BRB No. 13-0593

JAMES GREEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	DATE ISSUED: Nov. 24, 2014
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on
Party-in-Interest	)	RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case, *Green v. Ceres Marine Terminals, Inc.*, BRB No. 13-0593 (Aug 19, 2014).[1] 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds, opposing the motion, to which employer has filed a reply brief and claimant a surreply.[2] We grant employer's motion for the sake of clarification and instruct the administrative law judge that he may reopen the record to allow the submission of additional evidence pertinent to the issues to be addressed on remand.

In its motion for reconsideration, employer contends that the Board erred by substituting its own finding of fact for that of the administrative law judge and, thus, in rejecting the administrative law judge's conclusion that claimant did not prove a loss in wage-earning capacity due to his work injuries. Employer maintains that it was inappropriate for the Board to direct the administrative law judge to accept Dr. Likover's opinion over Dr. Whitsell's opinion. Employer also asserts, however, that the Board's

[1]We note that the present composition of the Board renders employer's request for en banc reconsideration moot. 20 C.F.R. §801.301.

[2]We accept employer's reply brief and claimant's surreply brief. 20 C.F.R. §§802.215, 802.219(h).

directive to credit Dr. Likover's opinion requires that the claim for additional benefits after December 15, 2011, be denied.

Pertinent to this issue raised by employer on reconsideration, the Board vacated the administrative law judge's finding that employer established the availability of suitable alternate employment as of March 21, 2011. Initially, the Board noted the absence of any evidence of alternate employment until January 12, 2012,[3] and modified the administrative law judge's decision to award claimant compensation for temporary total disability until he reached maximum medical improvement on December 15, 2011, and for permanent total disability until January 11, 2012. The Board then remanded the case "for the administrative law judge to address employer's evidence and determine whether employer established the availability of suitable alternate employment on the open market prior to the time claimant returned to light duty work on the waterfront" on April 30, 2012. *Green*, slip op. at 4. The Board instructed the administrative law judge that, on remand, he "must reconsider the medical restrictions resulting from claimant's injury." *Id.* at 5.

Contrary to employer's contention, the Board did not direct that Dr. Likover's opinion "must be accepted over Dr. Whitsell's opinion." Rather, the Board simply stated that the administrative law judge had not provided a valid rationale for relying only on Dr. Whitsell's March 2011 opinion "in view of claimant's later date of maximum medical improvement, claimant's continued medical treatment, and the reasons for Dr. Likover's change of opinion." *Id.* at 6. The Board thus remanded the case for "additional findings of fact concerning the date claimant was able to return to work and the extent of the restrictions caused by his work injuries." *Id.* The Board's decision, therefore, does not preclude the administrative law judge from reconsidering, on remand, all of the medical evidence, including the report proffered by Dr. Whitsell. Additionally, while employer is correct in noting that Dr. Likover "opined that claimant's work restrictions were NOT due to his work injury," the record clearly establishes that Dr. Likover did not reach this conclusion until the time of his June 21, 2012 report; up until that date, Dr. Likover had attributed claimant's inability to perform his usual work and imposed restrictions to light-duty work due, at least in part, to the December 26, 2010 work injury. We therefore

[3]The Board recognized that employer's earliest evidence of allegedly suitable alternate employment is a labor market survey dated January 12, 2012, and that this fact, coupled with the administrative law judge's finding regarding the lack of credible evidence demonstrating the availability of suitable jobs for claimant on the waterfront as of March 2011, establishes that employer could not meet its burden until at least January 12, 2012.

reject, as meritless, employer's contentions that: 1) the Board "directed that Dr. Likover's opinion must be accepted over Dr. Whitsell's opinion;" and 2) that this alleged Board "directive" requires the claim for additional compensation after December 25, 2011, be denied on the [incorrect] ground that Dr. Likover stated claimant's restrictions were not work-related. Thus, as the Board instructed, the administrative law judge "should address the issues of claimant's medical restrictions, the availability of suitable alternate employment, and claimant's post-injury wage-earning capacity."[4] *Id.* at 9.

We also reject employer's next contention: that the Board should instruct the administrative law judge to reopen the record to allow submission of additional testimony to clarify and supplement the gang sheet records and testimony of Steve McCormick, as it related to the availability of suitable alternate employment prior to January 12, 2012. The Board addressed Mr. McCormick's testimony in terms of employer's burden to establish the availability of suitable alternate employment, and stated that the administrative law judge's rejection of Mr. McCormick's testimony was rational.[5] The Board also stated that Mr. McCormick's testimony, explaining how gang sheets from February and March 2013 could be analyzed to determine what claimant could have earned during those months, does not establish the availability of suitable jobs on the waterfront in March 2011, and that even if it did, Mr. McCormick's testimony conflicts with claimant's testimony, which the administrative law judge found credible, that he could not have obtained as many suitable jobs in March 2011 since he had less seniority at that time than when he returned to work on April 30, 2012. *Green*, slip op. at 4. We thus reject employer's contention that it must be permitted on remand to clarify Mr. McCormick's testimony as it relates to the availability of suitable alternate employment prior to January 12, 2012.[6] Contrary to employer's assertion before the Board, it is not entitled to an opportunity to cure the defects in its evidence merely because the administrative law judge rejected it; the opportunity to cure in this case is given at the

[4]In addressing the extent of claimant's disability commencing January 12, 2012, the administrative law judge should address the significance of Dr. Likover's opinion that claimant was able to perform all of the jobs identified in employer's labor market surveys dated January 12, February 17, and March 14, 2012, as well as his statement that claimant's work-related condition had completely resolved as of June 21, 2012.

[5]The administrative law judge rejected Mr. McCormick's testimony as speculative and not supported by the gang sheet records. Decision and Order at 4, 20.

[6]The Board did not remand the case for consideration of the issue regarding the availability of suitable alternate employment prior to January 12, 2012.

discretion of the administrative law judge.[7]

We agree with employer that clarification is warranted with regard to the Board's remand instructions concerning the issues of claimant's post-injury wage-earning capacity and average weekly wage. In vacating the administrative law judge's summary finding that claimant did not sustain a loss of wage-earning capacity due to his work injury, the Board held that the administrative law judge "did not perform the requisite analysis; compare claimant's post-injury wage-earning capacity to his pre-injury earnings; or determine what claimant could earn in part-time work on the open market, based on labor market survey evidence." *Green,* slip op. at 7. Part of this requisite analysis thus involves the calculation of claimant's post-injury wage-earning capacity and pre-injury average weekly wage. The Board observed that claimant's argument, that his trial attorney had misstated his total "wages" could be addressed pursuant to a Section 22 modification request based on a mistake of fact, 33 U.S.C. §922, and since the case was, in any event, being remanded, the Board held "that claimant may raise his average weekly wage contention before the administrative law judge on remand in the interest of judicial economy." *Green,* slip op. at 8.

It is well-established that an administrative law judge has considerable discretion regarding the development of evidence and has the duty to inquire fully into the matters at issue, conducting proceedings in a manner to best ascertain the rights of the parties. 20 C.F.R. §§702.338, 702.339. Additionally, the administrative law judge has wide discretion in the manner in which proceedings are conducted, *see Dionisopoulous v. Pete Pappas & Sons*, 16 BRBS 93 (1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982), and he has the authority to reopen the record on remand. *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980). Moreover, under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Although it is implicit in the Board's initial decision that the administrative law judge may reopen the record for the submission of additional evidence on the issues of wage-earning capacity and average weekly wage,[8] we now explicitly state that the administrative law judge may reopen the record to allow additional evidence on these two issues in order to inquire fully into the issues and to best ascertain the rights of the parties. *Bakke*, 13 BRBS 276; 20 C.F.R. §§702.338, 702.339.

[7]Employer may submit a motion addressed to the administrative law judge seeking further consideration of this issue. *See* 33 U.S.C. §922.

[8]This may include allowing employer to supplement the record with regard to Mr. McCormick's testimony as it may relate to the calculation of claimant's post-injury wage-earning capacity.

Accordingly, employer's motion for reconsideration is granted. 20 C.F.R. §802.409. The Board's prior decision, modifying in part and vacating in part the administrative law judge's decision, is affirmed, and the case is remanded to the administrative law judge for further consideration consistent with the Board's initial Decision and Order and this Order.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS[9]
Administrative Appeals Judge

[9]Due to the retirement of Judge Roy P. Smith, Judge Boggs is substituted on the panel of this case. 20 C.F.R. §802.407(a).