

In the ORS 656.340 Vocational Assistance Dispute of

**Maria Benitez, Claimant**

Contested Case No: 07-118H

**FINAL ORDER**

July 30, 2008

MARIA BENITEZ, Petitioner

LIBERTY NW INSURANCE CORP., Respondent

Before John Shilts, Workers' Compensation Division Administrator

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Claimant timely filed exceptions to Workers' Compensation Board Administrative Law Judge (ALJ) Nicholas M. Sencer's January 30, 2008, Proposed and Final Order which upheld a decision denying vocational assistance. ORS 656.340(6); 656.704(2)(a); OAR 436-001-0246. Insurer responded. The matter comes before the director for a final order. The issue is whether claimant is eligible for vocational assistance. I affirm and adopt the January 30, 2008 order denying vocational assistance.

**FINDINGS OF FACT**

I adopt and incorporate the ALJ's findings of fact. Claimant injured her ankle at work on June 19, 2006. Her treating physician, Dr. Waring, diagnosed her with a lateral right ankle sprain and fibular chip fracture. Dr. Waring released claimant for modified work on July 26, 2006.

On September 12, 2006, Dr. Waring again authorized modified work. Claimant worked on September 15 and 18, but returned to Dr. Waring for further treatment. As of September 18, 2006, Dr. Waring excused claimant from all work for one week.

On October 9, 2006, Dr. Waring approved an "Alternate Regular Job Analysis," provided by the insurer, describing a job for claimant which primarily involved sitting rather than standing. By October 19, 2006, the employer had terminated claimant's employment for her alleged failure to either work or explain her absence on September 28 and 29 and October 2, 2006. On October 19, 2006, the employer notified claimant it would have offered her this modified job if she had not already been terminated for disciplinary reasons.

On November 21, 2006, Dr. Waring saw claimant again. He released claimant to perform her regular work. The insurer notified claimant on December 27, 2006, that it was closing the claim and that claimant was not entitled to any permanent partial disability.

Claimant's attorney sought review of the no disability finding. ORS 656.268(5)(c); OAR 436-030-0115. The department's Appellate Review Unit (ARU) referred claimant for an examination by a medical arbiter, Dr. Marble. ORS 656.268(6)(b), (6)(f), 656.268(7)(a); OAR 436-030-0165. Dr. Marble examined claimant on March 15, 2007.

Dr. Marble observed swelling in the ankle and measured reduced range of movement. Claimant reported to him that she suffered activity related pain, swelling and snapping within the joint. Dr. Marble concluded claimant's use of her right ankle was significantly limited. There

were significant pain complaints which he believed suggested instability and intraarticular pathology. Dr. Marble stated that if claimant were his patient he would recommend re-opening her claim and referring her to an orthopedic surgeon to have her ankle evaluated. Dr. Waring reviewed these results and stated : “Assuming that Dr. Marble’s findings are an accurate reflection of her clinical circumstances, then his recommendation would seem reasonable.”

On March, 30, 2007, the department issued an Order on Reconsideration. The reviewer awarded claimant a whole person impairment of five percent.

On June 26, 2007, the insurer notified claimant she was deemed not eligible for vocational assistance. The insurer’s reasons were that claimant had been discharged from her job for reasons unrelated to her injury, that Dr. Waring had released claimant for regular work, and that the employer would have provided a suitable job had claimant been unable to perform her regular job. The insurer therefore concluded claimant’s inability to work was not due to a disability resulting from her injury. ORS 656.340(6)(a), (6)(b); OAR 436-120-0350(3).

On July 5, 2007, claimant’s attorney requested a director’s review of the denial of eligibility for vocational assistance. ORS 656.283(2), 656.340(4); OAR 436-120-0008(1). The director issued a Review and Order on September 17, 2007. The reviewer concluded claimant was not entitled to vocational assistance because her injury did not prevent her from returning to regular employment. ORS 656.340(6)(a); OAR 436-120-0320(11)(c). This ruling was based on Dr. Waring’s having released claimant to her regular work.

On October 8, 2007, claimant requested a hearing before the director to review the September 17, 2007 order. ORS 656.704(2)(a); OAR 436-001-0019. ALJ Nicholas M. Sencer held that hearing on December 27, 2007.

ALJ Sencer relied primarily on three considerations in reaching his determination. He pointed out that claimant bears the burden of proving the director’s order should be modified. *See Harris v. Saif*, 292 Or. 683, 689-691 (1982).. Although the ALJ stated he found Dr. Marble’s report persuasive, he also placed weight on the fact Dr. Waring had been claimant’s treating physician. Finally, Dr. Waring was the only physician who provided an opinion on the record as to claimant’s ability to work. For these reasons, ALJ Sencer found there was no basis to modify the director’s order. He also found this conclusion precluded reaching the issue of whether claimant could perform modified work.

## CONCLUSIONS OF LAW

ORS 656.283(c) provides the ALJ may modify the director’s order 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.”

As noted above, claimant bears the burden of proving that the director's order should be modified. *Saif, supra*.

ORS 656.340(6)(a) establishes the conditions under which a worker is entitled to vocational assistance:

“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.”

“Suitable employment” is defined as “[e]mployment of the kind for which the worker has the necessary physical capacity . . . .” ORS 656.340(6)(b)(B). A worker has a “substantial handicap to employment” when “. . . the worker, because of the injury . . . lacks the necessary physical capacities . . . to be employed in suitable employment.” ORS 656.340(6)(b)(A).

Claimant first argues the ALJ violated a statute (ORS 656.340(6)(a), quoted above) by relying on Dr. Waring's having “released” claimant back to work to conclude claimant is capable of working. Claimant asserts the issue is, rather, her actual capacity to work. There is no error of law such as applying an incorrect statute. The ALJ was not persuaded by the simple existence of the release, but rather by the actual meaning of Dr. Waring's statements.

Dr. Waring's phrasing of releasing claimant to her normal work is simply another way of saying he found her physically capable of performing her normal duties. In fact, the same document from Dr. Waring states claimant is “. . . released without any work restrictions . . .” and further states there are “[n]o specific work restrictions.”<sup>1</sup> It is clear Dr. Waring at that time believed claimant was physically able to perform her normal job. Dr. Waring was the only medical professional whose opinion about claimant's ability to work was included in the record. The ALJ was entitled to give this opinion weight, even in the face of contradictory evidence, given that Dr. Waring had the most experience in treating claimant.

Claimant finally contends the ALJ abused his discretion by failing to establish a record sufficient to determine the issues, as required by ORS 183.415(10). Claimant's underlying assertion is that the ALJ stated he found Dr. Marble's evidence persuasive and that, therefore, the ALJ should have remanded the matter to learn Dr. Marble's formal opinion on whether claimant was able to resume her regular work.

Dr. Marble examined claimant on March 15, 2007. During the administrative review of this matter claimant's attorney suggested he might want to question Dr. Marble.<sup>2</sup> The hearing before the ALJ was not held until December 27, 2007. There was ample opportunity to supply additional evidence on this point at the hearing. The ALJ did not restrict the evidence or limit the record in any way which prejudiced claimant. Claimant was afforded a full opportunity to present any desired evidence and the department's having conducted both an administrative and a hearing review in this matter met its obligation to gather the necessary and relevant

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<sup>1</sup> 11/21/06 “List Visit Detail” dictated by Dr. Waring; Exhibit 6, page 2.

<sup>2</sup> Rehabilitation Review Unit Memo to File, Exhibit 14, p. 2.

information.

**IT IS HEREBY ORDERED** the January 30, 2008 Proposed and Final Order is affirmed.

DATED this 30th day of July, 2008