BRB No. 96-0971

LINDA D. GREGORY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimant.

Robert A. Rapaport and Lynne M. Ferris (Knight, Dudley, Clarke & Dolph, P.L.C.), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (95-LHC-2113) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On November 7, 1991, claimant injured her right wrist while working as a machinist trainee for employer. Claimant underwent a series of ten surgical procedures and the parties stipulated that she reached maximum medical improvement on February 10, 1995, the date her treating physician, Dr. Gwathmey, assigned her an impairment rating of the right upper extremity of 35 percent. Emp. Ex. 9.

Claimant began working with a Department of Labor vocational rehabilitation

counselor, Loretta Harris, who, in February 1993, identified 281 positions which she considered suitable for claimant based on her work history, transferability of skills analysis, and abilities. Cl. Ex. 11 at 126, 132-133. From this list, the vocational counselor developed a search plan which focused on the positions of security guard, shipping/receiving clerk and forklift operator. Cl. Ex. 12 at 25. Claimant signed the job search agreement which specified the duties she was to fulfill in looking for work. Cl. Ex. 11 at 116.

In April 1993, employer provided claimant with light-duty employment. After one and one-half days, however, claimant quit when she learned that the position was temporary; since her injury, she had moved to Mount Jackson, Virginia, several hours away from the employer's facility, and felt that a temporary position did not warrant her moving back. Tr. at 21-22. Employer acquiesced in claimant's assessment, and agreed to provide her with an additional 90 days of rehabilitation counseling. Claimant did not obtain a position within the 90 day period, however, and her rehabilitation file was closed in July 1993. Cl. Ex. 12 at 28.

In August 1993, on her own initiative, claimant enrolled in the Natural Resources Management program at Lord Fairfax Community College. Tr. at 25; Cl. Ex. 10 at 25. When learning of claimant's action, the Department of Labor reassigned her case to Loretta Harris, who was instructed to investigate whether the Natural Resources Management program would provide claimant with viable employment opportunities. On June 13, 1994, the Department of Labor reopened claimant's case, reassigning Ms. Harris as her rehabilitation counselor. Cl. Ex. 11 at 89-90. Ms. Harris, who had 20 years of vocational experience in the Shenandoah Valley area where claimant had relocated, determined that given claimant's physical capabilities, the jobs available to her upon completion of her training would include park naturalist, park ranger, game warden and wildlife agent. Cl. Ex. 12 at 16. Dr. Gwathmey, claimant's treating physician, approved these positions. Cl. Ex. 11 at 46-48, 68. Ms. Harris estimated that claimant's wage-earning capacity upon completion of her program would be between $19,500 and $20,500, and would increase with experience. Cl. Ex. 12 at 22-23.

On August 16, 1994, Jarrrell Wright, an Office of Workers' Compensation specialist at the Department of Labor, approved claimant's rehabilitation plan and award. As part of the award, the Department of Labor assumed the expenses of claimant's program and provided her with a minimal maintenance allowance provided she complied with the requirements of the program. Cl. Ex. 11 at 37-38; Cl. Ex. 12 at 18. The conditions of the program were that claimant must be enrolled full-time (carry 12 credits during the fall and spring semesters, and 6 credits in the summer) and maintain a 2.0 grade point average. Mr. Wright's report approving the program further stated that "The self-insured employer...is now paying compensation for temporary total disability and it is assumed that such payment will continue for the authorized period of training." Cl. Ex. 11 at 38. Employer voluntarily paid claimant temporary total disability compensation benefits for various periods until February 10, 1995, the date the parties stipulated that maximum medical improvement had been achieved. Emp. Ex. 11. Claimant sought temporary total disability compensation under the Act from the February 10, 1995, date of maximum medical

improvement until the completion of her Department of Labor - sponsored full-time vocational rehabilitation program.[1]

