

In the ORS 656.340 Vocational Assistance Dispute of
Victor L. Jones, Claimant
Contested Case No: 11-095H
AMENDED ORDER REMANDING TO DIRECTOR
October 27, 2011
VICTOR L. JONES, Petitioner
CHARTIS CLAIMS, INC., Respondent
Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, a hearing was convened on October 3, 2011 before the undersigned administrative law judge. Claimant was present and represented by counsel Rex Q. Smith. The employer, Beaverton Bakery, Inc., and its administrator, Chartis Claims, Inc., were represented by Tricia D. Hole. The record closed at hearing. An Order Remanding to Director issued on October 11, 2011. That order contained incorrect appeal language. The October 11, 2011 order is abated and replaced by this amended order.

Exhibits 1 through 154, A, B, C, D, E, and 150A are admitted. Exhibit 150A is an exhibit packet prepared by the Director on July 21, 2011, consisting of Exhibits 1 through 23. Exhibits within Exhibit 150A shall be identified as "Ex. 150A-X").

ISSUE

Vocational Services: Claimant challenges the Director's May 24, 2011 order affirming a determination that he is ineligible for vocational services.

Attorney Fees: Claimant seeks award of attorney fees should he be determined eligible for vocational services.

STATEMENT OF FACTS

As of December 16, 2009, claimant was employed as a delivery driver, transporting baked goods for the employer. The work involved occasional lifting, frequent pushing and pulling, and occasional overhead reaching activities. The work also involved occasional bending, stooping, and crouching. (Ex. 1).

On December 16, 2009, claimant fell from a truck, sustaining injuries. (Ex. 2). The employer accepted a claim for right shoulder strain, right elbow fracture, and lumbar strain on February 9, 2010. (Ex. 27). The employer modified the acceptance on March 3, 2011 to include acute partial thickness tear of the supraspinatus tendon of the right shoulder. (Ex. 134).

On December 16, 2009, claimant was involved in a low-impact motor vehicle accident ("MVA"). He was a restrained passenger in a vehicle that was rear-ended. (Exs. 5, 6).

On January 29, 2010, claimant began treating with Dr. Di Paola. The doctor restricted him to light duty. (Exs. 17, 21).

A lumbar MRI scan on February 3, 2010 reportedly showed multilevel degenerative changes. (Ex. 24). An MRI arthrogram of the right shoulder that same day reportedly showed tendinosis or degeneration of the supraspinatus with a high-grade partial thickness tear and abnormal signal consistent with a labral tear. (Ex. 26).

Dr. Di Paolo stated on February 12, 2010 that claimant would need shoulder surgery. He continued the light duty restriction. (Exs. 29, 30). He again continued the restriction on March 5, 2010 and March 19, 2010. (Exs. 39, 41).

Dr. Di Paolo operated on claimant's right shoulder on March 31, 2010. He noted that the supraspinatus tear apparent on imaging had acute characteristics. The surgery included a rotator cuff repair. (Ex. 42). The doctor took claimant off duty for the surgery and during post-surgery therapy and recovery. (Exs. 44, 46, 47, 58, 59).

On May 3, 2010, Dr. Di Paola noted that claimant was unable to bend, squat, or kneel, as his delivery driver work required. (Ex. 58).

On May 25, 2010, Dr. Di Paola restricted claimant to light duty. (Exs. 67, 70). He continued that restriction on June 28, 2010, August 2, 2010, August 23, 2010, September 27, 2010, October 28, 2010, November 29, 2010, and December 27, 2010. (Exs. 83, 84, 92, 94, 98, 99, 106, 107, 112, 113, 121, 122, 123).

Dr. Di Paola noted on June 28, 2010, that claimant had significant low back pain, but he was not a surgery candidate. (Ex. 83). The doctor noted on August 2, 2010 that claimant was receiving aquatic therapy for the low back symptoms. (Ex. 92).

On November 22, 2010, claimant saw Dr. Lorber for an evaluation regarding possible transfer of care. Claimant complained of low back pain and of right shoulder symptoms, the latter worsened by movement. Dr. Lorber understood that Dr. Rask was treating claimant's low back, and Dr. Lorber preferred "not to have too many chefs in the kitchen at this point." He noted that "Dr. Di Paola at this point [did] not anticipate [claimant] returning to his job at injury." (Ex. 120).

