BRB Nos. 12-0180
and 12-0315

SHAWN WALKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	DATE ISSUED: 11/29/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Rehabilitation Plan and Award of R. Todd Bruininks, District Director, and the Order Granting Partial Summary Decision and the Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

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

Jennifer Kim and Russell Metz (Metz & Associates P.S.), Seattle, Washington, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Law Judges.

PER CURIAM:

Employer appeals the Rehabilitation Plan and Award (Case No. 14-143800) of District Director R. Todd Bruininks and the Order Granting Partial Summary Decision and the Order Awarding Benefits (2012-LHC-00624) of Administrative Law Judge Russell D. Pulver 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right hand on May 11, 2005, while working for employer as a boilermaker/rigger. CX 1. He underwent a wrist fusion on October 22, 2008, a re-fusion on July 9, 2009, and a pin removal on December 18, 2009. EX 4 at 2. Employer paid temporary total disability and medical benefits. On May 20, 2010, the Office of Workers' Compensation Programs (OWCP) referred the case to a vocational counselor, Ms. Clawson. CX 1. On June 1, 2010, employer informed Ms. Clawson that claimant cannot return to its employ. EX 4 at 6.

On June 25, 2010, claimant underwent a physical capacity evaluation, which demonstrated he was capable of performing medium duty work, as he could be expected to lift and carry 30-40 pounds occasionally and 15-20 pounds frequently. CX 3. Claimant underwent vocational testing arranged by the OWCP on September 15 and November 5, 2010; Ms. Clawson received the report on November 8, 2010. EX 4 at 8. On December 21, 2010, claimant's treating physician determined he had reached maximum medical improvement and that he had a two percent impairment of the upper extremity. Employer paid claimant temporary total disability benefits through December 20, 2010. 33 U.S.C. §908(b). Beginning December 21, 2010, when claimant's condition reached maximum medical improvement, and continuing until January 31, 2011, employer paid claimant permanent partial disability benefits under the schedule for a two percent impairment to the upper extremity. 33 U.S.C. §908(c)(1). Mr. Bennett, employer's vocational expert, prepared a labor market survey on January 26, 2011, listing fourteen positions he believed suited claimant, which were available from October 14, 2010, through January 26, 2011, and which paid between $10 and $18.75 per hour. On

March 28, 2011, Ms. Clawson submitted a proposed vocational rehabilitation plan to the OWCP.[1] EX 4 at 8. On April 20, 2011, the Department of Labor (DOL) provided employer with a Notice of Proposed Vocational Rehabilitation Plan. CX 5. Under the proposed plan, claimant would attend training with the ultimate goal of becoming an electronics technician or assembler. Employer objected to this plan on May 4, 2011.[2] CX 7. Before receiving approval from the district director, claimant began his vocational training on July 5, 2011. On December 7, 2011, the district director approved the rehabilitation plan, rejecting employer's objections.[3] Employer appeals the approval of the vocational rehabilitation plan. BRB No. 12-0180. Claimant and the Director, OWCP, urge affirmance of the district director's approval of the plan. Employer has filed a reply brief.

After entering the formal training program, claimant sought total disability benefits. Employer disputed the claim on the grounds that it had already fully compensated claimant for his scheduled permanent partial disability and it established there were available jobs on the open market that he could perform. Claimant submitted a motion for summary decision requesting that the administrative law judge order employer to pay total disability benefits during his participation in the rehabilitation program. The administrative law judge found that employer established the availability of suitable alternate employment as of October 14, 2010, which claimant did not diligently pursue, and therefore, employer established that claimant was only temporarily partially disabled from October 14 through December 20, 2010. 33 U.S.C. §908(e). The

[1]Ms. Clawson recommended formal training through the Electronics Technician Certificate of Proficiency program at Lake Washington Technical College. This training would take place over seven quarters, followed by 90 days of placement services (July 5, 2011 – June 20, 2013).

[2]Employer contended that vocational rehabilitation was unnecessary because its labor market survey demonstrated that claimant is capable of performing and obtaining employment in alternate positions that pay hourly wages comparable to what he could potentially earn after completion of the rehabilitation program. Employer additionally asserted that not all of the jobs listed in Ms. Clawson's survey would be suitable for claimant upon completion of the program, as his physician did not specifically approve all of the identified jobs and some of the positions required multiple years of experience.

[3]The district director stated that employer's labor market survey does not demonstrate that claimant could perform the jobs on the basis of his age, education, work experience and physical restrictions; the purpose of the proposed plan was to provide claimant with the training needed to secure employment; and claimant would likely earn between $9.84 per hour and $16.56 per hour upon completing the program. Approval Order at 2-3.

administrative law judge also found that, on the date of maximum medical improvement, December 21, 2010, employer became liable for permanent partial disability benefits under the schedule. The administrative law judge found that employer is liable for total disability benefits as of July 5, 2011, when claimant commenced his rehabilitation program and work became unavailable to claimant. Employer appeals the administrative law judge's award of total disability benefits. BRB No. 12-0315. Claimant, in response, seeks affirmance of the award. Employer has filed a reply brief.

Initially, we address employer's challenge to the district director's approval of the vocational rehabilitation plan (the plan). Employer contends retraining was not necessary because it established the availability of suitable alternate employment before the plan was proposed. Employer also avers that its liability will not be reduced by claimant's participation in vocational rehabilitation, as it fully paid its liability under the schedule, and that the district director did not thoroughly address its objections to the 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); *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). 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.

Reviewing the district director's implementation of a claimant's vocational rehabilitation plan requires the Board to address whether the decision was based on consideration of the relevant regulatory factors and whether there has been a clear error of judgment. *Meinert*, 37 BRBS at 166; *Cooper*, 22 BRBR at 40 (the Secretary of Labor's vocational rehabilitation determination may be challenged only on the basis that the Secretary has abused her discretion in making the decision). 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 to restore or increase the employee's wage-earning capacity. 20 C.F.R. §702.506; *see R.H. [Hopfner] v. Todd Pacific Shipyards, Inc.*, 43 BRBS 89 (2009).

Upon review of the district director's approval of the rehabilitation plan, relevant law, and the arguments raised on appeal, we hold that employer has failed to demonstrate an abuse of discretion by the district director. Employer does not allege that the plan does not comply with the regulatory criteria, as claimant's impairment is permanent, and his retraining program was relatively "short" with the goals of remunerable employment and restoring claimant's wage-earning capacity. 20 C.F.R. §§702.501-702.508. Further, the district director adequately addressed each of employer's objections to the plan. Contrary to employer's assertion, its identification of alternate jobs that pay approximately the same as entry level electronics positions, that claimant is not qualified for every available job in the electronics market, or that claimant's treating physician approved only categories of jobs rather than the specific jobs identified, have no bearing the propriety of the vocational rehabilitation plan. *Hopfner,* 43 BRBS at 91; 20 C.F.R. §§702.501, 702.506. A vocational rehabilitation plan need not qualify a claimant for a particular job identified in a labor market survey. The purpose of Ms. Clawson's labor market survey was to assess whether there was a viable market in claimant's geographic area for electronics assemblers and technicians, not to identify specific jobs for claimant that would be immediately suitable upon completion of the program; moreover, claimant's treating physician, Dr. Blauvelt, approved both types of jobs. DX 1. Thus, Ms. Clawson's recommended plan is in accordance with the regulations, and employer has not shown that the district director abused his discretion in implementing it. *Hopfner,* 43 BRBS at 91; *Meinert,* 37 BRBS at 166-167. Accordingly, we affirm the district director's approval of a vocational rehabilitation plan for claimant.

Next, we address employer's challenge to the administrative law judge's award of total disability benefits for the duration of the plan. Employer contends the administrative law judge erred in finding claimant to be totally disabled for the length of his rehabilitation program because it presented available suitable alternate employment and fully compensated claimant under the schedule prior to the commencement and approval of claimant's program. Employer additionally asserts that the administrative law judge erred in deciding the matter in a summary decision, alleging there is a genuine factual dispute as to whether claimant is totally disabled.

Where, as in this case, it is uncontroverted that the claimant is incapable of resuming his usual employment duties with his employer due to his injury, he has established a prima facie case of total disability; the burden thus shifts to his employer to establish the availability of jobs he can perform, which, given the claimant's age, education, and background, he could likely secure if he diligently tried. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied* , 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP* , 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.,* 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The claimant, however, can establish his entitlement to total

disability benefits if suitable alternate employment is not available to him due to his participation in a rehabilitation program sponsored by DOL. *See Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). In addressing whether suitable alternate employment is not reasonably available to a claimant, an administrative law judge should consider factors such as whether: (1) enrollment in a rehabilitation program precluded any employment; (2) an employer agreed to the rehabilitation program and to continued payment of benefits; (3) completion of such a program would benefit a claimant by increasing his wage-earning capacity; and (4) the claimant demonstrated diligence in completing such a program. *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998). None of the factors is determative. *Brickhouse*, 315 F.3d at 295-296, 36 BRBS at 91(CRT). If employment is not available, even if it is otherwise suitable for the claimant, then the employer has not satisfied its burden, and the claimant is entitled to total disability benefits until the date alternate employment becomes available. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 489 U.S. 1073 (1991). It is a claimant's burden to establish that he is unable to perform suitable alternate employment due to his participation in a vocational training program. *See Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

Employer contends that an award of total disability benefits in this case is not permissible because, unlike previous cases in which the claimant had a scheduled injury, here the scheduled award was fully paid before the commencement of the plan. That is, employer argues that once claimant's disability became permanent and partial, and his scheduled benefit was fully paid, he should not subsequently be awarded total disability benefits simply due to his participation in a DOL-approved rehabilitation program.[4] Essentially, employer invites the Board to draw a distinction between schedule-injury cases in which benefits have been fully paid and those in which they have not for purposes of determining whether a claimant may thereafter be considered totally disabled. We decline to make such a distinction as it is contrary to case precedent.

[4]Claimant began his rehabilitation program eight months after employer established the availability of suitable alternate employment, six months after his condition reached maximum medical improvement, and five months after employer fully paid permanent partial disability benefits under the schedule. The delays to which employer refers are less significant than it asserts as Ms. Clawson submitted the vocational rehabilitation plan to employer only three months after claimant's condition became permanent, and it appears a prior rehabilitation plan for claimant had been disapproved. Only permanently disabled employees are eligible for vocational rehabilitation services. 33 U.S.C. §939(c)(2); 20 C.F.R. §702.501.

Although employer correctly notes that there are no reported cases in which the claimant was awarded total disability benefits under these exact circumstances, *see, e.g., Castro*, 401 F.3d 963, 39 BRBS 13(CRT), the same standards apply to the issue of total disability in all cases. *Gregory*, 32 BRBS 264; *see Potomac Electric Power Co. [PEPCO] v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). A claimant is entitled to receive total disability compensation when he is unable to return to his usual work due to his work injury, unless his employer establishes there are suitable alternate jobs *available* which he can realistically secure. *See Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT). Suitable alternate employment is not available if the injured worker is unable to accept employment because it is precluded by his participation in a vocational rehabilitation program. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT). It is well established that a claimant is not limited to an award under the schedule when an injury to a scheduled member results in total disability. *PEPCO*, 449 U.S. at 272, 14 BRBS at 365. Therefore, the fact that permanent partial disability benefits were fully paid under the schedule is not determinative of claimant's entitlement to total disability benefits. Moreover, situations exist which require an employer's payment of total disability benefits even after a scheduled award has been paid. For example, in *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), the claimant received temporary disability benefits as well as scheduled permanent partial disability benefits for a work-related hand injury. The claimant returned to work with his employer, but was laid off for economic reasons. The employer was held liable for total disability benefits for the lay-off period because suitable alternate employment was not shown to be available during that period. *See also Hairston*, 849 F.2d at 1196, 21 BRBS at 124(CRT) (suitable alternate employment not established by a position at a bank that the claimant physically performed for seven weeks, as the job was not realistically available to him once his employer learned of his criminal record). Contrary to employer's assertion, therefore, case law supports the administrative law judge's finding that a total disability award is permissible after partial disability has been established. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Abbott*, 27 BRBS 192. Therefore, we reject employer's argument that an award of total disability is precluded in this case.

The administrative law judge found that, although employer's labor market survey established the availability of suitable alternate employment: 1) claimant's certificate program was a full-time program; 2) claimant stated that he would not be able to work and attend classes; 3) at the time of the hearing, claimant was enrolled in four core electronics classes and attended school from 2:15 p.m. to 8:20 p.m. Monday through Thursday; 4) claimant spent, on average, three hours outside of class for each hour spent in class; 5) claimant's commute was 45 minutes each way; 6) and claimant showed full diligence in pursuing the plan. Order at 11. Thus, the administrative law judge rationally determined that claimant's full-time participation in the rehabilitation program precluded him from securing and keeping a full- or part-time job, making the jobs in employer's labor market survey not reasonably available to claimant during the program. Further,

the administrative law judge found that the plan would increase claimant's wage-earning capacity over time and that employer's objection to the plan because it would not reduce its ultimate liability for permanent partial disability benefits is not determinative of claimant's entitlement to benefits.[5] Order at 11; *see Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Brickhouse*, 315 F.3d 286, 295-96, 36 BRBS 85, 91(CRT). Accordingly, the administrative law judge awarded claimant total disability benefits during his enrollment in the rehabilitation program between July 5, 2011, and June 20, 2013. As the administrative law judge considered claimant's entitlement to total disability benefits during his enrollment in the approved vocational rehabilitation program in light of relevant criteria and as employer does not argue that the administrative law judge incorrectly applied these criteria, we affirm the administrative law judge's finding that suitable alternate employment was not reasonably available to claimant during his enrollment in the rehabilitation program. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Gregory*, 32 BRBS 264.

Finally, employer asserts it was improper for the administrative law judge to issue a "summary decision" because the extent of claimant's disability during his enrollment in the vocational rehabilitation program was disputed. In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). The administrative law judge found that employer established suitable alternate employment with its labor market survey; thus, the administrative law judge viewed suitable alternate employment in employer's favor. The administrative law judge also found that claimant established he cannot work during his vocational program, and he therefore granted claimant's motion for summary decision.

[5]The administrative law judge observed that, although claimant's participation in the program will not reduce employer's ultimate liability for permanent partial disability benefits, employer's interests are theoretically furthered because claimant will acquire skills which reduce the likelihood that he will be unable to obtain suitable alternate employment in the future thus rendering employer liable for total disability compensation. Order at 10; *see Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

We reject employer's contention. Employer has not identified any facts which establish a genuine dispute to claimant's inability to work during his formal training period. It does not dispute claimant's course load, hours in school, or diligence in completing the program. Rather, employer's argument is legal, not factual, in that it disputes the propriety of an award of total disability during vocational rehabilitation after suitable alternate employment was established and a scheduled award was fully paid. As employer has not shown the existence any genuine issues of material fact, we reject employer's assertion that summary decision was improper. Although the administrative law judge was required to make findings based on the facts specific to this case, the administrative law judge did so, and employer has not identified any facts that would preclude an award during the period in question. Moreover, the administrative law judge's conclusion is supported by substantial evidence of record, and we have upheld the legal basis for the award. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT). Therefore, the administrative law judge's grant of summary decision in claimant's favor and the award of total disability benefits are affirmed.

Accordingly, the district director's Approval of Claimant's Rehabilitation Plan and the administrative law judge's Order Granting Partial Summary Decision and the Order Awarding Benefits are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge