
In the ORS 656.340 Vocational Assistance Dispute of

Charles W. Keller, Claimant

Contested Case No: 06-161H

PROPOSED & FINAL ORDER

April 16, 2007

CHARLES W. KELLER, Petitioner

SAIF CORPORATION, Respondent

Before Emerson G. Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on August 17 2006 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

In lieu of proceeding to hearing on February 20, 2007, the parties submitted this matter to the undersigned Administrative Law Judge for a decision based on documentary evidence and written closing arguments. Claimant is represented in these proceedings by attorney George Wall. The employer, East Side Plating Co., and its insurer, the SAIF Corporation, are represented by attorney Mary Goebel Adams.

The documentary evidence received consists of Exhibits 1 through 15, and 11A.

The record closed on March 30, 2007.

ISSUE

Whether claimant is ineligible for vocational assistance because he has become unavailable for vocational assistance for reasonable cause; *i.e.*, incarceration for a period of greater than six months.

FINDINGS OF FACT

Claimant sustained a compensable right wrist sprain and TFCC tear on October 24, 2002. (Exs. 1; 2; 6; 8). The claim was closed by a June 7, 2006 Notice of Closure (NOC), as corrected on July 11, 2006, with an award of 18 percent (equal to 34.56 degrees) scheduled permanent disability. (Exs. 7; 10).

Claimant has not been released to return to his regular work as a metal finisher. (Exs. 1; 10).

On July 4, 2006, claimant advised Adele Bostwick (rehabilitation consultant assigned to his claim) that he had become incarcerated and would likely remain so until at least October 2009. (Ex. 9). Further advising that because of his incarceration he was currently unable to participate in a vocational eligibility evaluation, claimant requested vocational help upon his release from prison. (*Id.*)

Following a July 12, 2006 “warning,” SAIF issued a Notice of Ineligibility for Vocational Assistance on August 1, 2006. (Exs. 11; 11A; 12). Claimant requested Director’s Review. (Exs. 12; 14).

Reasoning that claimant was unavailable for vocational assistance because of his incarceration, Rehabilitation Review Unit (RRU) applied OAR 436-120-0355(8) and determined that claimant was ineligible for vocational assistance.¹ (Ex. 14-2). Relying on OAR 436-120-0360(6) RRU further reasoned that SAIF’s Notice of Ineligibility would become final unless claimant requested redetermination of his eligibility within six months from the date that he received SAIF’s Notice of Ineligibility.² (Ex. 14-3). Consequently, RRU issued an August 17, 2006 Director’s Review and Order affirming SAIF’s denial of vocational assistance. (*Id.*)

Claimant requested a hearing.

CONCLUSIONS OF LAW

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.³ ORS 656.283(2)(c). In determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make independent findings of fact. OAR 436-001-0225(3); *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993).

¹ OAR 436-120-0350(8) provides that a worker is ineligible for vocational assistance if the worker has declined or has become unavailable for vocational assistance for reasonable cause.

² OAR 436-120-0360(6) requires a carrier to redetermine a worker’s eligibility for vocational assistance when a worker was unavailable for vocational assistance due to short-term incarceration becomes available within six months of the date of the worker’s receipt of the carrier’s notice of ineligibility.

³ “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).

Claimant asserts that OAR 436-102-0360(6) is outside the scope of the Director's authority as set forth in ORS 656.340(6). Consequently, claimant seeks an order remanding this matter to RRU for a redetermination (without application of OAR 436-012-0360(6)) of his eligibility for vocational assistance. As explained below, I reject claimant's argument that the Director lacked authority to promulgate OAR 436-120-0360(6).

ORS 656.340(6)(a) provides that:

“A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.”

The remainder of ORS 656.340(6) defines the terms “substantial handicap to employment” and “suitable employment.” Therefore, claimant correctly asserts that under ORS 656.340(6), if a worker has a “substantial handicap to employment,” the worker's eligibility for vocational assistance is limited only by the worker's ability to return to his previous employment or to other available and suitable employment with the employer at injury/aggravation.

However, ORS 656.340(7) provides:

“Vocational evaluation, help in directly obtaining employment and training shall be available under conditions prescribed by the director. *The director may establish other conditions for providing vocational assistance, including those relating to the worker's availability for assistance, participation in previous assistance programs connected with the same claim and the nature and extent of assistance that may be provided. Such conditions shall give preference to direct employment assistance over training.*” (Emphasis added).

Thus, pursuant to ORS 656.340(7), the director has authority to establish conditions for the provision of vocational assistance that relate to the worker's availability for such assistance.

OAR 436-120-0360(6) relates to a worker's availability for vocational assistance. Accordingly, I reject claimant's argument that OAR 436-120-0360(6) was promulgated outside the Director's authority.

ORDER

The August 17, 2006 Director's Review and Order is affirmed.