

In the Vocational Assistance of
Bradford D. Stevens, Claimant

Contested Case No: 06-008H

PROPOSED & FINAL ORDER

March 31, 2006

CIS WORKERS' COMPENSATION GROUP , Petitioner

BRADFORD D. STEVENS, Respondent

Before Keith Kekauoha, Administrative Law Judge, Workers' Compensation Board

Hearing convened in Pendleton on March 2, 2006 before Keith Kekauoha, Administrative Law Judge.¹ Claimant was present and represented by his attorney, Michael Gilbertson. Employer, City of Portland, and insurer, CIS Workers' Compensation Group, were represented by their attorney, Krishna Balasubramani. The hearing was recorded by the Administrative Law Judge. Exhibits 1-31, 25A and 30A were admitted into evidence.² Testimony was taken and, following recorded closing arguments, the record closed on March 2, 2006.

ISSUES

1. Vocational Assistance. Insurer appealed the Director's Review and Order dated December 19, 2005 which ordered insurer to redetermine claimant's eligibility for vocational assistance.

2. Assessed Attorney Fees. Claimant requests an insurer-paid attorney fee in the event that the Director's order is not modified.

FINDINGS OF FACT

Claimant has a prior history of right knee injury and surgeries, two of which were performed by Dr. Bowman, but no history of left knee symptoms before February 25, 2004.

On February 25, 2004, claimant suffered a left knee injury while working for employer as a meter reader. His injury claim was initially accepted for a disabling left knee strain.

An MRI of the left knee showed a medial meniscal tear. In March 2004, Dr. Weeks,

¹ This case was originally consolidated for hearing with WCB Case No. 05-08266, which involved insurer's request for hearing concerning an Order on Reconsideration. However, a separate hearing was held in each case. An Opinion and Order is being issued in WCB Case No. 05-08266 on this same date.

² Claimant objected to admission of Exhibits 25A through 31 on the ground that they were generated after the Director's order and are therefore irrelevant under the applicable standard of review. Claimant's objection was overruled at hearing. OAR 436-001-0225(3) provides that new evidence may be admitted and considered in vocational assistance disputes. (WCD Admin. Order 06-050).

orthopedic surgeon, performed an arthroscopic partial medial meniscectomy and identified Grade II chondromalacia of the patella. Following surgery, claimant underwent physical therapy and returned to a modified job with employer.

After being released back to his regular job, claimant experienced significantly increased pain in the left knee. Dr. Weeks considered performing repeat arthroscopic surgery.

Claimant sought a second opinion from Dr. Wobig, orthopedic surgeon, who became his new attending physician. In February 2005, Dr. Wobig performed a second arthroscopic surgery on the knee. He found tears of the medial and lateral menisci, along with Grade III chondromalacia of the patella, and performed a partial medial meniscectomy, partial lateral meniscectomy, and patellar chondroplasty.

Insurer modified its claim acceptance to include left knee partial medial and lateral meniscal tears.

Claimant's left knee condition significantly improved after Dr. Wobig's surgery, and he was released to regular work in late March 2005. However, after returning to regular work, claimant experienced increased pain and swelling in the left knee. He was again taken off work in April 2005, and employer subsequently could not provide further modified work.

In May 2005, Dr. Anderson, orthopedic surgeon, performed a Work Capacity Evaluation. Dr. Anderson concluded that claimant should be restricted to rare crouching and kneeling and no crawling and was unable to return to his regular job at injury due to the crouching and kneeling requirements.

In June 2005, Dr. Wobig declared claimant's left knee condition medically stationary. Dr. Wobig concurred with Dr. Anderson's opinions and concluded that claimant has permanent restrictions on crawling, kneeling and squatting. Dr. Wobig later attributed all of claimant's work limitations to preexisting chondromalacia rather than the meniscal tears.

In July 2005, claimant returned to work for employer at a light duty job answering phones, picking up mail, and performing file work.

On September 7, 2005, insurer closed the claim by issuing a Notice of Closure which awarded temporary disability and 11 percent scheduled permanent disability for the left knee. Claimant, through his attorney, filed a request for reconsideration of the closure notice with the Appellate Review Unit (ARU) of the Workers' Compensation Division.

Claimant continued working at the light duty job until September 23, 2005. Subsequently, employer apparently could no longer modified work, and claimant did not return to work.

In October 2005, claimant saw Dr. Bowman for a second opinion. Dr. Bowman ordered a bone scan. He initially misread the bone scan as showing medial compartment joint changes in the left knee. He later clarified that the bone scan actually showed medial compartment changes in the *right* knee and that the only left knee abnormality identified on the bone scan was mild

increased uptake in the left anterior tibial tubercle, which was not related to the compensable injury. However, he felt that claimant had symptoms consistent with medial joint degeneration.

On October 10, 2005, a vocational consultant, Susan Potter, performed a vocational eligibility evaluation on insurer's behalf and, based on Dr. Wobig's opinion relating claimant's work restrictions to the preexisting chondromalacia, concluded that claimant was not eligible for vocational assistance because his work restrictions were not related to the accepted injury. On the same day, she issued a Notice of Ineligibility for Vocational Assistance, which stated that claimant's lack of suitable employment was not due to limitations caused by the compensable injury or which existed before the injury.

Claimant, through his attorney, filed an appeal of the ineligibility notice with the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division.

On November 2, 2005, as part of ARU's reconsideration of the closure notice, Dr. North, orthopedic surgeon, performed a medical arbiter examination. He reported loss of quadriceps strength and attributed the loss of strength to deconditioning resulting from pain and decreased activity related to the compensable injury and subsequent surgeries. He also reported that claimant was significantly limited in the ability to repetitively use the left knee due to diagnosed chronic and permanent medical conditions arising out of the accepted conditions and identified the medial meniscus as the specific body part involved. Based on weight-bearing x-rays, he felt that claimant was developing degenerative joint disease, primarily in the medial aspect of the knee, as a direct medical sequela of the industrial injury. He also noted the preexisting patellar chondromalacia, which he felt was asymptomatic, and related 75 percent of his findings to the accepted conditions.

On December 12, 2005, ARU issued an Order on Reconsideration which increased claimant's scheduled permanent disability award for the left knee from 11 percent to 20 percent based on the impairment findings of Dr. North.

RRU, as the Director's designate, conducted an investigation of claimant's eligibility for vocational assistance. On December 19, 2005, RRU issued a Director's Review and Order concluding that claimant's lack of suitable employment was due to limitations caused by the compensable injury rather than preexisting conditions. RRU ordered insurer to redetermine claimant's eligibility for vocational assistance.

On January 10, 2006, Dr. Woodward performed an insurer medical examination (IME) at insurer's request. Claimant complained of pain in the anterior, medial and posterior aspects of the left knee, with the most severe pain in the medial aspect of the knee. He also reported left knee stiffness, popping and occasional swelling. Dr. Woodward felt that the accepted meniscal tears and resultant partial meniscectomies caused limitations in stair and ladder climbing, walking and squatting, but stated that the limitations imposed by Dr. Anderson appeared to be due to the chondromalacia patellae.

Claimant, through his attorney, requested that insurer modify its claim acceptance to include degenerative changes of the medial compartment of the left knee. On February 28, 2006,

insurer issued a partial denial of the degenerative changes.

CONCLUSIONS OF LAW AND OPINION

Insurer contends that RRU erred in relying on the medical arbiter's opinion to find that claimant's lack of suitable employment is due to limitations caused by the compensable injury. Claimant responds that RRU appropriately relied on the opinion of the medical arbiter. Based on my review of the record, I agree with insurer and reverse the Director's order.

Under ORS 656.283(2), in a vocational assistance dispute, the Director's order may be modified only if it: (1) violates a statute or rule; (2) exceeds the Director's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(3) (WCD Admin. Order 06-050). As the proponent of modification of the Director's order, insurer has the burden of proving by a preponderance of the evidence that the Director's order violated a statute or rule, exceeded the Director's statutory authority, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. *See Harris v. SAIF*, 292 Or 683, 690 (1982) (burden of proof is generally upon the proponent of a fact or position, the party who would be unsuccessful if no evidence were introduced on either side); *see Cook v. Employment Division*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the burden of proof in an administrative hearing is by a preponderance of the evidence).

The applicable administrative rule in this dispute, OAR 436-120-0350 (WCD Admin. Order 05-059), provides that a worker is ineligible for vocational assistance when any of several enumerated conditions apply. One of the conditions is that the worker's lack of suitable employment is not due to the limitations caused by the accepted injury or which existed before the injury. *See* OAR 436-120-0350(3).

The issue in this case is whether claimant's lack of suitable employment is due to limitations caused by the accepted injury. RRU concluded that it is, relying on the opinion of the medical arbiter, Dr. North, that 75 percent of his findings were due to the accepted conditions. RRU reasoned that Dr. Wobig's opinion (that 100 percent of claimant's limitations were caused by preexisting chondromalacia) was unpersuasive because he failed to document that claimant's accepted conditions included a strain injury. RRU further reasoned that Dr. North was thorough and persuasive and that ARU relied on his report in increasing claimant's permanent disability award.

Insurer argues that RRU should not have deferred to ARU's reliance on Dr. North's opinion in increasing claimant's permanent disability award. Noting that ARU operates under evidentiary limitations that do not apply to RRU's proceedings (*e.g.*, requirement to consider only the impairment findings of the medical arbiter and attending physician and to give deference to the medical arbiter's findings), insurer argues that RRU should not have simply relied on Dr. North's opinions and, instead, should have relied on the opinion of the attending physician and surgeon, Dr. Wobig, and the opinion of Dr. Woodward.

After reviewing the record, I conclude that insurer has met its burden of proving error.

RRU's reason for discounting Dr. Wobig's opinion is not persuasive. The fact that Dr. Wobig did not document that the accepted conditions included a strain injury has little or no relevance to whether claimant's work restrictions are due to the accepted conditions because no doctor has related any of claimant's work restrictions to the original knee strain. Rather, the doctors have related claimant's work restrictions to the preexisting chondromalacia, the accepted meniscal conditions and/or the degenerative joint changes.

RRU's reason for relying on Dr. North's opinion is also unpersuasive. Although ARU relied on Dr. North's opinion to increase claimant's permanent disability award, it did so largely based on Dr. North's status as medical arbiter. In determining the extent of permanent disability, ARU is required by rule to rely on the impairment findings of the medical arbiter, unless a preponderance of medical evidence demonstrates that different findings by the attending physician are more accurate. *See* OAR 436-035-0007(5). RRU, on the other hand, is not bound by that rule in resolving vocational assistance disputes. Hence, the fact that ARU relied on the medical arbiter's findings should not have been the determinative factor in weighing the relative persuasiveness of the medical opinions in this vocational assistance dispute.

After weighing the medical opinions, I find that Dr. Wobig's opinion is entitled to greater weight. As claimant's attending physician and surgeon, he was in the best position to evaluate the nature and cause of claimant's work restrictions. He saw claimant on multiple occasions, whereas Dr. North saw claimant only once for the medical arbiter examination, and had the opportunity during surgery to observe first-hand the meniscal tears and patellar chondromalacia.

In addition, Dr. Wobig explained why he believed 100 percent of the permanent work limitations found by Dr. Anderson during the May 2005 Work Capacity Evaluation were related to the preexisting chondromalacia even though claimant had no left knee symptoms before the February 2004 accident. (Ex. 15). He stated that the accepted meniscal tears themselves would not have been expected to cause permanent work limitations, (Ex. 15-2), and analogized claimant's left knee condition to an automobile tire with a hole, stating that when the hole is plugged, it then becomes apparent that the wear on the tire is significant, (Ex. 15-3). He also analogized claimant's injury to the straw that broke the camel's back. (*Id.*)

Dr. Wobig's opinion is supported by the opinion of Dr. Woodward, who performed an IME and concluded that, while the meniscal tears caused some loss of ability to normally use the knee, the limitations imposed by Dr. Anderson appeared to be due to the chondromalacia. (Ex. 28 pp. 13-14).

Dr. North and Dr. Bowman, on the other hand, related claimant's work restrictions primarily to the compensable injury rather than the preexisting chondromalacia. However, I find their opinions unpersuasive because they both related claimant's left knee problems at least in part to degenerative joint disease in the medial compartment, a condition which has been claimed but remains in denied status at this time. (*See* Ex. 31). Dr. North ordered weight-bearing x-rays and found pathology (loss of normal valgus alignment and narrowing of the medial joint space) consistent with early degenerative joint disease in primarily the medial aspect of the knee. (Ex. 21 pp. 9-10). He concluded that the degenerative joint disease was a direct medical sequela of the industrial injury. (Ex. 21-9). He related claimant's knee problems (pain, decreased motion,

and quadriceps muscle deconditioning) primarily to the industrial injury, but he did not specify the extent to which the degenerative joint disease contributed to these problems. (Ex. 21-10). Because it is unclear how much of the knee problems identified by Dr. North were actually due to the denied degenerative joint disease rather than the accepted meniscal tears alone, I conclude that his opinion relating claimant's impairment to the accepted conditions is unreliable.

Dr. Bowman initially stated that he did not believe claimant's symptoms were due to chondromalacia because a bone scan showed increased uptake only in the medial joint line of the left knee. (Ex. 22). However, he later stated that he had misread the bone scan and that the increased uptake in the medial compartment was actually in the *right* knee. (Ex. 29 pp. 2-3). Although he nevertheless felt that claimant's medial left knee pain was a consequence of the loss of meniscus, (Ex. 29-3), he explained that the left knee symptoms were consistent with medial joint degeneration caused by the accepted meniscal tears, (Ex. 30A-3). In other words, Dr. Bowman felt that claimant's left knee symptoms were due in part to the degenerative joint disease which is in denied status. Because his opinion is based on consideration of a condition which has not been accepted, I give his opinion lesser weight.

Based on the well-reasoned opinion of the attending physician and surgeon, Dr. Wobig, I find that claimant's current lack of suitable employment is not due to limitations caused by the accepted injury or which existed before the injury. I therefore conclude that the Director's order to redetermine claimant's eligibility for vocational assistance violated OAR 436-120-0350(3). Furthermore, because RRU deferred to ARU's reliance on the medical arbiter's opinion in a permanent disability dispute, rather than independently weighing the relative persuasiveness of the conflicting medical opinions in this dispute, I also conclude that the Director's order was characterized by abuse of discretion. *See Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37, 46 (1999) (RRU's failure to consider all relevant circumstances in making its decision in a vocational assistance dispute was an abuse of discretion). Accordingly, the Director's order shall be reversed.

ORDER

The Director's Review and Order dated December 19, 2005 is reversed, and the October 10, 2005 Notice of Ineligibility for Vocational Assistance is reinstated and upheld.