BRB Nos. 94-906 - 94-928

FRED H. GREEN, JR., *et al*.	)	
	)	
Claimants-Respondents	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION AND ORDER

Appeals of the Decision and Order and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Hayden S. Dent (Richard F. Scruggs, P.A.), Pascagoula, Mississippi, for claimants.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision on Motion for Reconsideration (93-LHC-7948, *et al.*) of Administrative Law Judge C. Richard Avery denying summary judgment on 23 claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

[1]By Order dated May 2, 1994, the Board designated the *Green* case, BRB No. 94-906, as the lead case for purposes of briefing and decision. A list of all claimants and BRB numbers is attached to this decision.

By order dated January 7, 1993, the district director was commanded by the United States District Court for the Southern District of Mississippi to transfer to the Office of Administrative Law Judges approximately 3,000 asbestos claims filed under the Act for hearings on employer's Motion to Consolidate and Motions for Summary Judgments. Of this number, 25 claims involved employees who worked for employer prior to April 1, 1971, and each had entered into a voluntary settlement under Section 8(i) of the Act, 33 U.S.C. §908(i), with employer, settling all claims for disability benefits for $3,425, and leaving open only each of these claimants' entitlement to future medical benefits.[2] The Section 8(i) settlement agreements provide that employer is to be reimbursed the full amount of its lien, until the lien is satisfied for each claimant, less $925 for attorney's fees and expenses, once future aggregate gross third-party settlement(s) entered into subsequent to the date of Section 8(i) agreement reach $10,000. In addition, the Section 8(i) settlements provide that employer's responsibility for payment of medical benefits would only begin after a deductible of $12,500 had accrued and once the existing credit and/or setoff is exhausted from the third-party settlement(s).

Employer sought summary judgment based on the claimants' failure to obtain its written approval of third-party settlements in claims brought against asbestos manufacturers entered into after the Section 8(i) settlements, as required by Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). The administrative law judge found that summary judgment is not appropriate because there is insufficient information for him to ascertain whether or not there are material facts at issue. Specifically, the administrative law judge noted that there was no evidence presented of subsequent third-party settlements, of whether claimants have reached their established deductibles and have exhausted employer's setoffs, and of whether subsequent medical expenses have been incurred or whether the expenses fall within the provisions of Section 7 of the Act, 33 U.S.C. §907. Thus, the administrative law judge remanded the cases to the district director for appropriate action. In a Decision on Motion for Reconsideration, the administrative law judge also found that because all 23 claimants had settled all rights to compensation under Section 8(i), they "lost" the status of "persons entitled to compensation" and therefore fall outside the requirements of Section 33(g)(1). Therefore, the motion for reconsideration was denied.

On appeal, employer contends that the administrative law judge erred in denying the motion for summary judgment as there are no material issues of fact in contention. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. In addition, the Director, Office of Workers' Compensation Programs (the Director), responds, urging dismissal of the appeals for lack of ripeness. On the merits, the Director urges affirmance of the administrative law judge's finding that the 23 claimants "lost" the status of "persons entitled to compensation" and therefore fall

[2]This group includes two claims brought by widows. The administrative law judge found that the Section 8(i) settlement agreements these claimants entered into in 1988 fully and finally settled their claims at that time. The administrative law judge considered the 23 remaining claims separately from these two, and these are the 23 cases that are now on appeal to the Board.

outside the requirements imposed by Section 33(g)(1).

We agree that these appeals must be dismissed. The administrative law judge in this case did not issue a decision on the merits; rather, he found that there was insufficient information for him to determine whether material facts are in dispute as the claims had not been developed or investigated. Therefore, the administrative law judge remanded the cases to the district director for further "appropriate action." It is well-established that an order remanding a matter to a lower tribunal for further findings and proceedings is not final. *See Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27 (CRT) (11th Cir. 1987); *Cabot Corp. v. United States*, 788 F.2d 1539 (Fed. Cir. 1986); *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). In this case, the administrative law judge did not resolve the controversy between the parties, but instead denied employer's motion for summary judgment and remanded the case to the district director for further proceedings. The administrative law judge's Decision and Order, therefore, is not final. *Washington Metropolitan Area Transit Authority v. Director, OWCP*, 824 F.2d 94, 20 BRBS 13 (CRT) (D.C. Cir. 1987); *Arjona*, 24 BRBS at 223.

Federal courts ordinarily will not grant interlocutory review of an incomplete decision. *See* 28 U.S.C. §1291. Such review is permissible, however, in that "small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (the collateral order doctrine);[3] *see also United States v. 101.88 Acres of Land, Etc.*, 616 F.2d 762, 765 (5th Cir. 1980). Similarly, the Board generally does not accept interlocutory appeals so as to avoid piecemeal review. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Niazy v. The Capital Hilton Hotel,* 19 BRBS 266 (1987); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85 (1974). The Board will grant interlocutory review nonetheless if necessary to properly direct the course of the adjudicatory process. *See Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

In the present case, no exceptions to the rule against taking appeals of interlocutory orders apply, as the Board need not direct the course of the adjudicative process, and the "collateral order doctrine" does not apply to these cases as employer is seeking to foreclose all future entitlement to medical benefits on the merits. *See Butler*, 28 BRBS at 118. Moreover, the administrative law judge's decision did not conclusively resolve any issues, and the legal issues raised by employer will be subject to review once an administrative law judge issues a final decision awarding or denying

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[3]Under the collateral order doctrine, review of an interlocutory order will be undertaken if the following three criteria are satisfied: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue that is completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

benefits in these cases. *Cooper Stevedoring*, 826 F.2d at 1014 n.10, 20 BRBS at 30 n.10 (CRT). Employer's appeals, therefore, are dismissed.

In addition, we also reject employer's contention that the cases are "ripe" to foreclose employer's liability for medical benefits. Employer contends that claimants have viable, open, pending claims for medical benefits, by virtue of the Section 8(i) settlements, because they need only submit a bill for payment and do not need to file a new claim. However, there is no evidence of record that the claimants have requested medical benefits.

The Board recently discussed the issue of ripeness in a case where it was undisputed that the claimant had made no request for medical benefits. *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994); *see also Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994)(Brown, J., concurring), *aff'g on recon. en banc* 27 BRBS 250 (1993)(*en banc*)(Brown, J., concurring). The Board held that where claimant has settled his claim for compensation and has not requested medical benefits, there is no claim pending; therefore, there can be no issues to decide. *See Parker*, 28 BRBS at 341; *Boone*, 28 BRBS at 123. Consequently, the Board held that the issue of whether Section 33(g) bars claimant's potential claim for medical benefits in the case was premature. Inasmuch as the claimants in the instant cases have settled their claims for compensation under the Act, and there is no evidence of pending claims for medical benefits, the decision in *Parker* is dispositive of the ripeness issue.[4] Therefore, we reject employer's contention that the issue of whether claimants' entitlement to medical benefits is precluded under Section 33(g)(1) is ripe for adjudication.

In addition, we reject employer's contention that the administrative law judge erred in denying the motion for summary judgment inasmuch as it is not disputed that the claimants entered into third-party settlements after the date of the Section 8(i) settlements without employer's prior approval. Employer contends that the non-moving party must come forward with specific facts to show that there is a genuine issue of material fact and to produce evidence to support its contentions. Employer avers that claimants did not do so here.

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[4]As in *Parker*, employer contends this case is similar to the situation in *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992), because the Ninth Circuit determined that the apportionment issue was ripe, despite the lack of evidence on the specifics of any third-party settlements, thereby permitting adjudication of a speculative issue. We reject this contention. Contrary to employer's argument, the court determined that the issue was ripe because it presented a question of law fit for review and because the parties were not able to settle the third-party agreements without knowing whether the employer was entitled to an offset pursuant to 33 U.S.C. §933(f). The inability to settle the claims constituted a hardship which outweighed any interest in postponing adjudication. *See Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 142-143 (CRT). The cases at bar, in which employer seeks dismissal of claims for medical benefits which may not exist, present neither an issue fit for review nor a hardship which outweighs the interest in postponing adjudication of this issue until an actual claim is filed. *See Parker*, 28 BRBS at 342 n.3.

The purpose of summary judgment is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges,[5] 29 C.F.R. §§18.40, 18.41, an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact.

In the instant cases, the claims for compensation have been settled pursuant to Section 8(i), and employer is contesting only the claimants' right to medical benefits in view of the alleged third-party settlements entered into without employer's approval. However, as the administrative law judge stated, there is no evidence of record that the claimants have requested medical benefits, either past or future, nor is there evidence regarding the deductible or exhaustion of the credit. There also is no evidence regarding the existence or amount of the third-party settlements. Thus, there is no evidence from which the administrative law judge can determine whether the claimants are entitled to medical benefits under the Act, a material issue of fact in a medical benefits only claim. Therefore, we affirm the administrative law judge's denial of employer's motion for summary judgment. *See Harris,* 28 BRBS at 259.

[5]The Rules apply unless inconsistent with a rule of special application as provided by statute or regulation. *See* 29 C.F.R. §18.1; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

Accordingly, as the administrative law judge's Decision and Order is not a final appealable Decision and Order, employer's appeals are dismissed as interlocutory.[6] 20 C.F.R. §802.401(b).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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[6]Inasmuch as we hold that the administrative law judge's Decision and Order is not a final decision, and thus is not subject to review at this time, *see Arjona*, 24 BRBS at 223, we need not address employer's contentions regarding Section 33(g), 33 U.S.C. §933(g).