BRB No. 98-1172

MICHAEL FIRTH	)	
	)	
Claimant	)	
	)	
	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 26, 1999
	)	
	)	
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 and Errata Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason & Mason), Newport News, Virginia, for employer.

LuAnn Kressley (Henry L. Solano, Solicitor of Labor; Carol DeDeo, 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and Errata Order (97-LHC-732) 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 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 suffered a work-related injury to his neck, right shoulder, and upper extremity on March 9, 1988. Following a hearing, claimant was awarded temporary partial disability benefits from June 20, 1988, and continuing. *See Firth v. Newport News Shipbuilding & Dry Dock Co.*, 90-LHC-1018 (Oct. 17, 1991). On November 3, 1996, employer stopped payment of claimant's temporary partial disability benefits. On December 3, 1996, claimant requested an informal conference before the district director on the issue of his entitlement to permanent partial disability benefits from November 4, 1996, and continuing, which the district director scheduled for January 7, 1997. *See* 33 U.S.C. §922. Employer responded by letter dated December 10, 1996, that as this was "not a matter which can be resolved at the Department of Labor level (since it involves the A.L.J.'s order) please do not schedule an informal conference . . . ." Dir. Ex. 2. The district director responded on December 24, 1996, stating in part "[i]nasmuch as the employer has requested the case go forward for a formal hearing without benefit of conference and has not requested 8(f) relief nor submitted a fully documented, duplicate 8(f) application as is required, the Prehearing Statement, Form LS-18, filed by claimant's counsel will be forwarded for formal adjudication and the Office of Administrative Law Judges and the Solicitor advised that the Absolute Defense applies." Dir. Ex. 3.

Subsequent to the transfer of the case to the Office of Administrative Law Judges (OALJ), employer notified the administrative law judge by letter dated October 29, 1997, that the parties had stipulated that claimant reached maximum medical improvement on October 5, 1993, and that he has had a full-time minimum wage-earning capacity of $134 per week since November 4, 1996.[1] Thus, employer noted that the only issue remaining in dispute was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The Director did not dispute employer's entitlement to Section 8(f) on the merits, but invoked the absolute defense pursuant to Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), contending that employer was aware of the permanency of claimant's condition while the claim was pending before the district director yet did not request Sections 8(f) relief at that time.

[1]On August 27, 1997, employer filed an pre-hearing statement noting that the issues for resolution at the hearing included Section 8(f), and the nature and extent of disability. *See* Emp. LS-18.

In his Decision and Order, the administrative law judge found that no purpose is served by requiring that an application for Section 8(f) relief be presented to the district director in a modification case once the case has been transferred to the OALJ. The administrative law judge reasoned that since the issues involved modification under Section 22 of the Act, 33 U.S.C. §922, the claim was not subject to "consideration by the district director within the meaning of the Act." Decision and Order at 7. Thus, as employer raised the Section 8(f) issue once the case was transferred, and as the Director had an opportunity to defend the Special Fund, the administrative law judge concluded that the absolute defense does not bar employer's entitlement to Section 8(f) relief in this case. Further, as he found that all three elements of entitlement have been satisfied, the administrative law judge granted employer Section 8(f) relief.

On appeal, the Director contends that the administrative law judge erred in rejecting the absolute defense in this case as employer did not request Section 8(f) relief as soon as the permanency of claimant's condition became known. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The Director contends that the administrative law judge erred in finding that the absolute defense of Section 8(f)(3) does not bar employer's application for relief from continuing compensation liability pursuant to Section 8(f) in the instant claim. Section 8(f)(3) provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 44 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) (1994).[2] Moreover, the regulations provide 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. 20 C.F.R. §702.321(b). Employer is not required to request Section 8(f) relief only when an informal conference has been scheduled. *Cajun Tubing*

[2]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

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. *Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998). The regulations also mandate that if a claim for permanency has been raised by the date the case is referred to the OALJ, the employer's "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 employer could not have reasonably anticipated the liability of the fund while the claim was before the district director. 20 C.F.R. §702.321(b)(3).

In the instant case, the Director contends that the district director's scheduling of an informal conference for January 7, 1997, on the issue of claimant's entitlement to permanent partial disability benefits was sufficient notice to the employer of its obligation to file its application for Section 8(f) relief. The Director notes that the procedure for processing a petition for modification is the same as that used for an initial claim, *see* 33 U.S.C. §§919, 922; 20 C.F.R. §702.373; he contends, therefore, that employer's request for referral did not relieve it of its obligation to request Section 8(f) relief prior to the referral. Moreover, noting that an informal conference is just one of several events that give rise to an employer's obligation to submit its application for Section 8(f) relief to the district director, the Director contends that employer had notice of the permanency of claimant's condition when, by letter dated December 10, 1996, Dr. Morales opined that claimant had reached maximum medical improvement as of October 5, 1993. *See* Dir. Ex. 1.

The administrative law judge based his finding that employer's application for Section 8(f) relief is not barred on the finding that the case was not "considered" by the district director. The administrative law judge found that "no purpose is served by requiring that an application for section 8(f) relief be presented to the district director in a modification case once the case has been transferred to the [OALJ]." Decision and Order at 7. Moreover, the administrative law judge found that the case was referred for a hearing without an informal conference or submission of a Section 8(f) application as the case was being litigated pursuant to Section 22 of the Act.

We agree with the Director that the administrative law judge erred in excusing employer's non-compliance with Section 8(f)(3). The fact that this claim was processed pursuant to Section 22 of the Act is of no relevance to the applicability of Section 8(f)(3). Although a district director may not "modify" a decision of an administrative law judge regarding an issue in dispute, *see Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986), modification proceedings are properly initiated at the district director level and the district director does have the power, pursuant to Section 22, to review a compensation case in accordance with the procedure prescribed in respect of claims under Section 19, 33 U.S.C.

§919. *See* 33 U.S.C. §922; 20 C.F.R. §702.373. Section 19(c), 33 U.S.C. §919(c), provides that the district director shall make or cause to be made such investigations as he considers necessary in respect of the claim, and, upon application of any interested party, shall order a hearing thereon. In addition, the regulations provide that the "district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date." 20 C.F.R. §702.311. Thus, the district director in this case had the authority to consider the modification request for permanent partial disability benefits and any accompanying Section 8(f) petition, but transferred the claim to the OALJ prior to the scheduled conference upon employer's request for a hearing. 20 C.F.R. §702.316. In doing so, the district director explicitly stated that no Section 8(f) application had been received, as was required, and gave notice that the absolute defense would be raised.[3] *See generally Abbey v. Navy Exchange*, 30 BRBS 139 (1996). Nonetheless, approximately 11 months later, employer filed a Section 8(f) application with the administrative law judge.

The administrative law judge's reasoning in finding the Section 8(f)(3) bar inapplicable cannot be upheld. The statute does not provide an exception, applicable in modification cases, to the rule that a claim for Section 8(f) relief must be raised before the district director; by its specific terms Section 8(f)(3) applies to all claims for Section 8(f) relief. Moreover, the fact that in a disputed claim a district director cannot modify an administrative law judge's decision does not lead to the conclusion that the district director does not play a meaningful role in processing modification petitions.[4] In particular, in a

[3]We reject employer's contention that the Director did not properly raise and plead the affirmative defense, as the Director raised the defense in a pre-hearing statement dated February 28, 1997, submitted exhibits to the administrative law judge, and addressed the issue in a timely post-hearing brief before the administrative law judge.

[4]For example, where a party seeks modification of a claim for temporary benefits to one for permanent disability, if the parties agree on the date of permanency and degree of loss in wage-earning capacity, as they did here, the district director has the authority to enter an order. 20 C.F.R. §702.315.

Section 8(f) case, the Act and regulations require that employer request Section 8(f) relief initially from the district director, and the request may be approved at that level if the facts warrant Section 8(f) relief. The fact that the claim was filed under Section 22 does not affect the district director's authority, or employer's responsibilities, under Section 8(f) and Section 702.321 of the regulations.

Moreover, the requirement that employer file its Section 8(f) request with the district director also is not altered by the fact that an informal conference was not held, particularly since in this case, the informal conference was scheduled and then canceled at employer's request. The fact that an informal conference is not always a necessary prerequisite to the filing of a Section 8(f) claim was discussed by the Ninth Circuit in *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991), wherein the court held that a district director can "consider" a claim in many ways short of an informal conference, noting that there is no requirement that the district director correspond with the parties or hold an informal conference. 935 F.2d at 1548, 24 BRBS at 217-218 (CRT). In *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997), the Board held that the administrative law judge erred in finding that the district director did not "consider" the claim before referring it to the OALJ, where the district director's letter informed the employer of the claimant's claim for permanent partial disability, told the employer of OWCP's view of the claim, and set a deadline for submission of a Section 8(f) application. Further, in *Gross*, the court held that the burden of producing evidence that the district director transferred a case to the OALJ before evaluating every aspect of the claim is on the party disputing the district director's consideration, and that absent such evidence, it is assumed that the district director did consider every aspect of the claim when deciding whether to transfer it for a formal hearing. *Gross*, 935 F.2d at 1548, n. 4, 24 BRBS at 218, n. 4 (CRT).

In the present case, employer submitted no evidence that the district director decided to transfer the case before properly considering it. *See id.*, 935 F.2d at 1548, 24 BRBS at 182 (CRT). Claimant's request to modify the original award of temporary partial disability to an award of permanent partial disability due to a change in condition was properly before the district director, and once employer was aware that permanency was at issue, it was incumbent on it to raise Section 8(f) and comply with 20 C.F.R. §702.321. *See, e.g., Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991). Employer did not attempt to raise Section 8(f) at that time, but on December 10, 1996, requested the transfer of the claim to the OALJ for a hearing on the issue of claimant's entitlement to permanent partial disability benefits.[5] In the letter granting that request, the district director gave

[5]Employer does not contend that it could not have reasonably anticipated that the case might meet the legal requirements for obtaining Section 8(f) relief until after the case was

employer ample notice that he had considered Section 8(f), finding that employer had not raised that section or filed an application and noting that the appropriate parties would be advised that the absolute defense was applicable. Employer raised its claim for Section 8(f) some 11 months after that date.

transferred. *See generally Wiggins*, 31 BRBS at 145; *see also Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

On these facts, there is no basis for the administrative law judge's conclusion that the district director did not consider the claim, *Wiggins*, 31 BRBS at 144, such that employer was not required to raise Section 8(f) before the case was transferred to the OALJ. Moreover, the fact that the Director had the opportunity to defend the Special Fund's liability before the administrative law judge cannot supercede the plain statutory and regulatory requirements, which do not contain such an exception. We therefore reverse the administrative law judge's finding that the Section 8(f)(3) bar is not applicable in this case and hold that employer was required to file an application for Section 8(f) relief prior to the transfer of the case to the OALJ. As it did not do so, employer's claim for Section 8(f) relief must be denied.

Accordingly, the administrative law judge's Decision and Order granting employer relief from continuing compensation liability pursuant to Section 8(f) of the Act is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge