

BRB No. 02-0611

TERRY W. CAMPBELL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NORFOLK SHIPBUILDING AND)	DATE ISSUED: <u>July 2, 2002</u>
DRYDOCK CORPORATION)	
)	
and)	
)	
RICHARD FLAGSHIP SERVICES)	
INCORPORATED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	ORDER

Employer has filed a timely appeal of the administrative law judge's Decision and Order on Remand filed April 30, 2002. 33 U.S.C. §921(a), (b); 20 C.F.R. §§802.205, 802.207. This appeal is assigned BRB No. 02-0611. All correspondence relating to this appeal must bear this number.

Employer also has filed a motion for expedited review. Employer requests that the Board issue a final decision in the captioned case so that it may pursue an appeal of the Board's three previous decisions in this case. *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998), BRB No. 99-0704 (April 7, 2000), BRB No. 01-0426 (Jan. 28, 2002). Claimant has not responded to this motion.

Claimant, a rigger, injured his head, neck, and back at work on May 2, 1987. Employer voluntarily paid claimant various periods of total and partial disability benefits between May 1987 and January 7, 1993. Claimant returned to light duty work for employer in October 1992 but was fired from this job on January 9, 1993,

for violating a company rule. Claimant worked for Savage Builders from September 13 to December 10, 1993. In his initial Decision and Order, the administrative law judge denied claimant's claim for total disability benefits commencing January 9, 1993. Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking total disability benefits commencing August 5, 1994. The administrative law judge denied benefits, and claimant appealed.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998), the Board affirmed the administrative law judge's finding that there had been no change in claimant's condition since the initial decision. The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits.

On remand, the administrative law judge awarded claimant total disability benefits commencing January 4, 1993, following claimant's discharge, finding that employer did not establish suitable alternate employment as claimant's light duty job in employer's facility was not within claimant's restrictions and too physically demanding. Upon the motion for reconsideration of the Director, Office of Workers' Compensation Programs, the administrative law judge awarded claimant total disability benefits as of October 19, 1992, the date he found claimant reached maximum medical improvement.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 99-0704 (April 7, 2000), the Board affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment through claimant's post-injury light duty job at its facility. Consequently, the Board affirmed the administrative law judge's award of total disability benefits for the periods when claimant was not working. The Board, however, vacated the administrative law judge's award of total disability benefits for the period claimant was actually working. The Board remanded the case to the administrative law judge to determine whether claimant was entitled to total disability benefits for the period when he was working part-time in the light duty job for employer from October 19, 1992, to January 9, 1993, and for Savage Builders from September 13 to December 10, 1993.

On remand, the administrative law judge found that claimant worked through extraordinary effort and in spite of excruciating pain from October 19, 1992, to January 9, 1993, and consequently awarded claimant total disability benefits for this period. The administrative law judge awarded claimant only partial disability benefits for the period from September 13 to December 10, 1993.

Employer appealed the administrative law judge's award of total and partial

disability benefits.¹ The Board vacated the award of total disability benefits while claimant worked for employer, and remanded the case for the administrative law judge to discuss claimant's testimony and to provide a rationale for crediting or not crediting it. The administrative law judge also was to determine the sufficiency of Dr. Suter's reports for purposes of establishing that claimant worked only through extraordinary effort and in spite of excruciating pain. *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 01-0426 (Jan. 28, 2002). The Board affirmed the award of partial disability benefits from September 13 to December 10, 1993.

On remand, the administrative law judge denied claimant benefits for the period from October 19, 1992 to January 9, 1993, finding that claimant did not work only through extraordinary effort and in spite of excruciating pain. On appeal, employer does not challenge this finding, but seeks the entry of a final order so that it may appeal the Board's prior decisions. See 33 U.S.C. §921(c).

¹Employer also raised contentions concerning the Board's first two decisions in this case in order to preserve these issues for appeal. The Board did not address employer's arguments that: (1) the Board exceeded its scope of review with regard to the administrative law judge's 1995 and 1997 decisions; (2) the Board erred in affirming the administrative law judge's granting of claimant's petition for modification in BRB No. 97-1371; and (3) the Board erred in affirming the administrative law judge's finding that the light duty job at employer's facility was not suitable in BRB No. 99-0704, as the Board's prior rulings constituted the law of the case.

Employer's motion for expedited review is granted. Employer has raised no issues with regard to the administrative law judge's decision on remand, and the Board's prior decisions constitute the law of the case. *See, e.g., Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). Employer has not offered a basis for departure from this rule. Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge