

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-479

AUGUST TERM, 2010

Stephen Bain	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Robert Hofmann	}	DOCKET NO. 810-12-07 Wncv

Trial Judge: Geoffrey W. Crawford

In the above-entitled cause, the Clerk will enter:

Plaintiff is incarcerated. He sued defendant, the Commissioner of Corrections, essentially alleging that he was prevented from participating in a prison work camp program because of a disability, in violation of the Americans with Disabilities Act, thereby depriving him of good-time credits that would have reduced his term of imprisonment. Following a bench trial, the court granted judgment as a matter of law to defendant under Vermont Rule of Civil Procedure 52(c), concluding that plaintiff failed to prove he was “disabled” within the meaning of the Act. Plaintiff appeals pro se from the trial court’s order. We affirm.

The court made the following findings. Plaintiff is fifty-six years old, and he has suffered from chronic back pain since at least 1998. His preferred treatment has been narcotic pain medication. Between 1998 and 2003, when plaintiff was not incarcerated, he lived a normal life. He worked on his Christmas tree farm, did house repairs, and drove power equipment for lawn projects. Plaintiff returned to prison in 2003. At that time, Dr. Mitchell Miller reviewed plaintiff’s medical history and found numerous red flags related to opiate use, which made him uncomfortable in continuing opioid therapy. Dr. Miller testified at trial that he did not believe that plaintiff suffered from a significant level of disability. He believed plaintiff was capable of sedentary work and did not have a limitation based on sitting.

A June 2003 progress report indicated that plaintiff appeared to be doing relatively well. His mood, affect, and speech were normal. He was able to sit more comfortably. Plaintiff continued to state that his pain was severe, however, and requested stronger pain medication. A nurse’s notes from the same period echo these observations. By 2004, plaintiff was receiving 40 milligrams of methadone daily. In October 2004, use of this drug was discontinued after plaintiff was caught trying to steal a methadone tablet. In February 2005, plaintiff was seen by a pain specialist at Dartmouth Hitchcock Medical Center. The doctor recommended against the resumption of narcotic medications and offered a variety of non-narcotic regimens. In June 2006, a different doctor recommended the resumption of methadone. By the summer of 2006, plaintiff had resumed using methadone to control his back pain.

Plaintiff complained that he was denied the opportunity to participate in work camp due to his disability because the prison work camp did not accept inmates who were taking narcotic prescription medicine. To satisfy his burden of proving a violation of the ADA, the court explained that plaintiff needed to show as a threshold matter that he had a disability, defined by statute as a “physical or mental impairment that substantially limits one or more major life activities of [an] individual.” 42 U.S.C. § 12102(1)(a). The court concluded that plaintiff failed to meet that burden here.

It found the only evidence that plaintiff's back pain limited an important life activity was plaintiff's own subjective testimony, which was not corroborated by the medical and other objective evidence. As recounted above, the medical professionals who examined plaintiff consistently noted an absence of symptoms (except as reported) and they observed plaintiff's ability to walk and sit without signs of discomfort. Plaintiff's reports of leg pain were not consistent with anatomical nerve distribution. Plaintiff had also been cleared for sedentary work. Indeed, the court found that plaintiff had been able to stand and converse volubly and pleasantly through an entire day of court. When he was not incarcerated, moreover, plaintiff was active in projects around his home.

Nonetheless, plaintiff consistently pushed his doctors to prescribe higher doses of pain medication. The court found that plaintiff exaggerated the impact of the pain on his activities and abilities to support a longstanding dependence on narcotics for pain relief. It found him to be "an engaging, manipulative rogue." Having failed to meet his burden of proof with respect to the element of disability, the court granted judgment as a matter of law to defendant. In its order, the court noted that plaintiff attempted to raise a variety of other claims in a post-trial filing. It found that plaintiff had not presented any meaningful evidence at trial to support such claims. This appeal followed.

Plaintiff challenges the court's factual findings, and raises various claims of error involving rulings on the record. He first asserts that the court failed to advise him of his statutory right to appointed counsel. As an initial matter, the record shows that plaintiff was aware that the Prisoner's Rights Officer might be able to offer him assistance in his case. He notified the court in writing that he intended to proceed pro se and that he intended "to forgo representation through the appointment of counsel by the court." More importantly, while plaintiff alleges that the court failed to discuss this issue with him at the hearing, he failed to order a transcript of the proceedings below. He thus failed to offer any record support for this claim. Our rules require an appellant to produce a transcript of all parts of the proceeding below that are relevant to the issues the appellant raises on appeal, and to demonstrate how his claims of error were preserved. V.R.A.P. 10(b)(1); V.R.A.P. 10(b)(2) (appellant must produce transcript if appellant challenges findings or evidence in support thereof); V.R.A.P. 28(a)(4). Having failed to order a transcript, petitioner has waived any challenge to the court's findings and oral rulings. In re S.B.L., 150 Vt. 294, 297-98 (1988); see also Appliance Acceptance Co. v. Stevens, 121 Vt. 484, 487 (1960) (appellant has burden to demonstrate error in challenged rulings below and must, therefore, produce a record that substantiates appellant's position). Plaintiff's remaining arguments fail for the same reason. We note that the court's conclusion in this case is well-supported by its findings. Given plaintiff's failure to show that any of the court's findings are clearly erroneous, we uphold its decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice