
In the Matter of the ORS 656.340 Vocational Services Dispute of

Lewis, Leah M., Claimant

Contested Case No: H03-034

FINAL ORDER

June 29, 2004

Thrifty Payless, Inc., Petitioner

Leah M. Lewis, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

HISTORY OF THE CASE

Claimant, by and through her attorney Christopher Zuercher, timely filed exceptions to Administrative Law Judge (ALJ) Catherine Coburn's January 22, 2004 Proposed and Final Contested Case Hearing Order. Employer, Thrifty Payless, Inc. by and through its attorney William Replogle, timely submitted a response. This matter comes before the director for issuance of a final order. The entire record has been reviewed, including the exhibits received into evidence, the audio recording of the hearing, and the parties' written arguments. The director affirms the ALJ on different grounds.

At the contested case hearing on review of an order of the Rehabilitation Review Unit of the Workers' Compensation Division 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 on one of the grounds listed in ORS 656.283(2)(c). 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.*

ISSUE

The issue here is whether claimant was employed in suitable employment for 60 days. A worker is ineligible for vocational assistance if the worker has been "employed at least for 60 days in suitable employment after the injury * * *." OAR 436-120-0350. "Suitable employment" is defined as employment "for which the worker has the necessary physical capacities * * * and abilities[.]" OAR 436-120-0005.

The Rehabilitation Review Unit found that the modified photo clerk position was not suitable because it exceeded claimant's permanent work restrictions as to lifting and bending/stooping, as provided by claimant's attending physician. The ALJ reversed, finding that the unit abused its discretion by disregarding the attending physician's clarified opinion regarding claimant's ability to bend.

Claimant makes several arguments in her exceptions: (1) the modified job was unsuitable because it also exceeded claimant's lifting restriction; (2) Dr. Sandefur did not "clarify" his opinion regarding claimant's ability to bend; and (3) the unit accorded the job analysis its proper weight and did not disregard it. Claimant also takes issue with the ALJ's finding regarding her credibility, and seeks attorney fees.

Insurer responds that the evidence in the record supports the conclusion that the modified job was within claimant's restrictions.

CONCLUSION

Neither party raised issues with the ALJ's findings of fact; the director therefore adopts the ALJ's findings of fact.

Lifting Restriction

Claimant argues that the ALJ erred by ignoring the unit's finding that the lifting requirements for the modified job exceeded the 20-pound lifting restriction provided by Dr. Sandefur in the closing exam. Claimant contends that insurer did not challenge that portion of the unit's order and because that provides an independent and sufficient basis for finding unsuitability, the unit's order should be affirmed.

Insurer responds that claimant is incorrect about the lifting restriction because it is included in the ALJ's findings of fact. Further, insurer argues that the "essential job function" sheet referred to the *regular* photo finishing clerk position, not the modified photo clerk position. According to insurer, the affidavits from store manager Ms. Hoover, the testimony of assistant manager Mr. Wesley, and Mr. Scopacasa's job analysis of the modified photo clerk position all demonstrate that the lifting requirements were within Dr. Sandefur's restrictions.

In a January 2003 letter, Mr. Scopacasa included an August 24, 2002 job analysis for a modified photo clerk position, as well as "Essential Job Functions" for the photofinishing clerk (one hour stores only). (Ex. 46-3). Among other things, the "essential job functions" sheet listed requirements of the physical ability to "frequently lift up to 50 pounds[,] and occasionally exerting force using a push/pull motion to move more than 100 pounds of chemicals on a wheeled dolly. (Ex. 46-3). The lifting requirements on the "essential job functions" sheet are inconsistent with the lifting requirements on the August 24, 2002 job analysis for a modified photo clerk position, which referred to lifting, carrying, pushing, and pulling up to 10 pounds occasionally. (Ex. 46-2). Under these circumstances, it is clear that the "essential job functions" sheet pertains to the *regular* photo finishing clerk position, not the modified photo clerk position.

Therefore, the fact that lifting requirements on the “essential job functions” sheet exceeded the 20 pound lifting restriction provided by Dr. Sandefur in the closing exam is of no consequence.

The February 2003 affidavit of Ms. Hoover, the store manager, said that the physical requirements of the photo clerk position “were well within [claimant’s] lifting limitation of 25 pounds[.]” (Ex. 47-2). Ms. Hoover also explained:

“The job in question required occasional lifting up to 10 pounds, but never ‘constant lifting.’ The one hour photo machine has a print paper canister that is not changed on a frequent basis. At most, it is changed one time per day. [Claimant] was not required to change the paper, as stated previously.” (*Id.*)

Although Ms. Hoover incorrectly stated that claimant’s lifting limitation was 25 pounds, her affidavit said that the modified job only required “occasional lifting up to 10 pounds,” which is consistent with Dr. Sandefur’s lifting restriction of 20 pounds. The unit’s finding that the lifting requirement for the modified job as provided by Ms. Hoover’s affidavit exceeded the 20-pound lifting restriction is not accurate.

Ms. Hoover’s statement that the modified job required lifting up to 10 pounds is consistent with claimant’s affidavit, which said she “had to lift 10-pound print paper canisters on a frequent basis.” (Ex. 36-2). I also note that claimant’s affidavit said that she believed she had a 25-pound lifting limit. (Ex. 36-1). At hearing, claimant testified that she lifted items up to 20 pounds, and she said that the paper canisters weighed between 10 and 15 pounds. Sherry White, who worked with claimant in the photo department from April 2000 until February 2001, agreed with the description in the job analysis that said claimant had to lift up to 10 pounds occasionally.

In summary, claimant is incorrect that the lifting restriction provides an independent and sufficient basis for finding that the modified job was unsuitable. There is nothing in the record that supports the unit’s conclusion that the lifting requirements for the modified job exceeded the 20-pound lifting restriction. Therefore, the lifting requirements of the modified job were within claimant’s physical restrictions.

Bending Restriction

The ALJ found that Dr. Sandefur later clarified his opinion that claimant should perform no bending, and claimant was therefore capable of performing some bending. The ALJ further found that the unit abused its discretion by disregarding Dr. Sandefur’s clarified opinion.

Claimant argues that Dr. Sandefur did not “clarify” his opinion by concurring with Dr. Rich’s report. Claimant contends Dr. Rich’s report does not speak to claimant’s abilities during April and May 2000. Further, claimant contends, Dr. Sandefur’s concurrence was based on Dr. Rich’s evaluation and findings. Claimant also contends that the unit appropriately gave Mr. Scopacasa’s job analysis, and Dr. Sandefur’s approval thereof, little weight.

Insurer responds that under OAR 436-030-0035(5), Dr. Sandefur's concurrence amounted to agreement with Dr. Rich's report in every particular. Dr. Sandefur therefore adopted Dr. Rich's conclusion that claimant could perform some bending. Insurer contends the record supports the finding that claimant could perform some bending. Further, insurer argues, the fact that claimant did perform the job contradicts her argument that the job was beyond her restrictions.

The unit relied on Dr. Sandefur's May 1, 2000 closing examination, which provided "no bending." (Ex. 12-1.) The ALJ relied on Dr. Sandefur's July 20, 2000 concurrence with Dr. Rich's June 21, 2000 report, which provides in the "History of Injury" portion that "[f]or the past 3 months, [claimant] has been working at RiteAid with a 25-pound maximum lifting limitation and the advice to avoid repetitive bending, stooping, or squatting." (Ex. 13-2). In the "Comments and Recommendations" portion, in response to insurer's questions, Dr. Rich further provides, "[claimant] has returned to work 6 hours a day, 5 days a week with an understood permanent lifting limitation of 25 pounds and the advice to avoid repetitive bending or twisting." (Ex.13-6).

The phrasing of these statements in Dr. Rich's written report indicates that they are not Dr. Rich's findings or recommendations as to claimant's abilities. Rather, they appear to be Dr. Rich's report of his understanding of previous advice given claimant, either based on claimant's report to Dr. Rich, or on Dr. Rich's interpretation of other information in claimant's medical history. In either case, the director does not find the statements persuasive evidence of claimant's abilities. Likewise, the director does not give Dr. Sandefur's concurrence with Dr. Rich's written report as much weight as the ALJ gave the concurrence. The concurrence is simply an "X" next to the phrase "I agree" on a letter drafted by employer's processing agent. (Ex. 14.) The letter provides, in part, "Please indicate below whether you concur with the findings and recommendations of [Dr. Rich]." As explained above, the director does not interpret Dr. Rich's written report as containing a finding or recommendation that claimant can perform some bending. The most straightforward, and therefore the most persuasive,¹ evidence of Dr. Sandefur's opinion is Dr. Sandefur's own notes of May 1, 2000, wherein he states, "[Claimant] needs to be on permanent light duty work with no bending, twisting, and no lifting greater than 20 pounds." (Ex. 12-1.) Dr. Sandefur's own words are a clearer indication of his opinion than Dr. Rich's understanding of Dr. Sandefur's opinion, or Dr. Sandefur's subsequent check-the-box-type response to Dr. Rich's report. The director does not agree with the ALJ that Dr. Sandefur "clarified" his opinion by concurring with Dr. Rich's report.² It follows that the unit did not disregard Dr. Sandefur's "clarified" opinion.