Claimant saw Dr. Woodward for an independent medical evaluation ("IME") on January 14, 2011. Claimant complained of right shoulder and low back pain, but not of right elbow pain. The doctor reported examination findings that included reduced motion of the right shoulder compared to the left and loss of lumbar motion. He assessed as work-related diagnoses only resolved right shoulder contusion, resolved right elbow contusion, and resolved lumbar strain. He asserted that claimant's right supraspinatus condition was degenerative and preexisting. He did not diagnose any combined condition. With respect to the conditions Dr. Woodward considered work-related, he said that claimant could "return to all the activities of which he was capable prior to [the December 14, 2009 accident]" and that claimant had no permanent impairment. (Ex. 125).

On January 31, 2011, Dr. Di Paola saw claimant and reviewed Dr. Woodward's report. He stated that he concurred with the report for the most part, but he disagreed regarding claimant's right supraspinatus tear. He explained that his findings were consistent with an acute tear. With respect to claimant's work restrictions, he stated: "Light duty – restrictions are outlined on a permanent basis as it relates to his [right] shoulder supraspinatus rotator cuff repair." (Ex. 127; *see* Ex. 128).¹

On February 8, 2011, Dr. Di Paola filled out a form sent him "[i]n anticipation of [his] 01/31/11 appointment with [claimant]." The doctor checked a box stating that claimant was released to "full/partial duty," referring to a work release. (Ex. 129). The record does not show which document the doctor meant.

On February 15, 2011, claimant's vocational counselor wrote Dr. Di Paola to request the permanent work restrictions the doctor mentioned on January 31, 2011. (Ex. 131).

The employer wrote Dr. Di Paola on February 11, 2011 regarding Dr. Woodward's IME report. The doctor replied on February 24, 2011. He checked a box stating that claimant's right supraspinatus tear was related to the December 14, 2009 work injury. He checked boxes stating that Dr. Woodward's shoulder findings were valid for rating impairment and that they could be apportioned 50-50 to injury and to preexisting conditions and lack of effort. He then checked a box stating that he did not "find" any permanent restrictions associated with the right supraspinatus tear. (Ex. 132).

The employer closed the accepted claim on March 3, 2011, awarding 9 percent whole person impairment for claimant's right shoulder. (Ex. 135). The employer based that award on Dr. Woodward's examination findings. (Ex. 136).

On March 7, 2011, claimant's vocational counselor wrote claimant that he was ineligible for vocational assistance. The counselor reasoned that Dr. Di Paola had stated that claimant had no permanent restrictions based on the accepted claim. (Ex. 138). The counselor based that conclusion on Dr. Di Paola's February 24, 2011 "check box" report. (Ex. 15A-16). Claimant requested review. (Ex. 150A-19).

The Director issued a Director's Order and Review on May 24, 2011. The Director affirmed the determination that claimant was ineligible for vocational services. The Director reasoned that Dr. Di Paola had agreed with Dr. Woodward's January 14, 2011 IME report that "all of [claimant's] accepted medical conditions had resolved without causing permanent impairment." (Ex. 150A-22).

Claimant, meanwhile, appealed closure of his claim, and the Director referred him for a medical arbiter panel examination by Dr. Harris, Dr. Rischitelli, and Dr. Murphy. The panel saw claimant on June 8, 2011. They correctly noted that the employer had accepted the right supraspinatus tear as part of the claim. Claimant complained of right shoulder and low back pain, but his right elbow was pain free. Claimant still was receiving treatment and

¹ Dr. Di Paola referred to claimant's left shoulder. In the context of the entire record, I find that he meant the right.

physical therapy that included his back and right shoulder, albeit through the Veterans' Administration. The doctors reviewed medical records, including Dr. Di Paola's February 24, 2011 "check box" report. They noted that claimant was not working because his employer could not accommodate the restrictions Dr. Di Paola had imposed. The doctors examined claimant, noting the absence of pain behavior, and reported valid impairment findings for claimant's low back and right shoulder. They attributed 100 percent of the shoulder and 25 percent of the low back findings to the December 14, 2009 injury. (Ex. 144).

The Director issued an Order on Reconsideration on June 21, 2011. The Director considered the June 8, 2011 medical arbiter report the most persuasive evidence of impairment and awarded claimant impairment value for loss of right shoulder motion, a chronic condition limiting repetitive use of the right shoulder, and loss of lumbar motion, that loss apportioned per the arbiter panel report. The Director did not award work disability, finding that claimant had been released to regular work. The Director did not identify the basis for that finding. (Ex. 149).

Dr. Di Paola spoke with employer's counsel on August 8, 2011. He stated that on January 31, 2011, he permanently had restricted claimant to light duty based on claimant's subjective complaints, not objective findings. He asserted that claimant could perform his regular work as a delivery driver without any permanent restrictions referable to the December 14, 2009 injury. (Ex. 154).

CONCLUSIONS OF LAW AND OPINION

Claimant challenges the May 24, 2011 Director's Order and Review upholding determination that he is ineligible for vocational services. In a vocational assistance case, I may modify a director's order only if it:

- (a) Violates a statute or rule;
- (b) Exceeds the director's statutory authority;
- (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). The abuse and discretion standard of review raises the question how a determination could be made that the Director abused its discretion in fact-finding when evidence thereafter could be admitted that bears on such fact finding. Considering the standard of review in light of the Supreme Court's decision in *Colclasure v. Washington County School District #48-J*, 317 Or 526 (1993), I conclude that admission of new evidence can require remand to the Director to enable the Director to issue an order

sufficient for review. Here, the circumstances are such that a determination whether the Director's May 24, 2011 order could be modified would be premature. The May 24, 2011 order is insufficient for review for two reasons.

First, in upholding determination that claimant was ineligible for vocational services, the Director reasoned that Dr. Di Paola had agreed with Dr. Woodward's January 14, 2011 opinion that "all of [claimant's] accepted medical conditions had resolved without causing permanent restrictions." (Ex. 150A-22). The problem this rationale presents is that Dr. Woodward deemed only resolved right shoulder contusion, resolved right elbow contusion, and resolved lumbar strain work-related conditions and said that claimant had no permanent impairment with respect to those conditions. (Ex. 125). Dr. Woodward did not address whether claimant had permanent impairment or work restrictions with respect to the accepted right supraspinatus tear condition. The Director did not explain why Dr. Di Paola's concurrence with Dr. Woodward's January 14, 2011 report meant that claimant had no permanent restrictions. This particularly is problematic because Dr. Di Paola expressly stated on January 31, 2011 that claimant permanently was restricted to light duty because of his right shoulder supraspinatus tear. (Ex. 127; see Ex. 128).

Dr. Di Paola, it is true, backtracked on his January 31, 2011 opinion. He checked a box on February 24, 2011 stating that he did not "find" any permanent restrictions associated with the right supraspinatus tear. (Ex. 132). He then asserted on August 8, 2011 that he permanently had restricted claimant's work activity on January 31, 2011 based on claimant's subjective symptoms, not objective findings. (Ex. 154). Remand is appropriate to enable the Director to consider whether Dr. Di Paola persuasively retracted his January 31, 2011 permanent work restrictions. In particular, the Director should consider whether the doctor's August 8, 2011 rationale that he based his determination of permanent work restrictions on subjective complaints, not objective findings, could be a persuasive rationale where the doctor had stated on February 24, 2011 that he agreed with Dr. Woodward's shoulder impairment findings, findings the employer used to award benefits at closure. (*See* Exs. 135, 136). Even if the Director could reconcile Dr. Di Paola's August 8, 2011 opinion with his agreement that claimant had permanent impairment, the Director should consider whether determination of permanent impairment based on subjective symptoms would be appropriate under the circumstances of this case.

Second, remand is appropriate because the Director found in its June 21, 2011 Order on Reconsideration that claimant has a chronic right shoulder condition that substantially limits repetitive use. (Ex. 149). Claimant's job at injury required frequent pushing and pulling, as well as occasional lifting and occasional overhead reaching activities. (Ex. 1). If claimant has a chronic right shoulder condition that limits repetitive use, I question how he could perform all the activities of his job at injury. On remand, the Director should have the opportunity to consider the June 21, 2011 Order on Reconsideration and whether its findings therein bear on the issue of claimant's vocational eligibility.

ORDER

IT IS HEREBY ORDERED that the October 11, 2011 Order Remanding to Director is abated and replaced by this order. The May 24, 2011 Director's Review and Order is reversed

and remanded for further proceedings consistent with this opinion. The parties' appeal rights shall run from the date of this order.