BRB No. 99-0442

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| EDDIE L. KEE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: Jan. 19, 2000 |
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| 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.

Robert E. Walsh and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-2295) 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).

Claimant injured his right hand during the course of his employment for employer on February 13, 1992. It is uncontested that claimant's injury reached maximum medical improvement on September 25, 1992, with a resulting 40 percent impairment, and that he is unable to return to his usual employment as a welder.

Employer paid claimant permanent partial disability benefits under the schedule. 33 U.S.C. §908(c)(3). From June 23, 1993, until January 9, 1994, claimant received vocational assistance from the Department of Labor (DOL). On December 22, 1993, the DOL authorized claimant's participation in a tractor-trailer driver training program. Claimant successfully participated in the training program from January 10, 1994, to April 21, 1994. Thereafter, claimant sought employment as a tractor-trailer driver, which he secured commencing on August 8, 1994. Claimant sought benefits under the Act for temporary total disability from June 23, 1993, to August 6, 1994, while he was participating in vocational evaluation, training and job placement.

In his Decision and Order, the administrative law judge found that employer established the availability of suitable alternate employment based on the parties' stipulation that minimum wage entry-level jobs were available during the period claimant sought compensation and that claimant was qualified to perform these jobs. Decision and Order at 3, Stipulation No. 11. He next found that claimant is not eligible for benefits during the periods he received vocational evaluation and job placement, and he denied benefits for the period claimant received the tractor-trailer driver training, finding that claimant failed to offer any evidence he was unable to work while participating in the training program.

On appeal, claimant contends the administrative law judge erred by placing the burden of proof on claimant to establish that he was unable to work in suitable alternate employment due to his participation in vocational evaluation, training and job placement. Thus, claimant contends the administrative law judge erred in denying benefits for the periods in question. Employer responds, urging affirmance.

Where, as in the instant case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Hooe v. Todd Shipyards Corp.,* 21 BRBS 258 (1988).

Claimant can establish total disability if suitable alternate employment is not reasonably available due to his participation in a DOL-sponsored rehabilitation program. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). In *Abbott*, the Board and the Fifth

Circuit held that despite employer's showing of suitable alternate employment which the claimant was physically capable of performing, the administrative law judge's award of total disability nonetheless was appropriate on the facts presented. 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 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. *Abbott,* 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 court agreed with the Board 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 full-time in the DOL-sponsored rehabilitation program. *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26 (CRT). The Fifth Circuit also recognized that awarding total disability compensation to Abbott served the Act's goal of promoting the rehabilitation of injured workers. *Id.*, 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). The court stated that courts should not frustrate the DOL's rehabilitative efforts when they are reasonable and result in lower total compensation liability for the employer and its insurer in the long run. *Id.*, 40 F.3d at 128, 29 BRBS at 26, 27 (CRT). The court reasoned that both parties' interests were served by Abbott's completion of his vocational rehabilitation program; employer's long-term compensation liability was reduced by virtue of Abbott's increase in his earning power well above the minimum-wage level.

The Board discussed *Abbott* in two subsequent cases. In *Bush v. I.T.O. Corp.,* 32 BRBS 213 (1998), the claimant had a college degree prior to his injury, and employer established that claimant had the capacity post-injury to earn greater than the minimum wage. Nevertheless, the Board held the rationale of *Abbott* applicable as the alternate jobs were not realistically available to claimant during the period of his participation in a full-time DOL-sponsored nursing program. The rehabilitation program was designed to maximize claimant's skills and minimize employer's long-term liability.[1] The Board held that an award of total disability

[1]In this regard, the employer and the Special Fund decreased their yearly compensation liability by approximately $12,741 by virtue of claimant's higher post-injury wage-earning capacity as a nurse as opposed to his wage-earning capacity as a marine technician, which employer argued established the availability of suitable

during this period promoted the goal of rehabilitating claimant to the fullest extent possible and in the long term would lower employer's liability. In *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998), however, *Abbott* was held to be inapplicable as the claimant stipulated that she had obtained part-time employment while enrolled in a DOL-sponsored rehabilitation program. Thus, alternate employment was "realistically available" during the rehabilitation period and claimant was limited to a recovery under the schedule for her arm impairment. *Gregory*, 32 BRBS at 267.

In the instant case, claimant does not challenge the administrative law judge's finding that, pursuant to the parties' stipulation, employer established the availability of suitable alternate employment from June 23, 1993, to August 6, 1994. Moreover, the administrative law judge found that claimant submitted no evidence that he was unable to work due to his participation in the tractor-trailer driver training program. In this regard, claimant did not testify at the formal hearing, and the sole exhibit he submitted is his vocational file, which contains no evidence detailing the training program.[2] In its holding in *Abbott*, the Fifth Circuit stated that it would be unduly harsh and incongruous to find that suitable alternate employment was reasonably available if the claimant demonstrates that, through his own diligent efforts at rehabilitation, he was ineligible for such a job. *Abbott*, 40 F.2d at 128, 29 BRBS at 27 (CRT), *quoting Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 6 (CRT)(2d Cir. 1991). Thus, the decision in *Abbott* contemplated that claimant bears the burden of proving that he is unable to perform suitable alternate employment due to his participation in a vocational training program. *See also Gregory*, 32 BRBS at 267. This result is consistent with well-established case law placing the burden of proof on a claimant to show he was unable to obtain alternate employment despite a diligent effort in order to be entitled to total disability benefits notwithstanding a showing by employer of suitable alternate employment. *See Tann*, 841 F.2d at 542, 21 BRBS at 13 (CRT); *see also Palombo,* 937 F.2d at 73, 25 BRBS at 6 (CRT); *Roger's Terminal & Shipping Corp. v. Director*, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir 1986), *cert. denied*, 479 U.S. 826 (1986). Thus, we hold that the administrative law judge properly placed the burden of proof on claimant to establish that suitable alternate jobs were realistically unavailable while he was in the tractor-trailer driver program. *See generally Anderson Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994). In the absence of any evidence that claimant diligently sought but was unable to obtain suitable alternate employment while receiving vocational assistance

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alternate employment. *Bush*, 32 BRBS at 219, and n.10.

[2]It appears, however, that the training classes were held in the evening. *See*, *e.g.*, CX 1 at hhh.

before his training, while in the training program, and during job placement services after his training, we hold that the administrative law judge properly denied total disability benefits during these periods. *See Tann*, 841 F.2d at 542, 21 BRBS at 13 (CRT).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge