



BRB No. 15-0002

AZAD KARIM)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MISSION ESSENTIAL PERSONNEL, LLC)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	DATE ISSUED: <u>Aug. 28, 2015</u>
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Rehabilitation Plan and Award of Marco A. Adame II, District Director, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Jonathan A. Tweedy and Christy L. Johnson (Brown Sims), New Orleans, Louisiana, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Rehabilitation Plan and Award (OWCP No. 02-0231613) of District Director Marco A. Adame II 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We review the district director's approval of a vocational rehabilitation plan under the abuse of discretion standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

Claimant sustained injuries to his head, neck, and back as a result of an accident on July 18, 2012, while he was working for employer as a linguist aboard the U.S.S. *Milieu*. Between July 24, 2012 and November 15, 2013, claimant underwent MRIs of his spine and was evaluated by, and/or received treatment for his back injuries from, a number of physicians, each of whom diagnosed lumbar and cervical conditions and imposed physical restrictions. Most recently, claimant's treating physician, Dr. Levine, diagnosed claimant with a cervical strain, low back strain, and discogenic disease. Dr. Levine recommended that claimant continue with physical therapy, that he undergo a cervical steroid injection and possibly a work hardening program, and that claimant avoid repetitive bending, prolonged sitting or standing, and lifting more than 15 pounds. Dr. Levine subsequently opined that claimant reached maximum medical improvement on March 31, 2014, for his work-related neck and back injuries with some degree of permanent impairment. Employer's consultant, Dr. O'Meara, however, opined in his May 2014 report, that claimant's work injuries had resolved and that no restrictions on claimant's activities were necessary. At a July 30, 2014 informal conference, the district director, relying on Dr. Levine's opinion, concluded that claimant suffers from a permanent disability.

On July 30, 2014, Jeannette Clark, a vocational rehabilitation counselor assigned to claimant's case by the district director's office, submitted a Transferable Skills Report. Based on claimant's education and work history,¹ and relying on claimant's physical restrictions, Ms. Clark performed a labor market analysis in the relevant geographic area. She identified 10 positions for in-house computer instructors at community colleges and businesses, as well as 16 positions for a technical support specialist, that would be suitable for claimant upon the conclusion of a retraining program. On August 14, 2014, Ms. Clark proposed a vocational rehabilitation plan for claimant under which he would be placed in an on-the-job training program as a Multilingual Computer Instructor at the

¹Ms. Clark noted that claimant received a B.A. degree in military science in Iraq and a B.S. in computer science from the State University of New York at Binghamton. She also noted that he can read, write, and speak English, Arabic, and Farsi, and that he is also able to speak Kurdish, Persian, and Turkmani.

Accounting Academy in San Diego, California. Ms. Clark determined that this plan was suitable for claimant based on his education, work history in the computer field, and his expressed interest to work as an instructor.² Specifically, the plan called for claimant to receive instruction for the period from August 11 to December 8, 2014, which Ms. Clark indicated would prepare claimant to qualify for a vocational instructor certification. Upon successful completion of this training period, the plan anticipated that claimant would be retained as an instructor at the Accounting Academy.

On August 25, 2014, employer objected to the plan, arguing that claimant should not be placed in vocational rehabilitation because: (1) there is no medical evidence establishing that claimant suffers from any permanent disability; (2) the position with the Accounting Academy is not identified in the labor market survey; (3) the plan lacks any description of the position, required skills, education and experience requirements, or physical demands associated with the position; and (4) the proposed plan does not demonstrate how claimant's short-term or long-term earnings prospects would increase based on the additional training. On August 27, 2014, Ms. Clark responded to an inquiry from the district director seeking clarification as to why she recommended the Accounting Academy program for claimant. Ms. Clark explained that, while claimant's multilingual skills and work history appear to make him an excellent candidate for a job on the open market, his age, physical restrictions, significant hearing impairment,³ and outdated computer skills, make it difficult for him to compete in the open market for employment, particularly against younger candidates who have advanced degrees and updated skills. Ms. Clark thus stated that the willingness of the Accounting Academy to accommodate claimant's physical restrictions and allow him the flexibility he needed to attend his ongoing medical appointments led her to believe that the position was an "ideal choice" for claimant. DX 6.

