BRB No. 13-0165

BARRY COSGROVE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 12/16/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Rehabilitation Plan and Award of R. Todd Bruininks, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, 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, HALL and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Rehabilitation Plan and Award (OWCP No. 14-154669) of District Director R. Todd Bruininks 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 review the district director's approval of the vocational rehabilitation plan under the abuse of discretion standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

On January 17, 2011, claimant sustained an injury to his right knee while working as a shipfitter for employer. Claimant did not return to work after his injury. On May 19, 2011, claimant underwent a right knee arthroscopy with trochlear chondroplasty and medial plica excision. EX 1 at 17. On August 5, 2011, Dr. Haq, claimant's treating physician, stated that claimant's condition had reached maximum medical improvement, and although "there is some loss of motion of the affected joint, there is no ratable impairment." EX 1 at 6. However, Dr. Haq recommended permanent work restrictions, and opined that claimant "would not be able to return to the Job of Injury because of his chronic right knee chondromalacia." *Id*. On September 7, 2011, Dr. Brigham, employer's expert, stated claimant could return to work with limited kneeling, squatting, crawling, and climbing for three months. EX 1 at 12. Dr. Brigham also concluded that claimant had a five percent permanent impairment to his right leg. *Id*. at 13.

At the request of claimant, the district director's office assigned Carole Barron, a vocational rehabilitation counselor, to develop a vocational plan for claimant. Ms. Barron reviewed claimant's work restrictions and performed a transferable skills analysis. Claimant underwent vocational testing, which indicated he would fare well in occupations that involve engineering, craft and production technology. CX 2 at 39. Ms. Barron conducted a labor market survey and a wage survey in claimant's relevant labor market to determine the employment outlook for engineering technicians and computer assisted drafting (CAD) operators. Based on her findings, she determined that almost two out of every three engineering technicians found employment in their field, and she concluded there were sufficient job opportunities such that claimant would be employable upon completion of rehabilitation training as an engineering technician.[1] CX 2 at 16; EX 4 at 6.

[1]Three of ten employers Ms. Barron contacted had current openings for CAD operators and all five employers hiring electronics technicians had current openings. Seven of the ten employers indicated they expected to hire engineering technicians or CAD operators within the next year. Salaries for electronics engineers ranged from $23.70 to $31 per hour ($49,000 to $64,000 annually), and salaries for CAD operators ranged from $19.30 to $31 per hour ($40,000 to $64,000 annually). CX 2 at 20-21. The

On February 15, 2012, Ms. Barron proposed a vocational rehabilitation plan. She stated that claimant had transferable skills for drafter/engineer technician positions, from his previous employment, such as reading blueprints. Based on vocational testing indicating claimant has a high average in abstract thinking and verbal reasoning abilities, above average organization skills, and average general learning and clerical abilities, Ms. Barron opined claimant would be a "reasonable formal training candidate." CX 2 at 15, 19. She recommended claimant enroll in a four-quarter training program for an Applied Science Degree in Engineering Design Technology at Renton Technical College, plus two quarters of general education courses required for the AAS degree. On February 27, 2012, employer objected to the plan, arguing that claimant should not be placed in vocational rehabilitation because: (1) suitable alternate employment that did not require retraining was available;[2] (2) claimant did not diligently pursue the suitable alternate employment identified by employer; and (3) claimant's chance of securing work following the rehabilitation plan is "speculative." EX 1 at 2. In her July 6, 2012 progress report, Ms. Barron noted that she was informed on May 1, 2012, that claimant's rehabilitation plan had been approved. EX 3 at 6. Claimant started taking classes at Renton Technical College on July 2, 2012. *Id*.

On December 13, 2012, the district director addressed employer's objections to the proposal. The district director found that the proposed rehabilitation plan provided claimant the best opportunity to restore his post-injury wage-earning capacity, claimant diligently sought employment, but was not hired, and the occupations for the proposed rehabilitation program are "in demand." Order at 1-3. The district director thus formally approved the vocational rehabilitation plan, "based on all the evidence of record." Employer appeals the district director's award. The Director, Office of Workers' Compensation Programs (the Director), and claimant respond, in separate briefs, urging affirmance and arguing that employer did not establish an abuse of the district director's discretion. Employer filed reply briefs.

Section 39(c)(2) of the Act gives the Secretary the discretionary authority to direct "the vocational rehabilitation of permanently disabled employees. . . ." 33 U.S.C. §939(c)(2); *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *R.H. [Hopfner] v. Todd Pacific Shipyards, Inc.*, 43 BRBS 89 (2009). Review of the district director's implementation of a

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minimum qualifications for these positions varied; however, all employers required an AA or AAS degree in CAD, Engineering Design Technology, or the equivalent. CX 2 at 20-24.

[2]Employer's vocational expert, Ms. Cohen, performed a labor market survey and identified six jobs she believed claimant could perform without further training. EX 1 at 19-25. Wages ranged from $8.67 to $12 per hour ($18,000 to $24,900 annually). *Id*.

claimant's vocational rehabilitation plan requires the Board to address whether the relevant factors have been considered and whether there has been an abuse of discretion. *Hopfner*, 43 BRBS at 90; *Meinert*, 37 BRBS at 164. Section 702.506 of the implementing regulations provides 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.

20 C.F.R. §702.506; *see also* 20 C.F.R. §§702.501-702.508 (regulations implementing Section 39(c)(2)). Thus, the regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few: 1) the employee must be permanently disabled; 2) the goal of the plan must be to return the employee to remunerative employment within a "short" period of time; and, 3) it must restore or increase his wage-earning capacity. 20 C.F.R. §§702.501, 702.506. Additionally, the regulations require the submission of medical data and other pertinent information in support of the plan. 20 C.F.R. §702.502. The employer does not have an explicit role in the formulation of a rehabilitation plan but is entitled to notice and an opportunity to comment prior to implementation of the plan. *Meinert*, 37 BRBS at 167 n.4; *Castro*, 37 BRBS at 73; 20 C.F.R. §§702.502-702.506; *see Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003) (plan may be implemented over an employer's objections without a hearing).

Employer contends the district director erred in approving the rehabilitation plan. Specifically, employer asserts that the vocational rehabilitation plan in this case is unwarranted because claimant retains a wage-earning capacity on the open market. In this regard, employer avers that it demonstrated the availability of suitable alternate employment. Employer also contends the district director failed to adequately consider the regulatory criteria in assessing the plan and that claimant does not have a permanent impairment. Lastly, employer argues that the rehabilitation specialist improperly approved the plan verbally, which claimant then began, without a written authorization from the district director or notice to the employer.

Initially, we reject employer's assertion that claimant is not permanently disabled and that the district director erred in failing to address this issue. Employer did not raise this objection to the district director. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). Further, it defended this case on the ground that suitable alternate employment was available without retraining. This argument assumes that claimant cannot return to his usual work. Moreover, as the Director asserts, Dr. Haq stated claimant could not return to his prior employment because of his right knee condition. Thus, employer has not

shown that claimant's condition is not permanent and that the district director abused his discretion in this regard.[3] *Castro*, 401 F.3d 963, 39 BRBS 13(CRT).

Employer next asserts the district director failed to address whether the rehabilitation program will increase claimant's wage-earning capacity. Contrary to employer's assertion, however, the district director observed that claimant could earn between $8.67 and $12 per hour in the jobs available in employer's labor market survey, but that Ms. Barron's research indicated he could earn approximately $23.75 per hour at the conclusion of his training. Order at 2. Thus, contrary to employer's assertion, the district director considered the evidence and rationally found that claimant's potential income level after vocational rehabilitation would restore his wage-earning capacity. 20 C.F.R. §702.506; *Meinert*, 37 BRBS at 167.

To the extent employer argues that the rehabilitation plan is not "short" and therefore violates the regulation at Section 702.506, we reject the argument. As the Director states, claimant's plan was less than two years long. Thus, employer has not shown an abuse of discretion on this basis.

We additionally reject employer's contention that the district director abused his discretion by approving the rehabilitation plan despite employer's introduction of evidence of the availability of suitable alternate employment that would return claimant to work without further training. Contrary to employer's contention, the fact that it identified alternate employment, deemed suitable for claimant by its vocational counselor, is insufficient to establish that the district director abused his discretion in approving claimant's rehabilitation plan. The objective of vocational rehabilitation is to "return permanently disabled persons to gainful employment . . . through a program of reevaluation or redirection of their abilities, *or* retraining in another occupation, *or* selective job assistance." 20 C.F.R. §702.501 (emphasis added). Thus, the fact than an employer has identified alternate jobs, even those which it alleges would allow the claimant to return to work without additional training, does not preclude the claimant from participating in a retraining program, make his retraining program unnecessary, or make him ineligible for such a program. *Hopfner*, 43 BRBS at 91; *Meinert*, 37 BRBS at 166; *see generally Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). As employer's identification of alternate jobs in this case does not preclude the approval of claimant's vocational rehabilitation plan, the district director was not required to specifically address the suitability of the jobs identified by employer. Moreover, the

[3]In this context, it would be unreasonable for the district director to rely on Ms. Barron's opinion regarding claimant's disability as it is founded on her assumption that Dr. Brigham's work restrictions were permanent. As Ms. Barron is not in a position to make a medical diagnosis her opinion does not constitute a medical opinion on which the district director could rely to find claimant's disability permanent.

district director addressed employer's assertion that claimant did not diligently look for a job; he found that claimant provided documentation of his contacts with potential employers, but was not hired. Order at 2.

Lastly, employer contends the district director's "approval and implementation process" was deficient because the vocational specialist verbally and informally "approved" claimant's vocational rehabilitation plan, months prior to the district director's addressing its objections and issuing a formal order. While the approval procedures in this case arguably lacked order, employer has shown no reversible error. Paragraph 6 of Section 3-0500 of the OWCP Procedural Manual provides that "[p]lans or service authorizations which will bring the [rehabilitation] cost to more than $15,000 are subject to the approval of the District Director . . . ." Procedure Manual Ch.3-00500 Paragraph (6)(a).[4] Pursuant to the manual, the district director formally approved the plan, which cost $16,301.05, on December 14, 2012. As the Director asserts, although the district director must approve such a rehabilitation plan, there is no prohibition against preliminary informal approval of a plan prior to the district director's issuing a formal award. Further, while an employer may comment on a proposed plan, nothing in the procedure manual requires the employer's objections to be addressed prior to a preliminary approval or a claimant's starting a rehabilitation program. In this case, any error in failing to address employer's objections at the earlier stages is harmless, because the district director ultimately addressed employer's objections and applied his formal approval of the program retroactively. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Although the procedure utilized and the Order are not as precise as employer would have, such lack of precision does not warrant a conclusion that the district director abused his discretion in approving this rehabilitation program. 20 C.F.R. §702.501; *see Hopfner*, 43 BRBS at 91; *Meinert*, 37 BRBS at 166. The vocational plan is sufficiently based on the regulatory criteria. Therefore, we reject employer's contentions of error and we affirm the district director's approval of the rehabilitation plan. *Walker v. Todd Pacific Shipyards*, 46 BRBS 57 (2012), *vacated on other grounds on recon.*, 47 BRBS 11 (2013).

[4]http://www.dol.gov/owcp/procedure-manual/rehab.pdf

Accordingly, the district director's Rehabilitation Plan and Award is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I write to note that while we find an abuse of discretion was not established in this case, the delay and retroactive approval of the plan are troubling, and our determination in this case should not be considered an affirmance of the district director's authority to provide retroactive approval in all cases. *See generally Beno v. Shala*, 30 F.3d 1057 (9th Cir. 1999); *see also Ion v. Duluth, Missabe & Iron Range Ry Co.*, 31 BRBS 75 (1997).

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JUDITH S. BOGGS
Administrative Appeals Judge