

In the ORS 656.340 Vocational Assistance Dispute of

Adan G. Ibarra, Claimant

Contested Case No: 10-004H

FINAL ORDER

February 4, 2011

ADAN G. IBARRA, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Insurer SAIF Corporation (insurer) found claimant Adan G. Ibarra (claimant) ineligible for vocational assistance. ORS 656.340. Following administrative review, the Workers' Compensation Division's Employment Services Team (EST) issued a Director's Review and Order affirming insurer's position. Claimant requested a hearing. Following that hearing, Administrative Law Judge (ALJ) Darren L. Otto issued a Proposed and Final Order affirming EST's order. Claimant requested director review of that order. I affirm both orders.

FACTUAL SUMMARY

Claimant compensably injured his arm and foot on December 22, 2004, when he fell while performing his regular job as a roofer. The accepted conditions are fracture, distal body of calcaneus, left foot, and radial head fracture, right elbow. Claimant filed an aggravation claim on October 8, 2008, that was accepted for lateral impingement of the calcaneus on the peroneal tendons due to fracture callus overgrowth, left foot. His report of the aggravation stated October 8, 2008, was his last day of work.

Doctor Richard Carpenter treated claimant. On February 16, 2006, Dr. Carpenter signed a job analysis for claimant that insurer submitted to him, indicating he had reviewed that document. That form said claimant's job title was "roofer" and described the physical tasks claimant performed in that position. On April 7, 2009, Dr. Carpenter wrote that claimant could return to his regular work on April 2, 2009. On April 30, 2009, Dr. Carpenter reported that claimant could return to his regular work May 1, 2009. Dr. Carpenter wrote on June 9, 2009, that claimant did not have any limitation in the repetitive use of the left foot/ankle for the accepted conditions; did not have any strength loss in the left foot/ankle for the accepted conditions; and was able to stand or walk, or both, for more than two hours total in an eight-hour day. Dr. Carpenter also indicated on that form that there was no history of prior injury to the ankle.

Insurer found on August 18, 2009, that claimant was not eligible for vocational assistance. Insurer concluded claimant was able to return to his regular work.

EST held a telephone conference with the parties on September 16, 2009. Claimant said during that conference that he had been working as a roofer at the time he aggravated his condition, but that he could no longer perform his job duties.

Dr. Carpenter stated on September 16, 2009, that claimant should be able to stand and walk for a cumulative one hour out of an eight-hour work day; could rarely lift 50 pounds and

frequently carry up to 30 pounds; and was limited to using stairs and ladders on a rare basis. Dr. Carpenter stated claimant could not return to his work as a construction laborer.

On September 18, 2009, Dr. Carpenter responded to a letter from insurer by checking boxes following statements printed on the letter. He checked boxes indicating claimant was released to his regular work, which was identified as “his job at aggravation.” Another box indicated claimant had been working as a roofer at the time of aggravation and Dr. Carpenter checked a box indicating this work continued to be physically suitable for claimant. The doctor checked another box that claimant was able to stand or walk for more than two hours in an eight-hour day.

EST spoke with Ms. Melissa Morris, a vocational coordinator for insurer, on September 28, 2009. EST’s notes of that conversation report that Ms. Morris stated: “[T]hroughout the initial injury, the two years of claim closure, and aggravation, [claimant] was performing his regular job until the employer laid off workers. Ms. Morris stated [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.”

On October 10, 2009, Dr. Carpenter signed a letter from claimant’s attorney, acknowledging their conversation. Dr. Carpenter had said the permanent restrictions against standing, lifting, and the use of ladders and stairs would prevent claimant from returning to his work as a roofer.

Dr. Charles T. Weeks conducted a medical arbiter examination of claimant on October 15, 2009. Dr. Weeks found claimant was “significantly limited in his ability to repetitively use the left foot and ankle due to the diagnosed chronic and permanent condition arising out of the accepted condition” but that there was no instability in the left ankle. Claimant would be able to stand or walk for a total of more than two hours in an eight-hour period. Dr. Weeks said his findings were due to the accepted conditions.

EST issued its order on January 7, 2010. EST found, as of that time, neither Dr. Carpenter nor Dr. Weeks had expressly tied claimant’s work restrictions to his accepted conditions. Dr. Carpenter had also repeatedly stated claimant could return to his regular work. EST therefore concluded claimant could return to his regular work. The insurer’s finding of ineligibility for vocational assistance was therefore correct.

Dr. Carpenter was deposed on August 17, 2010. He had not seen claimant since April, 2009. He agreed that if claimant had returned to work as a roofer, that would be “convincing” about whether claimant could return to his regular work. The doctor also explained that when he signed the points in insurer’s September 18 letter, he did not understand that claimant was a roofer. When he indicated on April 30 that claimant could return to his regular work, the doctor only meant return to work full time, not roofing specifically. He said he had changed his view to think claimant could not return to roofing work while talking with claimant’s attorney after signing the September 18 insurer letter. Dr. Carpenter was also asked to comment on EST’s order, which stated Dr. Carpenter had not expressly tied the physical activity restrictions to claimant’s accepted condition. Dr. Carpenter said the physical restrictions, and his opinion

claimant could not return to work as a roofer, were due to claimant's work injury. Specifically as to muscle weakness in claimant's ankle, which was noted in the medical arbiter report, Dr. Carpenter said this was due to early degenerative changes in the subtalar joint, rather than nerve weakness. Dr. Carpenter said this resulted from the work injury. Contrary to the findings of EST and the ALJ, Dr. Carpenter did specifically state in the deposition that claimant's work restrictions, including making limited use of stairs and ladders, were related to his work injury, and that the work injury prevented claimant from returning to work as a roofer.

ALJ Otto found claimant continued his work as a roofer until he was laid off. He also cited Dr. Carpenter's deposition testimony that claimant's inability to tolerate certain activities was due to degenerative changes in the subtalar joint and pointed out that was not an accepted condition. The ALJ also pointed out that Dr. Carpenter's opinion had changed several times and had been contradictory and that the doctor said during his deposition claimant's injury "might" make it difficult to return to roofing work. Finding this medical evidence unpersuasive, ALJ Otto affirmed EST's order.

CONCLUSIONS OF LAW

In this vocational services dispute I may only modify the previous order if it violates a statute or rule, exceeds the director's statutory authority, was based on an unlawful procedure, or constitutes an abuse or unwarranted exercise of discretion. New evidence is admissible at the hearing. ORS 656.340(16)(d); OAR 436-001-0225(3). As the party asserting error, claimant bears the burden of persuasion. Where the evidence is closely balanced, the party bearing that burden will lose. *Marvin Wood Products v. Callow*, 171 Or App 175, 183-184 (2000).

An injured worker may be eligible for vocational assistance if they are unable to return to the work they were performing at the time of injury, or other work for which they are qualified and which has pay similar to what they were receiving at the time of injury, due to a substantial handicap that results from their accepted compensable condition. ORS 656.340(6). EST and ALJ Otto concluded the medical evidence did not establish claimant met this requirement.

EST's order may not be valid for the reasons given in the order, but it still reached a correct result. EST's order concludes neither Dr. Carpenter nor Dr. Weeks directly tied the work restrictions they approved to the accepted condition. However, Dr. Weeks' report expressly states claimant is "significantly limited in his ability to repetitively use the left foot and ankle due to the . . . condition arising out of the accepted condition." There is no evidence in the record that claimant ever suffered any injury to his left ankle other than the accepted condition. Dr. Carpenter's June 4, 2009, statement says there is no prior history of injury to the ankle. There was thus no source for the restrictions other than the accepted condition. Other evidence does support the order.

The two pieces of evidence that are critical to resolving this dispute are the statement by vocational counselor Morris and Dr. Carpenter's final opinions expressed during his deposition. The statements from each of them are flawed. Dr. Carpenter expressed multiple, conflicting views on whether claimant could return to his regular work. Dr. Carpenter signed a report on June 9, 2009, after the aggravation, saying claimant had no restrictions on repetitive use of the

ankle, no strength loss in the ankle, and no instability in the ankle Dr. Carpenter made multiple statements that claimant could return to his “regular work” before clarifying at the deposition that he had not always understood this meant returning to work as a roofer. However, insurer did not ask Dr. Carpenter during his deposition to clarify why he had signed insurer’s letter, that specifically mentioned claimant’s regular work was roofing, saying claimant could return to his regular work. Dr. Carpenter was also not asked at the deposition about the February 16, 2006, job analysis he had signed that explained the tasks claimant performed as a roofer.

Ms. Morris told EST claimant worked until he was laid off. However, there is no evidence in the record of the date claimant was laid off. Insurer’s September 18, 2009, letter to Dr. Carpenter states claimant was working as a roofer “before his aggravation,” which implies claimant stopped working when he aggravated the existing condition.

EST and ALJ Otto appear to have concluded claimant stopped working when he was laid off, and not as a result of the aggravation. The record establishes claimant first reported his aggravation claim on October 8, 2008. The 827 form that claimant filed, reporting the aggravation, states claimant last worked on October 7, 2008. There is not clear and specific evidence in the record that claimant continued working as a roofer after the aggravation, or that he filed the aggravation claim at the same time he was laid off. There is no statement in the record from claimant rebutting insurer’s allegation claimant only stopped working when he was laid off, in spite of claimant’s having participated in a telephone conference, and in spite of a hearing having been held at which claimant could have offered evidence on this point. Either party to this dispute could have contributed significantly to an appropriate resolution by placing specific clarifying evidence in the record on this point.

As the party asserting error in the prior orders, claimant has the burden of persuasion on that point. A reasonable person could read Ms. Morris’ statement to say that claimant was able to work, even with the aggravated condition, and only stopped working when he was laid off. Claimant had the opportunity to directly rebut this implication, but did not do so. Dr. Carpenter reported several times that he believed claimant could return to work, including on documents that stated claimant was a roofer, and only changed that view many months after he had last seen claimant and following a conversation with claimant’s attorney. His final opinion is, therefore, not very persuasive. These facts cast significant doubt on the assertion that the limitations related to claimant’s accepted conditions prevent him from returning to roofing work. Claimant has therefore not met his burden of establishing the prior orders are erroneous.

IT IS HEREBY ORDERED EST’s January 7, 2010 Director’s Review and Order, and ALJ Otto’s November 15, 2010 Proposed and Final Order, are affirmed.