
In the ORS 656.340 Vocational Assistance Dispute of

Kenneth D. Dubray, Claimant

Contested Case No: 08-282H

PROPOSED & FINAL ORDER

April 15, 2009

KENNETH D. DUBRAY, Petitioner

SAIF CORPORATION, Respondent

Before Chuck Mundorff, Administrative Law Judge

Pursuant to notice, a hearing convened on March 16, 2009 in Eugene, Oregon before Administrative Law Judge (ALJ) Chuck Mundorff. Claimant was present and represented by his attorney, Dale Johnson. The employer, Peterson Pacific Corp., and its insurer, the SAIF Corporation (SAIF) were represented by their attorney, Debra Ehrman. The record closed following recorded arguments on March 16, 2009.

Exhibits

At hearing, exhibits 1-108, 85A, 95A, 97A,B, 99A, 101A and 102A were admitted into the record without objection.

Issues

Claimant challenges the Director's Review and Order dated August 13, 2008. The issue is claimant's eligibility for further vocational assistance services.

STANDARD OF REVIEW AND EVIDENTIARY RECORD

ORS 656.283(2), ORS 656.340, OAR 436-001-0225(3) and *Colclasure v. Washington County School District #48-J*, 317 Or 526, 537 (1993), provide that the ALJ conducts a hearing at which the parties develop a record and on the basis of that record the ALJ finds facts. Based upon those facts, the ALJ may modify the Director's Order only 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.

ORS 656.283(2)(c).

FINDING OF FACT

Claimant was injured while employed as an industrial painter with Peterson Pacific Corp. (Exs. 1, 2). His claim was accepted for right shoulder strain, right shoulder adhesive capsulitis with minor impingement secondary to 3/18/02 work injury and left shoulder impingement. (Ex. 75). He was awarded 32% unscheduled permanent partial disability. (Ex. 75-4). He was initially evaluated for vocational retraining in August of 2005 by Rob Crymes at Sturges Vocational Consulting and was found eligible for those benefits in April of 2006. (Exs. 5-14).

Claimant had a long, difficult process in trying to find a suitable goal for retraining. (Exs. 15-25). Due to the failure to identify a training plan within 90 days from the date that claimant was found eligible for assistance, a conference was scheduled with the Workers Compensation Division (WCD), SAIF and claimant. (Ex. 26). That conference was deferred for development of a new training goal on September 14, 2006. (Ex. 28).

Subsequently, two more conferences were scheduled as a goal was not approved or a plan signed within the following months. (Exs. 33, 39). On January 30, 2007, SAIF denied a Return to Work Goal as a civil engineering technician as over long. (Ex. 42). Claimant appealed that decision and a conference was scheduled in regards to that matter. (Ex. 46). On April 17, 2007, WCD issued a Letter of Agreement which approved the goal of civil engineering with the understanding that claimant would complete pre-requisites and Fall Term course work at his own expense prior to SAIF providing vocational benefits for the final 5 terms of the course. (Ex. 55). However, once again, 90 days passed without a training plan being signed. (Ex. 67).

On November 6, 2007, Mr. Crymes issued a warning letter to claimant due to failure to follow up in regards to the proposed agreement. (Ex. 73). At some point, the training goal changed from civil engineering technician to pharmacy technician. On December 5, 2007, Mr. Crymes issued a second warning letter in regards to claimant's failure to remain in contact with him. (Ex. 79). On January 31, 2008, another conference was scheduled as a training plan was still not in place. (Ex. 88). At that conference it was noted that claimant had ceased working with Mr. Crymes and that provision of vocational services was transferred to John MacLeod. The resolution of that conference noted that a training goal would be selected within 30 days and that an additional conference would be held if the plan was not completed and approved by April 4, 2008. (Ex. 90).

On March 27, 2008, Mr. MacLeod sent a letter to claimant notifying him that his request for two year training program for energy management was denied by SAIF as being beyond the 16 months allowable by rule. That letter was sent regular and certified mail. (Ex. 91).

On April 14, 2008 another conference was set for failure to complete the plan as agreed in February. (Ex. 94). On April 18, 2008, Mr. MacLeod sent a certified letter titled: "Notice of Possible End of Eligibility for Vocational Assistance." That letter provided in pertinent part in bold letters:

"To remain eligible, you must select the occupation to establish as your vocational goal within ten days of receiving this letter. This selection has to be communicated to your counselor by that date, either in writing, by email, or by telephone." (Ex. 95-2).

On April 21, 2008, a conference was held with parties regarding the development of a training plan. At that conference the goal of civil engineering tech was identified as the plan, with claimant being responsible for the first 5 weeks of training. Mr. MacLeod noted in the conference that he had provided claimant with the warning letter quoted above. At that conference, Mr. MacLeod noted that he would provide claimant and his attorney an updated

labor market survey. (Ex. 96).

On May 2, 2008, claimant's then counsel wrote to Mr. MacLeod in response to the April 18, 2008 End of Eligibility letter. In that correspondence he noted that he requested additional time for claimant to choose a plan as he (claimant) had just received the labor market information requested at the conference. That letter noted that claimant was vacillating between the energy management program, sleep apnea technician, and prosthesis technician and required time to digest the labor information. That letter also noted that counsel for claimant had received the April 18, 2008 letter on April 22, 2008, and that claimant likely received it at a later date as he was away from his residence at the time the letter was issued. (Ex. 98).

On May 5, 2008, SAIF issued a Notice of End of Eligibility for failure to comply with the April 18, 2008, warning from Mr. MacLeod. (Ex. 99). On that same day, claimant's counsel sent a letter to Mr. MacLeod selecting the energy management technician program for training. (Ex. 99A). Claimant appealed the End of Eligibility determination from SAIF and a review was undertaken by the Employment Services Team (EST) of WCD for investigation and findings of fact. On August 13, 2008, the Director issued a Review and Order in regards to claimant's continued eligibility. That Order affirmed the end of eligibility. Claimant timely appealed resulting in this proceeding. (Ex. 107).

CONCLUSIONS OF LAW AND OPINION

Claimant contends that the Director's Order erred in upholding SAIF's end of eligibility as that Order was based upon an error in the EST's findings of fact. Specifically, claimant argues that the April 18, 2008 warning letter was not returned to Mr. MacLeod on April 19, 2008 as found by the EST on page 2 of its Order. (Ex. 107-2). Claimant argues that he did not receive the warning letter until he returned from visiting out of town on April 28, 2008 and that the letter, by its own terms was not effective until receipt. He argues that the May 5, 2008 letter sent by his counsel to Mr. MacLeod was timely from the date of receipt and his eligibility should not have ended.

SAIF argues that claimant had more than ample time and numerous opportunities to avail himself of vocational services and through his own obstinacy and indecisiveness has lost his right to those services. It argues that claimant was verbally apprised of the April 18, 2008, letter, and knew that it was in effect, while participating in the conference on April 21, 2008. It argues that actual receipt is not the standard and that it was incumbent upon claimant to act whether he had actual receipt or not.

Much was made in the testimony of the witnesses and in the receipt of exhibits of the timing of the mailing and receipt of particular documents. For instance, Mr. MacLeod testified that he did not mail the April 18, 2008 letter until April 21, 2008 making it impossible for the unclaimed letter to be returned on April 19, 2008. (Ex. 107-2). After reviewing the testimony, it is clear, and the parties seemed to agree, that the signed certified return receipt showing a signature of Ken DuBray on April 22, 2008 was not a receipt of the April 18, 2008 warning letter.

Claimant testified that he was out of town during the relevant period of time and that he appeared at the April 21, 2008 WCD conference by phone. He noted that the signature on the return receipt was a friend's that he authorized to pick up his mail. SAIF argues that I should determine whether this is his or another's signature contending that if I find it is his signature he had constructive notice of the warning letter as he was in the area when the regular mail April 18 letter would have been delivered. From my review of the record it is clear that the signature on the return receipt is not claimant's. In reviewing the contemporaneous assertions of claimant's counsel and the comparing the signatures in the record, I believe it probable that claimant was out of town and did not actually receive the April 18, 2008 warning letter until April 28, 2008.

However, the question remains whether actual receipt triggered the 10 days for claimant to act, or whether issuance of the letter, and claimant's admitted knowledge of its existence, triggered the 10 days time limit. Claimant argues that by agreement of the parties themselves, documented in the letter, the 10 days began upon actual receipt. SAIF argues that not only was claimant aware of the letter, but that his counsel at the time received the letter on April 22, 2008, and that claimant was in touch with counsel and SAIF during the period and that he had more than adequate notice to act timely. SAIF also relies upon the decision in *Jason M. Thomas*, 12 CCHR 206 (2007), and argues that OAR 436-120-0350(9)¹ which provides for ending eligibility for services after written warning, does not contain an actual receipt provision.

As noted above, as the party appealing the Director's order, claimant has the burden of proving error in the Director's determination. See *Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). The Director's decision may be modified only if it: (1) violates a statute or rule; (2) exceeds the statutory authority of the agency; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c).

Claimant argues that the Director's designate, EST, abused its discretion in upholding the ineligibility notice. Generally, under the "abuse of discretion" standard, the inquiry is "whether discretion was exercised 'to an end or purpose not justified by, and clearly against, reason and evidence.'" *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37 (1999) (quoting *Far West Landscaping, Inc. v. Modern Merchandising, Inc.*, 287 Or 653, 664 (1979)). Therefore, the inquiry in this case is whether EST's decision was within the range of discretion justified by, and consistent with, reason and evidence.

Here, there is no question that some factual errors were incorporated in the Director's Order. However, the ultimate holding of that decision was that claimant was on notice of the warning letter as early as April 21, 2008 when he was advised that it had issued and was in effect, that his counsel at the time had received the letter and was in contact with the carrier and the vocational services provider and that the regular mail copy of the letter was not returned as undeliverable. (Ex. 107-5). In addition, EST did not give weight to claimant's argument that claimant did not have ample time to chose a goal.

¹ That rule reads: OAR 436-120-350(9) The worker has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information. No written warning is required if the worker refuses a suitable training site after the vocational counselor and worker have agreed in writing upon a return-to-work goal.

Based upon the above record, I am not persuaded that claimant has shown an abuse of discretion. The record shows that claimant had innumerable conferences, three warnings, two vocational counselors and 4 years to a suitable training program. Claimant's own actions in not monitoring his mail, when he was actually aware of the issuance and effect of the warning letter, is not justification for an extension of the 10 day period noted in that letter. As cited in *Thomas*:

“OAR 436-120-0350(9), provides that a worker is ineligible for vocational assistance if he/she fails, “after written warning,” to provide relevant information. The rule does not say “after *claimant's receipt of* written warning.” Thus, claimant's reading of the rule is not supported by the language of the rule and would require inserting terms that are not contained in the rule.” (*Thomas, supra* at 209).

For these reasons I conclude that claimant has not carried his burden of proof. EST's decision is well within the range of discretion allowed by the rule and comports with reason and evidence. Accordingly the Director's Order is affirmed.

ORDER

Claimant's request for relief is denied and the Director's Review and Order dated August 13, 2008 is affirmed.