

In the ORS 656.340 Vocational Assistance Dispute of

Kenneth S. Ferguson, Claimant

Contested Case No: 08-182H

PROPOSED & FINAL ORDER

October 20, 2009

KENNETH S. FERGUSON, Petitioner

SAIF CORPORATION, Respondent

Before Robert Brazeau, Administrative Law Judge

A hearing in this matter was convened in Portland, Oregon on May 12, 2009 before Administrative Law Judge Brazeau. Claimant appeared with his attorney, Edward Hill. Our United Villages and SAIF Corporation appeared through Larry Schucht, SAIF Trial Counsel.

Exhibits 1 through 30, 1A, 3A, 3H, 3I, 4A, 5A through D, 7B, 7BB, 7C, 5A, 15A, 15AA, and 20A were admitted at the time of the hearing. Exhibits 3B through 3G, 3J, 3K, 7A, 16A, 17A and 17B were withdrawn.

The record was left open for closing arguments and ultimately closed on September 21, 2009.

ISSUE

Claimant appeals the Director's Review and Order dated September 16, 2008, which affirmed SAIF's decision that claimant was ineligible for vocational services.

FINDINGS OF FACT

Claimant compensably injured his neck, back and shoulder in April 2006. SAIF accepted his claim for C-7 radiculopathy and closed it in June 2007 with a whole person award of 12 percent and a work disability award equal to about \$12,500. Claimant was thereafter declared eligible for vocational assistance.

In November 2007, an authorized training program (ATP) was prepared by a vocational counsel, Ms. Smith. Therein, it was noted that claimant was motivated and anxious to begin training as an Instructional Assistant. It was also noted that he had lost his rented apartment and was living with friends and relatives with his 8-year-old son. Claimant agreed to and accepted the program on December 4, 2007. By agreeing to participate in the plan, claimant also agreed to report within 24 hours any circumstances that might affect his ability to complete the training program. Claimant initially requested assistance with a computer and child care, but later withdrew those requests when SAIF's vocational coordinator refused to pay for them. Claimant then advised that he had made other arrangements for child care and that he did not need a computer during the first term of his community college studies.

Claimant began his training program on January 7, 2008. On February 27, 2008, he met with Ms. Smith to discuss his progress. He advised that he was having difficulty attending classes and caring for his son at the same time, but that he was doing well in school. Claimant and Smith met again on March 17, 2008, at which time claimant advised that he had missed two

days of school because of child care problems. Then on March 31, 2008, claimant advised Smith that he was having financial problems that might result in his becoming homeless in April.

On May 2, 2008, Ms. Smith issued a “Warning” letter to claimant, advising him that his training program could be terminated if he did not fulfill the requirement of providing training and grade reports required by his training program contract. She had made several attempts to contact claimant at a phone number he had provided, but she was unsuccessful. Claimant was also reminded in the May 2, 2008 letter that he had failed to keep an appointment with Smith that had been rescheduled due to claimant’s child’s illness. Smith allowed claimant until May 9, 2008 to provide the required documentation. On that day, claimant phoned Smith and advised that because of financial problems, he might move to Bend, Oregon. Smith was left with the impression that claimant intended to quit school and his training program.

On May 19, 2008, SAIF advised claimant that his vocational training program had been terminated. Melissa Morris, SAIF’s vocational coordinator, determined that claimant had failed to attend classes, had not maintained contact with Ms. Smith, and had failed to submit required progress reports. She had obtained information through Ms. Smith and the community college claimant had attended that he had stopped attending classes in April 2008.

Claimant retained counsel in June 2008 and on July 18, 2008, his attorney appealed the termination of claimant’s vocational assistance. As part of his appeal, claimant submitted an affidavit dated August 20, 2008. Therein, claimant advised that in April 2008, he and his son’s mother were splitting child care costs for their son. The son’s mother then discontinued paying her portion, leaving the entire burden on claimant. This burden, and his inability to maintain a workable computer, led to his missing classes and his inability to keep in regular contact with either Ms. Smith or SAIF’s vocational coordinator.

The Workers’ Compensation Division issued a Director’s Review and Order on September 16, 2008, upholding the termination of claimant’s vocational services. The Order found that claimant had effectively discontinued training without notifying his vocational counselor or SAIF.

Claimant requested a hearing from the Director’s Order on September 19, 2008

CONCLUSIONS OF LAW AND OPINION

This is claimant’s appeal from the Director’s Order finding him ineligible for vocational services. Jurisdiction over this controversy lies with the Board under ORS 656.704(2)(a) and OAR 436-001-0019. Pursuant to ORS 656.283(2)(c) and OAR 436-001-0225(3), which pertain to vocational services disputes, the Board’s administrative law judge may modify the director’s order only if the order violates a statute or rule, exceeds the director’s statutory authority, was made upon unlawful procedure or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. After carefully reviewing this record and paying particular attention to the testimony of the witnesses, I find that the director’s order was correct and should be affirmed.

OAR 436-120-0350 pertains to a worker's becoming ineligible for vocational services. Among the reasons for a finding of ineligibility are those found in subsections (8), (9) and (10). Subsection (8) provides that the worker is ineligible if he/she has declined or has become unavailable for vocational assistance for reasonable cause. If the insurer does not believe the worker had reasonable cause, the insurer must warn the worker prior to finding the worker ineligible or ending the worker's eligibility under this section. Subsection (9) provides that the worker is ineligible if he/she has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information. Subsection (10) provides that a worker is ineligible if he/she fails, after written warning, to comply with the return-to-work plan. No written warning is required if the worker fails to attend two consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer.

Here, there is no reasonable contention that claimant did not stop attending classes and did not remain in contact with his vocational counselor and/or SAIF; the record is clear in that regard. Claimant, however, contends that his extreme financial hardship, lack of equipment and child care problems constituted "reasonable cause" for his failing to attend classes and failing to maintain contact with SAIF and his counselor. Indeed, "reasonable cause" is defined by OAR 436-120-0005(8) to include "illness or medical condition of the worker's family, financial hardship, or circumstances beyond the reasonable control of the worker."

The director's order, however, found that despite claimant's hardships, he knew of his responsibilities under his training agreement and that he could have maintained contact with SAIF and/or his vocational counselor had he exercised reasonable diligence. While I sympathize with claimant's circumstances, I must reluctantly agree with the director's order in that regard. Claimant was advised on a number of occasions that he was required to maintain contact with his counselor regarding his academic progress. Once he failed to do so, he was specifically warned by the counselor on May 2, 2008 that he could lose his eligibility for failing to provide information about his progress. He was provided toll-free telephone numbers to contact for that purpose. In fact, he ultimately did phone the counselor on May 9, 2008 and suggested that he would no longer be attending classes and that he might be relocating to Bend. In follow-up e-mails with claimant's academic instructors, the counselor learned that claimant had ceased attending his four community college classes more than two weeks earlier.

Again, I acknowledge the difficult circumstances under which claimant attempted to participate in his training program. Yet, he initially agreed to it and in doing so, he further agreed to maintain contact with his vocational counselor throughout the duration of his training program. He failed to do so, however, and I must agree with the director's order that it was not beyond his reasonable control to do so. I, therefore, conclude that the director's order did not violate a statute or rule, did not exceed the director's statutory authority, was not made upon unlawful procedure and was not characterized by an abuse of discretion or clearly unwarranted exercise of discretion. The director's order will, therefore, be affirmed.

ORDER

The Director's Review and Order dated September 16, 2008 is affirmed.