

In the Vocational Assistance of

Pema Tsomo, Claimant

Contested Case No: 07-086H

PROPOSED & FINAL ORDER

October 29, 2007

PEMA TSOMO, Petitioner

SAIF CORPORATION, Respondent

Before Jill M. Riechers, Administrative Law Judge

The hearing convened before Administrative Law Judge Jill M. Riechers in Portland, Oregon, on September 28, 2007. Claimant was present and represented by Peter O. Hansen. The employer, Friendship Health Center, and its insurer, SAIF Corporation, were represented by Holly A. Ansari. Brain Turner was present as employer representative. At hearing, Exhibits 1 through 20, 9A, 9B, 9C, 11-3a and 19A were offered and admitted. The record closed on the day of hearing, following closing arguments.

ISSUE

Claimant filed a request for hearing challenging the Director's Review and Order No. VO 07-134, issued May 29, 2007, which affirmed SAIF's March 19, 2007 Notice of Ineligibility for Vocational Assistance. (Exs 12, 19, 20). Pursuant to ORS 656.704(2)(a) and OAR 436-001-0019, on July 2, 2007, the Workers' Compensation Division referred the matter to the Workers' Compensation Board, Hearings Division for hearing.

FINDINGS OF FACT

Claimant, age 44 on the day of hearing, was injured on July 26, 2002, while working as a certified medication aide for employer. (Ex 1). The claim was accepted on April 27, 2004 for a herniated L4-5 disc. (Exs 2, 3).

On January 9, 2007, claimant underwent a physical capacity evaluation ("PCE"), the results of which revealed that she was capable of performing work in the Sedentary category, requiring lifting, carrying, pushing and/or pulling ten pounds maximum, walking occasionally and mostly sitting. (Ex 5-1). She was found to be capable of sitting, standing and walking, each, for one-half hour at a time, and was found to be capable of spending two to two and one-half hours in each of those positions in an eight-hour day. (Ex 5-3). Efforts on physical testing were full or near-full, but there were some inconsistencies with her reporting of physical abilities. She was noted with inconsistent perceived disability compared to her actual demonstration function. (Ex 5-1, -2).

Claimant underwent a second PCE, with a different provider, on February 8, 2007. (Ex 7). The results of this PCE indicated that claimant was capable of Sedentary-Light work. (Ex 7-11). Claimant's effort was felt to be low and inconsistent. (Ex 7-9).

On March 4, 2007, claimant's attending physician, Robert Manley, M.D., stated that he

did not concur with the findings of the second PCE, but that he did concur with the findings of the January 9, 2007 PCE. (Ex 8). According to Dr. Manley, the January 9, 2007 PCE accurately outlined claimant's capabilities.

On March 13, 2007, Jennifer O. Frank, M.A., C.R.C. performed a Residual Employability Analysis ("REA"). (Ex 10). Ms. Frank noted claimant had been educated to the 10th grade in India, and had received a diploma. (Ex 10-1). Claimant had begun training to become an herbal doctor. She worked in a clinic as a cashier and herbal dispenser, and performed accounting duties for nine or ten years. She then came to the United States in 1995. From 1995 to 2001, claimant worked as a cashier and as a personnel clerk. Claimant spoke English well, and scored 90 in reading and writing pre-GED examinations at Portland Community College. (Ex 10-2).

Ms. Frank noted that claimant's most recent work history was as a general clerk for the employer at injury, in the sedentary category, and included answering telephones, copying and paperwork. (Ex 10-2). Claimant was working 20 hours per week in this position. Prior to that time, claimant worked as a certified medication aide. Her duties consisted of administering medications to patients, maintaining related medical records, verifying identities of patients, name of drug, dosage and time of administration. Before that, claimant had worked as a certified nurse's aide for about 16 months. Claimant had studied for and become a medication aide during that time. (Ex 10-2, -3).

Ms. Frank concluded that claimant had skills from her current and previous positions that would lend themselves to a variety of occupational selections claimant could still perform, given her current physical abilities. (Ex 10-5).

Ms. Frank also prepared an Eligibility Evaluation Report on March 13, 2007. (Ex 11). Taking claimant's average weekly wage at the time of her injury, and taking into account cost of living increases, she determined that \$11.79 per hour was a suitable wage. (Ex 11-4). Two of the jobs Ms. Frank had specified in the REA, personnel clerk and insurance clerk, were within claimant's skill levels, physical capacities and paid at or above the suitable wage. Ms. Frank reviewed job openings posted at the Employment Department, and found that reasonable employment opportunities existed in both occupations. (Ex 11-5). She concluded:

Mrs. Tsomo is capable of working per-time in the Sedentary range of work. She is able to work in unskilled or semi-skilled positions that would pay minimum wage and above. Jobs identified through the transferable skills analysis pay above 80% of the wage currently being paid for her regular job, or \$11.79 per hour, when factoring in 20 hours per week. Based on these findings, I would recommend to SAIF Corporation that Mrs. Tsomo be found ineligible for vocational assistance because she does not meet all the criteria for eligibility under OAR 436-120-0320(10), namely, she does not possess a substantial handicap to employment and need assistance to overcome it. (Ex 11-6).

SAIF subsequently issued the March 19, 2007 Notice of Ineligibility for Vocational Assistance. (Ex 12). Claimant's claim was closed on March 20, 2007, with an award of four per cent scheduled permanent partial disability for the left leg and 27 percent unscheduled permanent partial disability for the back. (Ex 14). On April 30, 2007, Dr. Manley signed a check-box letter prepared by claimant's counsel, in which he acknowledged that claimant was working four to five hours per day, compared to eight before her injury, and agreed that it was his opinion that claimant was not able to return to regular employment or to any other suitable and available work with the employer because claimant was limited to working part-time in the sedentary category and therefore had a substantial handicap and required assistance to overcome that. (Ex 16-2).

Delmi Hernandez, Lead Vocational Consultant of the Workers' Compensation Division Rehabilitation Review Unit, performed a Suitable Employment Analysis. (Exs 18, 19). Ms. Hernandez relied on the January 9, 2007 physical capacity evaluation findings, and she performed a review of labor market information, and determined that both the insurance clerk and personnel clerk positions would provide reasonable opportunity for suitable employment for claimant. (Ex 18). Ms. Hernandez noted that the OLMIS report stated that short-term, on-the-job training was sufficient preparation for these occupations, as the positions were entry-level. (Ex 18-3, -4). She found 24 positions that claimant would qualify for as an insurance clerk, and 33 positions claimant would qualify for as a personnel clerk.

After reviewing the available information, and speaking with claimant, her counsel, Ms. Frank and with SAIF representatives, Ms. Hernandez, as the Director's delegate, issued the Director's Review and Order that is the subject of the present case. (Ex 19). Ms. Hernandez noted that Dr. Manley concurred with the January 9, 2007 PCE, which had found claimant capable of working in a sedentary capacity and of sitting, standing and walking thirty minutes at one time, and for a total of two and one-half hours for each of these positions in an eight-hour work day. On April 30, 2007, Dr. Manley had signed a concurrence letter indicating claimant was restricted to working part time in the sedentary category, however, this restriction differed from the January 9, 2007 PCE findings and was unexplained. (Ex 19-2). The April 30 opinion did not contain an explanation for the discrepancy, was written without testing or patient examination and was prepared after claimant had already been found medically stationary. For these reasons, the Director declined to rely on the April 30 opinion and concluded that the restrictions were those outlined by the PCE and approved by Dr. Manley. (Ex 19-3).

The Director's order found no substantial handicap to employment because of the number of suitable positions paying a suitable wage available within claimant's physical capacities as personnel clerk and insurance clerk for which claimant would qualify. (Ex 19-4). The Director found claimant did not meet the criteria for eligibility for vocational assistance under OAR 436-120-0320, including, "As a result of the limitations caused by the injury, the worker: Has a substantial handicap to employment and requires assistance to overcome that handicap." (Ex 19-4).¹

Dr. Manley saw claimant on June 5, 2007. (Ex 19A). He commented that claimant was missing some work due to severe back and leg pain, and that her work tolerance remained four

¹ The Director relied on the rules contained in WCD Admin. Order 05-080, effective January 1, 2006. (Ex 19-1).

hours per day for four or five days. His impression was that the workers' compensation system had failed to help claimant.

CONCLUSIONS OF LAW AND OPINION

Claimant seeks reversal of the May 29, 2007 Director's Review and Order. SAIF and employer request that it be affirmed.

OAR 436-120-0320(10)(c)(C) sets forth conditions for eligibility for vocational assistance:²

(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.

In determining that claimant did not have a substantial handicap, the Director relied on the medical record, including the January 9, 2007 PCE with which Dr. Manley concurred, and the vocational evaluation performed by Ms. Frank as well as the Director's own findings in the suitable employment analysis performed by Ms. Hernandez.

ORS 656.283(2)(c) provides, in pertinent part:

When the director issues an order after review under paragraph (b) of this subsection, the order shall be subject to review under ORS 656.704. At the contested case hearing, the decision of the director's administrative review shall be modified only if it:

- (A) Violates a statute or a 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.³

Claimant indicated at hearing that the Director's order should be modified under Subsections (A) [violation of a statute or rule] or (D) [characterized by abuse of discretion or clearly unwarranted exercise of discretion] of ORS 656.283(2)(c). Claimant has the burden of proof. See ORS 656.266(1).

With respect to the argument that the Director's order should be modified because it violated a statute or rule, claimant asserted that she did not have the necessary skills to perform the jobs that Ms. Frank and the Director determined were suitable and that claimant was capable

² The Director's Order erroneously stated that the rule is contained in OAR 436-120-0320(9); it is actually in (10).

³ See also OAR 436-001-0225(3), which provides that at hearing, new evidence may be admitted and considered, but that the ALJ may modify the director's order only if it meets at least one of the criteria specified in OAR 436-001-0225(3)(a) through (d), which are identical to the criteria set forth in ORS 656.283(2)(c)(A) through (D).

of performing. The personnel and insurance clerk positions identified as suitable for claimant were entry-level jobs. Claimant is currently performing clerical functions in her part-time work with the employer-at-injury. Claimant did not offer any expert vocational evidence to rebut the conclusions of Ms. Frank and the Director that claimant did possess such skills.

Claimant also contended that she did not have the physical capacity to perform work in these jobs, but Dr. Manley concurred that claimant was capable of full-time sedentary work, at the time he concurred with the findings and conclusions set forth in the January 9, 2007 PCE. His subsequent April 30 opinion did not provide an explanation for the conclusion that claimant was limited to part-time work. Unexplained changes of opinion are diminished in their persuasiveness. See *Kelso v. City of Salem*, 87 Or App 630 (1987). Dr. Manley's later statements contained in his June 5, 2007 chart note appear to be based on claimant's subjective representations, and not on any new or changed objective examination findings after the January 9, 2007 PCE. In any event, this office visit took place after issuance of the Director's order. Claimant has not established that the Director's decision violated a statute or a rule.

Turning to the question of whether the Director's order was characterized by abuse or clearly unwarranted exercise of discretion, the Director based the findings contained in the Order on the medical evidence, consisting of the January 9, 2007 PCE concurred with by the attending physician; claimant's average weekly wage; the claimant's work history, skills and abilities; and the information obtained by Ms. Frank and by Ms. Hernandez in reviewing labor market information. There is nothing in the record to suggest that the conclusions reached in the Director's order or the process used to arrive at those conclusions in any way constituted either an abuse of discretion or clearly unwarranted exercise of discretion.

It follows that the Director's Review and Order dated May 29, 2007 must be affirmed.

ORDER

IT IS THEREFORE ORDERED that the May 29, 2007 Director's Review and Order is affirmed.