On September 4, 2014, the district director rejected employer's objections to the proposal. The district director found that, contrary to employer's position, the record establishes that claimant reached maximum medical improvement with permanent work restrictions on March 31, 2014. Specifically, the district director relied on the March 31, 2014 Work Capacity Evaluation submitted by claimant's treating physician, Dr. Levine,

²The position with the Accounting Academy was not listed among those identified by Ms. Clark for in-house vocational computer instructors. Ms. Clark indicated that since claimant would be offered employment at the Accounting Academy at the conclusion of his program, she included the labor market survey to otherwise show that "there is a positive labor market for this industry." DX 6.

³Employer acknowledged that Dr. Seidmann opined, on March 26, 2014, that claimant has a 48.8 percent binaural hearing loss.

in which the physician stated that claimant's neck/back condition became permanent and stationary with some degree of permanent impairment as of that date. The district director also found that employer's contention, that the Accounting Academy was not among the jobs listed in a labor survey, "appears irrelevant" since the purpose of the vocational rehabilitation labor market survey, to find viable employment for the claimant, was satisfied once the Accounting Academy offered claimant the position in its on-the-job training. Additionally, the district director noted that Ms. Clark's August 27, 2014 response included "a copy of the job description which appears to reflect the occupation of Computer Instructor, the focus of the proposed" on-the-job training, and a statement that claimant's salary may increase 10 to 15 percent after six months to a year of employment. The district director added that because claimant appears to possess outdated computer skills, he is older, and has work restrictions that adversely affect his ability to compete in the open market, it stands to reason that his hourly pay rate would be significantly lower than in his prior work for employer or other work as a computer system administrator. The district director thus stated that the plan meets the objective of returning claimant to competitive employment. Consequently, the district director formally approved the vocational rehabilitation plan on September 4, 2014. Employer filed a notice of appeal of that Order on October 8, 2014.

Claimant's participation in the training program with the Accounting Academy was terminated as of September 23, 2014, due to the Accounting Academy's cash-flow problems, low enrollment, and claimant's apparent lack of necessary skills to be an effective instructor. Upon receiving notification of the plan's termination, the district director gave Ms. Clark 30 days to develop a new rehabilitation plan for claimant. On October 8, 2014, Ms. Clark proposed a new plan, whereby claimant would receive training through New Horizons to update his computer skills and prepare him for certification as a Windows Server 2012 Solution Associate. Ms. Clark stated that the ultimate goal of the plan was to provide claimant with skills necessary to be employed as a Technical Support Specialist. Employer objected to the new proposed rehabilitation plan.⁴ On November 7, 2014, the district director rejected employer's objections and approved the plan, thereby entering a new vocational rehabilitation award for claimant.

On appeal, employer challenges the district director's September 4, 2014 award, and any "extension" of that plan. The Director, Office of Workers' Compensation Programs (the Director), and claimant respond, in separate briefs, urging affirmance of the district director's actions either on the ground that employer is precluded from

⁴In its November 6, 2014 objection, employer, contending that the new plan only seeks to extend the on-the-job training program awarded by the district director on September 4, 2014, "maintain[ed] all of the same objections to the [new] recommended plan they asserted against the original plan." DX 9.

challenging the November 7, 2014 rehabilitation plan that is currently in effect because employer did not appeal it, or alternatively, because employer did not establish an abuse of the district director's discretion in approving the rehabilitation plans.

The Director avers that the Board should not review the district director's November 7, 2014 rehabilitation plan because employer did not file a notice of appeal of that second plan.⁵ We reject this contention. The Board's regulations state that a notice of appeal shall contain, inter alia, information identifying the decision or order being appealed, such as the OWCP number and the date of the order or decision being appealed. 20 C.F.R. §802.208(a). Notwithstanding these requirements, "any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of [filing an appeal pursuant to] § 802.205." 20 C.F.R. §802.208(b). Employer's petition for review and accompanying brief filed on November 24, 2014, following the district director's November 7, 2014 Order, "reasonably permits identification" of the district director's November 7, 2014 rehabilitation plan as an order from which an appeal is sought. While employer's brief refers primarily to the September 4, 2014 Order, it also identifies the plan proposed by Ms. Clark on October 8, 2014, as "extending the proposed training," and specifically objects to the September 4, 2014 Order "and any extension" thereof.⁶ Employer's Brief at 7, 12. Thus, we shall consider employer's challenge to the November 7, 2014 plan on the merits.⁷ *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.*, 303 F.App'x 928 (2^d Cir. 2008).

Employer contends the district director erred in approving the rehabilitation plans because they do not comply with the regulatory factors necessary for implementation of a plan. *See* 20 C.F.R. §§702.501 - 702.508. Specifically, employer asserts that the vocational rehabilitation plans are unwarranted because claimant is not permanently disabled and because the rehabilitation plans will not, in this case, restore or increase claimant's wage-earning capacity.

⁵The Director further contends that employer's appeal of the first rehabilitation plan is moot because that plan was terminated.

⁶The district director's letter dated November 7, 2014, informing the parties that he was approving the October 8, 2014 rehabilitation plan refers to this second plan as an "amendment" of the first rehabilitation plan approved on September 4, 2014. DX 3. Employer's characterization of the second plan as an extension of the first plan thus is reasonable in light of the district director's choice of words.

⁷We note, moreover, that employer raised to the district director the same objections to each plan.

Section 39(c)(2) of the Act gives the Secretary the discretionary authority to direct “the vocational rehabilitation of permanently disabled employees. . . .” 33 U.S.C. §939(c)(2); *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *R.H. [Hopfner] v. Todd Pacific Shipyards, Inc.*, 43 BRBS 89 (2009). Section 702.506 of the implementing regulations provides in pertinent part:

Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially.

20 C.F.R. §702.506; *see also* 20 C.F.R. §§702.501-702.508 (regulations implementing Section 39(c)(2)). The regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few: 1) the employee must be permanently disabled; 2) the goal of the plan must be to return the employee to remunerative employment within a “short” period of time; and, 3) it must restore or increase the employee’s wage-earning capacity. 20 C.F.R. §§702.501, 702.506. Additionally, the regulations require the submission of medical data and other pertinent information in support of the plan. 20 C.F.R. §702.502. The employer does not have an explicit role in the formulation of a rehabilitation plan but is entitled to notice and an opportunity to comment prior to implementation of the plan. *Meinert*, 37 BRBS at 167 n.4; *Castro*, 37 BRBS at 73; 20 C.F.R. §§702.502-702.506; *see Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003) (plan may be implemented over an employer’s objections without a hearing).

Contrary to employer’s contention, the record contains the March 31, 2014 report of Dr. Levine, in which he explicitly states that claimant’s work-related conditions became permanent and stationary on that date. Dr. Levine added that claimant retained “some degree of permanent impairment” from his work injury and that he would thereafter have permanent physical restrictions that included no prolonged sitting or standing and no lifting of more than 15 pounds. This opinion is sufficient to satisfy the first regulatory factor that the employee be permanently disabled.⁸ 20 C.F.R. §702.502; *see also Hopfner*, 43 BRBS at 91 n. 3. Moreover, we reject employer’s contention that

⁸Although there is conflicting evidence as to the existence of permanent restrictions in this case, the district director acted within his discretion in giving greatest weight to the opinion of claimant’s treating physician, Dr. Levine, on this issue as it pertains to the appropriateness of the vocational rehabilitation plan. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

neither plan was designed to restore or increase claimant's wage-earning capacity. The objective of vocational rehabilitation is to "return permanently disabled persons to gainful employment...through a program of reevaluation or redirection of their abilities, or retraining in another occupation, or selective job placement assistance." 20 C.F.R. §702.501 (emphasis added). The September 4 and November 7, 2014 Orders approving the two vocational plans were designed to restore claimant's wage-earning capacity.⁹ The former plan actually placed claimant in a position in which he would earn a salary while training for a permanent position with the Accounting Academy and the latter plan enables claimant "to update his computer skills to pursue" gainful employment as a Technical Support Specialist. Ms. Clark's labor market analysis demonstrated that such jobs existed in the relevant geographic area for persons with the requisite skills. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Thus, the plans satisfied the regulatory criteria of returning claimant to work and restoring his wage-earning capacity.

Consequently, we hold that employer has not shown that the district director abused his discretion in implementing either rehabilitation plan, as employer has failed to demonstrate that the district director did not comply with the regulatory criteria. *Hopfner*, 43 BRBS at 91; *Meinert*, 37 BRBS at 166-167. Ms. Clark adequately documented the sources she relied upon in making her vocational recommendations and her recommended plan has the ultimate goal of returning claimant to remunerative employment. We therefore affirm the district director's November 7, 2014 Rehabilitation Plan and Award. *Id.*

⁹To the extent that employer wishes to contest claimant's entitlement to disability benefits during the rehabilitation plan, that is an issue for a formal hearing before an administrative law judge. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

Accordingly, the district director's Rehabilitation Plan and Award is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge