SECTION 39

Section 39(a) authorizes the Secretary of Labor to promulgate rules and regulations to administer to the Act. The agency's interpretation of its authorizing statute is entitled to "considerable deference" and it need only adopt a permissible interpretation in order to be sustained. Regulations must be sustained unless they are unreasonable and plainly inconsistent with the statute. In this case, the Board upheld the validity of the regulation at 20 C.F.R. §§702.241-702.243. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

A request for payment of rehabilitation expenses under Section 39(c)(2) must be made to the deputy commissioner for the compensation district in which the claimant's injury occurred, and not the Office of Administrative Law Judges, since an award for such expenses is subject to the discretion of the Secretary of Labor, and the Secretary has delegated the authority to direct the rehabilitation of employees to the Office of Workers' Compensation Programs, pursuant to 20 C.F.R. §702.501-702.508, of which the deputy commissioner is an agent. Cooper v. Todd Pacific Shipyards Corp., 22 BRBS 37 (1989).

Section 702.506(c), 20 C.F.R. §702.506(c), of the regulations implementing Section 39(c)(2) permit the termination of rehabilitation if the employee fails to cooperate with the agency supervising the training. The Board affirms the administrative law judge's finding that claimant's failure to remain in contact with the counselor constituted a failure to cooperate. OWCP had no duty to counsel claimant before termination if claimant could not be located. However, the administrative law judge erred in terminating claimant's Section 8(g) maintenance allowance before vocational rehabilitation was terminated. 20 C.F.R. §702.507(a). Olsen v. Triple A Machine Shop, 25 BRBS 40 (1991), aff'd mem. sub nom. Olsen v. Director, OWCP, 996 F.2d 1226 (9th Cir. 1993).

The Board affirms the deputy commissioner's denial of claimant's request for rehabilitation services, as the parties' Section 8(i) settlement discharges claimant's right to seek further benefits under the Act. Section 39(c)(1) and Section 8(g) provide that employees must be receiving compensation under a continuing award in order to be eligible for rehabilitation services. Olsen v. General Engineering & Machine Works, 25 BRBS 169 (1991).

The Board remands the case to the administrative law judge, as he did not adequately explain his conclusion that that claimant's INS records are relevant to claimant's credibility, or how claimant's credibility affects the disability issue presented, as the degree of scheduled impairment is at issue. Moreover, with regard to whether the INS records are relevant to rehabilitation efforts under the Act, Section 39(c)(1), (2) of the Act, and its implementing regulations, 20 C.F.R. §§702.501 *et seq.*, authorize the Secretary of Labor and her designees, the district directors, to provide for the vocational rehabilitation of permanently disabled employees; thus, whether claimant's vocational rehabilitation plan is reasonable or necessary is a discretionary one afforded the district director, and the administrative law judge cannot review the plan or deny claimant rehabilitation services. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

The Board rejected employer's assertion that it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation. Contrary to employer's assertion, the district director did not err in not transferring the case to OALJ upon employer's request. Rather, because the Act gives the Secretary of Labor the authority to provide and direct vocational rehabilitation, the authority is wielded by the district directors and is discretionary. Thus, administrative law judges have no authority to determine the propriety of vocational rehabilitation, and it was appropriate for the district director to retain the case. Moreover, employer was not denied constitutional due process because, prior to assessing liability for total disability benefits during the period of rehabilitation, employer was afforded a full hearing on this issue. With regard to implementation of the vocational program, the Board notes that the employer has the right to appeal directly to the Board the district director's implementation of a plan. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd,* 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied,* 126 S.Ct. 1023 (2006).

The Ninth Circuit rejected employer's assertion that it was denied due process because it was not permitted a hearing to determine the necessity of a vocational rehabilitation program for claimant. The court relied on its decision in *Healy Tibbitts*, 201 F.3d 1090, 33 BRBS 209(CRT), stating that Section 19(c) does not require an evidentiary hearing on all contested issues. The determination of the reasonableness of a rehabilitation program is left to the discretion of the district director and does not require any fact-finding by an administrative law judge. Moreover, the court stated that the implementation of the rehabilitation program itself did not deprive employer of property because the implementation did not trigger the payment of benefits; payments were required because of the administrative law judge's award after the hearing. The hearing constituted a sufficient pre-deprivation hearing and protected employer's due process rights. *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *aff'g* 37 BRBS 65 (2003), *cert. denied,* 126 S.Ct. 1023 (2006).

The Board affirms the district director's implementation of a vocation rehabilitation plan as employer failed to show an abuse of discretion. The counselor gave claimant appropriate vocational tests and tried unsuccessfully to place him in various positions commensurate with his existing skills. In recommending retraining as a motorcycle mechanic, the counselor demonstrated the compatibility of the skills to be obtained with claimant's existing skills, the wages claimant could be expected to earn upon completion of the program, the labor market for motorcycle mechanics, and the suitability given claimant's physical restrictions. As the regulatory criteria for vocational rehabilitation were satisfied, the Board affirms the vocational retraining program. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

The Board observes that the statutory provision and regulations governing vocational rehabilitation do not provide employer an explicit role in the formulation of a rehabilitation plan. In *Castro*, 37 BRBS 65, the Director conceded that employer is entitled to notice and an opportunity to comment prior to implementation of a rehabilitation plan. Nonetheless, as *Castro* was decided after the plain was in place in this case, the Board declines to remand the case for the district director to consider employer's "evidence" regarding the wages claimant could earn without a rehabilitation program. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).