

BRB No. 09-0656
OWCP No. 07-177845

J.R)
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 Claimant)
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 v.)
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 NGSS/INGALLS OPERATIONS) DATE ISSUED: 06/29/2009
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 Employer)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) ORDER

Claimant, by letter to the Board dated May 26, 2009, requests that the Board convene an informal conference, pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). This correspondence is assigned BRB No. 09-0656.¹ Claimant avers that the issues to be raised at the informal conference involve questions of fact which are beyond the scope of the district director's authority to resolve. Claimant notes that any memorandum of informal conference issued by a district director is not appealable to the Board, yet is binding for purposes of fee liability pursuant to Section 28(b).

The Board declines to convene an informal conference, as it is without authority to do so, Section 28(b) notwithstanding.² The Board's grant of authority is derived from Section 21(b) of the Act, 33 U.S.C. §921(b). Section 21(b)(3) states, in pertinent part:

¹ Claimant's letter is assigned a BRB number solely for tracking purposes. The letter is not considered to be a notice of appeal.

² Section 28(b) states, in relevant part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, *the* deputy commissioner or *Board*

The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.

33 U.S.C. §921(b)(3); *see also* 20 C.F.R. §802.201. The Board is not empowered to engage in fact-finding or to review evidence *de novo*. *See, e.g., Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); 20 C.F.R. §802.301(a). The Board's role is to review appealed decisions in order to ascertain if the findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). It is clear from this statutory scheme that the reference in Section 28(b) to the Board cannot confer on the Board the authority to conduct the initial informal steps in claims processing, as the 1972 Act reflects the "neatly legislated procedural separation of informal settlement conferences and formal adjudications."³ *Shell v. Teledyne Movable Offshore, Inc.*, 14 BRBS 585, 589 (1984); *see also* 33 U.S.C. §919(d); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). Indeed, the

shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b) (emphasis added).

³ No cases address the meaning of this language in Section 28(b) or to other references to the Board which do not fit neatly with its role as defined in Section 21. *See also* 33 U.S.C. §§923, 927 referring to "hearings" before the Board. The Act is not a model of clarity on some points. Nonetheless, the foundation of the Board's authority lies in Section 21 and that section must control.

regulations at 20 C.F.R. §§702.301-702.319 govern the informal processing of cases at the district director level. There are no corresponding regulations permitting the Board to convene an informal conference. The Board solely “performs a review function which prior to the 1972 amendments was performed by the district courts.” *Nacirema Operating Co. v. Benefits Review Board*, 538 F.2d 73, 75, 4 BRBS 190, 193 (3^d Cir. 1976).

Claimant’s conundrum is apparent from the recent case precedent concerning Section 28(b). If the district director issues a written recommendation with which employer complies, claimant is not entitled to an attorney’s fee payable by employer even if that recommendation is legally and/or factually erroneous. *See, e.g., Andrepont v. Murphy Exploration & Prod. Co.*, ___ F.3d ___, 2009 WL 1124246 (5th Cir. March 17, 2009). Moreover, the district director’s memorandum of informal conference is not appealable to the Board. *See generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *Maria v. Del Monte/Southern Stevedore*, 22 BRBS 132 (1989) (*en banc*), *vacating on reconsideration* 21 BRBS 16 (1988) (associate director’s letter notifying claimant that the Special Fund was suspending benefits while it recouped a credit is not a final appealable order). Nonetheless, these concerns can be addressed only by Congress. *Andrepont*, 2009 WL 1124246 at *6-7.

Accordingly, claimant’s request that the Board convene an informal conference pursuant to Section 28(b) is denied.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge