BRB No. 01-0572

FRANK RAVALLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PASHA MARITIME SERVICES	)	DATE ISSUED: Sept. 12, 2002
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY/ FREMONT COMPENSATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on MOTION for
Petitioner	)	RECONSIDERATION *EN BANC*

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order *En Banc* in the captioned case, *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has responded to claimant's motion.

Claimant sustained a work-related injury on October 22, 1986. Pursuant to the parties' stipulations, claimant received ongoing permanent partial disability benefits. Employer was granted relief pursuant to Section 8(f), 33 U.S.C. §908(f). Employer subsequently applied for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking to terminate all compensation on the ground that claimant no longer had any loss in his wage-earning capacity. The administrative law judge granted employer's petition for modification and terminated claimant's disability award.

Claimant appealed, first arguing that the administrative law judge's decision was void

because the settlement agreement into which he and employer entered could not be modified. Claimant also contended that the administrative law judge erroneously calculated his current wage-earning capacity, and thus erred in terminating benefits. On cross-appeal, employer raised the issue of the effective date of the termination of claimant's award.

The Board first held that the parties, in 1990, had not entered into a settlement under Section 8(i) of the Act, 33 U.S.C. §908(i), with regard to claimant's claim for compensation benefits. The documents involved established that the parties entered into a Section 8(i) settlement only with regard to medical benefits, and that claimant's compensation entitlement was disposed of by stipulated order pursuant to 20 C.F.R. §702.315. Such orders are subject to Section 22 modification. The Board also affirmed the administrative law judge's finding that claimant's actual post-injury earnings represented his wage-earning capacity but remanded the case for the administrative law judge to compare claimant's post-injury earnings to the wage level paid at the time of claimant's injury in order to neutralize the effects of inflation. The Board affirmed the denial of a nominal award, as such was supported by substantial evidence. *Ravalli v. Pasha Maritime Services*, BRB Nos. 99-9357/A (Dec. 23, 1999). With regard to employer's appeal, the Board stated that termination cannot be retroactive, citing the Board's holding in *Spitalieri v. Universal Maritime Services*, 33 BRBS 6, 8-9 (1999), *aff'd on recon. en banc.*, 33 BRBS 164 (1999) (McGranery and Brown, JJ., dissenting), *rev'd*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001), that termination is not a "decrease" within the meaning of Section 22.

On remand, the administrative law judge found that claimant's wage-earning capacity, adjusted for inflation, exceeds claimant's average weekly wage, and thus that claimant is not entitled to ongoing benefits. He terminated claimant's benefits as of the date his order on remand was filed, March 23, 2001.

The Director appealed, contending that a modifying order terminating claimant's award can be retroactive, citing the Second Circuit's reversal of the Board's *Spitalieri* decision. The Director further contended that, as a matter of law, the termination of benefits should be effective on December 1, 1998, with the Special Fund entitled to a credit for all benefits paid after that date.

The Board adopted the construction of Section 22 given by the Second Circuit in its *Spitalieri* decision, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000). The Board therefore held "that a modifying order terminating compensation based on a change in the claimant's physical and/or economic condition may be effective from the date of the change in condition." *Ravalli*, 36 BRBS at 50-51. The Board agreed with the Director's contention that the termination should be effective on December 1, 1998, as it was the date of the administrative law judge's initial decision and as the last wage data used in the administrative law judge's wage-earning capacity calculation stems from 1998. *Id*. at 51. Thus, the Board

modified the administrative law judge's decision to reflect the termination of benefits as of December 1, 1998, with a credit, pursuant to Section 14(j), 33 U.S.C. §914(j), to the Special Fund for its overpayments, should benefits ever resume.

In his motion for reconsideration, claimant raises three contentions: (1) the administrative law judge erred in failing to consider his 2000 wages, which would demonstrate that his current wage-earning capacity does not exceed his pre-injury average weekly wage; (2) the Board erred in failing to give proper consideration to the parties' settlement agreement, which claimant contends demonstrates the intent to settle, pursuant to Section 8(i), the issue of claimant's compensation entitlement, as well as his entitlement to medical benefits; and (3) the administrative law judge erred in denying his request for a nominal award pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

We reject claimant's contentions, as these issues are not properly before the Board. As to the first issue, claimant contended, in his response to the Director's appeal, that the administrative law judge erred in failing to consider his earnings in the year 2000 in determining his post-injury wage-earning capacity. *See Ravalli*, 36 BRBS at 49 n.2. This contention does not support the administrative law judge's decision below, and thus the Board appropriately did not address this issue in its last decision. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Therefore, this issue cannot be raised in a motion for reconsideration. Similarly, with regard to the second and third issues, claimant did not raise them in an appeal after the administrative law judge issued his decision on remand. Claimant cannot raise these issues for the first time in a motion for reconsideration. *See generally Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423 (9th Cir. 1962), *cert. denied*, 373 U.S. 904 (1963). Moreover, the Board addressed these issues decided adversely to claimant in its first decision, and the Board's decision constitutes the law of the case. *See Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631 (9th Cir. Feb. 26, 2001). Claimant has not offered any reason why this doctrine is inapplicable here. Thus, claimant's motion for reconsideration must be denied.

Accordingly, claimant's motion for reconsideration *en banc* is denied. 20 C.F.R. §§801.301(c), 802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge