
In the ORS 656.340 Vocational Assistance Dispute of

Kenneth S. Ferguson, Claimant

Contested Case No: 08-182H

FINAL ORDER

December 23, 2009

KENNETH S. FERGUSON, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Insurer SAIF Corporation (insurer) terminated claimant Kenneth S. Ferguson's (claimant) eligibility for vocational services. Claimant requested administrative review and the Workers' Compensation Division's (WCD) Employee Services Team (EST) issued a Director's Review and Order on September 16, 2008, upholding insurer's action. After a contested case hearing Administrative Law Judge (ALJ) Robert Brazeau issued a Proposed and Final Order on October 20, 2009, affirming EST's order. I affirm both orders on the grounds claimant missed two consecutive days of training and failed, without reasonable cause, to provide notice to his vocational counselor or insurer, and because he stopped attending training and did not notify his counselor. OAR 436-120-0350(10); 436-120-0520(1).¹

FACTUAL SUMMARY

Claimant suffered a compensable injury and was found eligible for vocational services. He signed an authorized training plan (ATP) which called for him to enter school for training in January, 2008. The plan required him to submit to his vocational counselor monthly training reports and to submit his grade reports within ten days of receiving them. Claimant has a young son for whom he is the primary caregiver. He also expected he would need a computer to complete his education. The original ATP that was submitted to insurer for approval included payment for child care and for a computer. Insurer refused to approve those costs and removed them from the ATP. Claimant signed a plan addendum that stated that he had withdrawn his requests for child care costs and a computer. Claimant testified at the hearing that he never withdrew those requests but was told by insurer's representative that she would "throw the whole plan out" if he did not agree to the amended plan.

Claimant had been scheduled to meet with his vocational counselor on April 24, 2008. However he called the counselor on April 22 and rescheduled the meeting to May 1 because his son was ill. Claimant's vocational counselor submitted a report on April 29, 2008, in which she stated claimant had not submitted his March progress report or his grade report for the previously completed term.

¹ OAR 436-120-0350 provides in part:

A . . . worker's eligibility [for vocational assistance] ends when . . . :

(10) The worker . . . fails to attend 2 consecutive training days and fails, without reasonable cause, to notify the vocational counselor or the insurer.

OAR 436-120-0520(1) provides in part:

If the worker stops attending training for any reason, the worker must notify the vocational counselor by the close of the next working day.

Claimant did not attend the May 1 meeting and did not contact the counselor prior to the meeting to notify her or reschedule the meeting. The counselor issued a warning letter on May 2. The letter reminded claimant of the requirements to submit reports and that his training eligibility could be terminated for failing to comply with the ATP's requirements. The letter gave claimant until May 9 to submit the reports.

Claimant called the counselor on May 9. Claimant left a message saying he had run out of money, had had his internet service terminated, and that he might have to move to Bend to stay with relatives.

Claimant testified that it was very difficult for him to comply with the ATP because he was the full-time caregiver for his young son, who was only in school part of the day. This placed time and financial demands on claimant that the ATP didn't take into account. He required a computer to perform class work and to take on-line courses, some of which were not readily available otherwise, and to enable him to be at home to meet his child care responsibilities. He was able to borrow money to buy a computer during the first school term but was unable to use it effectively after he lost his internet service for non-payment early in the second term. At the end of April his son was extremely ill, requiring full-time care for about a week. His telephone was also broken from about April 22 through May 9. Claimant regularly talked with his vocational counselor about the time and financial difficulties he experienced because the ATP did not include child care expenses or pay for his computer.

In early May claimant's counselor contacted the school to check on his progress. Several instructors reported claimant had not been in school or otherwise contacted them for three to four weeks. Insurer issued a notice of end of training eligibility on May 19, 2008, on the grounds claimant had become unavailable for training, had failed, after written warning, to fully participate in the training process or provide requested information, had failed, after written warning, to comply with the ATP's requirements, and had stopped attending training without notifying his counselor or insurer.

On administrative review EST found claimant's training eligibility was properly terminated. EST's order states claimant failed to attend two consecutive days of training and failed to notify his counselor or insurer that he was no longer attending training. After a hearing at which he heard extensive testimony from claimant, ALJ Brazeau upheld EST's order on the grounds claimant's failure to maintain communications with insurer or his counselor was not due to factors reasonably beyond claimant's control.

CONCLUSIONS OF LAW

This is a vocational assistance dispute under ORS 656.340. I may only modify the director's order if it violates a rule or statute, exceeds the director's statutory authority, relies on an unlawful procedure, or constitutes an abuse or unwarranted exercise of discretion. ORS 656.283(1)(c); OAR 436-001-0225(3).

EST stated very narrow grounds for its decision. Although insurer cited several grounds for terminating claimant's vocational services eligibility, EST's Director's Review and Order

specifically found only that claimant failed to attend two consecutive days of training without notifying his vocational counselor or insurer, without reasonable cause, and that claimant failed to notify his counselor that he had stopped attending training. OAR 436-120-0350(10); 436-120-0520(1). The order specifically declines to make findings on any other grounds.

There is no dispute claimant missed at least two consecutive days of training and failed to notify his counselor or insurer of that fact. It also appears claimant did not return to class after his son recuperated. The only issue, therefore, is whether claimant had reasonable cause for failing to notify the counselor or insurer about his missed training.

“Reasonable cause” includes illness of a worker or a member of the worker’s family, financial hardship, and circumstances beyond the worker’s control OAR 436-120-0005(8). To some extent the record demonstrates all of these factors were present in claimant’s life. The question is whether it was reasonable for claimant to allow three to four weeks of not attending training to pass without communicating this fact to his counselor or insurer.

Class began at the beginning of April, 2008 and by mid-May the school reported that claimant had not participated in three to four weeks. Claimant had been scheduled to meet with the counselor on April 24 and that meeting was rescheduled due to claimant’s son’s illness. Claimant submitted an affidavit and testified at the hearing but did not assert he had notified the counselor in the April 22 phone call that he was missing or would continue to miss class. Although claimant testified his son was seriously ill at the end of April, he testified this illness lasted about one week. Claimant did not adequately explain why he did not communicate with his counselor or insurer after his son recovered.

Claimant testified he had lost his internet service and that his phone was not working as of the end of April, until he succeeded in contacting his counselor on May 9. While the lack of email and phone and his son’s illness might justify some delay in providing notice of his missed classes, claimant did not explain why he was unable to provide any kind of notice prior to May 9. In this regard, insurer’s representative and the counselor both testified they have toll-free telephone numbers to facilitate contact. Claimant may have had reasonable cause for some delay in providing notice of his missed classes but there is not reasonable cause for not communicating at all between April 22 and May 9, given the significance of claimant’s missing a large period of classes. Claimant’s eligibility for vocational services was therefore properly terminated for failure to provide notice of missed training, under OAR 436-120-0350(10) and 436-120-0520(1).

Claimant argues his eligibility for vocational services should be redetermined. OAR 436-120-0360.² The rule requires an insurer to redetermine eligibility upon being notified of changed circumstances. The decision is first for the insurer to make, not this division. There is no evidence in the record claimant has made a request to insurer under this rule and claimant also fails to identify the changed circumstances that would justify a redetermination.

² OAR 436-120-0360 provides in part:

If a . . . worker’s eligibility ended for any of the reasons specified in sections (1) through (8) . . . the insurer must redetermine eligibility upon notification of a change of circumstances.

(1) The worker, for reasonable cause, declined, or was not available for vocational assistance

Claimant also contends there were numerous flaws in the training plan that made it impossible for him to succeed. If claimant felt the plan was defective he could have asked the division to hold a conference on the plan or for director review of the plan. OAR 436-120-0008(1); 436-120-0500(2). Even if the plan was inadequate this would not provide reasonable cause for the extended period during which claimant failed to provide notice of his missed training.

IT IS HEREBY ORDERED EST's September 6, 2008, Director's Review and Order and the ALJ's October 20, 2009, Proposed and Final Order are affirmed.