
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Holland, Christopher R., Claimant

Contested Case No: H03-015

FINAL ORDER

October 31, 2003

CHRISTOPHER R. HOLLAND, Petitioner

AIG CLAIM SERVICES, INC., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

AIG Claim Services Inc. (insurer), by and through its attorney Jerald P. Keene, timely submitted exceptions to Administrative Law Judge Catherine P. Coburn's June 9, 2003 Proposed and Final Contested Case Hearing Order. The ALJ reversed the December 31, 2002 Director's Review and Order finding claimant, Christopher R. Holland, ineligible for vocational services. Claimant, by and through his attorney Gary Borden, timely responded, and insurer replied.

The underlying issue is whether the Director's Review and Order correctly determined that claimant is no longer eligible for vocational services. The record of this proceeding, including the exhibits, the audio recording of the hearing, and the parties' written arguments, has been reviewed. The director adopts the ALJ's proposed order as the Final Order, except as supplemented below. *See* OAR 137-003-0655(6).

The director adopts the ALJ's findings of fact as supported by a preponderance of the evidence in the record. *See* OAR 137-003-0665(4).

On behalf of the director and at claimant's request, the Rehabilitation Review Unit issued a Director's Review and Order on December 31, 2002. Relying on *Kaeo v. SAIF Corporation*, 185 Or App 1 (2002), the unit found that after the September 19, 2002 combined condition denial, claimant no longer had an accepted disabling claim. Accordingly, he was no longer eligible for vocational assistance under OAR 436-120-0350(1) and 436-120-0320(1). The unit further declined to consider whether insurer had new information under OAR 436-120-0350(1), because to do so would be to determine whether insurer had sufficient information to issue the denial.¹

In vocational assistance disputes, the Director's Review and Order can only be modified 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). Here, the ALJ found that the unit committed legal error by violating ORS 656.005(7)(a)(B) and OAR 436-120-0350(1). The ALJ disagreed that the unit could not consider whether insurer had new information under OAR 436-120-0350(1), and went on to find that insurer did not obtain new information between the time it found claimant eligible and the time it found claimant ineligible. The ALJ further disagreed that the combined condition denial meant that claimant no longer had an accepted disabling claim and, relying on *South Lane*

¹ "Matters concerning a claim" are within the jurisdiction of the Workers' Compensation Board rather than the director. ORS 656.704.

County School District v. Arms, 186 Or App 361 (2003), *rev denied* ___ Or ___ (Jul. 29, 2003), found that the unit misconstrued *Kaeo*. The ALJ awarded claimant's attorney a fee in the amount of \$3,125.

Insurer excepted to the ALJ's order, contending that the ALJ committed legal error in finding the worker eligible in a claim in which ongoing compensability has been denied. The denial of the combined condition meant claimant no longer had a "compensable injury" as defined in ORS 656.005(7)(a)(B). In order to be eligible for vocational assistance, you must have an accepted, compensable claim. Insurer further objects to the ALJ's finding that insurer did not obtain new information, contending it amounts to ruling on the procedural validity of a compensability denial. On this basis, insurer challenges the validity or application of OAR 436-120-0350(1). The new information, according to insurer, was the denial itself. Insurer further discusses current condition denials versus combined condition denials -- in both cases, further benefits should be terminated under ORS 656.262(2). Insurer invites the director to take a position on the reconciliation of *Kaeo* and *Arms*.

Claimant responds that the ALJ's order should be adopted and affirmed with one correction. Claimant contends the evidence that claimant's condition was no longer compensable was obtained prior to finding claimant eligible for services. Therefore, insurer obtained no new information after the eligibility determination but before finding claimant ineligible. Further, claimant argues that insurer's position is inconsistent with *Arms*. Claimant submits a statement of services asking for an additional attorney fee of \$750 for the exceptions process.

The director agrees with claimant that the ALJ's statement that "Only Dr. Tesar's report establishes a pre-existing condition and it was authored in February 2002, several months after insurer issued the notice of ineligibility" [proposed order, page 5] is in error. The notice of ineligibility was issued September 25, 2002, and the notice of eligibility was issued July 16, 2002, both well after February 2002. The proposed order is corrected in that respect.

The director agrees with the ALJ's conclusion. In spite of insurer's combined condition denial, claimant remains eligible for vocational assistance under the statute and rules. While the director agrees with the insurer that she has no jurisdiction to rule on the procedural validity of a major contributing cause denial, the director disagrees that is what OAR 436-120-0350(1) purports to do. The ALJ found, for purposes of vocational assistance eligibility, no new information in the record between the date insurer found claimant eligible and the date the insurer found claimant ineligible. The fact that insurer's denial was upheld does not change the fact that claimant remains eligible for vocational assistance under the statute and rules. Contrary to insurer's contention, the ALJ did not ignore the denied status of the claim. Rather, the ALJ found that the denied status had no impact on vocational eligibility.

Because claimant has prevailed, his attorney is entitled to a fee. ORS 656.385(1). The director considers the following factors in awarding attorney fees: the time devoted to the case; the complexity of the issues; the quality of representation; the value of the interest involved; the nature of the proceedings; the benefit secured for the claimant; the risk that an attorney's efforts may go uncompensated; the assertion of frivolous issues or defenses; a statement of services, if submitted; and any other relevant consideration. OAR 436-001-0265(1).

Applying the above factors, the ALJ awarded \$3,125. Insurer did not object to the ALJ's award. Claimant's attorney requests an additional \$750 for three hours spent in responding to insurer's exceptions at the rate of \$250 per hour. Insurer has not objected to the request. Therefore, the director will award the additional fee requested. Accordingly, claimant's attorney is awarded an additional \$750, for a total of \$3,875.

IT IS HEREBY ORDERED that: the December 31, 2002 Director's Review and Order is modified. The June 9, 2003 Proposed and Final Order is adopted as supplemented above. Claimant is eligible for vocational services.

DATED this 31st day of October, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

By: _____
John Shilts, Administrator
Workers' Compensation Division