

G.G. )  
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 Claimant-Respondent )  
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 v. )  
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 SM CONSULTING )  
 )  
 and )  
 )  
 FIDELITY & CASUALTY COMPANY OF ) DATE ISSUED: 04/29/2008  
 NEW YORK/CNA INTERNATIONAL )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Second Rehabilitation Plan and Award of Eric L. Richardson,  
District Director, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Cherry Hill, New Jersey, for  
claimant.

Michael W. Thomas, Sean T. Monaghan and Shana L. Precht (Laughlin,  
Falbo, Levy & Moresi, LLP), San Francisco, California, for  
employer/carrier.

Peter B. Silvain, Jr. (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank  
James, Acting 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 Second Rehabilitation Plan and Award (Case No. 02-137914) of District Director Eric L. Richardson 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 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) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2003).

Claimant, a linguist, suffered shrapnel wounds and injuries to his wrist, shoulders and back, as well as a hearing loss and post-traumatic shock disorder, when a car bomb exploded near him in Baghdad, Iraq, on October 14, 2004. Employer has paid disability benefits voluntarily. Claimant's physical injuries were deemed permanent as of April 4, 2006. Claimant remained under psychiatric care.

In July 2006, the Office of Workers' Compensation Programs (OWCP) referred claimant for vocational rehabilitation. An initial rehabilitation plan was developed in an attempt to return claimant to work as an Arabic translator within the United States. Employer had no objections to this plan, and it was approved by the district director on April 5, 2007. This plan was based on the assumption that claimant had the necessary security clearance for such work; stateside positions require that an applicant have this clearance prior to his hiring. Claimant's security clearance, however, had expired and claimant's attempts to find work as a translator were unsuccessful. Consequently, a second rehabilitation plan was developed.

The second plan, proposed in July 2007, called for claimant to train for eight months as a computer security specialist and user support analyst, positions which fit his vocational background and interests, as well as his physical restrictions.<sup>1</sup> Employer objected to the plan, summarily contending that suitable jobs were available to claimant in the field of translation without a security clearance and that claimant's security clearance was still viable. The district director addressed employer's objections, stating that claimant did not possess a valid security clearance and that the OWCP had learned through the first, failed plan, that the lack of such a clearance was an impediment to

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<sup>1</sup> The plan called for claimant to undergo LTS Career Training from August 6, 2007 through June 6, 2008, plus 90 days of job placement services and employment monitoring through September 3, 2008. EX 16.

employment as a translator in the United States.<sup>2</sup> The district director stated that, therefore, claimant was entitled to another vocational rehabilitation plan in order to return him to remunerative work. The district director approved the second plan on July 24, 2007.

On appeal, employer contends that the district director's plan violates the regulatory criteria set forth in 20 C.F.R. §702.501 because claimant has not yet reached maximum medical improvement for his psychological injury. Moreover, employer contends that the proposed plan does not materially increase claimant's wage-earning capacity over that which he could earn without the training. Finally, employer argues that the plan violates its due process rights because it is not permitted to question the vocational rehabilitation counselor concerning the assumptions, testing, and research on which she based her recommendation for the training program. Employer also contends its due process rights are violated because it is obligated to pay claimant total disability compensation without a hearing for the duration of the vocational rehabilitation, noting, in addition, that its obligation is extended in this case due to the first, failed plan.

The Director, OWCP, has filed two motions.<sup>3</sup> In its Motion to Remand for Reconsideration, the Director requests remand for the district director to determine whether claimant's psychological condition and treatment affects the suitability of the current plan.<sup>4</sup> The Director further moves to strike those of employer's arguments which were not first presented to the district director.

Employer opposes the Director's motions, arguing that the plan must be vacated because it has not been established that claimant's psychological condition is permanent and that such a condition precludes better-paying employment than that on which the plan is based. Employer also avers that all of its contentions are properly before the Board, as an appeal of the plan is its only recourse.

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<sup>2</sup> The OWCP stated it would reconsider its approval of the second plan if employer could demonstrate that claimant had a valid security clearance.

<sup>3</sup> Claimant responds that he will not be filing a formal response but adopts the Director's arguments. Letter dated February 12, 2008.

<sup>4</sup> The Director requests that the plan not be vacated but go forward in the interest of time.

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 otherwise 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.

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). If, as employer contends on appeal, it believes that the 14 days in which it may comment on a proposed plan are insufficient for it to provide a meaningful response, employer should timely request an extension from the district director. In this case, employer had the opportunity to comment on the counselor's "Vocational Rehabilitation Plan Rationale." Other than to state its disagreement with the proposition that translator work was unavailable to claimant, employer did not submit any objections to the proposed plan. As employer had the opportunity to file objections to the plan, and the implementation of such is committed to the discretion of the district director, *see Castro*, 401 F.3d at 978, 39 BRBS at 24(CRT), employer's due process rights were not violated. *See also* n. 7, *infra*.

The documentation underlying the plan states that: (1) suitable alternate employment is not available with employer;<sup>5</sup> (2) claimant's treating physician stated he cannot return to work overseas; (3) the proposed computer work is within claimant's

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<sup>5</sup> In addition to lacking a valid security clearance, claimant failed to pass the translation examination required by employer before claimant could return to work as a full-time translator/interpreter at its Reston, Virginia, facility.

physical restrictions; and (4) the proposed work is vocationally and educationally suitable for claimant. The counselor stated that claimant could be expected to earn between \$24,960 to \$27,456 per year.

Employer contends that the vocational plan is inadequate as it returns claimant to employment that pays well below those wages he earned as a linguist.<sup>6</sup> Employer did not raise this issue before the district director. Nonetheless, that a claimant's proposed wage-earning capacity does not equal his pre-injury wages is not necessarily determinative of the propriety of the plan or establish an abuse of the district director's discretion. See generally *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002); *Meinert*, 37 BRBS at 166-167. The goal of vocational rehabilitation is increasing a claimant's wage-earning capacity and lowering employer's liability in the long-term. See *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994).

The factors addressed by the OWCP support its approval of the second rehabilitation plan. 20 C.F.R. §§702.501, 702.506. Claimant's physical injuries were deemed permanent and the proposed employment is physically, educationally, and vocationally suitable for claimant. He is precluded from returning to work as a translator. As claimant had no earnings at the time the plan was implemented, the plan will restore claimant to remunerative employment within a short period of time.<sup>7</sup> *Meinert*, 37 BRBS at 167. Nonetheless, we agree with the Director that remand is required as the district director did not address whether claimant's psychological condition affects his participation in the rehabilitation program. The Act requires that a claimant's disability be permanent, 33 U.S.C. §939(c)(2), and that any plan be suitable in terms of both physical and psychological work-related conditions, 20 C.F.R. §702.501. Thus, the case

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<sup>6</sup> Employer notes that claimant's wages prior to his injury were in excess of \$100,000 per year. However, claimant earned these wages in a war zone.

<sup>7</sup> As the Director notes, 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). The Director correctly asserts that employer may cease at any time its voluntary payments of compensation. Moreover, employer is not denied due process of law, as, 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. See *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994); see also *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2003); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002).

is remanded for the district director to consider whether claimant's psychological condition and related treatment affects the suitability of the plan. As the plan is otherwise implemented based on appropriate factors, the plan will remain in effect.<sup>8</sup>

Accordingly, the case is remanded to the district director for findings consistent with this decision. The Rehabilitation Plan and Award is to remain in effect.

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

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<sup>8</sup> The attachments to employer's brief documenting the procedural history of this case do not contain any information concerning claimant's psychological condition after August 2006. The Director states that the district director has been trying to obtain updated information in this regard.