BRB No. 98-0497

LINDA D. GREGORY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
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.

Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimant.

Robert A. Rapaport and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order On Remand (95-LHC-2113) 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).

This case is before the Board for the second time. To briefly recapitulate the facts, on November 7, 1991, claimant injured her right wrist while working as a machinist trainee for employer. Claimant underwent a series of ten surgical procedures, and the parties stipulated that she reached maximum medical improvement on February 10, 1995, the date her treating physician, Dr. Gwathmey,

assigned her an impairment rating of the right upper extremity of 35 percent. Emp. Ex. 9.

Claimant began working with a Department of Labor (DOL) vocational rehabilitation counselor, Loretta Harris, who, in February 1993, identified 281 positions which she considered suitable for claimant based on her work history, transferability of skills analysis, and abilities. Cl. Ex. 11 at 126, 132-133. In August 1993, on her own initiative, claimant enrolled in the Natural Resources Management program at Lord Fairfax Community College. When learning of claimant's action, Ms. Harris was instructed to investigate whether the Natural Resources Management program would provide claimant with viable employment opportunities. On August 16, 1994, Jarrrell Wright, an Office of Workers' Compensation Programs specialist at DOL, approved claimant's rehabilitation plan and award. As part of the award, the Department of Labor assumed the expenses of claimant's program, and provided her with a minimal maintenance allowance provided she complied with the requirements of the program. Cl. Ex. 11 at 37-38; Cl. Ex. 12 at 18. The program required that claimant be enrolled full-time (carry 12 credits during the fall and spring semesters, and 6 credits in the summer) and maintain a 2.0 grade point average. Employer voluntarily paid claimant temporary total disability compensation benefits for various periods until February 10, 1995, the stipulated date of maximum medical improvement. Claimant sought additional temporary total disability compensation under the Act from that date until the completion of her DOL-sponsored full-time vocational rehabilitation program.[1]

Based on Ms. Harris's vocational testimony regarding the 281 jobs available in 1993, the administrative law judge found that claimant was qualified for a significant number of available jobs. He then determined that as claimant did not follow the search plan Ms. Harris had devised for her in 1993, Cl. Ex. 11 at 126-132, she was not diligent, and thus she did not rebut employer's showing of suitable alternate employment. The administrative law judge concluded that as claimant was partially disabled, had reached maximum medical improvement on February 10, 1995, and her impairment fell under the schedule, pursuant to *Potomac Electric Power Co. v. Director, OWCP* (*PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980), her exclusive remedy was permanent partial disability benefits under the schedule, 33 U.S.C. §908(c)(1).

The administrative law judge also rejected claimant's argument that pursuant

[1]The record reflected that claimant was behind schedule in completing her course of studies. Although she was scheduled to graduate in December 1995, due to surgery in the fall of 1994, the projected ending date was extended through the spring of 1996.

to the Board's decision in *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192, 202 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), regardless of employer's showing of suitable alternate employment she was entitled to the claimed temporary total disability benefits because she was precluded from working while she was enrolled in the DOL-sponsored rehabilitation program. In so concluding, the administrative law judge reasoned that *Abbott* was distinguishable because it did not involve a scheduled injury. Claimant appealed, reiterating the argument made below that, despite employer's showing of suitable alternate employment, under *Abbott*, he is entitled to the temporary total disability compensation claimed during the period of her enrollment in the DOL-sponsored rehabilitation program because she was precluded from performing any employment. Employer responded, urging affirmance.

On appeal, a majority of the Board remanded the case for the administrative law judge to fully consider the relevant factors under *Abbott*. Whereas the Board and the court in *Abbott* relied on a number of relevant facts in upholding the administrative law judge's award of total disability benefits while Abbott was precluded from accepting employment due to his participation in a DOL-sponsored vocational rehabilitation program, the denial of the claim in the present case was based solely on the administrative law judge's determination that claimant's injury was covered under the schedule. However, as the same standards apply to the issue of total disability in both scheduled and non-scheduled injury cases, the Board vacated the denial of benefits. The Board relied on the fact that, under *PEPCO,* 449 U.S. at 277 n.17, 14 BRBS at 366-367 n.17, where claimant is totally disabled the schedule does not apply. Thus, as the applicable case precedent establishes that a claimant is entitled to receive total disability compensation where she is unable to return to her usual work unless employer establishes that there are suitable alternate jobs *available* which claimant can realistically secure, s*ee Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984); *New Orleans (Gulfwide) v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 165 (5th Cir. 1981), and suitable alternate employment is not available if the injured worker is unable to accept employment because it is precluded by the terms of a vocational rehabilitation program, *Abbott,* 27 BRBS at 202, the fact that any permanent partial disability would be covered by the schedule is not determinative of the total disability issue. Thus, the Board remanded the case, directing the administrative law judge to reconsider claimant's entitlement to temporary total disability benefits during her enrollment in the approved vocational rehabilitation program in light of *Abbott*, specifically addressing whether her enrollment precluded any employment, whether employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits, whether completion of the program would benefit claimant by increasing her wage-earning capacity, whether claimant showed full diligence in

completing the program, and other relevant factors. *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, BRB No. 96-0971 (April 25, 1997) (unpublished) (Dolder, J., dissenting).

On remand, after considering the specific questions posed by the Board relevant to application of *Abbott*, and answering them negatively, the administrative law judge found that *Abbott* was distinguishable and reaffirmed his prior finding that claimant was not entitled to the additional total disability benefits claimed. Claimant appeals, arguing that the administrative law judge's finding that *Abbott* is not applicable is not supported by substantial evidence, and that in so concluding he erred by ignoring relevant evidence. Employer responds, urging affirmance.

We affirm the administrative law judge's determination that *Abbott* is not applicable on the facts presented. 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 Abbott 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. In his Decision and Order, the administrative law judge awarded the requested benefits, rejecting the argument that suitable jobs available during his rehabilitation paying minimum wage established a wage-earning capacity and thus limited him to permanent partial disability benefits and holding claimant was entitled to temporary total disability compensation until he completed his vocational rehabilitation program. The Louisiana Guaranty Insurance Association (LIGA), which became liable for the claim after Abbott's 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.

The Board and the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge. *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192, 202 (1993), *aff'd*, 40 F. 3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994). 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 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. Since, under *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 Board and the court determined 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 DOL-sponsored rehabilitation program. In addition, both bodies cited 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 its humanitarian purposes, as well as the fact that 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. 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. In *Abbott,* both parties' interests were served by claimant's completion of his vocational rehabilitation program, as claimant was able to earn more money, thus reducing LIGA's long-term compensation liability under Section 8(c)(21), 33 U.S.C. §908(c)(21).[2] *See also Bush v. I.T.O. Corp*, BRBS , BRB No. 97-1707 (Sept. 2, 1998).

In the present case, claimant correctly asserts that the administrative law judge ignored relevant evidence when he determined on remand that there was no evidence that employer had agreed to her rehabilitation plan, that she had not been diligent in completing the vocational program, and that completion of the program would not benefit claimant's wage-earning capacity. We conclude, however, that

[2]The Board's prior decision acknowledged that since this case involves a permanent partial disability award under Section 8(c)(1) of the schedule, this factor from *Abbott* is not present. The Board held, however, that this distinction was not controlling in and of itself in view of the other factors to be weighed and the fact that the *Turner* standard applies regardless of the body part injured. Slip op. at 6.

any errors in this regard are harmless, and thus need not be addressed. As discussed previously, in *Abbott* the award of total disability benefits while claimant was enrolled in the vocational rehabilitation program was predicated on the fact that the alternate work was not realistically available because the terms of the rehabilitation program precluded claimant from working. In the present case, however, on remand claimant stipulated that on February 25, 1997, while still in school, she obtained a part-time job as a cashier/operator at Natural Chimney's Regional Park. Inasmuch as claimant, in fact, thus actually obtained employment while she was enrolled in the rehabilitation program, the administrative law judge rationally inferred that in this case claimant's rehabilitation plan did not preclude her from working, and that, had she chosen to do so, claimant could have performed this, or a number of other entry level jobs identified by Ms. Harris at any time since she entered Lord Fairfax Community College. Inasmuch as application of *Abbott* rests on the fact that alternate jobs were not realistically available to claimant due to his enrollment in rehabilitation, and in the present case claimant was able to work and pursue her studies during the relevant period, the administrative law judge properly distinguished *Abbott* in this case. Thus, his denial of temporary total disability compensation during the period of rehabilitation and his finding that claimant is limited to her scheduled recovery as of February 10, 1995, the stipulated date of maximum medical improvement, are affirmed. *See generally Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994).

Accordingly, the administrative law judge's Decision and Order On Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge