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| THOMAS G. OLSEN |) | BRB Nos. 04-0584, 04-0584A, |
| |) | 04-0606 and 04-0606A |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| TRIPLE A MACHINE SHOP, |) | |
| INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | |
| Cross-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF |) | |
| WORKERS' COMPENSATION |) | |
| PROGRAMS, UNITED STATES |) | |
| DEPARTMENT OF LABOR |) | |
| |) | |
| Cross-Petitioner |) | |
| |) | |
| THOMAS G. OLSEN |) | BRB No. 04-0607 |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| TRIPLE A MACHINE SHOP, |) | |
| INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF |) | DATE ISSUED: 01/31/2005 |
| WORKERS' COMPENSATION |) | |
| PROGRAMS, UNITED STATES |) | |
| DEPARTMENT OF LABOR |) | |
| |) | |
| Petitioner |) | DECISION AND ORDER |
| Appeals of the Orders of Remand of Paul A. Mapes, Administrative Law Judge, United States Department of Labor. | | |

Thomas G. Olsen, San Francisco, California, *pro se*.

Robert E. Babcock, Lake Oswego, Oregon, for self-insured employer.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, and the Director, Office of Workers' Compensation Programs (the Director), appeal the Orders of Remand (2003-LHC-0993 and 2001-LHC-1500), and the Director appeals the Order of Remand (2000-LHC-1504) of Administrative Law Judge Paul A. Mapes rendered on claims 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a long and torturous history, and it has been before the Board many times. To briefly summarize, the work-related injury in this case occurred in 1978. In 1982, Administrative Law Judge Halpern awarded claimant permanent total disability benefits, and he granted employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In 1986, claimant's entitlement to medical benefits for the 1978 injury was resolved via a Section 8(i), 33 U.S.C. §908(i), settlement. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). In 1999, employer filed a motion for modification pursuant to Section 22, 33 U.S.C. §922, alleging that claimant's condition changed from total to partial and that he is employable, and this claim was assigned number 2000-LHC-1504 by the Office of Administrative Law Judges (OALJ). In late 2000, claimant filed a claim for benefits, alleging injury due to exposure to toxic substances while at employer's facility. At nearly the same time, claimant challenged the validity and scope of the 1986 settlement. These combined claims were assigned number 2001-LHC-1500 by the OALJ, but they were not consolidated with case #1504. Neither case #1500 nor case #1504 has been adjudicated.

In October 2001, the administrative law judge issued an Order to Show Cause Why This Proceeding Should Not Be Suspended Until Such Time As The Claimant

Obtains Representation From A Licensed Attorney. In that order, the administrative law judge presented the procedural history of the case, including a thorough description of the warnings he has given claimant to refrain from continued “misrepresentations and dilatory tactics,” as well as a description of claimant’s pattern of making false representations, failing to comply with procedural orders, filing frivolous complaints and appeals for delay purposes, filing recusal requests and interlocutory appeals, and making threats for intimidation purposes. Thus, the administrative law judge directed claimant to show why all further proceedings in case #1500 should not be suspended until he obtains a licensed legal representative. On appeal of this Order, the Board held that only Section 27(b), 33 U.S.C. §927(b), applies to claimant’s case if the administrative law judge finds that sanctions are warranted. The Board remanded the case for the administrative law judge to determine whether sanctions are warranted and, if so, to certify the facts regarding claimant’s non-compliance to the district court pursuant to Section 27(b). Further, the Board concluded that the administrative law judge cannot require claimant to obtain legal representation, as he is permitted to represent himself. *Olsen v. Triple A Machine Shop, Inc.*, BRB No. 02-0612 (June 3, 2003), *recon. denied* (Sept. 16, 2003).

On remand, and following the administrative law judge’s receipt of a transcript of the deposition testimony of claimant’s treating physician, Dr. Goldman, the administrative law judge ordered the parties to show cause in each of three cases¹ why the cases should not be remanded to the district director’s office until claimant has been assigned a guardian or becomes competent to act as his own attorney. The administrative law judge remanded the claims to the Office of Workers’ Compensation Programs (OWCP) “until such time as claimant has been assigned a guardian or has become physically and mentally capable of acting as his own attorney.”² Order of Remand (2003-LHC-0993) (March 31, 2004); Order of Remand (2001-LHC-1500) (March 31, 2004); Order of Remand (2000-LHC-1504) (March 30, 2004). Claimant and the Director appeal the remand orders in case #1500 and case #993, and the Director appeals the remand order in case #1504.³ BRB Nos. 04-0584, 04-0584A, 04-0606, 04-0606A, and

¹Case #1500 is claimant’s claim for injury due to exposure to toxic substances and his challenge to the validity of the 1986 settlement. Case #1504 is employer’s motion to modify the award from permanent total disability to one for permanent partial disability benefits, and case #993 is claimant’s claim for benefits for a shoulder injury he alleges occurred while attending a deposition in case #1504.

²Employer responded to the administrative law judge’s show cause order in case #1504, but the administrative law judge rejected employer’s reasons why he should hold a hearing or grant it summary decision. No party responded to the show cause order for case #993 or case #1500.

³In an Order dated May 21, 2004, the Board accepted jurisdiction of these interlocutory appeals to properly direct the course of the adjudicatory process, and it consolidated the appeals for decision purposes only.

04-0607. Employer responds to the appeals in all three cases.

Claimant and the Director both contend the administrative law judge erred in remanding these cases to the district director's office. In particular, the Director argues that the administrative law judge misinterpreted the Board's June 2003 decision and that his orders do not satisfy the requirements of the Administrative Procedure Act, 5 U.S.C. §§552, 554 (the APA), because the administrative law judge did not make the necessary findings of fact.⁴ Employer responds, agreeing with the Director that the remand orders should be vacated. The Director asks the Board to instruct the administrative law judge to conduct hearings on the merits or to commence other actions consistent with the Board's directions to process these cases. Employer asks the Board to instruct the administrative law judge to commence the sanctioning process under Section 27(b).

In all three orders, the administrative law judge stated that the Board's June 2003 decision held that claimant would have a right to represent himself in proceedings under the Act "even if he were not medically competent to engage in such representation." Orders of Remand at 2. Premised on this interpretation of the Board's decision, and purportedly supported by the deposition testimony of Dr. Goldman, who, according to the administrative law judge, stated that claimant has a rare medical condition that prevents him from competently representing himself, the administrative law judge remanded the case to the OWCP until claimant is assigned a guardian or can competently represent himself. Contrary to the administrative law judge's summary, however, the Board held only that claimant is within his rights to act on his own behalf, and that proceedings cannot be suspended until he obtains licensed legal assistance. *Olsen*, BRB No. 02-0612, slip op. at 6 (citing 28 U.S.C. §1654; *Iannaccone v. Law*, 142 F.3d 553, 556 (2^d Cir. 1998); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985)). The Board noted that its holding regarding the limit on the administrative law judge's authority was not altered by claimant's assertion that he could no longer represent himself, because claimant's competence was not an issue before the Board. *Olsen*, BRB No. 02-0612, slip op. at 6 n.7. The only issue was whether the administrative law judge had the authority to suspend proceedings and require claimant to hire an attorney, and the Board resolved that

⁴Claimant raises a number of issues in his briefs that are beyond the scope of this appeal. Accordingly, we need not address his arguments regarding his entitlement to an appointed attorney, his disagreement with previous decisions in the proceedings, his entitlement to medical benefits, his request to have sanctions implemented against employer, and his assertion that there is insufficient evidence to support employer's motion for modification. We also need not address claimant's arguments concerning his request for recusal of the administrative law judge, as the Board deferred addressing that issue until, if necessary, after the case has been heard on the merits. *Olsen*, BRB No. 02-0612 (Order on Recon.), slip op. at 3. To the extent claimant takes issue with the Director's statement that claimant "elected" to proceed without licensed legal representation, the point is moot, as claimant is proceeding without legal assistance.

question in the negative. Thus, the administrative law judge erred in interpreting the Board's decision as holding that claimant is entitled to represent himself whether or not he is competent to do so. Rather, if claimant is found to be incompetent, then recourse lies with Section 11 of the Act, 33 U.S.C. §911.

Section 11 specifically states:

The deputy commissioner may require the appointment by a court of competent jurisdiction, *for any person who is mentally incompetent* or a minor, of a guardian or other representative to receive compensation payable to such person under this chapter and to exercise the powers granted to or to perform the duties required of such person under this chapter.

33 U.S.C. §911 (emphasis added).⁵ The Director correctly argues that the administrative law judge's orders are deficient under the APA, as they do not contain an explicit finding that claimant is not mentally competent to represent himself in these cases. There is only an implication that claimant is not capable of managing his own claim based on a doctor's deposition testimony. The implication alone is insufficient. Pursuant to the APA, the administrative law judge must address all relevant evidence and make findings of fact and draw conclusions of law that are supported by substantial evidence of record. 5 U.S.C. §557(c)(3)(A); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). Consequently, we agree with the Director that by remanding these cases to the OWCP "until such time as claimant has been assigned a guardian or has become physically and mentally capable of acting as his own attorney[.]" the administrative law judge has abdicated his duty of making a finding on the matter of whether claimant is able to continue acting as his own representative. *See Marko v. Morris Boney Co.*, 23 BRBS 353 (1990); *Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982). Therefore, we must vacate the administrative law judge's Orders of Remand and remand these cases to the administrative law judge for further proceedings. If the administrative law judge finds a determination as to whether claimant is "mentally competent" under Section 11 is necessary, then the administrative law judge must address the relevant evidence and make the required findings.⁶ If the administrative law judge

⁵In 1972, the Act was amended to add Section 19(d), 33 U.S.C. §919(d), which provides for the transfer of adjudicative functions to the Office of Administrative Law Judges. Thus, since 1972, administrative law judges, rather than deputy commissioners (now called district directors), conduct formal hearings and hold the powers and duties granted deputy commissioners under Section 19 of the Act. *See Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003); *Percoats v. Marine Terminal Corp.*, 15 BRBS 151, 153-154 (1982).

⁶For example, the administrative law judge should address the entirety of Dr. Goldman's deposition testimony, as well as any other medical opinions or other

determines that claimant is not mentally competent and cannot represent himself, giving consideration to all the relevant evidence and arguments, then implementation of the provisions of Section 11 must commence. Following the appointment of a guardian, or if the administrative law judge determines that claimant is capable of continuing his self-representation, then the administrative law judge should hold a hearing in these consolidated cases to resolve the issues. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *see also United States v. Flewitt*, 874 F.2d 669 (9th Cir. 1989); *Faretta v. California*, 422 U.S. 806 (1975); *Olsen*, BRB No. 02-0612, slip op. at 11-12. If necessary, the administrative law judge may certify the facts to the district court pursuant to Section 27(b) of the Act regarding claimant's disobedience of lawful orders or process.⁷ 33 U.S.C. §927(b); *A-Z International v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

testimony or observations relevant to this inquiry. *See Dir. Brief at 12-14.*

⁷We decline employer's invitation to require the administrative law judge to implement the statutory sanctioning process, as it is within his authority to decide whether to invoke Section 27(b). *Goicochea*, 37 BRBS at 6-7; *Olsen*, BRB No. 02-0612, slip op. at 11.

Accordingly, the administrative law judge's Orders of Remand are vacated, and the cases are remanded to the administrative law judge for consideration in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge