BRB No. 91-2160

RUTH DOBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Michael A. Jacobson, Seattle, Washington, for claimant.

Philip B. Grennan (Lee, Smart, Cook, Martin & Patterson, P.S., Inc.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (82-LHC-125, 126, 127) of Administrative Law Judge Alexander Karst 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 is the third time that this case is before the Board. To recapitulate, claimant sustained injuries in three work-related incidents occurring on October 15, 1980, October 24, 1980, and March 9, 1981, while working for employer as a shipscaler. Specifically, on October 15, 1980, claimant was injured when a pipefitter burst through a steel door, causing the door to hit her in the head,

resulting in head, neck and lower back pain. Employer voluntarily paid claimant temporary total disability compensation from October 19, 1980 through October 21, 1980. On October 24, 1980, claimant was injured when she fell over a hose on the deck of a ship, causing contusions of her neck, back and forehead. Employer voluntarily paid claimant temporary total disability compensation from October 24, 1980 until January 21, 1981, when she returned to work. On March 9, 1981, after carrying heavy sandbags, claimant became sick and faint in the lunch room, and passed out in the ladies room. Employer voluntarily paid claimant temporary total disability compensation from March 10, 1981 through November 1, 1982. *See* 33 U.S.C. §908(b). Since these injuries, claimant has complained of headaches, confusion, forgetfulness, numbness in her feet and watery eyes.

At a formal hearing held on July 15, 1983, Administrative Law Judge Ellin M. O'Shea accepted the parties' stipulations that the three aforementioned work-related incidents occurred in the course and scope of claimant's employment with employer. *See* 1983 Hearing Transcript at 4-6. In a Decision and Order dated December 19, 1983, Judge O'Shea awarded claimant temporary total disability compensation from October 16, 1980 to January 31, 1983, the date of maximum medical improvement, exclusive of the time that claimant actually worked. 33 U.S.C. §908(b). Judge O'Shea found, however, that claimant did not suffer any permanent disability as a result of these work-related injuries but, rather, that claimant has a non industrial-related cerebral organic condition which affects her work abilities.

Claimant thereafter sought modification of Judge O'Shea's Decision and Order pursuant to Section 22 of the Act, 33 U.S.C. §922. In seeking modification, claimant contended that there had been a mistake in a determination of fact by Judge O'Shea, namely that claimant's brain dysfunction was not work-related, and that newly developed evidence demonstrated a change in her physical condition. After conducting a hearing concerning claimant's request for modification, Administrative Law Judge Alexander Karst, who had been assigned the case, found that the evidence presented by claimant was "merely cumulative of the evidence presented to and considered by Judge O'Shea" and that he had "no jurisdiction to reweigh the evidence previously considered by Judge O'Shea." Decision and Order - Denying Benefits of Judge Karst at 2. Accordingly, Judge Karst denied claimant's motion for modification. Claimant's motion for reconsideration was also denied.

Claimant then appealed the denial of her motion for modification to the Board. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988)(*Dobson I*). The Board determined that Judge Karst had erred both in failing to consider the new evidence submitted by claimant in support of her modification petition and in concluding that he lacked jurisdiction to reconsider previously submitted evidence. The Board therefore remanded the case to the administrative law judge to consider claimant's motion in light of both the old and new evidence before him. *Id*. at 176.

On remand, the administrative law judge sought briefs from the parties regarding claimant's request for modification. Claimant thereafter filed a Memorandum in Support of Modification, contending, *inter alia*, that she had remained totally disabled due to the work-related incidents until January 6, 1986. Employer did not file a brief. In a Decision and Order dated April 24, 1989, Judge Karst found claimant's testimony regarding the occurrence of the three work-related incidents to be "either deliberate fabrications unworthy of belief or delusions not corresponding to reality." Decision and Order of Judge Karst at 12. After further rejecting medical opinions favorable to claimant, since those opinions relied upon claimant's veracity concerning the occurrences of the work-related incidents, Judge Karst denied claimant's modification petition.

Claimant, without the assistance of legal representation, again appealed the denial of her request for modification to the Board. The Board held that Judge Karst erred when, on remand, he addressed, *sua sponte*, the issue of whether claimant established the existence of working conditions or an accident which could have caused her injuries. The Board noted that the parties had stipulated at the initial formal hearing before Judge O'Shea that three work-related incidents occurred in the course and scope of claimant's employment with employer, that Judge O'Shea accepted the stipulation and that, thus, claimant's veracity regarding the occurrence of these incidents was never at issue in the proceedings below. Moreover, the Board noted that the occurrence of the incidents was never placed at issue by either party in the modification proceedings. The Board thus held that although the administrative law judge is afforded wide discretion in modification proceedings, *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, *reh'g denied*, 404 U.S. 1053 (1972), to permit consideration of issues stipulated in the first proceeding and which were not presented as a basis for modification would not render justice under the Act. Accordingly, the Board vacated Judge Karst's denial of modification, and remanded the case for consideration of the issues raised in claimant's request for modification, in accordance with its prior decision. Additionally, citing *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989), the Board directed that the case be assigned to a new administrative law judge on remand. *See Dobson v. Todd Pacific Shipyards Corp.*, BRB No. 89-1919 (Jan. 30, 1991)(unpublished)(*Dobson II*).

Thereafter, in an Order dated June 27, 1991, Chief Administrative Law Judge Nahum Litt stated that the Board lacked authority to direct that the instant case be assigned to a new administrative law judge on remand and, once again, assigned the case to Judge Karst. In a Decision and Order dated August 21, 1991, Judge Karst reaffirmed his prior findings as stated in his Decision and Order of April 24, 1989. Specifically, Judge Karst, again questioning claimant's veracity, stated that he could not accept Dr. Aigner's diagnosis of post-concussion syndrome because he could not accept that physician's premise that claimant told him the truth about the work incidents. Thus, Judge Karst once again denied claimant's petition for modification.

Claimant, with the assistance of counsel, now appeals the administrative law judge's denial of modification, contending that Judge Karst's Decision and Order of August 21, 1991 is contrary to law inasmuch as the Board had ordered that the case be assigned to a new administrative law judge on remand. Alternatively, claimant contends that Judge Karst erred in discrediting claimant's testimony concerning the occurrence of the work-related incidents. Claimant requests that the Board reverse Judge Karst's August 21, 1991 decision and award claimant additional temporary total disability compensation from January 31, 1983 through January 6, 1986. Employer responds, urging affirmance of Judge Karst's denial of modification.

The threshold issue raised by this appeal is whether Chief Administrative Law Judge Litt committed error in assigning the case to Judge Karst, in contravention of the Board's order contained in *Dobson II*. Judge Litt maintained that the Board acted without authority in directing that the case be assigned to a new administrative law judge on remand. Based on our review and analysis of federal case law concerning the issue of reassignment of a case to a different judge on remand, we hold that the Board does have the authority to direct that a case be assigned to a different administrative law judge on remand and that the Board's reassignment order in *Dobson II* was proper.

The Benefits Review Board's role is that of a quasi-judicial agency, adjudicating private rights. *See Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). Specifically, the Board is authorized by Congress "to hear and determine appeals raising a substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the Act or its extensions. *See* 33 U.S.C. §921(b)(3). The Board performs the review function performed by the United States District Courts prior to 1972. *See Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73 (3d Cir. 1976). Regarding the Board's review authority, the Act specifically states that the Board may remand a case to the administrative law judge for further appropriate action. *See* 33 U.S.C. §921(b)(4); *see also* 20 C.F.R. §802.405.

The relationship of the Board to the administrative law judge is similar to that of the United States Courts of Appeals to the United States District Courts. The decisions of the United States Courts of Appeals recognize that an assignment to a different judge on remand is appropriate in certain instances. For example, under 28 U.S.C. §455(a), a judge must recuse himself in circumstances that give rise to a reasonable inference of impropriety or lack of impartiality. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). *See also* 28 U.S.C. §144. Recusal is also necessary where the lower court judge appears to have prejudged proceedings over which he is to preside, or if he appears "boxed in" by prior rulings such that he will be forced to reach a certain result regardless of the merits. *See Frates v. Weinshienk*, 882 F.2d 1502, 1504 (10th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). The Administrative Procedure Act (APA), 5 U.S.C. §556, which provides that hearings must be impartial, contains a similar provision applicable to administrative law judges. The provisions of the APA regarding hearings are explicitly made applicable to proceedings conducted by administrative law judges under the Act. 33 U.S.C. §919(c).

The existence of statutory provisions concerning the disqualification of judges upon a party's motion does not pose an obstacle to a court's ordering reassignment on remand, as these provisions

are not the exclusive method whereby a judge may be removed from hearing a case. The United States Court of Appeals for the Ninth Circuit has stated that an appellate court may:

> exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment.

United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986). While the statutory provisions at 28 U.S.C. §455 address recusal based on circumstances existing prior to or at the time of a judge's participation in a case, the same standards apply where reassignment is required based on a judge's own conduct during his participation in a case. *United States v. Torkington*, 874 F.2d 1441 (11th Cir. 1989).

Reassignment is appropriate where a reasonable person would question the trial judge's impartiality. *United States v. Holland*, 665 F.2d 44 (5th Cir. 1981). Remarks by a trial judge during trial may give rise to an inference of bias or a lack of impartiality. *Id*. Cases that have maintained a "stalemated posture" because of the district judge's intransigence also require reassignment to another judge. *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340 (11th Cir. 1983)(*per curiam*). An assignment to a different judge is also appropriate where the reassignment preserves the appearance of justice, *United States v. Schwarz*, 500 F.2d 1350 (2d Cir. 1974), or is "in the public interest as it minimizes even a suspicion of impartiality." *United States v. Simon*, 393 F.2d 90 (2d Cir. 1968). Where a district judge's continued participation in a case presents a significant risk of undermining the public confidence in the fair administration of justice, the appellate court has the authority and the duty to order the case reassigned to a different district judge. *Torkington*, 874 F.2d at 1441. If there is no indication of personal bias, the Second Circuit has delineated factors to be considered by a court in deciding to exercise its supervisory authority:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Robin, 553 F.2d 8 (2d Cir. 1977)(*en banc*); *see also United States v. White*, 846 F.2d 678 (11th Cir.), *cert. denied*, 488 U.S. 984 (1988); *United States v. Garcia*, 694 F.2d 294 (1st Cir. 1982); *United States v. Long*, 656 F.2d 1162, 1166 n.7 (5th Cir. 1981). Reassignment is appropriate where the facts indicate that a stalemated situation exists. In *Robin*, the court stated that where a judge has repeatedly adhered to an erroneous view after an error is called to his attention, reassignment may be advisable to avoid an exercise in futility.

In the instant case, our review of the prior decisions of both the administrative law judge and the Board indicates that remand to a new administrative law judge was necessitated by several of the reasons discussed above. In his first decision, Judge Karst denied modification, finding that the evidence presented by claimant was "merely cumulative of the evidence presented" to Judge O'Shea, and that he had "no jurisdiction to reweigh the evidence previously considered by Judge O'Shea." In *Dobson I*, the Board held that Judge Karst committed error in not reviewing claimant's evidence, and remanded the case to the administrative law judge to reconsider claimant's motion for modification. *See O'Keeffe*, 404 U.S. at 256 (fact finder has broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection upon evidence initially submitted).

On remand, Judge Karst again denied modification, finding that the injuries alleged by claimant in her initial claim did not occur, despite the fact that the occurrence of the three incidents relied on by claimant had not been contested by employer at any stage in the proceedings and, in fact, were stipulated to by the parties before Judge O'Shea. These stipulations were accepted by Judge O'Shea and acted on by the parties throughout the initial proceedings. Moreover, Judge Karst's second decision is replete with references to claimant which demonstrates a lack of impartiality and bias towards her. After noting that many "of [claimant's] statements recorded in the file strike me as entirely incredible," *see* 1989 Decision and Order at 11, Judge Karst stated that:

> Although the claimant appears to have emotional or personality problems, the evidence before me persuades me that she is shrewd, manipulative and determined, and had, since at least 1978, been trying to find some way to obtain disability benefits from the public sector or from an employer. The papers she submitted reveal that she is bound and determined to portray herself as a victim of malevolent, even "sadistic" villains who cause her injuries, who do not treat her or her injuries sympathetically or properly, and who do not properly press her claim.

Id. Based upon the foregoing, reassignment was necessary in the instant case to preserve the appearance of justice and to minimize even a suspicion of a lack of impartiality; thus, reassignment was consistent with the appellate case law.

Moreover, the most recent decision by Judge Karst, currently on appeal, demonstrates the futility of continued assignment to him. Despite the judge's clear error in disregarding stipulated facts, on remand he again reaffirmed his prior findings. While he addressed Dr. Aigner's opinion that claimant's seizures were related to her head injuries, he rejected it because he did not believe claimant's' assertions that she suffered blows to the head on October 15, 1980, October 24, 1980, and March 9, 1981. In so doing, he disregarded the parties' stipulations, the detailed descriptions in Judge O'Shea's Decision and Order of the incidents which specifically mention claimant's striking her head, and the fact that no physician questioned the occurrence of the events as described. Judge Karst's actions on remand served only to attempt to bolster his prior opinions rather than provide claimant with an objective decision based on the record. Reassignment was thus appropriate on several of the bases relied upon by the appellate courts.

It is also important to note that the Board did not direct the assignment of this case to any particular administrative law judge; rather, the Board merely directed that the case not be assigned to Judge Karst. Thus, the Board did not improperly inject itself into the assignment process. In similar circumstances, the United States Court of Appeals for the Second Circuit, in explaining its statement that a certain district court judge should not sit on the retrial of a case, stated:

> We did not suggest who *should* preside over the retrial. We suggested who *should not* preside. When we believe that there is an inherent problem in a particular remand, we have the power, indeed the duty, to frame our opinion to provide for "further proceedings . . . [which are] just under the circumstances." 28 U.S.C. §2106.

United States v. Yagid, 528 F.2d 962 (2d Cir. 1976).

By directing that the instant case should be assigned to a new administrative law judge on remand, the Board did not infringe upon the right of the Chief Administrative Law Judge to assign cases to judges within his office. The Board's instruction did not order the Chief Administrative Law Judge to assign the case to a particular judge, but merely directed that a particular judge *should not* hear the case. Thus, the Board's order in *Dobson II* was not contrary to 20 C.F.R. §725.454(b), the only authority cited by Chief Judge Litt in stating that the Board was without authority to direct assignment to a different administrative law judge.[1] Section 725.454(b) states that the Chief Administrative Law Judge may reassign a case to a new administrative law judge upon good cause shown. 20 C.F.R. §725.454(b). It does not address the Board's authority to direct that a certain administrative law judge not hear a case on remand.

Moreover, the Board's regulations, promulgated by the Secretary of Labor at 20 C.F.R. Part 802, specifically address the remanding of cases by the Board, stating that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." 20 C.F.R. §802.405. Section 21(b)(4) of the Act also authorizes the Board to remand a case to an administrative law judge "for further appropriate action." 33 U.S.C. §921(b)(4). It is error for an administrative law judge to fail to follow the Board's instructions on remand. *See Randolph v. Newport News Shipbuilding and Dry Dock*, 22 BRBS 443 (1989). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of

[1]In his Order declining to follow the Board's direction, Chief Judge Litt refers to a similar order issued over his signature in *Bogdis v. Marine Terminals Corp.*, No. 86-LHC-00109 (Sept. 10, 1990), wherein he stated that 20 C.F.R. Part 725 provides that the Board does not have authority or jurisdiction to consider the matter of assignment of judges. Judge Litt specifically referenced 20 C.F.R. §725.454(b). No other regulation in Part 725 addresses this issue. However, Part 725 regulations are relevant to claims arising under the Black Lung Act; *Bogdis* and *Dobson* arise under the Longshore Act. Thus, the Part 725 regulations are not applicable to the instant matter; the appropriate regulations are contained in Parts 701 and 702, which are silent on this issue.

a superior forum, regardless of the lower forum's view of the instructions given it."[2] Once an administrative law judge issues his order on remand, the case may again be appealed, and if the Board has erred, the error will be corrected by the appropriate United States Court of Appeals pursuant to 33 U.S.C. §921(c). No provision of the Act or the regulations authorizes the Chief Administrative Law Judge to review the Board's decisions or to refuse to follow the directions contained in them.[3]

Based on the foregoing, we hold that the Board acted within its appellate authority when, in *Dobson II*, it directed that a different administrative law judge hear this case on remand.[4] The decision is consistent with appellate practice and complies with the decisions of the United States Courts of Appeals, which are charged with review of the decisions of the Board. Moreover, the Board's order was not inconsistent with any provision in either the Act or Department of Labor regulations. Chief Judge Litt's decision not to comply with the directive of the Board is, thus, directly at odds with appellate practice and is a violation of 20 C.F.R. §802.405.

[2]As stated *supra*, Section 802.405(a) of the regulations provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." 20 C.F.R. §802.405(a); *see also Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Herein, Judge Litt failed to take "such other action . . . as is directed by the Board."

[3]Chief Judge Litt stated that in *Dobson II*, the Board exceeded its statutory standard of review under 33 U.S.C. §921(b)(3) by substituting its judgment regarding claimant's credibility for that of Judge Karst. The Board's decision, however, does not discuss or comment in any way upon claimant's credibility. Rather, as discussed above, the Board's decision addresses Judge Karst's disregard for stipulations entered into by the parties and accepted by the first administrative law judge to hear the case.

[4]In a Black Lung case, the Board has similarly remanded a case with the instruction that a new administrative law judge be assigned, where the first administrative law judge displayed bias towards the employer and failed to follow the Board's directives in its first remand order. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Therefore, because Chief Judge Litt erred in assigning the instant case to Judge Karst on remand, in contravention of the Board's instruction in *Dobson II*, and as Judge Karst's 1991 opinion did not provide findings in accordance with the Board's prior opinion, we must vacate Judge Karst's 1991 Decision and Order, and remand the case once again for consideration of the issues raised in claimant's request for modification in accordance with our prior decisions. Furthermore, we again direct that the case be assigned to a new administrative law judge on remand.[5]

Accordingly, Judge Karst's 1991 Decision and Order denying modification is vacated, and the case is remanded for reconsideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]Based on our holding in this matter, claimant's contentions concerning the merits of Judge Karst's 1991 Decision and Order are moot.