Based on Ms. Harris's vocational testimony, the administrative law judge found that claimant was qualified for a significant number of available jobs. He then determined that as claimant did not follow the search plan Ms. Harris had devised for her in 1993, Cl. Ex. 11 at 126-132, she was not diligent and did not rebut employer's showing of suitable alternate employment. The administrative law judge thus concluded that as claimant was partially disabled, had reached maximum medical improvement on February 10, 1995, and her impairment fell under the schedule, pursuant to *Potomac Electric Power Co. v. Director, OWCP* (*PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980), her exclusive remedy was permanent partial disability benefits under the schedule. The administrative law judge also rejected claimant's argument that pursuant to the Board's decision in *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192, 202 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), regardless of employer's showing of suitable alternate employment she was entitled to the claimed temporary total disability benefits because she was preluded from working while she was enrolled in the Department of Labor-sponsored rehabilitation program. In so concluding, the administrative law judge reasoned that *Abbott* was distinguishable because it did not involve a scheduled injury and the Board's decision in *Abbott* did not discuss or cite *PEPCO.* Moreover, the administrative law judge indicated that while the Board's purpose in *Abbott* was to avoid penalizing a claimant who was attempting to better him or herself, denying the claimed compensation would not frustrate that purpose, as claimant will receive her scheduled award regardless of her status at Lord Fairfax Community College. The administrative law judge further stated that awarding the claimed total disability compensation would put claimant in a better position than she otherwise would have been in had she not gone to school, by converting her entitlement to a scheduled award into entitlement to full temporary total disability compensation.

On appeal, claimant reiterates the argument made below that despite employer's showing of suitable alternate employment she is entitled to temporary total disability compensation during the period of her enrollment in the Department of Labor-sponsored rehabilitation program under *Abbott* because she was precluded from performing any employment during this time. Employer responds, urging affirmance.

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[1]The record reflects that claimant was behind schedule in completing her course of studies. She was scheduled to graduate in December 1995. Due to surgery in the fall of 1994, the projected ending date was extended through Spring 1996, although evidence was presented as to whether this date was realistic.

After consideration of the administrative law judge's Decision and Order in light of claimant's argument, we conclude that it is necessary to remand the case for additional consideration because in denying claimant's claim for temporary total disability compensation, the administrative law judge failed to fully consider the relevant factors under *Abbott*. In *Abbott*, following his medical release, the claimant sought vocational counseling through the United States Department of Labor and thereafter enrolled in a four-year full-time medical technology degree program. The Department of Labor paid claimant's tuition and required him to attend school full-time, year-round, and maintain a minimum grade point average. Claimant Abbott subsequently completed his four-year program, plus a one-year internship and commenced work as a medical technician with earnings well above a minimum wage level. Thereafter, he sought temporary total disability compensation from the date of his injury until August 27, 1990, when he completed his vocational training and obtained employment, and permanent partial disability compensation thereafter. In his Decision and Order, the administrative law judge determined that although Abbott had reached maximum medical improvement on April 18, 1984, and his employer had provided vocational testimony sufficient to establish the availability of suitable alternate employment paying minimum wage at that time, Abbott was nonetheless entitled to temporary total disability compensation until he completed his vocational rehabilitation program. In so concluding, the administrative law judge noted that by completing his vocational program claimant had increased his earning power well above the minimum wage level. The administrative law judge further observed that while, in retrospect, perhaps a different or shorter program could have been devised, the rationale for rehabilitation rather than a job placement program was sound. Moreover, he noted that the Department of Labor had not only endorsed the plan, but, in fact, had paid claimant's tuition, and that while the employer and its insurance carrier had knowledge of the program, they did not object to it, and continued to pay claimant temporary total disability compensation benefits until employer became insolvent. Finally, the administrative law judge noted that claimant was diligent in completing the rehabilitation program in the face of academic and financial difficulties. The Louisiana Guaranty Insurance Association (LIGA), which became liable for the the claim because Abbott's employer and its primary insurer became insolvent, appealed the administrative law judge's award, arguing that Abbott was only partially disabled after reaching maximum medical improvement because it introduced vocational testimony identifying a number of minimum wage jobs which he was capable of performing.

The Board and subsequently the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge. *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192, 202 (1993), *aff'd*, 40 F. 3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994). The Board and the Fifth Circuit held that despite LIGA's showing of suitable alternate employment which the claimant was physically capable of performing, the administrative law judge's award was nonetheless appropriate. In so concluding, both bodies noted that in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), the Fifth Circuit recognized that the Act provides no standard for determining the extent of disability and that the degree of disability is not assessed solely on the basis of

physical condition; it is also based on factors such as age, education, employment history, *rehabilitative potential* and the *availability of work* that claimant can perform. *Id.,* 27 BRBS at 204; 40 F.3d at 127, 29 BRBS at 26 (CRT)(emphasis added). Moreover, noting that pursuant to *Turner*, 661 F.2d at 1038, 14 BRBS at 164 (CRT), an individual may be totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that kind of work," the Board and the court determined that the administrative law judge's award of total disability benefits to Abbott was appropriate because the jobs identified by employer were unavailable and could not reasonably be secured while he was enrolled in the Department of Labor-sponsored rehabilitation program, *Id.*, 27 BRBS at 202-203; 40 F.3d at 127-128, 29 BRBS at 26 (CRT). The Board and the Fifth Circuit also recognized that awarding temporary total disability compensation to Abbott served the Act's goal of promoting the rehabilitation of injured workers to enable them to resume their places, to the greatest extent possible, as productive members of the work force, and comported with its humanitarian purposes. *Id.*, 27 BRBS at 203; 40 F.3d at 127, 29 BRBS at 26-27 (CRT); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 95 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Moreover, both noted that the Act and its implementing regulations, 33 U.S.C. §939(c)(2); 20 C.F.R. §§701.501-701.508, give the Department of Labor the authority to direct rehabilitation programs, *Abbott*, 27 BRBS at 203 n.8; 40 F.3d at 128, 29 BRBS at 26-27(CRT). The Fifth Circuit further indicated that courts should not frustrate those efforts when they are reasonable and result in lower total compensation liability for the employer and its insurers in the long run. *Id.*, 40 F.3d at 128, 29 BRBS at 27(CRT). Finally, the Board and the Fifth Circuit recognized that both parties' interests were served by Abbott's completion of his vocational rehabilitation program; LIGA's long-term compensation liability was reduced by virtue of Abbott's increase in his earning power well above the minimum-wage level.

In *Abbott*, the Board and the court thus relied on a number of facts relevant under the Act in upholding the administrative law judge's award of total disability benefits while Abbott was precluded from accepting employment due to his participation in the Department of Labor-sponsored vocational rehabilitation program. The denial of the claim for temporary total disability benefits in the present case, however, was based solely on the administrative law judge's determination that claimant's injury was covered under the schedule; thus, based on the conclusion that employer demonstrated jobs claimant could perform and she reached maximum medical improvement and thus would be limited to scheduled permanent partial disability benefits but for her decision to go to school, the administrative law judge concluded that continuing temporary total disability benefits would unjustly enrich her.

Contrary to the reasoning employed by the administrative law judge, however, in both scheduled and non-scheduled injury cases, a claimant is entitled to receive total disability compensation where she is unable to return to her usual work unless employer establishes that there are suitable alternate jobs *available* which claimant can realistically secure. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984); *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 165. The schedule is a basis for an award of permanent partial disability benefits under Section 8(c), *see* 33 U.S.C.

§908(c)(1)-(20), and Section 8(c) does not apply if claimant is entitled to total disability benefits under Section 8(a) or (b), 33 U.S.C. §908(a), (b). The administrative law judge thus erred to the extent that his denial of the claim was based on the belief that, under the United States Supreme Court's decision in *PEPCO*, a claimant who has sustained a scheduled injury is precluded from receiving total disability benefits once she reaches maximum medical improvement. The court in *PEPCO* specifically stated that a claimant who sustains a scheduled injury is not limited to permanent partial disability compensation under the schedule if the injury renders claimant totally disabled. *PEPCO,* 449 U.S. at 277 n.17, 14 BRBS at 366-367 n.17. *See also Jacksonville Shipyards v. Dugger*, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979). Thus, before claimant can be limited to benefits under the schedule, suitable alternate employment must be realistically available. If claimant is unable to accept employment because it is precluded by the terms of approved vocational rehabilitation, then suitable alternate employment is not available.[2] *Abbott,* 27 BRBS at 202.

[2]We note that the principle relied upon in *Abbott* that in order for employer to reduce its compensation liability it must identify suitable alternate employment which is realistically available to claimant, is consistent with the holdings of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *See Lentz v. The Cottman Co.*, 852 F.2d 159, 21 BRBS 109 (CRT) (4th Cir. 1988). We also note that, while the administrative law judge's finding here that suitable jobs were available is not appealed, it is based on a job survey done prior to claimant's reaching maximum medical improvement, as well as prior to her relocation, *see See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994), and entry into the rehabilitation program. Employer continued paying temporary total disability after this survey was completed.

It is correct that, in this case, claimant's participation in the vocational rehabilitation program, regardless of any increase in her wage-earning capacity, will not reduce employer's ultimate liability for permanent partial disability benefits. The schedule is in the nature of a liquidated damages provision, and once claimant is permanently partially disabled, her award is fixed by the degree of medical impairment. In distinguishing *Abbott*, the administrative law judge relied heavily upon the fact that employer's liability in *Abbott* was ultimately reduced, while employer here cannot achieve such a benefit. However, the fact that employer benefited as well as claimant was but one of the factors upon which the Board and the court relied in affirming the award in *Abbott*. The fact that both claimant and employer thus benefited from claimant's rehabilitation in *Abbott* is not dispositive. The Act provides for the rehabilitation of disabled workers, as discussed in the *Abbott* decisions. Workers with injuries covered under the schedule are entitled to rehabilitation, and the Department of Labor directs their care, as it must with any other permanently disabled employee. *See* 33 U.S.C. §939(c)(2); 20 C.F.R. §§702.501-702.508. Inasmuch as the administrative law judge in the present case did not analyze all of the relevant facts in considering whether claimant was entitled to continuing total disability benefits under *Abbott,* we vacate his denial of benefits. On remand, the administrative law judge should reconsider claimant's entitlement to total disability benefits during her enrollment in the approved vocational rehabilitation program in light of *Abbott*, specifically addressing whether her enrollment precluded any employment, whether employer agreed to the plan and continuing payment of temporary total disability benefits, whether completion of the program would benefit claimant by increasing her wage-earning capacity, whether claimant showed full diligence in completing the program and other relevant factors.[3]

Accordingly, the administrative law judge's Decision and Order denying compensation is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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[3] In the present case, the administrative law judge determined that because claimant is confined to a scheduled award, he did not need to reach the question of whether she was doing an adequate job pursuing her vocational rehabilitation. Decision and Order at 10. He observed, however, that employer had made a strong case for claimant's inability to complete the program in the Spring of 1996 and noted that if he were to order payments of temporary total disability compensation, they would terminate in the Spring of 1996, the date on which claimant alleged she would complete her program. The administrative law judge stated that he would then place the burden on claimant to demonstrate entitlement to an extension of benefits. In light of our decision to remand the case for the administrative law judge to reconsider claimant's entitlement to temporary total disability in light of *Abbott*, if on remand the administrative law judge finds that *Abbott* is applicable, he should make definite findings and award claimant compensation limited to the duration of her vocational rehabilitation program.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to remand this case to the administrative law judge. On the facts of this case, I would simply affirm the administrative law judge's determination that the employer had established suitable alternate employment, a finding of fact that claimant does not challenge. Under the Board's limited standard of review, *see O'Keeffe*, 380 U.S. at 360, the unchallenged finding of suitable alternate employment ends the inquiry as to whether or not claimant is entitled to any further temporary total disability compensation benefits. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, I would not reach the issue of claimant's participation or alleged participation in the vocational rehabilitation program and whether or not the Board's decision in *Abbott* requires a different result.

NANCY S. DOLDER
Administrative Appeals Judge