BRB No. 99-0138

PAUL BRUCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION	)	DATE ISSUED: 10/18/99
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Michael W. Prokopik (Franklin & Prokopik), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (92-LHC-1052) of Administrative Law Judge Jeffrey Tureck 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 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To briefly recapitulate, claimant was injured on April 19, 1990, when his right foot was caught between two shipping containers. Claimant's injury was diagnosed as a crush injury of the ankle, and he underwent surgery on September 4, 1990, for a right tarsal tunnel release. Claimant was paid temporary total disability benefits from April 20, 1990, to July 8, 1990, and from September 4, 1990 to January 9, 1991.

In his Decision and Order, Administrative Law Judge Joel R. Williams awarded

claimant permanent partial disability benefits for a 7 percent loss of use of the right leg pursuant to Section 8(c)(2), (19) of the Act, 33 U.S.C. §908(c)(2), (19). Claimant appealed to the Board, contending that the administrative law judge erred in determining the extent of claimant's impairment and by awarding benefits for an impairment of the leg pursuant to Section 8(c)(2), rather than for an impairment of the foot pursuant to Section 8(c)(4), 33 U.S.C. §908(c)(4). The Board affirmed the administrative law judge's determination that Dr. Honick's opinion could not be credited as the impairment rating was given too soon after claimant's surgery, based on the opinions of Drs. Hunt and Naiman to that effect. The Board nevertheless vacated the administrative law judge's award, agreeing with claimant that based on the specific fact pattern of the case, claimant's impairment is to his foot rather to his leg. The case was remanded for the administrative law judge to determine the extent of claimant's foot impairment. *Bruce v. I.T.O. Corp. of Baltimore*, BRB No. 93-0692 (Feb. 28, 1996)(unpublished).

On remand, the parties were advised that Judge Williams had retired and that the case would be reassigned to a new administrative law judge. Claimant's counsel requested that a new hearing be scheduled; this request was granted and a hearing was scheduled for January 15, 1998, before Judge Tureck (the administrative law judge). On November 5, 1997, claimant moved to submit additional medical evidence on the extent of his foot impairment. The administrative law judge denied this motion. Claimant requested reconsideration on November 11, 1997; he attached to his motion the March 4, 1991, and May 10, 1991, reports of his treating physician, Dr. Naiman, who opined that nerve regeneration from claimant's surgery would require a year or two and that rating claimant's impairment at that time was not possible.[1] CX 3. The administrative law judge denied the motion for reconsideration.

In his Decision and Order On Remand, the administrative law judge noted his denial of claimant's motion to submit additional evidence, and he decided the case on the basis of the documentary evidence admitted at the previous hearing. Regarding the extent of claimant's foot impairment, the administrative law judge credited the May 10, 1991, report of Dr. Naiman, which stated that claimant should not be rated at that time because his condition was still improving. The

[1]These reports were admitted into the record at the hearing before Judge Williams. In his motion, claimant asserted that new evidence was necessary in light of Dr. Naiman's prior opinion that claimant's recovery could take up to two years.

administrative law judge therefore discredited the February 26, 1991, rating of Dr. Honick and the June 17, 1991, rating of Dr. Kan. He credited the two percent impairment rating given by Dr. Hunt on May 28, 1992, which the administrative law judge found the best explained and congruent with Dr. Naiman's recommendation to not rate claimant too soon after the September 4, 1990, surgery. Accordingly, claimant was awarded benefits for a two percent impairment of the foot pursuant to Section 8(c)(4).

On appeal, claimant challenges the administrative law judge's denial of his motion to submit additional medical evidence on remand addressing the extent of his foot impairment. Employer responds, urging affirmance.

Section 702.338, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and to receive into evidence all relevant and material testimony and documents. Section 702.339, 20 C.F.R. §702.339, provides that administrative law judges are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but should conduct the hearing in a manner which will best ascertain the rights of the parties. *See also* 33 U.S.C. §923(a). Accordingly, the administrative law judge has great discretion concerning the admission of evidence, *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988), and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

Under the facts of this case, we hold that the administrative law judge abused his discretion by denying claimant's timely motion to submit additional medical evidence addressing the extent of his foot impairment. Generally, when a case is remanded by the Board, it is not necessary for the administrative law judge to reopen the record for the receipt of additional evidence. *See, e.g., Dionisopoulous v. Pete Pappas & Sons,* 16 BRBS 93 (1984). Due to the retirement of Judge Williams, claimant's request for a formal hearing before the new administrative law judge was granted. *See generally Creasy v. J. W. Bateson Co.,* 14 BRBS 434 (1983)(*de novo* hearing required at the request of a party when credibility of live testimony is at issue). Thereafter, on November 5, 1997, over two months before the scheduled hearing, claimant timely moved to submit additional evidence. Inasmuch as a new hearing was scheduled, at which time additional testimony was to be adduced, it was arbitrary for the administrative law judge to refuse claimant's request that he also be permitted to submit new medical evidence.[2] The Board's statement in its first

[2]As claimant's motion was made over two months before the scheduled hearing, employer would have had sufficient time to procure additional medical evidence.

decision that the extent of claimant's impairment should be determined "based on the medical evidence of record," slip op. at 3, does not preclude this result. The Board's decision does not mandate that only the prior record evidence be considered, and in view of the fact that additional testimonial evidence was to be received, it is not inconsistent with the Board's remand order to permit the administrative law judge's decision to be based on additional documentary evidence.

Moreover, the uncontradicted evidence of record establishes that claimant's ankle injury and resulting surgery required a lengthy period of time before it would reach maximum medical improvement. In addition to the credited reports of Dr. Naiman to this effect, the record also contains the October 22, 1991, report of Dr. Hunt, whose May 29, 1992, rating was credited by the administrative law judge on remand. In his October 22, 1991, report, Dr. Hunt opines that a final assessment of claimant's foot impairment should be deferred at least two years or more. EX 8. Thus, newer evidence arguably would be useful in assessing the extent of claimant's impairment.

Inasmuch as a new hearing was scheduled and claimant timely sought admission of additional evidence, and in view of the nature of claimant's injury, it was incumbent upon the administrative law judge to receive all relevant evidence at the formal hearing. 20 C.F.R. §702.338. Accordingly, we vacate the administrative law judge's decision and we remand the case so that the parties may submit additional evidence on the extent of claimant's foot impairment.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge