

R.H.)
)
 Claimant-Respondent)
)
 v.)
)
 TODD PACIFIC SHIPYARDS,)
 INCORPORATED)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE) DATE ISSUED: 07/23/2009
 CORPORATION)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

Peter B. Silvain (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Approval of Rehabilitation Plan and Award (Case No. 14-145263) of District Director Karen P. Staats 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 review the district director's implementation of the 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 injured his right knee on January 17, 2006, while working as a shipfitter and welder. Claimant's treating physician, Dr. Alinea, diagnosed claimant as suffering from severe degenerative knee disease and a lateral meniscus tear. On October 5, 2006, Dr. Alinea released claimant for work which did not involve squatting, kneeling or stair/ladder climbing. At employer's request, claimant was examined by Dr. Levine on February 22, 2007. Dr. Levine opined that claimant had reached maximum medical improvement as of that date and imposed restrictions due to the work-related knee condition including: no kneeling, squatting, deep knee bending or prolonged walking. Thus, the parties agreed that claimant cannot return to his former duties and that he has a permanent disability as a result of his injury. Moreover, employer had no work available at its facility within claimant's restrictions.

Claimant worked with Ms. Clawson, a vocational rehabilitation specialist, to develop a retraining plan with the ultimate goal of becoming Computer Aided Design (CAD) Technician or Mechanical Drafter.¹ On December 5, 2007, Ms. Clawson presented a "draft" proposed vocational rehabilitation plan recommending claimant's enrollment in a one-year program in Bates Technical College beginning in January 2008. However, claimant underwent surgery on his right knee on January 24, 2008. On July 24, 2008, the Department of Labor informed employer that Ms. Clawson was attempting to ascertain claimant's residual restrictions following this surgery and included a Notice of Proposed Vocational Rehabilitation Plan.² In its initial response, employer questioned

¹ Claimant requested vocational rehabilitation services through the Department of Labor in July 2007.

² The notice provided fourteen days for employer to submit comments regarding the proposed plan. However, due to an error within the law firm, employer's counsel did not receive the correspondence as it was routed to the firm's Alaska office. Employer's

the limitations imposed by Dr. Teeny following claimant's surgery in January 2008. Dr. Teeny clarified that claimant can stand or walk up to four hours in an eight-hour day with alternating sitting, standing and walking. Dr. Teeny also maintained the previous limitations on bending, twisting and stair climbing on an occasional basis, but prohibiting squatting or kneeling. He stated that claimant could lift up to 20 pounds at a time on a continuous basis, but up to 50 or 70 pounds only on an occasional basis. Claimant began attending classes at Bates in September 2008. On October 9, 2008, employer filed additional objections to the proposed plan. The district director reviewed employer's objections and found them to be without merit. Therefore, the district director issued an Approval of the Rehabilitation Plan and Award on October 22, 2008.

On appeal, employer contends that the district director erred in approving the plan which was based on physical limitations claimant no longer has. Moreover, employer contends that retraining was not necessary in this case because it established the existence of other employment that would have accommodated claimant's work restrictions. Employer also avers that the plan calls for "lengthy" retraining rather than returning claimant to remunerative employment within a "short period of time" as required by the regulations. Lastly, employer contends that it was denied due process of law as it had insufficient time to respond to the proposed plan and claimant's course of study began before the comment period had concluded. The Director, Office of Workers' Compensation Programs, and claimant respond, urging affirmance of the district director's approval of the vocational rehabilitation plan as it is not an abuse of discretion and is supported by the underlying documentation. Employer has filed a reply brief.

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); *see also Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). The regulations at 20 C.F.R. §§702.501-702.508 implement Section 39(c)(2), and 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.

counsel was granted additional time to file a response, and he responded on August 21, 2008.

Reviewing the district director's implementation of claimant's vocational rehabilitation plan requires the Board to address whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error or judgment...[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *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). The regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few. The employee must be permanently disabled, 20 C.F.R. §702.501, the goal is to return the employee to remunerative employment within a "short" period of time, and it must restore or increase the employee's wage-earning capacity, 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. Neither the Act nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan. *Meinert*, 37 BRBS at 166; 20 C.F.R. §§702.502-702.506.

Before Ms. Clawson recommended that claimant attend classes at Bates Technical College, she gave claimant vocational tests, reviewed his medical, educational and vocational history, and concluded that he had no transferable skills. Ms. Clawson reviewed claimant's test results and concluded that Engineering Technician would be an appropriate career goal and that the Mechanical CAD-Drafting program would help claimant achieve that goal. Ms. Clawson also conducted a labor market and wage study for these positions in claimant's community, ascertaining their general availability. Initially, Ms. Clawson recommended claimant begin the program at Bates Technical College in January 2008, but the start date was delayed due to claimant's scheduled knee surgery in January 2008 and his subsequent recovery. Thus, although development of the plan was initiated prior to the date claimant ultimately reached maximum medical improvement,³ it was not approved by the district director until she reviewed the vocational and medical evidence after claimant's recovery from the January 2008 surgery. Moreover, we reject employer's contention that Ms. Clawson based her recommendation regarding claimant's vocational rehabilitation on erroneous physical limitations. In August 2008, Ms. Clawson specifically requested that Dr. Teeny clarify claimant's restrictions following his recovery from the January 2008 and the approved plan is based on those restrictions.

³ We note that Dr. Levine, employer's consultant, had previously stated that claimant was at maximum medical improvement. Moreover, Section 702.502, 20 C.F.R. §702.502, states that vocational rehabilitation services are available in cases where permanent disability is "likely."

In this case, employer has not shown that the district director abused her discretion in implementing this rehabilitation plan, as employer has failed to demonstrate that she did not comply with the regulatory criteria. *Meinert*, 37 BRBS at 166-167. Ms. Clawson adequately documented the wages claimant will 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. Ms. Clawson demonstrated how claimant's vocational background and aptitude testing fit well with the new skills claimant will obtain at the technical college. Moreover, Ms. Clawson explained that the physical requirements of the plan did not exceed claimant's restrictions, as documented by Dr. Teeny's most recent evaluation of claimant's condition. In addition, the program is scheduled to be for only one year, and thus the goal of obtaining a vocational objective in a short period of time is satisfied.

Contrary to employer's argument, the fact that it identified alternate employment that its vocational expert believed is suitable for claimant is insufficient to establish that the district director abused her discretion in approving claimant's rehabilitation plan. 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 identification of alternate jobs by employer does not preclude claimant from participating in a retraining program, make his retraining program unnecessary, or make him ineligible for such a program. *Meinert*, 37 BRBS at 166.

In addition, employer contends that it was deprived of due process because it was afforded only 14 days to respond to the proposed plan and because claimant began his course of study before the plan was formally approved. Employer contends that the 14 days provided were not sufficient to reply in a "meaningful way," but does not specifically allege how it was deprived of due process. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, has held that a rehabilitation plan does not, in itself, deprive an employer of its property. *Castro*, 401 F.3d at 978, 39 BRBS at 24(CRT). In addition, employer had the opportunity to respond to the plan both in August and October 2008. Moreover, although claimant began his retraining program before the plan was formally approved, the district director fully addressed employer's response to the proposed plan, including its vocational evidence. Therefore, as employer was apprised of the plan and afforded an opportunity to comment on it prior to its approval by the district director, the district director insured that the plan was based on Dr. Teeny's updated restrictions, and employer has not established a harm to a protected property interest, we reject employer's contention that the vocational rehabilitation plan violates employer's due process rights. As employer has not established that the district director abused her discretion in approving the rehabilitation plan based on the regulatory criteria, we affirm the award.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge