
In the Matter of the Vocational Dispute of

Udosenata, Iquo O., Claimant

Contested Case No: H02-123

FINAL ORDER

May 12, 2003

IQUO O. ODOSENATA, Petitioner

PEACE HEALTH MEDICAL CENTER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

The Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD) issued a November 14, 2002 administrative order that found petitioner ineligible for vocational assistance. Petitioner appealed RRU's order.

On January 16, 2003, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Attorney Christopher Moore represented petitioner, claimant Iquo O. Udosenata. Respondent, Peace Health Medical Center, and its insurer, SAIF Corporation, were represented by attorney Mary Goebel Adams. The WCD waived appearance. Claimant testified on her own behalf.

On February 5, 2003, Hearing Officer Coburn issued a Proposed and Final Contested Case Hearing Order, which affirmed RRU's order. Petitioner filed exceptions to the Proposed and Final Contested Case Hearing Order on February 25, 2003. Respondent timely filed a response. 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, all documents filed, and the parties' arguments, has been considered.

FINDINGS OF FACT

Claimant sustained a compensable injury on February 16, 2001 while working as a certified nursing assistant (CNA) in the employer's operating room. (Exs. 1). The claim was initially accepted for thoracic strain. Claimant returned to modified work. Dr. Richard Matteri, orthopedic surgeon, examined claimant on March 7, 2002 at SAIF's request. Dr. Matteri examined the dorsal and lumbar spines. He found claimant's range of motion measurements valid. Dr. Matteri felt that claimant's thoracic strain had resolved with no objective physical findings. (Ex. 2). Claimant's attending physician, Dr. Goldenberg, concurred with Dr. Matteri's report. (Ex. 3).

An April 3, 2002 Notice of Closure closed the claim for thoracic strain with an award of time loss only. (Ex. 4). Dr. Edward Reeves performed a medical arbiter examination on July 19, 2002 for the thoracic strain. (Ex. 17). The August 21, 2002 Order on Reconsideration awarded

two percent unscheduled permanent partial disability based on Dr. Reeve's range of motion findings of the thoracic spine. (Ex. 20).

In the interim, on April 5, 2002, SAIF found claimant ineligible for vocational assistance on the basis that her claim closed with no award of permanent disability. (Ex. 5). Claimant requested review of the insurer's Notice of Ineligibility for Vocational Assistance, asserting that her attending physician had indicated that she was not capable of returning to regular employment. (Ex. 6).

On May 22, 2002, Dr. Goldenberg released claimant to unrestricted duty. (Ex. 10). On May 23, 2002 in response to inquiries from claimant's attorney, Dr. Goldenberg opined that claimant did not have a chronic condition that significantly limited her ability to use her thoracic spine in a repetitive fashion. He explained that claimant had likely recovered from her initial injuries and that her ongoing pain was myofascial and unlikely directly related to her work injury. Dr. Goldenberg also agreed with Dr. Matteri's thoracic range of motion findings and that those reduced findings were probably an accurate reflection of her actual range of motion. He, however, felt that these findings were not related to the work injury. Dr. Goldenberg concluded that claimant was not precluded from returning to her regular work as a result of the work injury. (Ex. 8).

Claimant's examination remained normal on June 6, 2002. Although the employer had concerns about claimant's work release, Dr. Goldenberg wrote another release for claimant to return to full time unrestricted duty. (Exs. 9, 12).

After claimant received a permanent disability award for the thoracic strain condition, on June 13, 2002, SAIF issued a Notice of Ineligibility for Vocational Assistance on the ground that claimant had been released for regular work. (Ex. 13).

In June 2002, SAIF expanded its scope of acceptance to include lumbar strain. (Ex. 15). A June 17, 2002 Notice of Closure closed the claim for lumbar strain condition without an award of any disability. (Ex. 14). Dr. Christopher Swan performed a medical arbiter examination on August 29, 2002 regarding the accepted thoracic strain and lumbar strain. Ranges of motion and strength testing were normal. (Ex. 23). The October 3, 2002 Order on Reconsideration affirmed the June 17, 2002 closure. (Ex. 25)

Susan Bottomley, OTR, performed a work capacity evaluation (WCE) on July 23, 2002 at the employer's request. Claimant did not demonstrate the physical demands necessary to perform her job at injury. She demonstrated the ability to work in the light to light-medium range. However, claimant's limitations could not be explained based on the lumbar or thoracic strains. Claimant reported that she doubted that she would be capable of her regular work. (Ex. 18).

Dr. Goldenberg reported on August 22, 2002 that the limitations reported by the WCE were likely claimant's actual limitations. Claimant's performance on the WCE demonstrated that she had been unable to return to her former level of activity due to her injury. In light of the WCE, claimant was probably not capable of performing her prior regular employment. (Ex. 21).

On August 29, 2002, SAIF again found claimant ineligible for vocational assistance on the ground that she had been released for regular work. (Ex. 22).

CONCLUSIONS OF LAW AND OPINION

The director may modify RRU's decision 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). The director reviews pursuant to ORS 656.283(2) under the record developed before the hearing officer. *Colclasure, supra*. As relevant here, claimant is eligible for vocational assistance if, as a result of the limitations caused by the injury, she: (1) "is not able to return to regular employment;" (2) "is not able to return to any other suitable and available work with the employer at injury;" and (3) "has a substantial handicap to employment and requires assistance to overcome that handicap." OAR 436-120-0320(9)(c).

RRU found that the preponderance of the evidence established that claimant had no objective findings that prevented her from returning to regular work. RRU further found that Dr. Goldenberg's subsequent opinion, which relied on the WCE, that claimant had loss of function, was inconsistent with his earlier opinion and was insufficient to rebut the weight of the contrary medical opinion. RRU therefore concluded that "the limitations caused by [the] work injury do not prevent [claimant] from returning to regular employment." Because claimant was able to return to regular work, she was not eligible for vocational assistance. The hearing officer affirmed.

Claimant contends that RRU's order violated all of the requirements of ORS 656.283(2)(c)(A)-(D). Claimant first argues that RRU's decision should be modified based on its holding that valid reduced range of motion is not an objective finding. Claimant contends that the opinions of Dr. Matteri and Dr. Swan that claimant had no objective findings are unpersuasive. She relies on the findings of Dr. Reeves and of Ms. Bottomley as supported by Dr. Goldenberg's subsequent opinion to assert that she had reduced range of motion. Therefore, claimant contends, RRU's conclusion that claimant had no objective findings that would prevent her to return to regular work to the contrary was erroneous.

Moreover, claimant argues, imposing an objective findings requirement violated ORS 656.340 and OAR 436-120-0320(9) and exceeded the agency's authority. Claimant contends that neither the statute nor the rule impose a requirement that an inability to return to regular work be supported by objective findings. Therefore, RRU impermissibly enlarged the terms of the statute and rule. Claimant is correct that neither ORS 656.340 nor OAR 436-120-0320 impose an

objective finding requirement to support a worker's inability to return to regular work. However, RRU did not exceed its statutory authority to determine whether claimant had work related limitations that precluded her from returning to regular work. RRU found that claimant's injury related limitations did not preclude her return to regular work. Rather, as discussed further below, claimant is asserting that RRU is bound by the appellate review unit's findings of impairment. Also, as discussed below, the evidence supports RRU's and the hearing officer's findings that claimant could perform her regular work.

Next, claimant contends that the law of the case and/or issue preclusion applies and, therefore, RRU was bound by the appellate review unit's determination that claimant had objective findings of impairment. In *Mark B. Hardman*, 8 WCSR ____ (2003), the director held that the doctrine of "law of the case" did not apply to bind RRU by a prior appellate review unit determination regarding the worker's work capacity. The director also determined that issue preclusion was inapplicable. In making that determination, the director discussed the requirements of issue preclusion: "1. The issue in the two proceedings is identical. 2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding. 3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue. 4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding. 5. The prior proceeding was the type of proceeding to which [the] court will give preclusive effect." *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993) (citations omitted).

The director's discussion in *Hardman* regarding the fifth requirement is dispositive of claimant's argument regarding the authority of RRU and the appellate review unit. The director concluded the reconsideration process was not the type of procedure that should be accorded preclusive effect, in part due to legislative intent to create separate procedural requirements and separate avenues for resolving the different disputes before the appellate review unit and RRU. *Hardman, supra*. Thus, although the legislature granted the director the authority to conduct the reconsideration process and the authority to resolve vocational assistance disputes, as discussed in *Hardman*, the proceedings are separate functions.

Lastly, claimant argues that RRU abused its discretion by failing to evaluate Dr. Goldenberg's opinion as a whole. Dr. Goldenberg had consistently released claimant for regular work. He had also reported that claimant's ongoing pain complaints and reduced range of motion were not due to her work injury. His subsequent, unexplained opinion that the work capacity evaluation (WCE) demonstrated that claimant was not capable of returning to her regular job is inconsistent with the WCE itself. Ms. Bottomley reported that claimant's perceived limitations were not consistent with the WCE findings. During the WCE, claimant demonstrated the ability to lift 10-20 pounds. One month later, however, Dr. Swan placed no limitations on claimant's capacity to lift or carry or on her ability to stoop, crawl, twist, climb, reach, crouch, kneel, push, or pull. Thus, reviewing the medical evidence as a whole, the persuasive medical evidence establishes that claimant is able to return to regular work. RRU did not abuse its discretion in choosing to give more weight to the opinions of Drs. Matter, Reeves, and Swan and to discount Dr. Goldenberg's subsequent inconsistent opinion. The persuasive medical evidence does not establish that injury related limitations, including reduced range of motion, preclude claimant from returning to regular work.

IT IS HEREBY ORDERED THAT the February 5, 2003 Proposed and Final Contested Case Order finding claimant not eligible for vocational assistance is affirmed.

DATED this 12th day of May, 2003.

**CORY STREISINGER, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division