

In the Vocational Assistance of
Dianna L. Caswell, Claimant
Contested Case No: 06-210H
PROPOSED & FINAL ORDER

May 24, 2007

DIANNA L. CASWELL, Petitioner
SAIF CORPORATION, Respondent

Before John Mark Mills, Administrative Law Judge

Hearing in this matter was set before Administrative Law Judge John Mark Mills in Bend, Oregon on April 3, 2007. Prior to the time of hearing the parties advised that the matter could be submitted on the documentary record. Claimant was represented by her attorney, Philip H. Garrow. The employer, Dry Cleaning Station, and their insurer, SAIF Corporation, were represented by their attorney, John Motley. No proceedings were recorded. Exhibits 1 through 19 were submitted by the Workers' Compensation Division (WCD). Claimant submitted supplemental Exhibit 14A. Closing arguments were then submitted by the parties, the last of which was received on April 30, 2007 and the record was closed on that date.

ISSUES

Claimant contests the Directors Order dated December 13, 2006 which approved the insurer's determination that claimant was not eligible for vocational assistance. The Director's Order was issued by the Rehabilitation Review Unit (RRU) of WCD. Claimant seeks the award of an assessed attorney fee should he prevail in this proceeding.

STANDARD OF REVIEW AND EVIDENTIARY RECORD

Under ORS 656.283(2), ORS 656.340, OAR 436-001-0225(3) and *Colclasure v. Washington County School District #48-J*, 317 Or 526, 537 (1993), the ALJ conducts a hearing at which the parties develop a record and on the basis of that record the ALJ finds facts. Based upon those facts, the ALJ may modify the Director's Order only if it:

- a) violates a statute or rule;
- b) exceeds the Director's statutory authority;
- c) was made upon unlawful procedure; or
- d) was characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

FINDINGS OF FACT

Claimant was working in a dry cleaning position in April of 2005 when she filed an injury claim for her right arm. (Ex. 1). That claim was accepted ultimately for right biceps tendonitis, dislocation of the biceps tendon, and right shoulder impingement. (Ex. 9).

Claimant's main treating physician has been Dr. Jacobson. He initially released her to regular work in March of 2006. (Ex. 4). In May of 2006 he indicated that claimant was medially stationary, performed a closing evaluation and again released her to her regular work. However,

Dr. Jacobson noted that the job she had at that point was at a title company and that had not worked out, so she was not working. The record does not reflect that claimant ever attempted or was able to attempt to return to work in the dry cleaning position she held at the time of her injury.

Claimant's claim was closed in June of 2006 with a nine percent award based upon loss of range of motion and a surgical procedure that she had had. (Ex. 9). Because claimant had been declared able to return to her regular work, the insurer issued a Notice of Vocational Ineligibility on July 31, 2006. (Ex. 11).

Claimant contested that finding, noting that Dr. Jacobson had released her, not to her job at injury, but to work at a title company. She indicated that she could not work in the dry cleaning field given the overhead work which was the source of her initial injury. (Ex. 12).

In response to an inquiry from claimant's counsel, obtained during the review process by RRU, Dr. Jacobson indicated that his release had covered the dry cleaning position, but that she could not currently perform that position because her symptoms had increased and he was not at that point, on August 29, 2006, sure where claimant's actual restrictions would end up on a permanent basis. (Ex. 13).

Claimant returned for follow-up care with Dr. Jacobson on October 2, 2006. (Ex. 14A). Dr. Jacobson indicated that he amended his initial medically stationary finding to find that claimant did have limitations on her activity and therefore was limited to office-type work. Based on his restrictions, claimant would not be able to do her job at injury. (Ex. 14A).

Claimant had requested reconsideration of the closure of her claim and was seen by a medical arbiter, Dr. Andrews, on October 5, 2006. Dr. Andrews indicated that claimant was medically stationary as of the time of his evaluation and had permanent restrictions on her ability to do the type of work that she had done at the time of the injury. (Ex. 15). Based upon his evaluation an Order on Reconsideration was issued on November 8, 2006 and then modified on November 16, 2006 which awarded claimant a substantial award of permanent disability based on her impairment and social and vocational factors because of her inability to return to her job at injury. (Exs. 16, 17).

The Director's Order then issued on December 13, 2006 approving the insurer's denial of claimant's vocational assistance request. (Ex. 18).

CONCLUSIONS AND OPINION

Claimant has the burden of proving that the Director's Order should be modified. The basis for my review and the standard of review is set forth in the initial portion of this Order.

It is quite clear that the preponderance of the evidence available to RRU at the time of the Director's Order supports claimant's position that she was not, at that point, released to her regular work or able to perform her job at the time of the injury. That makes sense since claimant's accepted injury was to her shoulder and she is, according to both her treating

physician, Dr. Jacobson, and the medical arbiter, Dr. Andrews, unable to perform the type of overhead activities and repetitive activities with her injured shoulder which are associated with the job at injury she had in the dry cleaning trade.

Despite that clear record, the Director's Order found that Dr. Jacobson's original release was more persuasive than the more recent evidence from Jacobson and the arbiter. As will be discussed below, I find that that conclusion was an abuse of discretion and is based on errors of law.

I first address the issue addressed by both parties as to what consideration should be given to the supplemental exhibit submitted by claimant, Exhibit 14A and the related question, whether claimant's vocational eligibility is addressed as of the time of SAIF's order denying eligibility or is an ongoing question throughout the Director's review process.

On the first issue, the admissibility of Exhibit 14A, case law, the statute and the Director's own order make it clear that new evidence can be admitted before the ALJ at the time of hearing on a vocational eligibility issue. Exhibit 14A is admissible. The insurer in its brief cites OAR 436-120-0008(1)(g)(h) for the proposition that 14A should not be received unless that evidence could not have been discovered and produced during the RRU review. Those provisions cited by the insurer have to do with a reconsideration process that the Director can engage in and have no applicability to this hearing.

As far as when the determination for vocational eligibility is to be made, claimant cites OAR 436-012-0320 for the proposition that eligibility is determined at the time that the RRU review process is taking place, as opposed to at the time of the insurer's decision. I do not find a specific provision in that rule that supports claimant's position. However, it is clear from that rule, and from RRU review process set forth in OAR 436-120-0008 and from the Order itself, that the RRU is gathering additional information and making a fresh determination of vocational eligibility and is not limiting its review to the evidence available to the insurer at the time of its determination. In sum, I find that it is clearly appropriate to consider new evidence, including Exhibit 14A, and to determine claimant's vocational eligibility as of the time of the RRU review process and the Director's Order.

I now return to the Director's Order. The explanation for the Director's conclusion is contained in large part in the final paragraph of page 3 of the Order. The Director's Order indicated that claimant's symptoms seemed to have worsened but claimant never filed a claim for aggravation. While it may very well be as SAIF points out, and as is pointed out elsewhere in the Director's Order, that if claimant's claim were to be reopened for an aggravation claim, claimant's claim would have to be re-determined for vocational eligibility, there is no legal authority of which I am aware for the proposition that claimant must file a claim for aggravation before a change in her condition and new medical evidence concerning her ability to return to her job at injury can be considered by RRU during its review process. As discussed above, RRU evaluates the evidence available to it at the time of the review process and that evidence is not limited by any rule or statute to situations in which claimant has filed an aggravation claim. This portion of the Director's Order violates a statute or rule as it has no statutory or rule basis.

More importantly, the Director's Order goes on to indicate that Dr. Jacobson never provided any restrictions for claimant's work. While that finding made sense at the time of the Director's Order, it is completely contrary to Exhibit 14A and at this point, constitutes an abuse of discretion. Finally, given the most up to date information from claimant's treating physician and the arbiter, to the effect that claimant is not able to return to her job at injury, I find that the Director's conclusion that a preponderance of the evidence was reflected by Dr. Jacobson's initial regular return to work release is an abuse of discretion on this record¹.

In sum, I find that the Order of the Director should be modified. The Director's decision to affirm the insurer's July 31, 2006 denial of vocational assistance is set aside.

For prevailing in this proceeding claimant's counsel is entitled to the award of an assessed fee. Pursuant to ORS 656.385(1) and OAR 436-120-0008 I do not have specific evidence of claimant's counsel's times devoted to this matter. However, based on the record which reflects claimant's counsel's efforts on claimant's behalf in this case, and claimant's submission of two written arguments post hearing, and the obvious benefit of the claim to claimant and the other factors which I can consider under the statute and rule, it is clear that the maximum fee of \$2,000.00 is at minimum appropriate in this case. I therefore assess that fee.

ORDER

IT IS HEREBY ORDERED as follows:

- 1) The Director's Order dated December 13, 2006 affirming the insurer's July 31 denial of claimant's vocational assistance is modified and reversed. Claimant is entitled to vocational assistance as she is unable to return to her job at injury.
- 2) For prevailing in this proceeding claimant's attorney is awarded an assessed fee in the sum of \$2,000.00.

¹ I recognize, as pointed out by the insurer, that there is some lack of logic in the concept of finding that the Director abused its discretion in finding a fact based upon my consideration of evidence which was not in the Director's record. Nevertheless, under Colclasure that is what the standard of review appears to contemplate under these circumstances.