BRB No. 93-469

JESSE DEAKLE (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-988) of Administrative Law Judge G. Marvin Bober 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).

On July 22, 1981, claimant filed a claim against employer alleging he sustained an injury due to exposure to asbestos. On December 16, 1981, he filed suit in federal court against numerous asbestos manufacturers. Dir. Brief at 2. The district director approved a Section 8(i), 33 U.S.C. §908(i) (1982), settlement between claimant and employer on August 22, 1983, which discharged employer's liability for compensation in return for a lump sum payment to claimant of $10,000 and an attorney's fee of $1,642.[1] Comp. Order. Between 1982 and 1989, claimant and/or his estate entered into settlements with some of the third-party defendants, without first obtaining prior written approval from employer, resulting in an aggregate net recovery to claimant and/or his estate in the amount of $121,213.60. *See* Affidavit with attachment; Emp. Brief at 2-3. Claimant died on October 14, 1988. Decision and Order at 2.

Prior to becoming aware of claimant's death or the fact that no claim for death benefits had been timely filed, employer filed a Motion to Dismiss the "claim" pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g) (1988). Specifically, employer sought to prohibit claimant from seeking medical benefits because he failed to comply with the provisions of Section 33(g)(1), (2), 33 U.S.C. §933(g)(1), (2) (1988). Upon learning of claimant's death and of the fact that no timely death benefits claim had been filed, and despite agreeing with claimant's counsel in 1991 that "there are no viable claims to be filed in the future" in this case, employer proceeded with its action, seeking reimbursement of its $10,000 lien. *See* July 17, 1991 letter. In a letter dated July 23, 1991, claimant's counsel informed the administrative law judge that employer had been reimbursed the $10,000 it paid in accordance with the Section 8(i) settlement. *See* 33 U.S.C. §933(f). Nonetheless, employer requested that the case be transferred to the Office of Administrative Law Judges. Thereafter, the administrative law judge considered employer's motion to dismiss the claim, noting particularly that employer conceded that claimant had died without ever filing a claim for medical benefits and that no claim for death benefits was filed within the statutory period prescribed by Section 13, 33 U.S.C. §913. He concluded that "there is no possibility of any future claim for benefits under the Act[,]" and he held that the issue of claimant's further entitlement to compensation under the Act is moot, as "there is no issue under the Act that can ever be reached in this matter." Decision and Order at 2. The administrative law judge then remanded the case to the district director. *Id.* at 3.

Employer appeals the decision, contending that any future claim for medical benefits is barred by Section 33(g), that the administrative law judge erred in finding that the issue was not ripe for adjudication, and that the administrative law judge's order of remand effectively leaves the case open, requiring it to seek dismissal at a later date. The Director, Office of Workers' Compensation Programs (the Director), responds to the appeal, urging affirmance. Employer replies, questioning why the claim cannot be dismissed, and the file closed, when all parties agree the issues are moot.

We reject employer's argument that the Section 33(g) issue is ripe for adjudication. The Board recently discussed the issue of ripeness in its decision in *Boone v. Ingalls Shipbuilding, Inc.*,

[1]The settlement did not discuss claimant's entitlement to medical benefits, thereby leaving that issue open. *See* Comp. Order.

28 BRBS 119 (1994) (Brown, J., concurring), *aff'g on recon. en banc* 27 BRBS 250 (1993)(*en banc*)(Brown, J., concurring), noting the conclusion of the United States Court of Appeals for the Ninth Circuit that "[l]ack of ripeness will prevent review if the systematic interest in postponing adjudication due to a lack of fitness outweighs the hardship on the parties created by the postponement." *Boone*, 28 BRBS at 122; *see also Chavez v. Director, OWCP*, 961 F.2d 1409, 1414-1415, 25 BRBS 134, 141-142 (CRT) (9th Cir. 1992). In *Boone*, claimant Boone filed a claim under the Act alleging exposure to asbestos. Subsequently, he filed numerous third-party claims against asbestos manufacturers. Employer then requested the case be referred to the Office of Administrative Law Judges, and, nearly three years later, Boone filed a motion to withdraw his claim with the district director. The district director approved the motion to withdraw, and employer appealed the decision to the Board. *Boone*, 28 BRBS at 122. The Board held that the issues raised by employer were not ripe for adjudication, as there was no claim pending, and that employer could not be aggrieved unless or until a new claim was filed. *Id.* at 123-124; *see also Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 135-136 n.14, 28 BRBS 12, 17 n.14 (CRT) (5th Cir. 1994).

In the case now before the Board, the administrative law judge, the Director, and employer all agree that claimant's death renders him incapable of filing a future claim for medical benefits and that his survivors did not file a claim for death benefits within the statutorily prescribed period.[2] Common sense dictates that where there is no claim, there can be no issues to decide. *See Boone*, 28 BRBS at 123. Consequently, the administrative law judge correctly determined that the issue of whether employer can be held liable for any further benefits in this matter is moot. *See Murphy v. Hunt*, 455 U.S. 478 (1982) (where there is no reasonable expectation that an action will occur again, the test for the "capable of repetition, yet evading review" doctrine fails, and the issue is considered moot). Therefore, we affirm his finding.

Moreover, employer's Section 33(g) argument also must fail. Employer contends that any future request for medical benefits is barred by Section 33(g). Specifically, it argues that claimant failed to obtain written approval as required by Section 33(g)(1). The Supreme Court of the United States has determined that Section 33(g)(1) requires a claimant to obtain prior written approval of a third-party settlement when the net recovery from the settlement is for an amount less than the amount to which the claimant is entitled under the Act. *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). Further, it determined that prior written approval need not be obtained when a third-party settlement is for an amount greater than or equal to the claimant's entitlement under the Act. *Id.*, __ U.S. __, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT). In those instances, the claimant need only give his employer prior notice of the settlements, either

[2]In its July 17, 1991 letter to the administrative law judge, employer specifically stated:

> [W]e understand counsel for Claimant to represent that all past claims have been resolved and there are no viable claims to be filed in the future. . . . If all claims have been consummated, then we agree with counsel for Claimant that there is nothing to litigate. . . .

before the agency announces an award or the employer makes any payments. *See Boone*, 28 BRBS at 123-124; *see also* 33 U.S.C. §933(g)(2) (1988).

Claimant clearly settled his third-party actions for an amount greater than his entitlement under the Act.[3] Therefore, Section 33(g)(1) is inapplicable, and claimant need not have sought prior approval of the third-party settlements. Whether he gave employer notice is unknown, but it does not change the result in this case. Employer paid $10,000 pursuant to the Section 8(i) settlement with claimant, and it recouped said money when it was reimbursed from the net third-party settlement proceeds. 33 U.S.C. §933(f). Moreover, at the time of the Section 8(i) settlement, Section 33(g) of the Act required only written approval prior to a third-party settlement for less than the amount of compensation due under the Act. The notice requirement for third-party settlements for amounts greater than or equal to the compensation was added in 1984. *See* 33 U.S.C. §933(g) (1982) (amended 1984).

We reject employer's attempt to use Section 33(g) to bar claims for medical and death benefits which have not been and can never be filed. As the Board stated in *Boone*, employer cannot be aggrieved unless or until a claim is filed, and, in this case, claimant's death and the running of the statute of limitations prevent any further claims from being filed. Therefore, even if Section 33(g) were applicable to the case *sub judice*, there is no claim for it to bar.

Employer also contends that, despite the issue of its further liability being moot, the administrative law judge erred in remanding the case to the district director without instructions to officially close or dismiss it.[4] Although a remand order does not result in the final disposition of a case, *see Arjona v. Interport Maintenance*, 24 BRBS 222, 223 (1991), employer's fears of perpetual litigation in this case are unfounded. Given the administrative law judge's holding that there can be no future claim for benefits in this case, and employer's agreement thereto, the argument appears to be a matter of semantics only. As the 1983 Section 8(i) settlement constitutes the final disposition of the only claim filed in this case, discharging employer of its liability, the administrative law judge's determination

that there is no pending claim, making all issues moot, only confirms that earlier resolution. Had employer not sought dismissal of a non-existent claim, the case would have ended long ago.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

[3]Prior to settling his claim in 1983 for $10,000, claimant received nearly $30,000 from his third-party settlements.

[4]Employer fears the claim will "remain an open and viable claim through infinity" unless the case is dismissed with prejudice. Reply Brief at 1.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge