

In the Vocational Assistance Dispute of
LISA SPENCE-BRODBECK, Claimant

Contested Case No: H05-053

PROPOSED AND FINAL ORDER

MAY 26, 2005

INTELISTAF HEALTH CARE, Petitioner

LISA SPENCE-BRODBECK, Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Intelistaf Health Care (Employer) appeals a February 18, 2005 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services, which concluded that Lisa Spence-Brodbeck (Claimant) did not refuse an offer of suitable employment and therefore continued to be eligible for vocational assistance. The matter was referred to the Office of Administrative Hearings (OAH) for hearing on March 31, 2005.

On May 10, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith conducted a telephone hearing in this matter. Attorney Delbert Brenneman represented Employer and called one witness, vocational consultant John Sandreth. Respondent/Claimant was represented by her attorney, Ernest Jenks, and testified. The record closed that day.

ISSUE

Whether WCD's Director's Review and Order violates a statute or rule, exceeds WCD's statutory authority, was made upon an unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion by finding Claimant eligible for vocational assistance because she cannot return to regular employment.

EVIDENTIARY RULING

WCD's Exhibits 1 through 20 were admitted without objection.

FINDINGS OF FACT

The Findings of Fact in the February 18, 2005 Director's Review and Order are accepted and incorporated in this Final and Proposed Order, along with these specific findings:

(1) Employer accepted and found compensable Claimant's injuries of right shoulder strain and right rotator cuff tear from when she was working as a temporary orthopedic surgical technician.

(2) On June 14, 2004, her treating physician, Dr. Jonathan Greenleaf, M.D., reviewed a job analysis of a surgical technician provided by the employer and released Claimant to return to

such work, with the limitations of only occasional lifting and/or carrying of up to 20 pounds, occasional pushing/pulling of up to 20 pounds, frequent reaching below shoulder height, occasional reaching at shoulder height, and rare reaching above shoulder height. (Ex. 8.)

(3) On July 6, 2004, a medical arbiter of three physicians concurred with Dr. Greenleaf that Claimant could not lift more than 30 pounds and to avoid repetitive use of her right arm about shoulder height. They also concluded that Claimant could occasionally, but repetitively reach or push. (Ex. 9.)

(4) Based on contacts of supervisors of surgical assistants, the RRU reviewer concluded that surgical assistants must frequently push and pull, which Claimant cannot do. (Ex. 15.)

CONCLUSIONS OF LAW

WCD's Director's Review and Order does not violate a statute or rule or exceed its statutory authority nor was it made upon an unlawful procedure or was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

OPINION

Employer appealed the Director's Review and Order issued February 18, 2005, alleging no specific ground for reversal. ORS 656.340(4) and 656.283(2)(c) define the standard of review. OAR 436-001-0225(2) states in relevant part:

The standard of review is to determine whether the director's order:

- (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.

Employer has the burden of showing that the WCD's Review and Order meets one of these standards. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."). Additional evidence may be considered. OAR 436-001-0225(2).¹

In order to be eligible for vocational assistance, Claimant must, among other things, not be able to return to regular employment. OAR 436-120-0320(9)(c)(A). The Director's Review and Order issued February 18, 2005, concluded that she was not able to return to her "regular employment," which is defined as "the employment the worker held at the time of injury * * *." OAR 436-120-0005(10).

¹ OAR 436-001-0225(2) states:

In vocational assistance (ORS 656.340) disputes, new evidence may be admitted.

At hearing, Employer contended that the Review and Order gave too much weight to the physical limitations in the Medical Arbiter Report (Ex. 9) instead of the physical limitations described by Claimant's treating doctor. The Medical Arbiter Report was the basis for WCD's Order on Reconsideration that found Claimant more disabled. The Report was from an independent source and was reliable on its face. Employer has failed to establish that reliance on the Medical Arbiter Report was a violation of a statute or rule or an abuse of discretion or clearly unwarranted exercise of discretion. Moreover, Employer has failed to establish that WCD exceeded its statutory authority or utilized an unlawful procedure in relying on the Medical Arbiter Report.

At hearing, Employer also alleged that the Review and Order did not properly apply the restrictions stated in either report when determining that Claimant could not return to regular work. Specifically, Employer alleged that the reports limited Claimant from repetitive reaching, pushing, and pulling, but did not limit her from frequent reaching, pushing, and pulling. The Medical Arbiter Report says she "can occasionally" reach, push, and pull. The report does not say she can frequently reach, push, and pull. Again, Employer has failed to establish that reliance on the Medical Arbiter Report for Claimant's physical limitations was a violation of a statute or rule or an abuse of discretion or clearly unwarranted exercise of discretion and that WCD exceeded its statutory authority or utilized an unlawful procedure in relying on the Medical Arbiter Report.

Employer finally claimed that Claimant was collaterally estopped from contending that the claimant's regular employment was heavier than light because the Order on Reconsideration said her regular employment was light and at hearing, she claimed it was at least medium. The statement in the Order on Reconsideration was in relation to an ancillary issue and not the primary issue of whether Claimant was entitled to a larger disability award. This ancillary issue was not specifically argued and therefore, the statement in the Order on Reconsideration cannot be the basis for issue preclusion. Employer has failed to establish that WCD's failure to be bound by issue preclusion was a violation of a statute or rule or an abuse of discretion or clearly unwarranted exercise of discretion and that WCD exceeded its statutory authority or utilized an unlawful procedure.

ATTORNEY FEES

Claimant prevailed in defending the Director's Review and Order issued under ORS 656.340 and is entitled to attorney fees. ORS 656.385(1).² WCD shall require the insurer

² ORS 656.385 states in relevant part:

Attorney fees in cases regarding certain medical service or vocational rehabilitation matters; rules; limitation; penalties. (1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. * * *. The attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed by the director, or on appeal from an order of the director, under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for

or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. ORS 656.385(1). A statement of services may be considered as a factor in assessing the award if submitted within seven days of the hearing date. OAR 436-001-0265(1). A statement of services is not a prerequisite to a fee award, however. Claimant's attorney did not file one, but stated his hours and effort on the record. The ALJ may consider any information deemed relevant and appropriate. *See* OAR 436-001-0265(2), which lists the following factors: complexity of the issue(s) involved; quality of the legal representation; value of the interest involved; nature of the proceedings; risk in a particular case that an attorney's efforts may go uncompensated; and assertion of frivolous issues or defenses.

Claimant's attorney stated that he invested nine hours in the case, including the two hours of hearing, and that he charges \$250 per hour because his fee is contingent upon prevailing, for a total fee of \$2,250. When advised that he would need to show extraordinary circumstances to receive a fee above \$2,000, he modified his request to that limit. A fee of \$2,000 is appropriate because the following factors pursuant to OAR 436-001-0265(2) are present: the issues involved were complex, especially when coming from a file containing many reports; the value of the interest for vocational assistance can be substantial; and the risk that the attorney's efforts going uncompensated.

ORDER

WCD's February 18, 2005 Director's Review and Order is affirmed. The claimant is awarded attorney fees of \$2,000, to be paid by Employer.

establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances.