

BRB No. 93-0819

KIM B. ABBEY)
)
 Claimant)
)
 v.)
)
 NAVY EXCHANGE) DATE ISSUED:
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 and)
)
 GATES, McDONALD & COMPANY)
)
 Employer/Administrator-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Michael S. Guillory, Metairie, Louisiana, for employer/administrator.

Karen B. Kracov (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/administrator appeals the Decision and Order (91-LHC-1861) of Administrative Law Judge Richard D. Mills 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

On October 20, 1986, claimant, a salesclerk, injured her back while lifting a television set at work. The administrative law judge awarded claimant temporary total disability benefits from October 20, 1986 to January 25, 1991, and permanent total disability benefits from January 25, 1991 and continuing. The administrative law judge also awarded medical benefits and interest on the compensation. The administrative law judge summarily denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), after finding that employer waived its claim for Section 8(f) relief because employer did not timely submit its Section 8(f) application to the district director. The administrative law judge noted that the district director advised employer to submit its Section 8(f) application 45 days from February 20, 1991. On May 3, 1991, the district director referred the claim to the Office of Administrative Law Judges (OALJ), stating that employer did not submit its Section 8(f) application within the time allowed or to date and, therefore, the district director was invoking the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3). On appeal, employer challenges the administrative law judge's summary denial of Section 8(f) relief pursuant to Section 8(f)(3) of the Act.¹ The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief.

¹The administrative law judge's brief Section 8(f) finding is:

SECTION 8(F) RELIEF

The next issue to be addressed is Employer/Carrier's entitlement to Section 8(f) relief. By letter to Carrier dated February 20, 1991, District Director Kitchin advised that Employer/Carrier had 45 days to submit a completed 8(f) petition. On May 3, 1991, this claim was referred to our office at which time District Director Kitchin advised that Employer did not submit an 8(f) petition within the time allowed or to date, and therefore, she presented the absolute defense position. Accordingly, I find that this issue has been waived by Employer/Carrier and I need not discuss any claim for Section 8(f) relief.

Section 8(f)(3) of the Act states:

Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, 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). Section 702.321(b)(3) of the regulations provides in relevant part:

[F]ailure 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. This defense is an affirmative defense which must be raised and pleaded by the Director.

20 C.F.R. §702.321(b)(3). Employer contends that the Director, by remaining mute and relying solely upon the applicability of the absolute defense raised by the district director, has waived his right to object to employer's claim for Section 8(f) relief. Emp. Br. at 8, 11. This case thus presents an issue of first impression.²

We agree with employer that, based on the plain language of the applicable regulation implementing Section 8(f)(3), 20 C.F.R. §701.321(b)(3), the Director has waived his right to object to employer's claim for Section 8(f) relief as the Director did not raise and plead the absolute defense on his own behalf. Prior to the informal conference, Drs. McKowen, West, and Grimm all stated that claimant reached maximum medical improvement. Cl. Ex. 5; Emp. Ex. 9, 10, 13. Employer requested Section 8(f) relief, if applicable, at the informal conference. Nonetheless, at the informal conference held before the district director on June 22, 1990, the district director ordered temporary total disability benefits to continue pending maximum medical improvement. Subsequent to the informal conference, Dr. McKowen notified employer that claimant had reached maximum medical

²In *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on recon.*, 29 BRBS 103 (1995), a case in which the district director raised the absolute defense, the Board was not required to address the issue of whether the district director can properly raise and plead the absolute defense. In *Hawthorne*, the district director raised the absolute defense to a 1988 injury but not to a 1986 injury. Because the administrative law judge only awarded permanent disability benefits in connection with the 1986 injury, the claim for Section 8(f) relief on the 1988 injury was moot. The Board, therefore, held that as the district director only raised the absolute defense in relation to the 1988 injury, there was no evidence to support the administrative law judge's determination that employer's right to Section 8(f) relief with respect to the 1986 injury was barred pursuant to Section 8(f)(3).

improvement on January 25, 1991. By letter dated February 20, 1991, the district director advised employer to submit its Section 8(f) application within 45 days from February 20, 1991.³ Employer did not file its Section 8(f) application within the specified 45 days, or at all, and on May 3, 1991, the district director referred the claim to the administrative law judge, noting that since no Section 8(f) application had been filed, the district director was presenting the absolute defense.⁴

The Director did not appear at the formal hearing before the administrative law judge, and his first appearance in this case is in response to employer's appeal. Section 8(f)(3) does not identify the entity who must raise and plead the absolute defense. See 33 U.S.C. §908(f)(3). The Director is the guardian of the Special Fund. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd*, U.S. , 115 S.Ct. 1278, 29 BRBS 87 (CRT)(1995); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992). Thus, Section 702.321(b)(3) states that the Director must raise and plead the absolute defense. The comments to the final regulation embodied in Section 702.321(b)(3) restate the rule that the absolute defense is an affirmative defense and emphasize that "it must be raised and specifically pleaded by the Director before the OALJ." 51 Fed. Reg. 4270, 4279 (Feb. 3, 1986). The "Director" is defined in the regulations as the Director, Office of Workers' Compensation Programs, or his authorized representative. 20 C.F.R. §701.301(a)(6). Under the regulations, "District Director means a person appointed as provided in sections 39 and 40 of the [Act] or his or her designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under [the] Act and its extensions." 20 C.F.R. §701.301(a)(7). The issue presented here is whether the specific requirement that the *Director* raise and plead the absolute defense before the administrative law judge may be satisfied by the district director's statement of the defense in a referral letter.

³The district director's letter dated February 20, 1991, states only, "Because this office is required to make a ruling on any 8(f) claim prior to referral of a claim for a formal hearing, we will review your carefully completed 8(f) petition on receipt. It must be submitted within 45 days of this letter's date." Letter dated February 20, 1991 from District Director Kitchin to Carrier (emphasis in original).

⁴This May 3, 1991, referral letter appears to be a form letter, with a box checked which states, "The employer did not submit an 8(f) petition within the time frame allowed, or to date, and we would present the absolute defense position." Letter dated May 3, 1991, from District Director Kitchin to Chief Judge Litt.

In concluding it does not, we begin with the fact that the Director and district director are clearly separate entities under the regulations, each with his or her own responsibilities. The district director fills the statutory role of the "deputy commissioner," a title found in the statute but replaced in the regulations by "district director." See 33 U.S.C. §919; 20 C.F.R. §701.301(a)(7). As such, the district director performs a wide range of duties related to the filing, investigation and informal resolution of claims under the provisions of the Act and the implementing regulations. The "Director" is not a creation of the statute, but of the regulations. Under the Act, certain duties, notably those involving medical care and vocational rehabilitation, 33 U.S.C. §§907, 939, are entrusted to the Secretary. By regulation, the Secretary's responsibilities under the Act are delegated to the Assistant Secretary of Labor for Employment Standards, who established the Office of Workers' Compensation Programs, headed by the Director, to administer the benefits program under the Act. 20 C.F.R. §§701.201, 701.202.

Under this scheme, the regulations refer to various functions to be performed by the district director or by the Director. In appropriate cases, the Board has recognized that where the regulation refers to the "Director," it authorizes action by the "district director" as the designee of the Director. See *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). However, *Toyer* involved an issue regarding reimbursement for medical treatment, and Section 702.407, 20 C.F.R. §702.407, specifically provides for the exercise of the Director's authority to actively supervise medical care "through the district directors and their designees."

In the instant case, however, the reference in Section 702.321(b)(3) to the Director cannot refer to the district director as well as the Director, as the regulation as a whole details the duties of both the district director and the Director, as separate entities, with respect to Section 8(f) applications. For example, the regulation requires employer to file its Section 8(f) application with the district director. 20 C.F.R. §702.321(a)(1). The district director is required to establish a date for employer's submission of a fully documented Section 8(f) application and may grant an extension of time for submission of the application at the request of employer and for good cause. 20 C.F.R. §702.321(b)(1), (2). In turn, the Director is required to raise and plead the absolute defense to the Fund's liability as an affirmative defense upon employer's failure to submit a fully documented application by the date established by the district director. 20 C.F.R. §702.321(b)(3). The regulation further allows the district director to consider the claim for compensation and transmit the case for formal hearing, where permanency has been raised, even though employer has failed to submit a timely and fully documented application for Section 8(f) relief. 20 C.F.R. §702.321(b)(3). Moreover, Section 702.321(c) requires the district director to award Section 8(f) relief after concurrence by the Associate Director, DLHWC, or his or her designee, if all relevant evidence is submitted and the facts warrant relief. 20 C.F.R. §702.321(c). Section 702.321(c) specifically provides for different duties to be performed by the district director and the Director, within the same sentences. See 20 C.F.R. §702.321(c). If the district director and the Director were both able to raise and plead the absolute defense, then Section 702.321(b)(3) would have expressly stated. See generally *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524 (1985)(in order to give meaning to every word, the two phrases must have different meanings); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990)(when there are two different terms

used, there is a clear intent to have two different meanings).

We accordingly hold that the Director must raise and plead the absolute defense as an affirmative defense on his own behalf pursuant to 33 U.S.C. §908(f)(3) and 20 C.F.R. §702.321(b)(3). It follows that the district director may not raise the absolute defense for the Director by virtue of a referral letter stating the defense. This interpretation is further bolstered by the comments to the regulation noting that the Director must raise the defense before the administrative law judge. A referral letter transmits the case from the informal proceedings before the district director to the OALJ for a formal hearing; it is a purely ministerial act under the regulations. *See* 20 C.F.R. §§702.316, 702.317. The letter does not enter an appearance before an administrative law judge by the district director. Even if the letter could suffice to raise the absolute defense, moreover, the regulation requires both that the Director "raise and plead" the defense, and the comments state he must "raise and specifically plead" it. The use of these terms in the regulation indicates that, while pleadings under the Act are informal, more than a statement of the absolute defense is necessary. The form letter here is thus inadequate to both raise and plead the defense. By contrast, in other cases where the Director has asserted the Section 8(f)(3) bar, he appeared before the administrative law judge, filing a Motion to Dismiss employer's request for Section 8(f) relief. *See Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992); *Hargrave v. Cajun Tubing Testors Inc.*, 24 BRBS 248 (1991), *aff'd sub nom. Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992).

In conclusion, because the plain language of Section 702.321(b)(3) requires that the *Director* raise and plead the absolute defense, the administrative law judge erred in raising the Section 8(f)(3) bar based on the district director's statement in her referral letter. Consequently, he erred in summarily denying Section 8(f) relief. We, therefore, vacate the administrative law judge's summary denial of Section 8(f) relief as the Director did not raise and plead the absolute defense in this case.⁵

⁵In light of our holding that the administrative law judge erred in summarily denying Section 8(f) relief as the Director did not raise and plead the absolute defense, we need not address employer's remaining contentions regarding Section 8(f)(3). *See generally Lassiter v. Nacirema Operation Co.*, 27 BRBS 168 (1993); *Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992); 33 U.S.C. §908(f)(3); 20 C.F.R. §§702.321(b)(3), 702.336.

We remand this case to the administrative law judge to consider the merits of employer's claim for Section 8(f) relief as the Director had notice that Section 8(f) was at issue, and did not raise and plead the absolute defense pursuant to Section 8(f)(3).⁶ *Cf. Hawthorne*, 29 BRBS at 103 (where the Director did not have notice that employer would raise the applicability of Section 8(f) with respect to the claim for claimant's 1986 knee injury, the Board allowed the administrative law judge to consider, on remand, the applicability of Section 8(f)(3), if raised by the Director). In order for Section 8(f) to shift liability to pay compensation for permanent total disability from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, employer must establish that the injured employee had a pre-existing permanent partial disability, that the pre-existing disability was manifest to employer, and that claimant's total disability is not solely the result of the subsequent work injury alone. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, BRBS , BRB No. 94-2471 (Aug. 20, 1996). On remand, the administrative law judge must allow employer to present its evidence pertaining to these three elements, and the Director must be given the opportunity to respond.

⁶We reject employer's contention that claimant's condition is not yet permanent. In finding that permanency was established as of January 25, 1991, the administrative law judge acted within his discretion in crediting the opinion of Dr. McKowen that claimant reached maximum medical improvement on January 25, 1991. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 17-18; Cl. Ex. 5; Emp. Ex. 10; Tr. at 226-227. As a result of her work-related back injury, claimant was required to undergo back surgery and suffered from depression and chronic pain. Dr. McKowen, a Board-certified neurological surgeon who performed the back surgery on claimant, noted that both he and claimant's psychologist, Dr. Hutcheson, agreed that claimant reached maximum medical improvement on January 25, 1991. Cl. Ex. 5, 7; Emp. Ex. 10. The administrative law judge did not find Dr. VerVoort's opinion persuasive because Dr. VerVoort saw claimant only twice, whereas Dr. McKowen treated claimant consistently for four years, and because Dr. VerVoort is not an expert in the fields of surgery or psychology, as are Drs. McKowen and Hutcheson, respectively. Consequently, we affirm the administrative law judge's finding of permanency on January 25, 1991.

Accordingly, the administrative law judge's Decision and Order denying employer Section 8(f) relief is vacated, and the case is remanded to the administrative law judge for consideration of the merits of employer's claim for Section 8(f) relief. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge