

In the Vocational Assistance of

Adan G. Ibarra, Claimant

Contested Case No: 10-004H

PROPOSED & FINAL ORDER

November 15, 2010

ADAN G. IBARRA, Petitioner

SAIF CORPORATION, Respondent

Before Darren L. Otto, Administrative Law Judge

A hearing was scheduled to be heard in the above entitled matter on April 8, 2010 in Pendleton, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. The parties, however, asked that the matter be decided based on the written record and that request was granted. Claimant is represented by his attorney, R. Adian Martin. The employer, C & C Construction Services Inc., and its insurer, SAIF Corporation, are represented by their attorney, Larry D. Schucht. On October 4, 2010, claimant filed his initial written closing argument. On October 12, 2010, SAIF filed its written response. The hearing concluded on October 18, 2010 with claimant's reply. Exhibits 1 through 23 are received into evidence.

ISSUES

Claimant challenges the January 7, 2010 Director's Review and Order which found that he was ineligible for vocational assistance because he was released to return to regular work. The issue is whether the Director's Order violated a statute or rule, exceeded the statutory authority of the agency, was made upon unlawful procedure, or was characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

FINDINGS OF FACT

Claimant was 44 years old at the time of hearing (Ex. 1). On December 22, 2004, while working for the employer, he slipped on some ice, lost his footing, and slid off a roof. *Id.* As a result, he sustained injuries to his left lower and right upper extremities (Ex. 18-1).

On November 2, 2005, SAIF accepted claimant's fracture of the distal body of the calcaneus in his left foot and a radial head fracture of the right elbow as a disabling industrial injury (Ex. 2). That claim was initially closed on November 2, 2005 with a 16 percent scheduled permanent partial disability award for loss of use of his left foot (Ex. 3).

On April 7, 2009, claimant's attending physician, Richard Carpenter, M.D., released claimant to return to regular work as of April 2, 2009 (Ex. 6). On April 30, 2009, he found claimant's industrial injury medically stationary and released him to return to regular duty work as of May 1, 2009 (Ex. 8). On June 9, 2009, Dr. Carpenter felt that claimant had no limitation in the repetitive use of his left foot/ankle and no strength loss or instability due to the industrial injury (Ex. 10-2). As it pertained to the accepted left foot/ankle condition, Dr. Carpenter felt that

claimant was able to stand or walk or do both for more than two hours total in an eight hour day (Ex. 10-3).

Based on Dr. Carpenter's repeated conclusions that claimant was released to return to regular work, SAIF issued a Notice of Ineligibility for Vocational Assistance, effective August 18, 2009 (Ex. 11). Claimant requested a hearing challenging that notice of ineligibility (Ex. 14).

Claimant did in fact return to his regular work as a roofer following the industrial injury until he was laid off at which point he began telling people that he could not do the work (Ex. 21-3).

On August 19, 2009, claimant's aggravation claim was closed without any additional permanent disability benefits (Ex. 13).

On September 16, 2009, Dr. Carpenter concluded that claimant could not return to work as a construction laborer due to a number of physical restrictions (Ex. 15-1). Dr. Carpenter, however, did not attribute those restrictions to claimant's accepted left ankle/foot conditions. *Id.* On September 18, 2009, Dr. Carpenter noted that claimant continued to perform his regular work without restrictions and roofing was suitable employment (Ex. 16). Dr. Carpenter also stated that any physical restrictions placed on claimant's work activities were not related to the accepted left ankle/foot conditions, but were instead related to his plantar fasciitis. *Id.*

On October 10, 2009, Dr. Carpenter changed his opinion and stated that claimant could not return to regular work as a roofer (Ex. 17). Again, however, Dr. Carpenter did not attribute his physical restrictions to the accepted left ankle/foot condition. *Id.*

On October 15, 2009, claimant was examined by the medical arbiter, Charles Weeks, M.D., who felt that claimant's impairment findings were due to the accepted condition and no other unrelated condition (Ex. 18-3). Dr. Weeks, however, did not indicate that claimant was precluded from returning to his regular work. *Id.*

On November 17, 2009, an Order on Reconsideration increased claimant's scheduled permanent disability award for loss of use of his left foot to 22 percent (Ex. 20).

On January 7, 2010, a Director's Review and Order found that claimant was ineligible for vocational assistance because he was able to return to regular employment as a roofer (Ex. 22-3). Specifically, the Director concluded that claimant's physical limitations, caused by his work injury, did not prevent him from returning to regular work. *Id.* Claimant requested a hearing challenging that order (Ex. 23).

On April 7, 2010, Dr. Carpenter indicated that claimant's physical limitations as outlined earlier were solely due to his accepted fracture of the left foot and lateral impingement of the calcaneus on the peroneal tendons (Ex. 24). Following that report, the parties took Dr. Carpenter's deposition testimony during which he agreed that if claimant returned to work as a roofer without complications, that would be convincing evidence that claimant was in fact capable of returning to regular work (Ex. 25-8). Dr. Carpenter also concluded that there might

be some parts of roofing that might be difficult due to the industrial injury (Ex. 25-9). Finally, Dr. Carpenter believed that, if claimant could not tolerate certain activities, it was due to early degenerative changes in his subtalar joint, not from nerve weakness or the accepted left ankle/foot condition (Ex. 25-11).

FINDINGS OF ULTIMATE FACT

After the industrial injury, claimant returned to regular work as a roofer until he was laid off.

It is unknown whether claimant's permanent impairment and physical limitations of the left lower extremity are due to the accepted industrial injury or not.

CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that the Director either violated a statute or rule or its decision was characterized by a abuse of discretion or clearly unwarranted exercise of discretion and its January 7, 2010 Review and Order finding claimant ineligible for vocational assistance should be reversed. SAIF asserts that the evidence established that claimant did indeed return to regular work and, in any event, the Director's Review and Order was not characterized by abuse of discretion. Therefore, SAIF asks that the January 7, 2010 Director's Review and Order be approved.

At hearing, the decision of the Director's Administrative Review shall be modified pursuant to ORS 656.340(16)(d) 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.

OAR 436-120-0320(11)(c)(A) provides that a worker is eligible for vocational assistance if, as a result of the limitations caused by the injury or aggravation, the worker is not able to return to regular employment.

Based on a complete review of the evidence, the Director was persuaded that claimant could return to his regular work and was therefore ineligible for vocational assistance. That opinion was supported by substantial evidence in the record.

The last time Dr. Carpenter examined claimant was on April 30, 2009 (Ex. 25-6). At that time, he found claimant's condition medically stationary and released him to return to regular work as of May 1, 2009 (Ex. 8). Although Dr. Carpenter indicated on September 16, 2009 that

claimant had certain work restrictions and he could not return to work as a construction laborer, Dr. Carpenter did not state that those limitations were due to the accepted left foot/ankle condition nor did he state that claimant was unable to return to his job at injury of roofing (Ex. 15). On September 18, 2009, Dr. Carpenter clarified that claimant was released to his regular work without restrictions regarding his accepted left ankle/foot condition (Ex. 16-1). Dr. Carpenter also understood that claimant was working as a roofer at the time of his aggravation and that his working activities continued to be suitable physically for claimant to perform regarding his accepted left foot/ankle condition. *Id.* Dr. Carpenter clarified that any physical restrictions claimant had were attributable to unrelated conditions such as plantar fasciitis (Ex. 16-2).

It wasn't until October 10, 2009, when Dr. Carpenter talked with claimant's attorney, that he stated claimant could not return to work as a roofer or construction worker given his physical restrictions (Ex. 17). During his deposition, Dr. Carpenter explained that claimant's attorney convinced him that "there *might* very well be some sort of a part of roofing, especially if it's an extremely high pitch, that *might* be difficult with a painful ankle or with an ankle that has decreased motion and has a *** tendency to *** respond to excessive motion or angulations of his ankle when he is trying to traverse around a roof. I have been on a roof and it can be uncomfortable." (Ex. 25-9; emphasis added). On the other hand, if claimant actually returned to regular work and went back to his regular work as a roofer, Dr. Carpenter concluded that information would be convincing evidence that he was capable of performing his regular work activities (Ex. 25-8). Also, during that deposition, Dr. Carpenter indicated that if claimant was unable to tolerate certain activities it was from early degenerative changes in his subtalar joint (Ex. 25-11).

SAIF did not accept the degenerative changes in claimant's subtalar joint. Therefore, for that reason alone, any physical limitations claimant may have are not due to the accepted industrial injury. Dr. Carpenter has variously attributed claimant's physical limitations to the accepted left ankle/foot condition, unrelated plantar fasciitis, and unrelated degenerative changes in the subtalar joint. Those unexplained opinions are insufficient to establish that claimant's permanent impairment is due to the industrial injury.

On September 28, 2009, the Workers' Compensation Division Employment Services Team became aware that "throughout the initial injury, the two years of claim closure, and aggravation, [claimant] was performing his regular job until the employer laid off workers. *** [claimant] contested the work release at that point and began stating he could not return to regular work, despite performing the work for over two years." (Ex. 21-3). Dr. Carpenter conceded that just such information was convincing that claimant was capable of performing his regular work. Therefore, any opinions to the contrary were not supported by complete and accurate information and are disregarded. Finally, Dr. Carpenter's belief that there "might" be some part of roofing that "might" be difficult as a result of the industrial injury was insufficient to establish an inability to return to work by reasonable medical probability. For all those reasons, the Director's Order did not abuse its discretion in finding that claimant was returned to his regular work. Therefore, the January 7, 2010 Director's Review and Order will be approved.

ORDER

IT IS HEREBY ORDERED that the January 7, 2010 Director's Review and Order is approved in its entirety.