

In the ORS 656.340 Vocational Services Dispute of

ZEBEDEE MATHEWS, Claimant

Contested Case No: H05-101

PROPOSED AND FINAL ORDER

September 27, 2005

ZEBEDEE MATHEWS, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Director's Review and Order issued on June 28, 2005 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department). On July 20, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On September 2, 2005, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing. Attorney Scott M. McNutt represented petitioner Zebedee Mathews (claimant). Attorney M. Kathryn Olney represented respondent Liberty Northwest Insurance Corporation (insurer) and its insured, Sapa Anodizing Corporation (employer). Claimant and Cameron Helikson, employer's Safety Director, 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 18 were admitted into the record without objection. I sustained insurer's relevance objections to claimant's proposed Supplementary Exhibit 19 which is contained in the record as an offer of proof.

FINDINGS OF FACT

(1) On November 1, 2003, claimant suffered a compensable low back strain while working as a machine operator full time at \$13.75 per hour with some overtime. (Ex. 1; testimony of claimant and Helikson.) Insurer accepted a lumbosacral strain. (Ex. 9-4.)

(2) On August 16, 2004, Carol A. Farr, P.T. conducted a physical capacities evaluation (PCE) and rated claimant's work ability in the light category. (Ex. 4-1). On October 29, 2004, following a work conditioning program, claimant's work ability was rated in the medium category. (Ex. 5-3.) On October 29, 2004, Brandon Tilton, P.T. recommended that claimant return to regular full time work as a machine operator. (Ex. 6-2.)

(3) On November 9, 2004, attending physician Jennifer K. Lawlor, M.D. noted that claimant suffered a work-related lumbosacral strain and pre-existing degenerative disc disease.

(Ex. 7-1.) She released him to regular work 6 hours per day for two weeks and full time thereafter. (Ex. 7-2.) On November 30, 2004, claimant returned to Dr. Lawlor and requested additional time off and she “explained to him that he is now beyond the time frame expected for healing of a lumbar strain. His ongoing symptoms are attributable to his underlying pre-existing conditions. I cannot justify giving him work restrictions for his accepted condition but rather for his pre-existing conditions.” (Ex. 8-1.)

(4) In November 2004, claimant returned to regular work as a machine operator earning \$14.15 per hour. (Ex. 8-1; testimony of claimant and Hellikson.) The employer accommodates claimant’s physical limitations by assigning lighter duties including truck driving. Claimant works less overtime hours than he did before the work injury. (Testimony of claimant and Hellikson.)

(5) The accepted lumbosacral strain became medically stationary on November 30, 2004 and the claim was closed on December 21, 2004 without permanent partial disability (PPD) award. (Ex. 9-1.) The evaluator noted that no permanent impairment was attributed to the on the job injury; any permanent impairment was due to pre-existing conditions. (Ex. 9-2.)

(6) On February 25, 2005, Nels L. Carlson, M.D. conducted a medical arbiter’s examination. (Ex. 10.) He opined that claimant was limited to “lighter duty work than heavier work.” (Ex. 10-4.) He apportioned claimant’s limitations 2/3 to the work injury and 1/3 to the pre-existing degenerative disc disease. (*Id.*)

(7) In an Order on Reconsideration dated March 28, 2005, claimant was awarded 8 percent PPD for loss of use of the low back. (Ex. 11-3.)

(8) On April 21, 2005, insurer notified claimant that he was ineligible for vocational assistance. (Ex. 12.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance.

OPINION

Jurisdiction 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).

The burden of presenting evidence to support a fact or position rests with the proponent. ORS 183.450(2). In that regard, claimant bears the burden of proving by a preponderance of the evidence that the Director's Review and Order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (the burden of proof falls upon 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 by a preponderance of the 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).

RRU determined that claimant is ineligible for vocational assistance because he has returned to regular work as a machine operator. RRU relied on the PCE and the opinion of attending physician Lawlor. Claimant first contends that he is eligible for vocational assistance because he was awarded PPD. Claimant next contends that he is entitled to a vocational evaluation because he returned to a light duty job and not his regular work. In contrast, insurer contends that the administrative order is correct and should be affirmed.

ORS 656.340 requires an insurer 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 436-120-0320 provides:

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

(c) As a result of the limitations caused by the injury or aggravation, the worker:

(A) Is not able to return to regular employment;¹

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

¹ OAR 436-120-0005(10) provides in pertinent part:

“Regular employment” means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance;

(C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

Additionally, 436-120-0350 provides in pertinent part:

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

(3) The worker's lack of suitable employment is not due to the limitations caused by the injury or which existed before the injury.

I find claimant's arguments unpersuasive. To begin, a PPD award does not confer vocational eligibility. On the contrary, pursuant to ORS 656.340(6)(a) and OAR 436-120-0320(9)(c), a worker who receives a PPD award and returns to regular or other suitable work is ineligible for vocational assistance.

Next, under ORS 656.340(6)(a) and OAR 436-120-0320(9)(c)(A) and (B), an injured worker is eligible if he is unable to return to regular work or other suitable work. Furthermore, under OAR 436-120-0350(3) the inability to return to regular or other suitable work must be due to the accepted condition. Here, claimant returned to his regular work as a machine operator, earning a higher hourly rate than he did before the work injury, albeit with less overtime hours. The employer accommodates claimant's physical limitations by assigning lighter duties including truck driving. However, the record contains no evidence that this work is unsuitable. Moreover, Dr. Lawlor opined that these accommodations are necessitated by the pre-existing degenerative disc disease and not by the work injury.

Finally, RRU properly relied on the opinions of the attending physician and the physical capacities evaluator in determining that claimant is ineligible for vocational assistance. Therefore, finding no basis for modifying the administrative order, I affirm.

ATTORNEY FEES

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

ORDER

IT IS HEREBY ORDERED that:
The June 28, 2005 Director's Review and Order is affirmed.