In the ORS 656.340 Vocational Assistance Dispute of

Steven L. Blasingame, Claimant

Contested Case No: 06-187H

ORDER REMANDING TO DIRECTOR

March 7, 2007

SAIF CORPORATION, Petitioner
STEVEN L. BLASINGAME, Respondent

Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, a hearing was convened telephonically on February 22, 2007 before Administrative Law Judge Geoffrey G. Wren. Claimant was represented by Philip H. Garrow The employer, TMA, Inc., and its insurer, SAIF Corporation, appeared by their attorney Thomas R. Nash. The record closed on February 22, 2007.

Exhibits 1 through 49 and 51 through 52 were admitted at hearing. Exhibits 42a and 50 were withdrawn.

ISSUES

Vocational Services: SAIF appeals the September 29, 2006 Director's Review and Order setting aside SAIF's January 26, 2006 decision to terminate claimant's eligibility for vocational services and ordering SAIF to resume provision of vocational services and pay claimant's counsel and attorney fee.

Attorney Fees: Should the Director's order be affirmed, claimant seeks award of an attorney fee under ORS 656.385.

STATEMENT OF FACTS

Claimant is right-hand dominant. He injured his right elbow at work on August 21, 2003. SAIF accepted a claim for right lateral epicondylitis. (Exs. 1, 2, 21). At the time of his injury, claimant was employed as an automotive technician at Teague Motor Company ("Teague"). Claimant's job included transmission rebuilding, engine overhauls, bearing replacement, and differential service. Claimant's work required frequent lifting of up to 20 pounds, occasional lifting of up to 50 pounds, and rare lifting of up to 100 pounds with an available hydraulic jack. Claimant also frequently had to push and pull vehicle parts on carts or, rarely, push and pull vehicles into position. (Exs. 5, 7).

Claimant finished high school and attended San Diego City College, where he received a Certificate in Automotive Technology. Claimant also possesses a General Motors certification as a master technician. Prior to Teague, claimant had over 20 years of experience in automotive repair and management. (Exs. 2, 7).

In October 2003, claimant began treating with Dr. Verheyden, an orthopedic surgeon. Claimant stopped working that same month. (Ex. 2). On March 25, 2004, Dr. Verheyden

arthroscopically performed a right lateral epicondylar release, extensive debridement of the right elbow with removal of posterolateral osteophytes from the olecranon, and injection of the radial tunnel with Kenalog. (Ex. 4). On July 23, 2004, claimant told Dr. Verheyden that his elbow remained painful and that he could work only with one hand. The doctor noted on examination that claimant was quite sensitive and withdrew on even light palpation "almost to the extent that he [had] more pain than what [the doctor] expect[ed]." The doctor stated that he did not expect that claimant would be able to return to his work at injury. (Ex. 6).

In June 2004, claimant returned to Teague in a light-duty position doing electronics diagnostics, installation of accessories, and automotive tune-ups on an as-needed basis. (Ex. 7). Claimant was restricted to one-handed work. Teague terminated claimant's employment on September 14, 2004 because they no longer had the ability to accommodate one-handed work. (Ex. 8).

Denis Broderick, a vocational rehabilitation consultant, evaluated claimant's eligibility for vocational services. He recommended on September 24, 2004 that SAIF provide claimant with vocational evaluation services. (Ex. 8). SAIF declared claimant eligible for vocational assistance as of October 6, 2004. (Ex. 9).

Claimant underwent a physical capacities evaluation ("PCE") on October 11, 2004. He demonstrated full participation. The evaluators concluded that claimant had the ability to lift in the medium-heavy range of physical demands, including lifting and carrying 50 pounds without difficulty. (Exs. 10, 11). Dr. Verheyden reviewed the PCE. He wrote SAIF on November 22, 2004 that his examination showed that claimant could not carry 25 pounds with his right upper extremity and that he had "significant problems with load-bearing activities or any stress-related maneuvers utilizing his right elbow." Dr. Verheyden doubted that claimant could return to his work at injury. He declared claimant medically stationary, stating that he did not expect claimant's condition to improve significantly over time. (Ex. 11).

Dr. Verheyden again stated on January 3, 2005 that claimant would not be able to do his work at injury, but the doctor expressed concerns about "symptom magnification on exam and possible secondary gain issues." He nonetheless continued to think that claimant would not significantly improve with time. (Ex. 12).

Claimant underwent a work capacities evaluation on January 25, 2005. Claimant met validity criteria on testing, and the evaluator felt that his subjective complaints were consistent with objective findings. The evaluator concluded that claimant could work in the medium-heavy physical capacity range so long as work enabled him to keep loads close to his body and keep his right forearm in a supinated or neutral position. The evaluator felt that claimant could perform mechanical work if it allowed him to maintain these postures. Extension of the elbow with or without force provoked symptoms, and this problem prevented claimant from returning to his job at injury. (Ex. 13).

On February 1, 2005, Mr. Broderick recommended that claimant be provided training services to acquire skills and knowledge to gain new employment. (Ex. 14).

Claimant underwent an independent medical examination by Dr. Courogen on February 11, 2005. On examination, the doctor noted that claimant did not exaggerate his symptoms and that his elbow motion was better than at the time of his PCE. Dr. Courogen concluded that claimant was capable of modified work with limited stressful repetitive use of the right upper extremity. He considered this a permanent limitation. (Ex. 15).

By letter dated February 28, 2005, SAIF informed claimant that he was entitled to authorized training services. (Ex. 17).

Claimant returned to Dr. Verheyden on March 11, 2005. Claimant complained that he still had pain and discomfort in his right elbow, unchanged following several months of conservative treatment. Dr. Verheyden performed a complete bilateral physical examination. Claimant had exquisite tenderness along the entire posterolateral gutter and the course of his right olecranon and mild tenderness around the lateral epicondylar region. Strength was decreased slightly due to discomfort when claimant's arm was abducted and not held to his side. Dr. Verheyden stated that claimant had a fixed stable injury, and he did not expect further improvement. He stated that claimant could perform repetitive activities with his right arm only with the arm at his side. (Ex. 18).

Claimant's accepted claim closed March 17, 2005 with award of 9 percent scheduled permanent partial disability ("PPD"). (Ex. 19).

Claimant saw Dr. Smith for a medical arbiter examination on May 28, 2005. Claimant complained of continued, constant pain in the posterior and posterolateral aspects of his right elbow. On examination, he had decreased right elbow flexion and extension and tenderness over the radial and ulnar grooves, but not over the right epicondyle. Claimant also had significant loss of right grip strength, which Dr. Smith attributed to the work injury, surgery, and arthritic change. Dr. Smith considered all the findings valid. He noted that despite treatment and passage of time, claimant's elbow had not improved to the point he could return to his work at injury. (Ex. 20).

By Order on Reconsideration dated June 14, 2005, claimant was granted 14 percent scheduled PPD. In holding that claimant was entitled to an increased award, the ARU relied on Dr. Smith's medical arbiter report. (Ex. 21).

In October 2005, claimant was filmed without his knowledge operating a hand-held leaf blower, riding a lawn tractor, and throwing a flying disk. Claimant held the leaf blower with one hand, alternatively using the right and left hands. When holding the leaf blower in his right hand, claimant tended to hold it downwards, to his side, but at times he held it at arm's length. While operating the rider mower, claimant more often hand his arms near his sides, but he extended his right arm while turning. When throwing the flying disk, claimant used his right arm, extending it with each throw. Claimant did not appear in the imaging to have any discomfort performing these activities. (Ex. 22).

Dr. Verheyden viewed the surveillance imaging. On January 12, 2005, he opined that, based on the imaging and claimant's job description, claimant could perform his regular work

and did not need vocational training. Dr. Verheyden further opined based on his review of the imaging and his chart notes that claimant had misrepresented his physical capacities. (Ex. 24).

On January 20, 2006, SAIF terminated claimant's vocational assistance on the ground that his lack of suitable employment no longer was due to his work injury. (Ex. 25; *see* Ex. 26).

Claimant changed attending physicians to Dr. Andrews on February 16, 2006. He told the doctor that Dr. Verheyden was unable to help him further. (Ex. 27). Dr. Andrews noted that claimant was using Ultracet for pain and Flexeril to help him sleep at night. On examination, claimant did not demonstrate any abnormal pain behaviors. Right elbow motion was full. There were a couple of points of tenderness about the medial and lateral elbow. No effusion was obvious. Forceful use of the right wrist extensors and finger extensors provoked elbow pain. Claimant also had some sensory deficits. Dr. Andrews suspected radial or ulnar neuropathy and referred claimant to Dr. Mara. (Ex. 28).

On February 23, 2006, Dr. Verheyden noted that claimant had limited use of his right upper extremity. (Ex. 29).

The next day, claimant and his wife met with Dr. Verheyden. They discussed the surveillance imaging and Dr. Verheyden's January 12, 2006 opinion that claimant could return to his work at injury. Claimant told the doctor that the imaging was not an accurate representation of his abilities because he had to do work around his house and that he took pain medication to be able to mow the lawn, use a leaf blower, or engage in similar activities. Claimant complained of persistent pain and said that he could not return to his work at injury. On examination, claimant had good right elbow motion, but he had diffuse tenderness about the lateral epicondyle along the posterolateral tip of the olecranon. Claimant seems a little less tender than on previous examinations. Dr. Verheyden did not retract his January 12, 2006 opinion. (Ex. 30).

Dr. Andrews reviewed the surveillance imaging. On April 5, 2006, he stated:

> This video footage clearly demonstrates that Mr. Steven Blasingame is having no trouble using his right upper extremity for repetitive and sometimes forceful use. He does not seem to fail with this arm at all. Fortunately for him, this is a good sign and I am going to release him to regular duty without restrictions.

(Ex. 32).

Claimant appealed termination of his vocational eligibility. Andre Allen, a vocational consultant with the Workers' Compensation Division, held a phone conference with claimant, his attorney's legal assistant, SAIF's vocational coordinator, SAIF's counsel, and the claims adjuster. Claimant stated that he had pain radiating down his arm to his right hand. He did not agree that he could do regular work. He said that the surveillance imaging did not mean that he could handle heavy mechanical work on a full-time basis. (Ex. 33).

Claimant saw Dr. Andrews on May 3, 2006. The two discussed the surveillance imaging. Claimant expressed concern about lifting 100 to 150 pound transmissions. Dr. Andrews stated

that claimant "may need to be restricted to some degree" because of his injury and surgery. He arbitrarily picked a 50 pound lifting limit, explaining that the imaging showed claimant using his right arm repetitively, but it did not show claimant lifting anything heavy. (Ex. 34).

Claimant saw Dr. Mara on July 31, 2006. Dr. Mara reviewed Dr. Verheyden's and Dr. Andrews' chart notes. On examination, claimant showed some pain behaviors and withdrawal to palpation of his arm. Claimant was diffusely tender over the lateral epicondyle and olecranon. Terminal extension of the elbow caused some pain. Claimant's elbow motion otherwise was full. Dr. Mara did not think revision surgery would benefit claimant. He declined to give claimant work restrictions, as he was "seeing him as a second opinion for medical reasons only." (Ex. 36).

On August 21, 2006, claimant began working as an automotive mechanic at a suitable wage.

Dr. Mara reviewed the surveillance imaging. On September 8, 2006, he explained that the imaging showed claimant performing extensive work with his right arm. Dr. Mara concluded that if claimant was the person depicted, then he was "certainly capable of regular work without restrictions on his right arm." (Ex. 39).

On September 29, 2006, Mr. Allen issued a Director's Review and Order. Mr. Allen found that the leaf blower depicted in the surveillance imaging appeared to weigh under 20 pounds. He found that claimant generally held the blower close to his body, but occasionally he held it in his right hand away from the body. He found that claimant drove a rider mower and tossed a flying disk several times with his right hand. After finding facts regarding Dr. Verheyden's and Dr. Andrews' responses to the surveillance imaging, Mr. Allen reasoned that Dr. Verheyden, Dr. Courogen, and Dr. Smith "all agreed, based on objective medical evidence, that Mr. Blasingame could perform only work that allowed him to avoid repetitive use of his right elbow and to keep his right elbow close to his body." Dr. Mara had declined to comment about claimant's work capacity. Mr. Allen then stated:

> Based on my review of the JA of Mr. Blasingame, I conclude that Mr. Blasingame is medically unable to return to regular work as an automotive technician because, over time, it requires using his right elbow in a manner that exceeds his capabilities. The October 2005 surveillance video showed Mr. Blasingame handling a leaf blower for a few minutes at a time with his right hand, steering a riding lawn mower with both hands and tossing a frisbee with his right hand. The video did not show Mr. Blasingame performing heavy lifting or performing repetitive work activities with his right elbow or with his shoulder and arm in an adducted position. Therefore although Drs. Verheyden, Andrews and Mara indicated, after viewing the surveillance video, that Mr. Blasingame could perform his regular work activities, I disagree, based on the preponderance of the medical evidence discussed above.

Mr. Allen referred to *Dillon v. Whirlpool*, 172 Or App 484 (2001), in support of the position that he did not have to defer to Dr. Verheyden's or Dr. Andrews' opinions. The Director ordered

SAIF to restore claimant's vocational eligibility within 10 days and to pay claimant's counsel a $900 attorney fee. (Ex. 42).

CONCLUSIONS OF LAW AND OPINION

Director's Order

SAIF contends that the director erred in ordering restoration of claimant's eligibility for vocational services. In a vocational assistance case, I may modify a director's order only if it:

(a) Violates a statute or rule;

(b) Exceeds the director's statutory authority;

(c) Was made upon unlawful procedure; or

(d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ORS 656.283(2)(c); OAR 436-001-0225(3). SAIF argues that the director, though its designee Andre Allen, exceeded its authority or abused its discretion or engaged in an unwarranted exercise of discretion by substituting his medical opinion for the expert opinions of Drs. Verheyden, Andrews, and Mara. Claimant responds that the director did not exceed its discretion because Mr. Allen's decision was within the range of conclusions permissible by law and evidence of record.

The parties' positions raise the initial question whether the director in fact has authority to substitute its medical judgment for the expert opinions of record. The legislature has concluded that vocational assistance disputes regarding eligibility for services should be resolved through nonadversarial procedures to the greatest extent possible consistent with constitutional principles. ORS 656.283(2)(a). That conclusion sets the director in somewhat of a different posture than the Workers' Compensation Board or administrative law judges adjudicating cases under the Board's authority.

The director's authority with respect to vocational services cases, however, does not extend so far as to permit the director, through its designee, to substitute its medical judgment for the opinions of medical experts. This conclusion follows from analysis of the text and context of the statutory scheme regarding contested case hearings in vocational services disputes. *See PGE v. BOLI*, 317 Or 606, 610 (1993)(at the first level of statutory construction, a judge examines the text and context of a statute).

ORS 656.283(2)(b) provides for director review when an insurer determines that a claimant is not eligible for services, and the parties cannot reach agreement following that determination. That provision states that the director shall resolve disagreement of the parties through a "a written order containing findings of fact and conclusions of law." That order "shall be based on a record sufficient to permit review under paragraph (c) of this subsection," i.e.,

through a contested case hearing. *Id. See Colclasure v. Wash. County School Dist. No. 48-J*, 317 Or 526, 533 (1993)("There can be no doubt that the proceeding before the [ALJ] is a classic contested case."); *Liberty Northwest Ins. Corp. v. Jacobsen*, 164 Or App 37, 42 (1999)(informal administrative review before director does not include a contested case hearing). Although the Oregon Administrative Procedures Act (APA) does not apply directly to proceedings under ORS Chapter 656, general legal and constitutional principles require that such proceedings be conducted substantially in the manner prescribed by the APA. *Colclasure*, *supra*, 317 Or at 533 n. 3. ORS 183.450 requires that a decision in a contested case hearing be based on evidence. That evidence may include testimonial evidence, provided that the adverse party is afforded the right of cross-examination. ORS 183.450(3). That evidence also may include notice of judicially cognizable facts or official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. ORS 183.450(4).

If the director's designee enjoyed authority to substitute his or her own medical opinion for that of experts of record in resolving a vocational services dispute under ORS 656.283(2)(b), then the opinion of the director's designee would itself be evidence in a contested case hearing. The designee accordingly would have to submit to cross-examination. *See* ORS 183.450(3)(requiring that parties be afforded the right of cross-examination). The statutory text and context shows that the legislature did not intend such a result. Cross-examination of the director's designee would be at odds with the legislative command that vocational services disputes shall be resolved as nonadversarially as possible.

If the medical opinion of the director's designee could not be evidence at a contested case hearing without requiring the designee to submit to cross examination, then the designee's opinion could become evidence only if an ALJ could take official notice of it. *See* ORS 183.450(4) (regarding official notice). The record offers no basis for official notice. The opinion of a medical expert would be admissible only if subject to cross-examination. General principles of law, as set out in ORS 183.450(3), likewise would require subjecting the designee's opinion to cross-examination. In fact, the record suggests that cross-examination would be all the more vital with respect to the designee's opinion. Mr. Allen, the designee here, is a "Vocational Consultant." (Ex. 42). The record does not show whether he has medical training or expertise of any kind.

No basis exists on the record to accept the medical opinion of the director's designee as evidence on review of the director's order. Considered in context, then, ORS 656.283(2)(b)'s requirement of "a written order containing findings of fact and conclusions of law" means an order based on medical evidence extrinsic to the adjudicatory process, not the medical opinion of the director's designee. I turn then to the question whether the director in this case exceeded its authority.

SAIF obtained surveillance imaging in October 2005. The imaging showed claimant handling a leaf blower, driving a lawn tractor, and throwing a flying disk. After watching the imaging, Dr. Verheyden and Dr. Mara gave expert opinions that claimant could perform his regular work. (Exs. 24, 39). Dr. Andrews opined that claimant had no trouble using his right upper extremity for repetitive and sometimes forceful use. (Ex. 32). In ordering SAIF to restore claimant's eligibility, Mr. Allen compared Dr. Verheyden's, Dr. Andrews', and Dr. Mara's

opinions with his own review of the imaging. He noted that the imaging did not show claimant "performing heavy lifting or performing repetitive work activities with his right elbow or with his shoulder and arm in an adducted position." Mr. Allen then stated: "[A]lthough Drs. Verheyden, Andrews and Mara indicated, after viewing the surveillance video, that Mr. Blasingame could perform his regular work activities, I disagree, based on the preponderance of the medical evidence discussed above." He cited *Dillon v. Whirlpool*, 172 Or App 484 (2001), in support of the position that he did not have to defer to Dr. Verheyden's or Dr. Andrews' opinions. (Ex. 42).

Mr. Allen's reference to *Dillon v. Whirlpool*, *supra*, and the preponderance of the medical evidence suggests that he found the doctors' opinions based on the surveillance imaging unpersuasive in light of other evidence of record. Such a finding would be within the director's authority. Mr. Allen's statement that he "disagree[d]" with the doctors' opinions suggests that he applied his own medical judgment following review of the imaging. He did not have authority to do so. The director's order is unclear whether Mr. Allen engaged in a permissible or impermissible analysis of the evidence. I must remand this case for clarification. On further review, the director's designee shall determine whether medical opinions regarding claimant's work capacities based on the surveillance imaging are persuasive in light of the totality of the evidentiary record.

ORDER

IT IS HEREBY ORDERED that the September 29, 2006 Director's Review and Order is reversed and remanded for further proceedings consistent with this opinion.