

BRB No. 91-789

ARTHUR F. DICKINSON)
)
 Claimant)
)
 v.)
)
 ALABAMA DRY DOCK &)
 SHIPBUILDING CORPORATION) DATE ISSUED:
)
 Employer-Respondent)
)
 and)
)
 THE TRAVELERS INSURANCE)
 COMPANY)
)
 Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order Approving Compromise Settlement of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

Walter R. Meigs, Mobile, Alabama, for employer.

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for carrier.

Laura Stomski (Judith E. Kramer, Acting 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: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE,
Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Compromise Settlement (90-LHC-599) of Administrative Law Judge C. Richard Avery 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a welder for employer from 1964 to 1965, and from 1969 to 1988, when employer's shipyard closed. Based on an audiogram taken on February 13, 1987, which revealed a 15 percent binaural hearing impairment, claimant filed a claim for his hearing loss. A second audiogram administered in November 1989 revealed a 15.9 percent binaural hearing impairment.

Employer applied for relief under Section 8(f) of the Act, 33 U.S.C. §908(f), and, on December 13, 1989, the district director¹ informed employer that its application for relief had been approved, based on a pre-existing 11.3 percent monaural hearing impairment. The district director also notified employer that based on a 15 percent binaural hearing impairment, the Special Fund is liable for 5.9 weeks of compensation and employer is liable for the remaining 24.1 weeks. That day, the district director also referred the case to the Office of Administrative Law Judges. She forwarded claimant's pre-hearing statement and noted that Section 8(f) relief had been approved and would not be an issue at the formal hearing.²

After the case was referred to the Office of Administrative Law Judges, claimant and employer stipulated, *inter alia*, that: a) claimant's compensation rate is \$247.14 per week; b) claimant is owed \$7,636.62 in compensation for any injury he sustained while working for employer, and based on the district director's letter of December 13, 1989, the Special Fund is liable for \$1,458.13 of this amount, representing 5.9 weeks of compensation at the above-mentioned compensation rate; c) of the remaining compensation liability, \$3,089.25 is to be paid by employer

¹ Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for "deputy commissioner."

² In his subsequent Notice of Appearance of Counsel dated November 6, 1990, the Director informed the administrative law judge that since Section 8(f) had been considered and approved, he believed that it would not be an issue at the formal hearing.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

and \$3,089.25 is to be paid by carrier; d) these payments cover any and all disability, death benefits and all penalties, interest and any other costs arising from claimant's work-related hearing loss; e) employer is liable for all future medical care resulting from claimant's work-related hearing loss; and f) employer is liable for \$2,035 for an attorney's fee. See Petition to Approve Compromise Settlement. Claimant and employer then requested approval of the settlement by the administrative law judge pursuant to Section 8(i) of the Act. 33 U.S.C. §908(i). The administrative law judge approved the settlement, and incorporated the representation in the agreement that the agreement was not procured by fraud or duress. He found that claimant is entitled to \$7,636.62 "in compensation for any hearing loss which Claimant may have sustained while employed with" employer, of which \$3,089.25 is to be paid by employer, \$3,089.25 is to be paid by employer's carrier, and \$1,458.13 is to be paid by the Special Fund. See Decision and Order at 2.

On appeal, the Director challenges the administrative law judge's approval of the parties' settlement agreement, contending that it binds the Special Fund without the participation of the Director. The Director additionally argues that the settlement attempts to settle a claim not yet in existence, *i.e.*, death benefits, thereby violating Section 702.241(g), 20 C.F.R. §702.241(g) of the regulations. Employer and its carrier respond, urging affirmance. Claimant has not responded to this appeal.

The Director initially contends that the settlement agreement is invalid as it provides for payment by the Special Fund without the participation of the Director in violation of Section 8(i)(4) of the Act, 33 U.S.C. §908(i)(4), and Section 702.242(a) of the regulations, 20 C.F.R. §702.242(a). We disagree. Section 8(i)(4) of the Act states:

The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

33 U.S.C. §908(i)(4)(1988). Section 702.242(a) states that an application for settlement should be in the form of a stipulation signed by all parties. 20 C.F.R. §702.242(a).

The Board has previously determined that a settlement agreement between an employer and a claimant which affects the liability of the Special Fund is not binding on the Fund absent the participation of the Director. *Younger v. Washington Metropolitan Area Transit Authority*, 16 BRBS 360 (1984); *see also Brady v. J. Young and Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985). Moreover, Section 8(i)(4) was enacted in order to prevent employers from seeking relief from the Special Fund after reaching a settlement with a claimant in a case that otherwise would be assigned to the Fund. See H.R. CONF. REP. No. 1027, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2783-2787.

In the instant case, the settlement agreement affects the Special Fund by requiring it to pay \$1,458.13 to claimant. In response to the Director's appeal, employer argues that the letter dated December 13, 1989, signed by the district director, as well as the Director's November 6, 1990

notice of appearance before the administrative law judge, signified the Director's approval of the Special Fund's liability. The Director, however, maintains that the December 13, 1989 letter could not be relied on as a basis for settlement of the Special Fund's liability, asserting that it "merely stated the amount of compensation the Fund would be liable for should the claim be adjudicated." *See* Director's brief at 5. Employer asserts that if any error was committed in not having the Director actually participate in the settlement agreement, the Special Fund has not suffered any injury, and therefore the error is harmless. We agree. On the facts of this case, the settlement reached by claimant and employer did not bind the Special Fund to anything to which the Director had not previously agreed. Although the Director did not overtly participate in the settlement, the particular and unique facts of this case lead us to conclude that the Director constructively participated in the settlement process and gave approval of the disbursement from the Special Fund consistent with the settlement agreement.

The December 13, 1989 letter from the district director to employer is unambiguous; specifically, that letter clearly indicates approval of employer's application for relief from the Special Fund for benefits covering claimant's pre-existing monaural hearing impairment of 11.3 percent. Additionally, in referring the case to the Office of Administrative Law Judges, the district director informed Chief Judge Litt of the Director's approval of employer's Section 8(f) application, stating "Section 8(f) has been considered and approved, and will not be an issue at the formal hearing." *See* December 13, 1989 letter.

The Director argues that because he did not participate in the settlement negotiations between claimant and employer, and neither he nor his representative signed the settlement agreement, that portion of the agreement pertaining to Section 8(f) relief is invalid. The Director bases his argument on Section 702.242 of the regulations which contains the requirements for a complete settlement application. 20 C.F.R. §702.242. Particularly, subsection (a) mandates the application be in the form of a stipulation signed by all parties.³ 20 C.F.R. §702.242(a).

On the facts in this case we conclude that the parties complied with the regulations. Where the Director's approval of a Section 8(f) application has been given and the settlement is consistent with that approval, the reason for the rule that the private parties may not stipulate to matters that affect the Special Fund's liability is absent. *See generally Collins v. Northrop Corp.*, 12 BRBS 949 (1980). The district director had the authority to approve employer's request for Section 8(f) relief in this case, and such approval was given. *See* OWCP Release No. 64 dated June 15, 1987, *reprinted in* Volume A BRBS 4-114. The Director, therefore, knew to what degree the Special Fund was liable for claimant's benefits. As employer and claimant did not exceed the Special Fund's pre-approved limit of liability in their agreement, the settlement did not harm the Special Fund, and its interests remain secure. We, therefore, hold on the facts of this case that as employer's entitlement to Section 8(f) relief was established prior to the settlement, the Director constructively participated in the settlement process, and the private parties did not attempt to bind the Fund to any amounts which

³ The language that the Director cites in his brief is contained in Section 702.242(a) of the regulations, not Section 702.241(a). *See* 20 C.F.R. §§702.241(a), 702.242(a).

had not been approved, the fact that the Director did not sign the settlement agreement is not relevant in this case. Accordingly, the Director's contention is rejected.

The Director next contends that the settlement agreement should not have been validated as it attempts to discharge employer's potential liability for death benefits, in violation of Section 8(i) of the Act and Section 702.241(g) of the regulations. 33 U.S.C. §908(i)(1988); 20 C.F.R. §702.241(g). We reject the Director's contention.

Section 8(i)(3) of the Act, 33 U.S.C. §908(i)(3)(1988), provides that a settlement approved under this section shall discharge the employer's liability. The parties' settlement is limited to the rights of the parties and to the claims then in existence. *See Cortner v. Chevron International Oil Co., Inc.*, 22 BRBS 218 (1980); *see generally Abercumbia v. Chaparral Stevedores*, 22 BRBS 18 (1988), *order on recon.*, 22 BRBS 18.4 (1989); 20 C.F.R. §702.241(g). Contrary to the Director's contention, the discharge of employer's potential liability for death benefits contained in the settlement agreement does not warrant the invalidation of the entire settlement agreement. The settlement agreement as a whole clearly indicates the parties' intention to settle the claim for a 15 percent binaural hearing loss in existence.⁴ Under these circumstances, we conclude that the administrative law judge's approval of the settlement is limited to the hearing loss claim before him.

⁴ We note that employer, in its response brief, concedes that the reference to "death benefits" contained in the settlement agreement was inadvertent and unintended, and that the parties, in accordance with Section 702.241(g) of the regulations, sought only to release claims related to claimant's occupational hearing impairment and did not contemplate releasing a claim not yet in existence. *See* Employer's brief at 6-7.

Accordingly, the Decision and Order Approving Compromise Settlement of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge