
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

Popma, Lori, Claimant

Contested Case No: H02-120

PROPOSED AND FINAL ORDER

March 28, 2003

LORI POPMA, Petitioner

THRIFTY PAYLESS INC., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an October 29, 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 January 16, 2003, Administrative Law Judge Paul Vincent conducted a hearing in this matter. Attorney James Guinn represented petitioner Lori Popma (claimant). Attorney Dennis Reese represented responding self-insured employer Thrifty Payless Inc and its claims administrator Pinnacle Risk Management Services (insurer). WCD waived appearance at hearing. Claimant testified on her own behalf. I left the record open until January 23, 2003 to allow claimant to submit a supplementary exhibit.

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.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 15 as well as insurer's Supplementary Exhibits R1¹ through R15 were admitted into the record without objection. Also, claimant's Supplementary Exhibit 12A was admitted into the record without objection.

FINDINGS OF FACT

- (1) On July 30, 2000, claimant filed a claim for back pain suffered while working as a "full case" replenisher in a warehouse. (Exs. 1 and 12R-2; testimony of claimant.)

¹ I marked insurer's supplementary exhibits with the initial "R" for "respondent" in order to distinguish them from the WCD exhibits.

Following litigation, insurer accepted lumbosacral, thoracic and cervical strains as compensable conditions. (Exs. 3R and 4R.)

- (2) On March 21, 2001, claimant's attending physician Michael Tso, MD released her to regular work and declared the conditions medically stationary with no permanent impairment effective November 30, 2000. (Ex. 4.) Claimant returned to work with the employer at injury performing her regular work as a warehouse replenisher. After two weeks, the employer transferred claimant to a different department where she filled individual orders. (Ex. 12-2; testimony of claimant.)
- (3) Effective October 1, 2000, insurer notified claimant that she was ineligible for vocational assistance because she was released to regular work. (Ex. 3.) On November 12, 2001, the claim was closed without permanent partial disability.

(Ex. 5.)
- (4) On January 30, 2000, James Harris, MD conducted a medical arbiter's examination and found no permanent impairment. Dr. Harris noted that claimant had returned to work with the employer at injury and was working without significant difficulty. (Ex. 6.) In an Order on Reconsideration dated March 7, 2002, WCD awarded 2 percent permanent partial disability (PPD). (Ex. 7.)
- (5) On March 18, 2002, claimant changed her attending physician and was released to regular work. (Exs. 8 and 14R-10.) Claimant filed an aggravation claim and on April 9, 2002, insurer denied the claim. (Ex. 9.)
- (6) In the spring of 2002, claimant was off work for four months on maternity leave. (Testimony of claimant.)
- (7) On April 26, 2002, claimant sought medical treatment from Rodney W. Conner, MD complaining of upper back and bilateral shoulder pain. (Ex. 10-1; testimony of claimant.) Claimant advised Dr. Connor that no light duty was available and he released her to full duty on a trial basis effective May 6, 2002. (Ex. 10-1.) Dr. Connor wrote, "Release to full duty 5/6/02." (Ex. 9R.) On May 7, 2002, claimant returned to Dr. Connor and he authorized time off work and opined that claimant should not return to warehouse work. (Exs. 10-2 and 11-2.)
- (8) On June 14, 2002, Brian Denekas, MD and David Waldram, MD conducted an insurer's medical examination. (Ex. 12.) They opined that there was no objective reason why claimant could not perform warehouse work. (Ex. 12R-7.)
- (9) On November 25, 2002, insurer denied compensability of right bicep tendonitis. (Ex. R15.)

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 436-120-0320 lists the conditions a worker must meet in order to qualify for vocational assistance. OAR 436-120-0320(9)(c)(A) provides:

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

(A) Is not able to return to regular employment.

Additionally, OAR 436-120-0005(10) provides:

(10) "Regular employment" means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance;

RRU determined that claimant was ineligible for vocational assistance because she was released to regular work. RRU relied on the opinions of claimant's initial attending physician, Dr. Tso and the medical arbiter, Dr. Harris, who opined that claimant was capable of performing regular work. Similarly, insurer contends that claimant is ineligible because she is able to return to regular work.

As petitioner, claimant cites OAR 436-120-0320 and contends that she was entitled to an eligibility determination at the time of the Order on Reconsideration which awarded 2 percent PPD. In the alternative, claimant contends that she is entitled to an eligibility redetermination pursuant to OAR 436-120-0360. I find claimant's arguments unpersuasive.

To begin, OAR 436-120-0320(2)(a)² excuses an insurer from determining a worker's eligibility if she returns to regular work. Here, Dr. Tso released claimant to regular work and she returned to regular work. Therefore, insurer is not required to determine her eligibility for vocational assistance.

Next, OAR 436-120-0360(4) requires an insurer to redetermine an injured worker's eligibility if the worker was not awarded PPD and later is awarded PPD. Here, the Notice of Closure awarded zero PPD but the subsequent Order on Reconsideration awarded 2 percent. However, insurer issued two notices of ineligibility both on the basis of claimant's release to regular work. I find that insurer's issuance of the second notice of ineligibility which followed the PPD award satisfied OAR 436-120-0360(4), and therefore, claimant is not entitled to an eligibility redetermination.

Finally, I agree with RRU's determination that claimant is ineligible for vocational services. Pursuant to OAR 436-120-0320(9)(c)(A) and OAR 436-120-0005(10), a worker is ineligible if she is able to return to the employment the worker held at the time of the injury which gave rise to the potential eligibility for vocational assistance. Following Dr. Tso's release to regular work, claimant returned to warehouse work. Therefore, she is ineligible for vocational assistance.³

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 October 29, 2002 is affirmed.

DATED this 28th day of March 2003.

Paul Vincent, Administrative Law Judge
Hearing Officer Panel

² OAR 436-120-0320(2)(b) provides:

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

(b) The worker has returned to regular work or other suitable employment with the employer at injury or aggravation;

³ In the event that claimant establishes an aggravation claim or compensability of an additional condition, she may seek eligibility pursuant to OAR 436-120-0320.