

In the Vocational Assistance of  
**Amber L. Faircloth, Claimant**

Contested Case No: 08-128H

**PROPOSED & FINAL ORDER**

January 14, 2009

AMBER L. FAIRCLOTH, Petitioner  
ESIS, Respondent

Before Elizabeth Fulsher, Administrative Law Judge

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Pursuant to notice, a hearing was scheduled for October 30, 2008 in Bend, Oregon, before Administrative Law Judge Fulsher. Prior to the date of the scheduled hearing, the parties agreed to submit this matter on the documentary record with written closing arguments in lieu of a hearing. Claimant is represented by attorney, Philip Garrow. Precision Castparts Corp. and ESIS are represented by their attorney, Judy Johnson. The record closed on December 15, 2008 on receipt of claimant's final written argument.

Exhibits 1 through 40 are admitted into the record.

**ISSUE**

Whether claimant is entitled to vocational assistance. Claimant has appealed from the Director's Review and Order on Reconsideration dated July 9, 2008. (Ex. 35).

**FINDINGS OF FACT**

Claimant compensably injured her right shoulder on March 29, 2005. (Ex. 2). Claimant's claim was accepted as a disabling right shoulder tendonitis. In October 2007, Dr. Borman examined claimant at ESIS's request and concluded that claimant was capable from an objective standpoint of resuming her work activities without restrictions. (Ex. 5). Dr. Walther concurred with Dr. Borman, indicating that the shoulder was medically stationary and she was concerned that claimant also injured her neck. (Ex. 6). The claim was closed on December 21, 2007 with an award of 5 percent whole person impairment for the right shoulder. (Ex. 10).

On January 4, 2008, claimant signed a request to change her attending physician to Dr. Andrews. (Ex. 11). On January 8, 2008, Dr. Andrews restricted claimant to sedentary work lifting a maximum of 2.5 pounds and no repetitive right arm use. (Ex. 12). On January 28, 2008, ESIS found claimant ineligible for vocational assistance on the ground that she had been released to her regular work. (Ex. 14). Also on January 28, 2008, claimant was determined to be ineligible for vocational assistance. (Ex. 14). On February 5, 2008, Dr. Andrews indicated that his January 8, 2008 work release was related more to a possible cervical condition rather than the right shoulder condition. (Ex. 15). Dr. Radecki and Dr. Duff examined claimant on February 13, 2008. These physicians believed that claimant could return to her regular work. (Ex. 17).

On February 27, 2008, ESIS denied claimant's claim for "C5-6 mild diffused bulge." (Ex. 21). On March 26, 2008, Dr. Walther clarified that claimant has chronic pain and that she

did not believe that claimant could perform her full duty tasks. Dr. Walther agreed that claimant was released to modified work. (Ex. 22). On April 2, 2008, Dr. Andrews indicated he agreed with Dr. Walthers that claimant was limited to light duty with very limited repetitive use of the right shoulder, arm and hand as a sequela of the right shoulder condition only. (Ex. 25).

On April 21, 2008, following a request for abatement from claimant's attorney, the Director abated the April 11, 2008 order finding claimant ineligible for vocational assistance. (Ex. 29). The employer's attorney responded to claimant's request for reconsideration of the Director's order on May 2, 2008. (Ex. 30).

In July 9, 2008 Director's Review and Order on Reconsideration, the Director found that claimant had no limitations caused by her injury that prevented her from returning to regular work. On this basis, the order concluded that claimant was not eligible for vocational assistance. (Ex. 35). Claimant requested a hearing regarding the vocational assistance decision. (Ex. 36).

A May 13, 2008 Order on Reconsideration modified the December 21, 2007 Notice of Closure and increased claimant's whole person impairment to 15 percent and awarded 21 percent work disability. (Ex. 32). The employer requested a hearing regarding the May 13, 2008 Order on Reconsideration on May 22, 2008. (Ex. 34). In an August 27, 2008 Opinion and Order, ALJ Brazeau, among other things, agreed with the Order on Reconsideration's finding that claimant had never been released to regular work and was entitled to work disability. An October 16, 2008 Order on Reconsideration modified the original order to award attorney fees, but otherwise adhered to the August 27, 2008 order. (Ex. 39). The employer requested Board review of the ALJ's order. (Ex. 40).

### **CONCLUSIONS OF LAW AND OPINION**

Claimant argues that the preponderance of the persuasive evidence establishes that claimant's work restrictions prevent her return to regular work. Claimant argues that claimant's attending physicians, Drs. Walther and Andrews, as well as the Appellate Reviewer and the prior ALJ all found that claimant was precluded from returning to regular work. On this basis, claimant argues that the Rehabilitation Review Unit's decision finding claimant ineligible for vocational assistance was an abuse of discretion.

The employer responds that both attending physicians had, at various times, indicated their agreement that claimant was not restricted from returning to her regular work because of her accepted shoulder injury and had subsequently provided inconsistent opinions indicating that claimant was unable to return to work due to her shoulder condition. The employer contends that while permanent impairment must be rated by the attending physician, there is no such limitation on assessing eligibility for vocational assistance. The employer concludes by arguing that the Director properly weighed the medical opinions and concluded that the evidence preponderated in favor of a conclusion that claimant could return to her regular employment. Claimant replies that the decision that claimant was ineligible for vocational services was an abuse of discretion because claimant could not return to her regular work, has never been released to regular work and received work disability.

A decision of the Director's administrative review shall be modified by the ALJ 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); OAR 436-001-0225(3). OAR 436-120-0320(10)(c) provides the circumstances that must be met for a worker to be eligible for vocational assistance. One of these circumstance is satisfied if the worker is not able to return to regular employment as a result of the limitations caused by the injury or aggravation. OAR 436-120-0320(10)(c)(A).

In October 2007, Dr. Borman examined claimant at ESIS's request and concluded that claimant was capable from an objective standpoint of resuming her work activities without restrictions. (Ex. 5). Dr. Walther concurred with Dr. Borman, indicating that the shoulder was medically stationary and she was concerned that claimant also injured her neck. (Ex. 6). On January 8, 2008, Dr. Andrews, claimant's new attending physician, released her to modified sedentary work lifting no more than 2.5 pounds. (Ex. 12). On February 5, 2008, Dr. Andrews indicated that his January 8, 2008 work release was not representative of claimant's residual functional capacity due to the 2005 work injury and its sequelae. Instead, he indicated that the work release was "related more to possible cervical condition." (Ex. 15).

Dr. Radecki and Dr. Duff examined claimant on February 13, 2008 at ESIS's request. They concluded that claimant was objectively capable of returning to her regular work without restrictions. They felt that claimant had a pain syndrome and hysterical behavior. (Ex. 17).

On March 26, 2008, Dr. Walther clarified that she did not release claimant to full duty as a result of her shoulder condition only. Dr. Walther indicated that claimant has chronic pain and that she did not believe claimant could perform full duty tasks. She further clarified that claimant had only been released to light duty. On April 2, 2008, Dr. Andrews, claimant's current attending physician indicated that claimant was limited to light duty with very limited repetitive use of the right shoulder, arm and hand. (Ex. 25).

A May 13, 2008 Order on Reconsideration awarded claimant 21 percent work disability. (Ex. 32). An ALJ subsequently affirmed the Order on Reconsideration. (Exs. 38; 39).

The Director's Review and Order on Reconsideration concluded that claimant was ineligible for vocational assistance because she was able to return to regular work. In reaching this conclusion, the reviewer stated that Dr. Walther has provided no medical rationale that claimant's restrictions are related to her accepted conditions and indicated that the doctor had stated in July and August of 2007 that she had no objective explanations as to why claimant continued to have pain. The reviewer also relied on Dr. Walther's concurrence with Dr. Borman's report that claimant could do regular work without restrictions. The reviewer further relied on Dr. Andrews' statements that any restrictions claimant had were due to a possible cervical condition and the reviewer also relied on Dr. Radecki's and Dr. Duff's conclusion that claimant could return to regular work without restrictions. The reviewer stated that she was not persuaded by the final opinions of Drs. Walthers and Andrews the claimant was restricted due to the accepted condition because Dr. Walther could not explain claimant's symptoms and provided no medical rationale that the symptoms were related to the accepted conditions. The reviewer also noted that Dr. Andrews had provided conflicting opinions regarding whether claimant had

restrictions due to the accepted conditions and did not explain his change of opinion. Based on this reasoning, the reviewer concluded that claimant had no limitations caused by her work injury that prevented her from returning to regular work. On this basis, the order concluded that claimant was ineligible for vocational assistance. (Ex. 35).

On a review for abuse of discretion, “[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.” *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37, 45 (1999). The permissible range of discretion may be identified by “[a]sking whether discretion was exercised ‘to an end or purpose not justified by, and clearly against, reason and evidence.’” *Id*

Here, the opinions of Dr. Walther and Dr. Andrews were inconsistent, unexplained and poorly reasoned. It is important to note that for purposes of rating claimant’s impairment (including work disability) the Appellate Reviewer and ALJ were required to rely on the attending physician’s opinion. However, in a vocational services dispute, this is not required. The Director’s order gave specific reasons for finding the opinions of Drs. Walther and Andrews unpersuasive. Most importantly, the doctors did not reconcile earlier, seemingly conflicting opinions. I do not have “de novo” review in this case. The Director’s Review and Order on Reconsideration was not “clearly against, reason and evidence.” To the contrary, it gave reasons for not relying on the medical opinions supporting claimant’s position and provided reasoning to support the decision finding claimant ineligible for vocational services. Accordingly, given this standard of review for abuse of discretion, I am unable to find that the Director’s order was in error.

### **ORDER**

The Director’s Review and Order on Reconsideration dated July 9, 2008 finding claimant ineligible for vocational services is affirmed.