
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Nolan, Timothy S., Claimant

Contested Case No: H03-006

FINAL ORDER

July 2, 2003

TIMOTHY S. NOLAN, Petitioner
SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Coburn issued a Proposed and Final Contested Case Hearing Order on March 18, 2003 reversing the November 18, 2002 Director's Review and Order. Insurer timely submitted exceptions, and claimant timely responded. The entire record has been reviewed.

ISSUE

Whether SAIF Corporation is required to redetermine Mr. Nolan's eligibility for vocational assistance. The director finds that SAIF is not required to redetermine claimant's eligibility.

FINDINGS OF FACT

The director accepts the Judge's findings of fact, which are as follows:

(1) On July 2, 2001, claimant suffered injury while working as a laborer, delivering a cement fountain. (Ex. 1.) Insurer accepted lumbosacral strain and left shoulder strain as compensable conditions. (Ex. 3-4.)

(2) On March 26, 2002, insurer notified claimant that he was ineligible for vocational assistance because he lacked a substantial handicap to employment. Claimant did not appeal and the notice became final by operation of law. (Ex. 2.)

(3) On April 30, 2002, insurer issued a Notice of Closure awarding zero unscheduled permanent partial disability (PPD). (Ex. 3-1.) On July 22, 2002, WCD issued an Order on Reconsideration awarding 14 percent PPD. (Ex. 4-3.)

(4) On August 15, 2002, claimant requested insurer to evaluate his vocational eligibility. Insurer denied the request

because the earlier denial had not been appealed timely. (Exs. 5 and 6.)

CONCLUSIONS OF LAW

The Judge concluded claimant was entitled to redetermination of his eligibility for vocational assistance pursuant to OAR 436-120-0360(4). The Judge found that the plain meaning of that rule requires an insurer to redetermine eligibility upon notification of a change in circumstances, including a subsequent permanent partial disability award, and reversed the Rehabilitation Review Unit on its reading of the rule.¹ The Judge found the unit's interpretation of OAR 436-120-0360(4) inconsistent with OAR 436-120-0320(9)(c)(C) and OAR 436-120-0340(2)(d), and did not defer to its interpretation.

In its exceptions, insurer argues that claimant failed to appeal insurer's March 26, 2002 Notice of Ineligibility for Vocational Assistance; that under OAR 436-120-0320(2)(a), insurer is not required to redetermine claimant's eligibility; that OAR 436-120-0360 does not apply here; and that the Rehabilitation Review Unit did not abuse its discretion here.

Claimant's response to insurer's exceptions was simply that the Judge properly analyzed the law and facts in this matter, and insurer is required to redetermine claimant's eligibility for vocational assistance.

A brief outline of the process for determining and redetermining eligibility for vocational assistance, as provided in the director's rules, appears helpful in this matter.

The insurer shall contact a worker to begin the eligibility determination within five days of a request from the worker; receipt of documentation of a need for vocational assistance; knowledge that the claim qualifies for closure; or a permanent disability award. OAR 436-120-0320(1)(a)-(d). The insurer is not required to determine eligibility if: eligibility has previously been determined under the current opening of the claim and there are no newly accepted conditions; the worker has returned to work with the employer at injury; or the worker's claim closed with no permanent disability award. OAR 436-120-0320(2)(a)-(c). A worker entitled to an eligibility evaluation must meet additional criteria in order to be eligible for vocational services. OAR 436-120-0320(9).² So there are two steps to the vocational assistance eligibility process: (1) entitlement to an eligibility determination, and then (2) eligibility for services.

A worker is ineligible for vocational assistance, or a worker who has previously been found eligible becomes ineligible, if one of the criteria in OAR 436-120-0350 are met.

¹ The Judge found that the unit's reasoning under the rule was not supported by the record, and accordingly the unit abused its discretion. The Judge did not cite any authority for why this amounted to an abuse of discretion.

² Eligibility for vocational services is the stage at which the "substantial handicap to employment" criterion comes into play.

If a worker was previously found ineligible or the worker's eligibility ended, the worker can have his eligibility redetermined. OAR 436-120-0360. The worker qualifies for a re-determination only if he was found ineligible or his eligibility ended for any of the reasons listed in OAR 436-120-0360 sections (1) through (10). If one of the reasons applies, then the worker's eligibility shall be re-determined upon notification to the insurer that there has been a change of circumstances that is related to the original reason his eligibility either ended or was denied. *See* opening paragraph of OAR 436-120-0360.

It is under this framework claimant's eligibility must be examined. Under the process provided in the rules, insurer is correct that it is not required to redetermine claimant's eligibility for vocational assistance. Under OAR 436-120-0320(2), insurer is not required to determine claimant's eligibility because eligibility has previously been determined under the current opening of the claim and there are no newly accepted conditions. Because the worker has been previously found ineligible, he may be entitled to have his eligibility redetermined under OAR 436-120-0360. However, none of the ten reasons listed in sections (1) through (10) of that rule were the reasons why claimant was originally determined ineligible. Therefore, the condition set forth in the opening paragraph to that rule -- "If a worker was previously found ineligible or the worker's eligibility ended *for any of the reasons specified below, ****" (emphasis added) -- is not met. Even though claimant has shown a change in circumstances in that he has now been awarded permanent disability, OAR 436-120-0360 by its terms does not apply. Insurer is not required to re-determine claimant's eligibility.³

The Judge found that the plain meaning of OAR 436-120-0360(4) requires an insurer to redetermine eligibility upon notification of a change in circumstances. The Judge, however, ignores the first part of the rule requiring that the worker's ineligibility or end of eligibility be based on "any of the reasons specified" in sections (1) through (10). Only if one of those reasons was the reason why claimant's eligibility was denied, then, is insurer required to redetermine eligibility upon a change in circumstances; claimant's eligibility was denied for a different reason. The Judge found this reasoning is inconsistent with OAR 436-120-0320(9)(c)(C) and 436-120-0340(2)(d). Those rules apply to the substantial handicap eligibility criterion the worker must meet in order to be eligible for services. As noted above, the substantial handicap criterion is part of the second step in the eligibility process; the criterion is not reached if claimant is not entitled to an eligibility determination under OAR 436-120-0320(1) and (2). Moreover, lack of substantial handicap was the reason claimant's eligibility was originally denied, and it is not one of the reasons listed in OAR 436-120-0360(1)-(10).

ATTORNEY FEE

Claimant has not prevailed, therefore he is not entitled to an attorney fee award. ORS 656.385(1).

ORDER

³ The rules are clear, though, that nothing in the rules prevents the insurer from finding claimant eligible for vocational assistance at any time. OAR 436-120-0320(4).

The March 18, 2002 Proposed and Final Contested Case Hearing Order is reversed. The November 18, 2002 Director's Review and Order is affirmed.

SAIF Corporation is not required to redetermine Mr. Nolan's eligibility for vocational assistance.

DATED this 2nd day of July, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

BY: _____
John Shilts, Administrator
Workers' Compensation Division