BRB No. 97-1707

DANIEL F. BUSH	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Sept. 2, 1998
	)	
v.	)	
	)	
I.T.O. CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order On Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

D.A. Bass Frazier (Huey & Leon), Mobile, Alabama, for claimant.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for self-insured employer.

Laura Stomski (Martin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order On Remand (93-LHC-850) of Administrative Law Judge C. Richard Avery 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).[1] 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).

[1]On July 2, 1998, employer filed a motion in which it asked the Board to dismiss claimant's appeal in this case because it had filed a request for modification with the District Director of the Seventh Compensation District and asked that the case be referred for a formal hearing in order to modify the award of permanent partial disability compensation for the period from January 1, 1998 through March 27, 1998, to reflect that claimant experienced an increase in his wage-earning capacity. On August 11, 1998, employer's counsel filed a motion to remand based on the same reasoning. Claimant responded, opposing both motions. Employer's motions are denied. Inasmuch as the period of disability at issue on appeal, from March 1992 until June 1995, differs from that for which employer is seeking modification, there is no valid reason for the appeal not to proceed.

This case has been before the Board previously. On January 3, 1991, claimant, a refrigerator mechanic for employer, suffered a herniated disc as he attempted to change an oil seal on a container. Claimant underwent surgery performed by Dr. Hopper on September 4, 1991, followed by physical therapy and work hardening. Dr. Hopper released claimant to work on January 7, 1992 with restrictions. Tr. at 24. Prior to his medical release, claimant began working with a vocational counselor under a vocational rehabilitation program sponsored by the Department of Labor (DOL). Claimant, who had previously earned a Bachelor's degree in biology, took courses in the spring and summer of 1992, and was accepted into a formal nursing program in August 1992, from which he ultimately graduated on June 5, 1995.[2] Claimant sought permanent total disability benefits under the Act for the period he was undergoing retraining and continuing permanent partial disability benefits thereafter.

In his initial decision, the administrative law judge awarded claimant temporary total disability benefits from January 3, 1991, until January 7, 1992, when he was released to work by Dr. Hopper with a twenty percent impairment. Decision and Order at 10. The administrative law judge also awarded claimant permanent total disability benefits from January 7, 1992, through March 9, 1992, and permanent partial disability benefits thereafter, finding that employer had established that claimant had a residual wage-earning capacity during the period he was undergoing

[2]After claimant began this program, he was offered a light duty position by employer, which he accepted and started on August 6, 1992. Tr. at 35, 52, 60. However, he worked only three days before his back pain returned, so Dr. Hopper sent him back to physical therapy and added the restriction that claimant should not sit for more than one hour at a time. Tr. at 36. As claimant was not able to work during this period of recuperation, he began the nursing program in September 1992, but again left the program in November 1992 to attempt to work again. However, claimant alleges that employer would not hire him with the added restriction. Tr. at 38-39, 52. Claimant sought counseling at this time to help with depression. Cl. Ex. 6.

Claimant took one course in the nursing program in the Spring 1993 semester in order to keep his enrollment active, but paid for the course himself, because the DOL would sponsor only full-time course work. Tr. at 42. It is evident from claimant's testimony, and the subsequent history on modification and on remand, that claimant returned to the DOL sponsored program in August 1993, and graduated on June 5, 1995. Tr. at 42; Decision and Order of February 29, 1996. The parties stipulated that he is now employed and has a weekly wage of $697.45 in 1991 dollars. *Id.*

retraining of $329.91 per week[3] based on employer's identification of a suitable alternate job opportunity for a technician with National Marine Fisheries Laboratory which Ms. Tiblets had identified in a labor market survey. Decision and Order at 11. Claimant's motion for reconsideration was denied.[4]

[3]Although the administrative law judge refers to claimant's post-injury wage-earning capacity as this figure in the Order portion of his initial Decision and Order at 14, in the body of his decision on page 11 he states that claimant had a post-injury wage-earning capacity of $340.12.

[4]The administrative law judge also found that employer is not responsible for paying for counseling provided by Mr. Bennet, a social worker, as it was unauthorized, but is responsible for treatment by Dr. Dauterive, a physical therapist, since claimant was referred to him by Dr. Hopper. In a Decision and Order on Employer's Motion for Reconsideration, the administrative law judge amended his original order to reflect employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), and in a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's attorney a fee in the amount of $23,656.25, representing 189.25 hours of legal services at the rate of $125 an hour and 2.75 hours at the rate of $55 per hour, plus costs in the amount of $124. These findings were not challenged in the first appeal.

Claimant appealed this decision, but while the appeal was pending, employer filed a motion for modification pursuant to Section 22, 33 U.S.C. §922. The Board remanded the case to the administrative law judge, dismissing claimant's appeal subject to reinstatement upon the conclusion of modification proceedings. On modification before Administrative Law Judge Fletcher E. Campbell, the parties agreed that claimant had completed his DOL- sponsored reeducation and was able to obtain suitable alternate employment at a higher wage rate, thus reducing his post-injury loss in earning capacity. Judge Campbell calculated claimant's permanent partial disability benefits as of June 15, 1995, based on his post-injury wage-earning capacity of $697.45 in 1991 dollars.[5] This decision was not appealed, and claimant's original appeal, BRB No. 94-843, was reinstated by the Board at claimant's request.

On appeal, claimant argued that the administrative law judge erred in finding that employer established suitable alternate employment during the period he was attending the DOL-sponsored retraining program because the positions identified by employer's vocational expert were not realistically available to him while he was enrolled full-time in this program. Moreover, claimant contended that he was not qualified for the job with National Marine Fisheries Laboratory which the administrative law judge had determined was indicative of his post-injury wage-earning capacity,[6] and argued that employer was liable for a penalty pursuant to

[5]The administrative law judge also ordered that the overpayment that occurred since June 15, 1995, can be recovered by a deduction of $25 per week from claimant's continuing permanent partial disability benefits and that employer remains responsible for medical benefits. The administrative law judge also noted that employer agreed to pay claimant's attorney's fees and expenses in an amount not to exceed $10,500.

[6]Claimant did not challenge the administrative law judge's findings regarding two other positions identified with Gulf Coast Research Lab which the administrative law judge also found constituted available suitable alternate employment.

Section 14(e) of the Act, 33 U.S.C. §914(e). Employer responded, urging affirmance of the administrative law judge's finding that claimant is entitled to permanent partial disability benefits during the period he participated in the retraining program.

On appeal, as the administrative law judge had not considered the decisions of Board and the United States Court of Appeals for the Fifth Circuit in *Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1995), holding that claimant was entitled to total disability benefits while undergoing full-time vocational rehabilitation, the Board vacated his finding that employer established suitable alternate employment as of March 9, 1992, and remanded the case for him to reconsider claimant's entitlement to benefits from March 1992 to June 1995, when claimant completed his rehabilitation program. In so concluding, the Board stated that the administrative law judge may consider that there are periods of time during which claimant was not enrolled full-time in the retraining program. In addition, the Board remanded for the administrative law judge to reconsider whether the alternate job identified by Ms. Tiblets at National Marine Fisheries Laboratory was educationally suitable for the claimant, as well as his alleged unsuccessful attempts at obtaining it. In remanding the case, the Board instructed the administrative law judge that if this job was not suitable for or realistically available to claimant, he could not rely on its wages to establish claimant's post-injury wage-earning capacity. The Board rejected claimant's assertion that employer was liable for a penalty under Section 14(e), 33 U.S.C.§914(e), and awarded claimant's counsel a fee of $303.75 for work performed before the Board. *Bush v. I.T.O. Corp.*, BRB No. 94-843 (Feb. 25, 1997)(unpublished).

On remand, the administrative law judge reinstated his prior award of permanent partial disability compensation, finding the present case distinguishable from *Abbott* in that the claimant here had earned a college degree before working for employer and accordingly was not a typical unskilled worker who upon receiving a physical injury is relegated to minimum wage work. He further determined that this case was not about rehabilitation, as was the situation in *Abbott*, but rather a new direction that claimant chose to give his vocational life. Noting that in *Abbott,* the Fifth Circuit pointed out that a claimant must demonstrate his own diligent effort at rehabilitation, the administrative law judge further found that in the present case claimant was not diligent, as the most expedient and cost effective approach would have been for him to have taken a job in the field in which he was educated at the time of his medical release. In so concluding, the administrative law judge stated that even if claimant had to return to school for a few semesters in that field to enhance his skills, it would have been far less expensive than his embarking on a new career. The administrative law judge thus found that although rehabilitation was

a choice claimant made himself, and perhaps should be congratulated for, it was not something for which employer should be required to pay full compensation under the Act. He thus denied the claim for permanent total disability compensation during the three-and-a-half year period claimant was undergoing vocational rehabilitation. In addition, the administrative law judge determined on remand that although claimant possessed the minimum educational requirements necessary to apply for and compete for the technician position with the National Marine Fisheries Laboratory, he had not made a diligent attempt to obtain that position.

On appeal, claimant argues that the administrative law judge erred in finding the present case distinguishable from *Abbott* on remand, and in determining that claimant was educationally qualified for the job with the National Marine Fisheries Laboratory for various reasons. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, agreeing with claimant that the administrative law judge's attempt to distinguish *Abbott* should be rejected, and that claimant should have been awarded permanent total disability compensation during the period he was unable to work because he was enrolled full-time in the DOL-sponsored rehabilitation program.

This case presents the issue of whether *Abbott*, which is controlling as this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, applies where the injured employee possessed a college degree prior to rehabilitation and employer established he had a capacity to earn greater than minimum wage during the period of his full-time enrollment in a DOL-sponsored vocational rehabilitation plan. In order to determine whether the administrative law judge properly distinguished *Abbott* on these bases, a review of its facts and analysis is necessary.

In *Abbott*, following his medical release, the claimant sought vocational counseling through the United States Department of Labor and thereafter enrolled in a four-year full-time medical technology degree program. The Department of Labor paid claimant's tuition and required him to attend school full-time, year-round, and maintain a minimum grade point average. Claimant subsequently completed his four-year program, plus a one-year internship, and commenced work as a medical technician with earnings well above a minimum wage level. Thereafter, he sought temporary total disability compensation from the date of his injury until August 27, 1990, when he completed his vocational training and obtained employment, and permanent partial disability compensation thereafter. The administrative law judge determined that, although Abbott reached maximum medical improvement on April 18, 1984, and his employer provided vocational testimony sufficient to establish the availability of suitable alternate employment paying minimum wage at that time, Abbott was nonetheless entitled to temporary total disability compensation until he

completed his vocational rehabilitation program. The administrative law judge found that by completing his vocational program, claimant increased his earning power well above the minimum wage level. The administrative law judge further observed that while, in retrospect, perhaps a different or shorter program could have been devised, the rationale for rehabilitation rather than a job placement program was sound. Moreover, he noted that the DOL not only endorsed the plan, but, in fact, paid claimant's tuition, and that while the employer and its insurance carrier had knowledge of the program, they did not object to it and continued to pay claimant temporary total disability compensation until employer became insolvent. Finally, the administrative law judge found that claimant was diligent in completing the rehabilitation program in the face of academic and financial difficulties. The Louisiana Guaranty Insurance Association (LIGA), which became liable for the claim when the employer and its primary insurer became insolvent, appealed the administrative law judge's award, arguing that Abbott was only partially disabled after reaching maximum medical improvement because it introduced vocational testimony identifying a number of minimum wage jobs which he was capable of performing.

On appeal, the Board and the Fifth Circuit affirmed the administrative law judge. The Board and the Fifth Circuit held that despite LIGA's showing of suitable alternate employment which the claimant was physically capable of performing, the administrative law judge's award was nonetheless appropriate. 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 Act provides no standard for determining the extent of disability and 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 in the Department of Labor-sponsored rehabilitation program, *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26 (CRT). The Fifth Circuit also recognized that awarding temporary total disability compensation to Abbott 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, and comported with its humanitarian purposes. *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). Moreover, the Act and its implementing regulations, 33 U.S.C. §939(c)(2); 20 C.F.R. §§701.501-701.508, give the Department of Labor the authority to direct rehabilitation programs. *Abbott*, 40 F.3d at 128, 29 BRBS at 26-27(CRT). The Fifth Circuit further stated that courts should not frustrate those efforts when they are reasonable and result in lower total compensation liability for the employer and its insurers in the long run. *Id.* Finally, the court reasoned that both parties' interests were served by Abbott's completion of his vocational rehabilitation program; LIGA's long-term compensation liability was reduced by virtue of Abbott's increase in his earning power well above the minimum-wage level.

