BRB No. 97-1168

WANDA J. DIGGLES	)	
	)	
Claimant- Petitioner	)	DATE ISSUED:
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	
	)	
	)	
Self-Insured Employer- Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Decision of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lewis S. Fleishman (Richard Schechter, P.C.), Houston, Texas, for claimant.

David B. Gaultney (Mehaffy & Weber, P.C.), Beaumont, Texas, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion for Summary Decision (96-LHC-1662) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law made by the administrative

law judge if they are rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe v. Smith, Hinchman, & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury on June 30, 1987, while working for employer when she fell and hit her lower back and both knees. The parties agreed that claimant's average weekly wage at the time of injury was $240, and employer voluntarily paid claimant temporary total disability benefits from September 9, 1987, to October 11, 1987. Claimant and employer disagreed, however, about the nature, extent, and cause of claimant's disability thereafter, and the case was referred for a formal hearing. At the start of the hearing on April 20, 1989, claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director), informed Administrative Law Judge Richard Avery that they had agreed to settle the pending claim. According to the provisions of the proposed agreement, which was signed by claimant, employer, and the Director, employer agreed to pay claimant permanent partial disability benefits of $53 per week for 104 weeks beginning on May 9, 1988, with the Special Fund assuming payments on May 6, 1990. The agreement also provided for a lump sum payment of $10,000 for past medical expenses, and reflected that claimant's right to future medical care under Section 7 of the Act, 33 U.S.C. §907, was not limited by the agreement. On September 12, 1989, the parties submitted an application entitled "Stipulation of Facts and Application for Approval of Agreement and Award Pursuant to the Provisions of the LHWCA" to the administrative law judge for approval. In an Order filed on September 26, 1989, Judge Avery approved the proposed agreement, finding it adequate and not procured by duress.

On June 21, 1996, claimant filed a petition with the administrative law judge in which she sought to modify her continuing permanent partial disability award to an award for permanent total disability pursuant to Section 22, 33 U.S.C. §922, based on an alleged change in her condition as reflected by a Social Security Administration determination issued January 28, 1994, declaring her permanently totally disabled as of November 12, 1991. EX-D. On April 19, 1997, employer filed a motion for summary decision in which it asserted that the parties had previously entered a settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), which is not subject to modification. Claimant opposed the motion. EX-B.

On April 29, 1997, Administrative Law Judge Clement J. Kennington granted employer's motion for summary decision, finding that the parties' 1989 agreement constituted a settlement under Section 8(i). Accordingly, he found he lacked jurisdiction to entertain claimant's motion for modification as such settlements are not subject to modification under Section 22. On appeal, claimant challenges that

determination, arguing that Judge Kennington erred in finding that the parties' 1989 agreement was not subject to modification as it did not constitute a valid Section 8(i) settlement. Employer responds, urging affirmance of the administrative law judge's decision.

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i)(1994),[1] provides for the discharge of employer's liability for benefits where an application for settlement is approved by the district director or administrative law judge. Claimants are not permitted to waive their right to compensation except through settlements approved under Section 8(i). *See* 33 U.S.C. §§915, 916; *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). The procedures governing settlement agreements are delineated in the implementing regulations at 20 C.F.R. §§702.241-

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[1]Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

702.243. Section 22 of the Act explicitly states that settlements are not subject to modification.

We affirm Judge Kennington's determination that the parties entered into a Section 8(i) settlement in 1989 which had become final and was thus not subject to modification under Section 22. After reviewing the parties' agreement as well as the transcript of the proceedings before Judge Avery, Judge Kennington rationally rejected claimant's argument that the parties' 1989 agreement was not a settlement under Section 8(i) because neither the agreement itself nor Judge Avery's Order of approval explicitly referred to Section 8(i). In so concluding, he noted that there is no requirement under the Act for a specific statement within an agreement that it is made pursuant to Section 8(i) and that claimant had not cited any cases or regulations in support of her contention. Decision and Order at 2. Section 702.242(a) of the regulations provides that "[t]he application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the case." 20 C.F.R. §702.242(a). The submission here was in the form of a stipulation which summarized the relevant facts, and the parties sought the administrative law judge's approval of the agreement. Judge Kennington thus rationally rejected claimant's argument in this regard.[2] While Judge Avery's Order approving the parties' agreement also does not explicitly mention Section 8(i), in evaluating the agreement he found it adequate and not procured by duress. As he applied the standard applicable under Section 8(i), Judge Kennington reasonably interpreted the Order as approving a Section 8(i) settlement. *See generally Olsen v. General Engineering & Machine Works*, 25 BRBS 169, 171 (1991).

Citing *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988), claimant also asserts that no valid settlement occurred under Section 8(i) because the proposed agreement did not provide for the complete discharge of employer's liability. In *Lawrence*, the Board held that the administrative law judge erred in finding a district director's Compensation Order was a Section 8(i) settlement, as it did not contain findings required by Section 8(i) or provide for the complete discharge of employer's liability. Rather, the Order stated the file was closed "subject to the limitations of the Act or further Order." *Id.* at 284. By contrast, Judge

[2]The agreement also contains additional language indigenous to a Section 8(i) agreement, as it refers to the fact that the agreement was not made under duress, financial or otherwise, that claimant believes the agreement to be in her best interest, and that employer will be completely discharged from all future liability for disability compensation. *See* Agreement at 7, 8; *see generally Rochester v. George Washington University*, 30 BRBS 233, 235-236 (1997).

Kennington rationally determined that the language of the agreement in this case did provide for a complete discharge of employer's obligations. Specifically, paragraph 6 of the parties' agreement explicitly released employer "from any and all liability for compensation benefits and past medical expenses upon payment of the agreed-upon amounts by the employer," and further stated that "Claimant and Director understand and agree that after May 6, 1990, the employer's liability for compensation benefits terminates and that any future compensation benefits after that date will be the responsibility of the Special Fund."[3] Inasmuch as Judge Kennington rationally concluded that, unlike *Lawrence*, the parties' agreement in the present case provided for the complete discharge of employer's liability, he properly distinguished *Lawrence* in finding the agreement was a Section 8(i) settlement.

[3]We note that any increase in the Fund's payments imposes an additional financial burden on employer through its assessments. *See Olsen v. General Engineering & Machine Works,* 25 BRBS 169, 172 n.4 (1991). Thus, employer remains a party to all proceedings after the Fund assumes liability. 33 U.S.C. §908(f)(2)(B).

Finally, Judge Kennington found that the parties' agreement provided a full description of the terms of agreement, resolving all outstanding issues as required for a settlement.[4] Claimant attempts to attack this conclusion by asserting that a valid Section 8(i) agreement was not consummated because of omissions or technical deficiencies in the documentation underlying the settlement application. We reject this assertion. Section 702.242(b) details the information to be included in the application. On appeal, claimant for the first time points to specific items under this section which she asserts were not included, arguing, *inter alia,* that the application was deficient because it did not contain a recent medical report, an itemized statement of medical expenses, or a sufficient explanation of the adequacy of the amount. Such alleged deficiencies, however, do not provide a basis for modifying a final order approving a settlement. The initial issue on modification, which Judge Kennington properly addressed, is whether the parties entered into, and Judge Avery approved, an agreement under Section 8(i). Compliance with the regulatory requirements may be indicative of the parties' intent in entering the agreement and thus relevant to the administrative law judge's consideration of this issue; Judge Kennington's findings reflect his consideration of the agreement in this light. *See* n.4, *supra.* However, the deficiencies now raised by claimant go to whether the application complied with Section 702.241(b), and thus whether it was a valid agreement which Judge Avery could properly approve. The validity of the agreement underlying a Section 8(i) settlement order is not subject to an attack in modification proceedings under Section 22, but rather raises legal issues which must

[4]Specifically, the administrative law judge stated the agreement detailed "the amounts to be paid for compensation, medical benefits and representative fees; the reason for the settlement and the issues in dispute; the birth date of claimant; claimant's work history; claimant's medical condition with claimant reaching maximum medical improvement May 8, 1988; claimant's belief that this agreement is in her best interest; and an explanation of how the settlement amount is considered adequate based upon claimant's average weekly wage, the nature of the alleged injury and the question of causation, loss of earning capacity, and the potential for less recovery if pursued to a formal hearing." Decision and Order at 2.

be timely appealed under Section 21 of the Act, 33 U.S.C. §921. *See generally Downs v. Director, OWCP,* 803 F.2d 193, 198 n.13, 19 BRBS 36, 42 n. 13 (CRT)(5th Cir. 1986) (administrative law judge's authority to approve settlement not subject to attack under Section 22); *McPherson v. National Steel & Shipbuilding Co.,* 26 BRBS 71 (1992) *aff'g on recon. en banc* 24 BRBS 224 (1991) (appeal of settlement order where application did not comply with 20 C.F.R. §702.241). As Judge Avery's Order approving the parties' agreement was filed on September 26, 1989, and was not appealed within 30 days, it became final. In order to modify this award, claimant was required to prove it was a decision based on a stipulated facts rather than an order approving an agreement under Section 8(i). Claimant failed to do so in this case.

In summary, Section 8(i) provides that when the parties agree to a settlement, the administrative law judge shall approve it within 30 days unless the agreement is found to be inadequate or procured by duress. All parties, including the Director on behalf of the Special Fund, entered into an agreement in this case which resolved all issues as to claimant's entitlement. This agreement was approved by Judge Avery within the 30-day period under the standard set forth in Section 8(i). Upon reviewing this Order and the parties' agreement, Judge Kennington found the case was settled under Section 8(i). *See Olsen,* 25 BRBS at 171. This finding is rational, supported by the record and consistent with law. As settlements approved pursuant to Section 8(i) of the Act are not subject to modification under the Act, Judge Kennington properly found that claimant could not utilize Section 22 to alter the parties' 1989 agreement. *See generally Downs,* 803 F.2d at 193, 19 BRBS at 36 (CRT)*; Porter v. Kwajalein Services, Inc.*, 31 BRBS 112, 113-114 (1997); *Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985). Accordingly, we reject claimant's argument that Judge Kennington erred in granting summary decision in employer's favor and affirm his determination that the parties' prior Section 8(i) settlement barred his consideration of claimant's petition for modification.

Accordingly, the Decision and Order Granting Motion for Summary Decision of Judge Kennington is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge