

In the Vocational Assistance of
Steven E. Helstowski, Claimant

Contested Case No: 07-008H

PROPOSED & FINAL ORDER

June 29, 2007

STEVEN E. HELSTOWSKI, Petitioner
SAIF CORPORATION, Respondent

Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice this matter was scheduled for hearing on April 24, 2007 in Ontario, Oregon before Administrative Law Judge Fulsher. Prior to the date of the scheduled hearing, the parties agreed to submit this matter on the documentary record with written closing arguments. Claimant is represented by his attorney, Michael Gilbertson. AAA Thunderbolt Fire Service and SAIF Corporation are represented by their attorney, Carrol Smith. The record closed on June 1, 2007, following expiration of the time allowed for claimant to submit a reply argument.

Exhibits 1 through 22 are admitted into the record.

ISSUE

Whether claimant has a substantial handicap to employment and is therefore eligible for vocational assistance.

FINDINGS OF FACT

Claimant compensably injured his right knee on September 9, 2004. Claimant had right knee surgery performed by Dr. Bollom, who found claimant medically stationary and released him to regular work on July 19, 2005. (Ex. 3). The claim was closed on August 17, 2005 with an award of 9 percent scheduled permanent disability for the right knee. (Ex. 5). Claimant requested reconsideration.

On August 23, 2005, SAIF issued a notice of ineligibility for vocational assistance to claimant. SAIF based its decision on the fact that claimant was released to regular work by his treating physician and did not meet the eligibility criteria. (Ex. 6).

A medical arbiter examination with Dr. Ireland took place on November 17, 2005. (Ex. 8). On December 7, 2005, an Order on Reconsideration issued that increased claimant's scheduled permanent disability award to 21 percent for the right leg (knee).

SAIF wrote to Dr. Bollom on January 26, 2006 indicating that claimant's attorney had requested that claimant's eligibility for vocational assistance be re-determined. SAIF's letter asked whether claimant was capable of his regular work. On February 14, 2006, Dr. Bollom responded that:

“If Dr. Ireland’s most recent range of motion is accurate then seasonal firefighting may be difficult for [claimant] and a more sedentary job would be appropriate. I believe he has lost some motion since our last visit based on these numbers.” (Ex. 10).

Dr. Bollom signed a release to work on February 9, 2006. He checked the box releasing claimant to full duty without limitations as of July 19, 2006. Under the section for “other functional limitations or modifications necessary in the worker’s employment,” he wrote that claimant had apparently lost motion and had continued pain and may require a more sedentary job. Dr. Bollom indicated he had not seen claimant since July 2005. (Ex. 11).

Claimant underwent a physical capacity evaluation on March 27, 2006. This evaluation found claimant capable of medium work. (Ex. 12). Claimant had an eligibility evaluation on April 25, 2006. The evaluator concluded that claimant did not possess a substantial handicap to employment and was not eligible for vocational assistance. The evaluator identified occupations for which the work possessed the knowledge, skills, abilities and physical capacities to perform. (Ex. 13). On May 2, 2006, SAIF sent claimant notice of ineligibility for vocational assistance. Claimant, through his attorney, requested review of the notice of ineligibility. (Ex. 15).

On June 28, 2006, Dr. Bollom responded to a letter from SAIF asking him to review and provide his opinion of the eligibility for vocational services report and indicate whether the report was an accurate description of claimant’s physical abilities. Dr. Bollom checked the box for “yes.” (Ex. 16). On July 5, 2006, a vocational consultant performed a “suitable employment analysis.” She analyzed the jobs of cashier/checker and sales clerk and found that they would provide reasonable opportunities for suitable employment in claimant’s local area. Therefore, she did not reach the merits of the suitability of the remaining occupations identified by SAIF. (Ex. 17). On July 7, 2006, a Director’s Review and Order issued. The order concluded that claimant did not have a substantial handicap to employment and that claimant was therefore not eligible for vocational assistance. (Ex. 19).

On November 8, 2006, an ALJ ruled that the law of the case (as determined by the December 7, 2005 Order on Reconsideration) established that claimant was significantly limited in the ability to repetitively use his right leg. Because there was no discussion of that in either the RRU’s “suitable employment analysis” or its July 17, 2005 order, the ALJ was unable to determine from the record presented whether that limitation was considered by the RRU. On this basis, the ALJ remanded this matter for further proceedings before the Director. (Ex. 20). On November 27, 2006, a Director’s Review and Order again found that claimant did not have a substantial handicap to employment and was therefore ineligible for vocational assistance. (Ex. 21). Claimant requested a hearing on January 4, 2007. (Ex. 22).

CONCLUSIONS OF LAW AND OPINION

The Director’s Review and Order may be modified only if it violates a statute or rule, exceeds the Director’s statutory authority, is characterized by abuse of discretion, or was made upon unlawful procedures. ORS 656.283(2)(c).

The prior ALJ ruled that the law of the case (as determined by the December 7, 2005 Order on Reconsideration) established that claimant was significantly limited in the ability to repetitively use his right leg and remanded this matter for further administrative proceedings. In response, the Director issued a second Director's Review and Order and stated that final decisions of the Director had held that the "law of the case" doctrine does not apply between the Appellate Review Unit and the Rehabilitation Review Unit regarding a workers' physical restrictions. The cited decisions were *Mark B. Hardman*, 8 CCHR 127 (2003) and *Calvin Ott*, 7 CCHR 342 (2002).¹ The Director's order also gave greater weight to the opinion of Dr. Bollom, the attending physician, noting that the doctor concurred with the PCE as to claimant's physical restrictions.

Claimant argues that the Director ignored the prior ALJ's order, the Order on Reconsideration, the medical arbiter and the attending physician and did not determine whether the jobs identified are suitable considering claimant's established restrictions. SAIF responds that the Director has evaluated claimant's physical capacities, knowledge, skills and abilities and suitable wage and determined there were reasonable opportunities for employment and that claimant is consequently not eligible for vocational services. SAIF also notes that the Director's order cites final decisions determining that the "law of the case" doctrine does not apply between the Appellate Review Unit (ARU) and the Rehabilitation Review Unit (RRU) regarding a workers' physical restrictions.

To the extent that the cases relied on by the Director's order are binding precedent, those decisions must be followed. However, the Director's order also relied on the opinion of the attending physician, who agreed that the physical capacities evaluation of claimant's physical abilities was accurate. Under such circumstances, I conclude that the order cannot be modified under the review standard set forth in ORS 656.283(2)(c). Accordingly, the order should be affirmed.

ORDER

The November 27, 2006 Director's Review and Order is affirmed.

¹ In *Hardman*, the Director applied a *res judicata* or preclusion analysis.