

In the ORS 656.340 Vocational Services Dispute of

DANIEL MURRAY, Claimant

Contested Case No: H04-075

PROPOSED AND FINAL ORDER

December 21, 2004

DANIEL MURRAY, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Ella D. Johnson, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Director's Review and Order issued on April 30, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On June 16, 2004, WCD referred the matter to the Office of Administrative Hearings (OAH). On September 5, 2004, Administrative Law Judge Ella D. Johnson conducted a contested case hearing in Redmond, Oregon. Petitioner Daniel Murray (claimant) was represented by attorney Ronald Fantana. Attorney Sally Anne Curry represented respondent Liberty Northwest Insurance Corporation (insurer). Claimant testified on his own behalf and called Verk Vocational Consultant Denis Roderick, insurer's Senior Rehabilitation Consultant Jan Plummer as witnesses. The record was left open to obtain the original Memo to the File containing entry date of April 6, 2004 and closed following receipt of the document on October 19, 2004.

ISSUE

Whether RRU incorrectly determined that claimant's eligibility for vocational assistance should not be restored.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 29 and claimant's Exhibits A, 3A, 3B, 5A, 10A, 12A, 12B, 12C, 12D, 13A 29A and 30 through 33 were received into the record without objection. Liberty offered Exhibit 16A, pages 1 through 4.

Exhibit 16A is the signed copy of a letter sent by Plummer to claimant. Claimant's counsel objected to the inclusion of 16A, representing that it was identical to WCD's Exhibit 16. Based on this representation, Liberty agreed to include in the exhibits only the last two pages of Exhibit 16A. At closing claimant's counsel made much of the fact that the document marked as Exhibit 16 was unsigned, and was therefore, void and legally insufficient. On October 13, 2004, I admitted all of Exhibit 16A into the record, finding that Liberty did not withdraw the exhibit and that claimant's counsel had misrepresented that it was identical to Exhibit 16.

I also subsequently received from WCD the original Memo to File containing an entry dated April 6, 2004 by Michele Frisella, which confirmed that the beginning on an entry for that date had been whited-out and no other entry had been made. Inasmuch as WCD has requested

the original be returned, a copy of the WCD's original Memo to File for that date is included as Exhibit 34 and I now admit Exhibit 34 into the record.

FINDINGS OF FACT

I adopt and incorporate by this reference RRU's Findings of Fact contained in its April 30, 2004 Director Review and Order, with the following supplementation:

(1) On May 1, 2002, claimant reported that his fingers turned white and became numb after daily use of a vibrating tool called a Chicago Pneumatic knife to cut out windshields in his work as a glazier at B&D Auto Glass. (Ex. 1.) On June 19, 2002, James M. Edwards, MD diagnosed claimant with Raynaud's syndrome¹ of the 2nd, 3rd and 4th fingers bilaterally and bilaterally right and left hands. (Ex. 2.) On December 30, 2002, Liberty accepted the claim. A July 22, 2003 Notice of Closure, as corrected on August 12, 2003, closed the claim awarding 82 percent for the loss of use of the right and left hands. (Exs. 11, 12.) Against his attending physician's orders, claimant continued to work for B&D Auto Glass installing residential and commercial building glass, which does not necessitate the use of vibrating tools as often as the windshield installations. (Ex. 20; test. of claimant.)

(2) On December 2, 2003, Liberty notified claimant that he was eligible for vocational assistance. (Ex. 13) Claimant was scheduled for a SAGE Interest/Aptitude Evaluation² on January 8, 2004. On January 7, 2004, claimant notified his vocational counselor, Denis Broderick, that he forgot to request time off and was unable to attend the evaluation. They agreed to reschedule the evaluation for January 15, 2004. Broderick contacted claimant on January 13, 2004 to remind him about the evaluation.³ Claimant told Broderick that his attorney had scheduled another vocational evaluation on January 16, 2004 in Portland, Oregon. Broderick noted that claimant would have time to attend both appointments, but claimant told him that it would be inconvenient for his employer to take another day off to do the SAGE Evaluation. (Exs. 14, 21; test. of claimant and Broderick.)

(3) Claimant did not attend the January 15, 2004 SAGE Evaluation. On January 16, 2004, Broderick sent a warning letter to claimant stated that he might be jeopardizing his vocational eligibility for failing to participate in the vocational process. Broderick noted in his warning letter that he had rescheduled the SAGE evaluation for February 15, 2004. Claimant

¹ Raynaud's syndrome causes hypersensitivity to cold temperatures and causes the affected body parts to become numb and change colors. When the area is re-warmed, it is very painful. It is caused by the use of vibrating tools, such as the Chicago Pneumatic knife.

² The SAGE Evaluation is only offered on certain dates and times during the month and the insurer is not billed for the evaluation if the worker fails to appear on the date scheduled. (Test. of Plummer.)

³ Claimant testified that, when he received Broderick's call on January 13, 2004 to remind him about the SAGE evaluation scheduled for January 15, 2004, he could not take the time off because he did not have enough notice of the reschedule to take the time off. However, I do not find claimant's testimony persuasive. The record establishes that both claimant and his attorney receiving notice of the rescheduled date on January 22, 2004, which provided ample notice for claimant to request time off.

and his attorney received the letter on January 22, 2004. (Exs. 14; 21.)

(4) Claimant failed to attend the February 15, 2004 SAGE evaluation because he failed to note the new date when he received the warning letter. (Test. of claimant.) Claimant called Broderick and told him that he wanted to change vocational consultants. Claimant's attorney never contacted Plummer to request a change in vocational consultants. (Test. of Broderick and Plummer.) On February 6, 2004, Liberty's Senior Rehabilitation Consultant Jan Plummer sent a signed Notice of End of Eligibility for Vocational Assistance effective February 6, 2004 noting that his vocational assistance was ending because he failed to attend the February 15, 2004 evaluation. (Ex. 16A.) Claimant received the Notice on February 11, 2004 and his attorney received the Notice on February 10, 2004. (Exs. 16A-1, 16A-2.)

(5) On February 10, 2004, claimant's attorney requested review by the director of Liberty's Notice of End of Eligibility. (Ex. 17.) On April 1, 2004, claimant completed the SAGE evaluation and Liberty was billed for the evaluation. Liberty denied payment. (Exs. 23-25.) On April 30, 2004, RRU issued its order finding that claimant failed to participate in vocational assistance and concluding that his vocational assistance should not be restored. (Ex. 28.)

CONCLUSION OF LAW

RRU correctly determined that claimant's eligibility for vocational assistance should not be restored.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4) and ORS 656.704(3)(a). In a contested case hearing, vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. I may modify the administrative order only if it (A) violates a statute or rule, (B) exceeds the statutory authority of the agency, (C) was made upon unlawful procedure, or (D) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(5). In determining whether one of those criteria exist, I may admit evidence which was not before RRU and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of a fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence.) 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 (1998). I conclude that claimant has failed to meet his burden.

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. Under the heading "Ineligibility and End of Eligibility for Vocational Assistance", OAR 436-120-0350(9) provides in pertinent part:

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

(7) The worker has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information.

RRU determined that claimant is ineligible for vocational assistance because he failed to participate in the vocational assistance process as required by OAR 436-120-0350(9). Claimant first contends that insurer's Notice of End of Eligibility should be set aside as void for various alleged violations of rules regarding vocational assistance. In support of his contention, claimant argues that insurer has "unclean hands" and points to a Worker's Compensation Board (WCB) ALJ's order assessing penalties for alleged violations. Claimant further argues that insurer cannot hold claimant to strict compliance when it does not comply with what is required. However, the WCB ALJ's decision is currently on appeal and there is no persuasive evidence that insurer has unclean hands. Moreover, I am not authorized to utilize equitable remedies to decide cases. Consequently, I do not find claimant's technical arguments persuasive.

Claimant next contends that Broderick violated the Code of Professional Ethics for Rehabilitation Counselors (Ex. A.) by participating in doing harm to claimant in collusion with insurer's Senior Rehabilitation Counselor and behaving as if insurer and not claimant was his client. While that may or may not be true, Broderick's compliance with the ethical standards of his profession is an argument for another forum.

Finally, claimant argues that RRU abused its discretion and exercised its discretion without authority and for a purpose that is unjust and beyond reason. However, claimant fails to provide the basis for its argument and I find nothing in the record supporting such a sweeping indictment of RRU's order. Accordingly, concluding that claimant failed to carry the burden of proving that the administrative order is incorrect, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Directors Review and Order dated April 30 2004 is affirmed.