



BRB No. 15-0449

VALERIE J. OYADOMARI)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Mar. 17, 2016</u>
)	
COMMANDER, NAVAL INSTALLATION)	
COMMAND MWR)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Remanding Cases of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Michael W. Thomas (Thomas, Quinn & Krieger, LLP), San Francisco, California, for self-insured employer.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Remanding Cases (2014-LHC-01005, 2014-LHC-01006) of Administrative Law Judge Richard M. Clark 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). In addition, employer has filed a motion to dismiss claimant's appeal. For the reasons that follow, we deny the motion to dismiss, vacate the administrative law judge's Order Remanding Cases, and remand the case to the administrative law judge to reconsider whether there are factual disputes

regarding claimant's entitlement to disability and medical benefits, and, if so, to resolve those disputes.

Claimant's appeal involves consolidated claims for benefits under the Act arising from two work-related injuries: (1) a lower back injury on April 10, 2006, and (2) an injury to claimant's right shoulder, right wrist, right elbow, right hand, and lower back on June 24, 2010. *See* EXs 1, 2.¹ Employer filed Notices of Controversion with respect to both injuries, *see* CX E; EX 10, but made voluntary payments of disability benefits for various periods during which claimant was unable to work due to her work-related injuries, and additionally paid medical benefits for various medical services related to the injuries. *See* EXs 3, 4, 6, 7, 9, 11. An informal conference before an Office of Workers' Compensation Programs (OWCP) claims examiner was held on July 25, 2013, and, on August 2, 2013, the claims examiner recommended that employer pay claimant temporary total disability benefits for the period from May 16 through June 16, 2013, and indicated that the parties had agreed to revisit a few of the disputed issues. *See* EX 11. Pursuant to the claims examiner's recommendation, employer paid claimant temporary total disability benefits for the period from May 16 through June 16, 2013. *See* EX 12. On February 13, 2014, claimant requested referral of the claims to the Office of Administrative Law Judges (OALJ) for a formal hearing, *see* EX 13, and the district director forwarded the claims to the OALJ on March 12, 2014. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994).

On May 30, 2014, employer propounded discovery to claimant, including Requests for Admissions, Interrogatories and Requests for Production. *See* EX 14. On June 26, 2014, claimant filed a response to employer's Request for Admissions. *See* EX 15. In a letter to employer's attorney dated November 19, 2014, claimant's counsel requested that employer authorize reimbursement to claimant for the out-of-pocket medical expenses and parking and mileage expenses she incurred while attending medical appointments. *See* CX F at p.3. Claimant's counsel also asserted a claim for additional disability benefits for a total of 151.41 hours of missed work while claimant attended doctor and physical therapy appointments. *See id.* Attached to claimant's counsel's letter were two tables itemizing medical expenses and parking fees paid out-of-pocket by claimant and mileage expenses she incurred. *See id.* at pp. 4-5. Also attached were various documents, including: medical bill statements; prescription medicine receipts; parking receipts; physicians' disability slips; requests for sick leave to attend doctor and physical therapy appointments; and statements from HMSA, claimant's health insurance plan. *See id.* at pp. 6-59. In follow-up letters to employer's attorney dated

¹ Citations to exhibits refer to attachments to employer's Motion for Partial Summary Decision Denying Indemnity Benefits or Alternatively for Remand (EXs 1-17) and to attachments to claimant's Cross-Motion for Partial Summary Judgment for Entry of Section 7 Order and in Opposition to Employer's Motion for Partial Summary Judgment (CXs A-F).

December 8, 2014 and March 3, 2015, claimant's counsel stated that claimant had not been reimbursed for the out-of-pocket expenses documented in the November 19, 2014 letter, nor had she received disability benefits for the hours she missed work to attend medical appointments. *See id.* at pp. 1-2. On May 22, 2015, claimant propounded discovery on employer. *See* EX 16. In Claimant's Initial Disclosures filed on June 5, 2015, she reserved the right to identify additional issues, and indicated that discovery and investigation were continuing.² *See* EX 17.

On June 12, 2015, employer filed with the administrative law judge a Motion for Partial Summary Decision Denying Indemnity Benefits or Alternatively for Remand. On the same date, employer also filed a Motion to Quash Claimant's Discovery Requests. In response, claimant filed a cross-motion for Partial Summary Judgment for Entry of Section 7 Order and in Opposition to Employer's Motion for Partial Summary Decision.

In his Order Remanding Cases issued on July 10, 2015, the administrative law judge granted employer's alternative motion to remand the case to the district director, having found that there were no issues identified for a hearing.³ The administrative law judge denied claimant's cross-motion for summary decision on the basis that the motion lacked persuasive documentation to support her entitlement to the relief sought. Claimant appeals the administrative law judge's Order Remanding Cases. Employer has filed a motion to dismiss claimant's appeal on the ground that it is an appeal of an interlocutory order. In response, claimant has filed a memorandum opposing employer's motion to dismiss.⁴

We reject employer's contention that the Board should dismiss claimant's appeal on the basis that it is an appeal of an interlocutory order. Contrary to employer's argument, claimant's appeal is properly before the Board. The administrative law judge made a conclusive determination that there are no contested issues in this case, and the

² The parties' Proposed Discovery Plan filed May 28, 2015, indicates that the discovery cut-off date was July 31, 2015.

³ The administrative law judge denied as moot employer's separate Motion to Quash Claimant's Discovery Requests.

⁴ Claimant has filed a motion for an enlargement of time in which to file her Petition for Review and brief, and employer has filed a motion to stay briefing pending a ruling on employer's motion to dismiss. These motions are denied as moot in light of our determination that further briefing is unnecessary to the resolution of the issue presented by claimant's appeal.

propriety of that finding is raised by claimant's appeal.⁵ Employer's motion to dismiss claimant's appeal is therefore denied. *See generally Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010).

Based on our consideration of the parties' pleadings and the administrative file forwarded to the Board, we are unable to affirm the administrative law judge's conclusion that employer has shown that there were no cognizable issues for a hearing. *See Order Remanding Cases* at 6. In response to employer's motion for partial summary decision, claimant submitted documents in support of her assertion that employer has not reimbursed her for specific medical expenses and has not paid disability benefits for specific dates on which she was required to use sick leave in order to attend medical appointments for treatment of her work-related injuries. *See CX F*. Although employer states generally that it has paid all disability and medical benefits sought by claimant, it has not responded to claimant's assertions that she has not received disability benefits for the specific dates on which she took sick leave and has not been reimbursed for the out-of-pocket expenses documented in *CX F*. *See Emp. Mot. to Dismiss* at 3-4. The administrative law judge addressed claimant's affidavit in support of her cross-motion for summary decision, *see Order Remanding Cases* at 4-5, but he made no mention of the tables itemizing medical expenses and the documents regarding specific expenses and missed time from work that were attached to claimant's cross-motion for summary decision. *See CX F*.⁶

⁵ The Board has held that an order remanding a matter to a lower tribunal for further findings and proceedings is not final. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81, 82 (1995); *see also Cooper Stevedoring Co. v. Director, OWCP*, 826 F. 2d 1011, 20 BRBS 27(CRT) (11th Cir. 1987). However, in this case, although the administrative law judge stated that the case was being remanded to the district director for "further proceedings," he conclusively determined that there were no disputed issues between the parties. *See Order Remanding Cases* at 6. As distinguished from this case, the administrative law judge in *Green* found that there was insufficient information for him to determine whether there were material facts in dispute as the claims had not been developed or investigated; he therefore remanded the cases to the district director for further "appropriate action." *Green*, 29 BRBS at 82. Under those circumstances, the Board held that the administrative law judge's decision was not final and that interlocutory review was not appropriate. *Id.* at 82-83. In contrast to *Green*, this case does not involve interlocutory review of an incomplete decision as the administrative law judge made a definitive finding that there were no contested issues for a formal hearing.

⁶ Claimant also sought a ruling by the administrative law judge regarding her entitlement to additional medical treatment for various conditions that she alleges are related to her April 10, 2006 and June 24, 2010 work injuries. *See Cl. Affidavit in Opposition to Employer's Motion for Partial Summary Judgment*.

As the administrative law judge did not address the documents submitted by claimant in support of her assertion that employer has not paid all of the disability and medical benefits she has claimed,⁷ we must vacate his finding that there are no contested issues and remand the case for further consideration of whether there are actual issues involving disputed entitlement to disability or medical benefits for claimant's April 10, 2006 and June 24, 2010 work-related injuries that require findings of fact by the administrative law judge.⁸ See 33 U.S.C. §919; 20 C.F.R. §§702.316, 702.317; *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21, 24 (2007); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47, 49 (2004); see generally *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), cert. denied, 531 U.S. 956 (2000). If there are genuine issues of material fact, the administrative law judge cannot grant a party's motion for summary decision, but must convene a formal hearing in accordance with 20 C.F.R. §702.331 *et seq.* See, e.g., *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in part on recon.*, 46 BRBS 57 (2012).

⁷ It is well established that factual disputes with respect to the issue of claimant's entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, are within the administrative law judge's authority to resolve. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38, 40 (2002).

⁸ An administrative law judge may remand the case to the district director when the employer withdraws its controversion to the claim, and the parties are in agreement as to the claim's disposition. 20 C.F.R. §702.351; see *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21, 23 (2007). There is no indication in the administrative file before the Board, however, that employer has withdrawn the controversions it filed in this case. See CX E; EX 10. Following the informal conference, the district director properly referred the case to the OALJ upon claimant's request. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994). If, on remand, the administrative law judge determines that there are *new* issues arising from evidence that has not been considered by the district director which is likely to resolve the case without a hearing, he may remand the case to the district director for his or her evaluation and recommendations. 20 C.F.R. §702.336(a); see also 20 C.F.R. §702.316. In this case, however, the administrative law judge merely remanded the case to the district director "for further proceedings," without stating what proceedings the district director was to undertake.

Accordingly, the administrative law judge's Order Remanding Cases is vacated, and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge