BRB No. 97-1317

HENRY A. FARRELL	)	
	)	
Claimant	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER on
Respondent	)	RECONSIDERATION

Appeal of the Decision and Order Denying Section 8(f) Entitlement of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

Samuel J. Oshinsky, Counsel for Longshore (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

The Director, Office of Workers' Compensation Programs (the Director), has filed a motion for reconsideration seeking *en banc* review of the Board's decision in *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118 (1998), wherein the Board refused to consider the Director's contention that Section 8(f)(3) of the Act,

33 U.S.C. §908(f)(3), precludes employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f), as it was raised in his response brief. Employer responds, urging the rejection of the Director's motion. We grant the Director's motion for reconsideration.[1]

In his motion for reconsideration, the Director asserts that the decisions in *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), and *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987), support the position that his contention, raised in the response brief before the Board, should have been considered on appeal. The Director contends that despite the need for a remand to address the issue, it should be addressed as it provides an alternate avenue for affirming the administrative law judge's ultimate denial of Section 8(f) relief with regard to claimant's pre-existing mental impairment.

To reiterate the relevant facts of this case, employer filed its claim for Section 8(f) relief with the district director based on prior injuries to claimant's knee and back, as well as a lymphedema condition, but did not raise a claim with respect to claimant's pre-existing mental impairment. The administrative law judge, however, determined that an employer's timely filing of a Section 8(f) claim on one ground permitted an employer at a later time to argue additional grounds and assert an entirely different basis for Section 8(f) relief. In its decision in the instant case, the Board affirmed the denial of Section 8(f) relief based on claimant's prior back injury, but vacated the denial of Section 8(f) relief based on the pre-existing mental impairment and remanded for further consideration of employer's evidence as it relates to claimant's pre-existing mental impairment to discern whether the ultimate permanent partial disability is materially and substantially greater than that due solely to the work-related injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995).

[1]In light of the panel's decision to grant the Director's motion for reconsideration and thus, consider the merits of the arguments raised in his response brief, the request for *en banc* reconsideration is denied. *See* 20 C.F.R. §802.407(d).

In addressing the argument raised by the Director in his response brief that the absolute defense of Section 8(f)(3) is applicable as claimant's mental impairment was not raised as a basis for Section 8(f) relief in a timely fashion before the district director, the Board first held that as the Section 8(f)(3) bar is an affirmative defense, it is the Director's burden to come forward with the necessary evidence to support the claim that the employer failed to comply with Section 8(f)(3), *i.e.*, that employer could have reasonably anticipated the liability of the Special Fund as to claimant's mental condition in this case while the case was before the district director. *Farrell*, 32 BRBS at 122; *see also Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1993). The Board then observed that in order to address this issue, it would be required to remand the case for findings of fact regarding whether employer could have reasonably anticipated the liability of the Special Fund on the basis of claimant's mental impairment while the case was before the district director. *Farrell*, 32 BRBS at 122. Consequently, the Board held that as the Director, in forwarding his alternate rationale for supporting the administrative law judge's denial of Section 8(f) relief on the grounds of the prior mental condition, is contesting the administrative law judge's adverse finding regarding the absolute defense at Section 8(f)(3), and since consideration of the Director's contention would require remand, and thus, would not maintain the *status quo* of the administrative law judge's decision, his contention should have been raised in a timely filed cross-appeal. *Farrell*, 32 BRBS at 122, *citing* 20 C.F.R. §802.205(b)(2); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4; *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91 n. 3 (1983). The Board therefore concluded that it could not consider the merits of the Director's contention as it was raised in a response brief.

Upon reflection of the case law cited by the Director in support of his motion for reconsideration, we agree that the Director's contention that the absolute defense of Section 8(f)(3) is applicable, raised in his response brief, must be addressed inasmuch as it supports the administrative law judge's ultimate denial of employer's request for Section 8(f) relief. The Director persuasively contends that the Board's interpretation of the regulation at 20 C.F.R. §802.212(b),[2] is too narrow in view of case law governing the scope of responsive pleadings. In *Dalle Tezze*, a

[2]Section 802.212(b), 20 C.F.R. §802.212(b), states:

> Arguments in response briefs shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. Other arguments will not be considered by the Board (*see* §802.205(b)).

case arising under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Black Lung Act), the administrative law judge refused to apply the "interim presumption" of disability under 20 C.F.R. Part 727, finding an insufficient number of years of qualifying coal mine employment, but nevertheless awarded benefits under the more stringent Part 410 regulations, 20 C.F.R. Part 410. The claimant, in response to the Director's appeal to the Board, challenged the administrative law judge's refusal to apply the interim presumption, but the Board refused to consider the claimant's argument, ruling that acceptance of claimant's arguments on the issues in question would require remand for further factual determinations by the administrative law judge, and, therefore since these arguments were not raised in a separate appeal or cross-appeal, the Board declined to reach them. The Third Circuit reversed the Board's decision on this issue. The court quoted Justice Brandeis' opinion in *United States v. America Ry. Express Co.,* 265 U.S. 425, 435 (1924), holding that under the rules that guide federal appellate practice,

> the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . . . [T]he appellee may, without taking a cross-appeal, urge in support of a decree . . . , although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

Dalle Tezze, 814 F.2d at 132, 10 BLR at 2-67. Moreover, the Third Circuit observed that:

> We also find untenable the Board's assertion that if acceptance of the appellee's contention would result in a remand, then a cross-appeal is required . . . . [s]o long as the appellee's contention provides an alternate avenue to a prior favorable judgment, the appellate tribunal should consider the contention; it is quite irrelevant that the avenue might wend its way through an inferior tribunal before reaching the desired destination.

814 F.2d at 133, 10 BLR at 2-68.

Similarly, in *Malcomb*, a case also arising under the Black Lung Act, the United States Court of Appeals for the Fourth Circuit held that under the Board's cross-appeal regulation, 20 C.F.R. §802.205(b), an appellee need not cross-appeal in order to make an argument that supports the decision, or stated differently, supports the result reached by the administrative law judge but attacks the reasoning

used by the administrative law judge in reaching that decision. *Malcomb*, 15 F.3d at 369, 18 BLR at 2-113; *see also Hansen v. Director, OWCP*, 984 F.2d 364 (10th Cir. 1993).

A determinative factor in the resolution of the issue at hand involves consideration of whether the arguments raised in the response brief would enlarge one party's rights and/or diminish another party's rights. In *Dalle Tezze,* the Third Circuit recognized that this inquiry focuses on the rights of the parties *after*, not before, the rendering of the decision of the tribunal below. *Dalle Tezze*, 814 F.2d at 133, 10 BLR at 2-68. In this regard, consideration of the Director's contention would not alter the parties' ultimate positions in that he is arguing in favor of the outcome in this case: the administrative law judge's denial of Section 8(f) relief based on claimant's pre-existing mental impairment. Moreover, in determining whether the Director's contention, raised in his response brief, should be addressed by the Board, it is irrelevant that the Board found that consideration of his contention would require remand, as acceptance of his position by the administrative law judge would maintain the *status quo*. *See Malcomb*, 814 F.2d at 133, 10 BLR at 2-68. Consequently, we vacate that portion of the Board's decision wherein we declined to consider the Director's contention because it was raised in his response brief, and we shall consider whether, contrary to the administrative law judge's determination, the absolute defense of Section 8(f)(3) is applicable as claimant's mental impairment as a basis for Section 8(f) relief was not raised in a timely fashion before the district director.

The Board stated in its initial decision that remand would be required in this case for the administrative law judge to make findings of fact as to whether employer could have reasonably anticipated the liability of the Special Fund on the basis of claimant's mental impairment while the case was before the district director. In addition, the Board stated that as the Section 8(f)(3) bar is an affirmative defense, it is the Director's burden to come forward with the necessary evidence to support the claim that the employer failed to comply with Section 8(f)(3). As such, the Board noted that in order to prevail the Director must show, on remand, that employer could have reasonably anticipated the liability of the Special Fund as to claimant's mental condition in this case while the case was before the district director. *Farrell*, 32 BRBS at 122.

The Director, however, further asserts in his motion for reconsideration that, contrary to the Board's holding, the Director's position does not require remand. The Director argues that the Board's holding is in conflict with both the regulations and case law in that the statute does not require proof that Special Fund liability could be reasonably anticipated, but rather that it *could not be* reasonably

anticipated, which the Director maintains, places the burden on employer, rather than on the Director. Moreover, the Director argues that the decision of the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215 (CRT) (4th Cir. 1998), supports his interpretation regarding the burden of persuasion on this issue. The Director further notes that as the burden properly rests with employer, and, as in the instant case, employer has produced no evidence to meet its burden of showing that it could *not* have reasonably anticipated Special Fund liability based on a pre-existing mental condition while the case was before the district director remand is not required; thus, he argues that the administrative law judge's finding can be affirmed based upon the Director's alternative argument.

The pertinent part of Section 8(f)(3) states:

> Failure to present such request [for Section 8(f) relief] prior to such consideration [by the district director] 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.

(emphasis added). Section 702.321(b)(3) of the regulations states:

> The failure of an employer to present 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 prior to the consideration of the claim by the district director.

20 C.F.R. §702.321(b)(3). Section 702.321(b)(3) acknowledges that the absolute defense of Section 8(f)(3) "is an affirmative defense which must be raised and pleaded by the Director." *See generally Abbey v. Navy Exchange*, 30 BRBS 139 (1996). We therefore must determine whether in "raising and pleading" the applicability of the absolute defense, the Director also affirmatively bears the burden of establishing that employer did not comply with Section 8(f)(3) and its implementing regulation. We conclude that he does not. In *Elliot,* the Fourth Circuit remanded that case for the administrative law judge "to determine *if Newport News demonstrated* that it could not have 'reasonably anticipated' the late-asserted grounds," *Elliot,* 134 F.3d at 1246, 31 BRBS at 219 (CRT) (emphasis added), and thereby seemingly put the burden of persuasion on employer, as opposed to the Director, to prove that employer could not have "reasonably anticipated" the late-asserted ground for Section 8(f) relief at the time it initially filed its application with

the district director. Thus, according to the Director's position, which is supported by the Fourth Circuit's opinion in *Elliot*, the Director's burden ends once he raises the absolute defense and comes forward with the necessary evidence to support his claim that employer failed to comply with Section 8(f)(3), *e.g.*, employer's application for Section 8(f) relief. *Tennant*, 26 BRBS at 109. The plain language of Section 8(f)(3) of the Act, and of its implementing regulation at 20 C.F.R. §702.321(b)(3), states that the failure of employer to file a timely and fully documented application for Section 8(f) relief may be excused only where employer could not have reasonably anticipated the liability of the Special Fund. Thus, consistent with this plain language, we agree with the Director that it is employer's burden to establish that it could not have reasonably anticipated the liability of the Special Fund, and thus why it has not filed a timely or fully documented application for Section 8(f) relief, in order to prevent application of Section 8(f)(3). Consequently, we modify our decision to place the burden on employer, rather than on the Director, to show that it could not have reasonably anticipated the liability of the Special Fund as to claimant's pre-existing mental condition.

The Fourth Circuit, however, also observed that "only an administrative law judge has the power to make the factual findings, assess the credibility of the relevant witnesses, and resolve any inconsistencies in the evidence necessary to making this requisite determination." *Elliot,* 134 F.3d at 1246, 31 BRBS at 219 (CRT). There is some evidence in the record of a mental handicap prior to the date that this case was transferred to the Office of Administrative Law Judges, notably two IQ scores. In 1997, after referral, employer obtained the vocational report and deposition testimony of Ms. Eileen Bryant, who, after consideration of claimant's IQ scores, school records and other testing, opined that he was mentally handicapped. Thus, in light of this relevant evidence requiring a factual determination, the case is remanded for further consideration of whether employer has demonstrated that it could not have "reasonably anticipated" the liability of the Special Fund with regard to claimant pre-existing mental impairment at the time of its initial application with the district director. *Elliot,* 134 F.3d at 1246, 31 BRBS at 219 (CRT). If employer reasonably could have anticipated the liability of the Special Fund on this ground while the case was before the district director, the administrative law judge must apply the Section 8(f)(3) bar. *Id.*

Accordingly, the Director's motion for reconsideration is granted, and the Board's decision is vacated with regard to its disposition of the contention raised by the Director in his response brief. In addition, the Board's decision is modified to reflect consideration of the Director's alternative argument, raised in his response brief, regarding the administrative law judge's denial of Section 8(f) relief with regard to claimant's pre-existing mental impairment. In accordance with this decision, the administrative law judge's denial of Section 8(f) relief based upon claimant's mental impairment is vacated, and the case is remanded for further

consideration consistent with this opinion. In addition, the Board's original decision is modified to reflect that the burden for showing, pursuant to Section 8(f)(3), that employer could not have reasonably anticipated the liability of the Special Fund as to claimant's mental impairment falls on employer. If the administrative law judge finds that Section 8(f)(3) is inapplicable, he must then consider whether employer has met the contribution element for Section 8(f) relief with regard to the mental impairment consistent with the Board's prior decision. In all other respects, the Board's original decision in this case is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge