BRB No. 03-0377

JOHN E. MEINERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRASER, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	DATE ISSUED: Nov. 25, 2003
	)	
Employer/Carrier-Petitioners	)	
	)	
AIG CLAIMS SERVICES, INCORPORATED	)	
	)	
Claims Servicing Agent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Vocational Rehabilitation Plan of Karen P. Staats, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier.

Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark S. Flynn, Acting 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 Vocational Rehabilitation Plan (OWCP No. 14-0132259) approved for claimant by District Director Karen P. Staats 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 the vocational rehabilitation plan under the abuse of discretion standard. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989).

Claimant, who is right-handed, injured his left shoulder on November 11, 1999, during the course of his employment as a diesel mechanic. This injury necessitated surgery on March 21, 2001. Claimant reached maximum medical improvement on September 25, 2001, with a permanent restriction of no lifting more than 25 pounds at or above shoulder level. Employer paid claimant total disability benefits from March 21 to April 23, 2001, as well as medical benefits. Claimant then returned to work for employer in a light duty capacity. At the informal conference held before the district director on May 7, 2002, claimant stated he stopped working for employer when it went out of business. Employer contended that claimant voluntarily quit before it went out of business. The district director recommended payment of temporary partial disability benefits from the date claimant left employer until September 25, 2001, and permanent partial disability benefits from September 26, 2001 until December 31, 2001, based on claimant's loss of wage-earning capacity in alternate employment he obtained. As of January 1, 2002, claimant obtained employment that paid wages higher than his average weekly wage, so the district director recommended a $1 per week *de minimis* award. The record does not reveal whether employer complied with these recommendations, but it appears that the claim was transferred to the Office of Administrative Law Judges on August 8, 2002.

On September 19, 2002, claimant's attorney wrote to the Office of Workers' Compensation Programs (OWCP) stating that claimant lost his job and was requesting rehabilitation services. The OWCP referred claimant to a rehabilitation counselor for counseling, testing and placement services. Carl Gann, the counselor, eventually recommended that, given claimant's vocational history and the job market, a career as a motorcycle mechanic and/or small engine mechanic was feasible. Mr. Gann recommended a training program in motorcycle and small engine repair at Lake

Washington Technical College. The district director approved a rehabilitation plan in December 2002. Claimant would take three or four classes per quarter, from January 2, 2003, to March 23, 2004, at Lake Washington Technical College. The OWCP rehabilitation counselor, Ed Cope, wrote in a status report dated February 19, 2003, that the training was on a full-time basis, that claimant had to maintain a 3.0 grade point average, and that he advised that claimant not work while he was participating in the program.

Employer was not served by the district director with a copy of the rehabilitation plan until February 2003, at which time it objected based on a report authored by its vocational consultant. This consultant stated that the rehabilitation plan was unnecessary because it would not increase claimant's wage-earning capacity over that which he could earn with his current skills. Employer attached a labor market survey to its objection to the plan. Employer also filed an appeal of the plan with the Board.[1]

On appeal, employer contends the district director abused her discretion in approving the vocational rehabilitation plan (the plan) because it was implemented for claimant's personal reasons, it will not increase his wage-earning over what he currently could earn without the retraining program, and claimant is currently employable on the open market. Thus, employer contends that the regulatory criteria for the approval of a plan were not satisfied here. Employer also contends it should not have to pay any disability benefits to claimant while he is attending the technical college. Claimant responds that employer should not be able to undermine the district director's authority to implement a plan with "evidence" employer develops after the plan is implemented. Claimant states that the plan was implemented only after placement efforts proved futile. Claimant also states that the issue concerning employer's liability for benefits during the retraining period is not properly before the Board.

[1] Claimant filed a motion to dismiss employer's appeal on two grounds. Claimant contended employer was not adversely affected or aggrieved because it is not liable for the cost of the rehabilitation plan. Claimant also contended the appeal was not timely filed. The Board, in an Order dated May 22, 2003, denied the motion to dismiss. The Board stated that a direct appeal of the district director's rehabilitation plan was proper, pursuant to the decision in *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), that a party is not entitled to an administrative law judge hearing on the propriety of district director's vocational plan, and that employer has sufficient standing due to the fact that employer may have to pay benefits while claimant is in the retraining program pursuant to *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002), and *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The Board also stated that the appeal was timely filed as to the date employer was served by the district director with a copy of the rehabilitation plan.

The Director, Office of Workers' Compensation Programs (the Director), filed a response brief that urges affirmance of the plan. The Director states that the district director considered appropriate factors before implementing the plan, and that, under the abuse of discretion standard, no abuse has been demonstrated. The Director also has filed a motion to strike employer's argument regarding its liability for disability benefits, and three documents attached to employer's brief (EX 2, 11, 12), which were not presented to the district director prior to her implementation of the plan. Employer responds that its attachments were sent to the district director after the implementation of the plan because it was previously unaware of the approval of the plan. Employer states that the Board should review its evidence to determine if the plan was properly implemented. Alternatively, employer states that the Board should remand the case to the district director for consideration of its evidence. Employer also has filed a reply brief reiterating its argument that the plan was not implemented in accordance with the regulations.

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.

Employer contends that vocational rehabilitation is unnecessary in this case because claimant retains a wage-earning capacity on the open market, and moreover, that upon completion of the plan, claimant will have a lower earning capacity in motorcycle repair than that demonstrated by employer's labor market survey. Employer avers that the "evidence" it developed after the implementation of the plan demonstrates the validity of its contentions. Employer also contends that motorcycle repair was merely an interest of claimant's and that is why retraining in this area was pursued.

Reviewing the district director's implementation of claimant's vocational rehabilitation plan requires the Board to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . [T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v.*

Volpe, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few. The employee must be permanently disabled, 20 C.F.R. §702.501, the goal is to return the employee to remunerative employment within a "short" period of time, and it must restore or increase the employee's wage-earning capacity, 20 C.F.R. §702.506. 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. Neither the Act nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan.

Before Mr. Gann recommended that claimant attend classes at Lake Washington Technical College, he gave claimant vocational tests, reviewed his medical, educational and vocational history, and tried to place him in positions compatible with this background.[2] Mr. Gann contacted numerous employers that employ truck or marine mechanics or that have engine inventory/parts divisions. *See* Report dated November 22, 2002. Many of these employers were not hiring or the work involved lifting beyond claimant's restrictions. In addition, Mr. Gann reported that claimant was looking for work on his own. Mr. Gann and claimant explored other types of machine repair work, such as household generators, personal watercraft, and snow machines, and Mr. Gann continued to seek openings for claimant at tire sales stores, auto parts stores, and rental companies. Claimant expressed an interest in motorcycle repair, and Mr. Gann investigated the program at Lake Washington as it fit well with claimant's vocational history and aptitude scores. Mr. Gann reported that the college has a successful placement rate. The participants need to be able to lift 50 pounds and to pull on engine starters. Openings for motorcycle repairmen were located at several shops, and it was noted that new employees usually are hired in the spring, around the time claimant would complete his schoolwork in 2004. *See* Report dated December 10, 2002. Based on Mr. Gann's recommendation that claimant enroll in the motorcycle and small engine repair program, the district director approved this vocational plan for claimant.

We hold that employer has not shown that the district director abused her discretion in implementing this rehabilitation plan, as it has failed to demonstrate that she did not comply with the regulatory criteria. Mr. Gann adequately documented the wages claimant will 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. Mr. Gann documented his placement efforts prior to recommending retraining courses, and he demonstrated how claimant's vocational background and aptitude testing fit well with the new skills claimant will obtain at the technical college.

[2] The first avenue of a rehabilitation program is to attempt to place the claimant with his previous employer. In this case, employer was out of business, and its successor company did not have jobs for someone with a diesel mechanic's skills. *See* Letter dated October 9, 2002; OWCP Form 16X.

Moreover, Mr. Gann explained that the physical requirements of the plan did not exceed claimant's restrictions, as no lifting at or above shoulder level is required and claimant's dominant hand is not impaired. Thus, employer's contention that the plan was chosen based simply on claimant's desires is without merit.[3]

By way of attachments to its brief, employer attempts to establish that claimant has a current wage-earning capacity without the retraining program that is at least equal to what claimant will earn upon his completion of the plan. As the Director notes, this "evidence" was not submitted to the district director and cannot be considered by the Board for the substance of the matter asserted. Thus, we grant the Director's motion to strike the documents. Moreover, we decline to remand this case for the district director to consider these documents. Assuming, *arguendo*, the validity of employer's contention, employer cannot demonstrate an abuse of the district director's discretion where the plan is otherwise fully documented according to the regulatory criteria.[4] In sum, we affirm the district director's implementation of the vocational rehabilitation plan at Lake Washington Technical College, as it was implemented in accordance with the regulatory criteria and employer has not shown that there was a clear error in the district director's judgment concerning the propriety of this plan. *See Overton Park*, 401 U.S. at 416.

As claimant and the Director urge, we decline to address employer's contentions regarding its potential liability for disability benefits during the retraining period. This issue is one that is properly presented to an administrative law judge in the first instance, and employer is entitled to a full evidentiary hearing on this issue. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Castro*, 37 BRBS at 73-74. There is now a considerable body of law to guide the administrative law judge in addressing this issue, *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Castro*, 37 BRBS 65; *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Kee v. Newport News Shipbuilding & Dry Dock Co*., 33 BRBS 221 (2000); *Gregory v.*

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[3]Moreover, it is self-evident that a claimant is more likely to succeed at a plan if, in addition to its being suitable for him, it involves a vocation in which he is interested.

[4]In *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), the Director conceded that an employer is entitled to notice and an opportunity to comment prior to implementation of a rehabilitation plan. That decision, however, was issued after the district director approved the plan at issue in this case, and cannot be relied upon to retroactively undermine the district director's discretionary authority. Even if employer had notice of a proposed plan and the opportunity to comment, the district director could implement a plan over employer's objection and without a hearing on employer's evidence. *See Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003). Employer's only avenue of recourse is a direct appeal to the Board. *Id.*

Norfolk Shipbuilding & Dry Dock Co., 32 BRBS 264 (1998); *Bush v. I.T.O. Corp*., 32 BRBS 213 (1998); *Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994), and employer may appeal to the Board any adverse findings in this regard. Moreover, the wages claimant earns upon completion of the program do not necessarily represent his wage-earning capacity. Employer may show, after claimant re-enters the workforce, that his wage-earning capacity is higher than any wages he might actually be earning. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

Accordingly, the Director's motion to strike certain attachments to employer's brief is granted. The district director's approval of the vocational rehabilitation plan for claimant is 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 JEAN HALL
Administrative Appeals Judge