

In the Vocational Assistance of
Aaron W. Donaldson, Claimant

Contested Case No: 04-198H

FINAL ORDER

May 23, 2006

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

AARON W. DONALDSON, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Respondent claimant, representing himself, timely filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's December 1, 2005 Proposed and Final Order. Petitioner insurer, represented by attorney Robert L. Seelig, responded. This matter comes before the director for a final order. The issue is eligibility for vocational assistance. I affirm.

I adopt the ALJ's findings of fact.

Claimant challenged several of insurer's actions regarding claimant's vocational assistance. The Rehabilitation Review Unit (RRU), in its November 30, 2004 Director's Review and Order, concluded that insurer erred when it issued claimant a warning letter and subsequently ended his eligibility for vocational assistance; the correct wage to use in determining claimant's average weekly wage is his wage at aggravation; and that claimant qualifies for direct employment services rather than training. Both parties requested a hearing. ALJ Coburn reversed RRU's order, concluding that insurer was justified in issuing claimant a warning letter and ending his eligibility for assistance. The ALJ found that claimant failed to participate in the vocational assistance process and therefore became ineligible for assistance under OAR 436-120-0350(9).

An order of RRU regarding vocational assistance may only be modified if it violates a statute or rule; exceeds the statutory authority of the agency; was made upon unlawful procedure; or is characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283(2)(c). ALJ Coburn reversed RRU's order on the basis that it failed to apply OAR 436-120-0350(9).

OAR 436-120-0350(9)¹ provides:

“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. No written warning is required if the worker refuses a

¹ Adopted by WCD Admin. Order 04-056, effective April 1, 2004. *See* OAR 436-120-0003(2) (providing that the rules in effect on the date the insurer mailed its notice apply).

suitable training site after the vocational counselor and worker have agreed in writing upon a return-to-work goal.”

Claimant disputed the wage insurer was using to determine whether he was eligible for vocational assistance. Insurer found claimant eligible for assistance on May 14, 2004. On June 28, 2004, the vocational consultant notified claimant he was eligible for direct employment services. On July 7, 2004, claimant appealed the June 28 letter. Also on July 7, 2004, the vocational consultant issued claimant a warning letter, notifying him that his failure to cooperate would result in the end of his eligibility for assistance. The warning letter was based on claimant’s failure to attend meetings and provide requested information. The letter instructed claimant to attend a meeting on July 15, 2004 or contact the consultant by July 13, 2004. The letter indicated that failure to comply would result in the end of claimant’s eligibility. On July 16, 2004, claimant’s attorney appealed the warning letter on claimant’s behalf. Also on July 16, 2004, the vocational consultant notified claimant that he was no longer eligible for assistance for failure to comply with the July 7, 2004 warning letter. Claimant appealed the end of his eligibility.

RRU found that insurer erred when it ended claimant’s eligibility for vocational assistance. RRU reasoned that insurer should have suspended direct employment plan development following claimant’s request for administrative review of the issue of claimant’s suitable wage, until the issue of the appropriate wage and level of vocational services was resolved. RRU found that insurer was not justified in sending claimant a warning letter while RRU was reviewing the other issues and preparing to issue an order. Because the warning letter was improper, according to RRU, insurer improperly ended claimant’s eligibility. RRU cited OAR 436-120-0008(1) in its reasoning. That rule provides:

“Under ORS 656.283(2) and 656.340(4), a worker wanting review of any vocational assistance matter must apply to the director for administrative review. * * * Because effective vocational assistance is best realized in a nonadversarial environment, the first objective of the administrative review is to bring the parties to resolution through alternative dispute resolution procedures, including mediation conferences, whenever possible and appropriate. When a dispute is not resolved through mutual agreement or dismissal, the director shall close the record and issue a Director's Review and Order * * *.”

RRU appears to have relied on this rule in finding that the insurer should have suspended services while review of the other issues was pending. However, I find no such language in the rule. Further, OAR 436-120-0350(9) does not provide that an insurer may not issue a warning letter and end eligibility, or that a claimant is not required to cooperate, while an administrative review is pending. RRU did not discuss OAR 436-120-350(9) in its order. I do not find that the ALJ erred in modifying RRU’s order for failure to apply OAR 436-120-0350(9) and accordingly, I affirm.

IT IS HEREBY ORDERED the December 1, 2005 Proposed and Final Order is affirmed.