

In the Vocational Assistance of

Larry C Felgar, Claimant

Contested Case No: 09-075H

PROPOSED & FINAL ORDER

September 23, 2009

LARRY C FELGAR, Petitioner

SAIF CORPORATION, Respondent

Before Keith Kekauoha, Administrative Law Judge

Hearing was scheduled for July 27, 2009 before Administrative Law Judge Keith Kekauoha. The parties agreed to submit this matter on the documentary record, and the hearing was therefore canceled. Claimant is represented by his attorney, James Guinn. The employer, Davan Enterprise, and its insurer, SAIF Corporation, are represented by their attorney, Ben Stewart. Exhibits 1-28 were admitted into evidence. After receipt of written closing arguments, the record closed on August 25, 2009.

ISSUE

Vocational Assistance. Claimant requested a hearing on a Director's Review and Order dated April 7, 2009 that determined that he is not eligible for vocational assistance.

FINDINGS OF FACT

Claimant sustained a compensable neck and upper back injury while working as a welder/fabricator on June 13, 2008. (Exs. 5, 10, 12).

SAIF accepted the claim for a thoracic contusion and cervical strain. (Ex. 16).

In October 2008, claimant's attending physician, Dr. Young, released him to full duty. (Ex. 19).

On January 5, 2009, Dr. Young declared the accepted conditions medically stationary and indicated that claimant remained released to regular work. (Exs. 20, 21).

On January 9, 2009, SAIF issued a Notice of Ineligibility for Vocational Assistance, which stated that claimant was ineligible for vocational assistance because he had been released to regular work by his treating physician. (Ex. 22). Claimant requested administrative review of the ineligibility notice. (Ex. 25).

On January 21, 2009, SAIF issued a Notice of Closure that closed the claim with a permanent disability award of 4 percent loss of the whole person for impairment to the cervical and thoracic spine. (Ex. 23). Claimant requested reconsideration of the closure notice. On April 2, 2009, the Workers' Compensation Division's Appellate Review Unit issued an Order on Reconsideration that reduced the permanent disability award to none. (Ex. 27).

On April 7, 2009, the Workers' Compensation Division's Employment Services Team

(EST) issued a Director's Review and Order that held that claimant was not eligible for vocational assistance because he was awarded no permanent disability for the compensable injury. (Ex. 28).

CONCLUSIONS OF LAW AND OPINION

Claimant contends that the EST erred in finding him ineligible for vocational assistance. SAIF responds that the EST's order is correct and should be affirmed. Based on the following opinion, I agree with SAIF's position.

ORS 656.283(2)(c) provides that the Director's determination regarding vocational assistance 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.

Claimant argues that if he is found to be entitled to a permanent partial disability award for the compensable injury in WCB Case No. 09-02466, he is also entitled to vocational assistance. SAIF argues, however, that even if claimant is found to be entitled to permanent disability, the administrative rules provide that he is only entitled to a redetermination of his eligibility for vocational assistance. I agree. OAR 436-120-0360(4) provides that, after a worker has been previously found ineligible for vocational assistance, the insurer must redetermine eligibility within 35 days after "[t]he worker was not awarded permanent disability and the worker is later awarded permanent disability." Here, claimant was found ineligible because he had not been awarded permanent disability at the time of the Director's decision. The Director's decision did not violate a statute or rule and was not characterized by an abuse of discretion. *See* OAR 436-120-0320(2)(c). Accordingly, the decision will be affirmed.

Based on my Opinion and Order in WCB Case No. 09-02466, which issued on this date, claimant is now entitled to a permanent disability award. Consequently, there has been a change of circumstances since the Director's decision, and SAIF is required to redetermine claimant's eligibility for vocational assistance in accordance with OAR 436-120-0360(4).

ORDER

Claimant's request for relief is denied, and the Director's Review and Order dated April 7, 2009 is affirmed.