U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0216

PAUL MERRITT Claimant v. HUNTINGTON INGALLS, INCORPORATED - PASCAGOULA OPERATIONS Self-Insured Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Mar. 25, 2015 DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2013-LHC-01259) of Administrative Law Judge Larry W. Price 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who had prior serious knee injuries, sustained work-related injuries to his knees and back on November 30, 2006. He underwent extensive treatment; his knee condition reached maximum medical improvement on May 25, 2010, and his back condition reached maximum medical improvement on May 16, 2011. Employer paid claimant benefits from December 12, 2006. The private parties stipulated as to all issues on November 22, 2013, noting that only employer's request for Section 8(f), 33 U.S.C. §908(f), relief remained as an issue, and they requested that the administrative law judge enter an order based on their stipulations. The administrative law judge entered such an order on March 27, 2014, awarding claimant temporary total, permanent total, permanent partial, and then ongoing permanent total disability benefits. Decision and Order at 2-3, 5. In the same order, the administrative law judge stated that the only issue remaining was employer's entitlement to Section 8(f) relief. Finding that the regulation at 20 C.F.R. §702.321 sets the deadline for submission of a completed Section 8(f) application as the date of the informal conference and that employer did not submit one by that deadline, the administrative law judge applied the Section 8(f)(3), 33 U.S.C. §908(f)(3), absolute defense and denied employer's request for Section 8(f) relief. Decision and Order at 3-5. Employer appeals the denial of Section 8(f) relief, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Employer filed a reply brief.

Employer contends the administrative law judge erred in applying the Section 8(f)(3) absolute defense because he did not address whether the district director complied with the regulations regarding the deadlines for submission of a Section 8(f) application. Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), provides:

> Any request, filed after the date of enactment of the Longshore and Harbor Workers' Compensation Amendments of 1984, for apportionment of liability to the special fund established under section 44 of this Act for the payment of compensation benefits, and a statement of the grounds therefore (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

The regulation at 20 C.F.R. §702.321(b) provides that a request for Section 8(f) relief

should be made as soon as the permanency of the claimant's condition is known or is in dispute, and that an employer seeking relief under Section 8(f) must request the relief and file a fully-documented application with the district director. If the claimant's condition has not reached maximum medical improvement, or if no claim for permanency has been raised by the date the case is referred to the Office of Administrative Law Judges (OALJ), a Section 8(f) application need not be submitted to the district director. However, in all other cases failure to submit the application to the district director is an absolute defense to the liability of the Special Fund, unless the employer could not have reasonably anticipated the liability of the Special Fund while the case was pending before the district director. 20 C.F.R. §702.321(b)(3). This defense must be affirmatively raised and pleaded by the Director. *Abbey v. Navy Exchange*, 30 BRBS 139 (1996); *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

Section 702.321(b)(1) of the regulations states:

> a request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute. This could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition. . . . Along with the request for section 8(f) relief, the applicant must also submit all the supporting documentation required by this section, ... *Where possible, this documentation should accompany the request, but may be submitted separately, in which case the district director shall, at the time of the request, fix a date for submission of the fully documented application.* The date shall be fixed as follows:
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> (i) *Where notice is given to all parties that permanency shall be an issue at an informal conference, the fully documented application must be submitted at or before the conference.* For these purposes, notice shall mean when the issues (sic) of permanency is noted on the form LS-141, Notice of Informal Conference.

20 C.F.R. §702.321(b)(1) (emphasis added). Employer, in its briefs to the Board, contends the administrative law judge failed to address relevant facts: employer had raised Section 8(f) as an issue in its multiple notice of controversion forms, and the district director failed to fix a date for submission of documentation after each of those filings; the district director erred in presuming that his general notice scheduling the informal conference should have been interpreted by employer as requiring it to file a completed Section 8(f) application when the issues listed by the district director did not include Section 8(f); and, the district director erred in failing to grant its request for an extension of time to file a completed application. Employer contends the district director's failure to fix a due date for the Section 8(f) application precludes the

applicability of the absolute defense.[1] Thus, employer contends the administrative law judge erred in applying the Section 8(f)(3) absolute defense. The Director urges the Board to affirm the administrative law judge's decision because the date of the informal conference was the date fixed by regulation for the submission of the Section 8(f) application, and employer did not comply with that deadline.

On April 25, 2013, this case was transferred to the OALJ. The district director's transfer letter included claimant's pre-hearing statement and a notation that employer had not submitted a fully completed Section 8(f) application within the time-frame allowed or to date, and that the Director will assert the absolute defense Section 8(f)(3). On June 26, 2013, employer submitted its Section 8(f) application to the administrative law judge, and it submitted supplements to the application on July 23 and August 19, 2013. On November 22, 2013, claimant and employer filed a joint stipulation with the administrative law judge resolving all their issues, noting that the only issue remaining before the administrative law judge was employer's request for Section 8(f) relief. The Director responded to the Section 8(f) application by raising the absolute defense.

In addressing the Section 8(f)(3) issue, the administrative law judge agreed with employer that the regulations require the district director to fix a date by which the Section 8(f) application must be submitted when the request for such relief is not accompanied by supporting documentation. However, the administrative law judge found that as "permanency" was identified as an issue in the notice of informal conference, the deadline for submitting the Section 8(f) application was "at or before the informal conference," citing 20 C.F.R. §702.321(b)(1).[2] Decision and Order at 4.

[1] Employer asserts that the district director customarily set specific due dates for Section 8(f) applications and customarily granted requests for extensions of those dates, but, for some reason, did not do the same here. It relies on the Board's decision in *C.R.* [*Reid*] *v. Northrop Grumman Ship Systems, Inc.*, BRB No. 07-0549 (Feb. 29, 2008), and the administrative law judge's decision on remand in that case, *Reid v. Northrop Grumman Ship Systems, Inc.*, 2005-LHC-01349 (Jan. 29, 2009). The Board's decision in *Reid* is unpublished; both decisions lack precedential value. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

[2] Although the administrative law judge conflated the terms "district director" and "Director" in his decision, the Board has held that the district director and the Director are separate entities, each with his own responsibilities. *Abbey v. Navy Exchange*, 30 BRBS 139 (1996). Thus, employer is correct that the district director is not the proper entity to "raise and plead" the absolute defense. *Id.* However, any error in the district director's asserting the absolute defense is harmless because the Director actually raised and pleaded the defense before the administrative law judge.

Moreover, although the district director did not specify that the Section 8(f) application was due at the informal conference, the administrative law judge found that the regulation does not require that an employer be notified separately that a Section 8(f) application must be filed at the time of the informal conference. Accordingly, he found that the district director's general notification to the parties that they were to submit documentation in support of their positions was sufficient to put employer on notice that its Section 8(f) application was due. As employer did not file a completed application with the district director, the administrative law judge found that its request for Section 8(f) relief is barred by the absolute defense. *Id.* at 5. A brief review of the procedural history before the district director assists in addressing this appeal.

In this case, employer filed four notices of controversion dated: January 29, 2008; November 6, 2008; January 3, 2012; and March 4, 2013 – all of which listed Section 8(f) as an issue.[3] 8(f) App. Exh. 1. The district director did not respond to the notices. Rather, on April 10, 2012, three months after the third notice of controversion, the district director sent the parties a notice of informal conference. At the top of the page, the notice stated: "ISSUES: Entitlement to Longshore Benefits/PERMANENCY." Dir. Exh. 3. It informed the parties that the informal conference would take place on April 24, 2012, and, as a last instruction, stated: "Please provide documentation to this office prior to the conference to substantiate your positions." *Id*. The memorandum of the informal conference is dated April 30, 2012. Dir. Exh. 4. Therein, the district director stated that claimant was present and represented by counsel, employer was represented by an adjuster, and the Director was not represented. The issues were identified as "Permanency/Indemnity – TTD/PTD," and the district director noted that employer requested an extension of 30 to 60 days to file an application for Section 8(f) relief. In his summary, the district director stated that Section 8(f) was raised and that the absolute defense "will be asserted" because employer did not raise Section 8(f) as soon as the permanency of claimant's condition was known and because "[n]o 8(f) application [was] provided prior to or at the time of this conference."[4] *Id*. On November 29, 2012, the

[3] The first two notices were filed before either of claimant's work-related conditions reached maximum medical improvement; the third was filed after the conditions became permanent but before the informal conference; the last was dated after the informal conference.

[4] The administrative law judge implicitly found that employer's notices of controversion were sufficient to raise the issue of employer's entitlement to Section 8(f) relief. Decision and Order at 5; *see* n.3, *supra*. The administrative law judge did not apply the Section 8(f)(3) bar on the ground that employer failed to timely raise the Section 8(f) issue, but on the ground that employer failed to timely file an application for such relief. Although the Director does not concede that notices of controversion may act as "requests" for Section 8(f) relief, we see no reason why a notice of controversion

district director wrote a letter to claimant's counsel, with copies served on employer's adjuster and on claimant, indicating that the medical appointments that had been recommended at the informal conference were completed but that no Section 8(f) application had been received and the absolute defense would be asserted. 8(f) App. Exh. 3.

Based on the facts of this case, we reject employer's assertions of error and affirm the administrative law judge's application of the Section 8(f)(3) absolute defense. The applicable regulation clearly provides: "Where notice is given to all parties that permanency shall be an issue at an informal conference, the fully documented application must be submitted at or before the conference." 20 C.F.R. §702.321(b)(1)(i). Contrary to employer's assertion, the regulation is invoked when "permanency," not "Section 8(f)," is identified as an issue. Moreover, because permanency was at issue while the case was before the district director, "neither the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing." 20 C.F.R. §702.321(b)(2). Thus, employer's filing of its Section 8(f) application with the administrative law judge is untimely on the facts of this case.[5]

Employer would have us preclude application of the absolute defense based on the district director's failure to "fix a date for the submission of the fully documented application." We decline to do so because, as discussed above, in the event the district director does not "fix a date," the regulations provide a failsafe by fixing the date of the

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which raises the issue of Section 8(f) and is filed after a claimant's condition became permanent cannot serve as a "request" for Section 8(f) relief within the meaning of Section 8(f)(3) and its implementing regulations. Such filing accomplishes the task of putting the district director and the Director on notice that the employer expects Section 8(f) to be in issue. *See generally Devor v Dep't of the Army*, 41 BRBS 77 (2007).

[5] We need not address employer's argument that the administrative law judge erred in failing to address the district director's denial of employer's request for an extension of time to file its Section 8(f) application. That argument was not raised before the administrative law judge; it was first raised in employer's reply brief to the Board. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992); 20 C.F.R. §802.213; *see Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998) (Where employer's request and application were timely filed prior to the scheduled informal conference, the Board affirmed the administrative law judge's finding that the district director erred in denying employer an extension to supplement its application, as the denial was based on the erroneous belief that the application for Section 8(f) relief had been untimely filed).

informal conference as the application's due date, when, as here, permanency was at issue at the informal conference. 20 C.F.R. §702.321(b)(1)(i); *see generally Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997). The administrative law judge specifically found that the notice of informal conference identified "permanency" as an issue and that the parties were instructed to submit supporting documentation for their positions at or before the conference. He rationally found that these factors were sufficient to notify employer that its application for Section 8(f) was due at that time. Moreover, the regulations set the final deadline as the date the case is referred to the OALJ and is no longer under the jurisdiction of the district director.[6] 20 C.F.R. §702.321(b)(2). In this case, employer conceivably had from May 2010, when claimant's knee condition became permanent, through April 2013, when the case was referred to the OALJ, within which to file a completed Section 8(f) application with the district director. As employer did not submit a complete application while this case was before the district director, it failed to comply with the Act and regulations. Therefore, its application for Section 8(f) relief filed with the administrative law judge was untimely, and the administrative law judge properly applied the Section 8(f)(3) absolute defense to bar employer's claim for Section 8(f) relief.[7] *See Newport News Shipbuilding & Dry Dock Co. v. Firth*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004); *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005); *see generally Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

[6] Unless the Special Fund's liability could not have been anticipated, a factor not in play here, "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." 20 C.F.R. §702.321(b)(3).

[7] Thus, we need not address employer's contentions concerning its entitlement to Section 8(f) relief on the merits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge