

In the Vocational Assistance of

Mark Barton, Claimant

Contested Case No: 08-111H

PROPOSED & FINAL ORDER

April 17, 2009

MARK BARTON, Petitioner

PINNACLE RISK MANAGEMENT SERVICES, Respondent

Before Robert Brazeau, Administrative Law Judge

A hearing was convened in this matter on January 13, 2009 in Portland, Oregon before Administrative Law Judge Brazeau. Claimant appeared with his attorney, Peter O. Hansen. May Trucking Company and Pinnacle Risk Management Services were represented by William Replogle, Attorney at Law.

Exhibits 1 through 32, 34, 35, A, 8A, 12A through 12E, 15A, 16A, 22A, 23A, 23B, 23C, 24A, 25A and 25B were admitted into evidence at the time of the hearing. The employer objected to the inclusion of Exhibits 24B and 33 into the evidentiary record. A ruling on the admissibility of those exhibits is contained in the body of this order.

The record remained open for written closing arguments. It closed on April 14, 2009, at which time claimant's replay argument was received.

ISSUES

1. Whether Exhibits 24B and 33 should be admitted into the evidentiary record;
2. Claimant requests a hearing from the Director's order dated April 8, 2008, which affirmed the employer's determination that claimant is ineligible for vocational services.

FINDINGS OF FACT

Claimant compensably injured his cervical spine and left shoulder area on July 25, 2002 while employed as a trucker. The employer accepted his claim for a cervical strain and C4-5 disc herniation on November 30, 2004. It closed the claim on December 1, 2004 with an award of eight percent unscheduled permanent partial disability for claimant's neck.

Dr. Grossenbacher performed a medical arbiter's examination of claimant on April 5, 2005. Claimant advised that he had residual stiffness in his neck, with reduced range of lateral motion. He also complained of "overflow pain" into his left shoulder and reduced grip strength in his left arm. Claimant advised that he had not worked since his July 2002 injury. Dr. Grossenbacher found that claimant had permanent impairment, but he rated only that related to the accepted cervical spine condition and found no permanent work restrictions regarding that condition. The Order on Reconsideration then issued on April 25, 2005 and increased claimant's unscheduled disability award to 27 percent, noting that claimant had not yet been released to return to his regular work.

In August 2005, the parties entered into a stipulated settlement agreement, whereby the employer accepted claimant's claim for a "probable tear of the left rotator cuff) and re-opened claimant's claim for the processing of that condition.

Claimant returned to Dr. Hamilton, his attending physician in California, on November 22, 2006. He advised that his left shoulder surgery, which had been performed in October of 2005, had improved his left shoulder symptoms. He did not feel capable of performing his regular truck driving work, however, particularly those duties that required him to work overhead. Dr. Hamilton found claimant to be medically stationary with permanent lifting (40-50 pounds below chest level), pulling and pushing restrictions attributable to his compensable injury. He concluded that claimant could not perform his regular job on a consistent basis and that retraining was probably necessary.

The employer had claimant examined by Dr. Weinman on January 30, 2007. Claimant advised that he felt incapable of performing his truck driving job because of left shoulder pain after 45 minutes of driving and an inability to do repetitive work above shoulder level. Dr. Weinman agreed with Dr. Hamilton that claimant was medically stationary and significantly impaired in his ability to use his left shoulder. He also agreed that claimant was incapable of returning to his regular truck driving work.

The employer reclosed claimant's claim on April 7, 2007 with an award of 43 percent unscheduled disability for the neck and left shoulder. It also retained Willie Davis and Associates for the purpose of determining claimant's eligibility for vocational rehabilitation services.

On June 27, 2007, Dr. Hamilton advised the employer's claims processing agent that he had reviewed a modified job description involving light to medium work, including driving up to seven hours per day, but no loading or unloading of trucks. Hamilton advised that based on his November 2006 evaluation, claimant appeared capable of performing the modified job.

On July 2, 2007, Willie Davis of Davis and Associates asked the employer whether or not it had employment for claimant within the restrictions outlined in his medical records. Mr. Davis had apparently not received Dr. Hamilton's June 27, 2007 letter to the claims processing agent at the time. The employer's workers' compensation manager, Ms. Bowers, responded to Mr. Davis on July 6, 2007, advising that the employer had work within claimant's restrictions and would permanently place claimant on a "no-touch" load schedule in which he would not be required to load or unload trucks. Ms. Bowers included a copy of a permanent light duty job description that involved truck driving, but no loading and unloading.

On July 13, 2007, the employer made the modified truck driving job offer to claimant. On July 27, 2007 claimant, through his attorney, advised that he would not accept the modified job offer because the job was not "suitable" and because Dr. Hamilton had not reviewed a complete copy of the modified job description.

