
In the Matter of the Vocational Assistance of

Davison, Daniel J., Claimant

Contested Case No: H03-069

PROPOSED & FINAL ORDER

June 10, 2004

CNA CLAIMS PLUS, Petitioner

DAINEL J. DAVISON, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

Insurer appeals an administrative order issued on May 23, 2003 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On June 18, 2003, WCD referred the matter to the Office of Administrative Hearings. On December 8, 2003, Administrative Law Judge Catherine P. Coburn convened and continued a contested case hearing. Petitioner, CNA and its insured, Bear Springs Forest Products, (insurer) were represented by attorney Matthew F. Denley. Respondent Daniel J. Davison (claimant) was represented by attorney George Wall. Vocational consultant Steven Cardinal testified on insurer's behalf and claimant testified on his own behalf. On May 6, 2004, I reconvened the hearing for closing argument. The record closed on May 10, 2004 with the receipt of additional evidence

ISSUE

Whether RRU incorrectly determined that claimant suffers a substantial handicap to employment and is eligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 23, as well as claimant's Supplementary Exhibit 24, were received into the record without objection.

FINDINGS OF FACT

(1) Claimant has low math and reading skills. (Exs. 7-3 and 15-7.) Beginning in 1994, claimant worked in employer's lumber mill performing four job functions. Every two hours, claimant rotated among the following functions: grader, off-bearer, and trim saw and banding operator. Claimant lived in Battleground, Washington and worked in Portland, Oregon. (Ex. 1; testimony of claimant.)

(2) On July 26, 2000, claimant developed an occupational disease claim involving the left elbow. (Ex. 1.) Insurer initially accepted a left elbow strain and the claim was closed without permanent partial disability. (Exs. 3 and 4.) On August 1, 2001, Geoffrey E. Baum, D.O. performed a surgical medial release. (Ex. 7-1 and 7-3.) In September 2001, insurer accepted an aggravation claim and amended the acceptance to include left medial epicondylitis/flexor tendonitis. (Exs. 6 and 13.)

(3) On April 14, 2002, attending physician Baum imposed the following work restrictions: no repetitive lifting with the left upper extremity greater than 5 pounds, no single lifting greater than 20 pounds, and no use of vibratory tools. (Ex. 11-2.)

(4) In June 2001, Steven R. Cardinale, M.S. evaluated claimant's eligibility for vocational assistance. He considered claimant's cognitive and physical limitations and concluded that claimant was capable of performing the following occupations: food preparation, machine feeder and offbearer, assembler and fabricator, electric and electronic assembler, flagman and crossing guard. (Ex. 15.) On June 21, 2002, insurer notified claimant that he was ineligible for vocational assistance. (Ex. 15-2.)

(5) Claimant's average weekly wage (AWW) on the date of aggravation was \$249.30 per week or \$6.50 per hour working 39 hours per week. (Ex. 21-6.)

CONCLUSION OF LAW

RRU correctly determined that claimant suffers a substantial handicap to employment and is eligible for vocational services.

OPINION

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 which 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). 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). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

RRU determined that claimant suffers a substantial handicap to employment, and therefore, is eligible for vocational services. RRU applied OAR 436-120-0340(2)(g) and found that insurer's vocational evaluation was faulty. RRU determined that reasonable opportunities for employment did not exist in the Portland metropolitan area for production assembler, small products assembler, machine feeder and production helper jobs. RRU further reasoned that electronic assembly and flagger jobs require reading and writing skills that are beyond claimant's proficiency level. Insurer contends that RRU abused its discretion by rejecting its eligibility evaluation. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Under ORS 656.340(1), insurer is obligated to provide vocational services to a claimant who is eligible. ORS 656.340(6)(a) provides:

A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of the injury or the aggravation, and the worker has a substantial handicap to employment.

ORS 656.340(6)(b)(A) defines “substantial handicap”.

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 employment.

ORS 656.340(6)(b)(B) defines “suitable employment”.

“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 section¹. The director shall adopt rules providing methods of calculating the weekly wage currently being paid for the worker’s regular employment for use in determining eligibility and for providing assistance to eligible workers***.

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).

OAR 436-120-0340 provides in pertinent part:

¹ ORS 656.340(5) provides in pertinent part:

As used in this section and subsection (6) of this section, “regular employment” means the employment the worker held at the time of the injury or the claim for aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance; *****.

(2) To complete the substantial handicap evaluation the vocational counselor shall submit a report documenting the following information:

(g) An analysis of the worker's labor market utilizing standard labor market reference materials including but not limited to Employment Department (OED) information such as Oregon Wage Information (OWI), Oregon Comprehensive Analysis File and other publications of the Occupational Program Planning System (OPPS) and material developed by the division. When using the OWI data, the presumed standard shall be the 10th percentile unless there is sufficient evidence that a higher or lower wage is more appropriate. When such data is not sufficient to make a decision about substantial handicap, the vocational counselor shall perform individual labor market surveys as described in OAR 436-120-0410(6); *****.

In construing the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). See also *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (court's task in determining the legislative intent is to first examine the statute, including text and context, and if the intent is clear, to proceed no further with its analysis.) Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *Don't Waste Oregon Com. V. Energy Siting Council*, 320 Or 132 (1994). Here, RRU interpreted OAR 436-120-0340(2)(g), found insurer's labor market survey inadequate and concluded that claimant suffers a substantial handicap to employment. Inasmuch as RRU's interpretation of the rule is plausible and not inconsistent with any source of law, I defer to the agency's expertise. Furthermore, I cannot say that RRU exercised its discretion to an end clearly against reason and the evidence. Accordingly, finding no abuse of discretion, I affirm.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(3). Considering the factors listed in OAR 436-001-0265, I find that \$3,375 (15 hours at \$225 hourly rate) is a reasonable fee for claimant's attorney's services in this matter.

ORDER

IT IS HEREBY ORDERED that:

The administrative order dated May 23, 2003 is affirmed.