ROBERT T. WILSON	)	BRB No. 92-1794
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
	)	
ELLEN H. CALLNAN	)	BRB No. 92-1795
	)	
Claimant	)	
	)	
v.	)	
	)	
MORALE, WELFARE & RECREATION DEPARTMENT, DEPARTMENT OF THE NAVY	)	
	)	
and	)	
	)	
ESIS/CIGNA INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and the Decision and Order on Modification - Awarding Benefits, of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for employer/ carrier.

LuAnn Kressley (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order - Awarding Benefits (89-LHC-844) and the Decision and Order on Modification - Awarding Benefits (90-LHC-1746) of Administrative Law Judge David W. Di Nardi 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), and a claim filed under the Act as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.*[1] 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 Wilson sought compensation under the Act for back and asbestos-related lung injuries he sustained while working for General Dynamics Corporation (employer) as a painter from 1957 to 1990. The district director held an informal conference on January 16, 1991, at which employer submitted its application for Section 8(f), 33 U.S.C. §908(f), relief. On February 12, 1991, the district director informed employer that its Section 8(f) application was insufficient because it contained no medical report establishing the extent of all impairments and the date of maximum medical improvement. Employer was given until February 26, 1991, to correct these deficiencies but failed to do so.

The case was referred to the Office of Administrative Law Judges on April 9, 1991. In transferring the case, the district director noted that employer raised Section 8(f) before him but stated it is subject to the Section 8(f)(3) defense as employer failed to submit a timely, complete

[1]By Order dated March 2, 1994, the Board granted the Director's Motion to consolidate her appeal in *Wilson v. General Dynamics Corp.*, BRB No. 92-1794, with her appeal in *Callnan v. Morale, Welfare & Recreation Dept.*, BRB No. 92-1795, for purpose of brief and decision. 20 C.F.R. §802.104.

application. The Director also opposed employer's application by raising the Section 8(f)(3) bar in a brief submitted to the administrative law judge although she did not appear at the formal hearing. In his Decision and Order, Administrative Law Judge Di Nardi awarded claimant Wilson permanent total disability compensation commencing November 8, 1990, and held that employer was entitled to Section 8(f) relief without specifically addressing whether its application was sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations.[2]

Claimant Callnan had previously been awarded temporary total disability compensation for severe psychiatric problems resulting from a work-related incident in January 1984 while working for the Morale, Welfare & Recreation Department, Department of the Navy (employer), and sought to modify her award to one for permanent total disability compensation.[3] Claimant Callnan also sought payment of several disputed medical expenses. At the informal conference held via telephone on October 15, 1990, employer raised the issue of Section 8(f) relief and was afforded until November 8, 1990 to submit a completed application to the district director. On November 7, 1990, employer submitted its application. By letter dated November 14, 1990, the district director found employer's Section 8(f) application deficient because no medical evidence had been submitted documenting a pre-existing condition, no diagnosis or conclusion regarding a MMPI test conducted in January 1980 had been provided, and no medical evidence had been submitted establishing the extent of all impairments and the date of maximum medical improvement. The district director informed employer that it had until November 28, 1990, to correct these deficiencies and advised that failure to do so would result in invocation of the Section 8(f)(3) absolute defense. Employer did not respond.

The case was referred to the Office of Administrative Law Judges, and a formal hearing was held on November 14, 1991. Although the Director opposed employer's application by raising the Section 8(f)(3) bar in a brief submitted to the administrative law judge, she did not appear at the formal hearing. In his Decision and Order, Administrative Law Judge Di Nardi awarded claimant Callnan permanent total disability compensation commencing January 26, 1985, as well as the disputed medical expenses. In addition, the administrative law judge held that employer was entitled to Section 8(f) relief without addressing whether its Section 8(f) petition was sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations.[4]

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[2]At the hearing before the administrative law judge, General Dynamics submitted a Section 8(f) application which had been submitted to the district director on September 3, 1991, subsequent to referral to the Office of Administrative Law Judges and argued that a July 22, 1991 medical report by Dr. Browning was sufficient to overcome the basis asserted by Director in raising the absolute defense. Rx. 25; Tr. 22.

[3]The parties stipulated that claimant Callnan suffered a work-related psychiatric injury and that employer paid her temporary total compensation from January 5, 1984 through January 16, 1984 and from February 14, 1984 until the date of the hearing.

[4]In addition, in both cases the administrative law judge found claimants entitled to interest, medical benefits, and attorney's fees.

The Director has filed a Motion to Remand in both cases, in which she contends that inasmuch as Judge Di Nardi awarded Section 8(f) relief without first giving *de novo* consideration to whether the applications submitted by both employers are sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations, the cases must be remanded to allow the administrative law judge to determine whether employers' applications were sufficiently documented consistent with the Board's decisions in *Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992), and *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992).[5]

The Director's Motion to Remand is granted. Citing *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the administrative law judge properly determined that he had the authority to consider the applicability of Section 8(f)(3) notwithstanding the district director's opinion that the bar applies. Nonetheless, in both decisions, the administrative law judge, without reviewing the original applications, expressed agreement with employers' positions that the statutory and regulatory requirements of the Act have been satisfied when the district director is afforded notice that Section 8(f) relief is requested and of the general grounds for relief. He thus denied the Director's motion to dismiss and considered employers' Section 8(f) applications on their merits, finding that employers were entitled to Section 8(f) relief.

[5]Employer General Dynamics has not responded to the Director's motion. Employer Morale argues that the Director's appeal in BRB No. 92-1795 should be dismissed for failure to timely file a petition for review and brief within thirty days of September 2, 1992, the date the Board granted the Director's request for an enlargement of time. Employer Morale's motion to dismiss is denied. The Director was granted a second enlargement of time to file a petition for review by Order dated March 2, 1994 and filed the Motion for Remand in the captioned cases on March 28, 1994, within the thirty days allotted. *See* 20 C.F.R. §802.217(a).

Section 8(f)(3) of the Act provides:

> 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 deputy commissioner prior to the consideration of the claim by the deputy commissioner. 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) (1988). The accompanying regulation, Section 702.321, 20 C.F.R. §702.321, requires employer to submit a "fully documented application" and defines the term "fully documented." Further, it provides that "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 such failure is excused because 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). Where, as in the present cases, the Director has properly raised the Section 8(f)(3) defense in proceedings before the administrative law judge, the Board has held that the administrative law judge may not consider the merits of employer's Section 8(f) application without first fully considering whether the application is sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulation. *Fullerton*, 26 BRBS at 138; *Tennant*, 26 BRBS at 108; *see also Cajun Tubing Testors v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991), *aff'g Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991); 20 C.F.R. §702.321(a), (b), (c). The Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director. *See Tennant*, 26 BRBS at 107, 109; *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990); 20 C.F.R. §702.321(b)(3).

For the reasons set forth in *Tennant*, 26 BRBS at 103, we agree with the Director that the administrative law judge erred in considering the merits of employers' requests for Section 8(f) relief in the consolidated cases before us without first determining *de novo* whether employers' applications for Section 8(f) relief were sufficiently documented pursuant to the applicable regulations. We note that employers' Section 8(f) applications are not in the record before us. Because the regulation requires that the district director attach a copy of the application when forwarding the case to the Office of Administrative Law Judges and the Section 8(f) bar is an affirmative defense, the burden is on the Director to submit employers' applications for Section 8(f) relief into evidence. *Tennant*, 26 BRBS at 109. Therefore, we vacate the administrative law judge's denial of the Director's motions to dismiss and his award of Section 8(f) relief to employer in the captioned cases, and remand both cases for reconsideration of whether the employers' Section 8(f) applications

were sufficient to meet the requirements of Section 8(f)(3) of the Act and Section 702.321 of the regulations.

Accordingly, the administrative law judge's denial of the Director's motion to dismiss employers' Section 8(f) applications and the administrative law judge's awards of Section 8(f) relief in the captioned cases are vacated, and both cases are remanded for further consideration in accordance with this decision. In all other respects, the administrative law judge's Decision and Order -Awarding Benefits in BRB No. 92-1794 and the Decision and Order on Modification - Awarding Benefits in BRB No. 92-1795 are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge