

In the ORS 656.340 Vocational Assistance Dispute of

**Jennie A. Sample, Claimant**

Contested Case No: 08-026H

**PROPOSED & FINAL ORDER**

December 22, 2009

JENNIE A. SAMPLE, Petitioner

SAIF CORPORATION, Respondent

Before Emerson G. Fisher, Administrative Law Judge

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Claimant appeals the Director's Review and Order issued on January 31, 2008 by the Rehabilitation Review Unit (RRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

Pursuant to notice, a hearing was convened on June 29, 2009, in Portland, Oregon, before the undersigned Administrative Law Judge (ALJ). Claimant was present and represented by attorney Daniel Snyder. The employer, East Portland Imaging Center P.C., and its insurer, the SAIF Corporation, were represented by attorney Leah Sideras. The proceedings were recorded by the ALJ.

The documentary evidence received consists of Exhibits 1 through 47.

The record closed on November 24, 2009, following telephonic closing argument. The proceedings of November 24, 2009 were not recorded.

**ISSUE**

Whether claimant is eligible for vocational assistance.

**FINDINGS OF FACT**

On December 8, 2004, claimant was compensably injured while performing her regular work as an MRI coordinator. As of October 29, 2007, SAIF has accepted the following conditions: (1) right shoulder strain; (2) lumbar strain combined with pre-existing sacroiliac arthropathy condition; (3) right shoulder partial rotator cuff tear; and (4) right shoulder impingement. (Ex. 31).

Among other things, claimant's MRI coordinator duties included the following physical demands: (1) change positions every 30-35 minutes; (2) occasionally lift/carry a maximum of 30 pounds; (3) intermittently push/pull wheelchair bound patients distances of 120 yards, up/down a slight incline (estimated maximum exertion 50-70 pounds of force), one to two times per day (during times of inclement weather, this task is performed while holding an umbrella over the patient); (4) frequent reaching/handling; and (5) intermittent bending/squatting. (Ex. 8).

The claim was first closed in June 2005. (Ex. 7-1). At that time, only a right shoulder strain had been accepted. (*Id.*) Dr. Black (attending physician at closure) released claimant to her regular work. (Ex. 7-2).

The low back condition was accepted on January 11, 2006. (Exs. 10; 12-3). The initial attending physician for the back condition was Dr. Blatt. (Claimant's testimony; Ex. 12-3). Dr. Blatt last saw claimant in May 2005. (*Id.*) Thereafter, Dr. Turner became the attending physician. (Ex. 33-8).

A February 14, 2007 work capacity evaluation (WCE) requested by Dr. Turner determined that claimant did not have the capacity to return to her job as an MRI coordinator. (Ex. 16-10).

Dr. Turner performed a closing evaluation on August 10, 2007, and opined that claimant had no lasting impairment as a result of the work injury. (Ex. 23). Rather, he attributed claimant's limitations (as demonstrated in the WCE) to pre-existing conditions. (*Id.*)

Following a June 14, 2007 Opinion and Order, SAIF accepted right shoulder partial rotator cuff tear and right shoulder impingement.

Dr. Brenneke, who had surgically repaired the rotator cuff in October 2006, performed a closing evaluation of the newly accepted shoulder conditions on September 17, 2007. (Ex. 25). Dr. Brenneke opined that claimant would have had the capacity to perform the MRI coordinator job approximately three months after surgery. (*Id.*) Dr. Turner, who had not seen claimant since March 2007, concurred with Dr. Brenneke. (Exs. 28; 36).

On October 26, 2007, SAIF issued a Notice of Ineligibility for Vocational Assistance. (Ex. 29). Claimant requested review. (Ex. 34).

Dr. Gullo began treating claimant in December 2007, eventually completing Form 827 as the attending physician on January 9, 2008. (Exs. 20; 41).

Relying largely on the opinions of Drs. Turner and Brenneke, RRU concluded that the limitations caused by the work-related injury did not render claimant unable to return to her regular work as an MRI coordinator. Consequently, RRU affirmed SAIF's determination of ineligibility for vocational assistance.

Claimant requested a hearing.

On October 22, 2008, Dr. Gullo referred claimant to Rehab Medical Associates for assessment and compressive work hardening to optimize her ability to function. (Ex. 46).

In a June 22, 2009 response to inquiries from claimant's counsel, Dr. Gullo opined that he did not believe that claimant could return to her MRI coordinator work. (Ex. 47). In doing so, however, he explained he was not qualified to assess functional abilities, and would defer to rehab specialists, such as those to whom he had referred claimant. (Ex. 47).

It does not appear that claimant was evaluated by Rehab Medical Associates.

### CONCLUSIONS OF LAW

Claimant, relying on Dr. Gullo's opinion that she is unable to perform her regular work as an MRI coordinator, argues that RRU erred in concluding that SAIF's determination of ineligibility for vocational assistance should be affirmed. As reasoned below, I disagree.

A director's administrative review regarding vocational assistance may be modified 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.<sup>1</sup> ORS 656.283(2)(c). In determining whether any of the factors set forth in ORS 656.283(2)(c) were violated, the ALJ may admit evidence and make independent findings of fact. OAR 436-001-0225(3); *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993).

As previously noted, RRU relied primarily on the opinions of Drs. Turner and Brenneke to conclude that claimant was able to perform the job at injury. Dr. Turner was the attending physician that requested a WCE to evaluate physical capacities. Although the WCE concluded that claimant could not perform her job at injury, Dr. Turner explained those limitations were due to preexisting conditions.

Dr. Brenneke was the surgeon who performed claimant's rotator cuff repair. When claimant's shoulder condition became stationary, Dr. Brenneke performed a closing evaluation and opined that with respect to the then newly accepted shoulder conditions, claimant was able to return to her job at injury. Dr. Turner, still the attending physician of record, concurred with Dr. Brenneke.

Based on the foregoing, I am not persuaded that RRU's reliance on the opinions of Drs. Turner and Brenneke 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. Accordingly, I conclude that RRU's determination should be affirmed.

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<sup>1</sup> "The phrase 'abuse of discretion' is a legal term of art meaning a discretion exercised to an end or purpose not justified by and clearly against reason or evidence; any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and laws pertaining to the matter submitted. BLACK'S LAW DICTIONARY 10-11(6<sup>th</sup> ed. 1990); *Jerry L. Bell*, 2 WCSR 394, 395 (1997), citing *Casciato v. Oregon Liquor Control Comm'n*, 181 Or 707, 717 (1947) and *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 663 (1979). On review for abuse of discretion, '[t]he essential question is whether the choice made is consistent with one or several objectives to be served by vesting discretion in the decision-maker, under circumstances pertinent to the decision to be made.' *Teresa Brooke*, 8 CCHR 240, 241 (2003) quoting *Liberty Northwest v. Jacobson*, 164 Or App 37, 45 (1999)." *Suzanne P. Blakley*, 9 CCHR 287, 294 (2004).

I acknowledge the argument that Dr. Gullo is claimant's current attending physician, and as such, is in the best position to determine whether claimant is able to return to the job at injury. I note, however, that Dr. Gullo does not consider himself qualified to assess functional abilities. Moreover, it also appears that Dr. Gullo's opinion includes limitations attributable to conditions that are not apart of this claim. Consequently, I reject that argument.

**ORDER**

The January 31, 2008 Director's Review and Order is affirmed.