

In the Vocational Assistance of
Samuel Rodriguez-Durte, Claimant

Contested Case No: 06-005H

FINAL ORDER

December 7, 2006

SAMUEL RODRIGUEZ-DURTE, Petitioner

BARRETT BUSINESS SERVICES INC., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Petitioner claimant, through his attorney Steven M. Schoenfeld, timely submitted exceptions to Workers' Compensation Board Hearings Division Administrative Law Judge (ALJ) Emerson G. Fisher's September 7, 2006 Proposed and Final Order. Respondent employer, through its attorney Lance M. Johnson, responded. This matter comes before the director for a final order. I limit my review to the issues and arguments raised in the exceptions and response. The issue is whether claimant was released to his regular job. I adopt and affirm with the following supplementation.

I adopt the ALJ's findings of fact.

The underlying issue is whether claimant is eligible for vocational assistance. A worker is not eligible for assistance if the worker is able to return to regular employment. OAR 436-120-0320(9) (eff. 4/1/04). Employer, through its vocational consultant, found claimant ineligible for assistance. The Rehabilitation Review Unit (RRU), by Director's Review and Order dated December 9, 2005, affirmed concluding that claimant had been released to regular work and was able to return to regular work. ALJ Fisher affirmed, finding no basis on which to modify RRU's order. The ALJ concluded that the medical record does not support claimant's contention that he is unable to return to regular employment due to loss of grip strength in his left hand.

An order of RRU regarding vocational assistance may be modified only if it violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or is characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). Claimant does not specify on which basis he believes ALJ Fisher should have modified RRU's order. Rather, claimant raises factual and evidentiary disagreement with the ALJ's order.

Claimant first argues that the ALJ did not address the lifting requirements of claimant's regular work. According to claimant, the lifting requirements of his regular work exceed the limitations on lifting in Dr. Vu's release to work.

The job description with claimant's additions to it indicates occasional lifting of 60 pounds and consistent lifting of 25 pounds. (Ex. 20-2.) Dr. Vu approved the job description but indicated that claimant should limit *overhead* lifting to less than 25-50 pounds. (Ex. 21.) By indicating that the job description was otherwise appropriate, Dr. Vu agreed that claimant could lift 60 pounds. In his deposition, claimant testified that he had to lift two or three boxes at a time, each weighing 18-20 pounds. (Ex. 12-10). At hearing, claimant testified that the boxes weighed

20-25 pounds each. He testified that he carried up to three at a time, but was not told to carry that many at a time; he did it that way so he wouldn't have to make so many trips. Jose Rodriguez testified that the containers weighed 20-30 pounds and the younger workers carried three at a time, while the older workers moved two at a time. Anthony Miller testified that the boxes weighed 15 pounds each when full. He further testified that the heaviest thing workers had to lift were ladders weighing 20 to 30 pounds. While claimant's testimony at hearing provides some support for his contention that he lifted more than 60 pounds in his regular job, the other evidence indicates that he did not lift more than 60 pounds. There is no evidence that he was required to lift that much. In addition, the only evidence of any overhead lifting are claimant's additions to the job description. There is no evidence that he was required to lift more than 50 pounds overhead. The record does not support claimant's contention that his regular work required lifting in excess of the limits stated by Dr. Vu. Accordingly, I find no reason to reverse the ALJ's order or modify RRU's order on that basis.

Claimant next argues that the ALJ erred in not considering exhibit 26, Dr. Vu's report from July, 2006. The ALJ did not admit exhibit 26 into evidence because it was not submitted in compliance with OAR 436-001-0240(2). Claimant does not argue that the ALJ's evidentiary ruling was erroneous, and I find no basis on which to reverse it.

Claimant has not prevailed. Accordingly, his attorney is entitled to no fee. ORS 656.385(1).

IT IS HEREBY ORDERED the September 7, 2006 Proposed and Final Order is affirmed as supplemented above.