BRB No. 04-0890

DAVID L. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHUGACH DEVELOPMENT CORPORATION	)	
	)	
and	)	
	)	
ACE USA INSURANCE COMPANY	)	DATE ISSUED: 08/18/2005
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Peter W. Preston and Meagan A. Flynn (Preston Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Matthew H. Ammerman, Thomas H. Fitzhugh, III, and Nicholas Earles (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for employer/ carrier.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Approval of Rehabilitation Plan and Award and the Denial of Request for Reconsideration of Karen P. Staats (Case No. 02-133507) 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).[1] The Board reviews the district director's approval of a rehabilitation plan to determine:

> "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of 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."

Meinert v. Fraser, Inc., 37 BRBS 164, 166 (2003), *quoting 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).

Claimant injured his right hand in a work accident on Kwajalein Atoll. He underwent surgery on his right wrist and elbow on October 1, 2003. Claimant cannot return to his usual work. Therefore, the Office of Workers' Compensation Programs (OWCP) referred claimant to a vocational counselor, Stan Potocki, for vocational rehabilitation services. Mr. Potocki's first report stated that employer was not responsive to his calls, so he proceeded with a vocational plan on the assumption that no work was available within claimant's restrictions, given his vocational and educational background. After reviewing claimant's physical and educational test results, Mr. Potocki proposed a plan to retrain claimant to work in the general hospitality industry, identifying positions such as night auditor/clerk, front office manager, and entry level motel/hospitality manager. He stated claimant needed to upgrade his basic academic skills. To this end, Mr. Potocki recommended two terms of instruction at the Rogue Community College learning center, where claimant would receive basic reading, math, and writing instruction, as well as computer instruction. After this was completed, claimant was to undergo eight weeks of training in hospitality management at the Northwest Training Institute. Finally, claimant would have seven months of professional skills training, such as an internship under the auspices of Portland Community College. Claimant would then receive placement services. Mr. Potocki provided the requirements and wages of

[1] We grant employer's motion to reform the caption to reflect employer's name as Chugach Development Corporation.

jobs in these categories and claimant's physician approved the job categories as suitable for claimant.

On May 26, 2004, the district director sent to employer a "Notice of Proposed Vocational Rehabilitation Plan" in accordance with Mr. Potocki's recommendation. Employer was afforded 14 days in which to comment or to submit documents in support of its position. Employer submitted to the district director an objection to the plan on the ground that claimant already had the ability to earn more than minimum wage; employer submitted a labor market survey to support this position. Employer also averred, through reference to a psychologist's report, that additional schooling was not likely to improve claimant's educational abilities. Employer contended that attempts to place claimant in a job should be made before a vocational rehabilitation plan is implemented. Employer also stated that claimant's interest in the proposed plan was at best limited, and therefore the plan was not likely to succeed. Finally, employer averred that as claimant's injury was to a scheduled member, a vocational rehabilitation plan was not warranted as claimant's ability to earn wages at any particular level is irrelevant.

Mr. Potocki responded to employer's filing. He addressed how the wages claimant could be expected to earn are higher than the minimum wage. He stated that jobs identified in employer's labor market survey as pest control technician, merchant patroller, and telephone solicitor are not physically and/or educationally suitable for claimant. Mr. Potocki explained that the Rogue Community College aspect of the training program involved direct tutoring and was to be self-paced, consistent with claimant's learning style.

In June 2004, claimant informed Mr. Potocki that he was ready to commence the program. The district director approved Mr. Potocki's proposed plan on July 8, 2004. In her Order approving the plan, the district director addressed and rejected each of employer's objections to the plan. Employer filed a motion for reconsideration, disagreeing with the assessment of Mr. Potocki and the district director that claimant was limited to sedentary, as opposed to light-duty work, and disagreeing that the jobs it identified were not suitable for claimant. The district director denied the motion for reconsideration, again addressing each of employer's points.

Employer appeals the district director's approval of the vocational rehabilitation plan. Claimant responds, urging affirmance. Subsequent to the issuance of the Ninth Circuit's decision in *General Construction Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *aff'g* 37 BRBS 65 (2003), the Director, OWCP, filed a Motion for Summary Disposition, to which employer replied. In the alternative, the Director seeks affirmance of the district director's Order approving the rehabilitation plan.

In his Motion for Summary Disposition, the Director contends that employer's appeal is moot, because, as of April 4, 2005, claimant dropped out of his rehabilitation plan as his Social Security disability claim had been approved and his OWCP file was closed. Employer responds that the Board should decide its appeal as claimant was enrolled in the rehabilitation program for eight months and the validity of the program can affect claimant's entitlement to disability benefits during that period.[2] We agree with employer, and we deny the Director's Motion for Summary Disposition. If the district director abused her discretion in implementing the vocational rehabilitation plan, claimant's entitlement to disability benefits while he was enrolled could be affected. *See Castro,* 401 F.3d at 970-973, 39 BRBS at 18-20(CRT). Therefore, we will address the issues raised in employer's appeal.

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 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.

20 C.F.R. §702.506. *See Meinert*, 37 BRBS at 166.

We reject employer's contention that its due process rights were violated because the district director implemented a vocational rehabilitation plan without there being an evidentiary hearing. In *Castro,* the Ninth Circuit held that the Act does not entitle

[2] We reject employer's contention that the Director's motion/brief was not timely filed. The Board granted the Director until 30 days after *Castro* was issued or May 1, 2005, whichever came first, to file his brief. *Castro* was decided on March 2, 2005. The Director filed his motion on May 2, 2005. The Board has the discretion to accept pleadings filed out of time. *See* 20 C.F.R. §§802.217, 802.219.

employer to an evidentiary hearing, pursuant to the Administrative Procedure Act (APA), on the reasonableness of a rehabilitation plan prior to the implementation of that plan. *Castro*, 401 F.3d at 978, 39 BRBS at 34(CRT). The court reasoned that Section 39(c)(2) and its implementing regulations "commit the direction and therefore also the approval of such rehabilitation programs to the discretion" of the district director, and thus no factual findings by an administrative law judge are required. *Id.*; *see also Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000). In the event claimant seeks disability benefits during his period of vocational rehabilitation, employer is entitled to a full evidentiary, pre-deprivation, hearing pursuant to the requirements of the Act and the APA, and claimant must meet his burden of establishing his entitlement to benefits.[3] 33 U.S.C. §919(d); 5 U.S.C. §554; *Castro*, 401 F.3d at 978, 39 BRBS at 34(CRT)*; Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

We next address employer's contention that the district director abused her discretion in approving the rehabilitation plan. The Board's review is limited to determining whether the district director applied the statutory and regulatory criteria in rendering her decision or whether there was a "clear error of judgment." *Meinert*, 37 BRBS at 166. 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. In addition, OWCP's Longshore Bulletin No. 04-03 states that the district director must address all of employer's timely objections to the proposed rehabilitation plan.

Employer contends that the educational component of the plan is incompatible with claimant's intelligence testing. Dr. Pearson, a psychologist, administered educational tests. Claimant tested at the fourth grade reading level, the second grade

[3] As evidence of its denial of due process, employer contends that its documents concerning the availability of alternate employment claimant could perform without vocational rehabilitation were rejected by Mr. Potocki and Ed Cope, a rehabilitation specialist with OWCP, without employer's having the opportunity to question them as to the basis for their opinions. Given the framework of the Act, employer's contention in this regard goes to whether the district director abused her discretion in approving the plan.

spelling level, and the fifth grade math level. Dr. Pearson stated, "At this point, it doesn't seem likely that academic skills are going to be appreciably improved through further remedial work. [Claimant] is likely to learn best by direct observation and hands-on learning experiences." Because of claimant's vocational history of heavy labor, from which he was now precluded, Mr. Potocki stated that retraining was claimant's only option for obtaining employment above the minimum wage level and that retraining would require upgraded academic skills. Mr. Potocki recommended that claimant enroll for two terms (six months total) of remedial and computer classes at Rogue Community College. In her Order approving the plan, the district director acknowledged Dr. Pearson's report. She stated that the first two months of classes at the college were to be on a one-on-one basis and self-paced, as was the computer instruction. In addition, the post-community college portion of the program was to be at a small technical school with some one-on-one training, followed by an internship with on-the-job training. The OWCP documents forwarded to employer state: "This is hands-on training to accommodate Mr. Clark's low academic scores." As Mr. Potocki took claimant's low academic abilities into account and tailored the necessary schooling to claimant's learning style as discussed by Dr. Pearson, we hold that employer has not demonstrated an abuse of discretion in the approval of the plan merely because Dr. Pearson felt it unlikely that claimant's academic ability would improve.

