

In the Matter of the Vocational Assistance Dispute of

Wyant, Dennis A., Claimant

Contested Case No: HH02-062

PROPOSED & FINAL ORDER

August 16, 2002

DENNIS A. WYANT , Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a May 22, 2002 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On July 23, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney Christopher D. Moore represented petitioner Dennis A. Wyant (claimant). Attorney Jeffrey R. Gerner represented respondent, SAIF Corporation (insurer). WCD waived appearance at hearing. Claimant testified on his own behalf and the record closed on the date of 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 and conclusions of law are based upon the entire record.

ISSUE

Whether RRU correctly determined that claimant is ineligible for vocational services because the claim was closed without a permanent partial disability award.

EVIDENTIARY RULING

WCD Exhibits 1 through 6 as well as claimant's supplementary Exhibit 1A were admitted into the record without objection. Insurer objected to claimant's Supplementary Exhibit 7, arguing that it is not relevant within the scope of review because it was produced after the date of the administrative order on appeal. I overrule the objection pursuant to *Colclasure v. Washington County School District*, 317 Or 526 (1993) (Within statutory scope of review, administrative law judge may admit evidence that was not before the department and make independent findings of fact). Therefore, Exhibit 7 is admitted into the record.

FINDINGS OF FACT

- (1) On April 8, 1999, while employed as a sidewall assembler, claimant filed an occupational disease claim for bilateral carpal tunnel syndrome. (Ex. 1).
- (2) On April 8, 2001, Donald O. Warren, MD declared the bilateral conditions medically

stationary with no permanent partial disability. Dr. Warren noted, "Vocational rehabilitation continues to be indicated for this patient. The patient is able to return to modified duty which does not involve repetition or heavy use of the hands." (Ex. 1A).

- (3) On April 12, 2002, the claim was closed without permanent partial disability. (Ex. 2).
- (4) On April 30, 2002, insurer issued a Notice of Ineligibility for Vocational Assistance. (Ex. 3).
- (5) On May 14, 2002, claimant appealed the Notice of Ineligibility. (Ex. 4).
- (6) On July 2, 2002, Dr. Warren stated, "Not able to return to job at time of injury or any job requiring repetitive use of hands." (Ex. 7).

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance because the claim was closed without permanent partial disability award.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if: (1) it violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283 and OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District*, 317 Or 526 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of the evidence).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(1)(a) provides:

The insurer or self-insured employer shall cause vocational assistance to be provided to an injured worker who is eligible for assistance in returning to work.

ORS 656.340(6)(a) and (b) provide:

- (a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous

employment or to any other available and suitable employment with the employer at the time of injury or aggravation, and the worker has a substantial handicap to employment.

(b) As used in this section:

(A) A “substantial handicap to employment”¹ exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.”

OAR 436-120-0320 lists the criteria for eligibility. OAR 436-120-0320(2)(b) provides in part:

(2) The insurer is not required to determine eligibility if:

¹ OAR 436-120-0005(8) provides:

(8) Substantial handicap to employment” means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment. “Knowledge,” “skills,” abilities” have meanings as follows:

(a) “Knowledge” means an organized body of factual or procedural information derived from the worker’s education, training or experience.

(b) “Skills” means the demonstrated mental and physical proficiency to apply knowledge.

(c) “Abilities” means the mental and physical capability to apply the worker’s knowledge and skills.

(c) The worker’s claim was closed with no permanent partial disability.

Claimant contends that OAR 436-120-0320(2)(b) is invalid because it contravenes ORS 656.340(1) and (6). In support of his position, claimant argues that the statute requires an employer to provide vocational assistance in the absence of a permanent partial disability award. In contrast, insurer argues that the director is authorized to flesh out the statute and that the rule requiring a permanent partial disability award ensures a causal link between the compensable injury and the need for vocational assistance in accord with ORS 656.340(6). I agree.

Pursuant to OAR 656.726(4)(a), the director is authorized to promulgate administrative rules to regulate the provision of vocational services to injured workers. Exercising this

authority, the director adopted OAR 436-120-0320(2)(b).

Pursuant to ORS 656.340(6)(b), an injured worker is eligible for vocational assistance, at the employer's expense, only if a substantial handicap exists because of the injury. OAR 436-120-0320(2)(b) requires a permanent partial disability award as a means of establishing a causal nexus between the substantial handicap and the compensable injury. Accordingly, I find that RRU correctly determined that the employer was not required to determine claimant's eligibility in the absence of a permanent partial disability award.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED

The Director's Review and Order dated May 22, 2002 is affirmed.

DATED this ____ day of August 2002.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel