

In the Matter of the ORS 656.340 Vocational Services Dispute of

Frazier, O.C. III, Claimant

Contested Case No: H01-054

FINAL ORDER

February 8, 2002

PACIFIC EMPLOYERS' INSURANCE CORPORATION, Petitioner

O.C. FRAZIER III, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Insurer appealed an administrative order issued on March 12, 2001 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 11, 2001, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Pacific Employers' Insurance Corporation (insurer) was represented by attorney Bradley R. Scheminske. Respondent O.C. Frazier III (claimant) was represented by attorney Rory Linerud. WCD waived appearance. No witnesses testified and the record closed at the conclusion of the hearing.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUES

1. Does the director have jurisdiction to revisit the issue of claimant's vocational eligibility where all rights to compensation and vocational assistance have been waived pursuant to a Claims Disposition Agreement (CDA)?
2. Is claimant's attorney entitled to an attorney fee for defending this action?
3. Pursuant to ORS 656.385(4), is insurer subject to a penalty for filing exceptions based on a vexatious reason?
4. Pursuant to ORS 656.340, is claimant eligible for vocational services?

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 21 were received without objection. Insurer's Supplementary Exhibits were also received into the record as follows:

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| 22. Claims Disposition Agreement | 6-27-01 | 7 pp. |
| 23. Letter from Scheminske | 6-29-01 | 1 p. |
| 24. Proposed and Final Order of Dismissal | 7-19-01 | 1 p. |
| 25. Insurer's Exceptions | 7-23-01 | 5 pp. |
| 26. Delegation of Authority | 7-27-01 | 2 pp. |

FINDINGS OF FACT

On March 12, 2001, RRU issued a Director's Review and Order setting aside the insurer's notice of ineligibility for vocational assistance. (Ex. 20). On May 3, 2001, insurer appealed, requesting a contested case hearing. (Ex. 21). The case was set for hearing on the vocational issue for July 23, 2001.

On June 27, 2001, the Workers' Compensation Board approved a CDA executed by the parties. (Ex. 22). The CDA provides,

"Claimant acknowledges that by agreeing to the Claim Disposition Agreement he is relinquishing all further rights to temporary and permanent disability compensation, whether partial or total; all rights to vocational rehabilitation assistance; all future aggravation rights; survivors' benefits; and all other rights to payments, penalties, attorney fees, benefits and compensation of any kind whatsoever under any part or provision of the Oregon Workers' Compensation Law, Chapter 656 Oregon revised Statutes, to which he otherwise would be entitled except that claimant retains the right to medical care which is compensable under ORS 656.245 and for which insurer remains responsible because of the September 20, 1999 industrial injury. All rights, except the right to payment of medical bills under ORS 656.245, are expressly, completely, and fully released and waived by this agreement." (Ex. 22-3).

By letter dated June 29, 2001, insurer's attorney notified the Hearing Officer Panel that the parties had settled all matters regarding the claim and requesting the hearing officer to issue an appropriate order without the necessity of a contested case hearing. (Ex. 23). On July 19, 2001, the administrative law judge issued a Proposed and Final Order of Dismissal which bears the heading, "In the Matter of the Vocational Assistance of O.C. Frazier III, Claimant" and reads,

"According to the parties, this matter has been resolved by a Claims Disposition Agreement which was approved by the Workers' Compensation Board on June 27, 2001. Therefore, petitioner's request for hearing is considered withdrawn. ACCORDINGLY, IT IS ORDERED that this matter is dismissed with prejudice." (Ex. 24).

By letter dated July 23, 2001, insurer took issue with the language contained in the Dismissal Order, requested an amended order proposing alternative language, and filed written exceptions. (Ex. 25). On July 27, 2001, WCD delegated authority to the administrative law judge to conduct further hearing, address the four issues listed above and issue a Final Order. (Ex. 26).

CONCLUSIONS OF LAW AND REASONING

Jurisdiction: There is no question that WCD has jurisdiction over the underlying vocational eligibility dispute. ORS 656.340(4). The question presented is whether WCD

has jurisdiction over a vocational services dispute following approval of a CDA. OAR 137-003-0650(1) appears under the heading “Exceptions to Proposed Order” and provides:

“If the recommended action in the proposed order is adverse to any party or the agency, the party or agency may file exceptions and present argument to the agency or, if authorized to issue a final order, to the hearing officer.”

Insurer contends that the recommended action in the Proposed Order, dismissal with prejudice, was adverse to its interests. Insurer is entitled to raise such an argument on appeal. If any party is dissatisfied with a proposed order, the proper course is to file exceptions, as insurer did. Therefore, WCD has jurisdiction over the vocational services dispute on appeal from the Proposed and Final Order of Dismissal.

Attorney Fee: The next question is whether claimant’s attorney is entitled to an insurer-paid attorney fee for his services in defending this action. Under the terms of the approved CDA, claimant relinquished all further rights to attorney fees. ORS 656.236.¹ Therefore, claimant is entitled to no attorney fee.

Penalty: The next question is whether it is appropriate to assess a penalty against insurer under ORS 656.385(4). ORS 656.385(4) provides:

If upon reaching a final contested case decision where such contested case was initiated by an insurer or self-insured employer it is found by the director that the insurer or self-insured employer initiated the contested case hearing for the purpose of delay or other vexatious reason or without reasonable ground, the director may order the insurer or self-insured employer to pay to the claimant such penalty not exceeding \$750 and not less than \$100 as may be reasonable under the circumstances.

Although WCD waived appearance at hearing, the delegation of authority implies that insurer filed exceptions for a vexatious reason. Even though insurer may have filed exceptions without reasonable ground, the statute authorizes assessment of a penalty only where insurer requested a hearing for an illegitimate reason. No party contends that insurer’s initially requested a contested case hearing for an improper reason. The dispute comes before the director on appeal from the Proposed and Final Order of Dismissal. Because the current dispute stems from exceptions and not from a request for hearing, ORS 656.385(4) does not authorize imposition of a penalty.

¹ ORS 656.236(1)(a) provides in part:

The parties to a claim, by agreement, may make such disposition of any or all matters regarding a claim, except for medical services, as the parties consider reasonable, subject to such terms and conditions as the Workers’ Compensation Board may prescribe. For purposes of this section, “matters concerning a claim” includes the disposition of a beneficiary’s independent claim for compensation under this chapter. Unless otherwise specified, a disposition resolves all matters and all rights to compensation, attorney fees and penalties potentially arising out of claims, except medical services, regardless of the conditions stated in the agreement.

Vocational Eligibility: The final question is whether claimant is eligible for vocational services pursuant to ORS 656.340. Under the terms of CDA approved on June 27, 2001, claimant relinquished all further rights to vocational services. Therefore, claimant is entitled to no further vocational services. Accordingly, the administrative order dated March 12, 2001 finding claimant eligible for vocational services is moot.

ORDER

IT IS HEREBY ORDERED that:

1. The Directors Review and Order dated March 12, 2001 is vacated as moot.
2. Contested Case Number H01-054 is dismissed with prejudice.

DATED this 8th day of February 2002.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel