

In the Matter of the Vocational Assistance Dispute of

Brooke, Teresa, Claimant

Contested Case No: H02-084

FINAL ORDER

August 22, 2002

TERESA BROOKE, Petitioner

TRAVELERS INDEMNITY CO., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Insurer timely filed exceptions to Administrative Law Judge (ALJ) Ella D. Johnson's March 11, 2003 Proposed and Final Contested Case Hearing Order. Claimant timely filed a response, to which insurer responded. This matter comes before the director for a final order.

The entire record of this proceeding has been reviewed, including the exhibits entered into the record, a written transcript of the hearing, and the parties' written arguments. The director agrees with insurer's exceptions regarding ORS 656.283. Claimant's response focuses exclusively on the facts. The director declines to adopt the proposed order, and reinstates the August 2, 2002 Director's Review and Order affirming claimant's ineligibility for vocational assistance benefits.

The director's order following administrative review of a vocational assistance matter shall be based on a record sufficient to permit review, and shall be modified at a contested case hearing only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). The only basis at issue here is the director's exercise of discretion. ALJ Johnson reversed¹ the August 2, 2002 Director's Review and Order issued by the Rehabilitation Review Unit, finding that the unit abused the director's discretion "by failing to fully investigate the nature of claimant's job at injury to determine whether [claimant] could return to her regular job."

Based on the record before the unit and that before ALJ Johnson, the director disagrees; the unit considered all accounts of the nature of claimant's job at injury, and determined that claimant could return to it. While both the claimant and ALJ Johnson may disagree with the unit's conclusion and evaluation of the evidence, that alone is not a basis on which to modify the unit's order.

At the contested case hearing on review of the unit's order regarding vocational assistance, additional evidence may be adduced and additional findings of fact may be made. *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37, 42 (1999), citing *Colclasure v. Wash. County School Dist. No. 48-J*, 317 Or 526, 537 (1993). The order may only be modified,

¹ The proposed order states that the August 2 order is modified rather than reversed; however, the August 2 order found that claimant was able to return to her regular employment, and the ALJ found that claimant was not able to return to her regular work. The ALJ further remanded the matter to the insurer for a substantial handicap evaluation.

however, on one of the grounds listed in ORS 656.283(2)(c). Abuse of discretion under ORS 656.283(2)(c)(D) is alleged here. On a review for abuse of discretion, “[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.” *Jacobson*, 164 Or App at 45. The permissible range of discretion may be identified by “[a]sking whether discretion was exercised ‘to an end or purpose not justified by, and clearly against, reason and evidence.’” *Id.* Also relevant to the inquiry may be the purposes and considerations specified by the legislature. *Id.*

The court in *Jacobson* agreed that the director’s discretion was abused because the unit failed to consider relevant circumstances. The claimant had specific concerns about representations made to him regarding the training program. The unit had no discretion to ignore the claimant’s concerns, but appeared to ignore them nonetheless. While the record did contain a note indicating that the unit knew claimant was dissatisfied with the training, neither the record nor the order discussed the allegation that the training was misrepresented, nor explained why the unit discounted claimant’s dissatisfaction. The unit’s failure to adequately investigate and consider claimant’s concerns amounted to an abuse of discretion. *Id.* at 46-47.

This case is distinguishable from *Jacobson*. Here, claimant contends that she is eligible for vocational assistance because she cannot return to regular employment. Two versions of claimant’s regular employment were offered. The version reflected in the job analysis indicates that claimant’s regular work hours were 8:00 a.m. to 5:00 p.m. The version offered by claimant is that she worked 60-80 hours, 6-7 days per week. The two do not differ in the descriptions of the tasks to be performed, but only in the hours required.² ALJ Johnson notes as much in her findings of fact: “The primary difference between the employer’s description and claimant’s description of the job [] was that claimant’s description included more hours worked because she was performing two jobs.” (Proposed order, pages 2-3.) Therefore, the aspect of the nature of claimant’s job at injury that the unit allegedly failed to fully investigate is the number of hours claimant worked. However, the record that was before the unit is replete with references to claimant’s contentions regarding her long work hours, and the administrative order discusses the argument that she cannot return to work because of the number of hours. The order goes on to find that, despite the long hours, the evidence is that claimant can return to her regular work.

In reaching its decision, the unit considered the following evidence, as described in the findings of fact (Ex. 33-1, 33-2):

1. Dr. Morrissey’s April 7, 1999 report concluding that claimant was required to perform the work normally done by two people and regularly worked 60 to 70 hours per week, and describing long hours of driving, extensive note taking, and keyboarding. (Ex. 6)
2. Dr. Van Allen’s March 29, 2001 arbiter report concluding that claimant is not

² Claimant makes much of the fact that she was really performing the jobs of two or more people in doing both the clinical consultant and territorial sales manager jobs. The ALJ even concludes that “the preponderance of the evidence establishes that claimant’s regular employment at the time of injury was that of the dual role of territorial sales manager and clinical consultant.” However, no distinction is drawn between the tasks required of each position.

significantly limited in ability to repetitively use the hands, wrists, or forearms. (Ex. 11)

3. Ms. Broten's September 14, 2001 job analysis listing claimant's work hours as 8:00 a.m. to 5:00 p.m., and claimant's confirmation that the job analysis was accurate except for the work hours. (Ex. 14-5, 25)

4. Dr. Canepa's October 3, 2001 release to the tasks of claimant's regular work (Ex. 14-4), and his June 27, 2002 response to Mr. Bohnet's evaluation and Dr. Morrissey's report, concluding that claimant should be able to perform the position. (Ex. 32)

5. Ms. Broten's October 13, 2001 ineligibility determination. (Ex. 16)

6. Claimant's own report in an affidavit that she worked 60 to 80 hours weekly, including evenings and weekends, and attempted to fill two positions in a large territory. (Ex. 25)

7. Mr. Bohnet's November 15, 2001 functional capacity evaluation concluding that claimant was capable of performing the tasks based on an 8-hour work day (Ex. 20), and his May 29, 2002 statement that there is not enough information to determine if claimant is capable of performing the tasks based on a 60-70 hour work week. (Ex. 29)

Further, the vocational consultant explained claimant's contentions regarding the hours worked in a letter to Mr. Bohnet and in a letter to Dr. Canepa. (Ex. 26, 31, 32.) In the letter to Mr. Bohnet, the consultant states that, having received nothing to the contrary from the insurer or the employer, he will accept claimant's statements regarding her work hours. (Ex. 26-1.) He goes on to clarify that Dr. Canepa released claimant to the job "when it was described as 40 hours per week." (Ex. 26-2.) The reviewer further informs Dr. Canepa of the hourly discrepancy, and encloses a copy of Dr. Morrissey's report that clearly describes the long hours. (Ex. 31-1.) Ms. Broten also considered Dr. Morrissey's report and provided a copy to Dr. Canepa. (Ex. 15-2, 15-5)

Based on this record, the reviewer was clearly aware of claimant's contentions regarding the nature of her job, believed her regarding the hours, and attempted to obtain further clarification from the providers in light of claimant's contentions. Unlike *Jacobson*, the reviewer did not ignore claimant's concerns.

After considering and weighing the evidence in the record the unit concluded that, despite the number of hours claimant worked, she nonetheless did not meet the eligibility requirements under the rules. The unit based its conclusion on Dr. Canepa's release to regular work and Dr. Van Allen's finding that claimant was not significantly limited in repetitive use.

ALJ Johnson relied on much of the same record as the reviewer. ALJ Johnson explicitly relied on Dr. Puziss' opinion, while the unit did not do so in its order; Dr. Puziss' November 7, 2001 letter was in the record before the unit, however.³ ALJ Johnson relied on claimant's

³ Dr. Puziss' opinion appears to conflict with both Dr. Van Allen's report and the functional capacities evaluation as to claimant's ability to repetitively grasp. On Nov. 7, 2001, Dr. Puziss states, "She cannot return to her original occupation because it requires too much writing and/or typing. * * * It looks like she will always have to avoid

testimony at hearing regarding the nature of her job. However, the unit had before it claimant's own affidavit describing the nature of her job. Based on facts gleaned from claimant's testimony at hearing, ALJ Johnson further discounted Dr. Canepa's opinion, and relied on Dr. Puziss' opinion and Dr. Morrissey's report. ALJ Johnson did not consider the findings of the medical arbiter.

The unit and the ALJ each weighed the evidence in the record and reached different conclusions. However, the unit's reliance on different evidence than the ALJ does not rise to the level of being "clearly against reason and evidence." The record clearly demonstrates that the unit was aware of claimant's contentions and investigated them. That the ALJ reached a different conclusion is not a basis to modify the unit's order under ORS 656.283(2)(c). Accordingly, the unit's order is reinstated.

Claimant has not prevailed and is not entitled to an award of attorney fees. ORS 656.385(1).

IT IS HEREBY ORDERED that the March 11, 2003 Proposed and Final Contested Case Hearing Order is not adopted. The August 2, 2002 Director's Review and Order is reinstated. Claimant is not eligible for vocational assistance.

DATED this 22nd day of August, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

By: _____
John Shilts, Administrator
Workers' Compensation Division

heavy and/or repetitive grasping of either hand, more on the right." (Ex. 18.) On March 29, 2001, Dr. Van Allen states, "The patient has good grip strength measurements; however, there does not appear to be any weakness from her preoperative status, which showed actually lower grip strength measurements based on Dr. Puziss' measurements July 15, 1999. * * * The worker is not significantly limited in the ability to repetitively use the hands, wrists, or forearms based on the carpal tunnel syndrome and its subsequent treatment." (Ex. 11-2.) And Mr. Bohnet states on November 15, 2001, in part, "Ms. Brooke * * * did not display any limitations for grasping or fine motor activity, except with typing. * * * Ms. Brooke is appropriate for full time medium work, including tasks which involve grasping and fine motor activity." (Ex. 20-1.) Mr. Bohnet's 6-page report is much more comprehensive than the 1 1/2 page letter from Dr. Puziss that ALJ Johnson relied upon.