

In the ORS 656.340 Vocational Assistance Dispute of

BONNIE BOSTICK Claimant

Contested Case No: H05-094

PROPOSED AND FINAL ORDER

September 1, 2005

BONNIE BOSTICK, Petitioner

SAIF CORP., Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on June 13, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On July 12, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On August 16, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney James T. Guinn represented petitioner Bonnie Bostick (claimant). Attorney David L. Runner represented respondent SAIF Corporation (insurer). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether RRU correctly determined that claimant is ineligible for vocational assistance.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 26 were admitted into the record without objection.

FINDINGS OF FACT

(1) On June 21, 2002, claimant suffered a compensable injury when she slipped and fell while working as a plastics fabricator. (Ex. 1.) Insurer accepted left buttock contusion, right knee strain and right knee ACL tear as compensable conditions. (Ex. 5.) Claimant's condition became medically stationary on June 13, 2003 and the claim was closed on July 7, 2003 without permanent partial disability. (Ex. 6.)

(2) On June 13, 2003, attending physician Terrence A. Sedgewick, MD, noted that claimant had returned to full function at work without limitation and he recommended that she continue full duty work. (Ex. 4.)

(3) On August 25, 2003, medical arbiter Robert A. Berselli, MD, examined claimant and opined that she is not prevented from working or standing for more than 2 hours cumulatively in an 8 hour period. (Ex. 7-2.)

(4) In an Order on Reconsideration dated September 25, 2003, WCD awarded 19 percent

PPD for loss of use of the right leg. (Ex. 8.)

(5) On November 26, 2003, insurer notified claimant that she was ineligible for vocational assistance. (Ex. 9.)

(6) On May 3, 2004, insurer agreed to reevaluate claimant's vocational eligibility based on a physical capacities evaluation (PCE). (Ex. 13.)

(7) On May 19, 2004, claimant agreed that the job analysis (JA) for plastics fabrication was accurate. (Ex. 11-3.)

(8) On June 24 and 25, 2004, occupational therapist Marcel Gose' conducted a PCE which rated claimant's ability to work in the sedentary range. (Ex. 14-10.) In an addendum dated August 18, 2004, Gose' noted that the test results were questionable due to claimant's inconsistent efforts. (Ex. 17.)

(9) On September 2, 2004, Dr. Sedgewick concurred with the PCE and addendum. (Ex. 18.) He reviewed the plastics fabricator JA and approved claimant's return to regular work. (Ex. 19-1.) He opined that claimant was able to return to her regular work as a plastics fabricator or as a cashier, telemarketer, security officer, sales person, receptionist, office clerk, gas attendant, production assembler, or assembler. (Ex. 19.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible 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).

Claimant did not testify and offered no evidence to counter RRU's conclusion that she is ineligible for vocational assistance. On the other hand, insurer contends that the administrative order is correct and should be affirmed.

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6)(a) provides:

A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.

OAR 436-120-0330(5) lists the conditions for eligibility and provides:

- (5) As a result of the limitations caused by the injury or aggravation, the worker:
- (a) Is not able to return to regular employment;
 - (b) Is not able to return to any other suitable and available work with the employer at injury or aggravation; and
 - (c) Has a substantial handicap to employment and requires assistance to overcome that handicap.

RRU determined that claimant was ineligible for vocational assistance based on the opinions of Drs. Berselli and Sedgewick. RRU noted that the PCE was unreliable due to claimant's self-limited efforts.

I agree with RRU's determination. Dr. Sedgewick served as claimant's attending physician over an extended period and he released her to regular work in June 2003 and again in September 2004. Moreover, the record contains no countervailing evidence. Finally, finding no grounds to modify the administrative order, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to an attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated June 13, 2005 is affirmed.