In the ORS 656.340 Vocational Assistance Dispute of

PAULA GORANS Claimant

Contested Case No: H04-078

PROPOSED AND FINAL ORDER

November 15, 2004

PAULA GORANS, Petitioner

PORTLAND PUBLIC SCHOOLS, Respondent

Before Ella d. Johnson, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the March 19, 2004 Director's Review and Order issued by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On June 17, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On September 14, 2004, Administrative Law Judge Ella D. Johnson conducted a contested case hearing. Attorney Gary Borden represented petitioner Paula Gorans. Attorney Robert Yanity represented responding self-insured employer, Portland Public Schools (insurer). John A. Weaver, Portland Public Schools Custodial Supervisor testified and the record closed on the date of hearing.

ISSUE

Whether RRU incorrectly determined that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0320(9)(c)(A).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 14 were admitted into the record without objection.

FINDINGS OF FACT

I adopt the finding of fact contained in the administrative order on appeal with the following supplementation:

(1) Claimant worked as a custodial assistant for seven years and wore a foot brace. (Ex. 10.) On June 20, 2002, claimant suffered a left ankle injury while working as a school custodian. (Exs. 1 and 3-4.) Insurer accepted a left ankle sprain. (Ex. 6-4.)

(2) On July 11, 2003, William Couregen, MD (Orthopedic Surgeon) examined claimant at insurer's request. (Ex. 3.) He found the left ankle condition medically stationary and recommended no further treatment. He opined that claimant was able to return to her regular work as a custodian on condition that she wear supportive footwear and rest for a few minutes every one to two hours. (Exs. 3-4 and 3-6.)

(3) On July 22, 2003, Steven G. Tillett, DPM concurred. (Ex. 4.) On July 24, 2003, Myrna A.

Casono, MD concurred. (Ex. 5.)

(4) On August 5, 2003, the claim was closed with a permanent partial disability (PPD) award. (Ex. 6.)

(5) On December 11, 2003, insurer notified claimant that she was ineligible for vocational assistance because she had been released to regular work. (Ex. 7.)

(6) A school district custodial position allowed ten minute rest periods every two hours in addition to a lunch break. The custodial position allowed five minute rest periods every hour or additional rest periods. (Testimony of Weaver.)

CONCLUSION OF LAW

RRU correctly determined that claimant is ineligible for vocational assistance pursuant to OAR 436-120-0320(9)(c)(A).

OPINION

Jurisdiction over this vocational assistance dispute lies with the director. ORS 656.340(4). I may modify the administrative order only if it: (1) violates a statute or rule; (2) exceeds the agency's statutory authority; (3) was made upon unlawful procedure; or (4) was characterized by abuse of discretion or clearly unwarranted exercise of discretion. ORS 656.283; OAR 436-001-0225(5). To determine whether one or more of those criteria exist, I may admit evidence that was not before the department and make independent findings of fact. *Colclasure v. Washington County School District,* 317 Or 526 (1993); *Joseph A. Richard,* 1 WCSR 3 (1996); *Timothy W. Stone*, 1 WCSR 378 (1996). The burden of proving any fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving that the administrative order is incorrect. *Harris v. SAIF,* 292 Or 683 (1982) (general rule regarding allocation of proof is that burden in on the proponent of the fact or position); *Cook v. Employment Div.,* 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.* 303 Or 390 (1998).

Pursuant to ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. ORS 656.340(6) provides in pertinent part:

> (a) A worker is eligible for vocational assistance if the worker will not be able to return to the previous employment *****.

OAR 436-120-0320(9) provides in pertinent part:

> A worker entitled to an eligibility evaluation is eligible for vocational services if all the following additional conditions are met:
>
> *****
>
> (c) As a result of the limitations caused by the injury or aggravation, the worker:
>
> (A) Is not able to return to regular employment;

OAR 436-120-0005(10) provides;

> (10) "Regular employment" means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance.

RRU determined that claimant was released to regular work, and therefore, is ineligible for vocational assistance. Claimant contends that the administrative order violates a rule or reflects an abuse of discretion. In contrast, insurer contends that the administrative order is correct and should be affirmed. I agree with insurer's position.

The medical record uniformly indicates that claimant is able to return to her regular work. To begin, Dr. Couregen opined that claimant could return to work as a custodian if she wore supportive footwear and rested for a few minutes every one to two hours. Drs. Tillett and Casono concurred. Moreover, claimant wore a foot brace while performing her regular work before the June 2002 work injury. Furthermore, Weaver testified that regular custodial work included the rest periods prescribed for claimant. Based on the record, I conclude that RRU correctly determined that claimant was released to regular work, and therefore, is not eligible for vocational assistance. Finally, finding no basis for modifying the administrative order, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED

The Director's Review and Order dated March 19, 2004 is affirmed.