
In the Matter of the ORS 656.340 Vocational Services Dispute of

Udosenata, Iuuo O., Claimant

Contested Case No: H02-123

PROPOSED AND FINAL ORDER

February 5, 2003

IQUO O. UDOSENATA, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a Director's Review and Order issued on November 14, 2002 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On January 16, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Iquo O. Udosenata (claimant) was represented by attorney Christopher Moore. Respondent SAIF Corporation and its insured, Peace Health Medical Center (insurer) were represented by attorney Mary Goebel Adams. Claimant testified on her 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 set out below are based upon the entire record.

ISSUE

The issue is whether RRU correctly determined that claimant is ineligible for vocational services.

EVIDENTIARY RULINGS

The documentary record consists of WCD Exhibits 1 through 28 which were received into the record without objection. I overruled insurer's relevance objection to claimant's testimony and denied insurer's motion to leave the record open.

FINDINGS OF FACT

- (1) On February 16, 2001, claimant suffered a back injury while lifting a patient in her work as a certified nurse's assistant (CNA) in a hospital operating room. Insurer accepted thoracic and lumbar strains as compensable conditions. (Exs. 1 and 15.)
- (2) In an insurer's medical examination dated March 7, 2002, Richard Matteri, MD found no objective findings and that claimant's condition was medically stationary. On March 19, 2002, attending physician Jeffrey M. Goldenberg, MD concurred.

- (Exs. 2-7 and 3.)
- (3) On April 3, 2002, the claim was closed with zero unscheduled permanent partial disability (UPPD). (Ex. 4-1.) On April 5, 2002, June 6, 2002, and August 29, 2002 insurer notified claimant that she was ineligible for vocational assistance. (Exs. 5, 13, and 22.) On May 22, 2002 and on June 6, 2002, Dr. Goldenberg released claimant to return to regular work without restrictions. (Exs. 10 and 12.)
- (4) On July 19, 2002, Edward J. Reeves, DO examined claimant at MRU's request. He opined that she could occasionally lift 50 pounds, frequently lift 30 pounds and constantly lift no more than 20 pounds. Dr. Reeves attributed the lifting restrictions to the accepted condition. (Ex. 17-3.) On July 23, 2002, Health in Industry conducted a work capacity evaluation at employer's request. Susan Bottomley, OTR opined that claimant lacked the physical demands necessary to perform the job at injury. (Ex. 18-4.)
- (5) On August 21, 2002, the director issued an Order on Reconsideration modifying the April 30, 2002 Notice of Closure and awarding 2 percent UPPD. (Ex. 20-3.)
- (11) On August 23, 2002, Dr. Goldenberg replied to claimant's inquiry and agreed with the physical capacity evaluation which opined that claimant was unable to return to her regular work. (Ex. 21-2.)
- (12) On August 29, 2002, Christopher P. Swan, MD examined claimant at MRU's request. He found the thoracic and lumbar ranges of motion and strength testing normal. He opined, "There is no loss of [claimant's] residual functional capacity due to the accepted medical condition or sequelae of the accepted medical condition. *** There are no permanent restrictions preventing [claimant] from working the same number of hours as were worked prior of the injury."
(Ex. 23-2.)
- (13) On October 3, 2002, the director issued an Order on Reconsideration affirming the June 17, 2002 Notice of Closure and awarding zero UPPD. (Exs. 14 and 25.)
- (14) Claimant returned to work with the employer at injury as an on-call staffing coordinator. (Testimony of claimant.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational services.

OPINION

Vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. I may modify the administrative order only if it (A) violates a statute or rule, (B) exceeds the statutory authority of the agency, (C) was made

upon unlawful procedure, or (D) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-001-0225(5). In determining whether one of those criteria exist, I may admit evidence which was not before the Rehabilitation Review Unit (RRU) and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden of proof rests upon the proponent of that fact or position. 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).

Under ORS 656.340(1), an insurer is obligated to provide vocational services to a claimant who is eligible. ORS 656.340(6)(a) provides:

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 the injury or the aggravation, and the worker has a substantial handicap to employment.

OAR 436-120-0330(5) lists 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;
 - (b) Is not able to return to any other suitable and available work with the employer at injury or aggravation; and
 - (c) Has a substantial handicap to employment and requires assistance to overcome that handicap.

In interpreting the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute, *viz.*, to determine the meaning of the words used, giving effect to the intent of the enacting body, which in this case is the department. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993) (court's task in determining legislative intent first is to examine, including context in which the statute is found and, if intent is clear, to proceed no further with its analysis). Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context, or with any other source of law, there is no basis for asserting that the rule has been interpreted by the agency. *Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

RRU was persuaded by the opinions of Dr. Matteri, and Dr. Swan, and Dr. Goldenberg's initial concurrences. RRU determined that claimant was ineligible for vocational assistance because claimant had no objective findings that would prevent her return to regular work. RRU further found Dr. Goldenberg's recent opinion unpersuasive because it is inconsistent with his previous explicit opinions and with the other medical opinions. I agree.

Claimant relies on the opinions of Dr. Reeves and Susan Bottomley, OTR and Dr. Goldenberg's most recent opinion. Claimant further argues that the fact that the employer has offered her work as an on-call staffing coordinator constitutes an admission that claimant is unable to return to her job at injury, and therefore, she is eligible for vocational assistance. However, claimant offered no testimony to establish that the change in job assignment was made for medical reasons.

The medical evidence presented is closely divided. However, I find that RRU's application of OAR 436-120-0330(5) to the facts is plausible, and therefore, I defer. Furthermore, I find RRU's conclusion does not violate ORS 656.340 or OAR 436-120-0330(5) and presents no other ground for modification. Inasmuch as claimant has failed to carry her burden of proving by a preponderance of the evidence that the administrative order is incorrect, 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 that:

The Directors Review and Order dated November 14, 2002 is affirmed.

DATED this 5 day of February 2003.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel