
In the Matter of the ORS 656.340 Vocational Assistance Dispute of
CHRISTINE MARSON, Claimant
Contested Case No: H05-124
PROPOSED AND FINAL ORDER
November 18, 2005
CHRISTINE MARSON, Petitioner
SAIF CORPORATION, Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on July 7, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 26, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On October 13, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Jon C. Correll represented petitioner Christine Marson (claimant). Attorney Jerome B. Larkin represented respondent SAIF Corporation (insurer) and its insured Winners' Choice Custom Bowstrings (employer). No witnesses testified and the record closed on October 20, 2005 following a stipulation of facts.

ISSUE

Whether RRU correctly determined that claimant is ineligible for vocational assistance because she is able to return to suitable work with the employer-at-injury.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 25 were admitted into the record without objection.

FINDINGS OF FACT

(1) On September 2, 2003, claimant suffered a compensable injury while working as a hunting bow string technician. (Ex. 1.) Insurer accepted bilateral carpal tunnel syndrome. (Exs. 2 and 17.) In December 2003, claimant had right carpal tunnel release and in January 2004, claimant had the same treatment on the left. (Ex. 7.)

(2) On April 12, 2004, attending physician Michael L. Mara, M.D. released claimant to regular work. (Ex. 5.) On July 12, 2004, Dr. Mara found no objective impairment and declared the accepted conditions medically stationary. (Ex. 8.)

(3) On November 22, 2004, Susan Bottomley, OTR, conducted a physical capacities evaluation (PCE) and rated claimant's ability to work in the light-medium physical demand level. (Ex. 10-5.) On December 6, 2004, Dr. Mara concurred. (Ex. 11.)

(4) On December 30, 2004, Bottomley reviewed the job analysis for the position of packager with employer and approved it for claimant. (Ex. 13.) On January 7, 2005, Dr. Mara concurred. (Ex. 14.)

(5) On January 24, 2005, the employer offered a packaging position to claimant. (Ex. 15.) That month, claimant declined the packaging job offer. (Exs. 22 and 23-1.)

(6) On January 24, 2005, the claim was closed with permanent partial disability (PPD) awards of 5 percent each for the right and left wrists. (Ex. 16-1.) The PPD awards were based upon repetitive use limitations. (Ex. 16-2.)

(7) On March 14, 2005, insurer notified claimant that she was ineligible for vocational assistance because she had declined a suitable job offer with employer. (Exs. 19 and 22.)

(8) On May 11, 2005, medical arbiter Anthony L. Glassman, M.D. examined claimant at the request of the Appellate Review Unit (ARU) for the purpose of rating the extent of claimant's PPD. (Ex. 20.) On June 3, 2005, ARU issued an Order on Reconsideration increasing the PPD award to 7 percent bilaterally. (Ex. 21-3.)

(9) On June 10, 2005, Dr. Mara reviewed the medical arbiter's report and the packaging job analysis. Dr. Mara reiterated that claimant was capable of performing the packaging job duties. (Ex. 22.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance because she is able to return to suitable work with the employer-at-injury.

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 exists, 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. ORS 183.450(2); *see 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).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. OAR 436-120-0320 provides the conditions a worker must meet in order to establish eligibility for vocational assistance and provides in pertinent part:

(10) A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

(B) Is not able to return to any other suitable and available work with the employer at injury or aggravation;

RRU determined that claimant was ineligible for vocational assistance because she was able to return to suitable work as a packager with the employer-at-injury. Claimant contends that she is eligible for vocational assistance by virtue of the PPD award for repetitive use. In support of her position, claimant argues that RRU erred by concluding that claimant is physically capable of performing the packaging position which requires some repetitive wrist movements because ARU awarded PPD based on a repetitive use limitation. Claimant further argues that the Order on Reconsideration is final, and therefore, insurer is barred by the doctrine of issue preclusion from denying vocational assistance. In contrast, insurer contends that the administrative order is correct and should be affirmed.

The doctrine of “law of the case” applies to former decisions with the same set of facts. *Public Market Co. v. Portland*, 179 Or 367 (1946). If the issues are triable to different factfinders and neither’s findings bind the other, then the doctrine does not apply. *Westwood Corporation v. Bowen*, 108 Or App 310 (1991).

The director has previously held that the legal doctrine “law of the case” does not bind the Rehabilitation Review Unit to the findings of the Appellate Review Unit. *Theodore T. Aiken*, 8 CCHR 258 (2003); *Calvin Ott*, 7 CCHR 342 (2002); *Kurt Vandervort*, 7 CCHR 141 (2002); *Mark Hardman*, 7 CCHR 173 (2002). Therefore, ARU and WCB may award PPD but RRU may determine independently that the injured worker is ineligible for vocational assistance.

Here, ARU awarded 7 percent PPD each for loss of use of the right and left wrists. However, contrary to claimant’s argument, the law of the case does not bind RRU to find claimant eligible for vocational assistance. Moreover, a PPD award does not render a claimant eligible for vocational assistance. Rather, in order to establish eligibility, claimant must satisfy each administrative requirement. Furthermore, RRU is free to evaluate the medical evidence presented and to determine whether claimant is eligible for vocational assistance. Here, Bottomley, who conducted the PCE, and attending physician Dr. Mara opined that claimant is capable of performing the packaging job offered by the employer at injury. Thus, RRU properly relied on these medical opinions and concluded that claimant is ineligible for vocational assistance. Accordingly, finding no basis to modify the administrative order, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is entitled to no reasonable

attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated July 7, 2005 is affirmed.