BRB No. 01-0572

FRANK RAVALLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PASHA MARITIME SERVICES	)	DATE ISSUED: April 8, 2002
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY/ FREMONT COMPENSATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER *EN BANC*

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

Howard D. Sacks, San Pedro, California, for claimant.

Andrew D. Auerbach (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Mark Reinhalter, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (97-LHC-1676) 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 case is on appeal to the Board for the second time. To recapitulate, claimant sustained a work-related injury on October 22, 1986. Pursuant to the parties' stipulations, claimant received ongoing permanent partial disability benefits of $280.12 per week, based on an average weekly wage of $1,860.25, a post-injury wage-earning capacity of $1,440.05, and a weekly loss in wage-earning capacity of $420. Employer was granted Section 8(f) relief, 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 wage-earning capacity.[1]

The administrative law judge found that claimant's current actual earnings as a walking boss reasonably represented his post-injury earning capacity and that claimant's wage-earning capacity had been fully restored such that he was no longer disabled. Accordingly, he 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. He alternatively contended that the administrative law judge's determination on modification that he was no longer partially disabled was not supported by substantial evidence, and that the administrative law judge erroneously calculated his current wage-earning capacity. On cross-appeal, employer raised the issue of the effective date of the termination of claimant's award.

The Board first held that in 1990 the parties had not entered into a settlement under Section 8(i) of the Act, 33 U.S.C. §908(i), with regard to claimant's 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

[1]Pursuant to Section 8(f)(2)(B), 33 U.S.C. §908(f)(2)(B), an employer which is granted Section 8(f) relief remains a party to the claim and retains all rights under the Act.

Section 22 modification. *Ravalli v. Pasha Maritime Services*, BRB Nos. 99-9357/A (Dec. 23, 1999), slip op. at 3.

The Board next affirmed the administrative law judge's finding that claimant's actual post-injury earnings represented his wage-earning capacity, *id.*, slip op. at 5, 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, noting that the record contained evidence of the rate claimant's current job actually paid at the time of his injury. Thus, the Board remanded the case for the administrative law judge to recalculate claimant's post-injury wage-earning capacity, as adjusted for inflation, and to compare the result with claimant's pre-injury average weekly wage in order to determine if claimant still had a loss in wage-earning capacity. The Board affirmed the administrative law judge's denial of a nominal award, as his finding in this regard was supported by substantial evidence. *Id.*, slip op. at 6.

The final issue addressed by the Board was employer's contention that modification of the prior award should take effect in "at least 1993." The Board stated that the administrative law judge, in granting modification, had not specified an effective date of the modification of the prior award. The Board held that "[t]he plain language of Section 22 provides that retroactive termination of benefits is not permissible, as the section explicitly states, with two excepting provisions, that 'such new order shall not affect compensation previously paid....' 33 U.S.C. §922." *Ravalli*, slip op. at 7. The Board stated that Section 22 provides two exceptions to the provision that a new order should not affect compensation previously paid. First, it states that an increase in compensation may be made effective from the date of injury. Secondly, it states that if any compensation due is unpaid, an award decreasing the compensation rate may be effective from the date of injury, and that employer shall receive a credit against compensation due. Citing its decision 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), the Board held that termination is not a "decrease" within the meaning of Section 22; thus termination cannot take effect until the date the administrative law judge's order granting modification is filed. *Ravalli*, slip op. at 7. The Board held that, on remand, if the administrative law judge again terminated compensation, he could not do so retroactively. If the administrative law judge, after recalculating claimant's earning capacity, determined that claimant is entitled to continuing permanent partial disability compensation benefits, the Board stated he must specify a modification date and allow the Special Fund a credit for any overpayment.

On remand, the administrative law judge found that claimant's current 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 appeals, contending that a modifying order terminating claimant's award can be retroactive. The Director notes that the support for the Board's first decision on this issue, namely its decision in *Spitalieri,* has been reversed on appeal to the United States Court of Appeals for the Second Circuit. *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001). The Director further contends that, as a matter of law, the termination of benefits should be effective on December 1, 1998, with the Special Fund getting a credit for all benefits paid after that date. Claimant responds, urging the Board to adhere to the opinion it expressed in its *Spitalieri* decisions, and averring that the facts in this case are distinguishable from *Spitalieri* in any event. In this regard, claimant contends that the claimant in *Spitalieri* was found to be "feigning" disability, whereas the modification request here was based on solely on economic factors, and that unlike *Spitalieri,* no further benefits are due the claimant herein.[2] Employer has not responded to this appeal.

In *Spitalieri*, 33 BRBS 6, the claimant was awarded temporary total disability benefits in 1993 for a back injury. Employer subsequently filed for modification, alleging a change in the claimant's physical condition such that he could return to his usual work. The administrative law judge found that claimant could return to his usual work, and he terminated benefits as of August 31, 1994, allowing employer a credit for its overpayment of temporary total disability benefits against its liability for permanent partial disability benefits for a hearing loss arising out of the same accident that caused the back injury.

Claimant appealed, and the Board affirmed the administrative law judge's finding that there was a change in claimant's physical condition such that he is no longer disabled. The Board held, however, that benefits could not be terminated as of 1994, and that employer

[2]Claimant also contends that the administrative law judge erred in calculating the inflation adjustment, in that he failed to consider his 2000 wages which he submitted to the administrative law judge at the administrative law judge's request. Claimant contends that inclusion of these earnings would reveal a loss in wage-earning capacity. We decline to address this contention, as it is raised in a response brief and not in an appeal by claimant. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

was not entitled to a credit for its overpayments, for two reasons. First, the earliest opinion stating that claimant was not disabled was given in 1996. Second, the Board held that Section 22 does not permit the retroactive *termination* of benefits; rather, it permits only retroactive increases and decreases in compensation. Section 22 states, in relevant part:

> [The administrative law judge may] issue a new compensation order which may terminate, continue, increase or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, . . .

The Board stated that a retroactive termination of benefits would "affect compensation previously paid" contrary to the language of Section 22. The Board held that as there was no "decrease" in the compensation rate for temporary total disability, termination had to be effective from the date of the administrative law judge's order. Thus, the Board vacated the award of the credit against employer's liability for hearing loss benefits. *Spitalieri*, 33 BRBS at 8-9.

On reconsideration *en banc*, a majority of the Board affirmed the prior opinion. The majority stated that the plain language of Section 22 prohibits the retroactive termination of benefits, as the statute uses the words "terminate" and "decrease" in the same sentence, and thus, they must be accorded different meanings. Thus, only a decrease in payments may be retroactive, with a credit for the overpayment against the decreased payments due.[3] *Spitalieri*, 33 BRBS at 166. The majority held that no credit was created toward the hearing

[3]The Board discussed in greater detail its decision in *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993), which had been cited in its earlier opinion as support for this holding. In *Parks*, the claimant's permanent partial disability award was terminated after modification proceedings. Since the claimant's benefits were being paid by the Special Fund, the administrative law judge found the employer entitled to a credit for its assessments to the Special Fund as of the date employer filed its motion for modification. The Director appealed the credit against employer's Special Fund assessment, contending, *inter alia*, that the plain language of Section 22 mandates that compensation cannot be retroactively terminated, and that, inasmuch as the administrative law judge's decision terminated claimant's benefits, the termination can be effective only as of the date of the decision. The Board agreed, and held that "the Act does not provide for retroactive termination." *Id.*, 26 BRBS at 175.

loss benefits due as there was no "decrease" in temporary total disability benefits; there was only a "termination" which could not be retroactive.

Two Board members dissented. They posited that a "decrease" in benefits encompasses a "termination," and that the majority's opinion was "both unreasonable and unjust in that it would provide a credit to an employer whose liability was decreased to $1 but not to an employer whose liability is decreased to zero." *Spitalieri*, 33 BRBS at 170-171. The dissent further discussed the language of Section 22 permitting employer a credit for "*any* unpaid compensation," thus rejecting the majority's construction that because the temporary total disability benefits were reduced to zero, and employer owed permanent partial disability benefits on a different body part, no credit was owing.

On employer's appeal to the Second Circuit, the court agreed with the dissent's approach, and deferred to the Director's new interpretation of the statute.[4] *See Spitalieri*, 226 F.3d at 172, 34 BRBS at 88(CRT). The court discussed the language of Section 22 prohibiting a modifying order from affecting compensation previously paid, unless there is an increase in compensation, or a decrease in compensation where there are additional benefits due. The court held that employer was entitled to credit its excess temporary total disability payments against its liability for permanent partial disability benefits for the hearing loss. The court stated, "We agree with Petitioner and the Director that the exception for a 'decrease' in the second sentence of §922 should be read to include a decrease to zero, *i.e.,* a termination of benefits . . . We do not believe that a 'termination' of benefits is somehow different from a 'reduction' of benefits, in this case, to zero." *Id.*, 226 F.3d at 173, 34 BRBS at 88(CRT). The court emphasized that to hold otherwise would bear no relation to the statutory purpose of Section 22, and that nothing in the legislative history of Section 22 justified the Board's narrow construction of the word "decrease." Citing *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), the Second Circuit stated that, "To construe the statute so as to not permit a credit for retroactive termination of benefits would fail to render justice, especially where, as here, the overpayment is tinged with fraud on the part of Claimant." *Spitalieri*, 226 F.3d at 174, 34 BRBS at 90(CRT). The court

[4]This interpretation was contrary to the interpretation the Director espoused to the Board in *Parks.* The Director did not participate in the *Spitalieri* appeal before the Board, and this change of position was not discussed by the Second Circuit when it deferred to the Director's new interpretation. In his brief in the current appeal, the Director makes no mention of *Parks* or the change in his position. The Director, of course, is free to change his position, but, in such circumstances, deference is not due his position. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476, 26 BRBS 49, 52(CRT) (1992). We therefore reject his contention in the present case that we defer to his present position.

further held that the effective date of the termination could be from the date of the change in claimant's condition.

After consideration of the court's analysis in *Spitalieri*, and in light of the purpose of the Act's modification provision, we hold 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.[5] We are not persuaded by claimant's contention that the disparate factual situations between this case and *Spitalieri* mandate a different conclusion.[6] In contrast to *Spitalieri,* in this case there is a termination of benefits, but there are no other benefits due against which to credit an overpayment. While the court's analysis in viewing the termination as a decrease in *Spitalieri* rested in part on the credit owed to the employer for the hearing loss benefits, the Second Circuit used broad language supporting the notion that termination is the ultimate "decrease" and may be effective at any time after the date of injury when there are changed circumstances. *Spitalieri*, 226 F.3d at 173, 34 BRBS at 88-89(CRT). Thus, the court's opinion was not limited to factual situations where a credit is due. Moreover, the court effectively dealt with the language prohibiting modification from affecting compensation previously paid. The court interpreted the phrase in Section 22, "shall not affect any compensation previously paid," as meaning that a claimant cannot be made to repay benefits paid in the event that termination is retroactive. *Id.*, 226 F.3d at 172-173, 34 BRBS at 88(CRT). Indeed, this concept is well-settled. In *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 F.2d 299, 302 (1st Cir. 1939), *cert. denied*, 307 U.S. 645 (1939), the First Circuit interpreted Section 22 in this manner, stating:

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[5]The present case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, which has not addressed the issue presented.

[6]We reject claimant's contention that a critical distinguishing factor is that the claimant in *Spitalieri* was "feigning" disability whereas here employer's petition for modification is based solely on changed economic circumstances. While this factor seemingly played into the Second Circuit's "render justice" analysis, it clearly was not central to its holding that any termination can be retroactive.

> And the last sentence of Section 22, as amended, means that while the new order "may be made effective from the date of the injury", it "shall not affect any compensation previously paid", but any prior payments in excess of a decreased award "shall be deducted from any unpaid compensation". In other words the insurer in no case receives back any compensation previously paid but may have prior excess payments credited or allowed upon a present award, future awards, or any prior unpaid award "in such manner and by such method as may be determined by the deputy commissioner with the approval of the Commission" [now "Secretary."].

See also Ceres Gulf v. Cooper, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992); *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *Vitola v. Navy Resale & Service Support Office*, 26 BRBS 88 (1992). Thus, in view of this principle, it is logical to hold that a termination of benefits is a "decrease" within the meaning of Section 22 in all circumstances, with the statutory caveat that a credit is available for a decrease where benefits are still owing. Accordingly, we adopt the position of the Second Circuit, and we hold that a termination of benefits in a modifying order may be retroactively effective.[7]

We turn then to the Director's contention that the award herein should be modified/terminated as of December 1, 1998, the date of the administrative law judge's first decision. The Director contends that as the wage data used to calculate claimant's earning capacity pre-dates December 1, 1998, it is the last date that could be used.[8] In calculating claimant's current wage-earning capacity, the administrative law judge averaged the wages claimant earned during the 232 weeks running from the beginning of 1994 through the first 24 weeks of 1998, and he concluded claimant's average earnings were $3,013 per week. 1998 Decision and Order at 3. The Board rejected claimant's allegations on appeal that the administrative law judge erred in finding his actual wages representative of his wage-earning capacity, and thus affirmed the administrative law judge's finding. On remand for the inflation adjustment, the administrative law judge adjusted the $3,013 figure to 1986 wages, and found no loss in wage-earning capacity. Thus, as the last wage data used in the administrative law judge's calculation stems from the 24th week of 1998, the Director's request that the modification be effective from the date of the administrative law judge's

[7]To the extent it is inconsistent with this holding, the Board's decision in *Parks* is overruled.

[8]The Director persuasively argues that it makes no sense for the date of termination to be the date of the administrative law judge's decision on remand, as he came to the same conclusion as he did in his original decision.

December 1, 1998 Decision and Order is not unreasonable. Thus, we hold that termination of the award is effective as of December 1, 1998, and the administrative law judge's decision on remand is modified to reflect this holding. The Special Fund is entitled to a credit for payments made after that date should benefits ever be resumed. *See* 33 U.S.C. §§914(j), 922; *Bethlehem Shipbuilding,* 102 F.2d at 302.

Accordingly, the administrative law judge's Decision and Order on Remand is modified to reflect that claimant's award of benefits is terminated as of December 1, 1998. The Decision and Order on Remand is affirmed in all other respects.

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