

WALTER GREENE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CHARLESTON AIR FORCE)	DATE ISSUED:
CENTRAL BASE FUND)	
)	
and)	
)	
AIR FORCE CENTRAL WELFARE)	
FUND)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

John B. Kern, Charleston, South Carolina, for claimant.

Roy H. Leonard, San Antonio, Texas, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (85-LHC-1347) of Administrative Law Judge John C. Holmes 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 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'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 a second time. To recapitulate, claimant injured his back while working for employer as a tractor operator on October 3, 1983. Claimant returned to light duty work for employer on September 13, 1989. Employer terminated claimant on June 8, 1990 for failure to report that he had earnings from an outside business while he was on disability.

In the first decision issued in this case, Administrative Law Judge Stuart Levin found that claimant was temporarily totally disabled from October 6, 1983, and continuing. On September 26, 1989, employer filed a Motion for Modification, contending that claimant was no longer temporarily totally disabled. In a Decision and Order Granting Modification, Administrative Law Judge John C. Holmes (the administrative law judge) found that claimant reached maximum medical improvement on March 3, 1987. The administrative law judge further found that employer established the availability of suitable alternate employment by virtue of the light duty job it provided claimant at its facility. Next, the administrative law judge found that claimant suffered no loss in wage-earning capacity, as claimant was paid the same wage scale as he was earning at the time of the injury, and that because claimant was terminated for a reason unrelated to his disability, claimant is not entitled to benefits following his discharge on June 8, 1990. Lastly, the administrative law judge declined to issue a *de minimis* award. The administrative law judge therefore modified the prior decision to reflect claimant's entitlement to temporary total disability benefits from October 3, 1983, until March 3, 1987, and permanent total disability benefits from March 3, 1987 to September 13, 1989.

Claimant appealed this decision to the Board, contending, *inter alia*, that the administrative law judge erred in determining that claimant's light duty job with employer constituted suitable alternate employment, that the administrative law judge erred in failing to consider claimant's earning-capacity in the open market and, in the alternative, that the administrative law judge erred in failing to issue a *de minimis* award.

The Board affirmed the administrative law judge's findings regarding suitable alternate employment, claimant's wage-earning capacity in the open market, and claimant's termination by employer. However, the Board held, citing *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), that the administrative law judge erred in evaluating claimant's entitlement to a *de minimis* award as he failed to apply the proper legal standard. Accordingly, the Board vacated the administrative law judge's denial of a *de minimis* award, and remanded the case to the administrative law judge for consideration of this issue. *Greene v. Charleston Air Force Control Base Fund*, BRB No. 93-1613 (March 25, 1993) (unpublished).

On remand, the administrative law judge declined to address claimant's request for a *de minimis* award, stating "....I believe my reasons for denial of a *de minimas* [sic] award, though extremely brief were adequate. I, therefore, see no need to revisit this issue." See Decision and Order at 1.

On appeal, claimant contends the administrative law judge abused his discretion by failing on remand to follow the Board's instruction that he address claimant's entitlement to

a *de minimis* award pursuant to the proper legal standard. Claimant also contends the administrative law judge is biased against him, and seeks assignment to a different administrative law judge on remand. Lastly, claimant asserts that he should be afforded an opportunity to present relevant evidence to the administrative law judge on remand. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred in failing to comply with the Board's remand order. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operation of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." The Board's first Decision and Order specifically stated that the administrative law judge was to consider claimant's entitlement to a *de minimis* award under the legal standard set forth in *Fleetwood*. Thus, in refusing to consider claimant's possible entitlement to such an award, under the proper legal standard, the administrative law judge on remand erred by failing to follow the Board's directive. See *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157, 159 (1990).

Regarding claimant's possible entitlement to a *de minimis* award, the United States Supreme Court, in *Metropolitan Stevedore Co. v. Rambo*, No. 96-272, 1997 U.S. Lexis 3864 (U.S. June 19, 1997), adopted the standard set forth by the United States Court of Appeals for the District of Columbia Circuit in *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984), and the United States Court of Appeals for the Fifth Circuit in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981), *i.e.*, that a nominal award may be entered on claimant's behalf upon a showing that there is a significant possibility that a worker's wage-earning capacity will at some future point fall below his pre-injury wages. Accordingly, the Court held that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.

As this administrative law judge has not addressed this standard, we remand this case a second time for the administrative law judge to address claimant's possible entitlement to a nominal award pursuant to the Supreme Court's decision in *Rambo*. Claimant's request that the case be assigned to a different administrative law judge is denied, as claimant has not established bias by the administrative law judge. We agree with claimant, however, that the parties on remand should be afforded the opportunity to present evidence relevant to this issue, as the existing record closed on May 21, 1992.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge