

In the ORS 656.340 Vocational Services Dispute of

RONALD G. WILSON, Claimant

Contested Case No: H04-061

PROPOSED AND FINAL ORDER

July 25, 2005

RONALD G. WILSON, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Director's Review and Order issued on March 3, 2004 by the Rehabilitation Review Unit (RRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On August 26, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On November 15, 2004, Administrative Law Judge Catherine P. Coburn convened and continued a contested case hearing. Petitioner Ronald G. Wilson, (claimant) was represented by attorney Roger Ousey. Respondent Liberty Northwest Insurance Corporation (insurer) was represented by attorney Darren Lee. Claimant testified on his own behalf and insurer called Vocational Consultant Stan Potocky as a witness. I held the record open pending a deposition and the record closed on July 15, 2005 following oral closing argument.

ISSUE

Whether RRU incorrectly determined that claimant is ineligible for vocational services pursuant to OAR 436-120-0350(7).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 12¹ were admitted into the record without objection. I sustained claimant's objection to Supplementary Exhibit 3A because Carey Janzik, P.A was unavailable for a cross-examination deposition. Insurer withdrew Supplementary Exhibits 10B² and 10D. Insurer's Supplementary Exhibits 6A, 10A, 10C and 10E through 10L were admitted into the record without objection.

FINDINGS OF FACT

(1) On November 15, 1993, claimant suffered a compensable bilateral knee injury while working as an apartment maintenance manager. (Ex. 1.) Claimant underwent surgery and on April 1, 1996, he began a vocational training program. (Ex. 10C-1.) Insurer sent warning letters to claimant indicating that he had failed to participate. (Ex. 10C-2.) Claimant underwent further

¹ With the parties' agreement, I corrected a typographical error in the WCD Exhibit Index; Exhibit 11 is dated 03/03/04.

² Insurer renumbered Supplementary Exhibits 10A through 10L rather than 11A through 11L.

surgery, and in 1997, the parties executed a letter of agreement whereby insurer would provide six months of training under the former vocational plan and an additional two months as needed. (Ex. 10C-2.)

(2) The accepted conditions became medically stationary in April 2002. (Ex. 2.) A physical capacities evaluation indicated that claimant was capable of performing full time work in the light/sedentary range. (Ex. 10C-2.)

(3) In September 2002, insurer notified claimant that he was eligible for vocational assistance and referred the file to Nancy Cummings, Vocational Consultant. (Exs. 3 and 4.) On September 10, 2002, Cummings wrote to claimant that she had been unable to reach him by telephone and asked him to contact her to schedule an appointment. (Ex. 4.) Claimant failed to appear for a scheduled appointment on September 24, 2002 and failed to contact Cummings to reschedule. Claimant failed to appear for a scheduled appointment on October 2, 2002. (Ex. 6.) On October 3, 2002, insurer sent a warning letter to claimant. (Ex. 6.) Claimant failed to appear for a scheduled appointment on October 10, 2002. (Ex. 7.)

(4) On October 11, 2002, insurer ended eligibility and claimant appealed. (Exs. 7, 8, 9 and 10.) On March 11, 2002, RRU ordered insurer to restore claimant's eligibility because the termination notice failed to cite a relevant administrative rule. (Ex. 10A-3.)

(5) On May 2, 2003, Stan Potocky, Vocational Consultant, met with claimant to resume vocational services. Claimant indicated that he understood the importance of full participation. (Ex. 10C-3.) In July 2003, claimant requested insurer to appoint a new vocational consultant. (Ex. 10E.) On August 18, 2003, the parties entered into an agreement whereby claimant and Potocky would select a new vocational goal. (Exs. 10F-1 and 10G.) On August 25, 2003, Potocky provided a toll-free telephone number. (Ex. 10H)

(6) On September 4 and November 3, 2003, claimant attended meetings in Potocky's office. (Ex. 10I-2.) On October 20 and November 10, 2003, claimant failed to appear for scheduled appointments at Potocky's office and failed to telephone. (Ex. 10J-2.) On November 17, 2003, insurer sent a warning letter to claimant and claimant received it by certified mail. (Ex. 10J.) On November 24, 2003, claimant failed to appear for a scheduled meeting at Potocky's office and failed to telephone. (Ex. 10L-2.) On November 25, 2003, insurer notified claimant of the end of eligibility. (Ex. 10K.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational services pursuant to OAR 436-120-0350(7).

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 exists, I may admit evidence which was not before the 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).

RRU determined that claimant is ineligible for vocational assistance because he failed to participate in the vocational process. Claimant contends that his failure to appear at several appointments with a vocational consultant is excused by personal business or illness. For example, claimant testified that he missed appointments because he traveled out of state to assist his son in relocating and that he missed other appointments because he traveled out of town to earn wages by building a deck. Claimant offered no explanation for his failure to telephone his vocational consultant.

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. OAR 436-120-0350 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.

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).

Here, RRU interpreted OAR 436-120-0350(7) to mean that an injured worker becomes ineligible for vocational assistance when he was duly warned that nonparticipation may result in termination and subsequently failed to appear for several appointments with his vocational consultant. I agree. Furthermore, I am unpersuaded by claimant’s various undocumented excuses for failing to appear for numerous appointments and failing to telephone his vocational consultant. Finally, finding no grounds to modify the administrative order, 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 Director's Review and Order dated March 3, 2004 is affirmed.