

A.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS - TITAN	)	
CORPORATION	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE	)	DATE ISSUED: 09/23/2009
STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Rehabilitation Plan and Award and the Decision on Request for Reconsideration of a Vocational Rehabilitation Plan and Award of Eric L. Richardson, District Director, United States Department of Labor.

Michael W. Thomas and Robyn A. Leonard (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for employer/carrier.

Ann Marie Scarpino (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 Appeals Judges.

PER CURIAM:

Employer appeals the Rehabilitation Plan and Award and the Decision on Request for Reconsideration of a Vocational Rehabilitation Plan and Award (Case No. 02-154302) 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 (2006).

Claimant injured his back while working as a translator for employer at Guantanamo Bay, Cuba. He was diagnosed with a herniated disc and found unable to return to his usual employment. His condition reached maximum medical improvement on September 11, 2007, and he is limited to semi-sedentary activities that exclude repetitive bending, stooping, lifting and carrying. Claimant met with a vocational rehabilitation counselor, Mr. Vega, and together they created a plan to retrain claimant to be a phlebotomist and/or a customer service representative. Research established that there was a positive job market for both occupations, and entry level pay would range from \$10-\$12 per hour for a phlebotomist and \$9-\$10 per hour for a customer service representative. On January 30, 2009, the plan was served on employer, and on February 11, 2009, employer responded with its objections. Claimant enrolled in classes at the College of the Canyons in Santa Clarita, California, in the spring of 2009 and is scheduled to complete his education in December 2009.

The district director addressed employer's objections but approved the plan on February 2009, finding that it satisfies the regulatory criteria, that the classes are approved by the California Department of Public Health and will enhance claimant's employability as a phlebotomist and/or customer service representative and that the goals of the plan utilize claimant's people-skills and will improve other skills. Employer filed a motion for reconsideration, arguing that the plan was unnecessary because there was suitable alternate employment available which claimant could perform without additional training. The district director rejected employer's arguments, found the jobs identified in the labor market survey unsuitable for claimant, and reaffirmed the rehabilitation plan.<sup>1</sup> Employer appeals the district director's award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance as employer did not establish an abuse of discretion.

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<sup>1</sup>In June 2009, the plan was modified to approve additional educational expenses and expenses for medical exams and immunizations incurred by claimant.

Employer contends the district director erred in approving the rehabilitation plan. Specifically, it argues that the district director erred in dismissing the jobs identified as suitable by employer by failing to make findings of fact, applying arbitrary standards in rendering his decision, failing to consider the propriety of suitable jobs merely because they have a commission component, and discrediting the labor market survey because it was submitted by employer. The Director, responded, arguing that the district director's approval of the plan is not an abuse of discretion because it is in accordance with the regulatory criteria.

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) (9<sup>th</sup> Cir. 2005), *aff'g* 37 BRBS 65 (2003), *cert. denied*, 546 U.S. 1130 (2006); *R.H. v. Todd Pacific Shipyards, Inc.*, \_\_ BRBS \_\_, BRB No. 09-0177 (July 23, 2009). Review of the district director's implementation of a claimant's vocational rehabilitation plan requires the Board to address whether the relevant factors have been considered and whether there has been an abuse of discretion. *R.H.*, slip op. at 2; *Meinert*, 37 BRBS at 166; *Castro*, 37 BRBS at 73. Section 702.506 of the implementing regulations provides 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 also* 20 C.F.R. §§702.501-702.508 (regulations implementing Section 39(c)(2)). Thus, the regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few: 1) the employee must be permanently disabled; 2) the goal of the plan must be to return the employee to remunerative employment within a "short" period of time; and, 3) it must restore or increase his wage-earning capacity. 20 C.F.R. §§702.501, 702.506. Additionally, the regulations require the submission of medical data and other pertinent information in support of the plan. 20 C.F.R. §702.502. The employer does not have an explicit role in the formulation of a rehabilitation plan but is entitled to notice and an opportunity to comment prior to implementation of the plan. *Meinert*, 37 BRBS at 167 n.4; *Castro*, 37 BRBS at 73; 20 C.F.R. §§702.502-702.506; *see Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003) (plan may be implemented over an employer's objections without a hearing).

Prior to approving the plan in this case, the district director considered numerous vocational and medical reports submitted by the rehabilitation specialist. He considered the information concerning claimant's inability to return to his usual work, his permanent

impairment, his physical restrictions, his prior work history, and his transferable skills. In approving the plan, the district director rejected employer's objections regarding the viability of a career in phlebotomy and whether it will restore or materially increase claimant's wage-earning capacity. The district director discussed the length and nature of the classes claimant will take and found that the plan comports with the regulatory criteria. Employer asserted that the district director should reconsider his decision in light of a labor market survey submitted in its motion for reconsideration. The district director considered employer's submission but rejected the jobs identified in the labor market survey for a variety of reasons. On appeal, employer makes a variety of assertions to support its contention that the district director erred in approving the rehabilitation plan. However, those arguments address only the district director's rejection of its labor market survey and the jobs therein and do not challenge the district director's findings pertinent to the regulatory criteria.

Contrary to employer's argument, the fact that it identified alternate employment, deemed suitable for claimant by its vocational counselor, is insufficient to establish that the district director abused his discretion in approving claimant's rehabilitation plan. The objective of vocational rehabilitation is to "return permanently disabled persons to gainful employment . . . through a program of reevaluation or redirection of their abilities, *or* retraining in another occupation, *or* selective job assistance." 20 C.F.R. §702.501 (emphasis added). In this case, claimant has opted to retrain in another occupation and, while doing so, has enrolled in classes that the district director found will improve his English and computer skills also. The mere fact that an employer has identified alternate jobs, even those which it alleges would allow the claimant to return to work without additional training, does not preclude the claimant from participating in a retraining program, make his retraining program unnecessary, or make him ineligible for such a program. *R.H.*, slip op. at 5; *Meinert*, 37 BRBS at 166. As employer's identification of alternate jobs in this case does not preclude the approval of claimant's vocational rehabilitation plan, the district director was not required to give specific reasons for finding the jobs identified by employer unsuitable.<sup>2</sup> Therefore, any comments he made in that regard are not relevant to his approval of the rehabilitation plan. *Id.*

There is no dispute that claimant is permanently disabled. The plan approved calls for claimant to complete his schooling by December 2009. The record contains the vocational and medical documentation on which the district director relied, and the district director found that the plan satisfies the goal of returning claimant to remunerative employment utilizing and improving upon his various skills. As employer has not established that the district director abused his discretion in implementing the

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<sup>2</sup>Accordingly, we render no opinion on the suitability of the identified jobs.

rehabilitation plan based on the regulatory criteria, we affirm the award. *Id.*; 20 C.F.R. §702.506.

Accordingly, the district director's rehabilitation plan and award 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 JEAH HALL  
Administrative Appeals Judge