
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Pauli, Lowell E., Claimant

Contested Case No: H03-033

PROPOSED AND FINAL ORDER

May 27, 2003

LOWELL E. PAULI, Petitioner
SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a January 23, 2003 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 May 15, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Attorney James T. Guinn represented petitioner Lowell E. Pauli (claimant). Attorney Stefan J. Gonzales 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.

ISSUE

Whether RRU correctly determined that claimant is ineligible for vocational services.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 14 as well as insurer's Supplementary Exhibits 1A through 15 were admitted into the record without objection. Claimant withdrew Supplementary Exhibit 10A as a duplicate.

FINDINGS OF FACT

(1) On January 16, 2002, claimant fell approximately 8 feet off of a ladder and suffered a neck injury while working as a welder. (Exs. 1, 4-2 and 10-1.) Insurer accepted "minimally displaced anterior fracture of C5". (Exs. 1B and 6.) Attending physician Bradley J. Bergquist, MD treated claimant primarily with a rigid cervical collar. (Exs. 1A, 1C, 2B, 2C and 10-1.)

(2) On March 18, 2002, Dr. Bergquist released claimant to sedentary work. (Ex. 2B.) In early April 2002, claimant began performing light duty with the employer at injury. (Ex. 2C.) On May 16, 2002, Dr. Bergquist released claimant to work full duty one to two days per week and light duty three to four days per week through June 16. (Ex. 2E.) In June 2002, claimant performed office and pipehanger work. (Ex. 2F.) Claimant returned to full duty on June 14, 2002 and was laid off on June 17, 2002 due to lack of work. (Ex. 12-1.)

(3) On June 13, 2002, Dr. Bergquist opined that claimant was probably medically stationary and requested an independent medical examination (IME). (Ex. 3.) On August 21,

2000, Steven J. Schilperoort, MD conducted an IME and declared claimant's medically stationary. Dr. Schilperoort attributed 50 percent of claimant's ongoing symptoms to preexisting C5-6 spondylosis. (Ex. 4-6.) On September 4, 2002, Dr. Bergquist concurred. (Ex. 5.)

(4) On September 18, 2002, insurer issued a Notice of Closure awarding 9 percent permanent partial disability (PPD). (Ex. 6.)

(5) After visiting the employer, Rehabilitation Consultant Adele Bostwick drafted a job analysis describing the job duties required by claimant's regular work as a welder, pipefitter and fabricator. (Exs. 7 and 8A.) On October 28, 2002, claimant signed the job analysis verifying its accuracy. (Ex. 7-3.) On November 7, 2002, Dr. Schilperoort approved the job analysis and released claimant to perform regular work 8 to 10 hours per day. Dr. Schilperoort also noted:

I have one concern regarding a known habit among welders. There is a tendency to quickly flip the head forward or backward to position the welding mask rather than pushing it up or down by hand. If Mr. Pauli tends to do that he will cause pain in his neck from the C5-6 spondylosis. (Ex. 7-5.)

(6) On November 18, 2002, Dr. Bergquist concurred with Dr. Schilperoort's comments concerning the job analysis. (Ex. 8.) On November 22, 2000, Bostwick recommended that insurer find claimant ineligible for vocational assistance because he was released to regular work. (Ex. 8A.) On November 27, 2002, insurer notified claimant that he was ineligible for vocational assistance and claimant appealed. (Exs. 9-1 and 11.)

(7) On December 3, 2002, Stephen J. Thomas, MD examined claimant at the request of WCD's Appellate Review Unit. (Ex. 10.) Claimant indicated to Dr. Thomas that he was ready to go back to his regular job as a welder and millwright. (Ex. 10-2.) Dr. Thomas opined that claimant's only limitation was climbing in that he had difficulty looking up or extending his neck. Claimant had no limitations in lifting, stooping, crawling, twisting, reaching, crouching, kneeling, balancing, pushing or pulling and could work the same number of hours he did prior to the work injury. (Ex. 10-3.)

(8) On January 9, 2003, ARU issued an Order on Reconsideration and increased the PPD award to 13 percent. (Ex. 12A.)

(9) In March 2003, claimant began working as a welder and fabricator for a subsequent employer. Claimant builds large food processing equipment out of sheet metal. (Testimony of claimant.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance.

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) 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; 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.

OAR 436-120-0330(5) lists the conditions for eligibility and provides:

(5) As a result of the limitations caused by the injury or aggravation, the worker:

(a) Is not able to return to regular employment;

In the administrative order, RRU determined that claimant was ineligible for vocational assistance because he was released to regular welding work. As petitioner, claimant first contends that the administrative order violates a statute or rule and that it reflects an abuse of discretion. In support of his position, claimant argues that the release to regular work was invalid because the job analysis Dr. Schilperoort and Dr. Bergquist approved was inaccurate. However, claimant signed the job analysis, verifying that it accurately reflected his regular job duties.

Claimant next contends that a preponderance of the medical evidence establishes that he is unable to perform regular job duties. In support of his position, claimant relies on the opinion of medical arbiter Thomas. I find claimant's argument unpersuasive. To begin, Dr. Thomas conducted a medical arbiter's examination to assist ARU in rating claimant's PPD; his focus was not the vocational eligibility question presented to RRU. Also, Dr. Thomas imposed no limitations except for climbing and extending the neck upward. Dr. Schilperoort expressed a similar concern but attributed it to pre-existing spondylosis and not the work injury. Additionally, attending physician Bergquist concurred. For these reasons, I conclude that claimant was released to regular work, and therefore, is ineligible for vocational assistance pursuant to OAR 436-120-0330(5). Finding no basis to modify the administrative order, I affirm.

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 January 23, 2003 is affirmed.

DATED this 27th day of May 2003.

Catherine P. Coburn,
Administrative Law Judge
Hearing Officer Panel

