BRB No. 93-712

JAMES L. JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
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 of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

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

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (91-LHC-1000) of Administrative Law Judge G. Marvin Bober 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).

In an earlier proceeding claimant's claim against employer for a work-related pulmonary

impairment based a diagnosis of asbestosis was found to be barred by Section 12 of the Act, 33 U.S.C. §912 (1982) (amended 1984). In a Decision and Order on Reconsideration, the administrative law judge denied both past and future medical benefits.[1]

In a decision dated February 18, 1983, the Board affirmed the administrative law judges finding that claimant's claim was time-barred pursuant to Section 12 of the Act, and thus affirmed the denial of benefits. *Jackson v. Ingalls Shipbuilding, Inc.*, 15 BRBS 299, 305 (1983). The Board held, however, that as the administrative law judge found that claimant has a work-related injury, he is entitled to future medical expenses as provided by Section 7 of the Act, 33 U.S.C. §907. *Jackson*, 15 BRBS at 306.

On November 21, 1978, claimant filed a third-party suit against a number of manufacturers and sellers of asbestos products allegedly used at Ingalls Shipbuilding; the suit named 12 defendants. One defendant obtained a summary judgment in its favor and eight other defendant settled with claimant before trial during the period between June 1981 and August 1982.[2] After a jury trial in May and June 1982 against the three remaining defendants, an amended final judgment was entered on June 11, 1982, incorporating a jury verdict for claimant against Johns-Manville Sales Corp. and Raybestos-Manhattan, Inc./Raymark Industries, Inc. The jury absolved H.K. Porter Co. from liability. The judgment awarded claimant total damages in the amount of $1,070,750.00[3]

On September 5, 1990, employer filed a motion to dismiss claimant's right to any further medical benefits or possible compensation under the Act, alleging that claimant entered into third-party settlements with asbestos manufacturers without the prior written approval of employer as required by Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). In his Decision and Order, the administrative law judge found that the United States Court of Appeals for the Fifth Circuit in its panel decision in *Nicklos Drilling Co. v. Cowart*, 907 F.2d 1552, 24 BRBS 1 (CRT)(5th Cir. 1990), *aff'd*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (*en banc*), *aff'd sub nom. Estate of Cowart v.*

[1]Specifically, the administrative law judge found that claimant was not entitled to reimbursement for, or payment of, medical expenses incurred between March 19, 1978 and April 1, 1978, since, by failing to request that employer provide medical care, claimant had not complied with the requirements of Section 7 of the Act and its implementing regulations. The administrative law judge additionally found that physicians' reports were not furnished to employer and the district director as required by the Act and that there was no reason to excuse the failure to file these reports. 33 U.S.C. §907(d); 20 C.F.R. §702.422. The administrative law judge further found that claimant was not entitled at that time to an order requiring employer to provide future medical care and treatment.

[2]Claimant settled the third-party suits for a total gross amount of approximately $48,414.37. *See* Affidavit of claimant's third-party counsel, Danny E. Cupit, dated June 20, 1991.

[3]This judgment was affirmed on appeal in published decisions by the United States Court of Appeals for the Fifth Circuit. *See Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986).

Nicklos Drilling Co., 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), and *cert. denied*, 112 S.Ct. 3026 (1992), held that amended Section 33(g)(1) includes medical benefits in the term "compensation" as it is used in that section. Thus, the administrative law judge found that as claimant was awarded medical benefits, he is a "person entitled to compensation" and by failing to obtain prior written approval of the third-party settlements, claimant forfeited any right to further medical benefits under the Act.

On appeal, the Director contends that the administrative law judge erred in finding that claimant is a person entitled to compensation pursuant to Section 33(g)(1), and that as claimant did not institute third-party proceedings within six months after accepting compensation under a formal award as under Section 33(b), 33 U.S.C. §933(b), his tort recoveries do not offset employer's liability for further medical expenses under Section 33(f), 33 U.S.C. §933(f). Employer responds, urging affirmance of the administrative law judge's Decision and Order as it is in accordance with law. Claimant has not responded to this appeal.

Initially, we note that this claim for compensation reached final disposition a number of years prior to employer's Motion to Dismiss. Although the Board held that claimant would be entitled to any future medical expenses requested in accordance with the provisions of Section 7, the administrative law judge stated no medical expenses have been requested. Decision and Order at 1. Moreover, it appears from the record that the claimant had no intention to pursue a claim against employer, as his former attorney notified him of employer's action and suggested that he respond, with a substitute attorney, if he wished to protect his rights. Claimant did not respond before the administrative law judge and has not responded to this appeal. For the reasons stated in *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994),[4] we hold that as there was a final disposition of claimant's claim in 1983, and there has been no claim for medical benefits, employer's defense has been raised prematurely. Thus, we reverse the administrative law judge's Decision and Order granting employer's Motion to Dismiss claimant's rights to any further medical benefits under the Act.[5] *Id.*

Accordingly, the Decision and Order of the administrative law judge dismissing claimant's rights to any further medical benefits is reversed.

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[4]In *Parker*, the claimant entered into a settlement in 1985 with employer pursuant to Section 8(i), 33 U.S.C. §908(i), which discharged employer's liability for compensation in return for a lump sum payment to claimant and an attorney's fee. Subsequently, the claimant settled third-party claims without first obtaining prior written approval from employer. In 1990, employer filed a Motion to Dismiss the "claim," in which it sought to bar claimant from seeking medical benefits pursuant to Section 33(g). However, as claimant had not sought medical benefits in that claim, the Board affirmed the administrative law judge's decision that employer's motion to dismiss the "claim" was not ripe for adjudication. *See Parker*, 28 BRBS at 341; *see also Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994).

[5]As we have held that this "claim" was not ripe for adjudication, we decline to address the Director's specific contentions on appeal.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge