BRB No. 91-608

BEATRICE CUNNINGHAM (Widow of EARL CUNNINGHAM)	)	
Claimant	)	
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-Awarding Benefits of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Awarding Benefits (88-LHC-3628) of Administrative Law Judge A.A. Simpson, 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).

Prior to his death, claimant filed a claim for compensation due to a noise-induced hearing

loss on September 22, 1987. No informal conference was held, and on May 3, 1989, the district director referred the case to the Office of Administrative Law Judges. On November 1, 1989, employer filed its petition for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).[1]

The administrative law judge found that claimant filed a timely claim and that the evidence indicates that claimant suffered from a 49.7 percent binaural hearing impairment due, at least in part, to work-related noise exposure. The administrative law judge rejected the Director's Section 8(f)(3), 33 U.S.C. §908(f)(3), defense that the Section 8(f) petition was not timely filed, and found that employer is entitled to Section 8(f) relief on the merits. Employer was held liable for the 30.32 percent loss attributable to the second injury and the Special Fund was held liable for the pre-existing 19.38 percent loss. 33 U.S.C. §908(f)(1)(1988).

On appeal, the Director contends that the administrative law judge erred in finding that the absolute defense under Section 8(f)(3) does not bar the employer's request for Section 8(f) relief. The Director contends that employer had independent knowledge of claimant's prior hearing loss and the possible applicability of Section 8(f) while the case was pending before the district director, and that therefore employer's failure to raise the Section 8(f) issue before the district director bars its entitlement to such relief. Employer has not responded to this appeal.

Section 8(f)(3) states that any request for Section 8(f) relief and a statement of the grounds for such relief shall be presented to the district director prior to the consideration of the claim by the district director. 33 U.S.C. §908(f)(3). The regulation implementing Section 8(f)(3), 20 C.F.R. §702.321, requires that employer also submit a fully documented application in support of its claim for Section 8(f) relief. The failure to present such a request prior to consideration of the claim by the district director is an absolute defense to the Special Fund's liability which must be raised and pleaded by the Director. 20 C.F.R. §702.321(b)(3). The failure of an employer to present to the district director a timely and fully documented application for Section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the Special Fund while the case was before the district director. *See generally Cajun Tubing Testors Inc. v. Hargrave,* 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on recon.*, 29 BRBS 103 (1995); *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd. sub nom. Bath Iron Works v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991).

In the present case, the Director affirmatively raised the Section 8(f)(3) defense. The administrative law judge noted that no informal conference was held, and he found that employer filed its application for Section 8(f) relief after it had obtained evidence through discovery which was only available to it after referral of the case to the Office of Administrative Law Judges. Thus,

[1]Section 8(f) relief may be granted if it is established that the employee's disability was due in part to a manifest pre-existing permanent partial disability. *See* 33 U.S.C. §908(f)(1).

the administrative law judge rejected the Director's defense pursuant to Section 8(f)(3). The administrative law judge did not state which evidence was previously undiscoverable.

The parties stipulated that claimant provided employer with notice of his injury on July 24, 1986. The administrative file before the Board contains a letter dated October 24, 1986, from employer's claim representative to claimant stating that the report from Dr. Muller interpreting an audiogram administered on September 11, 1986, indicated several medical problems resulting in hearing loss including a prior mastoidectomy and possible otosclerosis or chronic otitis media.[2] Thus, based on Dr. Muller's opinion that 33.4 percent of claimant's 49.7 percent hearing loss was due to pre-existing conditions, employer wrote a letter to inform claimant that it would subtract as due to a previous hearing loss 33.4 percent from the assigned rating of 49.7 percent, leaving only a 16.3 percent binaural hearing loss due to noise exposure. These letters were not admitted into the formal record by the administrative law judge. Based on Dr. Muller's report, employer voluntarily paid claimant benefits for a 16.3 percent hearing loss from October 24, 1986 until March 19, 1987. Cl. Exs. 4, 5.

Inasmuch as it appears that there are facts that taken together may have been sufficient to place employer on notice that Section 8(f) was likely to be an issue at the time the case was before the district director, we vacate the administrative law judge's finding that employer could not have reasonably anticipated the applicability of Section 8(f) at the time the case was before the district director and remand the case for further consideration. *See Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992). On remand, the administrative law judge should reopen the record to admit relevant evidence. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

Moreover, we note that on remand the administrative law judge need only determine whether the record reveals that employer had sufficient information at the time the claim was before the district director so that Section 8(f) relief could have been requested in order to find that Section 8(f)(3) bars employer's request for Section 8(f) relief. The regulation at 20 C.F.R. §702.321(b) distinguishes between requesting Section 8(f) relief, and filing a documented application for such relief. The regulation provides that, where possible, the documented application should accompany the request, but that it may be submitted separately, on a date set by the district director. *See generally Currie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990). As the Director correctly asserts, employer, having sufficient information to be aware that Section 8(f) might be an issue in this case, could have written to the district director and requested sufficient time to prepare a documented application for Section 8(f) relief.[3] *Hargrave*, 951 F.2d at 75, 25 BRBS at 112 (CRT); *Bailey*, 24

[2]The report of Dr. Muller's audiometric evaluation on September 11, 1986, which was admitted into the record, indicates that claimant suffered a hearing loss due to: 1) otosclerosis in the right ear; 2) binaural noise related hearing impairment; and 3) history of ear surgery. Cl. Ex. 1. In addition, the audiometric evaluation of July 21, 1986, was interpreted by Marianne Towell as revealing "mixed type hearing loss." Emp. Ex. 12.

[3]Moreover, as the Director notes, discovery may be conducted while the case is pending before the district director. If employer needed a *subpoena* to obtain records, it could have sought one from

BRBS at 237.

Accordingly, the administrative law judge's Decision and Order granting Section 8(f) relief is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this decision. The decision is affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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the Office of Administrative Law Judges while the case remained with the district director. *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).