BRB No. 97-1269

LOUIS E. SERIO)
)
Claimant)
)
v.)
)
NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: June 11, 1998
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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Mark Reinhalter (Martin 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 Law Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director),

appeals the Decision and Order Granting Section 8(f) relief of Administrative Law Judge Daniel A. Sarno, Jr., 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 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).

Claimant, who worked as an electrician for employer from 1939 until he retired in 1983, sought compensation under the Act for asbestos-related pulmonary disease. Prior to the initial hearing, claimant and the employer stipulated that claimant was entitled to compensation for a 25 percent impairment pursuant to 33 U.S.C. §908(c)(23)(1994), based on the applicable National Average Weekly Wage of $360.59, as well as past, present, and future medical treatment of claimant's asbestosis. At the hearing on January 10, 1995, the parties informed Judge Malamphy that the sole issue remaining in dispute was employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). On March 23, 1995, however, employer sent a letter informing Judge Malamphy that it was withdrawing its request for Section 8(f) relief and that by copy of this correspondence to claimant and the Director, it was confirming to them that it would not pursue a claim for Section 8(f) relief at that time. Employer requested that the administrative law judge enter a compensation order awarding benefits consistent with the parties' stipulations. On May 8, 1995, Judge Malamphy issued the requested Order, and as all of the outstanding issues had been resolved, remanded the case to the district director for appropriate action.

On February 19, 1996, employer submitted a second request for Section 8(f) relief by way of a petition for modification under Section 22 of the Act, 33 U.S.C. §922. This request was denied by the district director on March 11, 1996. Employer, thereafter, requested a hearing and the case was referred to the Office of Administrative Law Judges. At the hearing held before Judge Sarno, employer introduced evidence in support of its claim that it was entitled to Section 8(f) relief based on claimant's pre-existing diabetes and granuloma/ fibrosis lung disease. The Director did not appear at the hearing but submitted a brief in which he opposed the Section 8(f) claim on the ground that the employer's withdrawal of that claim in the first hearing constituted a waiver which precludes employer's pursuit of that issue in a second hearing.

In a Decision and Order filed May 21, 1997, after noting that the Director cited *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897, 899 (1979), for the general proposition that Section 8(f) entitlement must be raised and litigated at the first

hearing of the case, Judge Sarno found that *Egger* mandated consideration of employer's Section 8(f) petition. Specifically, he determined that in *Egger,* the Board recognized that where Section 8(f) is raised but not actually litigated at the first hearing, an employer's subsequent request for Section 8(f) relief shall be considered in the interests of justice under the following circumstances: (1) the issue was raised at the first hearing; (2) there is an apparent understanding by the parties that the issue would be litigated at a future date; (3) the administrative law judge did not specifically rule that withdrawal of the issue at that time would constitute a waiver of entitlement; (4) consideration of the issue will not result in an alteration of the amount or duration of the award; and (5) there is no indication that any party is in any way prejudiced by consideration of employer's request for relief at the later date. Finding each of these requirements satisfied, Judge Sarno concluded that *Egger* dictated consideration of employer's request for Section 8(f) relief in this case, and upon considering employer's evidence, awarded Section 8(f) relief. Arguing only the issue of timeliness, the Director appeals the decision. Employer responds, urging affirmance.[1]

On appeal, the Director specifically argues that as long ago as 1979, the Board established the bedrock principle that if an employer withdraws its Section 8(f) request at the first hearing, when it would otherwise be appropriate for litigation, it is thereafter barred from pursuing the issue in later proceedings. The Director contends that the Board made this rule clear in *Egger* when it admonished future applicants that "hereafter the issue [of Section 8(f) relief] must be raised and litigated at the first hearing of the case." 9 BRBS at 899. The Director avers that contrary to Judge Sarno's determination, there are no exceptions to this rule, and that even if there were, he erred in finding that employer qualified for any such "exception" in this case. Moreover, he asserts that in finding to the contrary, Judge Sarno confused the result in *Egger* with the rule pronounced therein, maintaining that because *Egger* was decided more than 15 years prior to the initial hearing before

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[1]In its response brief, employer argues that the Director's attempt to raise an affirmative defense to employer's substantive claim after the record had been closed was untimely. We reject this contention. While the Director did not participate at the February 24, 1997, hearing, the Director's brief filed on April 25, 1997, was filed within the briefing schedule set by Judge Sarno at that hearing. Tr. at 7.

Judge Malamphy, employer had to be aware of its rule, and must accordingly bear the consequences of having withdrawn its Section 8(f) claim at the first hearing. In the alternative, the Director argues that even if *Egger* could be construed as providing for a permanent ongoing "exception," as Judge Sarno did here, critical distinctions exist between the situation of the employer in *Egger* and that of the employer in the present case.

A request for Section 8(f) relief must be raised and litigated in the same proceeding wherein permanent disability is at issue, absent a showing of special circumstances which, in the interests of justice, outweigh the need for finality in judicial proceedings. *American Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 83, 14 BRBS 923, 925 (5th Cir. 1982), *aff'g Carroll v. American Bridge Div., U.S. Steel Corp.*, 13 BRBS 759 (1981); *Avallone v. Todd Shipyards Corp.*, 13 BRBS 348 (1981), *review denied*, 672 F.2d 901 (2d Cir. 1981); *Wilson v. Old Dominion Stevedoring Corp.*, 10 BRBS 943 (1979); *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979). Once a compensation order becomes final, the only means of reopening the claim is to petition for modification pursuant to Section 22 of the Act, and the party seeking modification must establish that there has been a change in the claimant's condition or a mistake in a determination of fact. *See Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 735 19 BRBS 27, 31 (CRT) (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co., Inc.*, 16 BRBS 315 (1984); 33 U.S.C. §922; 20 C.F.R. §702.350.

We agree with the Director that employer's February 1996 application for Section 8(f) relief is untimely and that employer waived this issue when it withdrew its prior request for Section 8(f) from consideration at the initial hearing. In allowing the employer to litigate the issue of Section 8(f) relief at a second hearing, Judge Sarno misconstrued the Board's decision in *Egger* as providing for an ongoing exception to the rule requiring employer to raise and litigate Section 8(f) relief in the same proceeding wherein permanent disability is at issue. In *Egger*, the issue of Section 8(f) relief was raised but not litigated at the first proceeding. When the employer sought modification to raise the Section 8(f) issue, the administrative law judge found that modification of the prior decision award of benefits was not warranted as employer could have presented the Section 8(f) issue previously at the initial hearing. On appeal, after first declaring the impropriety of bifurcating hearings, the Board specifically stated, " In any case in which the application of Section 8(f) is an issue, we hold that *hereafter* the issue must be raised and litigated at the first hearing of the case." *Egger*, 9 BRBS at 899 (emphasis added). Nonetheless, because the parties had agreed that the applicability of Section 8(f) would be litigated at a future time, the administrative law judge had not specifically ruled that withdrawal of the issue at that time would constitute a waiver, and

consideration of the issue would not result in an alteration of the amount or duration of the award or prejudice any party, the Board declined to apply its holding in *Egger* retroactively and found remand for consideration of the merits of employer's request for Section 8(f) relief was in the interests of justice.

The Board's holding in *Egger* clearly states that in future cases, as the present case, Section 8(f) must be raised and litigated at the first hearing of the case. Based on the specific facts of *Egger,* however, the Board did not apply the holding to the parties in that case. Based on the holding in *Egger*, therefore, Judge Sarno erred in relying on that decision to create an ongoing exception applicable in this case. In *Egger,* moreover, the Board's decision to limit application of its holding was based on the parties' erroneous belief that the issues of liability and Section 8(f) relief could be separately litigated and the administrative law judge's failure to specifically rule that withdrawal of the issue would constitute a waiver of entitlement. Since *Egger* clearly forewarned that in future cases its ruling would apply, similar concerns cannot provide a basis for consideration of employer's untimely Section 8(f) petition in this case. As *Egger* was decided in 1979, employer was on notice at the 1995 hearing that bifurcation of the liability and Section 8(f) issues was improper, and while Judge Malamphy did not specifically inform the parties that postponing Section 8(f) at the initial hearing would result in a waiver, we agree with the Director that he had no duty to do so given that *Egger* had been in existence for 15 years as of the time of the hearing.[2]

The purpose of requiring an employer to raise and litigate Section 8(f) relief in the first proceedings wherein the permanency of claimant's disability is at issue is to facilitate the policy of finality in litigation and to avoid the bifurcation of issues. *See generally American Bridge*, 679 F.2d at 83, 14 BRBS at 925; *Egger*, 9 BRBS at 897. In the present case, at the time of the initial hearing before Judge Malamphy the permanency of claimant's condition was undisputed; the parties had stipulated that claimant was entitled to benefits under Section 8(c)(23) for a 25 percent whole person impairment. Contrary to the Director's assertions, a claim for Section 8(f) relief may be raised for the first time via a petition for Section 22 modification if the employer shows there are special circumstances which warrant such action. *See*

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[2]We note that in 1984, Congress amended Section 8(f) to require that an employer seeking relief under Section 8(f) must present its request "and a statement of the grounds therefor. . . to the deputy commissioner prior to the consideration of the claim by the deputy commissioner." 3 U.S.C. §908(f)(3) (1994). The applicability of Section 8(f)(3) is an affirmative defense, and the Director did not raise it in this case. *See generally Abbey v. Navy Exchange*, 30 BRBS 139 (1996).

Edward Minte Co., 803 F.2d at 731, 19 BRBS at 27 (CRT). In the present case, however, employer withdrew its claim for Section 8(f) relief from consideration following the initial hearing, and it has neither alleged or demonstrated any reason for not having litigated Section 8(f) at that time. Employer's renewed effort to raise Section 8(f) is clearly contrary to the holding in *Egger.* Inasmuch as parties are not permitted to invoke Section 22 merely to correct errors or misjudgments of counsel, or to circumvent the rule that Section 8(f) relief is waived if not properly raised at the first possible opportunity, *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982), *aff'g Woodberry v. General Dynamics Corp.*, 14 BRBS 431 (1981); *Dykes v. Jacksonville Shipyards, Inc.*, 13 BRBS 75, 76 (1981), we reverse Judge Sarno's findings and hold that employer is not entitled to Section 8(f) relief as its 1996 application for relief is untimely. *See Verderane*, 729 F.2d at 775, 17 BRBS at 154 (CRT); *American Bridge*, 679 F.2d at 81, 14 BRBS at 923.

According, the administrative law judge's Decision and Order Granting Section 8(f) relief is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge