

BRB No. 07-0436

J.B.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
L-3 COMMUNICATIONS/VERTEX)	
AEROSPACE)	
)	
and)	
)	
ACE AMERICAN INSURANCE)	DATE ISSUED:
COMPANY)	11/21/2007 <u>2007</u>
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	

DECISION and ORDER

Appeal of the Approval of Rehabilitation Plan and Award of the Acting District Director, United States Department of Labor.

Alan G. Brackett, Derek M. Mercer, and Jon B. Robinson (Mouledoux, Bland, LeGrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Approval of Rehabilitation Plan and Award of the Acting District Director (Case No. 02-143233) 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 acting district director's implementation 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*, 126 S.Ct. 1023 (2006).

Claimant, a heavy truck mechanic working in Iraq, suffered a knee injury on July 17, 2005. Following surgery in November 2005 and April 2006, claimant has physical restrictions including no kneeling, squatting, climbing stairs, or lifting or carrying more than fifty pounds. As a result, claimant cannot perform his usual job duties. Claimant's condition reached maximum medical improvement on June 26, 2006. Claimant was referred for vocational rehabilitation services by the Office of Workers' Compensation Programs (OWCP). Following vocational testing and analysis, the vocational counselor recommended that claimant attend a two-year program at Tulsa Community College to obtain a degree in computer drafting and design engineering technology. Employer objected to this plan, alleging that claimant has a zero percent impairment and that its vocational rehabilitation specialist identified suitable alternate employment paying as much at present as claimant would be capable of earning in two years upon completion of the program. On January 8, 2007, the acting district director issued a Rehabilitation Plan and Award for the community college program, noting that the vocational counselor refuted employer's allegation that suitable work was available for claimant.

Employer appeals the acting district director's award. The Director, OWCP, responds, urging affirmance of the plan's approval. Claimant, who is not represented by counsel, has not responded to this appeal.

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

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 [her] discretion, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, . . .

33 U.S.C. §939(c)(2). The regulations at 20 C.F.R. §§702.501-702-508 implement Section 39(c)(2). The regulation at Section 702.506 states, 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. Medical data and other pertinent information must accompany the OWCP's referral of the case to a rehabilitation counselor. 20 C.F.R. §702.502. Employer is entitled to notice of a proposed rehabilitation plan and an opportunity to comment on it, but is not given any formal role in the formulation of a plan. *General Constr. Co.*, 401 F.3d at 972, 39 BRBS at 19(CRT).

Employer contends that the vocational rehabilitation plan in this case is unwarranted because claimant retains a wage-earning capacity on the open market and will have no greater earning capacity upon completion of the program than he has now. In this regard, employer avers that it demonstrated the availability of suitable alternate employment and that the vocational rehabilitation plan will extend its liability beyond the scheduled award to which claimant would otherwise potentially be entitled. Employer also contends that claimant does not have a permanent impairment and that the vocational counselor failed to account for claimant's extensive education and vocational training in determining that claimant would not be able to obtain work without retraining.

We reject employer's contention that claimant is not permanently disabled because Dr. LaButti stated claimant has a zero percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Dr. LaButti also stated that claimant has permanent work restrictions resulting from the work injury and cannot return to his prior job. Dr. Palomino stated claimant has permanent work restrictions, and Dr. Mayoza suggested that claimant needs to be retrained for a job that requires primarily sitting. Based on these medical opinions, the acting district director did not abuse his discretion in finding claimant's condition permanent and that a vocational rehabilitation program is appropriate for claimant. 20 C.F.R. §§702.502, 702.504.

Contrary to employer's contention, the vocational specialist specifically addressed claimant's education and vocational history in concluding that a community college program is appropriate for claimant. *See* Transferability Skills Analysis and Test Results by PRC. Claimant's prior work history was in aviation electronics and aviation and truck repair. The counselor rationally concluded that these types of positions are unavailable to claimant due to his physical restrictions. *Id.* In addition, the counselor reviewed the

labor market survey submitted by employer and stated that all but one of the jobs identified were unsuitable as they were light or medium duty positions that exceeded claimant's restrictions or required skills claimant does not possess. See *Employability Opinion* dated Dec. 12, 2006. She further stated that the availability of one job does not demonstrate "reasonable labor market access." See generally *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir.), *reh'g denied*, 939 F.2d 1293 (5th Cir. 1991); *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (5th Cir. Sept. 19, 1994) (unpublished) (pursuant to U.S. Ct. of App. 5th Cir. Rule 47.5.3, decisions issued before January 1, 1996, are precedent); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998). Given claimant's relatively young age (33), educational abilities, and interest in computer drafting, employer has not established that the acting district director abused his discretion in approving the plan.

Employer also contends that the plan does not decrease its liability because claimant retains an ability to earn on the open market at a rate that is equal to the wages claimant will be able to earn when the program is completed, and because claimant's injury is to a scheduled member. As discussed, the vocational counselor rationally found that the jobs employer proposed for claimant are not suitable, and thus, claimant does not have a current earning capacity equal to the \$13.36 to \$18.86 per hour he can be expected to earn upon graduation.¹ See *Vocational Rehabilitation Plan*. Indeed, claimant has no demonstrated wage-earning capacity, and thus the plan will return claimant to remunerative employment. 20 C.F.R. §702.506. That claimant's injury is to a scheduled member does not affect the propriety of the plan, as the goal of vocational rehabilitation is the long-term recovery of claimant's earning capacity. See *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); see also *General Constr. Co.*, 401 F.3d at 973, 39 BRBS at 20(CRT).

The underlying vocational report adequately documents the wages claimant can be expected to earn upon completion of the program; as claimant had no earnings at the time the plan was implemented, the plan will return claimant to remunerative employment within a relatively short period of time. The counselor's recommendation was based on appropriate medical, vocational and educational testing. The counselor explained how the physical requirements of the jobs claimant could obtain do not exceed claimant's medical restrictions. As claimant's disability at the time the plan was implemented was permanent, and claimant could restore his wage-earning capacity following completion of the program, the plan satisfies the requirements of the regulations. 20 C.F.R. §§702.501,

¹ The counselor first contacted employer to ascertain if it had a suitable position available for claimant. Employer did not respond to this inquiry.

702.506. Accordingly, employer has not established an abuse of discretion in the acting district director's decision to approve claimant's rehabilitation plan. *Meinert*, 37 BRBS at 167. We therefore affirm the acting district director's implementation of the rehabilitation plan as it is adequately based on its underlying documentation.² *Id.*

Accordingly, the acting district director's approval of the vocational rehabilitation plan is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

² Any contentions concerning employer's liability for disability benefits during the duration of vocational rehabilitation are not properly before the Board. *Meinert v. Fraser, Inc.*, 37 BRBS 164, 167-168 (2003). If there are any issues concerning employer's liability for disability benefits, the parties are entitled to a full evidentiary hearing before an administrative law judge on this issue. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).