
In the ORS 656.340 Vocational Assistance Dispute of

ANGELA C. CHANCE, Claimant

Contested Case No: H04-112

PROPOSED AND FINAL ORDER

JANUARY 27, 2005

LIBERTY NORTHWEST INS. CORP., Petitioner

ANGELA C. CHANCE, Respondent

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

HISTORY OF THE CASE

Insurer appeals the Director's Review and Order issued on June 11, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On August 30, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 13, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner Liberty Northwest Insurance Corporation (insurer) was represented by attorney Meg Carman. Respondent Angela C. Chance failed to appear. Senior Rehabilitation Consultant Jan Plummer testified on insurer's behalf. The record closed on the date of hearing.

Thereafter, it came to my attention that there may been some procedural irregularity with mailing the initial hearing notice to claimant. In order to protect claimant's constitutional due process rights, I rescheduled the hearing and reopened the record. OAH sent the Rescheduled Hearing Notice to claimant's last known address by certified and by regular mail. Claimant failed to provide a telephone number as instructed in the hearing notice. On January 14, 2005, I conducted a second hearing. I contacted claimant at the last known telephone number and she failed to appear. The record closed on January 14, 2005.

Pursuant to OAR 137-003-0670(3), the ALJ may issue an adverse order upon default if a party was duly notified of the time of the hearing and failed to appear for reasons not beyond her reasonable control. Here, OAH sent a Rescheduled Notice of Hearing to claimant at her last known address¹ and she failed to provide a current telephone number as instructed. At the time of hearing, claimant was unavailable at the last known telephone number. Moreover, claimant has not contacted OAH to explain any circumstances that would justify her failure to appear. Based on the record, I find that a default order is warranted.

ISSUE

Whether RRU correctly determined that claimant remains eligible for vocational services pursuant to OAR 436-120-0320(8).

¹ On April 20, 2004, claimant telephoned the department to request administrative review. She confirmed the following mailing address: c/o William Coberly, 2165 Bellevue St SE, Salem, Or 97301. The Notice of Hearing was sent to that address.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 13, as well as insurer's Supplementary Exhibits 1a through 14 were received into the record without objection.

FINDINGS OF FACT

(1) On April 1, 2000, filed an occupational disease claim while working as an assistant cook. (Ex. 1.) Insurer accepted bilateral neuropathy. (Ex. 2-4.) On December 13, 2002, claimant's condition became medically stationary. (Ex. 2-1 and 3.)

(2) In March 2003, insurer's claims manager requested information from Dr. Blake. He replied that claimant had failed to appear for a physical capacities evaluation (PCE) and recommended further testing in order to determine her physical restrictions. (Ex. 1a.) On April 23, 2003 attending physician Erik D. Blake, MD reported claimant's physical measurements but not her physical restrictions. (Exs. 3a and 11.)

(3) On August 20, 2003, insurer closed the claim with a permanent partial disability (PPD) award. (Exs. 2-1 and 3.) Claimant received PPD installments at the Salem address² over a period of 29 months. (Testimony of Plummer.)

(4) Following claim closure, claimant's attorney verbally requested insurer to evaluate claimant's eligibility for vocational services. (Ex. 11-1.)

(5) On September 8, 2003, insurer's rehabilitation consultant requested information from Dr. Blake concerning claimant's physical capabilities for the purpose of evaluating her eligibility for vocational services. On September 12, 2003, based on his December 13, 2002 examination, Dr. Blake opined that claimant had no permanent restrictions. He suggested that a PCE would be helpful to determine whether there were valid work-related permanent restrictions. (Ex. 3a.)

(6) On October 7, 2003, claimant failed to appear for a medical arbiter examination. (Ex. 3b.)

(7) On October 13, 2003, claimant's attorney wrote to claimant at the Salem address. (Exs. 3c.) Claimant's attorney advised insurer that all correspondence should be sent to claimant at the Salem address. (Ex. 3d.)

(8) On January 14, 2004, at a Baker City address,³ insurer requested information from claimant in order to evaluate her eligibility for vocational assistance. Insurer notified claimant that a PCE was scheduled for January 30, 2004 and requested claimant to complete and return an enclosed a Work History Form. (Ex. 4.)

(9) In January 2004, insurer scheduled a PCE with Brad Lorber, MD for the purpose of

² C/o William Coberly, 2165 Bellevue St SE, Salem, Or 97301.

³ PO Box 232, Baker City, OR 97814.

evaluating claimant's vocational eligibility. (Exs. 4a and 4b.) On January 16, 2004, insurer notified claimant at the Salem address of the PCE appointment and on January 30, 2004, claimant failed to appear. (Ex. 4c.)

(10) On February 4, 2004, insurer sent a warning letter notifying claimant that failure to return the Work History Form before February 23 would result in termination of her vocational eligibility. (Ex. 5-1.) The warning letter was sent to claimant in Baker City and was returned with no forwarding address. (Ex. 5-3.)

(11) On March 8, 2004, insurer sent a warning to claimant at the Salem address notifying her that failure to return the Work History Form by March 24 would result in termination of her vocational eligibility. (Ex. 6.) The warning letter was sent to claimant by certified mail and was received at the Salem address. (Ex. 6-3.) Claimant failed to return a Work History Form to insurer. (Ex. 10; testimony of Plummer.)

(12) On April 7, 2004, insurer notified claimant at the Salem address that she was no longer eligible for vocational services. (Ex. 7.)

(13) Claimant was incarcerated from March 8, 2004 through April 12, 2004. (Ex. 9.)

(14) On April 20, 2004, claimant telephoned the department and requested a hearing to contest the denial. Claimant confirmed the same Salem address. (Ex. 8.)

(15) On June 11, 2004, the department issued a Director's Review and Order determining that claimant remained eligible for vocational assistance. (Ex. 12.)

(16) Insurer scheduled a PCE to take place on July 15, 2004. By telephone, claimant requested a different appointment time and confirmed the Salem mailing address. (Ex. 12a; testimony of Plummer.) Claimant failed to return insurer's telephone calls concerning rescheduling the appointment and insurer rescheduled the PCE appointment for July 15, 2004 at a time accommodating claimant's request. Insurer sent the notice to claimant at the Salem address and warned her that failure to attend the examination would end her eligibility for vocational assistance. (Ex. 12a.) Claimant failed to appear for the July 15th appointment. (Ex. 14.)

(17) Claimant has provided no work history form to date. (Testimony of Plummer.)

CONCLUSION OF LAW

RRU incorrectly determined that claimant remains eligible for vocational services pursuant to OAR 436-120-0320(8).

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4) and ORS 656.704(3)(a). In a contested case hearing, 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 RRU and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of a 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 preponderance of 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).

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. The question here is whether claimant is ineligible because she failed to provide vocationally relevant information to insurer. RRU applied OAR 436-120-0320(8) which provides:

After the worker's permanent limitations are known or can be projected, the worker shall, upon written request from the insurer, provide vocationally relevant information needed to determine eligibility within a reasonable time set by the insurer.

In the administrative order, RRU commended insurer's timely processing of the eligibility evaluation, but determined that insurer requested claimant's Work History Form prematurely when her permanent physical limitations were not known. RRU interpreted OAR 436-120-0320(8) to mean that claimant's work history was not yet vocationally relevant, and therefore, claimant remains eligible despite the fact that she has not provided a Work History Form.

In construing the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). See also *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (court's task in determining the legislative intent is to first examine the statute, including text and context, and if the 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 misinterpreted by the agency. *Don't Waste Oregon Com. v. Energy Siting Council*, 320 Or 132 (1994).

Insurer first contends that RRU's interpretation of OAR 436-120-0320(8) is not plausible in light of the evidentiary record. RRU reasoned that the Work History Form was not yet vocationally relevant because claimant's physical restrictions were not known at the time insurer requested it. However, RRU ignored the opinion of the attending physician. On September 12, 2003, Dr. Blake opined that claimant had no permanent physical restrictions. From that date forward, claimant's work history was vocationally relevant pursuant to OAR 436-120-

0320(9)(c)(C)⁴ and OAR 436-120-0340(2).⁵ Then in January, February in March, 2004, insurer sent Work History Forms to claimant at both the Baker City and Salem addresses and claimant failed to return them. Based on the record, I find that the administrative order incorrectly construed OAR 436-120-0320(8) because claimant's physical restrictions were known in September 2003, triggering the vocational relevance of claimant's work history. Moreover, three times, insurer requested a Work History Form and claimant failed to provide it.⁶ Therefore, RRU erred in concluding that claimant remains eligible, and accordingly, I reverse.

Insurer further contends that RRU's interpretation of OAR 436-120-0320(8) conflicts with OAR 436-120-0320(1)(a) which provides:

Unless one of the provisions in section (2)⁷ below applies, the insurer shall contact a worker with an accepted disabling claim or

⁴ OAR 436-120-0320 provides in pertinent part:

(9) A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

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

(C) Has a substantial handicap to employment and requires assistance to overcome that handicap.

⁵OAR 436-120-0340(2) provides:

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

(a) Relevant **work history** for at least the preceding five years;

(Emphasis added.)

⁶ Claimant was incarcerated from March 8 through April 12, 2004. However, insurer requested work history forms in January, March and April and claimant failed to respond. Claimant has provided no Work History Form to date.

⁷ OAR 436-120-0320(2) provides:

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

(a) Eligibility has previously been determined under the current opening of the claim and there are no newly accepted conditions;

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

(c) The worker's claim was closed with no permanent disability award. The following by themselves do not make a worker ineligible for vocational assistance:

(A) A finding that a worker is not entitled to an additional award of permanent disability

on aggravation, or

(B) A finding that a worker is not entitled to a permanent disability award because of an offset of permanent disability from a prior claim, or

(C) The worker disposes of permanent disability through a claim disposition agreement (CDA).

claim for aggravation to begin the eligibility determination within five days of the following:

(a) The insurer's receipt of a request for vocational assistance from the worker.

Following claim closure in August 2003, claimant's attorney requested vocational evaluation. This request triggered insurer's obligation to determine eligibility. Accordingly, on September 8, 2003, insurer began the eligibility evaluation process by requesting information from Dr. Blake. Insurer continued to process the eligibility evaluation in a timely fashion by scheduling PCEs and requesting a Work History Form. Pursuant to OAR 436-120-0320(9)(c) and OAR 436-120-0340(2), claimant's work history was relevant to the eligibility determination. Claimant has failed to respond to three requests for a work history form, including a warning letter sent to the Salem address which her attorney provided to insurer and which claimant provided to WCD. Based on the record, I find that claimant's Work History Form was relevant and claimant is ineligible because she failed to provide it. Accordingly, I reverse.

Finally, insurer contends that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0350(9) which provides in pertinent part:

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

(9) The worker has failed, after written warning, to participate in the vocational assistance process, or to provide relevant information.

The record establishes that claimant failed, after written warning, to provide a Work History Form which was relevant to her eligibility evaluation. Additionally, claimant has failed to participate in the vocational process by failing to attend one medical arbiter examination and two PCEs. For these reasons, she is ineligible and I reverse.

ORDER

IT IS HEREBY ORDERED that:

The Directors Review and Order dated June 11, 2004 is reversed.