Claimant specifically argues on appeal that the rationale underlying *Abbott* also supports awarding claimant the permanent total disability compensation claimed here.[7] Claimant maintains that, as in *Abbott*, by virtue of his having undergone retraining as of June 1995, the liability of employer and the Special Fund has decreased substantially[8] over what it otherwise would have been in the alternate

[7]Claimant further asserts that the administrative law judge's reliance on the fact that employer did not agree with the rehabilitation program is in error as the Secretary is given statutory and regulatory authority under the Act to direct vocational rehabilitation. Moreover, claimant maintains that, in any event, this finding is not supported by substantial evidence. Employer responds that it never agreed to the retraining program or to pay claimant compensation while he was undergoing rehabilitation. It appears that claimant's assertion that the administrative law judge erred in concluding that employer did not agree to the retraining program may be correct, inasmuch as employer cites testimony from Mr. Arceneaux in its response brief wherein he conceded that he had been informed by Mr. Tingle of claimant's rehabilitation program and that he did not have any objection to it. Tr. at 115. Nonetheless, we decline to address this argument as any error the administrative law judge may have made in this regard is harmless since he placed no emphasis on this fact in finding the present case distinguishable from *Abbott.* While the administrative law judge in *Abbott* did note that employer and carrier had knowledge of the rehabilitation and approved it, neither the Board nor the Fifth Circuit relied on this factor in affirming the award of total disability during the period the claimant was undergoing rehabilitation.

[8]Claimant maintains that although the administrative law judge found that claimant had a post-injury wage-earning capacity of $329.41 in his initial decision based on employer's showing of suitable alternate employment during the period claimant was enrolled in the vocational rehabilitation program, the parties agreed that as of the completion of this program on June 25, 1995, claimant's wage-earning

marine technology job which the administrative law judge found established that claimant had a residual wage-earning capacity of $329.91 per week in his initial Decision and Order. Pointing out that it was the DOL counselor who looked for a post-injury occupation where his available transferable skills could be used, Tr. at 77, and determined the appropriate rehabilitative plan, claimant also challenges the administrative law judge's determination that he voluntarily chose to change his vocation and leave his job with employer. In addition, claimant avers that in concluding that employer should not be made to pay for claimant's new career choice, the administrative law judge ignored the fact that his retraining was related to his prior biology degree. Claimant also contends that while the administrative law judge denied the claim based on the fact that claimant was not a typical unskilled worker, there is nothing in the Act or regulations which limits rehabilitation to only less qualified workers. Claimant asserts that as the objective of rehabilitation as set forth in Section 702.501 of the regulations, 20 C.F.R. §702.501, is "to return permanently disabled persons to gainful employment commensurate with their physical or mental impairments, or both, by reevaluation or redirection of their abilities, or retraining in another occupation, or selective job placement assistance," and that goal was fully met here, the administrative law judge's denial of his claim for permanent total disability benefits during the period of the rehabilitation program should be reversed inasmuch as it is harsh and incongruous, and contrary to applicable law.

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capacity increased to $697.45 or 211 percent more than the administrative law judge determined initially. Thus, claimant argues that as a result of his having undergone rehabilitation, employer and the Special Fund's compensation liability has been decreased by $12,741.56 per year.

We agree with claimant that the administrative law judge erred in denying claimant total disability compensation during the period that his full-time enrollment in the DOL-sponsored rehabilitation program precluded him from working. Although, as the administrative law judge found, the present case does differ from *Abbott* in that the claimant in this case previously attended college and graduated with a bachelor's degree, this fact is not a sufficient basis for holding *Abbott* inapplicable. In addition, the remaining reasons given by the administrative law judge for finding *Abbott* distinguishable are not rational or supported by the record.

Initially, although the administrative law judge found the present case distinguishable from *Abbott* based in part on his determination that, rather than undergoing rehabilitation, the claimant here had merely decided to change careers, this determination is not borne out by the record. Rather, the record reflects that after being informed by employer's first vocational counselor, Ms. Doumas, about the DOL-retraining program, claimant contacted Mr. Spivey at DOL, who in turn hired Mr. Tingle, another vocational counselor. After meeting with and evaluating claimant, Mr. Tingle determined that claimant was an excellent candidate for retraining and that a career in nursing would be the best way to utilize his prior education and transferable skills and to ensure his ability to care for himself and his family while at the same time minimizing employer's compensation liability. Tr. at 77-78, 110. Accordingly, he devised a plan which was ultimately approved and paid for by DOL, whereby claimant would take a few pre-nursing college courses he needed to be able to qualify and then would be enrolled in a nursing program at the University of Southern Mississippi for approximately two years. As a condition of his enrollment in this program, claimant was required to be a full-time student and to maintain a certain grade point average. Tr. at 81, 109. Mr. Tingle testified that claimant was highly motivated, noting that he did not have any problems getting claimant to take full loads of the required classes and that he received straight A's. Tr. at 80-82. Moreover, Mr. Tingle testified that upon completion of the program, claimant could be expected to earn $33,000 to $36,000 initially.[9] Tr. at 84. Thus,

[9]In addition, as the Director asserts in his response brief, in questioning the rehabilitation plan designed by the DOL's vocational counselor, the administrative law judge arguably exceeded his authority inasmuch as Congress has vested the Director with the authority to "direct the vocational rehabilitation of permanently disabled employees." *See* 33 U.S.C. §939(c)(2).

the evidence establishes that claimant was engaged in a rehabilitation program based on the course the counselor found would maximize his skills and minimize employer's liability, rather than merely pursuing a personal choice.

The administrative law judge's finding that *Abbott* is distinguishable because the most expedient and cost effective approach in the present case would have been for claimant to have taken employment in the area in which he was educated is also incorrect. In so concluding, the administrative law judge ignored the fact that as a nurse, claimant was earning more than twice what he would have earned in the lab technician job which the administrative law judge initially found indicative of his post-injury wage-earning capacity. Moreover, he ignored the fact that given that claimant was only 42 years old when this case was heard on remand, it is virtually certain that employer and the Special Fund will more than recoup the compensation paid during the period of rehabilitation and the cost of claimant's retraining; by virtue of claimant's higher post-injury wage-earning as a nurse, their compensation liability has been decreased by approximately $12,741.56 per year over what it would have been had claimant merely performed work as a marine technician.[10]

[10]Based on claimant's average weekly wage of $1,011.65., if claimant did not undergo retraining, employer's liability for permanent partial disability benefits would have been $459.49 per week ($1,011.65 -$329.91= $681.71 x 2\3) or $23,633.48 per year. Based on claimant's nursing salary, employer will only have to pay $209.46 in weekly permanent partial disability benefits ($1,011.65 -$697.45=$314.20 x 2\3) or $10,891.92 per year.

As discussed previously, the facts in this case do differ from those in *Abbott* in that the claimant here previously earned a college degree. Nonetheless, we agree with claimant that this fact is not determinative because the rationale underlying the decisions in *Abbott* is equally applicable here. As in *Abbott*, claimant here does not dispute that he was capable of performing at least some of the jobs which the administrative law judge identified as constituting suitable alternate employment, but this work was not realistically available to him by virtue of his participation in the DOL-sponsored rehabilitation program.[11] Moreover, as in *Abbott*, awarding compensation on the facts presented serves 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, which in turn will result in lower workers' compensation costs to the industry as a whole in the long run. In addition, in the present case as in *Abbott*, while employer will pay claimant more in the short term during the period of rehabilitation, its interests and those of the Special Fund, are also served because by virtue of claimant's retraining their long-term compensation liability has been reduced by more than $12,000 per year. Moreover, allowing an award of total disability on the facts presented is consistent with the recognition in *Abbott* that the Act and its implementing regulations give the DOL the authority to direct rehabilitation programs, and DOL did so in this case.

In light of this reasoning and the Fifth Circuit's admonition in *Abbott* that courts should not frustrate DOL-sponsored rehabilitation efforts where, as here, they are reasonable and result in lower total compensation liability for the employer and its insurers in the long run, *Abbott*, 40 F.3d at 128, 29 BRBS at 27(CRT), we reverse the administrative law judge's finding that *Abbott* is distinguishable.[12] The case is remanded for the administrative law judge to award claimant permanent total disability compensation during those periods in which his full-time participation in the DOL-sponsored rehabilitation program precluded his working.

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[11]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.

[12] We further note that allowing claimant to obtain total disability benefits during a period he is unable to secure employment is consistent with those cases addressing the onset of permanent partial disability, holding that disability becomes partial only when job availability is shown and not as of 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).

Claimant also challenge the administrative law judge's finding on remand that the job at National Marine Fisheries Laboratory, which he had previously relied upon in determining claimant's wage-earning capacity during the period he was undergoing rehabilitation, was educationally suitable and realistically available to him.[13] In reaching this conclusion, the administrative law judge found initially that the requirements for this job are that the applicant hold a bachelor's degree with a major study in biology, and at least 6 semester hours in fishery biology. *See* CX-9, p. 17. Moreover, he stated that claimant's transcript, CX-9, p. 12, reflects that claimant received a B.S. degree in June 1977 with a major in biology and a minor in chemistry, and that he also did graduate work in marine biology. After noting that claimant's transcript indicated that he had taken courses in marine biology, marine zoology, fishery biology, marine botany, marine ecology and estuarine biology, although under a quarter versus semester system, the administrative law judge determined that he was unwilling to conclude without proof that claimant's course work did not generally meet the requirement of at least 6 semesters of fishery biology. Decision and Order on Remand at 5.

[13]In this case, inasmuch as claimant temporarily withdrew from the program for a period of time and was thus capable of working, *see* n. 2, *supra,* he is limited to permanent partial disability compensation during this period. *See* n. 1, *supra*.

The question of whether it was reasonable for the administrative law judge to infer from claimant's transcript that, although he did not actually have the 6 semester hours of fishery biology specifically required in the job recruitment notice, he had the functional equivalent by virtue of his other course work involving other marine-oriented courses is a close one. This is particularly so when viewed in light of Ms. Tiblet's hearing testimony that she never received claimant's transcript and that if the job required 6 semesters of fishery biology, claimant would not be qualified. We need not, however, resolve this issue. In order for employer to meet its burden of establishing suitable alternate employment, employer must establish that the alternate work identified was available during "critical periods" when claimant was capable of performing it. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1045 n.11, 26 BRBS 30, 35 n.11 (CRT) (5th Cir. 1992); *Bryant v. Carolina Shipping Co*., 25 BRBS 294, 296 (1992). In the present case, claimant was a full-time student in the DOL rehabilitation program from January to November 1992, and from August 1993 through August 1995. The job with National Marine Fisheries was a temporary full-time job not to exceed one year which was initially posted on January 29, 1992, and which was filled by April 6, 1992. An employer can meet its burden of establishing the availability of suitable alternate employment through evidence of suitable jobs which, although no longer open, were available during the time claimant was able to work. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). In the present case, however, the job with National Marine Fisheries was only available during the time when claimant's participation in the DOL-sponsored rehabilitation program precluded him from working. Thus, we hold that on the facts presented regardless of whether this job was, in fact, suitable, it cannot satisfy employer's burden of establishing the availability of suitable alternate employment, because it was not shown to be available during the critical time period when claimant was capable of working.[14] Accordingly, we vacate the administrative law judge's finding

[14]We thus also need not address claimant's arguments that employer's vocational expert insured that this job was not realistically available to him by failing to timely provide him with the correct announcement number and by suppressing the actual physical requirements of this job when she presented it to the claimant's treating physician for approval, as well as his arguments that this was a temporary job subject to a hiring freeze and that it required one year of specialized experience which he did not possess. We also need not address claimant's argument that it was irrational for the administrative law judge to have concluded that claimant could realistically secure post-injury employment in 1992 based on a biology degree he received 20 years previously, where claimant had been working since 1979 as a longshore worker and had not been able to find full-time work in this field even when his degree was fresh and his skills were current.

that the National Marine Fisheries job identified by employer constitutes suitable alternate employment indicative of claimant's post-injury wage-earning capacity, and remand the case to him for reconsideration of claimant's entitlement to permanent partial disability compensation during the period between November 1992 and July 1993, when claimant withdrew from the DOL-sponsored rehabilitation program.

Accordingly, the administrative law judge's Decision and Order on Remand is reversed in part, and vacated in part, and the case is remanded to the administrative law judge for entry of an award consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge