BRB No. 01-0814

WILLIAM WALENDA	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NORTHWEST MARINE INCORPORATED	)	DATE ISSUED: July 16, 2002
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

Whitney R. Given (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1997-LHC-1957; 1997-LHC-1958; 1999-LHC-1425) of Administrative Law Judge Paul A. Mapes 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).

This is the second time this case has come before the Board, and the merits of the claim are not disputed. Rather, this case involves the question of whether employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief from the Special Fund. In January 1991, claimant sought treatment for work-related bilateral knee pain. Following proximal tibial osteotomies on both knees in March and September 1992, Dr. Baldwin, claimant's treating physician, found claimant's condition to be "medically stationary" on May 3, 1993, and he restricted claimant to sedentary or very light work. On March 18, 1994, claimant underwent bilateral knee arthroscopies and staple removal, and Dr. Baldwin determined claimant's condition was medically stationary as of May 19, 1994. On January 11, 1994, employer submitted to the district director Form LS-208 showing that it had instituted compensation for permanent partial disability on May 1, 1993. These payments continued through April 28, 1996. Dr. Baldwin performed total knee replacement surgeries in 1997 because claimant's condition continued to worsen, and on June 5, 1997, the district director referred the knee injury claims to the Office of Administrative Law Judges (OALJ). On February 9, 1998, Dr. Baldwin rated each knee as having a 75 percent permanent impairment, and he restricted claimant to sedentary work. After reviewing the medical records, Dr. Baldwin admitted, on March 30, 2001, that his earlier pronouncements of medical stability and permanency in 1993 and 1994 were in error. Based on these facts, employer contended its application for Section 8(f) relief, filed after the case was transferred to the OALJ, was timely. The Director, Office of Workers' Compensation Programs (the Director), responded, arguing that the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), applies to bar consideration of employer's application for Section 8(f) relief.

In the original decision awarding benefits, Administrative Law Judge Samuel J. Smith awarded employer Section 8(f) relief. The Director appealed, contending the administrative law judge erred in finding the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), inapplicable. The Board agreed that the award of Section 8(f) relief could not be affirmed. The Board vacated the finding that Section 8(f)(3) does not apply and remanded the case for further findings regarding whether the permanency of claimant's condition was known or was at issue or whether employer could have reasonably anticipated the liability of the

Special Fund while the case was before the district director.[1] *Walenda v. Northwest Marine, Inc.*, BRB No. 99-1048 (July 7, 2000).

[1]In the event the administrative law judge found Section 8(f)(3) inapplicable, the Board also remanded the case for further consideration of whether claimant's current permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone and for a determination of the percentage of impairment related to the pre-existing disability. *Walenda v. Northwest Marine, Inc.*, BRB No. 99-1048 (July 7, 2000).

On remand, Administrative Law Judge Mapes[2] (the administrative law judge) found that claimant's condition had become permanent, and permanency was at issue, prior to the date the district director referred the case to the OALJ. He also found that employer did not demonstrate that it could not have anticipated liability of the Special Fund while the case was before the district director. Decision and Order on Remand at 4. The administrative law judge found that permanency was at issue because the evidence established that claimant's condition is permanent, having continued for a lengthy period and appearing to be of lasting or indefinite duration. Although he acknowledged Dr. Baldwin's change of opinion regarding the date claimant's condition reached maximum medical improvement, he stated that such a change of opinion does not negate the fact that permanency was at issue while the case was before the district director. *Id.* at 5-6. The administrative law judge found that employer should have reasonably anticipated liability of the Special Fund in this case because claimant had a severe impairment, even absent a doctor's rating, and at least six months prior to the hearing employer was aware of the recommendation for bilateral knee replacements due to the worsening of claimant's condition.[3] Therefore, the administrative law judge denied employer's application for Section 8(f) relief by applying the Section 8(f)(3) bar, and he ordered employer to reimburse the Special Fund any payments made pursuant to Judge Smith's order. Decision and Order on Remand at 6-7. Employer appeals this decision, and the Director responds, urging affirmance.

Employer contends the administrative law judge erred in denying it Section 8(f) relief by applying the Section 8(f)(3) absolute defense. In this regard, it argues that the administrative law judge irrationally disregarded Dr. Baldwin's later opinion as to the date claimant's condition reached maximum medical improvement and irrationally relied on claimant's pre-hearing statement to determine that permanency was at issue. Rather, employer asserts that Dr. Baldwin's more recent assessment that claimant's condition reached maximum medical improvement in February 1998 should conclusively determine when permanency was established and, therefore, when it would be proper for employer to apply for Section 8(f) relief. Employer also argues that the administrative law judge erred in

[2]Judge Smith had retired by the time this case was remanded.

[3]Relying on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed.), the administrative law judge stated that, at best, the results following total knee replacement surgery are "good" and that is the equivalent of a 37 percent impairment. Pursuant to 33 U.S.C. §908(c)(2), a claimant with a 37 percent impairment to his leg would be entitled to 106.56 weeks of benefits. Thus, the administrative law judge stated that the recommendation for total knee replacement surgery alone should have forewarned employer of the liability of the Special Fund, as that procedure "almost inevitably entitles a claimant to more than 104 weeks of benefits." Decision and Order on Remand at 6-7 n.2.

relying on claimant's pre-hearing statement to find that permanency was at issue and in failing to address the merits of its claim for Section 8(f) relief. The Director disagrees with employer's interpretation of Section 8(f)(3) and urges the Board to affirm the administrative law judge's decision. In its reply brief, employer argues that the Director should not find "hyper-technical ways to defeat such claims" but should be supportive of employers whose applications are "factually sound."

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 the liability of the Special Fund while the case was before the district director. 33 U.S.C. §908(f)(3).[4] The implementing regulation, 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. Section 702.321(b)(1) provides that a request for Section 8(f) relief should be made as soon as the permanency of a claimant's condition is known or is an issue in the case.[5] *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Where the claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised by the date of referral, Section 702.321(b)(3) states that an application for Section 8(f) relief need not be filed with the district director. *See Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997); *Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990). However, in all other cases, 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, and such failure may only be excused

[4]Section 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 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.

[5]Section 702.321(b)(1) explains that permanency could be an issue when:

> benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition.

where the employer could not have reasonably anticipated the liability of the Special Fund prior to the consideration of the claim by the district director. As the Director timely raised this defense, and as employer did not file an application for Section 8(f) relief with the district director, employer bears the burden of establishing that it could not have reasonably anticipated the liability of the Special Fund while the case was before the district director. *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283, *modifying in pert. part on recon.* 32 BRBS 118 (1998).

To demonstrate that permanency was not at issue before the district director and that it could not have reasonably anticipated the liability of the Special Fund at that time, employer asserts the evidence establishes claimant's condition did not reach maximum medical improvement until February 1998. Employer argues that claimant's condition must be at maximum medical improvement before it can be required to file a claim for Section 8(f) relief. We affirm the administrative law judge's application of the absolute defense for the reasons that follow. First, evidence of maximum medical improvement is one method of establishing the permanency of a claimant's condition; however, it is not the only method.[6] It is well established that a claimant's condition is permanent if it has continued for a lengthy period and appears to be of lasting or indefinite duration as opposed to merely awaiting a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Further, the worsening of a claimant's condition does not affect whether the condition is permanent and of long-standing nature. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986). Dr. Baldwin initially stated that claimant's condition became medically stationary in May 1993 and May 1994, and he permanently restricted claimant to sedentary or light duty work. Jt. Exs. 32, 45. The administrative law judge found that claimant's condition was permanent in nature based on this evidence as well as on evidence showing there was little medical treatment to try to improve the condition during the two years following the March 1994 surgery. Decision and Order on Remand at 5. In light of this evidence, it was reasonable for the administrative law judge to conclude that claimant's condition became permanent while the case was before the district director. Thus, Dr. Baldwin's opinion that claimant's condition actually reached maximum medical improvement in 1998 does not establish that permanency was not at issue prior to the 1997

[6]Consequently, employer's reliance on *Diosdado v. Newpark Shipbuilding & Repair*, 31 BRBS 70 (1997), is misplaced. *Diosdado* did not involve the question of the timeliness of an employer's request for Section 8(f) relief but, rather, offered one valid method of determining when a claimant's condition reached maximum medical improvement.

transfer of the case to the OALJ. Rather, in this case, such evidence establishes only that claimant's condition reached a new level of medical stability in February 1998 after claimant underwent two knee reconstructions, and it does not invalidate earlier statements of claimant's condition being medically stationary or other medical evidence demonstrating the longevity of claimant's knee condition.

Employer's argument that it could not have known claimant's condition was permanent until 1998 is not supported by the record. Following the course of events as they transpired, employer began paying *permanent* partial disability benefits based on Dr. Baldwin's 1993 opinion that claimant's condition was medically stationary. Jt. Exs. 32-33, 39. Although it may not have known the exact degree of claimant's knee disability, it knew the nature of claimant's condition would be long-term by virtue of the doctor's assessment that the condition was stationary and his prescription for work restrictions. Employer also could not have known that Dr. Baldwin would determine a new date of maximum medical improvement five years later. Thus, employer had evidence that claimant's knee condition was permanent in 1993 or 1994, and its actions in paying permanent partial disability benefits belie the argument that it could not have known that claimant's condition was permanent until 1998.

Additionally, we do not agree with employer that the administrative law judge placed inordinate weight on claimant's pre-hearing statement to show that permanency was an issue prior to the transfer of the case to the OALJ. Claimant's pre-hearing statement, filed with the district director in May 1997, specifically identified his entitlement to "scheduled" and "permanent and total" disability benefits as issues he wished to raise before the administrative law judge. Pursuant to precedent set forth in *Container Stevedoring*, 935 F.2d 1544, 24 BRBS 213(CRT), such action should have put employer on notice that permanency was at issue and that it should apply for Section 8(f) relief. Claimant's counsel's statement years later that claimant's knee condition was not stationary prior to referral of the case to the OALJ does not, as the administrative law judge stated, change the fact that the question of permanency was put into issue in the pre-hearing statement.[7]

Finally, employer asserts that its claim, which is meritorious with regard to claimant's pre-existing and current disabilities, should not be rejected on "hyper-technicalities" where the "factual underpinnings of [the] defense are erroneous." As we have explained, the subsequent change of opinion of Dr. Baldwin with respect to the date on which claimant's

[7]Even prior to the filing of a pre-hearing statement, employer was informed of claimant's need for reconstructive surgery on both knees. We agree with the administrative law judge's analysis that this, too, should have put employer on notice that it should file an application for Section 8(f) relief.

condition actually reached maximum medical improvement does not alter the fact that employer knew the permanency of claimant's condition was an issue to be resolved, or should have reasonably anticipated the liability of the Special Fund, while the case was before the district director. Contrary to employer's assertions, the "underpinnings" of the Director's defense are intact, as the Act requires action be taken within a specific time frame and failure to act results in a denial of Section 8(f) relief, unless an excuse is granted. *See generally Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998) (Section 8(f)(3) applicable because employer did not act); *Abbey v. Navy Exchange*, 30 BRBS 139 (1996) (Section 8(f)(3) defense not applicable because Director did not act); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990) (excuse for untimely filing of Section 8(f) application granted). Here, the administrative law judge reasonably found that the absolute defense of Section 8(f)(3) applies because action, requesting Section 8(f) relief, was not taken within the time allotted, and the delay was not excused. Contrary to employer's assertions, even meritorious claims must be denied if they are filed in an untimely manner. This applies to both claims for disability benefits and claims for Section 8(f) relief. 33 U.S.C. §§908(f)(3), 912, 913. Thus, assuming, *arguendo*, employer is entitled to relief from the Special Fund on the merits, such rationale is insufficient to reverse the administrative law judge's finding that employer's claim for Section 8(f) relief is barred on procedural grounds.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.[8]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[8]In light of our decision, we need not address employer's arguments regarding the merits of its claim for Section 8(f) relief.