

RICHARD BRYANT)	
)	
Claimant)	
)	
v.)	
)	
VIRGINIA INTERNATIONAL)	
TERMINALS, INCORPORATED)	DATE ISSUED: 08/07/2003
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order and the Order on Employer’s Motion for Reconsideration, Motion to Reopen the Record, and Petition for Section 22 Modification of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

F. Nash Bilisoly (Vandeventer Black LLP), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order on Employer’s Motion for Reconsideration, Motion to Reopen the Record, and Petition for Section 22 Modification (2000-LHC-3029) of Administrative Law Judge Fletcher E. Campbell, 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 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 filed a claim for compensation under the Act on November 22, 1999, alleging he sustained a work-related hearing loss. On January 8, 2000, claimant’s attorney submitted to employer an audiogram conducted on November 19, 1999, which demonstrated a 56.3 percent binaural hearing loss. On January 14, 2000, employer mailed claimant’s attorney a hearing loss questionnaire to which, on February 7, 2000, the attorney responded that claimant had a prior audiometric test at Miracle Ear 11 years ago, and that he had a hearing evaluation approximately five years ago at Beltone Hearing Aid Center (Beltone). Claimant underwent a second audiogram on April 3, 2000, which showed a 39.4 percent binaural hearing loss. On August 3, 2000, claimant requested that the district director transfer the claim to the Office of Administrative Law Judges (OALJ) for a hearing, which was done on August 17, 2000. On August 15, 2000, employer subpoenaed claimant’s medical records from Beltone, which employer received on August 23, 2000. These records included an audiogram performed on December 1, 1994, that demonstrated a permanent hearing loss. Employer then submitted on September 11, 2000, an application for Section 8(f) relief, 33 U.S.C. §908(f), to the OALJ.

Subsequently, employer learned that claimant had undergone audiometric testing while in the Navy, where he was a diver. Employer obtained claimant’s military records on June 1, 2001, and they included three audiograms showing permanent hearing loss. Based on this newly acquired evidence, employer submitted a revised application for Section 8(f) relief on June 12, 2001. On July 6, 2001, the administrative law judge issued a Notice of Hearing for September 24, 2001. On August 7, 2001, the Director, Office of Workers’ Compensation Programs (the Director), raised the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3).

In his decision, the administrative law judge excused the failure of the Director to raise Section 8(f)(3) within 30 days after issuance of the notice of hearing. The administrative law judge found that the Director’s raising of the absolute defense 32 days after issuance of the notice of hearing substantially complied with the non-binding 30-day filing requirement contained in the pre-hearing notice. The administrative law judge also found that employer was given sufficient opportunity to respond to the Director’s raising of the absolute defense of Section 8(f)(3). The administrative law judge next determined that employer’s request for Section 8(f) relief was not timely as there was a ten month delay between the time claimant filed for compensation for permanent hearing loss in November 1999, and the time employer filed its petition for Section 8(f) relief with the OALJ in September 2000. The administrative law judge found that employer’s late filing was not excused as employer could have reasonably anticipated the liability of the

Special Fund while the case was pending before the district director. On reconsideration, the administrative law judge denied employer's request for modification and its motion to re-open the record for evidence relevant to establish the date employer first had evidence of claimant's pre-existing hearing loss. The administrative law judge found that employer could have presented such evidence prior to the issuance of his initial decision. The administrative law judge also denied employer's motion for reconsideration. The administrative law judge rejected employer's contention that employer was not obliged to file for Section 8(f) relief while the case was before the district director because the district director did not set a due date for the filing of a Section 8(f) application.

On appeal, employer challenges the administrative law judge's finding that the absolute defense of Section 8(f)(3) bars its claim for Section 8(f) relief, and the administrative law judge's denial of its motion to re-open the record. The Director has not responded to employer's appeal.

Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated that the Special Fund's liability would be at issue while the case was pending before the district director.¹ The regulation implementing this provision, 20 C.F.R. '702.321, provides that an employer seeking relief under Section 8(f) must request the relief and file a fully documented application with the district director prior to referral of the claim for adjudication. The regulation also states that the Section 8(f)(3) bar is an affirmative defense that must be raised and pleaded by the Director.

¹Section 8(f)(3) of the Act states:

Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title 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.

33 U.S.C. '908(f)(3).

Employer initially contends that the Director did not timely raise the absolute defense of Section 8(f)(3). Employer argues that, although the hearing was subsequently rescheduled, the Director received Notices of Hearing on October 25, 2000, December 29, 2000, and July 6, 2001. The notice specifically provides that the Director shall raise the absolute defense within 30 days of the date of the notice. In this case, the Director raised the absolute defense on August 7, 2001. In his decision, the administrative law judge found that the Director's noncompliance with the terms of the notice does not preclude his raising the absolute defense. The administrative law judge found irrelevant the Director's failure to respond to the October and December 2000 hearing notices as those hearings were subsequently cancelled and thus the hearing notices were superceded. The administrative law judge reasoned that he is not required to foreclose the Director from challenging employer's claim for Section 8(f) relief because of its untimely raising of the absolute defense, and that the Director substantially complied with the terms of the July 6, 2001, hearing notice as he raised the defense 32 days after the notice was issued.

The regulation at 20 C.F.R. §702.339 provides that administrative law judges are not bound by common law or statutory rules of evidence or technical or formal rules of procedure but should conduct the hearing in a manner that will best ascertain the rights of the parties. *See also* 33 U.S.C. §923. Thus, the administrative law judge has the discretion to consider an issue not timely raised pursuant to the terms stated in his Notice of Hearing, so long as the parties are afforded due process. *See generally Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *see also Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986). In this case, we hold that the administrative law judge acted within his discretion to find timely the Director's raising of the absolute defense of Section 8(f)(3). The parties filed simultaneous briefs addressing employer's entitlement to Section 8(f) relief on October 4, 2001, which provided employer ample opportunity to respond after the Director raised the absolute defense on August 7, 2001. Accordingly, we affirm the administrative law judge's finding that the Director timely raised the absolute defense before the administrative law judge. *See generally Abbey v. Navy Exchange*, 30 BRBS 139 (1996).

Employer next contends that it was not afforded sufficient opportunity to file an application for Section 8(f) relief with the district director because the district director did not provide a due date for filing an application, nor did he hold an informal conference. In his decision on reconsideration, the administrative law judge rejected employer's contention that the absolute defense of Section 8(f)(3) does not apply in cases where the district director does not set a date for the submission of an application for Section 8(f) relief. The administrative law judge found that employer's obligation to request Section 8(f) relief was initiated with the filing of claimant's claim for compensation for permanent hearing loss, and that the setting of a date by the district director for submission of an application for Section 8(f) relief is not a triggering mechanism to alert

employer of its obligation to request Section 8(f) relief. The administrative law judge also found that employer is required to timely request Section 8(f) relief while the case is pending before the district director whether or not an informal conference is held.

Section 702.321(b), 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 becomes known or is an issue in dispute. In this case, employer does not dispute the administrative law judge's finding that permanency was at issue upon claimant filing his hearing loss claim on November 22, 1999. Employer's Brief in Support of Petition for Review at 10. Section 702.321(b) further provides that the request should be accompanied by supporting documentation; however, the documentation may be submitted separately. In such cases, Section 702.321(b) states that the district director, at the time of the request for Section 8(f) relief, shall fix a date for submission of a fully documented application. In this case, it is undisputed that employer initially requested Section 8(f) relief after the case was transferred to the OALJ. Accordingly, regardless of whether the district director must fix a date for the submission of a Section 8(f) *application*, as there was no *request* for Section 8(f) relief while the case was before the district director, the district director was under no obligation under Section 702.321(b) to set a date for the submission of an application. Employer's contention therefore is rejected.

Moreover, 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 required to raise its Section 8(f) claim if the permanency of claimant's condition is known prior to the time the district director "considers" the claim for compensation. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998). In this case, the permanency of claimant's condition was known when the claim was filed for permanent hearing loss on November 22, 1999, and employer submitted no evidence that the district director decided to transfer the case to the OALJ before considering it. *See id.* The record contains a letter dated February 7, 2000, addressed to employer and claimant from Ruth Bonneville, a claims examiner for the district director, which states that she reviewed claimant's November 1999 audiogram, and she suggested an independent evaluation of claimant's hearing loss. Director's Opposition to Employer's Motion for Reconsideration at Attachment 3. Thus, there is evidence that the district director reviewed the claim. Moreover, the August 3, 2000, letter from claimant's counsel requesting transfer of the claim from the district director to the OALJ states that the parties have reached an impasse as to the cause of claimant's hearing loss. Director's Brief in Opposition to Application for Section 8(f) Relief at Ex. 2. This letter indicates that the parties had discussed the compensability of the claim, and that an informal conference would be futile. On these facts, and in the absence of any evidence that the

district director did not consider the claim, we affirm the administrative law judge's conclusion that the absence of an informal conference does not preclude the Director from raising the absolute defense of Section 8(f)(3). *See Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

Employer next challenges the administrative law judge's finding that it could have reasonably anticipated the liability of the Special Fund while the case was pending before the district director. The administrative law judge rejected employer's contention that August 23, 2000, when it received the audiogram from Beltone showing a pre-existing permanent hearing loss, was the earliest possible date it could have requested Section 8(f) relief. The administrative law judge found that since employer was aware of a claim for permanency in November 1999, employer should have propounded discovery to obtain evidence of pre-existing hearing loss prior to August 2000. As it is undisputed that employer did not file a Section 8(f) application with the district director, it is employer's burden to establish that it could not have reasonably anticipated the liability of the Special Fund. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *modifying in part on recon.* 32 BRBS 118 (1998).

In this case, after claimant filed his claim on November 22, 1999, employer mailed claimant's attorney a hearing loss questionnaire on January 14, 2000, to which counsel responded on February 7, 2000, stating that claimant had a prior audiometric test at Miracle Ear 11 years ago, and that he had a hearing evaluation approximately five years ago at Beltone. Employer contends that audiograms from Miracle Ear are not presumptive evidence of hearing loss under the Act, 20 C.F.R. §702.441(b), and would not be accepted as evidence of a compensable hearing loss. Moreover, employer asserts it had no other evidence at that time of pre-existing hearing loss as claimant gave no indication on the questionnaire of having undergone audiograms while serving in the Navy or that the Beltone hearing evaluation included audiometric testing. After claimant requested transfer of the claim to the OALJ on August 3, 2000, employer subpoenaed claimant's medical records from Beltone on August 15, 2000, which employer received on August 23, 2000, and which included an audiogram performed on December 1, 1994, that demonstrated a permanent hearing loss. Employer thereafter submitted a documented application for Section 8(f) relief to the OALJ on September 11, 2000.

We reject employer's assertion that it could not have reasonably anticipated the liability of the Special Fund prior to the district director's transferring the claim to the OALJ on August 17, 2000. In this case, employer has offered no evidence or argument explaining its failure to obtain the Beltone audiogram while the case was pending before the district director. After receiving claimant's responses dated February 7, 2000, to employer's hearing loss questionnaire, employer was aware that claimant underwent a prior hearing evaluation at Beltone. Employer, however, did not subpoena the records

from Beltone until approximately five months later on August 15, 2000, shortly before the case was transferred to the OALJ. Employer's contention that it could not have filed sooner because it acquired the audiogram from Beltone during the normal course of preparing the claim for hearing ignores its duty to undertake reasonable discovery to determine the applicability of Section 8(f) where, as here, the administrative law judge found that employer had reason to believe that Section 8(f) may be applicable. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).² Employer was obligated to obtain claimant's medical records from Beltone and Miracle Ear within a reasonable time after receiving claimant's responses to its questionnaire in February 2000. Accordingly, as the administrative law judge's finding is supported by substantial evidence, we affirm the administrative law judge's determination that employer should have reasonably anticipated the liability of the Special Fund before the claim was transferred to the OALJ.³ *Id.*

Finally, employer challenges the administrative law judge's denial of its motion to re-open the record. Employer asserts that the administrative law judge improperly denied it the opportunity to submit evidence to show that it could not have reasonably

²In *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999), the employer was unaware while the case was pending before the district director of any prior medical treatment for the claimant's back condition. The United States Court of Appeals for the Fifth Circuit held that the employer was not obligated to undertake discovery at the district director level to determine if the claimant's back condition was manifest prior to claimant's sustaining a work-related back injury. The court reasoned that the mere fact of a back condition is not sufficient information for employer to reasonably anticipate the liability of the Special Fund. *Vina*, 168 F.3d at 195-196, 33 BRBS at 69-70(CRT). *Vina* is distinguishable from this case in that employer was aware while the claim was pending before the district director of claimant's prior hearing evaluation at Beltone. This information is sufficient to require employer to determine the potential liability of the Special Fund by promptly obtaining any medical records generated by the Beltone evaluation.

³Notwithstanding the parties' stipulation that claimant responded to employer's hearing loss questionnaire in February 2000, JXB 3, the administrative law judge found that employer first propounded discovery on August 21, 2000, that could possibly have revealed the existence of pre-existing hearing loss. Decision and Order at 14. Any error by the administrative law judge in failing to cite the earlier date is harmless as there is no evidence of record to excuse employer's failure to obtain claimant's records from Beltone before the case was referred to the OALJ. *Cf. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Dillard]*, 230 F.3d 126, 34 BRBS 100(CRT) (4th Cir. 2000) (requiring remand if administrative law judge does not make necessary findings of fact).

anticipated the liability of the Special Fund prior to transfer of the claim to the OALJ and to obtain evidence that the district director did not “consider” the claim prior to its transfer. Specifically, employer contends it would establish it undertook reasonable steps to inquire into claimant’s previous testing for hearing loss, that claimant did not inform employer about his testing while in the Navy until after the case had been transferred to the OALJ, and that the district director did not consider the claim prior to its transfer. The administrative law judge found no basis to re-open the record, finding that employer sought to submit evidence that it should have presented prior to the issuance of his initial decision on April 2, 2002.

It is well established that an administrative law judge has great discretion concerning the admission of evidence or exclusion of evidence and his findings are reversible only if arbitrary, capricious, or an abuse of discretion. *See, e.g., Raimer v. Willamette Iron & Steele Co.*, 21 BRBS 98 (1988); 20 CFR §702.339. Where a party seeks to re-open the record for the submission of additional evidence, the party must show diligence in developing its case prior to closing of the record. *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989). In this case, we hold that the administrative law judge acted within his discretion in denying employer’s motion to re-open the record. Once the Director asserted the absolute defense of Section 8(f)(3) on August 7, 2001, employer had ample notice prior to the submission of its brief to the administrative law judge on October 4, 2001, Decision and Order at 10, that it was required to produce evidence establishing that it could not have reasonably anticipated the liability of the Special Fund while the case was pending before the district director, or that the district director did not consider the claim before its transfer to the OALJ. Employer does not contend that the evidence it sought to have admitted by re-opening the record could not have been submitted into evidence prior to filing its brief with the administrative law judge on October 4, 2001. Moreover, that employer was not aware of claimant’s prior audiometric testing in the Navy until after the case was transferred to the OALJ does not mitigate employer’s failure to anticipate the liability of the Special Fund after claimant informed employer in February 2000 of his prior hearing evaluations at Miracle Ear and Beltone. Accordingly, we affirm the administrative law judge’s denial of employer’s motion to re-open the record. *See Smith*, 22 BRBS at 49-50.

Accordingly, the administrative law judge's Decision and Order and the Order on Employer's Motion for Reconsideration, Motion to Reopen the Record, and Petition for Section 22 Modification are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge