

In the Matter of the Vocational Assistance Dispute of
Presnell, Raymond, Claimant

Contested Case No: H01-110

PROPOSED & FINAL ORDER

March 5, 2002

SAIF CORPORATION, Petitioner
RAYMOND PRESNELL, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Paul Vincent conducted a hearing in this matter on December 20, 2001. Petitioner SAIF Corporation (SAIF or insurer) appeared through attorney Michael Fetrow. Respondent Raymond Presnell (claimant) appeared through and with attorney Christopher Moore. The Workers' Compensation Division (WCD) appeared through attorney Carol Parks. The petitioner appeals an administrative order by the Workers' Compensation Division, Rehabilitation Review Unit (RRU) requiring SAIF to determine claimant's eligibility for vocational assistance.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUE

The issue is whether RRU correctly determined that SAIF was required to determine claimant's eligibility for vocational assistance.

EVIDENTIARY RULINGS

WCD Exhibits 1 – 22 were admitted into the record without objection.

FINDINGS OF FACT

The parties did not challenge the findings of fact contained in MRU's Administrative Order. Having reviewed the administrative record, I adopt the following findings of fact set forth in the Administrative Order:

The claimant injured his low back while working as a laborer for a cement contractor. SAIF initially accepted the conditions of lumbar sprain/strain, and fusion L4-5/S1 with left leg foot drop. Left hip osteoarthritis was accepted and added to the claim on September 14, 2000. To date, claimant has been awarded a total of 54 percent unscheduled permanent partial disability (PPD) for the lumbosacral back and left hip, and 30 percent scheduled PPD for the left leg.

In 1995, claimant sought treatment for left hip osteoarthritis. SAIF determined that the condition was compensable, and related to his accepted lumbar sprain/strain. Claimant

underwent a total left hip arthroplasty (replacement) on December 14, 1999.

At SAIF's request, the Worker's Compensation Board reopened claimant's claim, on its own motion, on January 25, 2000.

On July 17, 2000, claimant asked SAIF to accept left hip osteoarthritis as a new condition. SAIF denied the request.

An Opinion and Order on January 25, 2001 ordered SAIF to reopen claimant's claim, and process the new medical condition claim for left hip osteoarthritis. SAIF has appealed that decision and the case is currently pending before the Court of Appeals.

On May 7, 2001, claimant requested that SAIF provide vocational assistance. On May 15, 2001, SAIF refused to determine vocational eligibility because his aggravation rights had expired.

On May 24, 2001, the claimant requested administrative review of SAIF's refusal to determine his eligibility for vocational assistance.

On September 13, 2001, RRU ordered that SAIF determine claimant's eligibility for vocational assistance.

OPINION AND CONCLUSIONS OF LAW

Standard of Review

I may modify the director's order only if it: violates a statute or rule; exceeds 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. ORS 656.283(2)(c). In determining whether one of those criteria exists, I may admit evidence, which was not before RRU, and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996); see also *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proof rests on the proponent of that fact or position. ORS 183.450(2).

Entitlement to Vocational Benefits for a New Medical Condition

SAIF raises the same arguments at hearing as were raised during the Administrative Review; claimant and WCD rely on the conclusions of the Administrative Review in response. Compare Exs. 20, 21, 22.

SAIF's contention is that claimant is not entitled to vocational benefits because "no statute authorizes vocational assistance for his 1971 injury." SAIF contends that because claimant's aggravation rights expired in 1976, the subsequent "worsening of his condition" does not entitle him to vocational assistance.¹ SAIF further argues that OAR 436-120-0003(3) is

¹ See ORS 656.340(4) which provides in relevant part:

"A worker is not entitled to vocational assistance benefits when possible eligibility for such

invalid because ORS 656.340 applies only to claims for compensable injuries and aggravations, a reopening of the claim to process a new medical condition is neither of those, and therefore OAR 436-120-0003(3) is inconsistent with the statute and invalid.

I find WCD's position, raised in the Administrative Order and at hearing, to be more persuasive. The director concluded that the January 25, 2001 Opinion and Order changed the circumstances of claimant's claim such that he was now entitled to eligibility under OAR 436-120-0003(3). The director's argument was well reasoned:

OAR 436-120-0003(3) provides that a claim for aggravation, or a reopening of a claim to process a newly accepted medical condition will be considered a new claim for purposes of vocational assistance eligibility and vocational assistance. The January 25, 2001 Opinion and Order ordered SAIF to reopen [claimant's] claim and to process the new medical condition claim for left hip osteoarthritis. I therefore conclude one of the conditions in OAR 436-120-0003(3) has been met, and SAIF is required to determine [claimant's] eligibility for vocational assistance.

SAIF also contends that OAR 436-120-0003(3) is invalid because ORS 656.340 applies only to claims for compensable injuries and aggravations. SAIF contends that a reopening of a claim to process a newly accepted condition is neither of these, and OAR 436-120-0003(3) is therefore inconsistent with statute. ORS 656.340(1)(b) states that the insurer shall evaluate eligibility for vocational assistance of a worker with a claim for a disabling compensable injury or a claim for aggravation. Under OAR 436-120-0003(3), a reopening of a claim to process a newly accepted medical condition falls within the definition of a "disabling compensable injury." I therefore conclude that the rule is valid, and it requires SAIF to determine [claimant's] eligibility for vocational assistance.

Agency interpretations of their own rules are appropriately given a degree of assumptive validity if the agency has expertise based upon qualifications of its personnel because of its experience in the application of the statute to varying facts. *Springfield Education Association v. Springfield School District No. 19*, 290 Or 217, 227-228 (1980). Here, the rule is being interpreted by the agency that adopted it and the interpretation is a plausible one. Accordingly, I defer to the agency on this issue.

benefits arises from a worsening of the worker's condition that occurs after the expiration of the worker's aggravation rights under ORS 656.273."

ORDER

IT IS HEREBY ORDERED that the RRU's order in this matter, dated September 13, 2001, is affirmed.

DATED this 5th day of March, 2002.

By: _____
Paul Vincent, Hearing Officer
Hearing Officer Panel