

BRB No. 02-0783

ROBERT CASTRO)
Claimant-Respondent)
v.)
GENERAL CONSTRUCTION)
COMPANY)
and)
LIBERTY NORTHWEST) DATE ISSUED: May 13, 2003
INSURANCE COMPANY)
Employer/Carrier-)
Petitioners)
DIRECTOR, OFFICE OF)
WORKERS' COMPENSATION)
PROGRAMS)
Respondent)
LONGSHORE CLAIMS)
ASSOCIATION)
Amicus Curiae) DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy,
Administrative Law Judge, United States Department of Labor.

Nicole A. Hanousek (Law Offices of William D. Hochberg), Edmonds,
Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott), Seattle,
Washington, for employer/carrier.

Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Samuel J. Oshinsky, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for *amicus curiae*.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-515) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board held oral argument in this case in Seattle, Washington on January 29, 2003, and pursuant to 20 C.F.R. §802.215, we hereby accept the pleadings filed by employer and by the *amicus curiae* subsequent to the oral argument.

The parties do not dispute the facts of this case. Claimant worked as a pile driver for employer, and on November 20, 1998, he fell, tearing the anterior cruciate ligament in his right knee. After undergoing and recovering from reconstructive surgery on December 30, 1998, and two subsequent surgeries, claimant was released to return to light duty work on August 14, 2000. Claimant attempted to return to work at employer's facility, but the job proved to be too strenuous, and Dr. Mandt determined that the duties were beyond claimant's restrictions. Because employer offered no other light duty work, Dr. Mandt recommended vocational retraining.

Employer hired firms to conduct labor market studies, and those surveys identified jobs the counselors believed claimant could perform with starting wages ranging from \$8 to \$10 per hour. Cl. Ex. 8; Emp. Ex. 3. The Office of Workers' Compensation Programs (OWCP) referred claimant to a vocational rehabilitation counselor, Ms. Williams, to develop a rehabilitation plan. Based on their collaborative effort, claimant enrolled in a hotel tourism program at a local college and was scheduled to take classes from September 13, 2000, through June 7, 2002. Cl. Ex. 5. Upon completion of the program, claimant was expected to earn

¹Claimant had also attempted to return to work between June 14 and July 13, 1999.

approximately \$16,000 per year in an entry-level position and then, with experience, progress up to approximately \$27,580 per year or possibly \$30-40,000 per year if he became an assistant manager or a manager at a larger hotel. Emp. Ex. 5. As of the date of the hearing, June 20, 2001, and the date of the administrative law judge's decision, May 8, 2002, claimant had not completed his schooling. Claimant filed a claim seeking permanent partial disability benefits under the schedule for a 35 percent impairment to his right knee and temporary and permanent total disability benefits while enrolled in the vocational rehabilitation program.

The administrative law judge awarded claimant permanent partial disability benefits for a period of 48.96 weeks (17% of 288) pursuant to Section 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19). Decision and Order at 10. On the issue of total disability benefits, the administrative law judge determined that claimant demonstrated an inability to return to his usual work and that employer established the availability of suitable alternate employment. Decision and Order at 4, 11. He found that the jobs identified by Messrs. Ewald and Shafer, experts hired by employer, and affirmed by Mr. Owings, who inherited claimant's case after Ms. Williams retired, constituted suitable alternate employment. Cl. Ex. 8; Emp. Exs. 3, 5. Nevertheless, because claimant was enrolled in a vocational rehabilitation program, the administrative law judge awarded claimant total disability benefits for the duration of the program pursuant to *Abbott v. Louisiana Insurance Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Decision and Order at 11. Although the administrative law judge acknowledged that *Abbott* does not apply in every case where the claimant is enrolled in vocational rehabilitation, he applied it to this case because he found claimant demonstrated that enrollment in the program precluded employment in light of claimant's commuting time, class time, and study time, and that participation in the program would give claimant the best long-term earning potential. Decision and Order at 11-13. Accordingly, he awarded claimant temporary total disability benefits from July 14, 1999, until August 13, 2000, when claimant's condition reached maximum medical improvement, and permanent total disability benefits thereafter until June 7, 2002, the projected date of completion of the program. Decision and Order at 1 n.1, 13, 15. Finally, the administrative law judge rejected employer's assertion that claimant's average weekly wage should be calculated using Section 10(c), 33 U.S.C. §910(c), accepted claimant's argument that use of Section 10(a), 33 U.S.C. §910(a), is proper pursuant to *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and awarded benefits based on an average weekly wage of \$1,004.37. Decision and Order at 14. The administrative law judge subsequently denied claimant's motion for reconsideration. Employer appeals the administrative law judge's Decision and Order. The Longshore Claims Association (LCA) filed an *amicus curiae* brief in

²He stated that claimant's request to extend the award of total disability benefits to December 2002 would be better addressed in a motion for modification, as there were no documents before him to verify the need for the change.

support of employer's position. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision.

Total Disability Benefits During Vocational Rehabilitation

Employer contends the administrative law judge erred in awarding claimant total disability benefits during his retraining period. Its arguments are three-fold. First, employer argues that the decision in *Abbott*, issued by the United States Court of Appeals for the Fifth Circuit, runs afoul of the Act and should not be followed in this case arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Next, employer argues that if *Abbott* is good law, it does not apply to the facts of this case. Finally, it asserts it was denied due process because of the district director's failure to transfer the case to the Office of Administrative Law Judges (OALJ) for a hearing on whether claimant was entitled to vocational rehabilitation, as it objected to the program from the outset. The LCA also argues that *Abbott* is not good law and should not be followed. Claimant disagrees, and he argues that *Abbott* comports with the provisions and the intent of the Act, that neither the Act nor any other statute or constitutional right is violated, and that the evidence of record supports the administrative law judge's award of total disability benefits during the rehabilitation program. The Director agrees with claimant's position.

Applicability of *Abbott*

Employer first argues that the Fifth Circuit's decision in *Abbott* should be rejected as being contrary to the Act. The LCA agrees, citing legislative history which it asserts shows that Congress did not intend for the award of total disability benefits during rehabilitation where suitable employment is otherwise available. Claimant asserts that application of the principles espoused in *Abbott* accord with the policy for awarding total disability benefits established in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), and with the Act's goal of promoting the rehabilitation of injured employees. *See also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The Director argues that *Abbott* is good law and should be followed and that his interpretation of the Act and the regulations is due deference, as it is reasonable and has been followed consistently by the Board and the two courts that have addressed the issue.

In *Abbott*, the claimant injured his back on January 11, 1983. Ultimately, his doctor recommended vocational retraining. In the fall of 1985, *Abbott* began a four-year college program. The Department of Labor (DOL) paid his tuition and contractually required him to attend school full-time throughout the year and to

maintain a certain minimum grade point average. Abbott completed the program, plus a one-year internship, in July 1990, and he began work as a medical technician at a public hospital. From the date of Abbott's injury until its carrier became insolvent on September 15, 1986, the employer voluntarily paid compensation to the claimant and did not object to his rehabilitation program. When the employer sought payment of claimant's compensation from Louisiana Insurance Guaranty Association (LIGA), LIGA objected to the payment of total disability benefits while Abbott was enrolled in a retraining program, asserting that the availability of suitable alternate employment had been established. The administrative law judge ultimately awarded temporary and permanent total disability benefits until Abbott completed his retraining program, and the Board affirmed the decision. *Abbott*, 27 BRBS 192. In affirming the administrative law judge's decision in *Abbott*, the Board adopted the administrative law judge's reasoning that, although Abbott could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehabilitation program prevented him from working. Specifically, in light of *Turner*, 661 F.2d at 1037-1038, 14 BRBS at 160, the Board stated:

the degree of disability is determined not only on the basis of physical condition, but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that claimant can perform.

Abbott, 27 BRBS at 202.

In affirming the Board's decision, the Fifth Circuit acknowledged that the Act does not specifically provide for total disability benefits during periods of rehabilitation, but, following the Board's rationale, it also determined that the award was consistent with its holding in *Turner*, 661 F.2d 1031, 14 BRBS 156. That is, the jobs identified by the employer were not "available" to Abbott because his participation in the DOL-sponsored plan precluded him from working. As the jobs were "unavailable," the employer did not establish the availability of suitable alternate employment, and Abbott was entitled to total disability benefits until the completion of the program when jobs would become "available." *Abbott*, 40 F.3d at 124-125, 127-128, 29 BRBS at 23-24, 26-27(CRT).

The Board has consistently applied *Abbott* in cases arising both within and outside the Fifth Circuit to determine whether the claimants were entitled to total disability benefits during periods of vocational retraining. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001) (Ninth Circuit); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000) (Fourth Circuit); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998) (Fourth Circuit); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998) (Fifth Circuit); *Anderson v. Lockheed Shipbuilding*

& Constr. Co., 28 BRBS 290 (1994) (Ninth Circuit). Additionally, a recent decision of the United States Court of Appeals for the Fourth Circuit further supports the validity of *Abbott* and its progeny. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

In *Brickhouse*, claimant suffered a back injury. Unable to return to his usual work, he began a rehabilitation program in graphic communications. With only two classes remaining, in the last semester of the program, Brickhouse's former employer offered him alternate employment at its facility. The administrative law judge found, and the Board and the court affirmed, that Brickhouse's participation in the rehabilitation program precluded his acceptance of the employer's offer. Although the final courses may have been offered at night in the spring and summer semesters of 1997, the Board held that Brickhouse could not have completed his training within the time allotted by OWCP, that is by May 15, 1997, if he had taken the job; thus, the proffered employment was not available. *Brickhouse v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 98-1164, 00-520 (Feb. 6, 2001). Additionally, the Board held that *Abbott* applies even if rehabilitation does not necessarily result in an increased wage-earning capacity. The Fourth Circuit discussed *Abbott* and the Board's decision in *Gregory*, 32 BRBS 264, wherein the Board articulated factors to consider in awarding total disability benefits during vocational rehabilitation, and concluded, in agreement with the Director's position, that an increase in a claimant's wage-earning capacity is but one of several factors that must be considered and, alone, is not dispositive of a claimant's entitlement to total disability benefits during rehabilitation. Further, the court held that, considering all the relevant factors, Brickhouse had established that suitable alternate employment was unavailable to him while he was enrolled in his retraining program. *Brickhouse*, 315 F.3d at 293-296, 36 BRBS at 91-92(CRT).

Despite the consistent application of *Abbott* to permit an award of benefits where claimant is unable to work during vocational rehabilitation, employer now challenges such awards on the basis that there is no specific provision in the Act allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. Further, it asserts, while the regulations provide the framework for DOL to develop vocational retraining programs, they do not provide for total disability awards for the duration of such programs. As neither the Act nor the regulations mention such awards, employer, citing statutory construction cases, asserts that no such awards are permitted. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992) (use the language of the Act to interpret its meaning and go beyond that language only in extraordinary circumstances); *Alexander v. Director, OWCP*, 297 F.3d 805,

³The Fourth Circuit also stated that the administrative law judge was entitled to conclude it was unreasonable for the employer to compel Brickhouse to choose between the job and completing his training. *Brickhouse*, 315 F.3d at 296, 36 BRBS at 92(CRT).

36 BRBS 25(CRT) (9th Cir. 2002) (use plain language if it is clear). The LCA expounds on employer's argument by showing that Congress considered and rejected the idea of awarding total disability benefits during periods of vocational rehabilitation. In June 1980, the House of Representatives considered a bill that stated: "an employee . . . shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation." H.R. 7610, 96th Cong. (June 18, 1980). In July 1982, a bill before the Senate omitted the phrase "be entitled to" from the wording above. Sen. Rpt. 97-498 at 58 (July 19, 1982). By 1984, when the amendments to the Act were passed, these proposed amendments had been eliminated. As a result, no specific language on disability during rehabilitation is included in the Act as it exists today. Consequently, the LCA argues that the Fifth Circuit's decision in *Abbott* effectively re-inserts the provision that was discussed and rejected by Congress. As claimant counters, however, *Abbott* requires consideration of a number of factors; thus, entitlement to benefits is not automatic, as it would have been under the proposed amendments. The Director states that *Abbott* is in full compliance with the Act and the regulations and, rather than creating a new type of benefit, it merely adds another factor for the administrative law judge to consider when addressing the issue of the availability of suitable alternate employment.

We agree with claimant and the Director. The holding in *Abbott* rests, not on any novel legal concept, but on the well-established principle that, once claimant establishes a *prima facie* case of total disability, employer bears the burden of demonstrating the availability of suitable alternate employment. See, e.g., *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156. If employer makes this showing, claimant may nonetheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. See, e.g., *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991). Moreover, claimant is entitled to total disability until the date suitable alternate employment is available. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment. Although Congress considered and rejected awards of total disability benefits to employees enrolled in vocational rehabilitation programs as a matter of statutory right, the failure to enact that proposal does not establish that *Abbott* runs counter to congressional intent. Entitlement to benefits during enrollment in a vocational rehabilitation program under

⁴Employer has filed a supplemental brief, citing *A-Z Int'l v. Phillips*, 323 F.3d 1141 (9th Cir. 2003) (plain language of the Act limits remedy for the filing of fraudulent claim to that provided in Section 31, 33 U.S.C. §931). Employer contends that, in view of Congress' rejection of the proposed amendment and of the silence in Section 39, 33 U.S.C. §939, and its implementing regulations, 20 C.F.R. §702.501 *et seq.*, regarding the payment of total disability benefits during vocational rehabilitation, such awards are precluded.

Abbott is not automatic but depends on an analysis of various factors relevant to ascertaining whether employment is reasonably available. As the Director states, *Abbott* does not create a new type of award but permits consideration of factors relevant to claimant's employability consistent with existing case law.

In this respect, the *Abbott* case is like many others expounding upon and defining appropriate tests for application of the statute. For example, nominal awards are not specifically mentioned in the Act, and they extend the time frame for filing Section 22, 33 U.S.C. §922, motions for modification, but they have found favor in the courts as a rational interpretation of Section 8, 33 U.S.C. §908. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Similarly, in construing Section 8(f), 33 U.S.C. §908(f), the courts adopted a "manifest" requirement for an employer to receive relief under that section from continuing liability for compensation even though this requirement is not explicitly contained in the statute. See, e.g., *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1999); *Duluth, Missabe & Iron Range Ry. Co. v. Department of Labor*, 553 F.2d 1144, 5 BRBS 756 (8th Cir. 1977); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *American Mutual Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

With regard to disability, it was left to the courts to develop criteria for demonstrating "total" and "partial" disability, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition. See 33 U.S.C. §908; *Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Godfrey v. Henderson*, 222 F.2d 845 (5th Cir. 1955). Just as the courts and the Board have analyzed these issues, they have analyzed the issue of entitlement to total disability benefits during vocational rehabilitation and

⁵In a supplemental brief, the LCA asserts that *Rambo II* is distinguishable because Congress had not spoken on the matter of *de minimis* awards previously; therefore, it was reasonable for the courts to accept the Director's interpretation. However, it argues, the matter of total disability benefits during vocational rehabilitation had been addressed and rejected, and there is no need to look beyond the Act for Congress' intent in this regard. We disagree. While Congress did not enact the proposed automatic award of total disability benefits during vocational rehabilitation, there is nothing in the statute prohibiting total disability awards during periods of rehabilitation in appropriate circumstances, based on a number of factors consistent with case law. Similarly, we reject employer's reliance on *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003). Contrary to employer's assertion, *Ibos* does not invalidate *Abbott*. In *Ibos*, the court refused to expand the credit doctrine beyond the confines of Section 3(e), 33 U.S.C. §903(e), in order to allow an employer to offset its total liability against the claimant's settlement proceeds with prior employers. Here, there is no creation of a new award. Rather, the issue is only whether an employer has satisfied its burden of establishing the *availability* of suitable alternate employment under existing precedent.

found, consistent with the Director's interpretation, that the *Abbott* solution is reasonable within the framework of suitable alternate employment law. *Brickhouse*, 315 F.3d at 292-296, 36 BRBS at 91(CRT); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Brown*, 34 BRBS 195; *Kee*, 33 BRBS 221; *Gregory*, 32 BRBS 264; *Bush*, 32 BRBS 213; *Anderson*, 28 BRBS 290; *Abbott*, 27 BRBS 192. Specifically, if a claimant's rehabilitation agreement with OWCP prohibits him from extracurricular employment, or if the administrative law judge determines that the rehabilitation schedule prevents such employment, then employment is "unavailable" to the claimant. If employment is not available, even if it is otherwise suitable for the claimant, then the employer has not satisfied its burden, and the claimant is entitled to total disability benefits until the date alternate employment becomes available. *Id.*; *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. Therefore, we reject employer's contention that *Abbott* is an invalid extension of the law, and we affirm the administrative law judge's application of it to this case arising in the Ninth Circuit.

Claimant's Entitlement Under *Abbott*

Employer next asserts that, even if application of *Abbott* is proper, claimant is not entitled to total disability benefits because he has not established that his vocational rehabilitation program precluded employment. Claimant and the Director disagree. They argue that the administrative law judge correctly considered all relevant factors and reached a reasonable conclusion supported by substantial evidence. In its decision in *Gregory*, 32 BRBS 264, the Board discussed relevant factors under *Abbott*, stating that the fact-finder should consider: whether the employer agreed to the rehabilitation plan and the continuing payment of benefits; whether the claimant's enrollment in the plan precluded employment; whether the completion of the program would result in an increased wage-earning capacity for the claimant, thereby maximizing the claimant's skills and minimizing the employer's liability; and whether the claimant showed full diligence in completing the program.

⁶The Director suggests that a refinement of the criteria for ascertaining whether a claimant is entitled to total disability benefits while enrolled in a vocational rehabilitation program is necessary as some factors may impinge on the discretion of the Secretary in determining the claimant's entitlement to vocational rehabilitation. See discussion *infra*. We do not believe it is necessary to do so. The administrative law judge's role does not involve reviewing the implementation of the rehabilitation plan or a claimant's entitlement to rehabilitation services, but rather he assesses the effect of the plan on the claimant's employability during its implementation. The criteria identified in *Gregory* were developed from the facts supporting the award in *Abbott* and do not comprise a complete or inflexible standard. *Brickhouse*, 315 F.3d at 295, 36 BRBS at 91(CRT) ("the guiding legal principles require consideration of a wide range of the relevant factors in reaching the proper result in each case."). The whole body of law which has evolved since *Abbott* establishes that no one factor is dispositive of entitlement; thus the factors of concern to the Director, *i.e.*, whether employer approved the plan or it is reasonable, are not dispositive. See *Brickhouse*, 315 F.3d 286, 36 BRBS at 91(CRT) (*Abbott* may be applied even if rehabilitation does not increase post-injury

Gregory, 32 BRBS at 266; see also *Bush*, 32 BRBS at 219. Employer argues that consideration of these factors results in the conclusion that claimant has not established entitlement to total disability benefits pursuant to *Abbott*.

First, employer argues it did not approve of the rehabilitation plan. It asserts it established the availability of suitable alternate employment claimant could perform without resort to rehabilitative training. The administrative law judge found that employer's disapproval of the program is relevant, but it is not dispositive. Decision and Order at 12. Next, employer asserts that claimant's enrollment in the rehabilitation plan did not preclude employment. To the contrary, it states, claimant's plan required him to seek internships – paid or unpaid – and to work 700 hours. Cl. Exs. 5, 7. As classes were not offered every quarter, employer asserts claimant had ample time to work but had no real motivation to do so. Moreover, claimant secured an internship which paid \$7.75 per hour, and he worked approximately 80 hours before giving it up. Tr. at 46. The administrative law judge found that claimant showed that his enrollment effectively precluded other employment as he credited claimant's testimony regarding the hours dedicated to the retraining program: commuting (approximately 20 hours per week); studying (approximately 25 hours per week); and attending class (15-18 hours per week). *Id.* Further, the administrative law judge credited Ms. Williams, claimant's initial vocational counselor, who testified that claimant's intellectual capacity, in addition to his long commute, would cause claimant difficulty in trying to combine work and school. *Id.*; Cl. Ex. 21. He then gave claimant credit for attempting to secure work, both before entering the rehabilitation program and during, and he found that, contrary to employer's view, claimant's inability to retain the paid internship is proof of his inability to work and attend school at the same time. Decision and Order at 12.

Employer also argues that the evidence establishes that claimant's enrollment in the program would not increase his wage-earning capacity. Rather, it posits he would earn more per year if he obtained one of the jobs identified in the labor market surveys than if he completed the rehabilitation plan. Thus, employer argues that retraining was unnecessary. The administrative law judge based his conclusions on the opinions of claimant and his vocational advisors and found that enrollment in the program was best for claimant's long-term earning potential, and that starting wages in hotel management were comparable to or less than the wages of some of the jobs identified by employer but, depending upon training, experience, and hotel, could

wage-earning capacity); *Brown*, 34 BRBS 195 (*Abbott* award may be made even if injury was to a scheduled member); *Bush*, 32 BRBS 213 (factual differences with *Abbott* do not make it inapplicable).

⁷Claimant lives on Bainbridge Island in Washington state, and he must take a ferry and a bus to get to school. His commuting time varies from 1.5 hours to 2.25 hours each way. Decision and Order at 7; Tr. at 80.

exceed \$27,580 or \$30,000. Decision and Order at 13. Finally, employer contends claimant did not demonstrate due diligence in completing his program, as there were multiple delays both at the outset and during the training. Employer thus contends it should not be liable for total disability benefits during claimant's retraining period. The administrative law judge found that claimant was enrolled in the program without significant interruption since 1999 and was scheduled to complete it in June 2002. Decision and Order at 13. Accordingly, the administrative law judge awarded claimant total disability benefits for the duration of the training program, ceasing June 7, 2002. Decision and Order at 13.

We find employer's arguments unpersuasive. The administrative law judge clearly considered all of the relevant factors and reached a rational conclusion. Decision and Order at 12-13; *see also Brickhouse*, 315 F.3d at 295, 36 BRBS at 91(CRT). Although it is true employer opposed the program and there was no contractual requirement that claimant refrain from outside employment, the contract with OWCP did require claimant to attend school on a full-time basis. Further, the administrative law judge found that claimant demonstrated that the time needed for commuting, his classes, and his studies effectively prohibited outside employment unless claimant were to exhaust himself. The Board has previously affirmed a finding that outside employment was precluded on a similar rationale. *See Brown*, 34 BRBS at 198-199. As an internship was a required part of claimant's program, and, according to claimant, a paid internship was rare, it was reasonable for the administrative law judge to interpret claimant's resignation of such a position, absent evidence of any other reason, as evidence that he could not complete his schooling and work at the same time. Moreover, although the evidence establishes that claimant would have had a post-injury wage-earning capacity without any vocational rehabilitation, evidence of an eventual increased wage-earning capacity is not mandatory for an award under *Abbott*. *Brickhouse*, 315 F.3d at 295-296, 36 BRBS at 91(CRT). Nevertheless, the administrative law judge reasonably credited the testimony of claimant and his initial counselor that retraining would help increase claimant's long-term earning potential. *See id.*; *Brown* 34 BRBS at 198-199. Therefore, we affirm the administrative law judge's determination, after evaluation of the relevant criteria, that claimant is entitled to total disability benefits during his vocational rehabilitation. *Brickhouse*, 315 F.3d at 296, 36 BRBS at 91-92(CRT); *Abbott*, 40 F.3d at 124-128, 29 BRBS at 23-27(CRT); *Brown*, 34 BRBS at 198-199; *Bush*, 32 BRBS at 218-219.

Due Process

Employer next argues it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation and whether it is liable for total disability benefits for that period. It asserts that, upon its request, the case should have been transferred to the OALJ for a hearing on this issue, citing *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996). Employer maintains that failing to transfer this case for a hearing and allowing the vocational counselor, who is not an administrative law judge, to determine the appropriateness of vocational rehabilitation violates not only the Longshore Act, 33 U.S.C. §§919, 939, but also the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556, and the Fifth and Fourteenth Amendments of the Constitution, U.S. Const. amend. V, XIV, depriving employer of its due process rights by taking property without a hearing. The administrative law judge did not address these issues. As no fact-finding is involved, we shall address them.

First, while the Act grants “aggrieved parties” the right to a hearing, 33 U.S.C. §919(c), (d); *Boone*, 102 F.3d 1385, 31 BRBS 1(CRT), an evidentiary hearing before an administrative law judge is not necessarily required on all contested issues. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that purely legal disputes, or those disputes that do not require fact-finding, are not within the jurisdiction of the OALJ, and, therefore, do not require an evidentiary hearing. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *see also Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988) (no need for hearing where sole issue concerned legal question of employer’s ability to withdraw from settlement after claimant’s death); *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring) (OALJ has no jurisdiction over district director authority to change the claimant’s treating physician under Section 7(b)); *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991) (district director’s denial of rehabilitation services was properly appealed to the Board); *McGrady v. Stevedoring Services of America*, 23 BRBS 106 (1989) (district director’s decision regarding propriety of Section 14(f) penalty properly before the Board); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989) (within the district director’s discretion to determine whether the Special Fund is liable for the claimant’s vocational rehabilitation expenses). In *Cabral*, the court specifically held that as disputes regarding the amount of an attorney’s fee award are within the sole discretion of the district directors, they do not require an evidentiary hearing. In such cases where an evidentiary hearing is not necessary, review of the district director’s

⁸Although it noted that the United States Court of Appeals for the Seventh Circuit has held that parties have an absolute right to a hearing in all contested cases, *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), the Ninth Circuit specifically disagreed with the Seventh Circuit’s rationale and stated that “*Pearce* has not been followed or cited favorably by any other court.” *Cabral*, 201 F.3d at 1096, 33 BRBS at 214(CRT).

determination is best effectuated through appeal to the Board.

In this case, the issue employer sought to bring before an administrative law judge involved whether claimant was entitled to vocational rehabilitation. Section 39(c)(1)-(2) of the Act, 33 U.S.C. §939(c)(1)-(2) (emphasis added), addresses vocational rehabilitation and states in relevant part:

(c)(1) *The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.*

(2) *The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. . . where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in Section 44 in such amounts as may be necessary to procure such services. . . .*

Where statutory authority is placed in “the Secretary,” that authority is wielded by the district directors, as the Secretary’s discretionary authority has been delegated to those officials. 20 C.F.R. §§701.201, 701.202, 701.301(a), (6), (7). See *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 351 (1994) (McGranery, J., dissenting).

The implementing regulations set forth the procedures by which an injured employee may obtain vocational rehabilitation or retraining. 20 C.F.R. §§702.501 *et seq.* Section 702.501 states that the purpose of such retraining is to return permanently disabled persons to gainful employment. 20 C.F.R. §702.501. Section 702.502 provides that the district director or a member of his staff shall promptly refer an eligible claimant to the vocational rehabilitation advisor, and Sections 702.503-702.506 set forth the advisor’s responsibilities with regard to the claimant’s rehabilitation, from screening the claimant to developing the training program to monitoring the claimant’s progress. 20 C.F.R. §§702.502-702.506. The regulations do not give employers a role in forming or approving vocational rehabilitation programs. *Id.* Because Section 39(c)(2) and its implementing regulation grant the authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ

has no jurisdiction to address the propriety of vocational rehabilitation. *Olsen*, 25 BRBS at 171 n.3; *Cooper*, 22 BRBS at 40-41. Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits. *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT); *Cooper*, 22 BRBS at 40-41. Accordingly, contrary to employer's argument, neither the Act nor the APA, which does not come into effect, has been violated. We, therefore, reject employer's argument that it was deprived of due process because the case was not transferred to the OALJ upon its request.

We also reject employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. As Director points out, employer confuses its rights and obligations concerning two distinctly different decisions which the Act reserves to separate decision makers. This appeal stems from an evidentiary hearing before an administrative law judge on the issue of claimant's entitlement to disability benefits. Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits. See *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). With regard to implementation of claimant's vocational rehabilitation plan, Director concedes that employer is entitled notice and an opportunity to comment prior to implementation of the plan, noting that employer received ample notice and opportunity to comment. Moreover, employer could have filed a direct appeal to the Board if it believed the district director abused his discretion under the Act and regulation. See *Cabral*, 201 F.3d at 1095, 33 BRBS at 213(CRT); *Cooper*, 22 BRBS at 40-41. Under Section 39(c)(2), the costs of vocational rehabilitation are payable from the Special Fund. Congress has set forth the vocational rehabilitation process, and the district director and the administrative law judge in this case followed the proper procedures with regard to claimant's rehabilitative services. 33 U.S.C. §939(c); 20 C.F.R. §702.501 *et seq.*

⁹Thus, employer's remedy if it disagreed with the district director's decision regarding rehabilitation was appeal to the Board for review under an abuse of discretion standard. *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT). That this could result in the bifurcation of the case is an insufficient basis to ignore the statutory scheme giving exclusive authority to the Secretary and the district directors. See *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 353-354 (1994) (McGranery, J., dissenting).

¹⁰To the extent that employer seeks a hearing prior to the imposition of liability for benefits, we note that pre-deprivation hearings are not available under the Act. *Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3^d Cir. 2000).

Average Weekly Wage

Employer also contends the administrative law judge misinterpreted *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and erred in computing claimant's average weekly wage under Section 10(a) of the Act, 33 U.S.C. §910(a). Specifically, employer argues that *Matulic* is distinguishable from the case herein, that use of Section 10(a) results in benefits based on an unfounded increase of \$12,000 over claimant's historical earnings and that Section 10(c), 33 U.S.C. §910(c), should be used to compute claimant's average weekly wage. The LCA argues that previous Ninth Circuit cases show that the court did not establish a hard and fast rule in *Matulic* but, rather, sought to implement a standard that would be fair based on the facts of the case. That is, use of Section 10(a) is presumed but can be rebutted based on the facts of each particular case, although rebuttal cannot be based solely on the number of days worked. Citing *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983), and *Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74 (9th Cir. 1932), the LCA argues that Ninth Circuit precedent supports finding an average weekly wage that represents the claimant's true lost earning capacity and not one that ignores his earning history. Claimant interprets *Matulic* as establishing a "clear bright line" for defining "substantially the whole of the year." He asserts that, because his number of workdays surpassed the *Matulic* 75 percent mark, he is presumptively entitled to a computation of his average weekly award under Section 10(a). The Director concurs.

Section 10(a) of the Act, 33 U.S.C. §910(a) (emphasis added), states:

If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during *substantially the whole of the year* immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

The Board has held that 42 weeks is "substantially the whole of the year," *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981), but that 33 weeks is not, *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). Because the term is undefined, the Ninth Circuit addressed where the line should be drawn in *Matulic*.

¹¹Employer divides claimant's earnings for 1998, \$39,345.80, by 52 to reach an average

In *Matulic*, the administrative law judge found that the claimant actually earned \$43,370.81 in the year preceding his injury and that use of Section 10(a) would result in calculated earnings of \$52,941.20; thus, he concluded that Section 10(a) could not be used because it would overestimate the claimant's annual earnings. On appeal, the Ninth Circuit held that under the statutory framework, Section 10(a) must be used in calculating average weekly wage unless to do so would be unreasonable or unfair. *Matulic*, 154 F.3d at 1057, 32 BRBS at 150-151(CRT); see 33 U.S.C. §910(c). Based on this congressional mandate, the Ninth Circuit held that "mere" overpayment due to the application of Section 10(a) is not unreasonable or unfair but is built into the system. *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT); see also *Duncanson-Harrelson*, 686 F.2d at 1342. After discussing its decision in *Duncanson-Harrelson*, the court concluded: "when a claimant works more than 75% of the workdays of the measuring

weekly wage of \$756.65; however, employer's calculation fails to include some wages from 1997 which would complete the 52-week period.

¹²Section 10(c) applies "[i]f either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . . ."

¹³The Ninth Circuit affirmed the use of Section 10(c) in *Duncanson-Harrelson* because use of Section 10(a), while technically proper in that the claimant worked substantially the whole of the year, would result in overcompensation as claimant was a seasonal worker and would be compensated for working 65 more days than he actually worked. *Duncanson-Harrelson*, 686 F.2d at 142-143. In *Marshall*, the Ninth Circuit determined that it was improper to use Section 10(b), 33 U.S.C. § 910(b), to determine the claimant's average weekly wage when the similarly-situated worker worked over 100 days more than did the claimant during the work year. *Marshall*, 56 F.2d at 75-76, 78. The court noted that the claimants in both *Duncanson-Harrelson* (75%) and *Marshall* (61%) worked substantially fewer of the workdays than did *Matulic* (82%). *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT). Relying on the statement in *Duncanson-Harrelson* that the point at which the disparity between claimant's actual days of work and the 260-day standard becomes unreasonable is "a question of line-drawing," the court drew the line where *Duncan-Harrelson* left it, *i.e.*, at more than 75 percent of work days.

year the presumption that §910(a) applies is not rebutted.” *Id.*, 154 F.3d at 1058, 32 BRBS at 151(CRT). Thus, because Matulic worked 82 percent of the days and because the nature of his employment was stable and continuous, the court held that the administrative law judge should have applied Section 10(a). *Id.*, 154 F.3d at 1058, 32 BRBS at 152(CRT).

The Board followed *Matulic* in *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *appeal pending*, No. 02-71207 (9th Cir.). In *Price*, the administrative law judge found that the claimant’s employment was stable and continuous. During the 52 weeks preceding his injury, Price worked 197 days of the possible 260. The administrative law judge found that this number of days worked equated to 75.7 percent and required application of Section 10(a) pursuant to *Matulic*. *Price*, 36 BRBS at 62. The Board affirmed the administrative law judge’s conclusion, holding that *Matulic* set the threshold for application of Section 10(a) at 75 percent, and Price met that level. *Id.*

The administrative law judge herein found that claimant earned \$38,422.57 in 1995, \$38,571.33 in 1996, \$39,648.34 in 1997, and \$39,717.62 in 1998. In the 52 weeks prior to the injury, he found that claimant earned a total of \$40,466 by working 1,611 hours or 201.35 days, which amounts to 77.4 percent of the 260-day standard work year for a five-day per week worker. Decision and Order at 9, 14; Cl. Exs. 2-3. Thus, pursuant to *Matulic*, the administrative law judge applied Section 10(a) and found that claimant’s average weekly wage was \$1,004.37, resulting in a compensation rate of \$669.58. Decision and Order at 14. He rejected employer’s assertion that the presumptive use of Section 10(a) is rebutted because the calculated earnings exceed

¹⁴The court noted that in *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980), the Seventh Circuit applied Section 10(c) where a claimant worked 84 percent of the workdays. The Ninth Circuit felt that a line drawn at 84 percent was too rigid and stated: “We do not believe such a rigid rule is consistent with the intent or purpose of the Act.” *Matulic*, 154 F.3d at 1058 n.4, 32 BRBS at 151 n.4(CRT). In *Strand*, moreover, the court relied on the fact that claimant was a seasonal worker in holding Section 10(c) applies.

¹⁵It appears either claimant or the administrative law judge divided the number of hours claimant worked by 8 in order to arrive at 201.35 days. The Board has affirmed this as a rational method of arriving at the number of days worked, *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). *But see Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999) (decision on recon.), *aff’d*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000) (dividing vacation hours by 8 to convert them to workdays is irrational because it would mean the claimant worked more than the allotted 260 days per year for a 5-day-per-week worker).

claimant's actual earnings by \$12,000. As the Ninth Circuit stated in *Matulic* that overcompensation alone is insufficient reason to rebut the use of Section 10(a), and as that is the only reason employer offers here, we must affirm the administrative law judge's use of Section 10(a). The instant situation, like that in *Price*, satisfies the test set forth in *Matulic* and, consequently, "falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated." *Matulic*, 154 F.3d at 1058, 32 BRBS at 152(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹⁶Multiplying \$1,004.37 by 52 weeks results in calculated earnings of over \$52,000 per year, and claimant's actual annual earnings for each of the three years preceding his injury did not exceed approximately \$40,000.