
In the ORS 656.340 Vocational Assistance Dispute of

Bradford D. Stevens , Claimant

Contested Case No: 06-008H

FINAL ORDER

January 30, 2008

CIS WORKERS COMP GROUP, Petitioner

BRADFORD D. STEVENS, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Claimant, through his attorney Michael A. Gilbertson, timely filed exceptions to Workers' Compensation Board Administrative Law Judge Keith Kekauoha's March 31, 2006 Proposed and Final Order. Insurer, through its attorney Krishna Balasubramani, timely responded. On claimant's motion, director review of this matter was stayed pending completion of compensability proceedings before the Workers' Compensation Board. By letter dated November 27, 2007, claimant advised that director review could continue.¹ I review under ORS 656.704(2)(a) and OAR 436-001-0246. The issue is claimant's eligibility for vocational assistance. I adopt and affirm.

On October 10, 2005, insurer found claimant ineligible for vocational assistance because his lack of suitable employment was not due to the limitations caused by the injury or which existed before the injury. The notice of ineligibility stated that claimant's attending physician, Dr. Wobig, indicated that claimant has a pre-existing patellar chondromalacia condition, which is not related to nor part of the accepted condition, which is the cause of any current symptoms and work restrictions.

The Rehabilitation Review Unit (RRU), in its December 19, 2005 Director's Review and Order, set aside insurer's denial of vocational assistance. RRU concluded that claimant's lack of suitable employment is due to the limitations caused by the injury rather than by pre-existing injuries or conditions. RRU gave greater weight to the opinion of the medical arbiter, Dr. North, who stated that 75 percent of his findings were due to the accepted conditions. RRU found unpersuasive the opinion of Dr. Wobig that 100 percent of claimant's limitations were caused by preexisting chondromalacia. RRU ordered insurer to redetermine claimant's eligibility.

Insurer requested a hearing. ALJ Kekauoha reversed RRU, finding RRU's reasons for discounting Dr. Wobig's opinion and relying on Dr. North's opinion not persuasive. The ALJ weighed the medical opinions and found that Dr. Wobig's opinion is entitled to more weight. ALJ Kekauoha found that claimant's lack of suitable employment was not due to limitations caused by the accepted injury or which existed before the injury, but rather due to the preexisting chondromalacia. The ALJ concluded that RRU's order violated OAR 436-120-0350(3)² and was characterized by an abuse of discretion.

¹ With his November 27, 2007 letter, claimant included copies of the December 12, 2005 Order on Reconsideration, March 31, 2006 Opinion and Order, and ALJ Fulsher's February 21, 2007 Corrected Opinion and Order.

² OAR 436-120-0350 (WCD Admin. Order 05-059, eff. 7/1/05) provides:

“A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

“* * * * *

Claimant filed exceptions,³ but made no specific arguments regarding why he disagreed with the ALJ's order.

In response to claimant's exceptions, insurer first argues that because claimant's request for review does not articulate any specific exceptions to the ALJ's order, it is insufficient to constitute an exception under ORS 656.704(2)(a) and OAR 436-001-0246. However, neither of those provisions requires that exceptions take any particular form or have any specific content. Accordingly, I find that claimant's request for review is sufficient to initiate director review of the proposed and final order.

As to the merits, insurer's position is that the proposed and final order should be upheld. Insurer contends that RRU's order violates the statutory requirement that eligibility for vocational assistance be based only on a lack of suitable employment due to the accepted injury, and that RRU abused its discretion by deferring to the medical arbiter and not independently weighing the medical evidence.

Based on the information submitted, I am not persuaded that the March 31, 2006 proposed and final order should be modified.

As claimant has not prevailed in this matter, his attorney is not entitled to a fee under ORS 656.385(1).

IT IS HEREBY ORDERED the March 31, 2006 Proposed and Final Order is adopted and affirmed.

“(3) The worker's lack of suitable employment is not due to the limitations caused by the injury or which existed before the injury.”

³ Claimant's filing was titled “Request for Board Review” and mailed to the Workers' Compensation Board. Under OAR 436-001-0246(8) claimant's request for board review was forwarded to the director and treated as exceptions.