraction of 40%. (Ex. 11 at 11; Nichols Dep. Ex. 2 at 2.) Three and a half years later, in March of 1996, the claimant's ejection function was 61%, which is normal. (Nichols Dep. at 10; Nichols Dep. Ex. 2 at 2; and Ex. 22 at 13.)

¶16 In addition to the cardiomyopathy, and as noted by Dr. Davis in his final diagnoses, claimant also sustained cervical and thoracic injuries of his spine. Dr. Robert D. Schimpff, a neurologist, evaluated claimant at Dr. Davis' request. He initially examined claimant on November 23, 1992, at which time claimant complained of "lost strength in the left arm . . . occasional numbness in the left arm radiating from the shoulder anteriorly over the biceps and into the anterior forearm . . . [and] pain in his neck which is made worse by trying to look back and to the right." (Ex. 17 at 1.) An MRI disclosed "small disc herniations occurring at C5-6, T6-7, T7-8 and T8-9." (*Id.* at 2.) Dr. Schimpff deemed the herniation at the C5-6 as the "only clinically significant herniation." (*Id.*) Claimant's neck and left arm symptoms improved. (Ex. 17, *passim*.)

Alleged Disability

¶17 Claimant does not contend that he is totally disabled on account of his cervical and thoracic injuries. No further discussion of that condition is necessary.

¶18 He also does not contend that his cardiac function is in itself disabling.

¶19 Rather, claimant's disability case rests on his contention that he is unable to work on account of fatigue and an inability to concentrate. His testimony is supported by his current treating physician, Dr. Donald L. Hamner, a family practitioner, who testified by deposition that claimant is unable to work because he is unable to concentrate on job tasks on a full-time basis. However, Dr. Hamner's testimony is based largely on claimant's subjective reports.

Claimant's Post-Injury Education and Employment Opportunities

¶20 In the fall of 1993, claimant began two years of studies at the ITT Technical Institute (ITT) in Spokane, Washington, successfully finishing his studies in September 1995. He earned an associate of applied science degree in electronics engineering technology.

According to claimant, his schooling trained him to perform computer and copier repair. (Ex. 44.)

¶21 The Spokane ITT program was medically approved. It was also approved by claimant's assigned vocational consultant.

¶22 At the Spokane ITT, claimant attended two hours of classes followed by two hours of computer laboratory, amounting to four continuous hours.⁽¹⁾ There were, however, ten minute breaks between classes.

¶23 During the two years he attended the Spokane ITT program, claimant missed only one and a half days of classes. He graduated in September 1995, with a 3.7 grade point average. (*Id.* at 6-7.)

¶24 Upon graduating from the Spokane ITT program, claimant enrolled at another ITT school in Utah and pursued a program leading to a degree of bachelor of science of applied science. Claimant graduated in September 1996, with a perfect 4.0 grade point average. He had a perfect attendance record. (*Id.* at 9.)

Job Search and Job Offers

¶25 Since his graduation from Utah ITT, claimant has not sought employment. However, in April 1997, claimant's father forwarded a resume for his son to a computer company located near where claimant lives. The company contacted claimant and offered him a job paying \$30,000 annually. Claimant rejected the offer. He testified that he did not believe he could work full time.

Further Medical

¶26 Claimant has been examined and evaluated by a multitude of physicians. Itemizing each and every examination and evaluation would be a dreary and fruitless exercise. Discussion of medical opinions is therefore limited to the major, significant evaluations.

¶27 Dr. Davis, who practices in Kalispell, was claimant's treating physician until December 1995. (Ex. 11.)

¶28 Claimant began attending ITT in Spokane in September 1993, and thereafter saw numerous Spokane physicians, including Dr. Timothy M. Chestnut. Dr. Chestnut specializes in internal medicine, critical care and sleep disorders. (Ex. 3.) In March 1995 Dr. Chestnut tested claimant's exercise tolerance. In a September 13, 1995 letter to the Social Security Administration, and based on claimant's test results, he summarized his medical opinions, as follows:

1. You have an exercise limitation that is moderately severe
2. There is no lung or pulmonary limitation to exercise

3. There is a definite cardiac or heart limitation to exercise

4. Your exercise tolerance and ability to tolerate sedentary or more modest work should improve gradually with retraining; however, as you and I discussed, this will be an extended time frame. Although I think you would be able to tolerate school at this time, I do not think that full-time work is a viable option and would strongly advise against that given the results of this test.

Overall, I think your plans to continue school would be in your best interest. In view of your medical difficulties at this time with exercise tolerance, continued schooling would certainly be in your best interest.

(Ex. 3 at 8.) While Dr. Chestnut deemed claimant unable to work at this time, in paragraph three, he expressly noted his expectation that over the long haul claimant's tolerance and ability "to tolerate sedentary or more modest work should improve gradually with retraining."

¶29 After moving to Utah to work on his bachelor's degree, claimant was treated and evaluated by a number of Utah physicians. Among them were Dr. Joseph Muhlestein, a cardiologist who is an Assistant Professor of Medicine at the University of Utah and the Director of Research of the Cardiac Catheterization Laboratory; Dr. Frank Yanowitz, who is the Medical Director of The Fitness Institute of the LDS Hospital and an Associate Professor of Medicine at the University of Utah School of Medicine; and Dr. Stephen H. Nichols, a cardiologist. Dr. Nichols was part of a medical panel which examined claimant at the request of the insurer. Drs. Muhlestein and Nichols testified by deposition.

¶30 Dr. Nichols first examined the claimant on March 4, 1996. At that time he opined,

In any case, he has had **progressive objective improvement** on his chest x-rays and echocardiograms, to the point where he **currently has no physical evidence of cardiac disease. One is struck now by the disproportionate symptoms of congestive heart failure, in relation to the paucity of physical findings.**

[Emphasis added.]

(Ex. 22 at 14.) The doctor went on to suggest a "rest and exercise cardiac catheterization" procedure which he felt would settle the question of whether his symptoms were due to cardiac disease or not. (*Id.*)

¶31 Responding to a query from a State Fund claims examiner, Dr. Nichols wrote on October 30, 1996:

It is my feeling that **Mr. Durham should be able to return to full-time employment as an electronics technician.** I assume that this will involve periods of occasional walking and lifting of up to 25 pounds, which he should be able to accomplish.

[Emphasis added.]

(Ex. 22 at 15.)

¶32 The claimant returned to Dr. Nichols a year later on October 31, 1997. His opinions and recommendations at that time were:

My feeling is that Mr. Durham did have a cardiomyopathy which was related to the chest trauma experienced in 1992, but he has fully recovered since that time. His current symptoms may relate in part to deconditioning and the use of the beta blocker, Atenolol. Extensive testing of his cardiopulmonary status since 1994 has revealed no significant objective abnormalities, other than the limited VO₂ maximum discussed above. I believe that his chest pains are noncardiac.

. . . .

I believe that Mr. Durham reached maximum medical improvement by 1/95.

There is no need for any type of cardiac surgery.

I think he should be able to perform full-time sedentary work as an electronics technician, on the basis of the provided job analysis. In my opinion, he could return to gainful employment at this time.

I do not believe he has had any permanent impairment as a result of the injury.

. . . .

(*Id.* at 18.)

¶33 In his deposition Dr. Nichols identified a number of tests which indicated improvement of claimant's conditions since his injury. (Nichols Dep. at 12-13.) He approved job analyses for the Cashier II (*id.*, Dep. Ex. 3), Electronics Technician (*id.*, Dep. Ex. 5) and Computer Programmer (*id.*, Dep. Ex. 6).

¶34 One of the significant tests of claimant's functioning was an exercise tolerance test performed on January 17, 1997, by Dr. Yanowitz. Dr. Yanowitz reported the results as follows:

Exercise duration was 15.7 min; maximal heart rate was 192 bpm (>100% of predicted); maximal systolic blood pressure was 155 mmHg (normal response). The exercise was terminated because of leg fatigue. . . . The ECG response to exercise was normal. Measured max VO₂ was 28.6 ml/kg/min, placing him in the 4th percentile for his age and gender; I think he was truly maxed because his respiratory exchange ratio was 1.1 at max exercise (anaerobic). . . .

I do not find a specific cardiac reason for his low functional capacity; this could be due to deconditioning or some other metabolic abnormality.

(Ex. 6 at 1.) Dr. Nichols discussed the test in his deposition. He explained that it is used to continuously measure a person's consumption of oxygen as the person progresses from a low level of exercise to an increasingly difficult level. (Nichols Dep. at 29-30.)

¶35 Dr. Nichol's testified that the results of Dr. Yanowitz's testing placed claimant in the 4th percentile of the population. He explained that he is in "a lower group of normal people, **but it certainly wouldn't disqualify him from doing sedentary work.**" (*Id.* at 30; emphasis added.)

¶36 Dr. Nichol's assessment of the test results is supported by Dr. Yanowitz's November 20, 1997 explanation. In a January 17, 1997 letter, he stated that claimant's "maxVO₂ was 28.6 ml/kg/min." (Ex. 6 at 1.) In a subsequent, November 20, 1997 letter to Dr. Nichols, he enclosed an "Appendix III - Levels of Work," which listed VO₂ requirements for various levels of labor. In his letter, he wrote:

I'm enclosing a copy of the *Workplace Functional Ability: Medical Guidelines*, "Cardiovascular" category developed by the Utah Medical Association for evaluating disability based on functional capacity. Of interest is "Appendix III - Levels of Work". There you will see that the energy requirements for sedentary or light work are minimal. 1 MET is 3.5 ml O₂/kg/min. For example, if a person's maximal VO₂ is 28 ml/kg/min [8 METs], he or she should easily be able to carry out light or sedentary work.

(*Id.* at 20.) Appendix II sets out the VO₂ requirement for sedentary work as 1.5 to 2.1 METS, and for light labor as 2.2 to 3.5 METS.⁽²⁾ As noted by Dr. Yanowitz, 1 MET equals 3.5 ml/kg/min. Claimant tested at 28.6 ml/kg/min. (*Id.* at 1.) Thus, his VO₂ was 8.17 METS, exceeding the requirements for both sedentary and light labor. Dr. Yanowitz specifically wrote that a person with a VO₂ of 28 ml/kg/min, *which is the test result for claimant*, "**should easily be able to carry out light or sedentary work.**" (*Id.* at 20.)

¶37 Of some significance given a similar comment by Dr. Muhlestein and a later conditioning program at the University of Kentucky, Dr. Yanowitz commented on claimant's low VO₂ results, as follows:

I do not find a specific cardiac reason for his low functional capacity; **this could be due to deconditioning** or some other metabolic abnormality.

(Ex. 6 at 1, emphasis added.) The medical records do not disclose any metabolic explanation, but claimant's improvement while participating in a subsequent University of Kentucky conditioning program is consistent with Dr. Yanowitz's comment regarding deconditioning.

¶38 Dr. Muhlestein saw the claimant on at least six occasions between November of 1995 and November 1997. On June 6, 1997, he responded to a request from claimant's attorney

regarding claimant's ability to work as an electronics technician on a ten-hour-a-day basis. Dr. Muhlestein replied that claimant's heart had appeared to return to normal functioning but that in view of the VO2 testing by Dr. Yanowitz the claimant may have difficulty working ten hours straight:

The patient therefore appears to have significantly low functional capacity for unclear reasons. This could be due to deconditioning or some other metabolic abnormality which I have been unable to find. In either case, it does appear that it may be difficult for him to work continuously for a 10 hour period, which is what is described as the working day for this job. Based on his description of his symptoms and on the results of this VO2 functional assessment, it is my opinion that he may find it difficult to work for longer than 4 hours at a time without a rest period.

(Muhlestein Dep. Ex. 2 at 5618; Ex. 4 at 27.)

¶39 There are several significant aspects to Dr. Muhlestein's letter. First, he supports Dr. Yanowitz's comment that claimant's poor VO2 performance may be due to deconditioning. Second, he addresses a ten-hour-a-day job which requires more than four hours of constant work without a rest period, and even then he only observes that such a workday might be difficult for the claimant. His letter, and his deposition testimony, do not contradict Dr. Yanowitz's opinions that claimant's VO2 results are higher than what is required for either sedentary or light labor.

¶40 In his deposition Dr. Muhlestein qualified his opinion regarding claimant's ability to work. With regard to a rest period after four hours of work, he testified that he did not have an opinion as to how long the rest period should be. He further indicated that his use of the word "may" in that part of his letter which is quoted in paragraph 38 indicates that he has no strong opinion regarding claimant's work status:

The only thing I would change about my sentence is I may emphasize the "may" part. I am specifically trying to say that I don't have a strong opinion regarding his work status. I do not feel competent to state whether or not he is or is not capable of working for extended periods of time.

(Muhlestein Dep. at 36-37.) When asked if, regarding claimant's employability, he would defer to the medical panel which evaluated claimant, he responded:

A. Certainly I would defer to them. I will defer to anybody. I don't want to make the decision.

(Muhlestein Dep. at 34.)

¶41 After completing his degree at the Utah ITT, claimant returned to Kentucky, where he is living with or near his parents. Since moving to Kentucky, claimant has been treated by Dr. Donald L. Hamner, who is board certified in family practice. In 1998, *after the filing of his*

petition with this Court, he also sought a psychiatric evaluation concerning his chronic fatigue (Ex. 39) and participated in a cardiac reconditioning program at a University of Kentucky Outpatient Cardiac & Pulmonary Rehabilitation Center (Ex. 42).

¶42 The psychiatric evaluation was done on February 17, 1998. Claimant requested the evaluation, which was done by Dr. Arnold M. Ludwig. The doctor's report is just over two pages long and based on the single visit. The report sets out the circumstances of the evaluation, as follows:

Mr. Durham is a 39 year old divorced white male from Stanford, Kentucky. He scheduled an evaluation to determine whether there might be an emotional basis for the chronic fatigue he has been experiencing since an injury in October 1992. He said that he exhausted all the medical reasons and now would like to examine whether there is a psychiatric basis for his symptoms.

(Ex. 39 at 1.) Dr. Ludwig recorded the history claimant related to him, the results of a mental status indicating that claimant was "alert and oriented to time, place and person", was attentive and rationale and had "memory and concentration [which] were superficially intact." (Ex. 39 at 2.) Dr. Ludwig did no testing.

¶43 Based on the history recited by claimant, he concluded:

Although Mr. Durham has symptoms consistent with a Panic Disorder, I believe that the overall picture is more indicative of a syndrome with an organic basis, such as mitrovalve prolapse or some type of audonomic [sic] dysfunction. . . .

(*Id.*) On the other hand, he concluded that claimant "does not appear to be seeking an invalid way of life with his symptoms" and that his "pattern of responses is not consistent with someone seeking disability compensation for an imaginary disorder." (*Id.*)

¶44 I give no weight to Dr. Ludwig's evaluation. His opinions are plainly based on a short interview with claimant, who sought the interview after this litigation had begun. There is no indication that the doctor reviewed claimant's medical records. His observations concerning possible physical dysfunction must give way to the opinions of other physicians who examined claimant with regard to his physical condition.

¶45 In March 1998 the claimant enrolled in a six week cardiopulmonary reconditioning program at the University of Kentucky. The Court does not have the records for the program, only a one page report dated May 11, 1998. That report, however, provides significant information:

He has been seen at least three times a week for monitored exercise sessions and patient education.

. . . We still are seeing resting heart rates greater than 100 bpm and blood pressures that are more labile.

At times his blood pressure has decreased during exercise; for example on May 6 his systolic dropped from 150 to 138 mmHg, and his diastolic pressure dropped from 110 to 78 mmHg. He has been asymptomatic throughout these exercise sessions except for leg pain, fatigue, and musculoskeletal chest discomfort. He admits to taking other medications from his chiropractor and over the counter medications. We are uncertain regarding the effects these would have on his blood pressure.

Since his initial evaluation his MET level has increased from 5.80 to 9.7. His exercise duration on the treadmill has improved from 25 minutes to 50 minutes.

(Ex. 42.)

¶46 The Kentucky reconditioning program is significant because it documents the claimant's increased exercise tolerance as a result of an exercise program. Over the six week program, claimant doubled his treadmill endurance. He nearly doubled his MET level. The increase in claimant's MET level during the program is consistent with the comments of Drs. Yanowitz and Muhlestein that claimant's depressed MET levels in 1997 testing may have been attributable to deconditioning.

¶47 Dr. Hamner provides the strongest support for claimant's disability claim. He first examined claimant on February 28, 1998, and saw claimant six or seven times prior to his deposition being taken on May 19, 1998. Dr. Hamner considers himself to be the claimant's treating physician.

¶48 At the time of his deposition Dr. Hamner was provided job analyses for computer programmer and electronics technician. He testified that claimant cannot perform either job and that he may never be able to work:

A I don't think Mr. Durham can concentrate or function in a long term capacity. I don't think at this point, at least from my observations of him, that he can apply himself that long. **I would say an hour of concentration would be long term.**

Q Do you have an opinion whether Mr. Durham has a reasonable prospect of physically performing regular employment?

A In my opinion, I think it's -- he is unlikely to be able to do so.

(Hamner Dep. at 25, emphasis added; Ex. 31 at 25.)

¶49 Claimant's vocational consultant, Mark Schwager, testified that claimant is not employable because of his fatigue and inability to concentrate. That opinion, however, merely echos that of Dr. Hamner and ultimately claimant's subjective reports as to what he can and cannot do.

¶150 But for claimant's alleged fatigue and inability to concentrate, he is qualified to perform a number of computer-related jobs, some of which are sedentary. Terri Roach (Roach) identified electronics technician, electronics engineer and computer programmer as positions available in Montana and which claimant is qualified to perform. She also identified cashier as a position available to him.

¶151 While one of the specific jobs Roach identified in the Kalispell area was a ten-hour-a-day job, another was eight hours a day and sedentary. (Roach Dep. at 19-21.) There is no substantial evidence indicating that most jobs accessible to claimant require more than eight hours a day of work.

¶152 Dr. Nichols approved job analyses for the positions of Cashier II (Nichol's Dep. at 18-21; and Dep. Ex. 3), Electronics Technician (*id.*, Dep. Ex. 4.) and Computer Programmer (*id.* Ex. 6). Dr. Davis approved the same positions.

¶153 I am unpersuaded by Dr. Hamner's opinion that claimant is unable to work. He found no organic basis for claimant's fatigue and lack of concentration, although he postulated that they could be a side effect of claimant's medications. He did not review many of the medical records of claimant's other physicians. He was unfamiliar with claimant's academic records and attendance at ITT. He did not review claimant's vocational rehabilitation records. Most importantly, Dr. Hamner's opinion was based on claimant's reports as to what he can do.

¶154 Evidence from physicians more qualified regarding the claimant's heart and pulmonary condition show that claimant should be able to perform sedentary and light work in computers, work that he is eminently qualified to perform. Dr. Hamner's opinion that claimant would have trouble concentrating for even an hour (Hamner Dep. at 25) is inconsistent with the Court's observations of claimant at trial, the claimant's school attendance and other activities that claimant has engaged in.

¶155 In considering claimant's assertion that fatigue and an inability to concentrate preclude him from working, I have considered his testimony concerning his activities and evaluated his credibility.

¶156 Claimant's own testimony concerning his activities is inconsistent with the degree of disability he claims. Ultimately, I am persuaded that his claims concerning his fatigue and inability to concentrate are exaggerated.

- By his own report, since graduating from Utah ITT he has done minor car repairs, gardening, mowing lawns for up to one hour at a time, done some carpentry and occasional shopping. In the fall of 1997, he worked for his brother bucking bales of hay and cutting tobacco. He testified that he worked for only for 2-3 hours a day over a 30 day period, following which it took him 6 weeks to get back to normal.

- Bucking bales of hay and cutting tobacco are strenuous activities. In contrast to those jobs, claimant testified that he finds even grocery shopping taxing and only does it because he has to pick up prescriptions and his mother is sometimes unable to shop. His grocery shopping testimony was incredible. I did not, and do not, believe it.
- Claimant's post-injury success in schooling is evidence that he can concentrate and function for significant periods of time. His almost perfect grade point average, and his loss of only 1.5 days of classes during three years of schooling attest to his concentration and endurance. While his schooling did not require the 8 to 5 grind of regular employment, it nonetheless indicates that he has significant endurance and concentration skills which are beyond what he claims.
- On the day before trial he flew into Spokane, Washington, then drove 4 or 5 hours straight to reach Kalispell. He also testified that he is able to drive up to 3 to 4 hours, although he said that was the maximum.
- During trial, he sat for several hours without apparent difficulty concentrating.

¶57 I am unpersuaded that claimant is unable to perform regular work in the open labor market. To the contrary, I am persuaded that if motivated the claimant is capable of obtaining and holding regular, full-time employment as a computer technician, a computer programmer or even a cashier.

CONCLUSIONS OF LAW

¶58 Claimant was injured on October 2, 1992, thus the 1991 version of the Workers' Compensation Act governs his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶59 Section 39-71-702, MCA (1991), provides for payment of permanent total disability benefits to claimants who are permanently totally disabled. Permanent total disability is defined as:

"Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum healing, in which a worker has no reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

§ 39-71-116(16), MCA (1991).

¶60 As a matter of fact, the Court has found that claimant is capable of performing regular full-time employment in the computer industry and as a cashier. The sole basis on which claimant asserts he cannot do so is based on his own report that he suffers chronic fatigue and is unable to concentrate. I was unpersuaded by his reports and testimony.

¶61 Claimant is not entitled to attorney fees or costs.

JUDGMENT

¶62 1. The Court has jurisdiction over this controversy.

¶63 2. Claimant is not permanently totally disabled and is not entitled to permanent total disability benefits. His petition is **dismissed with prejudice**.

¶64 3. Claimant is not entitled to attorney fees or costs.

¶65 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶66 5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 1st day of December, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Garry D. Seaman

Mr. Todd A. Hammer

Submitted: June 16, 1998

1. Claimant testified that he did his labs on his own time. However, I did not find claimant's testimony on this and many other points credible.

2. There appears to be a typographical error in the chart's listing of the VO2 requirement for light labor. The chart entry reads 2.203.5 METS. Other entries indicate that the 0 in the middle should be a dash, thus it should read "2.2-3.5 METS."