
In the Matter of the ORS 656.340 Vocational Assistance Dispute of

CHRISTINE M. BRITTON, Claimant

Contested Case No: H05-129

PROPOSED AND FINAL ORDER

November 21, 2005

SAIF CORP., Petitioner

CHRISTINE M. BRITTON, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on July 6, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On September 9, 2005 the department referred the matter to the Office of Administrative Hearings (OAH). On October 18, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Jerome B. Larkin represented petitioner SAIF Corporation (insurer). Attorney Christopher D. Moore represented respondent Christine M. Britton (claimant). Robert Crymes testified on insurer's behalf and claimant testified on her own behalf. The record closed on the date of hearing.

ISSUE

Pursuant to ORS 656.340(6)(b)(A), whether RRU incorrectly determined that claimant lacks the necessary knowledge, skills and abilities to be suitably employed in a clerical position.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 17,¹ as well as insurer's Supplementary Exhibit 15A, were admitted into the record without objection.

FINDINGS OF FACT

(1) Claimant has a high school diploma and took some college classes, including some computer training. (Ex. 6; testimony of claimant.) She has worked as a tax accountant, office manager, billing clerk and bookkeeper; she performed clerical work for twenty years, most recently in 1999. (Exs. 7 and 10-1; testimony of claimant.)

(2) On September 15, 2003, claimant suffered a compensable injury while working as a rip saw operator. (Ex. 1.) Insurer accepted a left medical meniscus tear. (Ex. 7.) On November 20, 2003, claimant had surgery. (Ex. 4-2.)

¹ With the parties' agreement, I added page 2 to Exhibit 6 and renumbered the pages accordingly.

(3) On July 13, 2004, the left knee condition became medically stationary. Attending physician Christopher N. Walton, M.D. released claimant to work with restrictions of no twisting, climbing or stooping, and sitting as needed for comfort with extended leg when possible. (Ex. 3.)

(4) On February 21, 2005, Christopher A. Park, Occupational Therapist, conducted a Work Capacity Evaluation and rated claimant's ability to function in the sedentary-light physical demand level. (Ex. 6-10). Mr. Park provided a full medical release for claimant to return to clerical work. (Ex. 7-29.)

(5) On March 11, 2005, vocational consultant Rob Crymes recommended that claimant be considered ineligible for vocational assistance. (Ex. 7.) Based on his in-person interview with claimant, her resume, and information obtained from the Oregon Employment Department (OED), Oregon Wage Information 2004 (OWI 2004), Oregon Labor Market Information (OLMIS) data and O-NET, Crymes opined that suitable clerical work was available. (Ex. 7-31.) On March 23, 2005, insurer issued a Notice of Ineligibility. (Ex. 8.)

CONCLUSION OF LAW

Pursuant to ORS 656.340(6)(b)(A), RRU incorrectly determined that claimant lacks the necessary knowledge, skills and abilities to be suitably employed in a clerical position.

OPINION

Jurisdiction lies with the director. ORS 656.340(4). Pursuant to ORS 656.283(2)(c), I may modify the administrative order 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). The burden of proof falls upon the proponent of a fact or position. ORS 183.450(2). In that regard, insurer bears the burden of proving by a preponderance of the evidence that RRU incorrectly determined that claimant is eligible. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.* 303 Or 390 (1998).

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

Additionally, ORS 656.340(6)(b)(A) provides:

A “substantial handicap to employment”² exists when the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

OAR 436-120-0340(2)(g) specifies the information sources upon which eligibility determinations are based. OAR 436-120-0340(2)(g) provides in pertinent part:

To complete the substantial handicap evaluation the vocational counselor shall submit a report documenting the following information:

An analysis of the worker's labor market utilizing standard labor market reference materials including but not limited to Employment Department (OED) information such as Oregon Wage Information (OWI), Oregon Comprehensive Analysis File and other publications of the Occupational Program Planning System (OPPS) and material developed by the division. When using the OWI data, the presumed standard shall be the 10th percentile unless there is sufficient evidence that a higher or lower wage is more appropriate. When such data is not sufficient to make a decision about substantial handicap, the vocational counselor shall perform individual labor market surveys as described in OAR 436-120-0410(6);

The court has held that RRU abused its discretion by failing to adequately investigate an injured worker’s eligibility. *See Liberty v. Jacobsen*, 164 Or App 37 (1999) (RRU abused its discretion by failing to investigate claimant’s contentions about misrepresentation of a training program.); *Lance E. Bearden*, Proposed and Final Order, 10 CCHR 12 (2005) (RRU abused its discretion by basing an eligibility determination on purged job orders.)

Here, based on contacts with job placement agencies, RRU determined that claimant lacks the necessary knowledge, skills and abilities to perform clerical work because her twenty years of experience ended six years ago. Insurer contends that RRU abused its discretion by relying on information obtained from job placement agencies. In contrast, claimant contends that the administrative order is correct and should be affirmed. Having reviewed the record, I find that insurer has met its burden.

² OAR 436-120-0005(8) provides:

“Substantial handicap to employment” means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills and abilities to be employed in suitable employment.

RRU based its determination on its contacts with job placement agencies. However, OAR 436-120-0340(2)(g) requires consideration of other information sources such as OED, OWI, OPSS and OWI. The administrative scheme does not provide for eligibility evaluations that are based on information obtained from job placement agencies because they represent particular clients and not the full range of available jobs. For example, a job placement agency may refuse to refer an applicant because it considers her clerical experience outdated, while a business may hire the same applicant because it values her twenty years' experience. Moreover, job placement agencies may maintain policies concerning recency of work experience that conflict with the statutory definition of suitable employment. For these reasons, the administrative scheme does not recognize an eligibility determination that is based exclusively on information obtained from job placement agencies. Therefore, I conclude that RRU erred by ignoring information sources specified in OAR 436-120-0340(2)(g). Accordingly, I reverse.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated July 6, 2005 is set aside.