

In the ORS 656.340 Vocational Assistance Dispute of

**Pema Tsomo, Claimant**

Contested Case No: 07-086H

**FINAL ORDER**

April 30, 2005

PEMA TSOMO, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

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Claimant, through her attorney Peter O. Hansen, timely filed exceptions to Workers' Compensation Board Administrative Law Judge Jill Riechers' October 29, 2007 Proposed and Final Order. Insurer, through its attorney Holly Ansari, responded to the exceptions.<sup>1</sup> This matter comes before the director for a final order. The issue is eligibility for vocational assistance. I adopt and affirm with the following supplementation.

I adopt the ALJ's findings of fact.

On March 19, 2007, insurer determined claimant ineligible for vocational assistance because she did not have a substantial handicap to employment. The Rehabilitation Review Unit (RRU) affirmed insurer's decision in a Director's Review and Order dated May 29, 2007. Claimant requested a hearing. ALJ Riechers affirmed RRU's May 29, 2007 order, finding no statutory grounds to modify the order.

RRU's order may be modified only if it violates a statute or rule, exceeds the director's statutory authority, is characterized by abuse of discretion, or was made upon unlawful procedure. ORS 656.283(2)(c).

In her exceptions claimant raises many of the same arguments she raised at hearing. Claimant first argues that she does not have the necessary skills to perform the jobs identified by the vocational counselor and found to be suitable by RRU. Claimant asserts that skills are different from aptitudes. Claimant also argues that she has a substantial handicap to employment because she does not have the necessary physical capacities, knowledge, skills, or abilities to be employed in suitable employment.

For a substantial handicap to employment to exist, the worker must lack the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment because of the injury or aggravation. ORS 656.340(6)(b)(A). OAR 436-120-0005(11) defines knowledge, skills, and abilities as follows:

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<sup>1</sup> Insurer's response was not filed timely. Claimant's exceptions were filed November 28, 2007. Under OAR 436-001-0246(2)(b) a written response must be filed within 20 days of the date the exceptions were filed. The due date for insurer's response was December 18, 2007, as stated in the November 30, 2007 letter to the parties. Insurer filed its response on December 28, 2007. Because it was not timely, it is not considered and my review is limited to claimant's exceptions.

“(a) ‘Knowledge’ means an organized body of factual or procedural information derived from the worker's education, training and experience.

“(b) ‘Skills’ means the demonstrated mental and physical proficiency to apply knowledge.

“(c) ‘Abilities’ means the cognitive, psychological, and physical capability to apply the worker's knowledge and skills.”

As part of the determination of eligibility for vocational assistance, a certified vocational counselor performs a substantial handicap evaluation. OAR 436-120-0340(1). The vocational counselor, Jennifer Frank, reviewed many aspects related to claimant's capacity to work, such as relevant work history for the five preceding years. Ms. Frank then used the Oregon Employment Department's Oregon Labor Market Information System (OLMIS) research to generate a list of skills for each of claimant's prior occupations to determine transferable skills. These skills were then matched to jobs in the sedentary range, including insurance clerk and personnel clerk. Based on this and other information, the vocational counselor and RRU determined claimant did not lack the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment because of the injury or aggravation. While claimant states her disagreement with the conclusions reached by Ms. Frank and RRU, she has not pointed to any evidence in the record that persuades me that RRU's order should be modified in this regard because it violated a statute or rule, exceeded the director's statutory authority, was characterized by abuse of discretion, or was made upon unlawful procedure.

Claimant next argues that she is not required to offer expert vocational evidence to rebut the conclusions of the vocational counselor or RRU. However, RRU's order may be modified only on the bases listed in ORS 656.283(2)(c). To successfully argue that RRU's order be modified, claimant needs to offer some persuasive evidence that contradicts the vocational counselor's or RRU's opinion. Claimant's argument that their opinions are wrong is not enough.

Claimant also asserts that she does not have the physical capacity to perform the identified jobs. The vocational counselor and RRU relied upon the January 9, 2007 physical capacities evaluation (PCE) performed by Adventist Health Medical Center and with which claimant's attending physician, Robert E. Manley, MD, concurred. The January 9, 2007 PCE restricted claimant to working within the sedentary physical demand category. The two jobs identified by the vocational counselor and RRU, insurance clerk and personnel clerk, are classified in the sedentary work range. RRU did not rely on the April 30, 2007 letter written by claimant's attorney and signed by Dr. Manley restricting claimant to part-time work in the sedentary range. RRU explained that Dr. Manley changed his opinion without testing, patient examination, or an explanation as to why claimant's condition became more restricted after the January 9, 2007 PCE. I do not find RRU's reliance on the January 9, 2007 PCE over the April 30, 2007 letter to be in error.

Claimant argues that two jobs in the Portland metropolitan area with 57 openings is not a reasonable employment opportunity for claimant. OAR 436-120-0340(2)(f) requires the

vocational counselor to provide a list of physically suitable jobs for which a “reasonable labor market is documented to exist.” RRU’s Suitable Employment Analysis (SEA) included information from the Job Openings Summary Report (JOSR), which indicated there were 57 annual openings in claimant’s region for insurance clerk and personnel clerk. The SEA also included findings from the Oregon Employment Department’s Employment Outlook Information which provided that there were reasonable opportunities for suitable employment in the two positions in claimant’s region. Based on this data, RRU concluded that a reasonable labor market exists for the two positions. Although claimant disagrees with this conclusion, there is no evidence in the record that persuades me that RRU’s order should be modified in this regard on one of the bases listed in ORS 656.283(2)(c).

Claimant argues that RRU’s actions violate ORS 656.012(2)(c). ORS 656.012(2)(c) states that one objective of the Workers’ Compensation Law is “[t]o restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable.” Based on the PCE, the vocational counselor’s evaluation, and its own evaluation, RRU determined that claimant has the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment at a suitable wage in a field that has reasonable job prospects in her region. I find no basis to modify RRU’s conclusion.

Claimant argues that the director’s actions violate OAR 436-120-0340(2)(f), (g), and (h). OAR 436-120-0340(2)(f) is addressed above. OAR 436-120-0340(2)(g) requires the vocational counselor to perform an analysis of the worker’s labor market using several reference materials listed in the rule. RRU and the vocational counselor relied upon the listed materials when performing their analysis. OAR 436-120-0340(2)(h) requires the vocational counselor to consider the vocational impact of any limitations that existed prior to the injury. Claimant’s exceptions do not specify which limitations were not considered. I find no violation of the rules.

Claimant finally contends that the director’s order is characterized by an abuse or clearly unwarranted exercise of discretion. None of claimant’s arguments, however, persuade me that RRU abused its discretion.

Finding no basis on which to modify RRU’s order,

**IT IS HEREBY ORDERED** the October 29, 2007 Proposed and Final Order is adopted and affirmed.