
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Holland, Christopher R., Claimant

Contested Case No: H03-015

PROPOSED AND FINAL ORDER

June 9, 2003

CHRISTOPHER R. HOLLAND, Petitioner

AIG CLAIM SERVICES, INC., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a December 31, 2002 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On April 2, 2003, Administrative Law Judge Catherine P. Coburn (ALJ), Office of Administrative Hearings¹, conducted a hearing in this matter. Attorney Gary Borden represented petitioner Christopher R. Holland (claimant). Attorney Gordon Clark represented respondent, the Boeing Company and American Insurance Group (insurer). WCD waived appearance at hearing. No witnesses testified. The record closed on May 9, 2003 upon receipt of supplementary exhibits.

ISSUE

Whether RRU correctly determined that claimant is no longer eligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 17 were admitted into the record without objection. Insurer's Supplementary Exhibit 16A and 18 were admitted over claimant's relevance and untimely submission objections. Claimant's Supplementary Exhibit 2A and insurer's Supplementary Exhibit 19 were admitted into the record without objection. Claimant's Supplementary Exhibit 20 was admitted over insurer's relevance objection.

FINDINGS OF FACT

(1) On October 2, 2000, claimant suffered a right knee injury while working as an airplane machine part painter. (Ex. 1.) On April 4, 2002, insurer accepted a disabling claim for "medial meniscus tear, right knee." (Exs. 2-4 and 9-4.) On August 15, 2001, the accepted condition became medically stationary and on April 4, 2002, insurer issued a Notice of Closure

¹ The Office of Administrative Hearings (OAH) was previously called the Hearing Officer Panel (the Panel). The Panel's name was changed to the Office of Administrative Hearings by House Bill 2526, which became effective upon the Governor's signature on May 22, 2003.

awarding 9 percent permanent partial disability (PPD). (Ex. 2-1.) An Order on Reconsideration dated July 12, 2002, reduced the PPD award to 6 percent. (Ex. 3.)

(2) On July 16, 2002, insurer notified claimant that he was eligible for vocational assistance. (Ex. 4.)

(3) On February 21, 2002, Paul Tesar, MD examined claimant at insurer's request. He opined that the work injury combined with pre-existing chondromalacia of the patella and that the major contributing cause of ongoing pain complaints and disability was the pre-existing condition. (Ex. 16A-3.)

(4) On September 18, 2002, insurer issued a notice of modified acceptance specifying that it accepted "right knee medial meniscus tear combined with a preexisting, non-compensable chondromalacia of the patella." (Exs. 5, 10 and 11.)

(5) On September 19, 2002, issued a current condition denial pursuant to ORS 656.005(7)(a)(B) stating, "***the otherwise compensable injury is no longer the major contributing cause of the disability of your combined condition or the major contributing cause of the need for treatment of your combined condition." (Ex. 6-1.)

(6) On September 20, 2002, claimant wrote to insurer noting that claimant had been found eligible for vocational assistance but no services had been provided. (Ex. 7.)

(7) On September 25, 2002, insurer issued a Notice of End of Eligibility for Vocational Assistance citing OAR 436-120-0350(1). (Ex. 8-1.)

(8) On September 30, 2002, insurer closed the newly accepted combined condition listing the medically stationary date as August 15, 2001 and awarding no additional PPD. (Ex. 9-1.) Insurer listed the accepted condition as "right knee meniscus tear." (Ex. 9-4.)

(9) On October 7, 2002, and again on October 21, 2002, insurer corrected the date listed on the initial notice of modified acceptance. Insurer reiterated "***we are accepting your claim for right knee medial meniscus tear combined with pre-existing, non-compensable chondromalacia of the patella." (Exs. 10 and 11.)

(10) On November 8, 2002, insurer issued a Correcting Notice of Closure revising the end date for the aggravation rights. (Exs. 9 and 12.)

(11) In an Opinion and Order dated March 5, 2003, Workers' Compensation Board ALJ Hoguet affirmed the July 12, 2002 Order on Reconsideration and the September 19, 2002 current condition denial. (Ex. 18-11.) Claimant appealed. (Ex. 19.)

CONCLUSION OF LAW

RRU incorrectly determined that claimant is no longer eligible for vocational assistance.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) 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; 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 the proponent. ORS 183.450(2). As petitioner, claimant 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).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible.

RRU determined that claimant was no longer eligible for vocational assistance because currently, he has no accepted claim. Relying on *Kaao v. SAIF Corp.*, 185 Or App 1 (2002) *rev den.*, 335 Or 180 (2003), RRU reasoned that insurer's current condition denial revoked the previously accepted claim. Also, RRU declined to consider whether insurer obtained new information which did not exist or which the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility as required by OAR 436-120-0350(1).

Claimant contends that the Director's Review and Order violates ORS 656.005(7)(a)(B) and OAR 436-120-0350(1). In support of his position, claimant first argues that the record contains no new evidence to justify termination of vocational eligibility as required by OAR 436-120-0350(1). Claimant next argues that he remains eligible based on the initial accepted claim and PPD award, despite insurer's subsequent current condition denial issued under ORS 656.005(7)(a)(B). Claimant further argues that the current condition denial does not negate the previous claim acceptance and vocational eligibility. Claimant characterizes the denial of vocational assistance based on issuance of a current condition denial a "procedural construct" on insurer's part. Finally, claimant cites *Arms v. South Lane County Sch. Dist. and Connecticut Indemnity Co.*, ___ Or App ___ (Feb. 12, 2003).

New Information

Insurer ended claimant's eligibility based on OAR 436-120-0350(1) which provides:

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

- (1) The worker does not or no longer meets the eligibility requirements as defined in OAR 436-120-0320. The insurer

must have obtained new information which did not exist or which the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility.

OAR 436-120-0320 lists the criteria for determining vocational eligibility. Subsection (1) provides in part:

(1) [t]he insurer shall contact a worker with an accepted disabling claim or claim for aggravation to begin the eligibility determination***

RRU incorrectly declined to consider whether insurer obtained new information before terminating vocational eligibility as required by OAR 436-120-0350(1). Instead, RRU deferred to the Workers' Compensation Board where litigation was pending concerning compensability of the current condition and the extent of PPD. However, the Board lacks jurisdiction over vocational eligibility and its determinations concerning compensability and PPD do not decide the vocational question.² Furthermore, in enacting ORS 656.726(4)(a)³, the legislature charged WCD with responsibility to promulgate rules and issue orders applying those rules. Finally, where WCD has promulgated a rule, it is not free to ignore the rule. *AETNA Casualty & Surety Company v. Blanton*, 139 Or App 283, 286 (1996).

I find that the record contains no new information pertaining to eligibility which did not exist or which the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility. Insurer determined that claimant was eligible in July 2002. The record contains only one medical arbiter's report dated before the notice of eligibility and it makes no mention of a pre-existing condition.

Insurer terminated claimant's vocational eligibility in September 2002. The record contains no evidence prior to that time indicating that claimant suffered a pre-existing condition or that the preexisting condition had become the major contributing cause of claimant's disability. 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. Inasmuch as the record contains no new evidence as required by OAR 436-120-0350(1), termination of claimant's vocational eligibility is invalid.

² ORS 656.005(7)(a)(B), which governs current conditions, contains no requirement of new information. In contrast, OAR 436-120-0350(1), which governs vocational eligibility, requires that the insurer obtain new information as a basis for terminating eligibility.

³ ORS 656.726(4)(a) provides:

(4) The director is hereby charged with the duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties.

Current Condition Denial

Insurer takes the position that the subsequent current condition denial, issued under ORS 656.005(7)(a)(B) voids the initial acceptance as if it never existed and negates claimant's entitlement to vocational assistance which flowed from the accepted claim and the PPD award. I find insurer's argument unpersuasive.

ORS 656.005(7)(a)(B) provides:

If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.

In construing a statute, my task is to discern the intent of the legislature. The first level of analysis is to examine both the text and context of the statute, including other provisions of the same statute. If the legislature's intent is clear, no further inquiry is necessary. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993). The text of the statute indicates that a current condition denial does not operate as an outright revocation of the accepted claim. Following a current condition denial, the combined condition remains compensable for a conditional period and to a conditional extent.

Furthermore, the context of the statute renders insurer's argument unpersuasive. It fails to distinguish a back-up denial pursuant to ORS 656.262(6)(a)⁴ from a current condition pursuant to ORS 656.005(7)(a)(B). A back-up denial, based on fraud, misrepresentation or other illegal activity, extinguishes a claim as if it never existed and the claimant is entitled to no workers' compensation benefits of any kind. In contrast, a current condition denial relieves the insurer of liability from the date of issuance forward. However, under ORS 656.005(7)(a)(B), the claimant remains entitled to any benefits that were established prior to the date of the current condition denial.

I find that RRU misconstrued the *Kaeo* case. In *Kaeo*, the insurer initially accepted a lumbar strain. Later, the insurer issued a modified acceptance of a combined condition and denied the current condition. The court affirmed the current condition denial. RRU interpreted *Kaeo* to mean that following issuance of a current condition, the initial claim acceptance and any

⁴ORS 656.262(6)(a) provides in part:

The insurer or self-insured employer may revoke acceptance and issue a denial at any time when the denial is for fraud, misrepresentation or other illegal activity by the worker. If the worker requests a hearing on any revocation of acceptance and denial alleging fraud, misrepresentation or other illegal activity, the insurer or self-insured employer has the burden of proving, by a preponderance of the evidence, such fraud, misrepresentation or other illegal activity.

benefits flowing therefrom are extinguished. However, in *Kaeo*, the court quoted the Board's language to the contrary:

“A current condition denial does not ‘extinguish’ a prior, final permanent disability award. *Just because a current condition denial has issued does not mean that there was never any accepted condition or that any final permanent disability awards are ‘wiped out.’*” (*Kaeo*, 185 Or App at 4.)

(Emphasis in the original.)

In *Kaeo*, the court reasoned that a PPD award that was established prior to issuance of a current condition denial was not extinguished. I find that the same logic applies to vocational eligibility. Inasmuch as insurer notified claimant that he was eligible for vocational assistance before it issued the current condition denial, claimant's vocational eligibility was not extinguished. Even though the current condition denial was affirmed, the vocational eligibility flows from the initial accepted claim and remains viable.

This conclusion is consistent with the court's reasoning in *Arms*. There, the insurer initially accepted a knee strain. Later, the insurer issued a modified acceptance of a combined condition, denied compensability of the current condition and issued a notice of closure. The court held that the Board properly rescinded the notice of closure based on insufficient impairment findings. On appeal, the insurer argued that no PPD benefits could be awarded because there was no accepted claim at the time of closure. Rejecting this argument, the court reasoned,

Employer's argument rests on a false premise—that no accepted injury remains after it is determined to no longer be the major contributing cause of a combined condition—that derives from employer's failure to distinguish between the denial of the continuing compensability of the combined condition versus a denial of the original accepted injury. The text and context of the relevant statutes demonstrate that an accepted injury exists apart from a combined condition.

Employer's interpretation of the statutes in effect turns the denials under ORS 656.262(6)(c)⁵ and (7)(b)⁶ into backup

⁵ ORS 656.262(6)(c) provides:

An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005(7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-

denials that revoke the original acceptance of a claim. *See* ORS 656.262(6)(a) (providing circumstances—fraud, misrepresentation, and other illegal activity—where the insurer or self-insured employer may revoke acceptance and issue a denial.) To the contrary, the denial permitted by ORS 656.262(6)(c) is a denial of the continuing compensability of the combined condition and not a revocation of the original accepted injury. Thus, when the continuing compensability of a combined condition is denied because the otherwise compensable injury is no longer the major contributing cause of the combined condition, the underlying accepted injury remains compensable and must be closed pursuant to ORS 656.268(1).

In *Arms*, insurer argued that no PPD could be awarded because there was no accepted claim following issuance of a current condition denial. The court rejected that argument. Here, insurer asserts a similar argument *viz.*, that claimant is not eligible for vocational assistance because there is no accepted condition following issuance of a current condition denial. Following the court's reasoning in *Arms*, I find that the current condition denial does not revoke the original accepted claim and insurer remains liable for benefits that were established prior to issuance of the denial. Inasmuch as claimant's eligibility for vocational assistance flows from the initial accepted claim and was established before issuance of the current condition denial, it survives the denial.

In conclusion, I agree with claimant's contention that the administrative order violates ORS 656.005(7)(a)(B) and OAR 436-120-0350(1). RRU first erred by declining to consider whether the insurer had obtained new information as a basis for terminating vocational eligibility as required by OAR 436-120-0350(1). Additionally, I find that insurer failed to obtain new information before it issued a notice of ineligibility, and therefore, the termination was invalid. Furthermore, claimant's eligibility for vocational assistance remains viable despite the current condition denial issued under ORS 656.005(7)(a)(B). Finally, finding that the administrative order reflects legal errors, I modify it.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Applying the factors listed in OAR 436-001-

insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition.

⁶ ORS 656.262(7)(b) provides:

Once a worker's claim has been accepted, the insurer or self-insured employer must issue a written denial to the worker when the accepted injury is no longer the major contributing cause of the worker's combined condition before the claim may be closed.

0265(1), I find that \$3,125 is a reasonable fee for claimant's attorney's services in this matter.

ORDER

IT IS HEREBY ORDERED

The Director's Review and Order dated December 31, 2002 is reversed.

DATED this 9th day of June 2003.

Catherine P. Coburn
Administrative Law Judge
Office of Administrative Hearings