SECTION 39

Generally, Section 39 authorizes the Secretary of Labor to administer the provisions of the Act. Section 39(a) authorizes her to make rules and regulations, hire employees and purchase materials necessary to the administration of the Act. Section 39(b) states that she shall establish compensation districts to include the high seas and the areas within the U.S. where the Act applies and provides that judicial proceedings under Sections 18 and 21 shall be instituted in the district court within whose territorial jurisdiction the office of the district director with jurisdiction over the injury or death is located.

Section 39(c)(l) provides that the Secretary shall, upon request, provide employees with information and assistance in processing a claim and obtaining medical, manpower and vocational rehabilitation services. In addition, the Secretary may, upon request, provide legal assistance. Under Section 39(c)(l), the Board has held that the provision of legal assistance is within the discretion of the Secretary of Labor. Thus, where claimant alleged that the Secretary had denied his request to provide legal assistance, citing a shortage of staff, the Board held that claimant had failed to establish that the Secretary had abused his discretion. *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983). The Board also held that claimant had failed to establish that he had been prejudiced by the Secretary's denial of his request for legal assistance.

Section 39(c)(2) vests the Secretary with the authority to direct vocational rehabilitation. This authority is delegated to the district directors. *See Cooper v. Todd Pac. Shipyards Corp.*, 22 BRBS 37 (1989). The district director's determination is reviewed by the Board under an abuse of discretion standard. *Castro v. Gen. 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); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

The Board has held that vocational evaluation for the purpose of rehabilitation which is neither medical, surgical nor conducted by a physician, is not compulsory. Thus, the potential result from vocational rehabilitation is not a factor which may be considered in determining the extent of claimant's disability since neither the Act nor the regulations require that claimant undergo vocational rehabilitation training. *See Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979). In *Mendez,* the Board distinguished between vocational rehabilitation training, which claimant is not required to undergo, and an evaluation for purposes of securing evidence on suitable alternate employment.

As vocation rehabilitation is neither medical nor surgical, compensation payments to claimant may not be suspended under Section 7(d) because of claimant's failure to undergo vocational rehabilitation. *Simpson v. Seatrain Terminal of California*, 15 BRBS 187 (1982) (Ramsey, dissenting). In dissent, Judge Ramsey stated that vocational evaluation is often the key in determining the extent of disability. In *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985), the Board quoted from

Judge Ramsey's dissent in *Simpson* in holding that claimant's refusal to cooperate in a vocational rehabilitation evaluation is a factor which should be considered in assessing a vocational rehabilitation specialist's opinion relevant to suitable alternate employment. *See also Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985); Section 8 of the desk book, Vocational Evidence and Rehabilitation.

Digests

In General

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. Nat'l Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

The Board held that 20 C.F.R. §702.281(a) is not plainly inconsistent with Section 33(g) of the Act, such that Section 702.281(a) must be invalidated. Although Section 702.281(a) requires a claimant to give notice to employer and the district director of more events than does Section 33(g), there is no penalty for failure to give that notice. Thus, claimant's non-compliance with Section 702.281(a)'s provision to give notice of the institution of a third-party suit cannot bar his claim pursuant to Section 33(g)(2). *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010).

The Board rejected claimant's assertion that the definition of "aquaculture worker" at 20 C.F.R. §701.301(a)(12)(iii)(E) is "merely interpretive," lacks the force of law, and should be ignored in addressing coverage. The Board explained that, in passing the 1984 Amendments to the Act, the Department of Labor published Interim Final Rules and requested written comments and then published the Final Rules implementing the 1984 Amendments. As these regulations were subject to the notice and comment provisions of the APA, they are "substantive" and not "merely interpretive." Thus, they are binding as law. The Board further rejected claimant's assertion that the regulation is inconsistent with the Act because the Act does not explicitly state the definition, explaining that the Secretary is authorized to promulgate regulations, claimant has not shown that the Secretary's definition is overly expansive, and the definition is a permissible and consistent interpretation of the Act. Accordingly, as claimant meets the definition of an aquaculture worker, he is excluded from the Act's coverage. *Stork v. Clark Seafood, Inc.*, 47 BRBS 5 (2013), *aff'g on recon.* 46 BRBS 45 (2012).

Vocational Rehabilitation

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 Pac. 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) permits the termination of rehabilitation if the employee fails to cooperate with the agency supervising the training. The Board affirmed 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 Mach. Shop*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

The Board affirmed the deputy commissioner's denial of claimant's request for rehabilitation services, as the parties' Section 8(i) settlement discharged 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. Gen. Eng'g & Mach. Works*, 25 BRBS 169 (1991) (Note that OWCP subsequently changed its policy in this regard. *See* Industry Notice No. 117, July 7, 2004).

The Board remanded the case to the administrative law judge, as he did not adequately explain his conclusion that that claimant's INS records were relevant to claimant's credibility, or how claimant's credibility affected the disability issue presented, as the degree of scheduled impairment was at issue. Moreover, with regard to whether the INS records were 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 was reasonable or necessary is a discretionary determination 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 noted that the employer has the right to appeal directly to the Board the district director's implementation of a plan. *Castro v. Gen. 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).

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 a hearing. The hearing constituted a sufficient pre-deprivation hearing and protected employer's due process rights. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *aff'g* 37 BRBS 65 (2003), *cert. denied*, 546 U.S. 1130 (2006).

Observing that the statutory provision and regulations governing vocational rehabilitation do not provide employer an explicit role in the formulation of a rehabilitation plan, the Board noted that 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 plan was in place in this case, the Board declined to remand the case for the district director to consider employer's "evidence" regarding the wages claimant could earn without a rehabilitation program. The Board affirmed the district director's implementation of the vocation rehabilitation plan as employer failed to show an abuse of discretion on appeal. 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 affirmed the vocational retraining program. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

The Board affirmed the district director's approval of a rehabilitation plan even though claimant had begun the proposed course of study before approval, as the district director fully addressed employer's response to the proposed plan. The district director properly considered the regulatory criteria and the plan was adequately documented following claimant's recovery from surgery. In addition, the Board held that the identification of alternate jobs by employer did not preclude claimant from participating in a retraining program, make his retraining program unnecessary, or make him ineligible for such program. *R.H. [Hopfner] v. Todd Pac. Shipyards, Inc.*, 43 BRBS 89 (2009).

The Board affirmed the district director's approval of a rehabilitation plan that conformed to the regulatory criteria at 20 C.F.R. §§702.501-702.508. Further, citing *Hopfner*, 43 BRBS 89, the Board held that employer's identification of alternate jobs that pay approximately the same as entry level positions in the market for which the rehabilitative program was preparing claimant, that claimant was not qualified for every job available in the market, and that claimant's treating physician approved only categories of jobs rather than the specific jobs identified as available in the market, have no bearing on the propriety of the vocational rehabilitation plan. *Walker v. Todd Pac. Shipyards*, 46 BRBS 57 (2012), *vacated on other grounds on recon.*, 47 BRBS 11 (2013).