

BRB No. 97-212

JOHN E. PORTER )  
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 Claimant-Petitioner )  
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 v. )  
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 KWAJALEIN SERVICES, INCORPORATED ) DATE ISSUED:  
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 and )  
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 AIU NORTH AMERICAN, INCORPORATED )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Order Dismissing Claimant's Notice and Request for Lack of Jurisdiction of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

John E. Porter, Sapulpa, Oklahoma, *pro se*.

Robert C. Kessner (Kessner Duca Umebayashi Bain & Matsunaga), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Dismissing Claimant's Notice and Request for Lack of Jurisdiction (95-LHC-3069, 95-LHC-3070) of Administrative Law Judge Daniel L. Stewart 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 Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are 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, a pilot, was injured on May 1, 1991, and April 8, 1993, while working for employer. Following the May 1991 injury, claimant underwent carpal tunnel release surgery and right radial release surgery. In April 1993, claimant was injured when a cockpit window struck the back of his head which resulted in headaches, neck and shoulder pain, ringing in the right ear, floaters in his vision, achiness in both eyes, and tingling in his left leg and arm. Claimant also suffered from a work-related shoulder injury on February 1, 1992, and a fall on February 11, 1993. Employer voluntarily paid various periods of temporary total and temporary partial disability benefits for these injuries.

During the hearing in this case, claimant and employer agreed to settle the pending claims for \$100,000.<sup>1</sup> Subsequently, the parties submitted a Stipulation of Agreed Settlement to the administrative law judge, who approved it upon review in a Decision and Order Approving Stipulation of Agreed Settlement (Decision and Order) filed July 29, 1996. In his Decision and Order, the administrative law judge stated that the settlement is adequate, was not procured by duress, and conforms to the requirements of Section 8(i)(1) of the Act, 33 U.S.C. §908(i)(1), and its implementing regulations at 20 C.F.R. §§702.241-702.243. In accordance with the settlement, employer submitted a \$100,000 check to claimant which claimant deposited in a bank account.

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<sup>1</sup>The parties settled civil suits brought by claimant against employer in various state courts in California, Florida, and Virginia for an additional \$100,000. Tr. at 33-34, 46-47.

On August 22, 1996, claimant filed a Notice of Rescission (sic) of Agreed Settlement and a Request to Reset Formal Hearing Date (claimant's motion) with the administrative law judge. Employer responded in opposition to the motion and claimant replied. Ruling on claimant's motion, the administrative law judge issued his Order Dismissing Claimant's Notice and Request for Lack of Jurisdiction (Order) on October 3, 1996. In his Order, the administrative law judge construed claimant's motion as a motion requesting that his Decision and Order be set aside, holding that claimant could not unilaterally rescind an agreed settlement after it was approved and relying on *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988)(settlements are not binding upon claimants and are subject to rescission by them until approved). The administrative law judge determined that in order to set aside a compensation order, proceedings would have to be instituted within 30 days of the date his Decision and Order was filed in the district director's office or by August 28, 1996, in accordance with 33 U.S.C. §921(a) and 20 C.F.R. §702.350.<sup>2</sup> After noting that claimant had filed his motion within the requisite 30-day period on August 22, 1996, the administrative law judge determined that claimant's motion was not properly instituted under the Act, and consequently he concluded that he had no jurisdiction to set aside his compensation order. The administrative law judge held that the merits of claimant's arguments, as raised in his motion, could only be ruled upon by the Board, as Section 21(b) of the Act, 33 U.S.C. §921(b), to which Section 21(a) refers, involves appeals to the Board. Consequently, the administrative law judge dismissed claimant's motion for lack of jurisdiction.

On appeal, claimant challenges the administrative law judge's Order dismissing his motion for lack of jurisdiction. Upon claimant's appeal to the Board, employer filed a Motion to Dismiss claimant's appeal as untimely filed. The Board denied employer's Motion to Dismiss in its Order dated June 30, 1997, stating that claimant's appeal of the administrative law judge's October 3, 1996 Order was timely filed on October 21, 1996. Employer also seeks affirmance of the administrative law judge's Order, and requests attorney's fees and costs pursuant to Section 26 of the Act, 33 U.S.C. §926, for defending this appeal.

Initially, we hold that the administrative law judge's finding that claimant cannot unilaterally rescind the settlement as the settlement is binding upon claimant and not subject to rescission after it was approved by the administrative law judge is in accordance

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<sup>2</sup>33 U.S.C. §921(a) states:

A compensation order shall become effective when filed in the office of the deputy commissioner . . . , and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C. §921(a). Its implementing regulation, to which the administrative law judge referred, is found at 20 C.F.R. §702.350, and mirrors the statutory language.

with law. *Cf. Nordahl*, 842 F.2d at 773, 21 BRBS at 33 (CRT)(settlements are not binding upon claimants and are subject to rescission by them until approved). Moreover, the administrative law judge properly found he lacked jurisdiction to set aside his compensation order after it had been filed in the district director's office since no timely motion for reconsideration was filed,<sup>3</sup> and since settlements approved pursuant to Section 8(i) of the Act are not subject to modification under Section 22 of the Act, 33 U.S.C. §922 (1994). *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36 (CRT)(5th Cir. 1986), *aff'g Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37 (1986); *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991); *Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985); *Kuhn v. Associated Press*, 16 BRBS 46 (1983); 20 C.F.R. §802.206(b)(1). The administrative law judge properly stated that under such circumstances, claimant's only recourse is through an appeal to the Board.

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<sup>3</sup>The administrative law judge properly did not construe claimant's motion as a motion for reconsideration as it was filed after the 10 day time limitation had expired for filing such a motion. *Kuhn v. Associated Press*, 16 BRBS 46 (1983); 20 C.F.R. §802.206(b)(1).

The Board, however, lacks jurisdiction to review the merits of the administrative law judge's Decision and Order approving the settlement as claimant did not file an appeal to the Board within 30 days of the date the decision was filed on July 29, 1996. 33 U.S.C. §921(a); 20 C.F.R. §702.350. Although the Board's regulations provide that a notice of appeal filed with another governmental agency shall be considered filed with the Board as of the date it was received by that governmental agency, where it is in the interest of justice to do so, see 20 C.F.R. §802.207(a)(2), claimant's motion in this case was not a notice of appeal to the Board. The motion was directed to the administrative law judge, who ruled on it, and does not evince an intent to seek Board review of the approved settlement.<sup>4</sup> In addition, in light of the policy favoring the finality of settlements, we hold that it is not in the interest of justice to consider claimant's motion to rescind as a timely appeal of the administrative law judge's order approving the settlement under Section 8(i). See *generally Downs*, 803 F.2d at 193, 19 BRBS at 36 (CRT); *Olsen*, 25 BRBS at 169; *Lambert*, 17 BRBS at 68. Thus, the administrative law judge's Decision and Order approving the parties' settlement is final. See *Rochester v. George Washington University*, 30 BRBS 233 (1997).

We deny employer's request for attorney's fees and costs pursuant to Section 26 as the Board is without authority to award such fees and costs. See *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993).

Accordingly, the administrative law judge's Order Dismissing Claimant's Notice and Request for Lack of Jurisdiction is affirmed. Employer's request for attorney's fees and costs is denied.

SO ORDERED.

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>4</sup>In addition to the motion to rescind the settlement, claimant sought a new formal hearing. This indicates claimant sought further proceedings before the administrative law judge and not appellate review.