

In the Vocational Services of
Ray L. Branum, Sr., Claimant
Contested Case No: 06-157H

PROPOSED & FINAL ORDER

March 19, 2007

RAY L. BRANUM, SR., Petitioner
COMMERCE AND INDUSTRY INS. CO., Respondent
Before Robert Pardington, Administrative Law Judge

A hearing in the above-captioned matters was scheduled for January 19, 2007, in Portland, Oregon, before Administrative Law Judge Robert Pardington. Claimant is represented by attorney Daniel DeNorch. The employer, Premier Restoration, and its insurer, AIG Claim Services, are represented by attorneys Jerry Keene and Amy Osenar. Prior to hearing, the parties agreed to submit the matter on the record with written closing arguments. The record closed on receipt of claimant's reply argument on March 12, 2007.

Exhibits 1 through 27, including 23A&B, are hereby admitted.

ISSUE

Eligibility for Vocational Assistance. Claimant appeals the August 8, 2006 Director's Review and Order, which upheld the insurer's May 31, 2006 Notice of Ineligibility for Vocational Assistance. (Ex. 24).

FINDINGS OF FACT

Claimant, age 62, who worked for the employer as a painter, has accepted right shoulder and right elbow conditions. (Ex. 5). He eventually came under the care of attending physician Dr. Treible. (Exs. 7, 8). He apparently had a right shoulder surgery in early 2005. (*See* Ex. 9).

On August 17, 2005, Dr. Treible released claimant to work with "no specific restrictions." (Ex. 10). A month later, on September 14, 2005, Dr. Treible declared claimant's condition medically stationary. He noted that claimant continued to have subjective complaints, but his objective findings (in the shoulder) were almost normal. (Ex. 11). In an October 26, 2005 letter to the insurer, Dr. Treible indicated that claimant's right elbow condition was medically stationary without permanent impairment or disability. (Ex. 13).

On November 17, 2005, the insurer issued a Notice of Closure, awarding periods of temporary disability, and eight percent (25.6 degrees) unscheduled permanent disability for the right shoulder. (Ex. 15). Claimant requested reconsideration.

On March 24, 2006, Dr. Woolley performed a medical arbiter examination. (Ex. 16). Dr. Woolley made impairment findings, and concluded that claimant was significantly limited in the ability to repetitively use the right shoulder, but not the right elbow/arm, due to his accepted conditions. (Exs. 16, 17).

An Order on Reconsideration issued on April 4, 2006, increasing claimant's unscheduled permanent disability award to 21 percent (67.20 degrees), based on the arbiter's impairment findings. (Ex. 18).

On May 16, 2006, Dr. Treible reviewed and approved a job analysis of a painter position with the employer. (Ex. 19). He noted claimant's ongoing right elbow pain, and stated that it may interfere with his working as a painter. (Ex. 19-4). On May 22, 2006, Dr. Treible indicated that claimant's conditions were medically stationary as of May 16, 2006, but did not otherwise detail any physical restrictions. (Ex. 20).

On May 31, 2006, the insurer, through a vocational consultant, issued a Notice of Ineligibility for Vocational Assistance. (Ex. 21).

On July 7, 2006, claimant requested review of the Notice of Ineligibility with the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division. (Ex. 22).

In an August 8, 2006 letter to the RRU, claimant's counsel provided documentation for a requested attorney fee and requested/reserved the right to cross-examine Dr. Treible. (Ex. 23A). The RRU apparently received this letter the next day, August 9, 2006. (*See* Ex. 23B-1).

Also on August 8, 2006, the RRU issued a Director's Review and Order, affirming the May 31, 2006 Notice of Ineligibility. The RRU found that claimant was able to return to regular work regarding his accepted conditions, relying on the findings of Dr. Treible. (Ex 24).

Claimant appealed the Director's Review and Order, and, on October 19, 2006, the case was referred to the Board's Hearings Division. (Ex. 27).

CONCLUSIONS OF LAW AND OPINION

In vocational services disputes, the Director's Order shall be modified 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." ORS 656.283(2)(c), OAR 436-001-0225(3). However, new evidence may be admitted and considered. OAR 436-001-0225(3).

Here, claimant makes some arguments based on the Director's evaluation of the existing medical evidence, but has not persuasively explained how the Director's evaluation of the evidence violated a statute or rule, exceeded its statutory authority, was made upon unlawful procedure, or constituted an abuse of discretion. ORS 656.283(2)(c). Although the ALJ should make findings of fact from which to determine if the Director's decision survives the above standard of review, an "error of fact" is not in and of itself a basis for reversing the Director's order. *See Lasley v. Ontario Rendering*, 114 Or App 543, 547-48 (1992); *Donat E. Flores*, 45 Van Natta 1241, 1243 (1993).

Claimant's primary contention is that the Director abused its discretion by failing to afford him a "full and fair" opportunity to develop his case, and by making its decision on an "incompletely developed" record. Specifically, claimant contends that he should have been

given an opportunity to cross-examine his attending physician, Dr. Treible.

In an August 8, 2006 letter to the RRU, claimant's counsel provided documentation for a requested attorney fee and "preserved" the right to cross-examine Dr. Treible. (Ex. 23A). He added that "We understand this right may only be exercised in the context of a hearing, but we want to be on the record as making the demand for cross-examination." (*Id.*) The RRU apparently received this letter the next day, August 9, 2006.¹ (*See* Ex. 23B-1). However, on August 8, 2006, the RRU had issued its Director's Review and Order, affirming the May 31, 2006 Notice of Ineligibility for Vocational Assistance. (Ex. 24).

Even assuming that claimant intended to cross-examine Dr. Treible as part of the proceeding at the RRU, instead of merely "preserving" the right to cross-examine the doctor at a later hearing, I find that claimant's request was not timely. (*See* Exs. 23A-B, 24). Moreover, claimant did not thereafter request reconsideration of the Director's order. In other words, claimant's August 8, 2006 letter was apparently not treated as a request for reconsideration of the August 8, 2006 Director's Review and Order, and claimant did not pursue the matter further at the RRU. Based on the above reasoning, I decline to find that the Director abused its discretion in allegedly failing to allow the cross-examination of Dr. Treible.

Finally, given the parties' eventual request to submit this matter on the record with written closing arguments, claimant did not pursue cross-examination of Dr. Treible in this forum. *See* OAR 436-001-0225(3) (new evidence may be admitted and considered).

Accordingly, I find that the Director's Review and Order was not in error, in reference to the standard of review in ORS 656.283(2)(c).

ORDER

The Director's August 8, 2006 Review and Order is affirmed.

¹ In an unrecorded conference call with the parties, claimant contended that the RRU actually received the August 8, 2006 letter that day, via facsimile. However, there is no documentation of a "faxed" copy of the letter in the record.