

In the Vocational Assistance Dispute of
BOBBIE CARPENTER, Claimant

Contested Case No: H05-007

PROPOSED AND FINAL ORDER

June 7, 2005

BOBBIE CARPENTER, Petitioner

SAIF CORP., Respondent

Before Daina Upite, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals an administrative order issued on January 10, 2005 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On January 28, 2005, WCD referred the matter to the Office of Administrative Hearings.

On March 11, 2005, Administrative Law Judge Daina Upite conducted a telephone hearing in Salem, Oregon. Petitioner Bobbie Carpenter (claimant) appeared by and through her attorney, James Dodge. Respondent, SAIF Corporation (insurer) was represented by attorney David Runner. Claimant appeared as a witness.

The record remained open to receive another copy of Ex. 5i (2 pages), and for claimant's counsel to submit a Statement of Services. These documents were received March 29, 2005, whereupon the record closed.

ISSUE

Whether RRU incorrectly determined that claimant is not eligible for vocational services.

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 16 were received without objection. The insurer submitted supplemental exhibits marked 2A, 2B, 2C, 3A, 5A, 8A, and 12A. These exhibits were received without objection. Claimant offered Exhibit 5i, a medical chart note dated April 26, 2004. The substitute copy of Exhibit 5i, submitted March 29, 2005, is received into evidence.

FINDINGS OF FACT

(1) Claimant is a left-handed, 58-year-old woman who has a 10th grade education and a General Education Diploma (GED). For the past 10 years she has worked as a grocery clerk, waitress, and cook. (Test. of claimant.) Claimant lives in Baker City, Oregon. (Ex. 1 at 1.)

(2) On August 29, 2003, claimant sustained an on-the-job injury when she slipped and fell while working as a waitress. (Exs. 1, 2B at 1.) The insurer accepted the right knee injury on

December 15, 2003, as a posterior horn medial meniscus tear. (Ex. 2A.) Claimant was unable to work and received temporary total disability payments from October 22, 2003 through March 15, 2004. Claimant's weekly wage was \$90.28, and her TTD rate was \$60.19. (Exs. 2; 4 at 1.)

(3) On January 14, 2004, Dr. Sandefur performed arthroscopic surgery on the right knee. (Ex. 2B.) On July 7, 2004, Dr. Sandefur determined that claimant was medically stationary with respect to her right knee. (Ex. 3.) The insurer closed the claim August 16, 2004 and awarded claimant permanent partial disability in the amount of \$13,416 for the right knee. (Ex. 4.) On July 1, 2004, Dr. Sandefur evaluated claimant's ability to perform work as a waitress assistant for the employer-at-injury, and concluded that claimant was capable of performing the work as described. (Ex. 2C.)

(4) A rehabilitation counselor evaluated claimant on September 15, 2004, on behalf of the insurer. (Ex. 5.) Claimant has worked as a waitress from 1996 until she sustained the work injury in August 2003. Waitress work is classified as light. (*Id.* at 3.) The counselor determined that claimant did not have a substantial handicap to employment, as part-time jobs (10-20 hours per week), paying minimum wage were available in Baker City. The counselor determined that claimant could perform work as a grocery demonstrator and waitress. (*Id.* at 7.) The insurer issued a denial of vocational assistance on October 20, 2004. (Ex. 6.) Claimant requested administrative review. In November 2004, Dr. Sandefur indicated that claimant has no restrictions with respect to walking or standing, and that she is restricted to lifting no more than 30 pounds occasionally and 20 pounds frequently. (Ex. 9.)

(5) Claimant's left shoulder condition is not an accepted condition related to the August 29, 2003 injury. A hearing is pending regarding the compensability of claimant's left shoulder condition. Claimant contends that her left shoulder condition prevents her from working as a waitress or grocery clerk. Claimant has difficulty lifting, as well as standing in place for very long. (Test. of claimant.)

CONCLUSION OF LAW

RRU correctly determined that claimant does not have a substantial handicap to employment on account of her right knee injury and that, therefore, she is ineligible for vocational services.

OPINION

Jurisdiction lies with the director. ORS 656.340(4). I may modify the administrative order only if (1) it 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 and OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence which 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 its 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). 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 (1989).

RRU determined that claimant was not eligible for vocational services because she does not have a substantial handicap to employment. Claimant contends that she cannot return to her previous work as a waitress and, therefore, she has a substantial handicap to employment and is eligible for vocational services. Claimant contends that her left shoulder condition limits her ability to work as a waitress.

Under ORS 656.340(1), 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.”

ORS 656.340(6)(b)(A) defines “substantial handicap”.

“A ‘substantial handicap to employment’ 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.”

(Emphasis added.)

ORS 656.340(6)(b)(B) defines “suitable employment:”

“Suitable employment” means:

- (i) Employment of the kind for which the worker has the necessary physical capacity, knowledge, skills and abilities;
- (ii) Employment that is located where the worker customarily worked or is within reasonable commuting distance of the worker’s residence; and
- (iii) Employment that produces a weekly wage within 20 percent of that currently being paid for employment that was the worker’s regular employment as defined in subsection (5) of this section¹. The director shall adopt rules providing methods of

¹ ORS 656.340(5) provides in pertinent part:

As used in this section and subsection (6) of this section, “regular employment” means the employment the worker held at the time of the injury or the claim for aggravation under ORS 656.273, whichever gave rise to the potential eligibility for vocational assistance; *****.

calculating the weekly wage currently being paid for the worker's regular employment for use in determining eligibility and for providing assistance to eligible workers***.

OAR 436-120-0350(3) provides:

A worker is ineligible or the worker's eligibility ends when any of the following conditions apply:

(3) The worker's lack of suitable employment **is not due to the limitations caused by the injury or which existed before the injury.**

(Emphasis added.)

ORS 656.340(6)(b) requires a causal link between the compensable work injury and claimant's lack of suitable employment and, therefore, eligibility for vocational assistance. Furthermore, OAR 436-120-0350(3) lists the conditions of eligibility, which include the inability to return to suitable work as a result of the limitations caused by the work injury. Here, the compensable condition is claimant's right knee. RRU correctly determined that claimant's right knee condition does not prevent her from returning to suitable work. According to her physician, Dr. Sandefur, claimant has the physical capacity to perform light work and she has no restrictions with respect to walking or standing. Waitress work is classified as light, and claimant has the knowledge, skills, and ability to perform that type of work. Work that pays an appropriate wage is available in claimant's community.

Claimant's impediment to returning to waitress work is due to problems with her left shoulder, rather than problems with her right knee. The insurer, however, has not accepted claimant's left shoulder aggravation claim. Therefore, RRU correctly focused on whether claimant suffers a substantial handicap to employment on account of her compensable right knee injury. Consequently, claimant does not have a substantial handicap to employment and is ineligible for vocational assistance. The RRU decision should be affirmed.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to a reasonable attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY PROPOSED that:

The Director's Administrative Order dated January 10, 2005, is affirmed.