

G.P.)
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 Claimant-Respondent)
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 v.)
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 SCHAEFER STEVEDORING,)
 INCORPORATED)
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 and)
)
 AMERICAN LONGSHORE MUTUAL) DATE ISSUED: 10/31/2007
 ASSOCIATION, LTD)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Rehabilitation Plan and Award of Carolyn Salyer, Acting District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Lewis Fleishman (Cassidy, Raub & Fleishman), Houston, Texas, for claimant.

Alan G. Brackett and Derek M. Mercer (Mouledoux, Bland, LeGrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

Peter B. Silvain, Jr. (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 Rehabilitation Plan and Award (Case No. 08-125017) of Acting District Director Carolyn Salyer 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 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) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006).

Claimant injured her right knee in a work-related incident. Employer voluntarily paid temporary total disability benefits. In January 2006, claimant's physician stated that she had reached maximum medical improvement with a 10 percent leg impairment, and has permanent restrictions regarding lifting, climbing, kneeling, standing and walking. At that time, claimant did not wish to undergo the recommended knee surgery.

The Office of Workers' Compensation Programs (OWCP) referred claimant for vocational rehabilitation. A proposed plan called for claimant to continue in a medical assistant training program in which she had enrolled herself. The vocational counselor's report stated that employer had been contacted and agreed that the plan should be submitted to the OWCP for approval. The OWCP sent employer a notice of a proposed rehabilitation plan and provided employer 14 days in which to file comments or objections. Employer did not respond. On February 2, 2007, the district director entered the award of the rehabilitation plan. The plan provides for completion of the medical assistant program followed by a brief period of job placement services, to be completed by October 12, 2007.

On February 22, 2007, claimant underwent arthroscopic surgery on her knee. Employer then filed a timely notice of appeal of the rehabilitation plan. Attached to employer's brief in support of its appeal are medical documents post-dating the district director's order. On appeal, employer contends that the district director failed to take into account several important factors in implementing the plan. Employer contends that claimant's surgery, which may result in fewer restrictions, affects the propriety of the plan. Employer also contends that the rehabilitation counselor and the district director did not take into account employer's labor market survey, which identified available work that pays more than a medical assistant position will pay. Employer further avers that claimant is not entitled to temporary total disability benefits during her period of vocational rehabilitation.

The Director, OWCP, has filed a motion to strike and to remand, contending that the Board should strike employer's attachments post-dating February 2, 2007, such as those relating to claimant's knee surgery. The Director contends that the Board should remand the case to the district director for her to address whether the changes in claimant's medical condition affect the propriety of the current rehabilitation plan. The Director states that the Board is without authority to address the issue of claimant's entitlement to disability benefits as that issue has not been the subject of adjudication by an administrative law judge.

In her response brief, claimant contends that employer waived its right to object to the plan by failing to respond prior to the implementation of the plan. Claimant further contends that employer has not established an abuse of discretion by the district director, and that the issue of claimant's entitlement to disability benefits is not properly before the Board.

For the reasons that follow, we affirm the rehabilitation plan as it is currently implemented, but we grant the Director's motion to strike and we remand the case to the district director to address employer's contentions regarding the effect of claimant's surgery on the plan. 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.

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).

The documentation underlying the plan states that suitable alternate employment is not available with employer and that claimant's treating physician stated she cannot return to her usual work and the proposed rehabilitation plan is appropriate for her. Claimant underwent three days of vocational testing. The counselor's report discusses claimant's prior work history in medium to heavy labor and her inability to continue this type of work. The report states that suitable alternate employment on the open market, without further vocational rehabilitation, would pay between the minimum wage and \$7.00 per hour. The counselor stated that he identified many current openings for medical assistants and that such jobs pay between \$8.00 and \$10.00 per hour. The plan signed by the district director states that claimant's estimated starting salary after vocational rehabilitation would be \$7.00 per hour.

Employer contends that vocational rehabilitation is unnecessary in that claimant already retains the capacity to earn \$7.00 per hour, as evidenced by its labor market survey. Employer's labor market survey, which it attached to its appellate brief, is dated May 16, 2006, but apparently was never submitted to the district director. We agree with claimant that employer's cannot belatedly rely on this survey. Employer chose not to submit it in response to the proposed plan, and thus waived its right to rely on the survey. In any event, such evidence does not establish an abuse of the district director's discretion if the rehabilitation plan is otherwise fully documented according to the regulatory criteria. *Meinert*, 37 BRBS at 166-167. In addition, that a claimant's wage-earning capacity does not immediately increase upon completion of rehabilitation plan is not necessarily determinative of the propriety of the plan. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002). 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) (5th Cir. 1994).

The underlying vocational report adequately documents the wages claimant can be expected to 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 within a short period of time. The counselor's recommendation was based on extensive testing and he described how claimant can succeed at the medical assistant program despite some educational hurdles. The counselor explained how the physical requirements of the jobs claimant could obtain do not exceed claimant's medical restrictions. Claimant's physician approved the plan. As claimant's disability at the time the plan was implemented was deemed permanent, the plan expects to return claimant to paid employment in less than one year, and claimant could restore or surpass her pre-injury wage-earning capacity following completion of the program, the plan satisfies the requirements of the regulations. 20 C.F.R. §§702.501, 702.506. Accordingly, employer has not established an abuse of discretion in the district director's decision to approve claimant's rehabilitation plan. *Meinert*, 37 BRBS at 167. We therefore affirm the district

director's implementation of the rehabilitation plan as it is adequately based on its underlying documentation.¹

Subsequent to the issuance of the plan, claimant underwent knee surgery. Employer attached to its appellate brief documents concerning claimant's medical condition post-dating the issuance of the rehabilitation plan. These documents were not considered by the district director prior to her award of the rehabilitation plan, and the Board, therefore, is without authority to review their effect on the plan. *See* 33 U.S.C. §921(b)(3); *Meinert*, 37 BRBS at 167. Therefore, we grant the Director's motion to strike these documents. Pursuant to the Director's motion, we remand this case for the district director to address employer's documents concerning claimant's knee surgery and recovery therefrom, and any effect it may have on the rehabilitation plan.

¹ 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). 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 on this issue. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *see also General Construction Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

Accordingly, the district director's Rehabilitation Plan and Award is affirmed. The Director's motion to strike the attachments to employer's brief which post-date the award is granted. The case is remanded for the district director to address the significance, if any, of claimant's knee surgery on the plan.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge