

7/03/01

SUPREME COURT OF LOUISIANA

No. 01-C-0032

CLOPHA COMEAUX

versus

CITY OF CROWLEY

*On Writ of Certiorari to the Court of Appeal, Third Circuit,
Office of Workers' Compensation, District 4*

VICTORY, J., dissenting.

La. R.S. 23:1221(2)(c) provides that total permanent disability shall be awarded only if “the employee proves by clear and convincing evidence, unaided by any presumption of disability, that the employee is physically unable to engage in any employment or self-employment, regardless of the nature of character of the employment or self-employment . . .” La. R.S. 23:1221(2)(c) (emphasis added). While I agree with the majority that the court of appeal wrongfully extended *Pinkins v. Cardinal Wholesale Supply, Inc.*, 619 So. 2d 52 (La. 1993), I dissent from the majority’s holding that plaintiff is permanently totally disabled because of his “inability to be educated.”

The majority’s holding ignores the clear wording of La. R.S. 23:1221(2)(c) which requires that the employee prove that he is physically unable to work. The medical testimony was universally consistent that plaintiff can perform light sedentary work. Further, plaintiff testified at the administrative hearing that he stays home and cares for his 11 year old daughter, cooks, cleans the house, washes clothes, mows the lawn, deer hunts, drives his three-wheeler, and drives four hours to his doctor’s appointments. The plaintiff did not prove by clear and convincing evidence that he is physically unable to engage in any employment or self-employment.

In an effort to sidestep the requirement that the plaintiff prove he is physically unable to work, the majority hinges its opinion that plaintiff is permanently totally disabled on the fact that his attempt at rehabilitation failed. However, plaintiff's Functional Capacities Evaluation recommended that his rehabilitation include exercises, strengthening and flexibility program and cardiovascular training. Further, rather than undergo vocational training for a sedentary job, plaintiff chose to pursue his GED. After being in the program for one year, he failed six practice tests, particularly in math, and quit the program to provide child care for his 11 year old daughter at home. Thus, plaintiff's chosen mode of rehabilitation, which he quit and which involved a higher level of intellectual skill than is necessary for many sedentary jobs, failed. However, there are many sedentary jobs which do not require a high school education and which plaintiff could do with minimal training.¹ In addition, plaintiff's failed rehabilitation attempt had nothing to do with the back injury on which his disability status is based. Nevertheless, because plaintiff did not pass the GED practice tests and quit the program, the majority finds that he has unsuccessfully attempted rehabilitation due to his "inability to be educated or retrained" and is thus permanently totally disabled. This holding is erroneous because it puts an intellectual element into the permanent total disability determination under La. R.S. 23:1221(2)(c) that the legislature expressly excluded from consideration.

For all the above reasons, I respectfully dissent.

¹**Plaintiff's work history includes working for a jukebox company where he collected money out of jukeboxes and cigarette machines, and counted and recorded the amount of money he collected, and was a diesel mechanic. There is little doubt that plaintiff can still perform the job of collecting and counting money from jukeboxes, as well as many other sedentary jobs, such as working behind an auto parts counter (as he has training as an diesel mechanic).**