

In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Samuel Rodriguez-Duarte, Claimant

Contested Case No: 06-005H

PROPOSED & FINAL ORDER

September 7, 2006

SAMUEL RODRIGUEZ-DUARTE, Petitioner
BARRETT BUSINESS SERVICES INC., Respondent
Before Emerson G. Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on December 9, 2005 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

Pursuant to notice, a hearing was scheduled for July 14, 2006, in Portland, Oregon, before the undersigned Administrative Law Judge (ALJ). Claimant was present and represented by attorney Steven Schoenfeld. The employer, Barrett Business Services, and its claim processing agent, Pinnacle Risk Management, were represented by attorney Lance Johnson. Anthony Miller, an employer representative, was also present. WCD waived appearance. The proceedings were recorded by the ALJ.

The documentary evidence received consists of exhibits 1 through 24.

The record closed on August 15, 2006, following receipt of the parties written closing arguments.

ISSUE

Whether claimant is capable of returning to his regular employment for purposes of determining his eligibility for vocational assistance.

FINDINGS OF FACT

On June 9, 2004, claimant compensably injured his left upper extremity falling backward off a ladder. (Exs. 1 through 8). The employer accepted left wrist distal radius comminuted fracture. (Ex. 8).

Dr. Vu (attending physician) performed a closing evaluation on February 14, 2005. (Ex. 6). Dr. Vu found reduced ranges of motion of the left wrist in comparison to the right and that claimant's left hand grip strength was 40 pounds less than his right hand grip strength. (Exs. 6-2; 6-3). Noting that claimant had some limitations with supination of the wrist and ongoing shoulder pain, Dr. Vu released claimant to full duty work "if he can tolerate it." (Exs. 6-3; 6-4).

The claim was closed on April 14, 2005 with an award of 17 percent (equal to 32.64 degrees) scheduled permanent disability. (Ex. 7-2; 7-3). Claimant requested reconsideration.

On June 15, 2005, Celeste Forbes (vocational consultant) performed a vocational eligibility evaluation, and concluded that claimant was ineligible for vocational assistance. (Exs. 10; 11). The basis for Ms. Forbes conclusion was the attending physician's release to regular work. (Ex. 11-2).

Claimant was deposed on June 21, 2005. (Ex. 12). In response to questions from his counsel, claimant explained that one of his primary job duties was to clean fruit processing machinery. (Exs. 12-6; 12-7; 12-8). The same day, claimant requested review of Ms. Forbes determination that he was ineligible for vocational assistance. (Ex. 13).

In a July 13, 2005 "job description," the employer indicated that claimant's job at injury involved repetitive use of the hands, wrists, and arms, as well as the regular use of ladders. (Ex. 14).

Dr. Peterson performed a medical arbiter evaluation. (Ex. 16). Among other things, Dr. Peterson found muscle strength testing of the elbows, wrists, and hand motors, including the intrinsics to be 5/5.

(Ex. 16-2). Dr. Peterson opined that claimant was not significantly limited in his ability to repetitively use the left wrist due to the accepted condition. (Ex. 16-3).

Using Dr. Peterson's medical arbiter evaluation to rate impairment, an August 25, 2005 Order on Reconsideration reduced the employer's permanent disability award (awarded a closure) to five percent (equal to 7.5 degrees) for loss of use or function of the left forearm (wrist). (Ex. 17). Claimant requested a hearing.

On November 21, 2005, after reviewing the July 13, 2005 "job description" (as subsequently modified by claimant), Dr. Vu opined the job description was appropriate except for pushing/pulling 400-pound items, overhead lifting more than 25 pounds. (Exs. 20-2; 21).

Taking into account that Dr. Peterson did not believe claimant was restricted from returning to his regular work, and considering further that claimant's deposition description of his work did not include lifting overhead or pushing/pulling 400 pound items, a December 9, 2005 Director's Review and Order determined that claimant could return to his regular work, and thus affirmed the June 15, 2005 denial of vocational assistance. (Ex. 22-3). Claimant requested a hearing. (Ex. 23).

On July 13, 2006, claimant submitted copies of proposed Exhibits 1A, 5A, 25, and 26 to employer's counsel and the ALJ. (Hearing Division File).

CONCLUSIONS OF LAW

I begin with evidentiary rulings. At the commencement of the hearing, the employer objected to proposed Exhibits 1A, 5A, 25, and 26 on the ground that they were not submitted in compliance with OAR 436-001-0240(2).

OAR 436-001-0240(2) provides in pertinent part:

“Not less than 28 days before the hearing, or within seven days of receipt of the division's document index and documents, whichever is later, the petitioner(s) must provide legible copies of any additional exhibits that they will offer at hearing to the other parties, the director's representative, and the administrative law judge.”

The Division's document index and documents were sent to the parties' respective counsel on March 22, 2006. (Hearings Division File). The hearing convened on July 14, 2006. Thus, to comply with the terms of OAR 436-001-0240(2), claimant was to provide the employer and the ALJ with copies of any additional documents to be offered at hearing on or before June 16, 2006. Here, however, copies of Exhibits 1A, 5A, 25, and 26 were not provided to the employer or the ALJ until July 13, 2006. Consequently, the proffered exhibits were not submitted in compliance with OAR 436-001-0240(2). Because claimant has offered no explanation for failing to comply with the terms of OAR 436-001-0240(2), I sustain the employer's objection to Exhibits 1A, 5A, 25, and 26.

I acknowledge claimant's argument that OAR 436-001-0240(5) gives the ALJ discretion to admit documents not submitted within the time constraints set forth in OAR 436-001-0240(2). However, OAR 436-001-0240(5) only gives the ALJ discretion to substitute an accurate description or photograph of an object or real evidence for the object or real evidence. OAR 436-001-0240(5) says nothing about giving the ALJ discretion to ignore the “timeliness” requirements of OAR 436-001-0240(2). Accordingly, I reject claimant's argument.

The employer also objected to claimant's testimony and the testimony of Jose Rodriguez on the ground that their “testimony was not before the Director” and/or would not assist the ALJ in determining whether claimant was able to perform his regular job.

Pursuant to ORS 656.283(2)(c), a director's administrative review 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 was characterized by an abuse of discretion or clearly unwarranted exercise of discretion.¹ However, in determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make

¹ “The phrase ‘abuse of discretion’ is a legal term of art meaning a discretion exercised to an end or purpose not justified by and clearly against reason or evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and laws pertaining to the matter submitted. BLACK'S LAW DICTIONARY 10-11(6th ed. 1990); *Jerry L. Bell*, 2 WCSR 394, 395 (1997), citing *Casciato v. Oregon Liquor Control Comm'n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979). On review for abuse of discretion, ‘[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.’ *Teresa Brooke*, 8 CCHR 240, 241 (2003) quoting *Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999).” *Suzanne P. Blakley*, 9 CCHR 287, 294 (2004).

independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The ALJ has the responsibility to ensure that the record is fully developed and sufficient for judicial review. ORS 183.415(10). In doing so, the ALJ may admit and consider new evidence. OAR 436-001-0225(3).

Based on the foregoing, the employer's objection to the testimony of claimant and Jose Rodriguez is overruled.

I turn to the merits of claimant's challenge of December 9, 2005 Director's Review and Order. Claimant is eligible for vocational assistance if he is not "able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury," and he has "a substantial handicap to employment." ORS 656.340(6)(a); *former* OAR 436-120-0320(10)(c) (admin Order 05-059). Regular employment means "the employment the worker held at the time of the injury." ORS 656.340(5); OAR 436-120-0005(10). The relevant inquiry is whether claimant is able to return to regular employment, not whether his attending physician released him to regular employment. *Melissa Murphy*, 7 CCHR 8 (2002); *see also Glenda S. Quartermann*, 3 WCSR 339 (1998) (ORS 656.340(1) requires the insurer to evaluate the worker for eligibility if the worker has not "returned" to work; the insurer's determination that there was a "release" to work is insufficient).

Claimant testified that approximately 30 to 40 times a shift he would carry a hose up ladders, some of which were 8 to 10 feet in length, to wash down the fruit processing machinery. Claimant further testified that because he is right hand dominate, he carried and used the hose with his right hand. Thus, during the machine washing procedure, claimant used only his left hand to secure himself to the ladder. Reasoning that his reduced left hand grip strength prevents him from safely using ladders, claimant argues that he that he is unable to return his regular employment.

Mr. Miller (employer representative) did not dispute that claimant's job duties involved climbing ladders to wash down the fruit processing machinery. Nor did Mr. Miller dispute that performance of that job function would likely require a worker to secure himself/herself to a ladder with only one hand. Based on his own observations, however, Mr. Miller believed that claimant spent approximately ½ an hour per shift climbing ladders.

Based on the testimony of claimant, and Mr. Miller I find that a regular portion of claimant's job involves climbing ladders. Based on the same testimony, I further find that a person with a significant loss of function of the hand would be unable to perform claimant's regular employment. However, based on the following reasoning, I am not persuaded that claimant has sufficient loss of function of the hand to prevent him from returning to his regular job.

As noted above, Dr. Vu performed a closing evaluation on February 14, 2005, and reported that claimant's left hand grip strength was 40 pounds less than his right hand grip strength. Approximately five months later, Dr. Peterson performed a medical arbiter evaluation, and found 5/5 muscle strength in the elbows, wrists, and hand motors, including the hand

intrinsic. Based, in part, on that finding, Dr. Peterson opined that claimant was not significantly limited in the repetitive use of the left hand.

Based on that medical record, I find that Dr. Peterson's evaluation demonstrates improvement in claimant's hand function in the five month time period between the attending physician's closing evaluation and the medical arbiter evaluation. In such circumstances, Dr. Peterson's evaluation is more probative on the issue of claimant's left-hand grip strength as of the date of the Director's Review and Order. *See Regina Monahan*, 56 Van Natta 3203, 3208 (2004)(medical arbiter's opinion more probative due in part to five-month gap between closing evaluation and the medical arbiter's evaluation). Consequently, I rely on Dr. Peterson's opinion and conclude that medically, claimant has no significant loss of left hand grip strength.

Therefore, notwithstanding claimant's perceived loss of grip strength, I conclude that the medical record does not support the conclusion that a loss of left hand grip strength prevents claimant from performing his regular job. Having reached such a conclusion, I necessarily conclude there are no statutory grounds for modifying the December 9, 2005 Director's Review and Order.

ORDER

The December 9, 2005 Director's Review and Order is affirmed.