

In the Matter of the Vocational Dispute of

Murphy, Melissa, Claimant

Contested Case No: H00-120

FINAL ORDER

January 4, 2002

MELISSA MURPHY, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On February 27, 2001, Hearing Officer Paul Vincent conducted a telephone hearing. Petitioner, claimant Melissa Murphy, appeared and was represented by her attorney, R. Adian Martin. Meg Carman represented respondent Liberty Northwest Insurance Corporation (insurer). The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Petitioner Murphy was the only witness.

The WCD filed exceptions to Hearing Officer Vincent's June 26, 2001 Order Remanding¹ that determined claimant had not been released for regular work and which remanded the matter to RRU to develop the record on the issue of whether claimant had a substantial handicap to employment. Respondent Liberty responded to the exceptions, but petitioner Murphy did not. Before the Director, the issue is claimant's eligibility for vocational assistance. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Findings of Fact

I adopt Hearing Officer Vincent's Findings of Fact.

Conclusions of Law and Opinion

I may modify a director's administrative review regarding vocational assistance only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). The hearing officer may admit evidence and make independent findings of fact to determine whether any of the factors identified in ORS 656.283(2)(c) were violated. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The hearing officer has the responsibility to ensure that the record is fully developed so that it is sufficient for judicial review. ORS 183.415(10). I review pursuant to ORS 656.283(2) under the record developed before the hearing officer. *Colclasure, supra*.

Relying on the attending physician's release to regular full time work, the June 5, 2000 Order on Reconsideration found that claimant was not precluded from returning to her job at injury. Thus, pursuant to ORS 656.726(3)(f)(D)(ii) and OAR 436-035-0270(3)(b), social and

¹ The Department of Justice notified the parties on July 20, 2001 that the June 26, 2001 order was a Proposed and Final Contested Case Hearing Order, which should have contained notice of appeal rights.

vocational factors were not applied in determining claimant's permanent disability. (Ex. 6-3). The Rehabilitation Review Unit (RRU) relied on the findings in the June 5, 2000 Order on Reconsideration, that claimant was released to perform regular employment, in determining that claimant was able to return to regular work on a part-time basis. (Ex. 9). At a subsequent WCB hearing before Administrative Law Judge (ALJ) Mills, the June 2000 Order on Reconsideration was at issue, including the issue of whether claimant was entitled to additional permanent disability based on consideration of social and vocational factors. Inclusion of these factors depended upon whether claimant returned to regular work or was released to regular work with certain contingencies. ALJ Mills determined that, for purposes of rating disability under ORS 656.726(3)(f)(D)², it was "debatable" whether claimant was released to regular work, but that there was no evidence that claimant's job at injury was available at the time of her release. The ALJ, thus, determined that the social and vocational factors should be considered in rating claimant's permanent disability. (Ex. 11).

In this case, claimant contended that ALJ Mills' Opinion and Order, regarding the extent of claimant's permanent disability, was binding on the director. Hearing officer Vincent determined that he was not bound by ALJ Mill's order, but agreed that claimant was unable to return to her regular work at injury. Relying on claimant's testimony, he found that claimant's job at injury as a grill cook could not be performed within the limitations placed by the medical arbiter, Dr. Lee. Hearing officer Vincent, therefore, remanded the matter to RRU to determine whether claimant had a substantial handicap to employment.

The WCD and the insurer contend that the hearing officer made new ultimate findings of fact, but failed to state with legal reasoning how the administrative order by the RRU violated ORS 656.382(2)(c). The insurer additionally contends that the issue of whether claimant was released to regular work and whether that work was available for purposes of determining permanent disability is different than the issue of whether claimant returned to regular work for purposes of determining eligibility for vocational assistance.

The statutes and rules for determining the extent of disability are different than the statutes and rules for determining eligibility for vocational assistance. ALJ Mills determined the applicability of ORS 656.726(3)(f)(D)(ii), which requires the attending physician release to regular work at the job held at the time of injury and the availability of that job. In contrast, under OAR 436-120-0320(8), a worker is eligible for vocational assistance if, as a result of limitations caused by the injury, she is unable to return to regular employment. Regular employment means "the employment the worker held at the time of the injury ... " ORS 656.340(5); OAR 436-120-0005(7). The relevant inquiry is whether the worker is able to return to regular employment, not whether her attending physician has released her to regular employment. *Scott W. Adair*, 5 WCSR 109 (2000) (citing *Arthur Ismert*, 3 WCSR 70, 71 (1998)); *see also*, *Glenda S. Quatermane*, 3 WCSR 339 (1998) (ORS 656.340(1) requires insurer to evaluate worker for eligibility if worker has not "returned" to work; the insurer's determination that there was a "release" to work is insufficient.) Thus, I consider the preponderance of the evidence to determine the return to work question.

² ORS 656.726(3)(f)(D)(ii) provides that impairment is the only factor to be considered in evaluating unscheduled permanent disability if: "The attending physician releases the worker to regular work at the job held at the time of injury and the job is available but the worker fails or refuses to return to that job."

Here, the evidence supports the hearing officer's finding that claimant could not perform her regular work as a cook due to the medical limitations placed on her by Dr. Lee. Claimant testified that her work as a cook at Dairy Queen involved sweeping, mopping, cleaning counters, washing dishes, preparing food, and lifting heavy containers and trays. In performing these functions, she had to constantly bend, twist and reach. Dr. Lee, who performed a medical arbiter examination, opined that claimant was permanently precluded from frequently stooping, climbing, crouching, crawling and twisting. He also placed restrictions on claimant's ability to lift, carry, sit, stand and walk. (Ex. 4). Although the attending physician, Dr. Crawford, released claimant for regular full time work with respect to her on-the-job injury, she did not make specific findings regarding claimant's impairment or functional capacity other than to state that she did not feel there was any permanent impairment. (Exs. 1, 2). Thus, Dr. Crawford's opinion regarding claimant's ability to return to regular work is incomplete, and thus, not persuasive. Based on Dr. Lee's work restrictions and on claimant's testimony, claimant was unable to return to regular work. Because the available evidence shows that claimant was not capable of performing the duties of her regular employment, she is eligible for vocational assistance.

RRU, thus, erroneously applied OAR 436-120-0320(8) to conclude that claimant was ineligible for vocational assistance. Rather than modifying RRU's order, for violating a rule, hearing officer Vincent reversed and remanded the case to RRU. Based on the above, RRU's order is modified. RRU, however, did not decide the issue of whether claimant had a substantial handicap to employment for purposes of determining claimant's eligibility for vocational services. Accordingly, that issue is remanded to insurer for completion of a substantial handicap evaluation.

IT IS HEREBY ORDERED that

1. The June 26, 2001 Order Remanding is modified to determine that RRU's decision constituted a rule violation. Those portions of the order: (1) finding that claimant was unable to return to regular employment; and (2) remanding to RRU for development of the record regarding, and determination of, whether claimant has a substantial handicap to employment, is affirmed.
2. The November 9, 2000 RRU order that claimant is ineligible for vocational assistance is modified accordingly. The matter is remanded to Liberty Northwest Insurance Corporation for completion of a substantial handicap evaluation consistent with this order.

DATED this 4th day of January, 2002.

By: _____
John Shilts, Administrator
Workers' Compensation Division