

TOPIC 39 ADMINISTRATION AND VOCATIONAL REHABILITATION

39.1 ADMINISTRATION AND VOCATIONAL REHABILITATION GENERALLY

Section 39 of the LHWCA provides:

(a) Except as otherwise specifically provided, the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subsection (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chapter shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers thereof approved by the Secretary.

(b) The Secretary shall establish compensation districts, to include the high seas and the areas within the United States to which this chapter applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under section 918 and 921 of this title in respect of any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).

(c)(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedure for

obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

(c)(2) 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. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this chapter to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the costs of administering this subsection.

33 U.S.C. § 939.

Generally, Section 39 authorizes the Secretary of Labor to administer the provisions of the LHWCA.

39.2 SECRETARY'S PROVISION OF INFORMATION AND LEGAL ASSISTANCE

Section 39(c)(1) provides that the Secretary shall, upon request, provide employees with information and assistance in processing a claim and obtaining medical, manpower and vocational rehabilitation services. In addition, the Secretary may, upon request, provide **legal assistance**. However, it is important to note that under Section 39(c)(1), the Board has held that the provision of legal assistance is within the **discretion of the Secretary of Labor**. Thus, where a claimant alleged that the Secretary had denied his request, to provide legal assistance, citing a shortage of staff, the Board held that the claimant had failed to establish that the Secretary had abused his discretion. Kendall v. Bethlehem Steel Corp., 16 BRBS 3 (1983). The Board also held that the claimant had failed to establish that he had been prejudiced by the Secretary's denial of his request for legal assistance.

39.3 SECRETARY'S AUTHORITY TO DIRECT VOCATIONAL REHABILITATION

[ED. NOTE: For cases addressing a claimant's entitlement to compensation (although the claimant is capable of performing minimum wage work) while attending a vocational rehabilitation program, see Topic 8.2.3.2 Disability While Undergoing Vocational Rehabilitation.]

Section 39(c)(2) vests the Secretary with the authority to direct vocational rehabilitation. The Board has held that **vocational evaluation for the purpose of rehabilitation** which is neither medical, surgical nor conducted by a physician, is not compulsory. Accordingly, the deputy commissioner erred in suspending compensation payments to a claimant under Section 7(d) because of the claimant's failure to undergo vocational evaluation. Simpson v. Seatrain Terminal of California, 15 BRBS 187 (1982) (Ramsey, J., dissenting). In dissent, Judge Ramsey stated that vocational evaluation is often the key in determining the extent of disability. See also, Berkman v. Todd Shipyards Corp., 7 BRBS 933 (1978) (The LHWCA does not require that a claimant complete a rehab program.); Perry v. Stan Flowers Co., 8 BRBS 533 (1978) (A determination that a claimant is retrainable is insufficient to find that he is temporary rather than permanently disabled.); Price v. Dravo Corp., 20 BRBS 94 (1987) (A claimant's potential or actual participation in a vocational rehabilitation program is irrelevant to ascertaining the nature of his disability, since medical rather than economic considerations determine whether his condition can be deemed permanent.). Cf. Villasenor v. Marine Maintenance Indus., Inc., 17 BRBS 99 (1985), on recons. 17 BRBS 160 (1985) (Judge Ramsey's dissent in Simpson relied upon in holding that refusal to undergo rehabilitation evaluation is a factor which should be considered in determining disability); Morgan v. Asphalt Construction Co., 6 BRBS 540 (1977) ("Of course, if a claimant steadfastly refuses proffered rehabilitation treatment for purely spurious reasons where there is general agreement this treatment would help him, this fact should certainly be considered when making a determination of the degree of claimant's disability."). However, in Morgan, the claimant's refusal was found to be reasonable since "such treatment would likely be difficult, frustrating, and futile to a person of claimant's age."

The possible consequences of vocational rehabilitation is not a factor which may be considered in determining the extent of a claimant's disability since neither the LHWCA nor the regulations require that the claimant undergo vocational rehabilitation training. See 33 U.S.C. § 939(c)(2); Mendez v. Bernuth Marine Shipping, Inc., 11 BRBS 21 (1979).

An award of rehabilitation expenses under Section 39(c)(2) is subject to the discretion of the Secretary of Labor, and the Secretary has delegated the authority to direct the rehabilitation of permanently disabled employees to the Office of Workers' Compensation Programs. See generally 33 U.S.C. § 939 (c)(2); 20 C.F.R. §§ 702.501-702.508. Consequently, a request for payment of rehabilitation expenses under Section 39(c)(2) must be made to the district director for the compensation district in which the claimant's injury occurred, and not the Office of Administrative Law Judges. Cooper v. Todd Pacific Shipyards Corp., 22 BRBS 37 (1989) (ALJ did not possess jurisdiction to order the Special Fund to reimburse employer for claimant's rehabilitation expenses).

Review of a district director's discretionary act, such as an award of rehabilitation expenses, is properly undertaken by the Board. Cooper, supra; Glenn v. Tampa Ship Repair & Dry Dock, 18 BRBS 205 (1986).

A **claimant's failure to maintain contact** with the Office of Workers Compensation Programs during three months prior to the termination of vocational rehabilitation plan excused OWCP of its duty to counsel the claimant before such termination was undertaken since the LHWCA does not require that OWCP search for an uncooperative and seemingly missing person. Olsen v. Triple A Machine Shops, Inc., 25 BRBS 40 (1991).

Section 20 C.F.R. § 702.506(c) unequivocally states that an employee's training may be terminated if the employee fails to cooperate with the agency supervising his course of training. Section 20 C.F.R. § 702.507(b) states, *inter alia*, that a maintenance allowance shall be terminated when it is shown to the satisfaction of the Director that a trainee is not complying reasonably with the terms of the training plan or is absenting himself without good cause from training so as to materially interfere with the accomplishment of the training objective.

Neither the LHWCA nor the regulations provide for the reimbursement of moving or child care expenses associated with the implementation of an employee's vocational rehabilitation plan. See 33 U.S.C. 908(g).

Claimants must currently be receiving compensation under a continuing award (as opposed to a Section 8(i) settlement) in order to seek vocational rehabilitation services from the district director. Olsen v. General Engineering and Machine Works, 25 BRBS 169 (1991). A Section 8(i) settlement completely discharges a claimant's right to seek further benefits under the LHWCA. Olsen, supra. See also 33 U.S.C. § 908(g); 20 C.F.R. § 702.145(c).