BRB Nos. 97-1239

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| ELWOOD RICE | ) | |
| | ) | |
| Claimant | ) | DATE ISSUED: June 4, 1998 |
| | ) | |
| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | |
| | ) | |
| | ) | |
| Self-Insured Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | |
| Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order Granting Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Laura Stomski (Marvin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Section 8(f) Relief (96-LHC-6688) of Administrative Law Judge Richard K. Malamphy 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In May 1990, claimant, a retiree, filed a claim for benefits based a diagnosis of work-related asbestosis. In May 1995, claimant notified employer that he would be seeking permanent partial disability benefits as a result of his occupational disease. By letter dated September 19, 1995, claimant further informed employer that he would seek compensation for a 25 percent permanent impairment. Employer, on November 25, 1995, submitted a letter to the district director raising a claim for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), and requesting 60 days to supplement its application for such relief. Employer attached to its letter the July 5, 1995, medical report of Dr. Shaw. Following an informal conference before a claims examiner, employer's request for additional time to supplement its application was rejected and its application for Section 8(f) relief was denied by the district director on the grounds that it was inadequately documented and untimely filed as the claim had been pending for more than five years. The case was then transferred to the Office of Administrative Law Judges for formal adjudication, at which time the Director asserted the absolute defense to Special Fund liability set out in Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3).

On December 13, 1996, the administrative law judge issued his Order Bifurcating Issues - Granting Benefits for Permanent Partial Disability, Awarding Attorney's Fees, and Reserving Jurisdiction Over the Issue of Entitlement to Relief Under Section 8(f) of the Act.[1] In his subsequent decision dated April 22, 1997, the administrative law judge determined that employer's application for Section 8(f) relief was timely filed and sufficiently documented. Consequently, the administrative

[1]In this decision, claimant was awarded benefits, pursuant to the parties' stipulation, for an 18 percent permanent impairment due to asbestosis, commencing January 10, 1990, and continuing. 33 U.S.C. §908(c)(23).

law judge determined that the absolute defense of Section 8(f)(3) was inapplicable. The administrative law judge further found employer entitled to Section 8(f) relief on the merits.

On appeal, the Director challenges the administrative law judge's finding that the Section 8(f)(3) bar is inapplicable. Employer responds, urging affirmance.

Section 8(f)(3) of the Act provides that an employer's request for Section 8(f) relief, and a statement of the grounds for such relief, which is filed after September 28, 1984, must be presented to the district director prior to consideration of the claim by the district director, and that failure to do so will bar the payment of benefits by the Special Fund, unless the employer could not have reasonably anticipated that Special Fund liability would be at issue. 33 U.S.C. §908(f)(3)(1994). The implementing regulation at 20 C.F.R. §702.321 states that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is an issue in dispute. 20 C.F.R. §702.321(b)(1). The regulation further provides that the failure to submit a timely and fully documented application for Section 8(f) relief may be excused only if employer could not have reasonably anticipated the liability of the Special Fund prior to the district director's consideration of the claim. 20 C.F.R. §702.321(b)(3).

The Director first argues that the administrative law judge erred in finding that employer's application for Section 8(f) relief was timely filed before the district director. The Director maintains that employer's obligation to request Section 8(f) was triggered as of May 1995, when it first became aware that claimant was seeking benefits for a rateable permanent impairment, and thus asserts that employer's request for relief, filed some six months later without reasonable justification, cannot constitute satisfaction of its regulatory obligation to file "as soon as the permanency of the claimant's condition becomes known." 20 C.F.R. §702.321(b).

At issue in this case is the time frame in which employer must request Section 8(f) relief after the "permanency of claimant's condition is known or is an issue in dispute." The regulation states that this could occur when benefits are first paid or at an informal conference held to discuss the permanency of claimant's condition. 20 C.F.R. §702.321(b)(1). An employer is not required to request Section 8(f) relief only when an informal conference has been scheduled. *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1991), *aff'g* 24 BRBS 248 (1991). It is obligated to request such relief if it has the requisite knowledge of the permanency of claimant's condition prior to the time the district director "considers" the claim. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991) (if district director transfers the claim to the Office of Administrative Law Judges, it is assumed that he has fully considered the claim, absent evidence to the contrary).

In the instant case, the administrative law judge determined that employer's

application for Section 8(f) relief was timely since it was filed prior to the time that the permanency of claimant's condition became an issue before the district director. Thus, using the December 6, 1995, informal conference as the pivotal date for filing, the administrative law judge concluded that employer's submission of its Section 8(f) application to the district director in November 1995 was timely as it pre-dates the informal conference. In so finding, the administrative law judge rejected the Director's position that employer's application was untimely as claimant's claim had been filed in 1990, and thus was pending for five years prior to employer's request for Section 8(f) relief, finding that at no point during that five year period was the permanency of claimant's condition at issue. The administrative law judge noted in this regard that claimant had not received an impairment rating during that time period.

We affirm the administrative law judge's finding that employer's application for Section 8(f) relief was timely filed. Initially, we note that the administrative law judge properly found that at no time prior to May 1995 was the permanency of claimant's condition at issue. It was at this point that claimant first raised the issue of his entitlement to benefits for a permanent impairment, *see* Tr. at 18, notwithstanding that he filed a claim in 1990 based on his diagnosis of asbestosis.[2] The administrative law judge specifically found that claimant took no action on his claim before May 1995, and this finding is supported by the record before us. Employer is not required to monitor the claimant's condition to determine the point at which his disability has become permanent. *Brazeau v. Tacoma Boat Building Co.*, 24 BRBS 128 (1990). Moreover, that the parties ultimately stipulated that claimant is entitled to permanent disability benefits from 1990 does not indicate the permanency of claimant's condition actually was at issue prior to May 1995. *Id.*

Furthermore, we cannot say that the administrative law judge's finding that employer's November 1995 request was timely because it was filed six months after claimant first raised the permanency of his condition is irrational or not in accordance with law. Granted, the request was not made within days or weeks of employer's awareness of the claim for permanent benefits, but it was raised prior to the informal conference before the district director. In *Container Stevedoring*, the United States Court of Appeals for the Ninth Circuit stated:

[2]In addition, it appears that claimant did not supply evidence of his permanent impairment until September 19, 1995, when counsel wrote to employer "claiming" benefits for a 25 percent impairment based on Dr. Scutero's opinion. Emp. Ex. 8.