On July 30, 2007, Willie Davis and Associates advised claimant that he was not eligible for vocational services because he had "refused or failed to make a reasonable effort in available

light duty work . . .” Four days later, claimant requested review from the Rehabilitation Review Unit.

On October 4, 2007, Dr. Riggs examined claimant in California on behalf of the California Department of Motor Vehicles. Based on his examination, Dr. Riggs concluded that claimant was not physically qualified to operate a motor vehicle because of, among other things, impairment in his cervical spine and left shoulder.

On October 15, 2007, Willie Davis performed an analysis of the modified job offered to claimant by the employer. The analysis also addressed various concerns claimant had raised regarding his ability to perform certain physical functions within the modified job description. After considering the concerns, Mr. Davis concluded that claimant could perform the modified work within his restrictions. Mr. Davis also recorded a video of the job functions as outlined by the employer.

On April 8, 2008, the Director issued a Review and Order, affirming the employer’s denial of claimant’s claim for vocational assistance, concluding that claimant had refused to accept a suitable modified job offer in a location where he commonly worked.

Claimant requested a hearing from the Director’s Order on June 5, 2008.

On September 3, 2008, Dr. Riggs responded to an inquiry from claimant’s counsel, confirming that when he examined claimant in October 2007, claimant was unable to drive a commercial vehicle because of physical limitations in his left shoulder and cervical spine.

CONCLUSIONS OF LAW AND OPINION

1. Whether Exhibits 24B and 33 should be admitted as evidence

The employer objected to the admission of Exhibits 24B and 33 at the time of the hearing. After hearing the parties’ arguments in that regard, I took the objection under advisement. Having considered the parties’ written arguments, I conclude that the aforementioned exhibits should be admitted.

The employer argues that although “new evidence” is admissible in vocational rehabilitation disputes before the Board, Exhibits 24B and 33 are not “new” evidence. Claimant responds that “new evidence” is merely that which was not before the Department when it conducted its review. Claimant cites *Colclasure v. Washington Co. Sch. Dist. No. 48-A*, 317 Or 526 (1993), in support of his argument.

OAR 436-001-0225(3) provides that in vocational rehabilitation disputes transferred to the Board’s Hearings Division, the administrative law judge is authorized to consider “new evidence” submitted by the parties. In the context within which the rule arises (as, for example, compared to subsection (2) of the rule), I interpret it to mean that “new evidence” is simply that which was not submitted to the Department at the time it conducted its review of the vocational dispute. I know of no other evidentiary limitation, such as that suggested by the employer, *i.e.*,

that evidence that existed at the time of the Department's review, but which was not submitted to the Department, should be excluded from the evidentiary record.

Having found that Exhibits 24B and 33 are "new evidence" that can be considered in this forum, I hereby admit them into the evidentiary record.

2. Scope of Review

OAR 436-001-0170(1) provides that in disputes referred by the Director to the Hearings Division, the administrative law judge may conduct the hearing in any manner, consistent with these rules that will achieve substantial justice. Subsection (4) of the rule further provides that where appropriate, the administrative law judge may remand a dispute to the Director for further administrative action. While I am somewhat reluctant to do so, I conclude that the present case is one that should be remanded to the Director.

The "new evidence" submitted by claimant at hearing consists of a chart note from a physician who conducted an examination of claimant for the California Department of Motor Vehicles (Exhibit 24B), and a response from that same physician to an inquiry sent to him by claimant's counsel (Exhibit 33). The chart note advises that claimant did not qualify for a commercial driver's license at the time of the physician's October 4, 2007 examination of claimant. Exhibit 33, the physician's September 3, 2008 response to counsel, advises that based on claimant's loss of left shoulder motion and strength, as well as symptoms involving his cervical spine, claimant was not physically qualified to drive a commercial vehicle at the time he was examined.

Exhibit 24B was not submitted to the Department before it conducted its review, and Exhibit 33 was generated after the Director's order issued. The Director's order found that claimant was ineligible for vocational rehabilitation services because he was capable of driving a commercial vehicle but refused "suitable employment" offered by the employer in that regard. Given Dr. Riggs' opinion regarding claimant's ability to obtain a license necessary for performing the functions of his job, it is arguable that the Director could have reached a different decision on the merits had the Director been advised of that opinion. Under these circumstances, I conclude that it is appropriate to remand this matter to the Director for the consideration of the "new evidence" generated at hearing.

ORDER

This matter is hereby remanded to the Director for consideration of Exhibits 24B and 33 and for additional proceedings according to law.