

BRB No. 03-0390

TOM OLSEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TRIPLE A MACHINE SHOP,)	
INCORPORATED)	
)	DATE ISSUED: <u>Jan. 29, 2004</u>
Self-Insured)	
Employer)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Denying Request for Appliance or Apparatus of Philip G. Williams, District Director, United States Department of Labor.

Tom Olsen, Albuquerque, New Mexico, *pro se*.

Peter B. Silvain, Jr. (Howard Radzely, Solicitor of Labor, Donald S. Shire Associate Solicitor, Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Compensation Order Denying Request for Appliance or Apparatus of District Director Philip G. Williams 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 determinations of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The work-related injury in this case occurred in 1978. In 1982, Administrative Law Judge Halpern awarded claimant permanent total disability benefits, and he granted employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In 1986, claimant's entitlement to medical benefits for the 1978 injury was resolved via a Section 8(i), 33 U.S.C. §908(i), settlement. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

In 1999, employer filed a motion for modification pursuant to Section 22, 33 U.S.C. §922, alleging that claimant's condition changed from total to partial and that he is employable (2000-LHC-1504). In late 2000, claimant filed a claim for benefits, alleging injury due to exposure to toxic substances while at employer's facility. At nearly the same time, claimant challenged the validity and scope of the 1986 settlement. These combined claims were assigned number 2001-LHC-1500, but they were not consolidated with #1504. Neither case #1500 nor #1504 has been adjudicated. *See Olsen v. Triple A Machine Shop, Inc.*, BRB No. 02-612 (June 3, 2003), *recon. denied* (Sept. 16, 2003).

In the case currently before the Board, claimant contends the district director erred in denying him a motorized wheelchair, van, or any other appliance or apparatus payable by the Special Fund.¹ Specifically, claimant asserts that, as a "long-term beneficiary of the Special Fund," he is entitled to have the Fund pay for the "apparatus not otherwise available" that he needs. He states that such obligation on the part of the Special Fund is mandatory and not discretionary.² The Director, Office of Workers' Compensation Programs (the Director), argues that the decision of whether to grant a request for this equipment is discretionary, and claimant has not shown there was an abuse of discretion by the district director.

¹We decline to address claimant's contentions concerning the status of Administrative Law Judge Mapes as the presiding judge in cases #1500 and #1504. The present appeal pertains only to a decision by District Director Philip G. Williams. Similarly, we decline to address claimant's contentions concerning the scope of the 1986 Section 8(i) settlement. None of these arguments is pertinent to the issue herein.

²In his brief, claimant also asserts he needs a bariatric bed. This appears to be a new request: it was not discussed by the district director.

Section 39(c)(2) of the Act states:

The Secretary *may in [her] discretion* furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this chapter to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor *may, in [her] discretion*, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, including necessary prosthetic appliance or other apparatus.

33 U.S.C. §939(c)(2) (emphasis added). In his decision, the district director set forth the pertinent facts regarding claimant's injury and case. In a Compensation Order Denying Vocational Rehabilitation issued on November 20, 2001, the district director found that claimant was not fit for rehabilitation to any sort of gainful employment because of his physical condition. In this Order, the district director relied on the opinion of Dr. Burg who stated that "no employer would ever consider hiring [claimant, as he] requires daily nursing care and I don't think any physician in this country would state that this man could work at any sort of gainful employment." Comp. Order (11/20/01) at 2. Claimant's appeal of this Order was dismissed as untimely. *Olsen v. Triple A Machine Shop, Inc.*, BRB No. 02-354 (Feb. 22, 2002), *recon. denied* (April 26, 2002).³

Contrary to claimant's assertions, Section 39(c)(2) gives the Secretary, through the district directors, the discretion to supply a claimant with prosthetic devices or other apparatus needed "to render a disabled employee fit to engage in a remunerative occupation." 33 U.S.C. §939(c)(2). Thus, a claimant may be eligible for such devices if those devices will assist him in performing a job. The district director stated in his 2001 Order, however, claimant is "not an appropriate candidate for vocational rehabilitation services." Comp. Order (11/20/01) at 2. As the supply of apparatus is conditioned upon its usefulness to a claimant's work rehabilitation efforts, and as claimant has been found ineligible for vocational rehabilitation services, the district director did not abuse his discretion in denying claimant's request. 33 U.S.C. §939(c)(2); 20 C.F.R. §702.501 *et. seq.* Claimant admitted he needed the equipment to travel to doctors' appointments, rather than to obtain a "remunerative occupation," and expenses relating to medical rather

³Claimant filed an appeal of this Order with the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit transferred the matter to the United States Court of Appeals for the Ninth Circuit, *Olsen v. Triple A Machine Shop, Inc.*, No. 02-9529 (10th Cir. May 23, 2002), and the Ninth Circuit granted the Director's motion for summary disposition because the appeal was untimely. *Olsen v. Triple A Machine Shop, Inc.*, No. 02-71632 (9th Cir. Oct. 11, 2002). *See also* Dir's Brief at 7.

than rehabilitative services are not compensable under Section 39(c)(2). *See Olsen v. Triple A Machine Shop*, 25 BRBS 40 (1991). Accordingly, the district director rationally denied the request. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (standard of review is narrow; court may not substitute its judgment for that of the agency); *see generally Castro v. General Constr. Co.*, 37 BRBS 65 (2003); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003). As claimant has not shown an abuse of discretion by the district director, we reject his arguments, and we affirm the district director's denial of the requested devices.

Accordingly, we affirm the district director's Compensation Order Denying Request for Appliance or Apparatus.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge