

BRB Nos. 12-0180
and 12-0315

SHAWN WALKER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	
)	
and)	
)	
LIBERTY NORTHWEST INSURANCE CORPORATION)	DATE ISSUED: 03/20/2013
)	
Employer/Carrier-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Respondent)	ORDER on RECONSIDERTION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case, *Walker v. Todd Pac. Shipyards*, 46 BRBS 57 (2012). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director, Office of Workers' Compensation Programs (the Director) responds noting that, regardless of the Board's disposition of employer's motion to reconsider the affirmance of the administrative law judge's award of benefits, the district director's rehabilitation award remains intact as unchallenged. Claimant responds, urging rejection of employer's motion, and has also filed a fee petition for work before the Board. Employer has not filed objections to the fee petition.

Employer asserts that the Board erred in affirming the administrative law judge's grant of claimant's motion for summary decision because the evidence employer offered to counter claimant's motion raised a genuine issue of material fact. Employer contends that it offered evidence that the vocational rehabilitation program would not increase claimant's earning capacity relative to the alternative employment it identified, a factor

relevant to the unavailability of suitable alternate employment during the program; therefore, rather than find, “[c]ompletion of the program will also benefit [c]laimant by increasing his wage-earning capacity,” the administrative law judge should have inferred that the vocational rehabilitation program would not benefit claimant, as he must construe all inferences in the light most favorable to the non-moving party when ruling on a motion for summary decision.

As discussed in the Board’s decision, the administrative law judge should address relevant factors in determining whether claimant is entitled to total disability benefits while enrolled in a vocational rehabilitation program. *See generally Louisiana Ins. Guaranty Ass’n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). “These include whether enrollment in the rehabilitation program precludes any employment; whether the employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits; whether completion of the program would benefit the claimant by increasing his wage-earning capacity; and whether the claimant showed full diligence in completing the program . . . [N]o one of these factors, standing alone, should necessarily be considered determinative.” *General Constr. Co. v. Castro*, 401 F.3d 963, 971-72, 39 BRBS 13, 19(CRT) (9th Cir. 2005)(citing *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002), and *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998)). In this case, the administrative law judge found that claimant was diligently pursuing his retraining and that the vocational program precluded claimant from working. The Board affirmed these findings and employer does not seek reconsideration on this basis. Rather, employer notes that it submitted to the administrative law judge a labor market survey listing fourteen jobs that paid between \$9.00 and \$18.74 per hour. Based on the district director’s observation that claimant would likely earn between \$9.84 and \$16.56 per hour in an entry-level position upon graduation from the vocational rehabilitation program, as well as labor market research indicating that 80 percent of the program’s recent graduates are employed at a median wage of \$20.67 per hour, the administrative law judge determined that completion of the rehabilitation program would increase claimant’s earning capacity. Decision and Order at 11.

Upon reconsideration, we agree with employer that this conflicting evidence on claimant’s ultimate wage-earning capacity raised a genuine issue of material fact, and that the administrative law judge inappropriately resolved the issue by weighing the evidence in claimant’s favor. In addressing a motion for summary decision, the administrative law judge must determine if there is an absence of a genuine factual dispute and construe all inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Here, the administrative law judge weighed evidence regarding claimant’s wage-earning capacity in claimant’s favor, and thus, in conjunction with other factors, concluded that claimant is entitled to total disability

benefits while he is enrolled in the program. If it is necessary to weigh evidence and/or to make credibility determinations, the administrative law judge cannot grant summary decision. *Morgan v. Cascade General, Inc.*, 40 BRBS 9, 13 (2006)(citing *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). As the evidence employer offered could support its position regarding claimant's ultimate wage-earning capacity, and as this factor is among those relevant to claimant's entitlement to benefits, we must vacate the administrative law judge's Order Granting Partial Summary Decision and the consequent award of benefits.¹ *Morgan*, 40 BRBS at 13; 29 C.F.R. §§18.40(c), 18.41(a). We remand the case to the administrative law judge to set the case for an evidentiary hearing. 29 C.F.R. §18.41(b); 20 C.F.R. §702.331 *et seq.*

Claimant's counsel has filed a fee petition for work performed before the Board requesting a total of \$6,247.50, representing \$350 per hour for 17.85 hours of work before the Board. Counsel requests \$3,342.50 for work in BRB No. 12-0180 and \$2,905 for work in BRB No. 12-0315.² 20 C.F.R. §802.203(c). Employer has not filed any objections. We grant counsel's fee request of \$3,342.50 for work performed before the Board in BRB No. 12-0180, as claimant successfully defended the rehabilitation plan and the overall fee is reasonable and commensurate with the necessary work performed. 33 U.S.C. §928; 20 C.F.R. §802.203. However, the Act provides for an award of an attorney's fee for work performed before the Board only if claimant's counsel has been successful. *Id.* As we have vacated the administrative law judge's decision in BRB No. 12-0315 and remanded the case, counsel's petition for an attorney's fee is denied at this time. Counsel may reapply for a fee if claimant is successful before the administrative law judge on remand. 20 C.F.R. §802.203.

Accordingly, we grant employer's motion for reconsideration in BRB No. 12-0315. 20 C.F.R. §802.409. We vacate that portion of the Board's decision affirming the administrative law judge's Order Granting Partial Summary Decision. We vacate the administrative law judge's decision and remand the case for further action consistent with this decision. The Board's decision in BRB No. 12-0180 is affirmed. Claimant's

¹Employer moves for reconsideration only on the Board's affirmance of the award of total disability benefits, BRB No. 12-0315, and not on its affirmance of the rehabilitation plan, BRB No. 12-0180. We, therefore, agree with the Director that the Board's affirmance of the district director's award is unchallenged and is affirmed.

²Specifically, counsel's fee petition requests 8.8 hours spent on BRB No. 12-0180, 7.55 hours spent on BRB No. 12-0315, and 1.5 hours spent reviewing carrier's reply brief in both cases, review of the Board's Order on the consolidated dockets, and preparing the fee petition. As this 1.5 hours was spent on both appeals, we have allocated 0.75 hours to each appeal.

counsel is awarded a fee of \$3,342.50, payable directly to counsel by employer, for work performed before the Board in BRB No. 12-0180. 33 U.S.C. §928; 20 C.F.R. §802.203(e). If claimant succeeds in obtaining benefits before the administrative law judge on remand, his counsel may reapply for an attorney's fee in BRB No. 12-0315.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge