

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Kramer, Candace C., Claimant

Contested Case No: H02-126

PROPOSED AND FINAL ORDER

March 14, 2003

CANDACE C. KRAMER, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a November 25, 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 December 3, 2002, insurer timely requested review. On January 22, 2003, Administrative Law Judge Paul Vincent conducted a hearing in this matter. Attorney Michael G. Fetrow represented respondent, SAIF Corporation (insurer). Respondent Candace D. Kramer (claimant) failed to appear. WCD waived appearance at hearing. The record closed on the date of hearing.

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 correctly determined that claimant is eligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 23 as well as insurer's Supplementary Exhibits A and B were admitted into the record without objection. Also, on my own motion, I admit Supplementary Exhibit 22A which is the Director's review and Order dated November 25, 2002.

FINDINGS OF FACT

- (1) Claimant worked as a group life coordinator in a juvenile offender home for approximately seven years. (Ex. 1.) In January 2000, claimant filed a claim for a work-related psychiatric condition and insurer accepted "Adjustment Disorder with Mixed Anxiety and Depressed Mood" as compensable conditions. (Ex. 5-1.)
- (2) On June 6, 2001, insurer issued a Notice of Eligibility for Vocational Assistance.

(Ex. 6.) On October 31, 2001, the parties finalized a Return-to-Work Training Plan to begin in November 2001 and end in March 2003. Claimant planned to obtain an

Associates degree as a legal secretary. (Ex. 8.) Claimant began attending classes. (Ex. 21-1.)

- (3) The accepted conditions became medically stationary on December 19, 2001 and the claim was closed without permanent partial disability (PPD) on January 30, 2002 and claimant appealed. (Exs. 14-1 and 16-2.) On January 30, 2002, insurer issued a Notice of Training End and Eligibility End because the claim was closed without a PPD award. (Ex. 15.)
- (3) An Order on Reconsideration dated June 5, 2002 awarded 10 percent PPD. Insurer appealed the PPD award and a hearing was held before the Workers' Compensation Board on August 6, 2002. (Ex. 21-1.)

CONCLUSION OF LAW

RRU correctly determined that claimant is 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. Furthermore, pursuant to ORS 656.726(4)(g), the legislature authorized WCD to promulgate administrative rules to regulate the provision of vocational assistance to injured workers. OAR 436-120-0350(2) appears under the heading "Ineligibility and End of Eligibility for Vocational Assistance and provides:

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

- (2) The worker is determined not to have permanent disability after a finding of eligibility.

Additionally, ORS 656.313(1)(a)(D) appears under the heading, "Stay of compensation pending request for hearing or review" and provides:

(1)(a) Filing by an employer or the insurer of a request for hearing on a reconsideration order before the Hearings Division, a request for Workers' Compensation Board review or court appeal or request for review of an order of the Director of the Department of Consumer and Business Services regarding vocational assistance **stays payment of the compensation appealed, except** for:

(D) **Vocational benefits** for services for vocational evaluation and help in directly obtaining employment as provided by ORS 656.340(7)¹ and for services related to the development of plans for return to work, as provided by ORS 656.340(9)². No plan for return to work may be implemented until the vocational order on appeal has become final.

Here, insurer notified claimant that she was eligible for vocational assistance, the parties finalized a Return-to-Work Plan and claimant began a course of study. Several months later, the claim was closed without PPD and insurer notified claimant that her eligibility had ended. Subsequently, an Order on Reconsideration awarded 10 percent PPD and insurer appealed.

Insurer cites ORS 656.313 and contends³ that claimant is currently ineligible for vocational assistance because insurer appealed the PPD award. However, the plain meaning of the statute lists vocational benefits as an exception to the stay. Here, the Order on Reconsideration awarding 10 PPD is in effect, albeit pending insurer's appeal. Under ORS 656.313, claimant eligibility for vocational assistance continues notwithstanding insurer's appeal of the PPD award. Therefore, RRU correctly determined that claimant's eligibility for vocational assistance continues. Accordingly, insurer is liable for claimant's vocational assistance as specified in the Return-to-Work Plan finalized on October 31, 2001.

ORDER

IT IS HEREBY ORDERED

¹ ORS 656.340(7) provides:

Vocational evaluation, help in directly obtaining employment and training shall be available under conditions prescribed by the director. The director may establish other conditions for providing vocational assistance, including those relating to the worker's availability for assistance, participation in previous assistance programs connected with the same claim and the nature and extent of assistance that may be provided. Such conditions shall give preference to direct employment assistance over training.

² ORS 656.340(9)(a) provides:

The director shall adopt rules providing:

³ Insurer also contends that claimant failed to timely appeal the Notice of Closure which awarded zero PPD. However, I lack jurisdiction over the issue of permanent disability. ORS 656.704.

The Director's Review and Order dated November 25, 2002 is affirmed.

DATED this 14th day of March 2003.

Paul Vincent, Administrative Law Judge
Hearing Officer Panel