¹ See *Moe v. Ceiling Systems, Inc.*, 44 Or App 429 (1980) (physician's bare conclusion as to contribution of employment to worker's medical condition and need for treatment, without medical analysis or further explanation, given little weight); *Van Woesik v. Pacific Coca-Cola Co.*, 85 Or App 9 (1987), *rev'd on remand on other grounds* 93 Or App 627 (1988) (physician's response of "yes" on a questionnaire asking whether worker's condition had worsened was a mere conclusion without explanation, and was unpersuasive in light of other medical evidence in the record).

² Insurer argues that Dr. Sandefur's concurrence with Dr. Rich's report meant that Dr. Sandefur agreed in every particular, under OAR 436-030-0035(3) (since renumbered OAR 436-030-0035(5)), which provides, "The insurer must request the attending physician's concurrence or comments when the attending physician arranges, or refers the worker for, a closing examination with another physician to determine the extent of impairment, or when the insurer refers a worker for an insurer medical examination. A concurrence with another physician's report is an agreement in every particular, including the medically stationary impression and date, unless the physician expressly

The ALJ also relied on Dr. Sandefur's October 10, 2002 approval of Mr. Scopacasa's job analysis, which provided that the modified photo clerk job required occasional (1-33% of the time) bending/stooping. Dr. Sandefur's approval was indicated by an "X" next to the word "yes" on a letter from Mr. Scopacasa asking Dr. Sandefur, "As of May 1, 2000, based on your prescribed work release at that time, do you believe that Ms. Lewis was able to perform the job of Modified Photo Clerk as specified in the enclosed job analysis?" (Ex. 39-1.) For the same reasons discussed above, the director finds Dr. Sandefur's original May 1, 2000 notes more persuasive than Dr. Sandefur's check-the-box-type approval of the job analysis nearly two and a half years later.

The director does not agree with the ALJ that the unit abused its discretion by disregarding these "clarifications" of Dr. Sandefur's opinion. The unit's finding that the bending/stooping requirements of the modified job exceeded the work restriction of "no bending" provided in Dr. Sandefur's May 1, 2000 closing exam is supported by evidence in the record. Although the parties dispute how much bending was required by the modified job, it is undisputed that the job required at least some amount of bending.

However, claimant has failed to overcome the impact of the ALJ's finding that claimant satisfactorily performed the modified photo clerk position for 18 months with good attendance, no medical treatment, and no notice to any manager that the physical requirements were too difficult or that assistance was inadequate; claimant herself testified to these facts.³ (Test. of claimant.) Actual performance of a job can establish that the worker was capable of performing the job and that the job was suitable. *Tran, Tin T.*, 8 CCHR 88, 94 (2003); *Thomas R. Jarrell*, 47 Van Natta 329, 331 (1995). Under these circumstances, based on the evidence in the record, I find that claimant was "employed for at least 60 days in suitable employment after the injury," and is therefore ineligible for vocational assistance under OAR 436-120-0350.

Claimant has not prevailed; accordingly, her attorney is awarded no fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Directors Review and Order dated December 2, 2003 is reversed.

Dated this 24th day of June 2004.

states to the contrary and explains the reasons for disagreement. Concurrence can not be presumed in the absence of the attending physician's response." Even if this rule applied here, the director still finds the most persuasive evidence of Dr. Sandefur's opinion to be Dr. Sandefur's own notes.

³ Claimant does take issue with the ALJ's finding that claimant was not credible on this basis, and did offer the testimony of her co-worker that claimant complained of back pain every day. (Test. of White.)