

In the ORS 656.340 Vocational Assistance Dispute of

Jason K. Terrill, Claimant

Contested Case No: 08-207H

PROPOSED & FINAL ORDER

April 13, 2009

JASON K. TERRILL, Petitioner

SEDGWICK CLAIMS MANAGEMENT SERVICES, Respondent

Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for January 30, 2009 in Portland, 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 his attorney, Bennett Dalton. Providence Health System – Oregon and Sedgwick CMS are represented by their attorney, Allen Lyons. The record closed on March 13, 2009 on receipt of claimant’s final written argument.

Exhibits 1 through are admitted into the record. The employer objects to exhibit 25A contending that it is irrelevant to the issues. The admissibility of that document will be addressed in the body of the order.

ISSUE

Admissibility of Exhibit 25A.

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant worked for the employer performing cleaning duties. He filed a workers’ compensation claim on October 20, 2006 for dermatitis/rash/ hives on his hands. He indicated that for the past two weeks he noted red, dry flaky skin and swollen fingers of the right hand for 4 days with burning pain to both hands. (Ex. 2). Claimant’s employment was terminated on November 18, 2006 for violation of the employer’s harassment policy. (Ex. 3).

On November 30, 2006, claimant sought treatment from Dr. George for dermatitis of his hands and thighs that he related to deep cleaning the emergency room. Claimant was prescribed medications and released to regular work with a permanent restriction against doing deep cleaning. (Ex. 4). Claimant was examined by Dr. Larner, a dermatologist, at the employer’s request on January 8, 2007. Dr. Larner diagnosed allergic contact dermatitis that was resolved. (Ex. 7). The claim was accepted on January 23, 2007 for allergic contact dermatitis, bilateral hands. (Ex. 8). On January 31, 2007, Dr. Larner indicated that claimant had class II contact dermatitis of an upper extremity. (Ex. 10). Dr. George concurred on February 7, 2007. (Ex. 11). However, on March 22, 2007, Dr. George indicated the claimant had no impairment. (Ex. 12). The claim was closed on April 23, 2007 with no award of permanent disability. (Ex. 13). Claimant and the employer entered into a stipulation that resolved claimant’s hearing request regarding a temporary disability issue. The stipulation was approved on July 2, 2007. (Ex. 17).

Claimant underwent a medical arbiter examination with Dr. Gunn on July 11, 2007. (Ex. 18). Dr. Gunn indicated that claimant had a class 2 upper extremity dermatological condition. (Ex. 19). An August 17, 2007 Order on Reconsideration awarded 14 percent whole person impairment. (Ex. 20).

On November 2, 2007, claimant was notified that he was ineligible for vocational assistance. (Ex. 21). Claimant appealed the denial of ineligibility on December 19, 2007. (Ex. 22). On February 11, 2008, he employer submitted records regarding available suitable employment with the employer. (Ex. 25). Finding that claimant's lack of suitable employment was not due to the limitations caused by the work injury, a July 29, 2008 Director's Review and Order affirmed the November 2, 2007 ineligibility decision. (Ex. 28). Claimant requested a hearing regarding the Director's order. (Ex. 29).

CONCLUSIONS OF LAW AND OPINION

A Director's administrative review may only be modified if it violates a statute or rule, exceeds the agency's statutory authority, relied on an unlawful procedure, or constituted an abuse or clearly unwarranted exercise of discretion. ORS 656.283(2)(c); OAR 436-001-0225. In vocational assistance disputes under ORS 656.304, new evidence may be admitted and considered. OAR 436-001-0225(3).

Claimant offered a June 5, 2008 physical capacity evaluation (PCE) finding him capable of sedentary work. The employer objects to the PCE and argues that it is irrelevant because the limitations described in the PCE are not related to claimant's accepted allergic contact dermatitis. Because new evidence is admissible in vocational assistance disputes and because the evidence relates to claimant's physical limitations, I conclude that the PCE should be admitted into the record. However, for the reasons that follow, the Director's order is affirmed.

The Director's Review and Order identified suitable employment that would have been available to claimant had he not been terminated. Although it found that claimant was unable to return to his regular employment, the order concluded that claimant was ineligible for vocational services because his lack of suitable employment was not due to limitations caused by the work injury. Claimant argues that he is not capable of the suitable employment based on the June 5, 2008 PCE report. Specifically, he argues that based on the PCE, he is not capable of performing the "linen distributor" job identified as suitable employment because he is limited to sedentary work.

The employer argues that the PCE finding claimant to be capable of sedentary found claimant limited by pain in his right upper extremity, but never mentioned claimant's accepted allergic contact dermatitis or how it might weaken his upper extremity. The employer argues that there is no medical evidence relating claimant's limitations noted by the PCE to his accepted injury.

I agree that claimant has not established that the limitations found by the PCE are related to the accepted injury.

OAR 436-120-0320(10) (c)(B) provides that: “As a result of the limitations caused by the injury or aggravation, the worker: (B) Is not able to return to any other suitable and available work with the employer at injury * * *.” OAR 436-120-0320 (3) provides that: “The worker’s lack of suitable employment is not due to the limitations caused by the injury or which existed before the injury.” Based on this record, the only limitation that the medical evidence attributes to the compensable injury is claimant’s inability to work with certain cleaning chemicals. There is no mention in the record of any limitation of the upper extremity due to claimant’s accepted allergic contact dermatitis and no indication that this limitation existed before the injury. Accordingly, the Director’s order correctly found that claimant’s lack of suitable employment is not due to the limitation caused by the work injury.

The Director’s order did not violate a statute or rule, exceed the agency’s statutory authority, rely on an unlawful procedure, or constitute an abuse or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). Under such circumstances, the order will be affirmed.

ORDER

The July 29, 2008 Director’s Review and Order is affirmed.