
In the ORS 656.245 Medical Services of

Jeff Goodwin, Claimant

Contested Case No: 11-024H

FINAL ORDER

November 29, 2011

JEFF GOODWIN, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

The Workers' Compensation Division's Resolution Team (RT) and Administrative Law Judge (ALJ) Gregory J. Naugle upheld insurer Liberty Northwest Insurance Corporation's (insurer's) refusal to pay for palliative physical therapy services on the grounds claimant Jeff Goodwin (claimant) was not in a vocational training program. Claimant seeks review of RT's Administrative Order. I affirm.

FACTUAL SUMMARY

I adopt the facts as found in RT's order and restate them here in part for clarity. In 2007 claimant suffered a compensable back injury that insurer accepted as a lumbrosacral strain, non-disabling. In 2010, claimant contacted a claims adjustor and asked for authorization for physical therapy for back pain. Claimant said he was a student and was not working. The adjustor told claimant he did not qualify for palliative care because he was not working. Claimant subsequently obtained physical therapy treatment. Insurer refused to pay for that treatment on the grounds claimant was not working and was not in a vocational training program.

Claimant requested review. RT issued an Administrative Order on February 9, 2011, finding claimant was not entitled to palliative care because he was not working or participating in a vocational training program. Claimant requested a hearing. He argued his enrollment in school should be considered participation in a vocational training program entitling him to palliative care. ALJ Naugle issued a Proposed and Final Order on July 22, 2011, upholding RT's decision. However, ALJ Naugle did not rule on RT's conclusion or claimant's argument about whether school enrollment was equivalent to a vocational training program. The Proposed and Final Order discussed the requirements of making a palliative care request and made factual findings claimant had not submitted a care request meeting the controlling rule's requirements. ALJ Naugle upheld RT's order on these grounds.

Claimant filed exceptions. Those exceptions state, in part, that the Proposed and Final Order is erroneous because it is based on a legal issue, the adequacy of claimant's palliative care request, that was never raised, addressed, or argued by any party. Claimant also argues his school participation should qualify as a vocational training program.

CONCLUSIONS OF LAW

RT's Administrative Order may only be modified on review if it is not supported by substantial evidence or reflects an error of law. OAR 436-001-0225(2). Under this standard, the

reviewing entity must “evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence.” *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295, (1990). Under substantial evidence review, the reviewer cannot make original factual findings. “Nothing in our understanding of ‘substantial evidence’ review comports with an adjudicator rendering findings of fact. Rather, the rendition of findings of fact is associated with *de novo* review.” *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62 (2006).

The Proposed and Final Order is incorrect for two reasons. It makes original factual findings. It also is based on the legal issue of the adequacy of claimant’s palliative care request that was never raised during the proceedings.

The Proposed and Final Order does state it is applying the substantial evidence standard of review. However, the order first states the legal requirements for a palliative care request, then makes factual findings about the contents of claimant’s care request, and then reaches the legal conclusion the care request did not meet the legal requirements. A palliative care request must meet certain procedural requirements. OAR 436-010-0290(1)(a)(A-E). However, RT did not make any factual findings about claimant’s care request. The findings in the Proposed and Final Order that describe the details of claimant’s care request therefore constitute improper original factual findings that support the order’s legal conclusions. Absent these findings, there is not a factual basis for the order’s legal holding.

The order also errs in basing its ruling on an issue the parties had not raised, offered evidence on, or argued. A reviewing body should not address questions the parties have not raised. *Department of Human Services v. MJ*, 236 Or App 373, 379 (2010); *McKinley v. Owyhee Project North Bd. Of Control*, 104 Or App 576, 579 (1990). The reviewing body should not speculate about, or develop, or make a party’s argument where that party has failed to make the argument itself. *Stewart v. State*, 237 Or App 86, 92 (2010). The scope of review at hearing is limited to the issues the parties raise. *Robin A. Rohrbacker*, 53 Van Natta 51, 52 (2001); see *Mickey Walker*, 61 Van Natta 900, 901 (2009) (vacating portion of Opinion and Order that purported to decide matters not raised at hearing). Because insurer did not raise the argument about the form of claimant’s care request, claimant did not have the opportunity to present argument or evidence on this issue to RT or at the hearing.

Although the Proposed and Final Order contains errors, the question remains whether that order and RT’s order reached a correct result. RT’s order concluded claimant was not entitled to palliative care because he was in school but not in a vocational training program that satisfies the requirements of ORS 656.245(1)(c)(J) and OAR 436-010-0290(1). Claimant argued to the ALJ that his school program should qualify as a vocational training program.

ORS 656.245 establishes the requirement in dispute here. An injured worker whose condition has been declared medically stationary is only entitled to palliative care the attending physician prescribes and the insurer approves if that care is necessary to enable the worker to continue working or participating in a “vocational training program.” ORS 656.245(1)(c)(J). Whether claimant’s school program meets this definition is a question of law that I can review.

The term “vocational training program” is not defined in ORS 656.245. However, its meaning can be derived by examining the purpose of the workers’ compensation statutes, and ORS 656.340, which addresses the purpose of vocational training within the workers compensation system.

Under principles of statutory construction, we can look to other sections of the workers’ compensation statutes to determine the meaning of “vocational training program” as it is used in ORS 656.245(1)(c)(J). Where the same or similar language is used in different statutes within the same statutory scheme, that language is interpreted as having the same meaning wherever it is used. *Tharp v. PSRB*, 338 Or 413, 422 (2005); *Godfrey v. Fred Meyer Stores*, 202 Or App 673, 679 (2005); *State v. Harris*, 107 Or App 105, 111 (2001).

ORS 656.340 addresses the topic of vocational assistance and vocational training. The purpose of vocational training is “to return the worker to employment which is as close as possible to the worker’s regular employment at a wage as close as possible to the weekly wage [paid for the worker’s regular work].” ORS 656.340(5). An injured worker is only eligible for vocational training if their compensable work injury caused a disability that prevents them from working at employment that is similar to the worker’s job when they were injured, and that pays close to the same wages the worker was earning in their prior employment. ORS 656.340(6). “Vocational assistance . . . aims to ameliorate lost earning capacity by retraining. It promotes the general goal of self-sufficiency by assisting permanently disabled workers to achieve wages comparable to their pre-injury wages.” *Tee v. Albertson’s, Inc.*, 314 Or 633, 641 (1992).

It is not the purpose of the workers’ compensation system to place a worker in a better position than they were in before they were injured. Nor is it a goal of the workers’ compensation system to generally improve the quality of a worker’s life or to enable them to better themselves economically or socially. The intent of the system is to restore the injured worker to an economically self-sufficient status by supporting their ability to work following an injury. ORS 656.012(1)(c).

The legislature specifically chose to limit palliative care to that necessary to enable an injured worker to participate in a “vocational training program.” The legislature could have authorized palliative care for a worker involved in any kind of training, education, or school. However, the legislature did not do so. The legislature’s use of the phrase “vocational training” appears to be an intentional reference to the vocational assistance and training described in ORS 656.340. The central concept of when vocational training is authorized under ORS 656.340 is that it must be necessary to help overcome a disability arising from the compensable injury that prevents the worker from doing the work they previously performed, and earning the pay they previously earned.

Claimant’s claim was accepted without a finding of any disability. The current legal status of his claim, therefore, is that he does not have any disability, associated with his compensable work injury, that prevents him from performing the work he did at the time he was injured, or from earning the pay he earned doing that work. Claimant therefore does not qualify for vocational training, as that concept is applied in the workers’ compensation statutes. He has

voluntarily chosen to attend school for personal reasons not legally related to his compensable work injury. His school program therefore is not a “vocational training program” under ORS 656.245(1)(c)(J) and he is not entitled to receive palliative care to participate in that program.

IT IS HEREBY ORDERED for the reasons stated above, RT’s February 9, 2011 Administrative Order is affirmed. ALJ Naugle’s July 22, 2011 Proposed and Final Order is affirmed on grounds other than those stated in that order. Claimant is not entitled to palliative care to enable him to participate in his school program.