BRB No. 97-0215

PAMELA C. OUTSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	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.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.), 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:

Employer appeals the Decision and Order (95-LHC-2666) 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).

It is undisputed that in early 1993 claimant developed bilateral carpal tunnel syndrome, which arose out of and in the course of her employment as a machinist with employer, and that this condition precludes her performing her prior work duties. Claimant sought treatment from Dr. Gwathmey, who restricted her from using vibratory or power tools and performing sustained gripping, repetitive motions, and keyboard entries. He

further found that claimant reached maximum medical improvement on March 21, 1995, and assigned her a five percent permanent partial impairment in each extremity.

Claimant sought alternate employment with employer, but none was available within her restrictions. Thereafter, claimant enrolled in a vocational rehabilitation program under the supervision of the Department of Labor (DOL), whereby she received training to become a medical assistant/technician. Claimant was enrolled in this program from November 1994 through September 28, 1995. Having completed the program successfully, she was working as a medical technician as of the time of the hearing. Employer voluntarily paid claimant temporary total disability benefits from November 8, 1993 until March 21, 1995, and scheduled permanent partial disability compensation for a 5 percent impairment of each extremity thereafter. 33 U.S.C. §908(c)(3), (19). Claimant sought additional temporary total disability benefits from March 21, 1995, until September 28, 1995, when she completed her vocational rehabilitation program.

In his Decision and Order, the administrative law judge denied the claim for additional temporary total disability benefits, finding that although it was undisputed that claimant could not return to her regular employment, employer met its burden of establishing the availability of suitable alternate employment based upon a vocational survey performed by Ms. Mack, which identified 15 alternate employment opportunities paying an average wage of $8.70 per hour. Inasmuch as employer established the availability of suitable alternate employment, the administrative law judge determined that claimant was only partially disabled. Moreover, as claimant reached maximum medical improvement on March 21, 1995, and her injury was covered by the schedule, the administrative law judge concluded that, pursuant to *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 14 BRBS 363 (1980), her exclusive remedy was permanent partial disability benefits under the schedule notwithstanding her enrollment in the vocational rehabilitation program. The administrative law judge rejected claimant's argument based on the Board's decision in *Abbott v. Louisiana Insurance Guaranty Association,* 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), that she was entitled to temporary total disability benefits during the period when she was precluded from working due to her enrollment in the DOL rehabilitation program. In so concluding, the administrative law judge reasoned that *Abbott* was distinguishable because it did not involve a scheduled injury, stating that the Board's decision in *Abbott* does not indicate that the Board intended to modify the doctrine of *Potomac Electric* so as to affect the rights of an employee with a scheduled disability.

On appeal, claimant contends that the administrative law judge erred in denying her claim for temporary total disability benefits from March 21, 1995, through the end of her vocational rehabilitation training course on September 28, 1995. Specifically, claimant contends that the administrative law judge's decision should be reversed in that he erred in finding that employer met its burden of demonstrating the availability of suitable alternate employment. In the alternative, claimant argues that even if employer did identify suitable alternate job opportunities, she is nonetheless entitled to temporary total disability compensation during the period of her enrollment in the DOL-sponsored rehabilitation

program under *Abbott* because she was precluded from performing any employment during this time.[1] Employer responds, urging affirmance.[2]

Initially, we reject claimant's argument that the administrative law judge erred in finding that employer identified suitable alternate job opportunities based on Ms. Mack's May 16, 1995, vocational survey. Claimant argues that although Ms. Mack recognized that claimant's restrictions precluded her performing keyboard entry, she nonetheless identified six receptionist and secretarial positions and did not seek Dr. Gwathmey's approval of these positions. We need not determine, however, whether the receptionist and secretarial jobs Ms. Mack identified were suitable for claimant because in addition to the receptionist and secretarial jobs, Ms. Mack identified a number of non-secretarial jobs which she believed that claimant could perform. As claimant does not contest their suitability, we affirm the administrative law judge's finding that employer identified suitable alternate job opportunities based on Ms. Mack's vocational testimony.

Nonetheless, we are unable to affirm the administrative law judge's decision, as he erred in concluding that *Abbott* does not apply solely on the basis that claimant's disability involves members covered by the schedule. In *Potomac Electric*, the Court held that the schedule contained in Section 8(c)(1)-(20), 33 U.S.C. §908(c)(1)-(20), is the exclusive remedy for permanent partial disability involving parts of the body listed therein. However, the Court explicitly recognized that a claimant who injures a part of the body covered by the schedule may be entitled to total disability benefits. *Id.*, 449 U.S. at 277 n. 17, 14 BRBS at 366-367 n.17. The schedule is a basis for an award of permanent partial disability

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[1]Claimant requests an award of temporary total disability benefits through November 13, 1995, the date she actually secured employment. However, claimant is not entitled to additional total disability benefits after September 28, 1995, based on *Abbott,* as that decision applies only to the period of actual enrollment in a vocational rehabilitation program which precludes claimant's obtaining a job during that period of time.

[2]In its brief, employer renews its contention that claimant's petition for review should be dismissed as it was not timely filed in accordance with the briefing schedule issued by the Board. The Board previously rejected this argument in an Order dated January 30, 1997.

benefits under Section 8(c), 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 Court's holding in *Potomac Electric* regarding the exclusivity of the schedule thus applies only after claimant has been found partially disabled, and this finding requires a determination that either claimant is able to return to her former work or that suitable alternate employment is available to her. The analysis of these issues is not altered merely because the injury is to a scheduled member; the parties' respective burdens of proof remain the same regardless of the site of the injury. Since the decision in *Abbott* concerns the availability of alternate employment, *Potomac Electric* does not affect its application to a case.

In this case, it is undisputed that claimant cannot return to her former job. The burden thus shifted to employer to establish the availability of suitable alternate employment; in order to meet this burden, employer must produce evidence of jobs which are suitable given claimant's restrictions and which are realistically available. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984).[3] Once employer meets its burden, moreover, claimant may still be totally disabled if he meets his complementary burden of demonstrating that he was unable to obtain employment although he diligently tried. As the issue addressed in *Abbott* is whether jobs otherwise suitable are realistically available where claimant is enrolled in an approved vocational rehabilitation program which requires full-time attendance, the administrative law judge erred in denying total disability benefits upon employer's showing of suitable jobs without considering if the alternate jobs identified were, in fact, realistically available given claimant's prior enrollment in a DOL-sponsored rehabilitation program.

In *Abbott*, the Board and the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge's award of total disability compensation to an injured worker while he was enrolled in a four-year full-time medical technology program sponsored by the Department of Labor, concluding that the program's restrictions on outside employment rendered the otherwise suitable minimum wage jobs identified by

[3]In *Trans-State Dredging*, the United States Courts of Appeals for the Fourth Circuit followed the lead of the United States Courts of Appeals for the Fifth Circuit in *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), in adopting a two-part test focusing on (1) the types of jobs claimant is capable of performing or being trained to perform and (2) within these suitable jobs, whether jobs are available "for which the claimant is able to compete and which he could realistically and likely secure." *Trans-State Dredging,* 731 F.2d at 201, 16 BRBS at 76 (CRT).

employer unavailable. *Abbott v. Louisiana Insurance Guaranty Ass'n,* 27 BRBS 192, 202-204 (1993) *aff'd,* 40 F.3d 122, 127, 29 BRBS 22, 26 (CRT)(5th Cir. 1994). In so concluding, both the Board and the court discussed the holding of *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), in which the Fifth Circuit stated that the degree of disability is not assessed solely on the basis of physical condition, but is also based on factors such as age, education, employment history, rehabilitative potential and the availability of work that claimant can perform. Moreover, noting that pursuant to *Turner*, 661 F.2d at 1038, 14 BRBS at 164, 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 claimant was appropriate because the jobs identified by employer could not reasonably be secured and were thus unavailable while he was enrolled in the DOL-sponsored rehabilitation program. Both opinions recognized that awarding temporary total disability compensation to Abbott during this period 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. *Id.*; *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 relied on the provisions of the Act and its implementing regulations regarding vocational rehabilitation, 33 U.S.C. §939(c)(2); 20 C.F.R. §§701.501-701.508, which give the Department of Labor the authority to direct a worker's rehabilitation. Finally, the Board and the Fifth Circuit recognized that both parties' interests were served by Abbott's completion of his vocational rehabilitation program; claimant's earning capacity was increased well above the minimum wage level and LIGA's long-term compensation liability was reduced. Accordingly, under the *Abbott* decisions where a claimant's enrollment in a vocational rehabilitation program precludes his obtaining a job for the period of the program, the administrative law judge must consider this fact in determining whether alternate employment is not realistically available. As the administrative law judge did not undertake this analysis in the present case, it must be remanded for further consideration.

In addition, even if the jobs shown by employer were sufficient to meet its burden of proof in this case despite claimant's enrollment in the rehabilitation program, this finding does not end the inquiry. Under *Trans-State Dredging* and *Turner*, once employer meets its burden of proof, the burden shifts back to claimant to show due diligence in seeking alternate employment, and the diligent pursuit of vocational rehabilitation is certainly relevant to this issue. In this regard, the court stated in *Abbott* that it would be unduly "harsh and incongruous" to find suitable alternate employment available where claimant due to his diligent effort at rehabilitation is unable to accept such employment, citing the holding in *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991), that claimant is allowed an opportunity to prevail by demonstrating that he diligently sought but was unable to secure a job. Where claimant is fulfilling all the requirements of an approved vocational rehabilitation program and cannot work at that time without quitting the program, such facts must be considered in evaluating his due diligence. In addition, permitting total disability benefits to continue during a period when claimant is unable to secure employment is consistent with cases addressing the onset of permanent partial disability,

holding that disability becomes partial only when job availability is shown and not at the date of maximum medical improvement. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991); *Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT); *Stevens,* 909 F.2d at 1256, 23 BRBS at 89 (CRT).

In the present case, there are factual questions regarding claimant's enrollment in vocational rehabilitation which the administrative law judge must address in order to determine whether claimant's enrollment in the rehabilitation program was reasonable and precluded her obtaining alternate employment prior to its completion. Claimant here was enrolled in a medical technician training program, as was the claimant in *Abbott*, although for a much shorter time period than in *Abbott*. Like the claimant in *Abbott*, she had successfully obtained employment in her new field as of the time of the hearing. Moreover, claimant was enrolled in the program prior to the time that employer attempted to show suitable alternate employment. Prior to claimant's entrance into the training program, Ms. Jeanellen MacNeal, the OWCP vocational counselor assigned to claimant's case, secured approval of the job description for a medical technician or assistant from claimant's treating physician, Dr. Gwathmey, and described one goal of the program as enhancing claimant's wage-earning capacity. CX3bbb; CX3iii. Claimant testified that while enrolled in the program, she attended classes Monday to Thursday from 8:30 am until 12:30 pm and studied and did homework one to three hours per day seven days per week. Tr. at 18, 22.[4]

In an Injured Worker's Rehabilitation Status Report dated October 7, 1994, Jarell Wright, an OWCP specialist at the Department of Labor, approved claimant's rehabilitation plan and award. CX3yy. In this report, Mr. Wright states that the conditions of the award were that claimant be enrolled full-time, attend classes regularly, maintain at least a 2.00 (C) average, and complete the program on or before the expiration date of the award. Mr. Wright further stated in this report that failure to meet the aforementioned conditions could cause the termination of the program and the cancellation of the award and "that it is assumed that there will be no interruptions in the Program by termination of benefits or a recall to work." CX3yy.

Employer argues in its response brief that the facts in the present case are distinguishable from those in *Abbott* in that the suitable alternate jobs identified in this case

[4]Employer states in its response brief that claimant's hours were 8:30 am to 10:30 and the administrative law judge found this to be the case in his Decision and Order at 3. We note, however, that the administrative law judge cites claimant's hearing testimony, Tr. at 18, in support of that finding, and that claimant testified that her hours were from 8:30 am to 11:30 am in the cited testimony.

paid an average of $8.70 per hour, which is substantially more than minimum wage. On remand, the administrative law judge should consider the effect of the rehabilitation program in increasing claimant's earning capacity in addressing the reasonableness of the program. In addition, while in *Abbott*, the claimant's participation in the retraining program benefited employer as well as claimant by ultimately reducing its liability for permanent disability benefits, in the present case claimant's participation in the vocational rehabilitation program, regardless of any increase in her wage-earning capacity, will not reduce employer's compensation liability for permanent disability benefits. This result is due to the fact that 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. Therefore, employer is correct that *Abbott* is distinguishable in this respect. We do not believe this distinction alone dictates the outcome in this case, although it is a factor to be weighed with the other facts in this case. As we have discussed, the schedule does not apply unless claimant is partially disabled, and the relevant issues must be analyzed before that conclusion is reached. The goal of promoting the rehabilitation of injured employees to enable them to resume their places to the greatest extent possible as productive members of the work force applies regardless of whether the employee has injured a scheduled member, and the authority of the Secretary of Labor to direct the rehabilitation of all permanently disabled employees is not limited by the nature of their particular disabilities. *See* 33 U.S.C. §939(c)(2); 20 C.F.R. §§702.501-702.508.

In the present case, the administrative law judge did not consider the evidence relevant to application of the holding in *Abbott*. We therefore vacate his denial of the claimed temporary total disability benefits and remand the case for further findings. 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, 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.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues' decision to affirm the administrative law judge's finding that employer demonstrated that suitable jobs were available to claimant as of the date of maximum medical improvement in March 1995. I am unable to join in the remainder of their decision, however, because I believe that finding is dispositive of the issues raised in this case. Therefore, I would affirm the administrative law judge's decision that claimant is not entitled to additional benefits in this case.

By demonstrating the availability of suitable alternate employment at the time that claimant reached maximum medical improvement, employer established that claimant is at most partially disabled. Since claimant's injuries are to her arms, claimant is therefore entitled to an award of permanent partial disability for a specified number of weeks based on the degree of permanent impairment of her arms. Claimant's loss of wage-earning capacity after permanency is reached is irrelevant; under the holding in *Potomac Electric,* claimant is limited to the scheduled award. The schedule is in the nature of a liquidated damages provision, and it conclusively establishes the amount of claimant's entitlement to permanent partial disability. Loss of wage-earning capacity is presumed and in determining the degree of loss, economic factors such as claimant's age, education, and possibility of future loss of wage-earning capacity are not taken into consideration. Thus, when a claimant's injury is covered under the schedule, the fact that she may increase her wage-earning capacity through vocational rehabilitation or that she has been approved for a DOL Rehabilitation Program is not relevant, as the amount of her entitlement is fixed.

I do not agree that the decisions in *Abbott v. Louisiana Insurance Guaranty Association,* 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), expand claimant's entitlement in this case. In *Abbott*, the court recognized that the Act does not explicitly provide for an award of total disability benefits continuing during rehabilitation. In fact, the Act's provisions relevant to vocational rehabilitation are simple. Under Section 8(g), 33 U.S.C. §908(g), a claimant engaged in vocational rehabilitation under the direction of the Secretary is entitled to additional compensation of $25 per week, paid from the Special Fund. Section 39(c) of the Act, 33 U.S.C. §939(c), authorizes the Secretary to direct the rehabilitation of permanently disabled employees. There is no provision stating that a claimant should continue to receive disability benefits during the period of vocational rehabilitation or supporting the creation of new legal standards under such circumstances. The policy considerations cited by the court and the Board in *Abbott* cannot expand claimant's entitlement beyond that allowed by the Act. In this case, claimant reached maximum medical improvement and employer demonstrated the availability of suitable alternate employment paying well above the minimum wage. There is no assertion that claimant was unable to obtain employment within the scope of the available jobs or that she diligently sought such employment. Under these circumstances, claimant is permanently partially disabled and her recovery is for the number of weeks provided by the schedule consistent with *Potomac Electric.*

Accordingly, I disagree with the decision to remand this case for further consideration, and I would affirm the administrative law judge's decision.

NANCY S. DOLDER
Administrative Appeals Judge