

In the ORS 656.340 Vocational Assistance Dispute of

Lila J. Carlson, Claimant

Contested Case No: 06-001H

PROPOSED & FINAL ORDER

July 10, 2006

LILA J. CARLSON, Petitioner

SAIF CORPORATION, Respondent

Before Jenny Ogawa, Administrative Law Judge, Workers' Compensation Board

Claimant appeals the Director's Review and Order issued on December 29, 2005 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

Pursuant to notice, a hearing was scheduled for April 17, 2006, in Salem, Oregon, before Administrative Law Judge Ogawa. Claimant is represented by attorney James Dodge. The employer, HCW Clients, and its insurer, SAIF Corporation, are represented by Trial Counsel Charles Edelson.¹ The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. WCD exhibits 1 through 17 were received into evidence. The record closed on June 13, 2006, following receipt of supplemental closing argument.

ISSUE

Whether claimant returned to her regular employment for purposes of determining her eligibility for vocational assistance.

FINDINGS OF FACT

Claimant contracts with the Department of Human Services (DHS) to provide home health care. The client is considered the employer, although claimant is paid by DHS. Claimant has worked since June 2002 as an in-home caregiver. On September 13, 2004, she sustained a compensable injury. (Ex. 1). SAIF accepted the claim for right buttock contusion, right lumbosacral strain, and right sacroiliac strain. (Ex. 6). At the time of injury, the client was Elaine Klebe, and claimant's job required her to lift 50 pounds. In November 2004, claimant's attending physician, Dr. Blake, approved a job analysis for claimant's work for Ms. Klebe. That plan indicated that Ms. Klebe required substantial² assistance with eating, dressing, bathing, mobility, bowel/bladder, cooking, shopping, and housekeeping. (Ex. 2). On April 5, 2005, Dr. Blake declared her medically stationary and released for regular work. He noted that claimant demonstrated the ability to lift 50 pounds. (Ex. 3).

Dr. Vessely, orthopedic surgeon, performed an insurer-arranged medical examination (IME) on May 18, 2005. He found no objective findings to substantiate claimant's ongoing pain

¹ Prior to issuance of my order, Mr. Edelson left SAIF. Further argument was submitted by Jerome Larkin.

² "Substantial" was defined as the "client is able to perform only a small portion of a task and requires assistance with the majority of the task." (Ex. 2)

complaints. He did not believe that claimant's work injury was playing any factor in her current symptomatology. He further felt that claimant's preexisting degenerative disc disease would continue to be a source of discomfort. (Ex. 4).

Claimant returned to Dr. Blake on June 29, 2005 for worsening low back pain. Dr. Blake prescribe physical therapy as palliative care to help claimant continue working. (Ex. 5). Claimant's pain significantly improved with physical therapy, and she continued working her regular duty. Dr. Blake last saw claimant on July 29, 2005. (Ex. 7).

SAIF closed the claim on July 7, 2005 by Notice of Closure, which awarded 7 percent unscheduled permanent partial disability (PPD). (Ex. 6). On August 29, 2005, Dr. Gordin, orthopedic surgeon, performed a medical arbiter examination. Dr. Gordin opined that claimant's right buttock contusion and lumbosacral strain had resolved, but that she had ongoing dysfunction from the right sacroiliac strain. Dr. Gordin attributed 80 percent of claimant's range of motion loss to the sacroiliac strain and 20 percent to the preexisting lumbar degenerative disc disease. She further opined that claimant had chronic condition impairment due to the chronic sacroiliac dysfunction. Dr. Gordin also described claimant's residual functional capacity. (Ex. 8). Based on Dr. Gordin's report, the Appellate Review Unit (ARU) awarded an additional 9 percent PPD for a total award of 16 percent unscheduled PPD. (Ex. 9).

On October 5, 2005, SAIF determined that claimant was ineligible for vocational assistance because she had returned to regular employment and had been suitably employed for more than 60 days following her injury. (Ex. 10).

On November 15, 2005, the Rehabilitation Review Unit (RRU) held a conference call with the parties. Claimant and her attorney hung up before completion of the conference. Claimant's attorney subsequently told the RRU vocational consultant that he received the "Notice of Conference" after the conference and that had he read it before, he would have better understood the purpose of the conference. (Ex. 12).

The RRU issued is order on December 29, 2005, concluding that claimant was released to and could return to regular work. Because of that determination, the RRU did not reach the issue of whether claimant had been suitably employment for more than 60 days since her injury. The RRU affirmed SAIF's denial of vocational assistance. (Ex. 16). Claimant appealed the RRU's order. (Ex. 17).

CONCLUSIONS OF LAW:

SAIF's motion to strike claimant's supplemental argument

During SAIF's closing argument, an issue arose regarding which time period the determination of claimant's ability to return to regular work was to be made. I requested SAIF to submit supplemental argument regarding this question, with an opportunity for claimant to respond. SAIF submitted its supplemental argument on May 25, 2006. Claimant's response was received on June 12, 2006. Thereafter, SAIF moved to strike claimant's response on the grounds that it was untimely and was not responsive to the issue to be addressed. SAIF's motion to strike is granted. Claimant's response did not discuss the specific question I asked the parties to

address. Rather, claimant further argued the position she asserted during hearing. Because claimant's submission was not responsive and went beyond the scope of my request for supplemental authority, it is stricken and will not be considered.

Claimant's eligibility for vocational assistance

I may modify a director's administrative review regarding vocational assistance only if it violates a statute or rule, exceeds the statutory authority of the agency, was made upon unlawful procedure, or was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). I may admit evidence and make independent findings of fact to determine whether any of the factors identified in ORS 656.283(2)(c) were violated. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993). OAR 436-001-0225(3) further provides that "new evidence may be admitted and considered." I have the responsibility to ensure that the record is fully developed so that it is sufficient for judicial review. ORS 183.415(10).

My jurisdiction and scope of review to hear the RRU's administrative order are granted by ORS 656.283(2)(c). I agree with SAIF that, given my limited standard of review to modify the RRU's order, determining claimant's return to regular work, for purposes of determining her eligibility for vocational assistance, would be as of the date of the RRU's December 29, 2005 order.

Claimant is eligible for vocational assistance if she was not "able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury," and she has "a substantial handicap to employment." ORS 656.340(6)(a); *former* OAR 436-120-0320(10)(c)³ (admin. Order 05-059). Regular employment means "the employment the worker held at the time of the injury." ORS 656.340(5); OAR 436-120-0005(10). The relevant inquiry is whether claimant is able to return to regular employment, not whether her attending physician has released her to regular employment. *Melissa Murphy*, 7 CCHR 8 (2002); *see also* *Glenda S. Quatermane*, 3 WCSR 339 (1998) (ORS 656.340(1) requires insurer to evaluate worker for eligibility if worker has not "returned" to work; the insurer's determination that there was a "release" to work is insufficient.)

At the time of her injury, claimant worked for Ms. Klebe. Ms. Klebe required assistance with eating, dressing, bathing, mobility, bowel/bladder, cooking, shopping, and housekeeping. (Ex. 2). Claimant's duties required lifting 50 pounds, frequent stooping and twisting, moving furniture to clean, and physically assisting to lift or move Ms. Klebe. Claimant was authorized to work 46 hours/month for home care and 69 hours/month for personal care. She was paid \$8.73

³ That rule provided that a worker is eligible for vocational assistance if, "[a]s 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." (Admin. Order 05-059, eff. 7/1/05)

per hour. (Ex. 15-2). Ms. Klebe passed away on February 21, 2005. Because Ms. Klebe passed away before claimant was declared medically stationary and released for regular work, claimant could not return to the previous employment she held at the time of injury. However, she did return to other available regular employment as a home health aide.

The RRU found that claimant began working for Rebecca Knopf on March 15, 2005 and for Sarah Johnson on June 1, 2005. (Ex. 16). Starting June 1, 2005, claimant worked five hours per day, five days a week. She worked two days a week for Ms. Knopf and three days a week for Ms. Johnson. Claimant worked for Ms. Johnson for seven months, until January 9, 2006. Claimant testified she quit working for Ms. Johnson because she was unable to bathe and groom the client, and was unable to move furniture. Ms. Johnson testified that claimant's job requirements included dressing, cooking, housecleaning, and grocery shopping. She stated claimant was unable to assist her in and out of the bathtub.⁴ Claimant also had a hard time with bending, mopping, heavy dusting, and carrying groceries up the stairs. Ms. Johnson ended claimant's employment because she was not meeting her needs. After this employment ended, claimant was unable to obtain employment with another client. Information regarding claimant's termination of employment with Ms. Johnson was not available to the RRU, because it occurred after RRU's administrative review.