> In this case, permanency was in issue arguably on June 19, 1986 when the Orthopaedic Panel issued its report, and certainly no later than Mr. Gross' claim for compensation on October 23, 1986. In keeping with the regulations, Container Stevedoring should have filed its application for Special Fund relief at that time. After October, Container Stevedoring delayed over seven months without submitting an application. *At the very least*, in April 1987 when the deputy commissioner requested pre-hearing applications which are used to prepare a case for a formal hearing before an ALJ, Container Stevedoring should have recognized that the deputy commissioner considered its work completed and should have raised the issue of Special Fund relief immediately.

*Container Stevedoring*, 935 F.2d at 1547, 24 BRBS at 217 (CRT) (emphasis added).[3] In this case, employer's request for Section 8(f) relief was made prior to the informal conference and the claim's consideration by the district director. It was thus not untimely under the regulation. Thus, as the administrative law judge's finding that employer's application for Section 8(f) relief was timely filed is rational and in accordance with law, it is affirmed. *Id.; Brazeau*, 24 BRBS at 128; *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 134 F.3d 1241, 31 BRBS 215 (CRT) (4th Cir. 1998).

The Director also contends that the administrative law judge erred in finding

[3]In a footnote, the court rejected the employer's contention that the regulation requiring a Section 8(f) application as soon as the permanency of claimant's condition is known or is an issue in dispute is overly broad in light of the statutory directive that the application should be submitted "prior to consideration of the claim by the [district director]." The court stated that the regulation "merely suggests a way in which an employer can avoid the problem Container Stevedoring faces in having delayed too long before submitting an application." *Container Stevedoring*, 935 F.2d at 1547 n.2, 24 BRBS at 217 n.2 (CRT).

that employer's application for Section 8(f) relief was fully documented. The Director argues that while employer's letter dated November 29, 1995, did identify "chronic obstructive pulmonary disease (COPD) and hypertension" as pre-existing conditions, it failed to address the contribution requirement.

The implementing regulations provide that the employer must file with the district director a fully documented application in support of its request for Section 8(f) relief. 20 C.F.R. §702.321(a). Specifically, the application must contain a description of the pre-existing condition, reasons for believing that the disability would be less if not for the pre-existing condition, and the basis for the belief that the pre-existing condition was manifest to the employer. Employer must submit medical evidence in support of its assertions. 20 C.F.R. §702.321(a). The failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund, unless employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order. 20 C.F.R. §702.321(b)(3). The Board has held that in a proceeding before an administrative law judge in which the Director has properly raised the Section 8(f)(3) absolute defense, the administrative law judge must give *de novo* consideration to whether the employer has submitted an application requesting Section 8(f) relief that is in compliance with the regulations at 20 C.F.R. §702.321. *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992).

In this case, the administrative law judge determined that employer's application constituted a fully documented application since it states the ground for relief, COPD, supported by the medical opinion of Dr. Shaw. However, as the Director correctly argues, employer's letter and accompanying medical report do not specify the "reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability," 20 C.F.R. §702.321(a)(1)(ii),[4] and thus, employer's application, if comprised solely of the November 29, 1995, letter and medical report of Dr. Shaw, is not, on its face, in compliance with the pertinent regulation.

[4]In addition, in a case where the ultimate disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the second injury alone. 20 C.F.R. §702.321(a); 33 U.S.C. §908(f)(1).

Employer, however, notes that in its November 29, 1995, letter, it specifically requested a 60 day extension of time in which to supplement its application, as claimant's counsel had not responded to its request for claimant's medical records. The administrative law judge determined that the district director wrongfully denied employer's request to submit additional evidence in support of its application for Section 8(f) relief based solely on the erroneous belief that the application itself was untimely. *See* discussion, *supra.* The administrative law judge therefore determined that all relevant evidence, including evidence not previously submitted to the district director, should be considered in conjunction with employer's Section 8(f) application. *See generally Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992). Consequently, although the administrative law judge erred in finding that the application was, on its face, fully documented, this error is harmless as he rationally concluded that employer's request for an extension of time to supplement its application was improperly denied.[5] We thus affirm his finding that employer could submit additional evidence in support of its request for Section 8(f) relief at the formal hearing. Inasmuch as the Director does not challenge the administrative law judge's finding that employer satisfied the pre-existing permanent partial disability and contribution elements for Section 8(f) relief, the administrative law judge's award of such relief is affirmed.

Accordingly, the administrative law judge's Decision and Order Granting Section 8(f) Relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[5]The Director notes that the reason employer gave in its extension request, that it was unable to present evidence that the pre-existing condition was manifest because it could not obtain claimant's medical records, is invalid because employer need not satisfy the manifest requirement in this case as claimant is a voluntary retiree. *See Newport News Shipbuilding & Dry Dock Co. v. Harris,* 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). Nonetheless, because the administrative law judge rationally determined that the extension request was wrongfully denied, it matters not that the reason for the request was unnecessary.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge