

In the ORS 656.340 Vocational Assistance Dispute of

Amber Faircloth, Claimant

Contested Case No: 08-128H

FINAL ORDER

March 31, 2009

AMBER FAIRCLOTH, Petitioner

ESIS, Respondent

Before John Shilts, Administrator

The issue is whether claimant is entitled to vocational assistance. I affirm the ALJ's and Rehabilitation Review Unit's orders and find claimant is not entitled to vocational assistance because there is substantial evidence in the record that she is able to return to her regular work.

Claimant Amber Faircloth was compensably injured on March 29, 2005. The Workers' Compensation Division's Appellate Review Unit found claimant entitled to permanent partial disability. Administrative Law Judge (ALJ) Robert Brazeau found on review of the disability award that claimant was entitled to a work disability award because claimant's attending physician had not released claimant to her regular work. ORS 656.214(2)(b); OAR 436-035-0009(6).¹ That decision is currently on review before the Workers' Compensation Board.

Claimant was found ineligible for vocational assistance based on a finding that she was able to return to her original work. ORS 656.340(6)(a); OAR 436-120-0320(11).² The Rehabilitation Review Unit (RRU), on behalf of the director, and ALJ Elizabeth Fulsher both affirmed this ruling on review. Claimant filed exceptions to ALJ Fulsher's order.

¹ ORS 656.214(2)(b) provides:

"If the worker has not been released to regular work by the attending physician . . . or has not returned to regular work at the job held at the time of injury, the award shall be for impairment and work disability."

OAR 436-035-0009(6) provides in part:

"If the worker has not met the return or release to regular work criteria . . . the worker receives both an impairment and work disability benefit. . . ."

² ORS 656.340(6)(a) provides:

"A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment or to any other available and suitable employment with the employer at the time of injury . . . and the worker has a substantial handicap to employment."

OAR 436-120-0320(11) provides in part:

"A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

* * * *

(c) As a result of the limitations caused by the injury . . . the worker:

(A) Is not able to return to regular employment;

(B) Is not able to return to any other suitable and available work with the employer at injury"

FACTUAL SUMMARY

I adopt the facts as stated in ALJ Fulsher's order and RRU's order.

GENERAL FACTS

Claimant worked as a dimensional inspector and straightener for a metals company. Her job description stated she was required at times to exert up to seventy pounds of force to move objects. She injured her right shoulder on March 29, 2005. The injury was accepted as a disabling right shoulder tendonitis. On January 11, 2007, surgery was performed on the shoulder for the accepted condition.

Claimant's attending physician, Dr. Cara Walther, performed a closing exam on July 23, 2007. Dr. Walther recommended an MRI and set temporary work restrictions of one-handed work and no use of the right arm. Dr. Walther also reported claimant's pain was out of proportion to the objective findings. On August 8, 2007, after claimant underwent the MRI, Dr. Walther declared claimant medically stationary. Dr. Walther stated she did not have an objective explanation for claimant's pain. Dr. Walther referred claimant to Dr. Andrews for a pain consultation. In connection with this referral, Dr. Walther stated she believed claimant's pain would prevent her from returning to full-duty work and released claimant for light duty, one-handed work only.

Dr. Timothy Borman performed an IME exam on claimant on October 15, 2007. Dr. Borman said he had reviewed claimant's job description, that her symptoms did not appear to be related to her work injury, and that claimant was capable of returning to her work without any restrictions.

On November 17, 2007, Dr. Walther concurred with the findings, opinion, diagnosis, and discussion in Dr. Borman's report. Dr. Walther expressed concern claimant might have a neck injury.

Claimant requested on January 4, 2008 that her attending physician be changed to Dr. Andrews. Insurer agreed to this request.

Dr. Andrews, on January 4, 2008, released claimant for modified, sedentary work. He instituted restrictions that claimant could lift a maximum of 2.5 pounds and not perform any repetitive use of her right arm.

Insurer notified claimant on January 28, 2008, that she was ineligible for vocational assistance because she was able to return to her regular work. The notice asserted claimant's attending physician had released her to regular work on October 15, 2007. The only document in the record with that date is Dr. Borman's IME evaluation.

In response to an inquiry from claimant's attorney, Dr. Andrews stated on February 5, 2008, that the work restrictions he had imposed were not due to claimant's work injury. Rather,

Dr. Andrews stated the restrictions were due to a possible cervical condition. Dr. Andrews said that the accepted injury did not interfere with claimant's using her shoulder repetitively but that he had imposed restrictions due to a possible cervical condition.

Another IME was performed on February 13, 2008, by Dr.'s Radecki and Duff. Their report stated they had reviewed claimant's job description. They concluded claimant was "objectively" capable of returning to her regular work without restrictions. The report additionally stated there was no finding of a neck condition causing any symptoms and that claimant had multiple symptoms for which the doctors could not find a physical basis.

Insurer denied claimant's claim for a cervical condition on February 27, 2008.

Claimant's attorney sought clarification from Dr. Walther about her previous concurrence with Dr. Borman's IME report. Dr. Walther responded on March 26, 2008 and stated that she did not totally concur with that IME report as to the shoulder condition. She said that, with regard to claimant's shoulder condition, she did not intend to release claimant to full duty. Dr. Walther added that claimant had chronic pain, that the doctor did not believe claimant could perform "full duty tasks," and that the work release she had provided was modified due to claimant's right shoulder injury.

On April 2, 2008, Dr. Andrews responded to an inquiry from claimant's attorney. Dr. Andrews agreed with Dr. Walther's opinion that claimant's right shoulder injury limited her to light duty work with very limited repetitive use of the right shoulder arm and hand.

On February 11, 2008 claimant requested a review of insurer's denial of her eligibility for vocational assistance. The RRU issued an order on reconsideration in this matter on July 9, 2008, affirming insurer's decision. That order contains a detailed examination of the evidence. The reviewer noted claimant's attending physicians had contradicted themselves and each other as to claimant's condition and the need for work restrictions. It was also noted neither attending physician had explained how claimant's symptoms or work restrictions were related to her accepted injury and that all three IME physicians released claimant to work.

Claimant sought review of RRU's order on reconsideration. ALJ Elizabeth Fulsher heard the matter and issued a proposed and final order on January 14, 2009, affirming the insurer's and RRU's orders.

NOTICE OF CLOSURE – IMPAIRMENT FINDINGS

On December 21, 2007, insurer closed the claim with an award of five percent permanent partial disability. Claimant sought reconsideration of the notice of closure. The Appellate Review Unit issued its order on May 13, 2008.

In determining impairment, the reviewer specifically noted that she was not considering the February 13, 2008 IME report from Dr.'s Radecki and Duff because it occurred after claim closure and the attending physicians did not specifically concur with it. The reviewer found the preponderance of the evidence either stated by or concurred in by the attending physicians

supported a finding that claimant was not able to return to her regular work at the time of injury.

The employer requested review of this order. ALJ Robert Brazeau found claimant had not been released to her regular work. However the ALJ relied primarily on the fact Dr. Walther had never released claimant to her regular work and that her concurrence with the IME report was limited. ALJ Brazeau did not directly consider or comment on the IME reports.

CONCLUSIONS OF LAW

I may modify RRU's order only if it violates a statute or rule, exceeds the director's authority, is based on an unlawful procedure, or demonstrates an abuse of discretion or a clearly unwarranted exercise of discretion. OAR 436-001-0225(3). Claimant is only eligible for vocational services if she is unable to return to her regular work or some other suitable and available work as a result of limitations due to her accepted injury. OAR 436-120-0320(11).

The RRU reviewer concluded claimant's work injury did not prevent her from returning to her regular work. The reviewer pointed out that Dr. Walther did not have a medical explanation for how the ordered restrictions were related to claimant's injury nor did the doctor offer an explanation of the source of claimant's continued pain. Two different IME's by three different doctors were unable to relate claimant's symptoms to her compensable injury and both reports released claimant to her regular work. Although there was initially some confusion about the concurrence of Dr. Walther and Dr. Andrews with the IME reports, their subsequent clarifications did result in statements from both attending physicians that the work restrictions they imposed were related to claimant's compensable shoulder injury. The doctors' later statements did not appear completely consistent with their earlier statements.

While the medical evidence is conflicting, there is significant, credible evidence in the record that supports the reviewer's and the ALJ's conclusion that claimant was able to return to her regular work. Two reports by three different doctors specifically stated this to be the case. On this record I cannot find there was a violation of law or an abuse of discretion.

Claimant argues the ALJ erred "in finding that the opinion of the treating physician is not required in determining whether a worker is released for regular work . . ." This is not what the ALJ did or said. The ALJ expressly considered the opinions of both attending physicians but found them "inconsistent, unexplained and poorly reasoned."

Claimant argues that because the attending physician's opinion is controlling or entitled to substantial deference in resolving other workers' compensation issues, her attending physicians' opinions about her ability to work should be given greater weight than other evidence here. (See ORS 626.726(4)(f)(E); OAR 436-035-0007(5), (6); impairment for work disability payment must be based on attending physician's findings or those in which attending physician concurs). This argument actually undermines claimant's position. Neither the rule nor the statute which define when a worker qualifies for vocational services specify that the attending physician's opinion is controlling or entitled to particular deference. ORS 656.340(6)(a); OAR 436-120-0320(11). The difference between these rules and the ones claimant cites must be presumed to be intentional and deliberate. As the legislature specifically

distinguished this statute from the ones on which claimant relies and deliberately chose not to require greater deference to the attending physician's opinion in determining eligibility for vocational services, it is appropriate to base this decision on a balanced evaluation of all of the evidence in the record.

Claimant also asserts the decision about her inability to return to work made in the disability proceedings has already determined this issue and should be followed here under the principle of the law of the case. The law of the case doctrine states that where an appellate court has decided an issue in a case that decision is binding in any further proceedings in that same matter, unless the decision is overruled. *State v. Pratt*, 316 Or 561, 569, *cert den* 510 US 969 (1993). This department, however, has repeatedly stated in prior decisions that this principle does not apply between different sections within the Workers' Compensation Division as none is superior to the other. See *Nabor Munez-Chavez*, 12 CCHR 303, 304-305 (2007); *Mark B. Hardman*, 8 CCHR 127, 131 (2003).

Even if that were not the case, the doctrine would not apply under the present circumstances as the facts are different in this proceeding than they were in the disability matter. The doctrine of the law of the case does not apply where there are new or additional facts. *Huszar v. Certified Realty Co.*, 272 Or 517, 522-523 (1975). As described above, the statute and rule require that the attending physician's opinion must be given great weight in determining disability while this is not the case under the vocational assistance rules. Because of the difference in these rules the opinions of the IME physicians were given no consideration in the disability matter but were properly considered in this portion of claimant's case. The law of the case doctrine does not apply here.

IT IS HEREBY ORDERED

The Director's Review and Order on Reconsideration of July 9, 2008 and the ALJ's Proposed and Final Order of January 14, 2009 are affirmed.

DATED this 31st day of March, 2009.