
In the Vocational Assistance of
Monty L. Drew, Claimant
Contested Case No: 06-121H
CORRECTED PROPOSED & FINAL ORDER
July 13, 2007
MONTY L. DREW, Petitioner
FIDELITY & GUARANTY INSURANCE CORP., Respondent
Before Holly J. Somers, Administrative Law Judge

On July 5, 2007, the Opinion and Order in the above captioned matter was issued. However, the order was issued referencing the wrong mailing date. The order is being re-issued to correct that error. All rights shall run from the date of this order.

Pursuant to notice, the hearing convened on June 5, 2007 in Portland, Oregon before Administrative Law Judge Holly J. Somers. Claimant was present and represented by Gary Borden. Steve Maher represented the employer, Consolidated Freightways, and its claims processor, Broadspire. Exhibits 1 through 26, and 19A were admitted into the record. No testimony was taken and the record closed on June 5, 2007 following recorded closing arguments.

ISSUES

Eligibility for Vocational Assistance. Claimant appeals the May 31, 2006 Director's Review and Order finding him ineligible for vocational assistance. Ex. 24. Claimant requests an assessed attorney fee should he prevail.

FINDINGS OF FACT

While employed as a hostler for employer, claimant sustained a compensable injury on June 6, 2002. The processor accepted the conditions described "right shoulder strain combined with pre-existing acromioclavicular arthrosis; AC degenerative arthritis; right subacromial impingement."

After a medical arbiter examination, a March 10, 2006 Order on Reconsideration awarded temporary and permanent partial disability. Ex. 18. Claimant was awarded 18 percent unscheduled permanent partial disability for the right shoulder. No impairment was awarded for a chronic condition.

Effective April 6, 2006, claimant was found ineligible for vocational assistance. The April 7, 2007 Notice stated that claimant's attending physician, Edgar Ragsdale, M.D. approved the job analysis for the job of hostler and that pursuant to OAR 436-120-0350(3),¹ claimant was

¹ OAR 436-120-0350(3) states that a worker is ineligible for vocational assistance if the lack of suitable employment is not due to the limitations caused by the injury.

ineligible for vocational assistance. Ex. 20. Claimant appealed this decision to the Director of the Workers' Compensation Division.

On May 31, 2007, the Director affirmed the carrier's denial of vocational assistance. Ex. 24.

CONCLUSIONS OF LAW AND OPINION

Claimant has the burden of proving that the Director's Order should be modified. ORS 656.283(2)(c) provides that the decision of the Director's administrative review shall be modified only if it: (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.

Claimant contends that the Director's Order should be modified because it was made upon unlawful procedure. More specifically, claimant argues that the director incorrectly concluded that claimant could perform his regular job as a hostler because he was not significantly limited in repetitive use of his shoulder. Claimant relies on the medical arbiter's opinion to support his argument.

The carrier contends that because the March 10, 2007 Order on Reconsideration finding claimant was not permanently limited in repetitive use is final, the law of the case prevents a finding of vocational eligibility based on the opposite conclusion. The carrier also contends that even if claimant were permanently limited in repetitive use of the shoulder, the record does not demonstrate that that limitation is due to the accepted condition.

On February 24, 2006, the medical arbiter responded to clarification questions from the Appellate Review Unit. Ex. 17. The arbiter was asked whether claimant was significantly limited in the repetitive use of his shoulder due to the accepted condition. The arbiter provided a handwritten statement reading, "Patient is NOT significantly limited in repetitive use of right shoulder due to accepted condition but may be limited due to denied condition of degenerative arthritis of acromioclavicular [unreadable] (not shoulder glenohumeral)." (emphasis in original).

Assuming, *arguendo*, that the Order on Reconsideration's finding that claimant was not significantly limited due to the accepted condition does not preclude relitigation of that issue, the record does not support a conclusion that claimant was, in fact, significantly limited due to the accepted condition.

First, the arbiter stated only that claimant "may be limited" due to the degenerative arthritis. Ex. 17-1. This statement is insufficient to persuasively establish that it is medically probable claimant is limited. *Gromley v. SAIF*, 52 Or App 1055 (1981) (holding that persuasive medical opinions must be based on medical probability, rather than possibility); *Larry G. Gensman*, 58 Van Natta 734 (2006)

Further, claimant's attending physician specifically stated that claimant could perform the job of hostler on a full time basis. Ex. 26. As the attending physician, he is in the best position to evaluate whether claimant is able to perform his job at injury.

Therefore, I find claimant has not carried his burden to show that the Director's Order should be modified.

ORDER

The May 31, 2007 Director's Review and Order is affirmed.

IT IS SO ORDERED.