
In the Matter of the Vocational Assistance of

Dunlap, Mary P., Claimant

Contested Case No: HH02-042

PROPOSED & FINAL ORDER

July 19, 2002

SAIF CORPORATION, Petitioner

MARY P. DUNLAP, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Insurer appeals a February 7, 2002 Director's Review and Order issued by WCD's Rehabilitation Review Unit (RRU) which set aside its denial of claimant's request for vocational assistance finding that claimant has a substantial handicap to employment. Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter on May 22, 2002. Attorney Tom Seig represented petitioning insurer SAIF Corporation (SAIF or insurer). Attorney Michael Gilbertson represented respondent Mary P. Dunlap (claimant). The Department of Consumer and Business Services, Workers' Compensation Division (the department or WCD) waived appearance at hearing. SAIF called Linda Clark (Clark), Polly Thompson (Thompson), Jo Ellen Nolan (Nolan), and Brian Heinz (Heinz) as witnesses. Claimant testified on her own behalf and recalled Clark as a witness.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUE

Whether RRU's decision that claimant is eligible for vocational assistance because she has a substantial handicap to employment was characterized by an abuse of discretion pursuant to ORS 656.283(2)(c)(C).

EVIDENTIARY RULING

WCD Exhibits 1 through 21 were admitted into the record without objection. Claimant objected to the relevancy of all insurer's exhibits generated after RRU's decision which were not relevant to insurer's abuse of discretion argument. Insurer's Exhibits 20a, 20b, 20c, 20d, 20e, 22, 23 and 24 were admitted into the record over claimant's objections. The record closed on the date of hearing.

FINDINGS OF FACT

- (1) On June 28, 2000, claimant suffered a compensable right shoulder injury while working as a manager/caregiver at a residential care facility, earning \$12 per hour.

(Ex. 1; testimony of claimant).

- (2) Claimant's job description as Resident Manager required her to oversee the daily operations of the facility including scheduling and supervising 18 cooks, housekeepers, and caregivers and replacing absent workers. Claimant's job duties also included safeguarding 27 Alzheimer residents, supervising pharmacy dispensing and refills, maintaining residents' medical charts, and weekly summaries and communicating with physicians, registered nurses, family members and the facility administrator. Additionally, claimant's job duties included conducting facility tours, assisting family visitations and overseeing activity planning. (Ex. 20b; testimony of claimant).
- (3) The compensable condition became medically stationary on April 24, 2001. (Exs. 7, 9 and 10-4).
- (4) The compensable condition resulted in the following permanent physical restrictions: no work at or above the right shoulder level and no lifting over 10 pounds. (Exs. 4, 7, 8-7 and 13).
- (5) The employer at injury had no work available to accommodate claimant's physical restrictions. (Ex. 8-2).
- (6) Claimant graduated from high school and completed part of an auto body parts management training program approximately 25 years ago. (Exs. 8-3 and 17-1).
- (7) While employed by the employer at injury, claimant attended a basic three-week course as an activity leader. (Ex. 17-1; testimony of claimant).
- (8) Claimant lacks computer skills. (Testimony of claimant).
- (9) Claimant worked approximately 1½ years as a residential care manager of an Alzheimer's facility, 13 years as a caregiver/certified nurse's assistant in Alzheimer's Facilities, 9 years as a hospital cook, 1-1½ years as a molding machine operator and as a Subway assistant manager. (Exs. 8-3, 8-7 and 17-1; testimony of claimant).
- (10) As a volunteer, claimant has served as a Brownie leader, a softball coach and a Salvation Army cook. (Ex. 8-7; testimony of claimant).
- (11) Claimant's suitable wage is \$8.76 per hour.¹ (Exs. 8-8 and 18-1).
- (12) The highest Dictionary of Occupational Titles (DOT) specific vocational preparation requirement (SVP) that claimant meets is 6 (1 to 2 years of experience). (Ex. 8-8).
- (13) Claimant resides in Cornelius, Oregon which is located in OARS region 2, Multnomah and Washington counties. (Exs. 8-1 and 18-1).

- (14) On insurer's referral, Linda Clark, certified vocational counselor conducted an eligibility evaluation and concluded that claimant was capable of performing the duties of six jobs including residential manager, activities leader, program aid/group worker, rehabilitation center manager, community program aide, food concession manager. (Ex. 8; testimony of Clark).
- (15) On July 24, 2001, insurer issued a Notice of Ineligibility for Vocational Assistance. (Ex. 14).
- (16) On July 31, 2001, claimant requested administrative review. (Ex. 15).
- (17) In the course of its investigation, RRU contacted claimant, the employer-at-injury, and insurer. (Ex. 17).

CONCLUSION OF LAW

RRU's determination that claimant is eligible for vocational assistance because she has a substantial handicap to employment was not characterized by an abuse of discretion pursuant to ORS 656.283(2)(c)(C).

OPINION

The issue is whether RRU's decision should be modified pursuant to ORS 656.283 because the decision allegedly violates ORS 656.340 and is characterized by an abuse of discretion. Jurisdiction lies with the director. ORS 656.340(4). I may modify the administrative order only if: (1) it violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283 and OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with its proponent. ORS 183.450(2).

1 OAR 436-120-0005(10)(a) provides:

(10) "Suitable wage" means:

(a) For the purpose of determining eligibility for vocational assistance, a wage at least 80 percent of the adjusted weekly wage.

As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of the evidence).

Insurer's main contention is that RRU abused its discretion by failing to fully investigate the question of claimant's eligibility for vocational services. Specifically, insurer asserts that

RRU abused its discretion by failing to contact Linda Clark, the certified vocational counselor who conducted an eligibility evaluation on insurer's behalf, to discuss the nature of claimant's job-at-injury. Insurer further contends that RRU abused its discretion by failing to fully consider claimant's transferable skills in determining that each of the job goals Clark identified was not suitable for claimant. These were residential manager, activities leader, program aide, rehabilitation center manager, community program aid, and food concession manager. In contrast, claimant contends that she is not capable of performing the specified positions, that she has a substantial handicap to employment and, therefore is eligible for vocational services.

Abuse of discretion exists when an agency "exercises its discretion to an end or purpose not justified by, and clearly against, reason and evidence." *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or 707, 717 (1947).

In *Liberty Northwest Insurance Corp., v. Jacobson*, 164 Or App 37 (1999), claimant requested additional vocational training contending that the vocational provider made misrepresentations concerning the nature of the training he received. RRU denied claimant's request. During the administrative review, RRU did not investigate the claimant's contention. The administrative law judge (ALJ) found that RRU's failure to investigate the claimant's contention was an abuse of discretion and modified the department's order. The director of the department adopted and affirmed the ALJ's decision. *Gary Jacobson*, 3 WCSR 82 (1998). On appeal, the court held that the RRU's failure to adequately investigate was an abuse of discretion. The court found that the only evidence that RRU investigated and considered the claimant's contentions was a notation by RRU's vocational consultant that she spoke with the claimant. The court concurred with the director that the RRU had no discretion to ignore the claimant's contention, inasmuch as it was relevant to the inquiry. *Jacobson, supra*, 164 Or App at 46-47.

In the present case, the record reflects that RRU adequately investigated the matter. In order to ascertain the nature of claimant's job-at-injury, RRU contacted first the insurer and then the employer and obtained a written job description. I find that this investigation was adequate and that RRU did not abuse its discretion in this regard.

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6)(a) lists the criteria for eligibility including the requirement of a substantial handicap to employment. ORS 656.340(6)(b)(A) defines the term "substantial handicap" and provides:

"A 'substantial handicap to employment' exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment²."

OAR 436-120-0005(8) defines "substantial handicap" and provides:

"Substantial handicap to employment" means the worker,

because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. “Knowledge,” “skills,” “abilities” have meanings as follows:

- (a) “Knowledge means an organized body of factual or procedural information derived from the worker’s education, training or experience.
- (b) “Skills” means the demonstrated mental and physical proficiency to apply knowledge.
- (c) “Abilities” means the mental and physical capability to apply the worker’s knowledge and skills.”

Residential Manager: Insurer contends that claimant is capable of performing the duties of a residential manager. The SVP for this position is 8 (over 4 years up to and including 10 years of experience). Here, claimant had only 1½ years of experience as a residential manager when the work injury occurred. Inasmuch as claimant’s experience does not satisfy the SVP for residential manager, this position does not constitute “suitable employment” within the meaning of ORS 656.340(6)(b)(B)(i).

Activities Leader: Insurer contends that claimant is capable of performing the duties of an activities leader in a residential care facility. The strength requirement is light which comports with claimant’s permanent physical restrictions. The wage is \$12.50 which is the same as the wage at injury. The SVP is 6 (over 1 year up to and including 2 years of experience). Here, claimant completed a three-week training course as an activity leader. Also, with the employer-at-injury, she supervised the activity program for 1½ years and replaced the activity leader for one week. Additionally, claimant volunteered as a Brownie leader and a softball coach which required her to plan and organize group activities. However, to use the court’s language in *Far West Landscaping*, I cannot say that RRU exercised “its discretion to an end or purpose not justified by, and clearly against, reason and evidence.” Based on the record, I find that RRU did not abuse its discretion in deciding that claimant lacks the knowledge, skills and abilities to perform the duties of an activities leader in a residential facility.

2 ORS 656.340(6)(b)(B) provides in part:

(B) “Suitable employment” means:

- (i) Employment of the kind for which the worker has the necessary physical capacity, knowledge, skills and abilities.
- (ii) Employment that is located where the worker customarily worked or is within reasonable commuting distance of the worker’s residence; and
- (iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection (5) of this section.

Program Aid/Group Worker: Based on its interpretation of claimant’s transferable skills, insurer argues that claimant is capable of performing the duties of a program aide/group worker. RRU determined that claimant does meet the SVP of 6 (over 1 year

up to and including 2 years). Again, I cannot say that RRU abused its discretion in reaching this conclusion.

Rehabilitation Center Manager: Insurer argues that claimant is capable of performing the duties of a rehabilitation center manager. RRU determined that claimant does not meet the SVP of 7 (over 2 years up to and including 4 years). Here, claimant worked for 1½ years as a residential manager in an Alzheimer facility where rehabilitation is not a goal; claimant has no experience in medical rehabilitation. Based on the record, I agree with RRU's conclusion that rehabilitation center manager does not constitute suitable employment for claimant.

Community Program Aide: Insurer argues that the position of community program aide constitutes suitable employment for claimant. RRU determined that claimant met the SVP of 3 (over 30 days up to and including 3 months of experience). However, RRU conducted a labor market survey and found that of 13 job orders over a six-month period in Region 2, two positions paid inadequate wages and the other eleven required computer or bilingual skills that claimant does not possess. Furthermore, claimant has no experience with the criminal justice system or farmworker advocacy. Based on the record, I agree with RRU's conclusion that the position of community program aide does not constitute suitable employment for claimant.

Food Concession Manager: Insurer argues that the position of food concession manager constitutes suitable employment for claimant. RRU determined that claimant met the SVP of 6 (over 1 year up to and including 2 years experience). However, RRU conducted a labor market survey and found that of 90 job orders over a six-month period in Region 2, 62 required computer and office skills that claimant does not possess. RRU further found that ten of the 90 job orders exceeded claimant's physical restrictions. Finally, RRU found that five of the 90 job orders paid unsuitable wages for claimant. Based on the record, I agree with RRU's conclusion that food concession manager does not constitute suitable employment for claimant.

In conclusion, I find that RRU did not abuse its discretion by failing to contact insurer's vocational consultant because RRU obtained a written job description from the employer. Furthermore, I find that RRU did not abuse its discretion by weighing claimant's training, experience and transferable skills and determining that claimant has a substantial handicap to employment. Therefore, claimant is eligible for vocational services.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). Considering the factors listed in OAR 436-001-0265, \$2,625 is a reasonable fee for claimant's attorney services in this matter.

ORDER

IT IS HEREBY ORDERED

1. The Director's Review and Order dated February 7, 2002 is affirmed.
2. Insurer shall pay to claimant's attorney a fee of \$2,625.

DATED this ____ day of July 2002.

Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel