PART V

BENEFITS REVIEW BOARD POLICIES AND PROCEDURES

B. POLICIES AND PROCEDURES

2. Remand

Section 921(b)(4) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §921(b)(4), as incorporated by 30 U.S.C. §932(a), as well as the Board's rules of practice and procedure, permit the Board to remand a case for reconsideration to the hearing level or the district director level. 20 C.F.R. §802.405. The decision of whether to remand is made on a case by case basis. ***Couch v. Shamrock Coal Co.***, 2 BLR 1-342, 1-348 (1979). Remand is usually required when a hearing officer fails to resolve a factual issue, and the issue is necessary to a final determination. ***Luketich v. Bethlehem Mines Corp.***, 2 BLR 1-393, 1-400 (1979). When a case is remanded, the adjudication officer must issue a decision in writing, containing findings of fact and conclusions of law, as expeditiously as possible. 20 C.F.R. §802.405(a); *see also* ***Clevenger v. Director, OWCP***, 2 BLR 1-10 (1979).

CASE LISTINGS

[hearing officer exceeded scope of remand order by considering and awarding benefits under Reform Act where Board remanded case for consideration under Act as amended through 1972] ***Johnson v. Beth-Elkhorn Corp.***, 2 BLR 1-845 (1980).

[Sixth Circuit held that when "administrative law judge fails to make important and necessary factual findings, the proper course for the Board is to remand the case to the administrative law judge pursuant to 33 U.S.C. §921(b)(4) rather than attempting to fill the gaps in the administrative law judge's opinion"] ***Director, OWCP v. Rowe***, 710 F.2d 251, 5 BLR 2-99, 2-103 (1983).

[Board decided not to remand case for administrative law judge to explain rational for rejecting medical report where he had previously failed to do so despite having had two opportunities to review report] ***Blackledge v. Director, OWCP***, 6 BLR 1-1060 (1984).

[where Board vacates administrative law judge's decision, effect is to return parties to *status quo ante* with all rights, benefits and/or obligations they had prior to issuance of decision] ***Dale v. Wilder Coal Co.***, 8 BLR 1-119 (1985).

[Board did not need to apply Sixth Circuit's ruling that it erred pursuant to Section 727.203(b)(2) on remand because finding of no invocation under subsection (a)(4) was affirmable] ***Bozick v. Consolidation Coal Co.***, 8 BLR 1-130 (1985).

[where record shows that employer's counsel never received copy of the notice, Board affirmed earlier remand to district director with instructions to consider Section 725.364 to determine whether good cause exists for failure to timely controvert Notice of Initial Finding] ***Sharber v. Zeigler Coal Co.***, 8 BLR 1-143 (1985).

[if credibility of testimony is issue on remand, parties may request *de novo* hearing if original administrative law judge unavailable, ***Strantz v. Director, OWCP***, 3 BLR 1-431, 433 (1981); *de novo* hearing generally required when credibility of witnesses is important, crucial, or controlling factor in resolving factual dispute] ***Worrell v. Consolidation Coal Co.***, 8 BLR 1-158 (1985); ***White v. Director, OWCP***, 7 BLR 1-348 (1984).

[Board denied Director's motion to remand - because finding not supported by substantial evidence, rational, or in accordance with law - because motion failed to state grounds with particularity as required by Section 802.218(a)] ***Putnam v. Director, OWCP***, 8 BLR 1-388 (1985).

DIGESTS

Where the district director failed to follow the Board's specific instructions on remand in an attorney's fee case, the Board again remanded the case to the district director. Further reconsideration by the district director was necessary since the Board may not act as a fact-finder. ***Lenig v. Director, OWCP***, 9 BLR 1-147 (1986).

The Board held that a *de novo* hearing was required in this case because the parties' procedural due process rights were violated: 1) notice that the case was assigned to a different administrative law judge on remand was not given until the Decision and Order on remand was issued, and (2) the parties were not given an opportunity to express any comments about the transfer of the case for the administrative law judge who heard the case to another administrative law judge or to request a *de novo* hearing. ***McRoy v. Peabody Coal Co.***, 11 BLR 1-107 and 1-139 (1987)(en banc)(McGranery, J., dissenting), *previously misprinted at* 10 BLR 1-33 (1987).

The Board remanded the case for the second time, ordering the administrative law judge to independently evaluate the evidence of record instead of adopting the Director's post-hearing brief in its entirety as his decision. ***Hall v. Director, OWCP***, 12 BLR 1-80 (1988).

The Board accepted the Director's Motion to Remand for Payment of Benefits as a

withdrawal of controversion of all issues, thereby overruling the holdings in ***Lucas v. Director, OWCP***, 11 BLR 1-61 (1988)(Ramsey, CJ., concurring); ***Myers v. Director, OWCP***, 11 BLR 1-45 (1988)(en banc); ***Blake v. Director, OWCP***, 11 BLR 1-7 (1987)(en banc); ***Grieco v. Director, OWCP***, 10 BLR 1-139 (1987)(en banc); and ***Putnam v. Director, OWCP***, 8 BLR 1-388 (1985). ***Pendley v. Director, OWCP***, 13 BLR 1-23 (1989) (en banc).

Pursuant to Section 21(b)(4) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §921(b)(4), the Board is authorized to remand a case on its own motion or at the request of the Secretary, who is represented before the Board by the Director. Section 21(b)(4) is incorporated into the Act by Section 422(a) of the Act, 30 U.S.C. §932(a). ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

A finding of equally probative evidence under the discredited true-doubt principle does not automatically require a finding of insufficient evidence under a preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine on remand whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

Remand of the case for the administrative law judge to consider employer's answers to claimant's requests for admission is unnecessary where the parties' conduct at the hearing "makes manifest" that employer did not admit the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis, and that claimant understood these issues were not admitted. ***Johnson v. Royal Coal Co.***, 22 BLR 1-132 (2002) (Hall, J., dissenting).

The Board rejected the employer's contention that it must be dismissed as the responsible operator in the case because it was not determined that a miner did not receive a complete pulmonary evaluation until the initial appeal before the Board. The Board agreed with the Director that employer did not demonstrate how it was unduly prejudiced by the Board's decision to remand the claim for completion of the pulmonary evaluation mandated by the Act. ***Spangler v. Donna Kay Coal Co.***, BLR (July 30, 2010).

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