

In the ORS 656.340 Vocational Assistance Dispute of

Linda S. Toepfer, Claimant

Contested Case No: 06-139H

PROPOSED & FINAL ORDER

June 14, 2007

LINDA S. TOEPFER, Petitioner

FRED MEYER STORES INC., Respondent

Before Martha J. Brown, Administrative Law Judge

Pursuant to notice, a hearing was held and the record closed on May 14, 2007 in Salem, Oregon before Administrative Law Judge Martha J. Brown. Claimant was present but was not represented by counsel. The employer, Fred Meyer Stores, and its claims processing agent, Sedgwick Claims Mgmt. Svcs., were represented by their attorney, Bruce Byerly.

At hearing, Exhibits 1 through 137 and claimant's supplemental Exhibit 107A, were admitted into the record.

ISSUE

Vocational Services. Claimant has appealed the August 18, 2006 Director's Review and Order that she was not eligible for vocational assistance. (Ex. 131).

FINDINGS OF FACT

Claimant was compensably injured on January 3, 2002 while working for the employer as a cake decorator. On March 1, 2002, the employer accepted the claim as a disabling bilateral carpal tunnel syndrome.

The claim was closed by a January 3, 2003 Notice of Closure that awarded temporary disability but no permanent disability. An April 3, 2003 Order on Reconsideration awarded claimant 5 percent scheduled permanent disability for the left forearm (wrist) and 6 percent for the right forearm. A December 8, 2003 Opinion and Order increased claimant's award to 15 percent on the right and 14 percent on the left.

On April 25, 2006, claimant's former counsel wrote to the Director to appeal a February 28, 2006 Notice of Ineligibility for Vocational Assistance. The file was referred to Linda Hill, M.S. to further evaluate claimant for vocational assistance.

In a February 28, 2006 evaluation, Ms. Hill found that claimant was not eligible for vocational assistance. A Notice of Ineligibility for Vocational Assistance, effective February 28, 2006, was issued on that date.

On April 25, 2006, claimant's former counsel requested review by the Director. On August 18, 2006, a Director's Review and Order found that claimant could return to regular work and there was no basis for eligibility for vocational assistance. On August 28, 2006,

claimant's counsel wrote to the Board to request a hearing on the August 2006 Director's Review and Order, which affirmed the denial of vocational assistance.

CONCLUSIONS OF LAW AND OPINION

Pursuant to ORS 656.283(2)(b), if a worker is dissatisfied with an action of the insurer or self-insured employer regarding vocational assistance, the worker must apply to the director for administrative review of the matter. Moreover, pursuant to ORS 656.283(2)(c), when the director issues an order after review, the order shall be subject to review under ORS 656.704. At the contested case hearing, 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 characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Here, claimant acknowledged that her primary disagreement with her case centered on issues of alleged harassment and representation by prior attorneys.¹ Claimant did not make any arguments concerning the Director's order or eligibility for vocational assistance.

The Vocational Consultant found that the Notice of Ineligibility for Vocational Assistance had been issued because claimant could return to regular, or other suitable work with the employer-at-injury, and because her lack of suitable employment was not due to the limitations caused by the injury. Accordingly, the Consultant relied on OAR 436-120-0005(10), which provides that "regular employment" means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance.

In claimant's case, the Consultant found that claimant's regular work was as a bakery clerk/cake decorator for the employer, and claimant's treating doctor, anticipated no permanent impairment and did not find any work restrictions. Similarly, the arbiter did not find any work restrictions.

Although claimant was restricted from work in October 2003 by Dr. Van Winkle, Drs. Wilson and Bell subsequently did not note any work restrictions, and Dr. Wilson stated that claimant's objective findings would not prevent her from doing her job. Finally, Dr. Fitzgerald, claimant's new attending physician, agreed with Dr. Wilson's objective findings, and the medical arbiter, Dr. Brooks, stated that claimant's limitations were all due to pain, not actual lack of function.

Consequently, based on the opinions of Drs. Roberts, Wilson, Bell, Fitzgerald and

¹ Claimant was advised that the ALJ in this case could not address such issues and that the only issue to be litigated was entitlement to vocational assistance.

Brooks, the Consultant concluded that the preponderance of evidence showed that claimant had no work restrictions and could return to regular work. In light of that conclusion, the Consultant determined that it was not necessary to reach the issue of lack of suitable employment, and the denial of vocational assistance was affirmed.

After considering the record and the Director's Review and Order, and the lack of argument to support the request for hearing, I am unable to find any reason to modify the Order. In other words, I do not find that the Director, in this matter, either violated a statute or rule or exceeded the statutory authority of the agency. Moreover, I do not find an abuse of discretion or clearly unwarranted exercise of discretion. Therefore, the August 18, 2006 Director's Review and Order is affirmed.

ORDER

IT IS HEREBY ORDERED THAT The August 18, 2006 Director's Review and Order is affirmed, and the relief requested by claimant is denied.