

In the Request for Hearing of
Jassem M. Shahad, Claimant

Contested Case No: 07-265H

PROPOSED & FINAL ORDER

April 17, 2007

JASSEM M. SHAHAD, Petitioner

ALBERTSONS INC. , Respondent

Before David D. Lipton, Administrative Law Judge

Pursuant to notice, a hearing was held and closed on April 5, 2007 in Portland, Oregon before David D. Lipton, Administrative Law Judge. Claimant was present and was represented by Michael Gilbertson. The employer, Albertsons, Inc., and its claims management service, Specialty Risk Services, were represented by William Replogle. The employer representative was Brian McAnally. The proceedings were interpreted for Claimant by Ishmael Haider.

Exhibits 1 through 10 were admitted.

ISSUE

Claimant protests the December 19, 2006 Director's Review and Order which affirmed a Notice of Ineligibility for vocational assistance. Claimant contends that the Director's order was characterized by an abuse of discretion.

FINDINGS OF FACT

Claimant was compensably injured on November 4, 2004. He received an award of permanent disability benefits. His employer, Albertsons, determined that long term light duty would not be available to Claimant. On September 11, 2006 the claims management service referred Claimant to Susan Martin for a vocational eligibility evaluation.

Claimant has been in the United States since mid 2000. He is a native speaker of Arabic. He has worked at Albertsons as a courtesy clerk since May 2001.

Claimant speaks some English and can engage in simple conversations. He does not read or write English. He worked with three different managers at Albertsons and did not require an interpreter to perform his job.

Since his injury, either Claimant's brother or his brother's American wife have accompanied him to the doctor to interpret for Claimant.

After receiving the referral for a vocational eligibility evaluation, Ms. Martin contacted Claimant. He referred her to his attorney. Ms. Martin contacted Claimant's attorney. He recommended that she talk to Claimant's brother who would assist her to schedule an appointment to meet with Claimant. However, Claimant's brother called Ms. Martin and informed her that Claimant would not meet with her. Ms. Martin informed Claimant's attorney

that if Claimant did not meet with her she would have to find him ineligible for vocational services.

On October 11 Ms. Martin wrote to Claimant that despite her attempts to contact Claimant, a meeting had not yet been scheduled. The time within which to complete an eligibility evaluation had passed but she would meet with Claimant on October 17 to complete the task. Claimant called and left two messages for Ms. Martin while she was out of the office. She attempted to return his calls, but did not reach him.

On October 20, 2006 Ms. Martin sent Claimant a warning letter stating that Claimant did not appear for the October 17 meeting and rescheduling the appointment to October 26. Ms. Martin warned Claimant that if he did not attend that meeting she would understand that he did not wish to receive vocational services and Claimant would be declared ineligible for vocational assistance.

On October 24, 2006 Claimant's brother called the vocational counselor to advise her that Claimant would not meet with her. On October 27 Ms. Martin issued a Notice of Ineligibility for Vocational Assistance, citing Claimant's failure to participate in the vocational assistance process after a written warning. Claimant did not contact Ms. Martin in response to the Notice.

Claimant's attorney resigned and he obtained new counsel. His new attorney requested review of the Notice of Ineligibility. The Rehabilitation Review Unit conducted a telephone conference on December 18, 2006. The parties to the conference included Claimant, his brother, Claimant's attorney, Ms. Martin and the claims processor. Apart from his own knowledge of the events concerning the vocational assistance efforts, Claimant's brother attended the telephone conference to provide translation services on the recommendation of Claimant's attorney.

The Director's Review and Order issued on December 19, 2006. It found that Claimant failed after written warning to participate in the vocational assistance process and affirmed the Notice of Ineligibility.

OPINION AND CONCLUSION

Claimant has requested a hearing to protest the December 19, 2006 Director's Review and Order which affirmed the Notice of Ineligibility for vocational assistance. The purpose of a hearing before an Administrative Law Judge is to conduct a hearing, develop a record, make findings of fact and to determine whether the Director's Order survives review under ORS 656.283(2).

Claimant contends that the Director's Review and Order should be modified because the decision is the result of an "abuse of discretion." ORS 656.283(2)(c)(D). To allege that the decision is characterized by an "abuse of discretion" is to contend that the Director acted to an end or purpose not justified and clearly against reason and evidence in finding that Claimant "failed, after written warning, to participate in the vocational assistance process..." *Richard A. Colclasure* 46 Van Natta 1246 (1994).

The issue before the Director was whether Claimant was ineligible for vocational assistance because after written warning he failed to participate in that process. Claimant told the Director's delegate that he knew what he was supposed to do in response to Ms. Martin's contacts, but did not do it. However, the broad issue of a general lack of cooperation was not before the Director. The issue before the Director was whether Claimant failed to act after written warning. Claimant does not claim that he did not receive the warning, but he does not remember when he received it.

Claimant was able to and did contact the vocational counselor. He is able to have a simple conversation that requires scheduling a meeting. He does not claim that he was not aware of the warning. He did not contact Ms. Martin in response to it or even after receiving the Notice of Ineligibility.

Claimant was represented by an attorney at the telephone conference conducted by the Director's delegate. Claimant had an opportunity to present his issues and perspective. Claimant now disputes that he was aware of the October 26, 2006 appointment with Ms. Martin. His brother now maintains that he should not have had to act as his brother's interpreter and that he effectively terminated Claimant's vocational assistance opportunity in his October 24 telephone call to Ms. Martin without his brother's knowledge. These contentions were not put before the Director.

Claimant has never stated that knowledge of the warning letter prompted any participation in Ms. Martin's vocational assistance efforts. Despite Ms. Martin's calls, and the involvement of his attorney, Claimant made little effort to cooperate with Ms. Martin's efforts. She did not capture his attention until she issued the Notice of Ineligibility. Even then, Claimant did not contact Ms. Martin nor offer to participate in the vocational assistance process. Based on the above, I do not find that the Director exercised jurisdiction to an end not justified by this record or the rules. Therefore, there was no abuse of discretion and there is no authority to modify the December 19, 2006 Director's Review and Order.

ORDER

IT IS HERBY ORDERED that the December 19, 2006 Director's Review and Order is affirmed.