

In the ORS 656.340 Vocational Assistance Dispute of

Douglas E. Olsen, Claimant

Contested Case No: 11-049H

PROPOSED & FINAL ORDER

September 20, 2011

DOUGLAS E. OLSEN, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Emerson G. Fisher, Administrative Law Judge

Claimant appeals the Director's Review and Order issued on March 31, 2011 by the Employment Services Team (EST) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

In lieu of proceeding to hearing on July 16, 2011, the parties submitted the matter to the undersigned Administrative Law Judge (ALJ) for resolution based on documentary evidence and written closing arguments. Claimant was represented by attorney Adian Martin. Royal Crown Builders Inc., and its insurer, Liberty Northwest Insurance Corporation, were represented by attorney Barbara Woodford.

The record closed on August 29, 2011.

The documentary evidence received consists of Exhibits 1 through 20, 1A, 2A through 2D, and 15A.

ISSUE

Whether claimant is eligible for vocational assistance.

FINDINGS OF FACT

Claimant filed a claim for a back injury occurring on or about March 26, 2007. (Ex. 20-1). The insurer accepted a L4-5 disc herniation, and recurrent disc herniation with surrounding scar enhancement of L4-5. (Ex. 17-1).

Dr. Waring (attending physician) believed that claimant would benefit from surgery, but opined that claimant would not be a good surgical candidate until such time as certain non-work related medical conditions could be stabilized. (Exs. 2; 7-2; 15A-1).

On December 1, 2010, claimant was determined eligible for vocational assistance and training. (Ex. 17-2). Ms. Blanchard was assigned as vocational counselor. (Id.)

Ms. Blanchard issued a Notice of End of Eligibility for Vocational Assistance on February 1, 2011, on the ground that claimant had failed, after written warning, to participate in the development of a Return to Work Plan (RTWP). (Ex. 17-3).

Claimant requested Director's Review.

Finding that claimant had been notified of the need to contact Ms. Blanchard on at least three occasions prior to the issuance of the warning letter, a March 31, 2011, Director's Review and Order applied OAR 436-120-0165(9), and affirmed the end of eligibility decision.¹ (Ex. 17). Claimant requested a hearing.

CONCLUSIONS OF LAW

A director's administrative review regarding vocational assistance may be modified only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion.² ORS 656.283(2)(c). In determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make independent findings of fact. OAR 436-001-0225(3); *Colclasure v. Washington County School District No. 48J*, 317 Or 526, 537 (1993).

Here, claimant does not dispute that he had been notified of the need to contact Ms. Blanchard on at least three occasions prior to the issuance of the warning letter. Nor does claimant dispute a conclusion in the March 31, 2011 Director's Review and Order that "[he] essentially disappeared in the months following the determination of eligibility for vocational assistance." (Ex. 17-4). Rather, claimant argues that development of a return to work plan was impossible until the outcome of a necessary spinal fusion surgery was known.

The record establishes that claimant is in need of spinal fusion surgery. The record further establishes that one or more non-work related medical conditions currently prevent claimant from having the proposed surgery. That said, however, the record does not establish that claimant was medically unable to meet with or contact Ms. Blanchard. Nor does the record establish that claimant's "disappearance" in the months following the eligibility determination was the result of medical problems.

Therefore, based on the record presented, I am not persuaded that claimant has shown that it was error for the March 31, 2011, Director's Review and Order to affirm the end of eligibility decision.

¹ OAR 436-120-0165(9) provides, in pertinent part, that a worker's eligibility for vocational assistance ends when "the worker failed after written warning to participate in the development or implementation of a return-to-work plan."

² "The phrase 'abuse of discretion' is a legal term of art meaning a discretion exercised to an end or purpose not justified by and clearly against reason or evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and laws pertaining to the matter submitted. BLACK'S LAW DICTIONARY 10-11 (6th ed. 1990); *Jerry I. Bell*, 2 WCSR 394, 395 (1997), citing *Casciato v. Oregon Liquor Control Comm'n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979). On review for abuse of discretion, 'Mlle 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.' *Teresa Brooke*, 8 CCHR 240, 241 (2003) quoting *Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999)." *Suzanne P. Blakely*, 9 CCHR 287, 294 (2004).

ORDER

The Director's Review and Order dated March 31, 2011, is affirmed.