Employer's next argument is that the district director erred in assessing claimant's physical capacity to be at the "sedentary" level instead of at the "light" level. Employer contends that because of this error the district director erred in rejecting its evidence of jobs claimant could perform without a retraining program.

After claimant underwent physical therapy following recovery from his surgery, Dr. Young stated on February 19, 2004, that claimant "is definitely only capable of light work." The report from the therapy center states that claimant's "demonstrated functional strength at the end of the program is in the SEDENTARY-LIGHT work range." The occupational therapy discussion portion of the report states that, "At discharge, [claimant] is able to tolerate 8+ hours of conditioning/work activity at the Sedentary level." In addition, the report states that claimant "has repeatedly demonstrated an inability to hold onto objects over 20 lbs; hand dexterity is poor when handling weighted objects, or when having to apply force or torque while manipulating them."

In response to the proposed vocational rehabilitation plan, employer's vocational consultant conducted a labor market survey on the assumption that claimant could perform light work as stated by Dr. Young. The district director relied on those portions of the functional capacities evaluation performed by the therapists in which claimant's demonstrated lifting capacity is lower than that required for "light work." Based on the therapists' categorization of claimant's capacity as being at the "sedentary level," the

district director stated that the jobs identified by employer's expert were not suitable because two of them required lifting beyond the sedentary level.

We reject employer's contention that the district director abused her discretion in selecting the "sedentary" designation over the "light" designation, as the therapists' report supports this conclusion. Thus, there is no abuse of discretion in the district director's rejection of the jobs identified by employer as available to claimant without retraining. Specifically, Mr. Potocki and Mr. Cope, on whom the district director relied, stated that the pest control technician and merchant patroller positions are categorized as light-duty work by either the *Dictionary of Occupational Titles* or by the employer contacted by employer's vocational consultant. In addition, the district director's rejection of the pest control position is based on job requirements incompatible with claimant's hand injury and that such persons be licensed in Oregon, a qualification claimant does not possess. As to the telephone solicitor job, the district director stated that claimant does not possess the transferable skills needed for such work.

Employer's last contention is that the program violates that part of the regulation at Section 702.506 which states that a vocational rehabilitation training program should be intended to restore or increase materially a claimant's wage-earning capacity. Employer contends that the plan will not restore claimant's wage-earning capacity or increase it materially above that which he possessed without retraining.

Mr. Potocki stated that without retraining claimant would be limited to minimum wage jobs. Employer contended, by way of the labor market survey it provided to the district director that claimant currently could earn more per hour than the $7.91 per hour average wage of the jobs identified by Mr. Potocki in his survey. However, employer's survey related to specific jobs which the director found claimant could not perform. The district director stated that according to the State of Oregon Employment Department, the 25th percentile wage for hotel, motel and resort desk clerks is $8.19 per hour. The 10th percentile wage for a motel/hospitality industry manager and front office manager was $13.14 per hour. The district director noted that these conservative figures were used as claimant's potential earning capacity upon completion of the plan, and that therefore claimant had the potential to earn more as he gained experience.

We hold that employer has not established that the district director's action contravenes the regulation at Section 702.506. Claimant is unable to perform his usual work, and Mr. Potocki stated employer did not offer him any suitable positions within the company. Vocational testing revealed that claimant had no transferable skills, and the district director did not abuse her discretion in rejecting the types of jobs employer stated were available without retraining. Thus, the program offered claimant the opportunity to learn skills and to obtain placement in positions initially paying at least somewhat more

than the minimum wage consistent with the criterion that the intended plan restore or materially increase claimant's wage-earning capacity.

In sum, the district director applied the regulatory criteria in approving the rehabilitation plan, and her orders comply with the program requirement that she address employer's objections to the plan. Mr. Potocki's reports clearly explain claimant's need for educational and vocational training and the medical documentation supports the limitation to sedentary work. Employer's disagreement with the district director's assessments does not establish the "clear error" required to overturn the discretionary determinations. *Meinert*, 37 BRBS at 167. Therefore, we affirm the district director's approval of the rehabilitation plan.

Accordingly, the Director's Motion for Summary Disposition is denied. The district director's Approval of Rehabilitation Plan and Award and the Denial of Request for Reconsideration 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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JUDITH S. BOGGS
Administrative Appeals Judge