Claimant continues to work for Ms. Knopf. She testified that she can vacuum, wash dishes, run errands, and do light housecleaning. She stated she cannot do the lifting requirements, and she cannot bathe, dress, or prepare meals for Ms. Knopf. Claimant currently works 12.5 hours for Ms. Knopf.

Claimant testified that around October 2005, her back started getting bad. Claimant feels that she can only lift 25 pounds occasionally and 10 pounds frequently, stand 15 minutes, and sit 5 minutes. She also feels that she can only work five hours per day due to pain, for which she takes pain medication. The record contains no evidence that she has sought medical treatment after last seeing Dr. Blake on July 29, 2005 or that she filed a claim for aggravation based on a worsened condition. There is also no medical evidence to support claimant's self-expressed work restrictions. The RRU noted that at the time of Dr. Blake's July 2005 report, claimant had returned to work as a home health aide for almost five months. (Ex. 16-3). Claimant's testimony alone is insufficient to support her contention, that she cannot perform all the required tasks of her regular work nor work full time, or to establish that the RRU erred in determining that she had returned to regular work.

Claimant further argues that the RRU abused its discretion: (1) in the procedures it followed during the conference call; and (2) in giving more weight to Dr. Blake's opinion over Dr. Gordin's opinion regarding claimant's work restrictions.

In determining whether there was an "abuse of discretion" the "essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made." *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or App 37, 45 (1999).

⁴ Ms. Johnson is a large woman.

The RRU's "Memo to File" indicated that the Notices of Conference were faxed to claimant's attorney and to SAIF on November 14, 2005. On November 15, 2005, the RRU held a conference call between the parties. During the conference, claimant "indicated that it was her understanding that her doctor had released her to regular work," and SAIF agreed. At that point, claimant's attorney "accused [the RRU] of letting SAIF attack his client, and that his understanding was that this was a 'conference not a trial' and stated that [the RRU] was allowing SAIF to try to 'get my client to concede.' He then stated, let's end this and he and his client hung up." (Ex. 12-2). Ms. Roberts, a SAIF vocational coordinator, testified that the RRU started the conference by asking claimant her perspective. Ms. Roberts felt that claimant had told her story before the conference ended. At hearing, claimant argued that the RRU should have reconvened the conference to further flush out claimant's testimony.

The RRU's review is less formal and it is not obligated to hold a hearing. Rather, at hearing, additional evidence may be taken and additional findings of fact may be made. *Jacobson*, 164 Or App at 41-42. Here, there is no indication that the RRU failed to consider relevant circumstances in its review and decision. The RRU obtained and considered information from both claimant and the medical evidence regarding claimant's return to work. It relied on that information in rendering its decision. That information included the hours and wages claimant earned while working for Ms. Knopf and Ms. Johnson, and medical evidence regarding claimant's work releases and work restrictions. The RRU did not abuse its discretion in reaching its conclusion that claimant could and did return to regular work. *Compare Jacobson*, 164 Or App at 46 (abuse of discretion when RRU failed to investigate and consider a relevant contention in deciding the adequacy of the claimant's vocational training).

The question of whether the RRU should have given more weight to the opinion of Dr. Girod or of Dr. Blake is a factual issue. In other words, claimant disagreed with the RRU's weighing of the medical evidence.⁵ The RRU relied on Dr. Blake's opinion to determine that claimant had returned to regular work. The RRU gave greater weight to Dr. Blake's opinion, because he was claimant's attending physician, because he had the opportunity to treat claimant over time, because he was consistent in his releases to work, and because he reviewed claimant's regular work job description before reaching the conclusion that she could return to regular work. (Ex. 16-3). The RRU did not err in giving more weight to Dr. Blake's opinion, and substantial evidence supports its findings. *See Weiland v. SAIF*, 64 Or App 810 (1983) (greater weight given to the attending physician's opinion, absent persuasive reasons to do otherwise), and *Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight given to medical opinion that is well reasoned and based on complete information).

For the reasons stated above, there are no statutory grounds for modifying the RRU's order.

ORDER

⁵ Although claimant argued that more weight should be given to Dr. Girod's opinion, she testified that she could not meet Dr. Girod's work restrictions.

IT IS HEREBY ORDERED that the RRU's Administrative Order dated December 29, 2005 is affirmed.