

BRB No. 99-0113

DAVID L. GREGORY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>9/21/99</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits, Order Denying Reconsideration, and Order Denying Second Reconsideration Motion of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits, Order Denying Reconsideration, and Order Denying Second Reconsideration Motion (93-LHC-2773) of Administrative Law Judge Pamela Lakes Wood awarding benefits 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a painter/sandblaster, sustained a work-related back injury on November 8, 1989, prompting him to file a claim seeking total disability benefits. Administrative Law Judge Reno E. Bonfanti awarded claimant permanent partial disability benefits from March 5, 1992, and continuing. Employer's appeal was administratively affirmed by the Board pursuant to Public Law 104-134 (Omnibus Appropriations Act for Fiscal Year 1996), and the case was subsequently appealed to the United States Court of Appeals for the Fourth Circuit. The court vacated the Board's affirmance of the administrative law judge's decision and directed it to remand the case to the administrative law judge "with directions to reweigh the evidence and provide an adequate statement of the reasons for his findings." *Newport News Shipbuilding & Dry Dock Co. v. Gregory*, 114 F. 3d 1176 (4th Cir. 1997) (table).

By Order dated January 7, 1998, Associate Chief Administrative Law Judge James Guill informed the parties that the case would be reassigned to another administrative law judge due to the unavailability of Judge Bonfanti, and stated that "[a]ny party may object within 30 days of the issuance of this Order." Judge Guill's Order dated January 7, 1998. In addition, the parties were informed that they "are allowed 30 days from the issuance of this Order to submit briefs on the issue(s) remanded by the Board for consideration." *Id.* The case subsequently was assigned to Administrative Law Judge Pamela Lakes Wood (Judge Wood or the administrative law judge).

In her Decision and Order on Remand Granting Benefits, the administrative law judge concluded that claimant is entitled to permanent partial disability from March 5, 1992. Employer's subsequent motions for reconsideration were denied. Specifically, the administrative law judge concluded that the law firm representing employer was timely served with Judge Guill's Order notifying the parties of the reassignment of the case to a new administrative law judge, but failed to respond in a timely fashion and, thus, waived its right to a *de novo* hearing on remand.

On appeal, employer raises no error with regard to the merits of the award of benefits on remand, but argues that Judge Wood's Decision and Order on Remand Granting Benefits must be vacated as it was denied the right to a new hearing upon the reassignment of the case to a new judge because it did not receive timely notice of the reassignment of the case. Employer maintains that as a copy of Judge Guill's order was addressed to an attorney who was no longer with the firm representing employer and as employer's attorney established by way of an affidavit that a copy of Judge Guill's Order is not in the law firm's case file, it is clear that Judge Guill's Order was never received. Employer thus contends that its right to a new hearing was never waived and therefore the case must be remanded

for a *de novo* hearing, inasmuch as the credibility of witnesses is at issue in this case. Claimant responds, urging affirmance.

A rehearing of the evidence or a reopening of the record is generally not required when the Board remands a case to an administrative law judge when the parties were afforded ample opportunity to develop the evidence prior to the issuance of the original decision. See *Dionisopoulous v. Pete Pappas & Sons*, 16 BRBS 93 (1984). However, when the original administrative law judge is not available and the credibility of witnesses is at issue, a party may request a *de novo* hearing, and the second administrative law judge may not then rely on the record developed before another administrative law judge in determining the credibility of witnesses. *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981). The right to a *de novo* hearing, though, may be waived where a party, despite receiving adequate notice of a case reassignment, does not object to resubmission of the case on the existing record or seek to present further evidence in a timely fashion. *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981)(*en banc*).

In her Order Denying Reconsideration, Judge Wood explicitly addressed and rejected employer's contention that her Decision and Order on Remand Granting Benefits should be vacated and the case scheduled for a *de novo* hearing. Initially, the administrative law judge rejected employer's argument, as its assertion that it never received a timely notice of reassignment, was unsupported either by an affidavit or a declaration under penalty of perjury or by any documentation whatsoever.¹ Judge Wood nevertheless obtained the administrative file from the district director's office in order to investigate employer's assertion.

Judge Wood determined that while the service sheet accompanying Judge Guill's Order indicates that a copy of the Order was mailed to employer's prior counsel, Mr. Walker, at the correct address for the firm of Seyfarth, Shaw, Fairweather & Geraldson, a review of the administrative file gives no indication that the Order was returned as undeliverable. Judge Wood therefore concluded that employer received timely notice of the proposed transfer of the case through service of Judge Guill's Order on the law firm representing its interests in the instant case, failed to respond in a timely manner, and thus, waived its right to a *de novo* hearing

¹As Judge Wood notes in her Order Denying Second Reconsideration Motion, employer did attach an affidavit in support of the arguments raised in its second motion for reconsideration. She again found however that employer received notice of the proposed transfer of the case but failed to respond in a timely manner.

upon reassignment of the case to another administrative law judge on remand. *Pigrenet*, 656 F.2d at 1091, 13 BRBS at 843. We therefore hold that Judge Wood adequately considered employer's argument that it did not receive timely notice of Judge Guill's Order informing the parties of reassignment and affirm her conclusion that employer waived its right to a *de novo* hearing on remand as it is rational, within her discretion and supported by substantial evidence. Moreover, as employer does not challenge the merits of Judge Wood's award of benefits in this case, it is also affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Benefits, Order Denying Reconsideration, and Order Denying Second Reconsideration Motion are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge